The place and role of local government in federal systems

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Preface

South Africa has embarked on an important experiment of creating a decentralised system of government comprising three spheres of government – national, provincial and local. In comparison with international practice, local government has been given considerable constitutional recognition. In many respects South Africa is a leader in the emerging role that local government is expected to play in entrenching democracy and promoting development.

South Africa is not, however, the only decentralised country in the world that has embarked on this route of strengthening local government as a full sphere of government. In the more recent constitutions of Spain, Brazil, India, Nigeria and Switzerland, local government has been entrenched. But having three spheres of government operating each with a degree of autonomy makes for complex relationships. It may also impact on the effectiveness and efficiency of government. These problems are shared by most decentralised countries.

The place and role of local government in federal systems were examined at the annual conference of the International Association of Centers for Federal Studies (IACFS). From 29 September to 3 October 2004, the Local Government Project of the Community Law Centre, University of the Western Cape, hosted the annual meeting of the IACFS. The conference, sponsored by the Democracy Development Programme (DDP) and the Konrad-Adenauer-Stiftung (KAS), was held at Mont Fleur, Stellenbosch.

The conference was attended by 20 international delegates representing 14 IACFS member organisations from 11 different countries. Delegates were also in attendance from South African organisations, including the Municipal Demarcation Board, the DDP and KAS, the Palmer Development Group, and the Drakenstein Municipality.

This volume is a collection of some of the papers that were delivered at the conference.

The Community Law Centre would like to express its sincere gratitude to both the DDP and KAS for their interest in the project and for their financial support that made the conference and this publication possible.

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I would also like to thank two interns sponsored by the Forum of Federation and the Canadian International Development Agency, Cristen Peel and Coel Kirkby, for their invaluable editorial assistance. Finally, my appreciation goes to all the contributors of papers who responded to the many queries and requests.

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November 2005

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Introduction

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Three-level government – federal, state/provincial and local government – is common to all federal systems; however, the place and role of local government in those systems vary markedly. In some, local government is a constitutionally recognised sphere of government, while in others it is merely a competence of the state/provincial government. Nevertheless, local government has an increasing role in the governance of federal countries, placing new demands on the theory and practice of federalism. Moreover, its status is changing along with its new role.

The constitutional recognition of local government as an order of government in federal systems is a modern phenomenon. The first federal constitutions of the modern era did not include local government as an order of government. The Constitution of the United States of 1787 was silent on the matter, as was the Swiss Constitution of 1848. In the Canadian Constitution of 1867, local government was mentioned only as a provincial field of competence. The Australian Federal Constitution of 1901, being silent on the matter, had the same effect – making local government a creature of state power.

It was only after the Second World War that local self-government increasingly appeared in federal constitutions, often coinciding with the return to democratic rule. The first was the Constitution of the Federal Republic of

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Germany of 1949. Although the Spanish Constitution of 1978 was focused on the creation of Autonomous Communities, local autonomy was nevertheless mentioned. Brazil's return to civilian rule was also marked by the extensive protection of local self-government in the Constitution of 1988. The entrenchment of local government in the 73rd and 74th amendments to the Indian Constitution in 1992 was prompted by developmental concerns, while the extensive protection of local self-government in the South African Constitution of 1996 was the result of both democratic and developmental goals. Similar sentiments informed the entrenchment of local government as an order of government in the Nigerian Constitution of 1999.

In contrast to these developments, the recognition of local government in the Swiss Constitution of 1999 merely reflected the practice on the ground. In Italy, the constitutional reform initiatives of 1999 and 2001, entrenching decentralisation, have seen the recognition of regions, provinces and municipalities.

The trend is to increase the role of local authorities in the provision of services. Local authorities are seen as engines for growth and development, and more and more functions are being downloaded on them. This places considerable stress on local government to finance new responsibilities. With the increased status and role of local government, intergovernmental relations between the three levels of government have not only become more complex, but also critical for the demarcation of responsibilities and effective cooperation in service delivery.

