Local democracy at risk?

key points

- The legislative authority of local government must not be tampered with.
- The monitoring and support of local government must be clearly spelt out.
- The new system must be given a chance to take root.

The Justice and Constitutional Development Portfolio Committee held public hearings on the Third Constitutional Amendment Bill, 2002, at Parliament on 5 and 6 September 2002.

The need for amendments arose to make provision for enhanced provincial powers of intervention in municipalities. The proposals would give provinces the power to adopt budgets or give effect to budgets' revenue raising measures. This type of intervention amounts to inroads being made into municipalities' legislative authority.

SALGA opposed this type of intervention, stating that it:

- affirms and supports the current constitutional status of local government;
- affirms and supports the current constitutional framework wherein the supervision of municipalities amounts to monitoring, support and, in the last instance, intervention by the province;
- reiterates its stance that adequate monitoring and support will obviate the need for interventions by provinces;
- reiterates its stance that a clear legislative framework for provincial supervision is urgently needed and long overdue;
- is firmly of the view that the financial viability of municipalities is not dependent on the ability of other actors to intervene into municipal affairs;
- believes that the current regime for supervision is adequate and that the proposed amendments, insofar as [they] make inroads into the legislative authority of municipalities, undermine the constitutional integrity of local government.

The constitutional status of local government

The provisions of sections 40 and 43 of the Constitution are the constitutional foundation of local government, as one of the three spheres of government. These provisions introduced a change of revolutionary proportions to the scheme of government in general, and to the scheme and profile of local government in particular. While in the past local government was merely a public body acting on a delegated legislative authority, local government now has the status of being a government on its own and a lawmaker in its area of jurisdiction. Lawmaking in the current local government scenario is legislative, unlike in the past when it was administrative and thus subject to judicial review. As stated in the case of *Fedsure Life Assurance Ltd and others vs Greater JMC*:

> Under the interim constitution (and the 1996 Constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognized in the Constitution itself…

When the new Constitution was passed, the institutional integrity of local government was preserved and protected from the other organs of the State. It is within the framework of this protection that one must read and understand section 139 of the Constitution. The underlying proposition is that if there is a need for provincial intervention, it should be limited only to municipality's failure to fulfill an executive obligation. This means that the intervention should confine itself only to the operational conduct of the municipality and not extend to the legislative authority of a municipal council. This is exactly the same principle that underlies section 100 of the Constitution, which regulates national intervention into the affairs of a province. The full scope of the legislative authority of a province is left intact during an intervention.

Local government is, therefore, not a stepchild of the Constitution, nor an unintended consequence of our democratic transformation. If there is anything that distinguishes democratic South Africa from the past, it is precisely that local government has been elevated to a new status, with a responsibility to be the engine of transformation.

Supervision includes support, monitoring and intervention

Section 139 covers more than just the taking of remedial action by the provincial executive. It also includes a process whereby the province reviews and monitors the actions of municipalities. Thus, section 139 has two components. The first is a process of provincial review of the actions of municipalities in order to ensure fulfillment of executive obligations. The second is a process of correction if a municipality falls short of its obligations.

In the *Second Certification* judgment, the Constitutional Court identified five successive steps in the process of supervision, the first of which is reviewing or monitoring local government and the last is managing and terminating the assumption of responsibility. The purpose of intervention is:

> ...not to punish but to assist a municipality in addressing very specific problems. Intervention is a measure of last resort in a process of provincial supervision, which would normally commence with review and monitoring, followed by steps to strengthen and support where needed. The basis of the power of the province to monitor local government is set out in section 155(6) of

the Constitution where it is provided that 'each provincial government … by legislative or other matters, must provide for the monitoring and support of local government in the province'.

Adequate monitoring and support needed

Building capacity can be seen as the main purpose of rendering support. This can take place through training staff and councillors, providing material and technical support, making available legislative support systems, through methods of skills transfer, and through sharing resources.

