CONSTITUTIONAL AMENDMENTS:

Local democracy at the altar of supervision?

On 12 July 2001 the Minister for Justice and Constitutional Development published two Bills with proposed amendments to the Constitution. This article summarises the proposals that impact on local government and puts forward some comments and suggestions.

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MUNICIPAL BORROWING

The Bill proposes to insert a new section 156(6), which reads as follows: 'The council of a municipality may, within a framework prescribed by national legislation, bind itself and a future council in the exercise of its executive and legislative authority if this is necessary to secure loans or investments for the municipality.'

In terms of the current section 230, municipalities can raise loans for capital or current expenditure in accordance with conditions set by national legislation. These conditions must be 'reasonable'. The amendment Bill seeks to replace the 'reasonableness' requirement with a blanket regulatory power for national government. Further, the amendment Bill wants municipalities to repay loans raised for current expenditure 'within the same fiscal year' instead of 'within twelve months'.

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Constitutional Amendments

REPRESENTATION ON THE FINANCIAL AND FISCAL COMMISSION

Currently, organised local government nominates two persons for appointment by the President to the Financial and Fiscal Commission (FFC) (s 221(1)(c) of the Constitution). The proposed amendment reduces this nomination to an obligation on the President to consult organised local government before choosing the two persons.

INTERVENTION IN A MUNICIPALITY

National intervention in local government

Section 100 of the Constitution presently allows for national intervention in provincial governments. However, national government cannot intervene in local government even though there are areas where national government's involvement and capacity are pertinent and provincial government's involvement is minimal. An example is the provision of water and electricity. Provincial intervention in these areas would not amount to more than the facilitation of national government's involvement. The proposed amendment seeks to address this anomaly in the Constitution. It empowers national government to intervene in local government on the basis of section 100.

The inclusion of national intervention brings the supervision of local government in line with the constitutional principle of co-operative government. The three spheres are interrelated. There is no strict hierarchy or 'pecking order' that dictates that national government intervenes in provincial government and provincial government, in turn, intervenes in local government.

Changes to section 100 and section 139

The proposals contain certain changes to the texts of section 100 (national intervention, see above) and section 139 (provincial intervention in local government). Currently, intervention in terms of these sections can only take place if there is a 'failure to fulfil an executive obligation'. With regard to provincial intervention, the proposal is to remove the restriction to the failure to fulfil 'executive' obligations and allow intervention in the event of failure to fulfil *legislative* obligations. This does not apply to national intervention in provincial government.

Further, approval by the national Minister for provincial intervention is no longer required in terms of the proposed new section 139. With regard to both national and provincial intervention, the required approval by the National Council of Provinces (NCOP) is 'turned around' into a provision that authorises the NCOP to *end* the intervention. Review by the NCOP during that intervention is no longer mandatory but is at the discretion of the NCOP.

Assumption of legislative powers

The proposed removal of the restriction to failure to fulfil 'executive' obligations means that intervention in local government by provincial or national government can, in terms of the proposals, include intervention in *legislative* obligations as well as executive obligations. National intervention in provinces, however, is limited to *executive* obligations. In effect, this means that an administrator, appointed by the intervening national or provincial government to restore order in a municipality, will be authorised to pass by-laws on behalf of the municipality.

It is suggested that local government's status in the Constitution finds its most critical expression in the authority of a democratically elected municipal council to express the wishes of its constituency in a by-law. Therefore, the removal of the qualifier 'executive' in sections 100 and 139 cannot be, as the explanatory memorandum to the amendment Bill states, merely a 'technical' change. Extending national government's intervention power to legislative acts of local government significantly reduces local government's status in the Constitution. This mode of intervention goes to the core of democratic local government – its ability to make law.

The proposed amendment recognises the status of *provincial* legislation in section 100 by preventing national government from passing provincial legislation. At the same time, the amendment allows national and

provincial governments to pass *municipal* legislation. Local government is again made the stepchild of the other spheres of government. Because local government is key to successful development and to the establishment of a culture of democratic responsibility, it is worth preserving local government's bedrock of democratic governance, namely the authority to make laws.

Water under the bridge?

The rationale behind this proposal appears to be to enable the intervening provincial or national government to pass critical municipal legislation, such as a municipal budget. The failure to pass a budget has been a problem in a number of municipalities previously subjected to section 139 interventions. However, the problem that the amendment seeks to address is dealt with in draft municipal finance legislation. Section 19 of the draft Municipal Finance Management Bill authorises a municipality that failed to pass its budget to withdraw funds from its Revenue Fund. These funds may be used only to defray current expenditure in connection with matters for which funds were appropriated in the previous annual budget. This enables an administrator to take over the municipality and run its affairs without being hamstrung by its failure to pass a budget. However, a *new* budget would have to be passed by the council (or a new council, if the existing council is dissolved), thereby leaving intact the council's democratic mandate to prioritise its municipality's needs and to appropriate funds to meet those needs.