Given these developments, the theory and practice of federalism are confronted with new challenges and questions, including the following:

- Has local government emerged as an entrenched and viable sphere of self-government in federal systems? What were the principal historical, social or political reasons for the place that local government occupies in the system?

- Does the emergence of local self-government matter? Are citizens better off? Does it promote democratic and accountable government and better service delivery? What, if any, is the value of the constitutional entrenchment of local self-government?

- Where local self-government is entrenched, what has been the impact on the functioning of the federal system? Has it made intergovernmental relations

overly complex? Has it inevitably led to competition between subnational units for resources and power?

- What does the future hold? Is the trend towards 'glocalisation' – state power shifting towards global governance and local self-government? Do we see the rise of 'city states' rivalling states/provinces?

Some of these questions are addressed in this volume in the context of nine countries, namely: the United States (US), Canada, Australia, Austria, Germany, Spain, Switzerland, Italy and South Africa. A brief comparative overview of the papers, and the discussions they provoked at the 2004 annual International Association of Centers for Federal Studies conference, is given under the following headings:

CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT: THE SHAPE AND CONSEQUENCES OF RECOGNITION (OR NON-RECOGNITION)

As outlined above, local government was not recognised in the constitutions of the older federations, but in the past five decades it has enjoyed varying degrees of constitutional entrenchment. The significance of constitutional recognition was clearly illustrated by comparing Austria and India, with full recognition, with that of Canada and Australia. In the latter two countries, provinces could disestablish municipalities altogether as there is no constitutional protection for local government. Although India has given recognition to local government in the 73rd and 74th amendments, it has not always meant that sufficient powers are devolved to municipalities by state governments. Much depends on the nature of the constitutional recognition. The cryptic recognition of local autonomy in the German Basic Law has, however, meant that municipalities' autonomous spending power cannot be infringed by the *Länder* governments.

In Australia and Canada, constitutional recognition of local government remains on the political agenda. Two Australian attempts at constitutional recognition in the Federal Constitution have failed. In both instances it would appear that the popular referenda on the issue were not so much decided on the merits of the case, but by external political factors. In Canada, the metropolitan city of Toronto is leading the quest for constitutional recognition in the federal Constitution on the argument that local government should have its rightful place at the government table.

Although Italy is not regarded as a federal country, law and practice regarding local government show that it is in essence no different than decentralised Spain. It follows the worldwide trend that state power is increasingly devolved to lower levels of government – in Italy, regions, provinces and municipalities – in order to strengthen democracy and promote development.

The question remains about the value of constitutional recognition. In and of itself it may not contribute much, as the case of Switzerland suggests. Despite a lack of constitutional recognition until 1999, Swiss political tradition ensured that local government was recognised and treated as a significant partner in government. It can, however, be argued that the significance of recognising local government as a full partner in a federal system of government would enhance the structural relationship between the three spheres of government.

SUBNATIONAL CONSTITUTIONAL RECOGNITION

While attempts at recognising local government in the Australian federal Constitution have failed, local government is acknowledged in state constitutions, but without any guarantees with regard to powers or autonomy. The result has been weak local government powers and structures that could not prevent the dismissal in the 1990s of all municipal councils in the state of Victoria in a process of amalgamation. In the US, by contrast, varied practices emerged in state constitutions, where some states have included extensive 'home rule' provisions for local authorities in their state constitutions.

INSTITUTIONAL ARRANGEMENTS: FROM VILLAGES TO CITY STATES

The success of local self-government is affected by its institutional arrangements. In most countries there is a wide array of local government institutions, but a few commonalities emerge. Multi-layered structures are present in most countries. Distinctions are made between rural and large urban municipalities, investing greater powers and functions in the latter. The institutional arrangements of local self-government are often an important indicator of the role that local authorities play; small municipalities with few resources have a limited role, while large metropolitan governments perform a significant governance function.

The emergence of strong metropolitan municipalities could compete with provinces (as is the case in South Africa), resulting in an hourglass configuration

where provinces are squeezed thin by national and local government. The three city states in Germany (Bremen, Hamburg and Berlin) are, due to historical factors, an exception, where state and municipal government was located in the same political institution.