As stated earlier, there is a constitutional obligation on national and provincial governments to support and strengthen municipalities' capacity. Concerning municipalities' requests for support, legislation is clearly needed to determine issues such as when and how it may be requested, the role of organised local government in that process, identifying instances where support may be imposed (e.g. disaster management), and general criteria for drawing up indicators to show a need for support.

A framework for provincial monitoring has been established in section 105 of the Systems Act. It is now up to provinces to establish a monitoring regime that will not only enhance service delivery, but also highlight those areas where support is needed. This will go a long way to obviate the need for a full-scale intervention in response to situations where irreparable harm has already been done.

Provincial supervision needs a clear legislative framework

Our new local government dispensation is just short of two years old. The Constitution is clear in respect of the obligations of national and provincial governments towards local government. What is of critical importance at this juncture is for there to be a uniform legislative framework for provincial supervision that deals with monitoring, support and interventions.

As stated above, the Systems Act already provides a framework for provincial monitoring. What is lacking is a clear framework for support and intervention. As far as support is concerned, we have already alluded to the principles that should be incorporated into such a framework.

Regarding intervention, the following must be provided for either in the Constitution or in ordinary legislation:

- Prior to intervention, there must be statutory recognition of the role of, and consultation with, organised local government within the province and the National Council of Provinces (NCOP).
- There must be an obligation to report regularly to organised local government and the provincial standing committee.
- Permanent intergovernmental structures must be established at provincial level for consultation on identifying problems, terms of intervention, reporting mechanisms, and appointment of an administrator.
- Interventions must be preceded by measures to support and strengthen local government in general, and municipalities in particular.
- Consultations with organised local government must precede provincial commissions of enquiry.
- A regulatory framework is needed to enable provinces to deal with interventions.

It would be ideal if a uniform framework for provincial supervision could be a stand-alone Act of Parliament instead of being scattered through various pieces of legislation.

Interventions not a prerequisite for private sector investment

It has been argued that there is a need to create an investor-friendly climate between the private sector and municipalities in order for municipalities to attract private capital. SALGA has always understood that the demarcation process has, as its ultimate objective, the creation of fewer, bigger and better municipalities that are financially viable. It would follow that the need for interventions should now be less, not more.

It should be noted that *Business Day* reported on 27 August 2002 that the new municipal demarcation is finally paying off. This statement was made in light of the fact that municipal borrowing from the Development Bank of SA has increased during the period 2001–2002. The Minister of Finance indicated that loan approvals by the bank increased from about R600m in 2000/01 to R1.5bn in 2001/02. This is despite the fact that the current section 139 is in place, that there is apparently no

investor-friendly environment, and that municipalities are portrayed as being cash-strapped with little ability to generate their own funding.

The proposed amendment undermines the constitutional integrity of local government

It deserves to be repeated that the legislative authority of local government, as guaranteed in the Constitution, is a radical departure from the past and has been in place for a very short while. Nothing has happened since 5 December 2000 to justify inroads, no matter how circumscribed, into the legislative integrity of local government.

The situation now is that there is a proposed constitutional amendment that seeks to significantly alter the constitutional status of local government without any demonstrable evidence that there is a clear and present need for such a drastic diminution of powers. Once this principle has been compromised on such questionable grounds, any future diminution of local government's legislative powers will require very little, if any, substantiation.

The legislative and executive authority of local government, as circumscribed by the Constitution and the Municipal Structures Act, deserves to be protected until there is a clear, demonstrable need to alter the arrangement. It must be pointed out that the ultimate sanction for a municipal council that fails to carry out its executive obligations already exists: such a council can be dissolved by the Member of the Executive Committee where an intervention has failed to correct the situation.

As far as the extended time periods for NCOP approval are concerned, the period of 180 days appears to be inordinately long, especially if one considers that the NCOP has managed to review interventions in the past within the 30 day time period. It is only appropriate that the Constitution, through reasonably tight time frames, creates a sense of urgency in cases where one sphere intervenes into the affairs of another, as opposed to allowing 180 days to pass before the intervention ends.

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