A new form of intervention

In addition to the changes to sections 100 and 139, a new form of intervention is proposed by adding the following provision as subsection (8) to section 155 in the Constitution:

> *National legislation may provide for the exercise of executive and legislative authority on behalf of a municipality to the extent necessary –*
> *(a) to govern the municipality when the Council for any reason cannot function; or*
> *(b) to resolve a serious and persistent financial emergency in the municipality.*

Section 155(8) authorises that either the national or a provincial government (or any other body or institution) may exercise executive and legislative authority on behalf of a municipality when either the municipal council cannot function or there is a serious and persistent financial emergency.

Section 155(8)(b) must pave the way for the enactment of the Municipal Finance Management Bill which currently provides for the declaration of a financial emergency by the High Court on application of the municipality itself, national or provincial government, creditors, or other stakeholders. A Municipal Financial Emergency Authority would then appoint a financial administrator. This administrator may exercise on behalf of the municipality any of the municipality's executive or legislative power necessary to restore the municipality financially (s 98(2) of the Municipal Finance Management Bill).

The proposed section 155(8) has not been linked to sections 100 or 139. If these sections are not applicable, then none of their safeguards apply. However, the scope of intervention under the proposed section 155(8) can be very intrusive and can include the assumption of legislative authority. Sections 100 and 139 contain specific checks and balances when the national government or a provincial government intervenes in a municipality. The NCOP plays an important reviewing function where the national or a provincial government assumes an executive obligation of a municipality. The national legislation that section 155(8) calls for is not bound by any constitutionally prescribed safeguards. It does not need to include the supervisory role of the NCOP. The proposed section 155(8) will render sections 100 and 139 a dead letter. Why would provincial or national government make use of section 100 or 139 when a less cumbersome procedure is available?

National legislation should give effect to the Constitution, and not the other way around

FRAGMENTATION OF INTERVENTION POWERS

The proposed inclusion of section 155(8) appears to be part of a trend to increase the number and power of oversight and supervision instruments. In addition to the existing intervention powers under section 139, the following legislative initiatives have been taken:

Firstly, the Local Government: Municipal Structures Act 117 of 1998 (Structures Act) has introduced the *dissolution* of a municipal council after an unsuccessful section 139 intervention (s 34(3) of the Structures Act). A municipality's right to govern (s 151(3) of the Constitution) is thus made subject to the possibility that an elected Council may be dissolved. This may be a necessary and acceptable compromise. The objective of dissolution – to ensure that a new council is elected within 90 days – upholds the democratic nature of a local government.

Even though there is no explicit basis for dissolution in the Constitution (s 139 does not mention dissolution), section 159 of the Constitution now implicitly sanctions dissolution as an appropriate intervention. The 1998 Constitutional Amendment Act 65 of 1998 changed section 159(2) to read: 'If a Municipal Council is dissolved in terms of national legislation …'. No guiding principles were given for this very intrusive step in democratic local governance. There was no explicit reference that the checks and balances of section 139 applied. The normative framework for dissolution was thus left to the Structures Act.

Secondly, the proposals to amend the Constitution seek to introduce powers for national government to intervene in local government.

Thirdly, the Municipal Finance Management Bill, read with the newly proposed section 155(8)(b) (see above), introduces financial emergencies as circumstances warranting the assumption of authority by a financial administrator.

Fourthly, the proposed section 155(8)(a) provides for the exercise of authority on behalf of the council when the council 'for any reason cannot function'.

The need for most of these measures cannot be contested. However, the fragmentation of intervention powers will harm the system of intergovernmental relations. Not only will local government now be made subject to

two possible 'interveners', but also to a myriad of different intervention powers. Some of these powers are entrenched in different sections in the Constitution. Others are entrenched in ordinary statutes and are more or less implicitly 'sanctioned' by the Constitution. Ultimately the institutional integrity of local government will become victim to this 'diaspora' of intervention powers.

It is submitted that intervention in local government should have a firm basis in the Constitution and that all intervention powers, namely the issuing of a directive, assumption of responsibility, financial emergencies and dissolution, be entrenched in sections 139 and 100. It is imperative that all intervention powers are subjected to the system of oversight and checks and balances contained in those constitutional provisions.

THE TAIL WAGS THE DOG

In general, government's approach to amending the Constitution appears to be unprincipled. The first example is the previous amendment to section 159, mentioned above. The same approach appears to have prompted the newly proposed amendments.

Government's explanation for the new section 155(8) is quite explicit: 'Both amendments [which includes s 155(8)] give effect to ... the Municipal Finance Management Bill'. The point is that the national legislation should give effect to the Constitution, and not the other way around.

This approach to constitutional amendments wants the Constitution to react to developments in national legislation with the 'necessary' blank cheques. The proper approach, we submit, is for the normative framework to be clearly spelt out in the Constitution. It should be not relegated to national or provincial legislation that may undermine the spirit of our system of intergovernmental relations. This style of constitutional amendment contradicts the very purpose of the Constitution, namely, to provide the normative framework for national legislation.

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