The size of local government institutions becomes significant as the larger the local institutions, the more intense the competition with the next level of government for resources and power. Arguments are, however, advanced that the development of large metropolitan governments should not necessarily be seen as a zero-sum game where strong municipalities necessarily result in weak states or provinces. A clear definition of each sphere's role can avoid such a scenario.

For metropolitan municipalities the challenges are threefold: first, how can a large metropolitan population be governed effectively, and integrated policies implemented responsively, within a local government paradigm that seeks to enhance local democracy by bringing government closer to the people? Second, how can they fulfill their service delivery mandate by providing services effectively, efficiently and on an equitable basis to all their residents? Third, as the location of a country's industrial and economic heartland, how can the cities promote economic development and job creation?

THE SCOPE OF LOCAL SELF-GOVERNMENT: POWERS AND FUNCTIONS

The functions and powers of local government cover a broad range of areas, reflecting both similar competencies as well as significant differences. Different techniques are used to demarcate the powers. A narrow definition of competencies is, however, increasingly making way for broader plenary powers. Role confusion and conflicts over function overlaps are apparent in the countries under discussion.

The manner of allocation of powers to local government appeared crucial. When powers are granted by another sphere of government, the granting authority often perceives the transfer of powers as a loss of its own authority. It is perceived as a zero-sum game. In Spain, local government powers are not listed in the Constitution but are granted by higher levels of government. Although local government powers are listed in the Indian Constitution, they are still dependent on allocation by the state governments, which has resulted in slow progress regarding the empowerment of local authorities. However the powers are allocated, the concurrency of powers is always an issue that leads to

friction, and thus the need for effective cooperation between spheres of government is evident.

The role and status of local government are a function of its powers and functions. The key questions are: does local government have powers that matter? Are local authorities confined to 'roads, rubbish and rates', as is often said about Australian municipalities? Are local government's powers significant enough to make local self-government a meaningful enterprise so that citizens are interested in local politics?

THE NATURE OF LOCAL POLITICS

Widely divergent practices emerged on how local politics is conducted. In South Africa, political parties through the electoral system of proportional representation are an integral part of municipal government. On the other hand, in the US there were reforms at the beginning of the 20th century whereby municipal elections had to be strictly non-partisan because services rendered by a municipality should ideally be done in a non-partisan way. Canadian local mayors do not run on a party platform either, and likewise in Australia. Party politics is overt in Germany, Spain, Austria and Italy. Furthermore, once municipalities no longer represent small communities (which the majority of municipalities still do), it is more likely that politics organised around political parties will emerge.

FINANCING OF LOCAL GOVERNMENT

A key element of local self-government is financial autonomy. Political self-government may prove to be an empty shell if a local authority has no or limited revenue-raising powers. Moreover, the downloading of responsibilities without matching finances may cripple local authorities. The financing of local government shows great variation. In a few countries local government is largely self-sustaining, while in most it is largely reliant on transfers from other levels of government. South Africa and Switzerland have the highest levels of self-sufficiency, while Canadian municipalities are much more tied to transfers from provinces. However, there are both advantages and disadvantages in relying on own revenue sources. The most important reason for self-financing is that it fosters local accountability. Self-sufficiency may, on the other hand, exacerbate inequality between municipalities.

The sources of municipal revenue showed a high degree of similarity. Property rates were common to all countries, with income tax the exception. Facing ever increasing service delivery obligations, the nature of revenue-raising powers has become critical. In Canada, municipal taxes are seen as static (such as property taxes) compared to the more progressive taxes of the provinces (such as value added taxes). Where municipal activities and programmes, such as cultural festivals or sport events, do not generate income for the municipality itself but benefit the state or province (through the payment of value added tax), there are few incentives for the municipality to engage in such ventures.

SUPERVISING LOCAL GOVERNMENT: THE LIMITS OF LOCAL SELF-GOVERNMENT

In most countries local government is supervised by 'superior' levels of government. Supervision includes standard setting, support, routine review of decisions, monitoring of performance and intervention. The extent of supervision inevitably defines the level of local autonomy.

