Wolf in sheep's clothing?

PROPOSED CONSTITUTIONAL AMENDMENTS TO RESOLVE THE ELECTRICITY SAGA

Section 156(1) of the Constitution is the basis for the status of local government in the Constitution. It provides that municipalities have authority over the matters listed in Schedules 4B and 5B of the Constitution. Schedules 4B and 5B, in turn, each contain a list of topics called 'functional areas'. This constitutional protection of local government's authority sets South Africa apart from most other countries. Usually, local government is not referred to in a constitution.

Where a constitution does mention local government, it usually does not provide for and protect specific areas of authority as the South African Constitution does.

One of these protected functional areas is "Electricity and gas reticulation", which means the distribution of electricity to end-users. Therefore the Constitution gives municipalities the authority to 'reticulate' (distribute) electricity.

The electricity saga

On the basis of this constitutional authority, municipalities purchase electricity (mainly from Eskom) and distribute it to end-users. The profits that municipalities make on the sale of electricity are used to cross-subsidise other services and development.

For the last ten years, national government has been planning to restructure the electricity industry. Municipalities are to surrender their authority to sell electricity, as well as the assets that are used for it, to six regional electricity distributors (REDs). Initially, municipalities were requested to do so voluntarily, but many municipalities did not cooperate with the voluntary scheme. Another complicating factor has been that municipalities cannot easily transfer functions or assets to outside entities. There are strict rules to be followed in the Municipal Finance Management Act.

The national government's arguments in favour of the restructuring relate mainly to the fragmentation of electricity tariffs (municipalities determine their own electricity tariffs, within margins set by the National Energy Regulator of South Africa) and to the lack of investment in electricity infrastructure.

To compel municipalities to cooperate with the electricity restructuring, a constitutional amendment is now suggested. It inserts a provision into section 156. This provision (s 156(1A)(a)), if adopted, will provide as follows:

> National legislation may limit the executive authority of municipalities in respect of local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 when it is necessary to achieve regional efficiencies and economies of scale in respect of a specific municipal function.

In other words, the amendment will make it possible for Parliament to adopt laws that limit a municipality's say over its constitutional competencies. This is not new. Parliament already can, and frequently does, adopt laws that define and, in so doing, limit the scope of Schedule 4B competencies. For example, municipalities have to deliver water services (a Schedule 4B competency) according to the Water Services Act. However, the proposed amendment does much more than this. It extends the scope of Parliament's authority significantly by mandating Parliament to limit local government's powers whenever it is necessary to achieve "regional efficiencies and economies of scale". And, these powers are not limited to specific competencies. According to a further provision in the suggested text, the precondition for such legislation is simply that "municipal boundaries and executive authority negatively impede regional efficiencies and economies of scale".

Objectives of regulating local government's constitutional authority

The suggested amendment continues in section 156(1A)(b) by outlining what this legislation may pursue. It provides that the national law may

(i) facilitate appropriate institutional arrangements and municipal participation in those arrangements, including, but not limited to, compulsory participation and transfer of assets;
(ii) facilitate appropriate planning and expenditure in respect of infrastructure and maintenance;
(iii) facilitate equitable tariffs, user charges, fees, and service levels;
(iv) ensure equitable access and universal coverage;
(v) maintain, regulate and enforce essential minimum national standards; and
(vi) prevent unreasonable actions by a municipality which is prejudicial to the interests of another municipality or the country as a whole.

The "compulsory participation and transfer of assets" will enable Parliament to appropriate a municipality's electricity function and its electricity assets and transfer those to the relevant RED. The references to appropriate planning and expenditure, equitable tariffs, equitable access and service levels can be used to prescribed detailed regulation.

The ability of Parliament to make laws that "maintain, regulate and enforce essential minimum standards" is a duplication as far as Schedule 4B is concerned. Parliament is already empowered to so do with respect to Schedule 4B matters. With respect to Schedule 5B matters, section 44 of the Constitution reserves this kind of supervision for provinces. The amendment would therefore extend national powers and create an inconsistency with section 44 of the Constitution.

Safeguards?

The amendments also contain a number of 'safeguards'. Firstly, any national law based on this constitutional provision must facilitate appropriate municipal participation in

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decision-making. Secondly, it must "maintain municipal accountability to its community in respect of the function concerned". Thirdly, it must maintain fiscal and institutional sustainability through protecting municipal own revenue. SALGA and the Financial and Fiscal Commission must be consulted.

Assessment

This amendment goes to the heart of local government autonomy. It does infinitely more than just facilitate the electricity restructuring. The suggested amendments are by no means limited to electricity. They make the entire ambit of local government's authority subject to national laws. If adopted, they will probably set the scene for further laws on water and sanitation services, after which other sectoral laws will surely follow. The result will be an array of national laws, pursuing "regional efficiencies and economies of scale" and effectively ending local government autonomy. While councillors may currently feel that they are being held accountable for problems that are controlled by other spheres of government, this is set to be exponentially worsened if this amendment is adopted. Municipalities will increasingly become micromanaged through national legislation. Councillors will look like pale figureheads in the eyes of their communities, as they will not be responsible for anything.

The criterion of "regional efficiencies and economies of scale" will probably be meaningless and not give municipalities any protection against national laws limiting their authority. Whether or not regional efficiencies and economies of scale exist in a particular function is a notoriously difficult question to answer. Moreover, with this criterion, the suggested constitutional amendment reduces the value of local government to a matter of economics, unrelated to the empowerment of communities and bringing government close to the people. In any decentralised state, economies of scale must sometimes defer to the bigger objective of achieving a more inclusive democracy.

Accepting, for argument's sake, that the electricity industry needs to be reformed, one remains perplexed at the broadness of the amendments. Why not focus on electricity? Government spokesperson Themba Maseko explained:

> We don't want to amend the Constitution on an almost annual basis. If we did, it would stop providing certainty. So we thought it was better to give government the powers and trust ... [that] it will not use the powers willy-nilly.

However noble this sounds, it is an inherently anticonstitutional argument. Government is essentially arguing that, while it is in the process of making amendments, it might as well put the opportunity to good use by taking a swipe at local government. Who knows, it is bound to come in handy at a later stage when dealing with the troublesome local government sphere!

Provincial authority

Another, perhaps unintended, consequence of this amendment is that provincial government authority will be reduced. Currently, national government may not regulate (except in exceptional circumstances) the local government matters listed in Schedule 5B as they belong to provincial government's exclusive powers. This amendment will authorise Parliament to regulate 5B matters. This creates an inconsistency in the Constitution and strengthens national government at the expense of provinces.

In conclusion, these amendments clearly intend to place local government, once and for all, firmly under the authority of national government. If adopted, they will reduce local government autonomy in a manner that has not been seen since the adoption of the 1996 Constitution.

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