The supervising powers of superior levels of government proved to be a crucial factor in determining the level of local self-government. Again, the law and practice among countries differed considerably. It was also apparent that the supervision of local government should be seen against the political context: is local politics insulated against the party politics of the supervising level of government? Legal supervision is more prevalent in Europe, while political control is more evident in the North American systems. However, once the political trigger is pulled, it becomes a legal issue.

There are also various levels of supervision. In Austria, a distinction is made between control over administrative affairs and control over the budget. There is always an uneasy balance between autonomy and control, which fluctuates over time depending on the political climate.

INTERGOVERNMENTAL RELATIONS

In most countries the system of intergovernmental relations is hierarchical – municipalities relate only with the province/state/canton, and little direct contact is made with the federal government. However, with the growth in importance of local government, the trend is greater federal–municipal interaction, including the inclusion of local government in federal intergovernmental forums. Even in Australia, organised local government is a

member, along with the state premiers, of the federal Council of Australian Governments. In contrast, there are no structured relations with the federal government in Canada.

South African local government has arguably, from a comparative perspective, the closest ties with central government. A highly formalised system of intergovernmental relations has emerged through a variety of forums and processes. Local government has been included in most forums, and relates directly with the national government.

Once local government becomes a player at the national/federal level, organised local government becomes the important vehicle for communication. The experience in South Africa indicates that the demands to be an effective player at the national level place considerable strain on the resources of organised local government.

CONCLUSION

The papers in this volume on the place and role that local government plays in federal systems provide a valuable perspective on South Africa's experiment with developmental local government. The papers highlighted the following emerging trends:

- Federal systems are increasingly moving from a dual system of government (central-state/provincial relations) to institutionalised multi-level government. Constitutional recognition is not in and of itself sufficient to establish local self-government. Local self-government is embedded in practice.

- The growth of strong local government will require the redefinition of the role and function of provinces/states. International experience indicates that the relationship between municipalities (and metropolitan municipalities in particular) need not be a zero-sum game. The allocation of powers and functions to municipalities need not be at the expense of provinces/states. Often strong local government is good for provincial/state government. What is required, however, is clearly defined complementary roles for each sphere of government.

- Local autonomy without financial self-sufficiency is not feasible. Crucial to financial autonomy is access to progressive taxes. International experience

shows that property taxes are static and cannot be the principal source of local revenue.

- Because local government is crucial in the development and well-being of any country, it cannot be left to its own devices. Supervision is vital but the appropriate balance between supervision and autonomy should be struck.

- An important trend in multi-level government is the emergence of metropolitan government. Like many other developing countries in the world, South African cities face two realities: they have become the home of the ever-increasing numbers of poor and unemployed; and, at the same time, they are the places of hope for economic development.

Having three spheres of government – each with a degree of autonomy – makes for complex relationships. It may also affect the effectiveness and efficiency of government. These problems are shared by most federal countries. In examining the place and role of local government in federal systems through comparative analysis, this volume has hopefully made a start in exploring one of the key challenges facing federal systems.

State constitutions and local government in the United States*

MICHAEL E. LIBONATI

INTRODUCTION

Local government in the United States (US) has a rich history of variety, both in type and form. Cities, counties, towns, townships, boroughs, villages, school districts and a host of special-purpose districts, authorities and commissions make up the 87,849 distinct units of local government counted in the 2002 Census of Governments. These local units of government have many different forms and organisational structures. Variations in the number and forms of local government reflect the unique political cultures and forces that created and shaped local self-government in each state.

Experience with local government, which is shared by all Americans, has rarely given rise to sustained and systematic reflection about the relationship between local government and state government. The desire for local self-government has been institutionalised in thousands of compacts, charters, special acts, statutes, constitutional provisions, resolutions, ordinances, administrative rulings and court decisions since the earliest dates of settlement of this country. Among these enactments, state constitutional provisions are singled out for special attention in this chapter. Given this diversity, there is no single model of local government constitutional arrangement that is appropriate for all states. Nonetheless, the key issue remains the same from state to state, namely, the level of autonomy to be accorded to local governments in a state constitution.

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Increasing fiscal pressures on government and rising service expectations by the citizenry make continued controversy and debate over state constitutional treatment of local governments inevitable. As policy makers evaluate proposals for state constitutional change, they should consider six guiding issues before altering the state–local relationship embodied in their state's constitution:

- Is it desirable to increase or decrease the restrictions, if any, imposed on the power of the state to regulate local government?
- What degree of autonomy, however defined in the minds of the citizens of a particular state, should be granted to local governments?
- To what extent should the local electorate have a choice as to the form of local government and its policies?
- Should all local government units be eligible for local autonomy?
- To what extent should local governments be authorised to engage in intergovernmental cooperation?
- What role should courts have in determining issues of local autonomy?

DEFINING LOCAL GOVERNMENT AUTONOMY

This section examines the range of state constitutional definitions of local government autonomy. One of the most useful classifications of local self-government is Gordon Clark's principles of autonomy. These principles distinguish between a local government's power of initiative and its power of immunity.

By initiative, Clark means the power of local government to act in a 'purposeful goal-oriented' fashion, without the need for a specific grant of power from the legislature. By immunity, he means 'the power of localities to act without fear of the oversight authority of higher tiers of the state'.[1] There are four variations in the exercise of these two components to autonomy:

- powers of both initiative and immunity;
- power of initiative but not immunity;

- power of immunity but not initiative; and
- neither power of initiative nor immunity.

POWERS OF BOTH INITIATIVE AND IMMUNITY

Initiative and immunity powers as expressed in state constitutions vary considerably from one state to another. The Colorado Constitution, for example, confers both initiative ('the people of each city and town of this state ... are hereby vested with, and they shall always have, power to make, amend, add to, or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters') and immunity ('such charters and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith').[2] These texts both empower the home rule unit to exercise initiative for all local and municipal matters, and immunise the home rule unit from state legislative interference in these matters.

POWER OF INITIATIVE BUT NOT IMMUNITY

Pennsylvania's home rule provision exemplifies how states afford a charter unit the authority to 'exercise any power or perform any function not denied by this Constitution, by its home rule charter, or by the General Assembly at any time'.[3] It grants initiative but not immunity. In this formulation – known as the Fordham-Model State Constitution devolution-of-powers approach to local governance[4] – the state legislature has a free hand in defining and limiting the scope of local initiative.

POWER OF IMMUNITY BUT NOT INITIATIVE

State constitutions contain several types of provisions conferring immunity, but not initiative, on local government. For example, the Utah Constitution prohibits the legislature from passing any law granting the right to construct and operate a street railroad, telegraph, telephone, or electric light plant within any city or incorporated town 'without the consent of local authorities'.[5] Thus, a Utah municipality cannot be forced to accommodate certain state-franchised utilities, but may not otherwise have any affirmative regulatory authority initiative over these enterprises.

Virginia's prohibition of state taxation for local purposes does not, for example, provide its political subdivisions with affirmative taxing authority.[6] In several states, the Constitution forbids the legislature from delegating 'to any special commission, private corporation, or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects ... or to levy taxes or perform any municipal function whatsoever' without conferring on protected municipalities any correlative power to initiate action in any of the enumerated policy areas.[7] Also, state constitutional prohibitions against special or local laws are aimed at conferring immunity, but not initiative, on local governments.

NEITHER POWER OF INITIATIVE NOR IMMUNITY

The Connecticut Constitution illustrates the strict control by the state over its political subdivisions. It states that '[t]he General Assembly shall ... delegate such legislative authority as from time to time it deems appropriate to towns, cities, and boroughs relative to the powers, organisation, and form of government of such political subdivisions'.[8] The apparent utility of this type of provision is to defeat challenges to a broad allocation of authority to local governments based on a delegation doctrine or due process claims.

Finally, some state constitutions, such as New Jersey's, are silent on the issue of local government autonomy, leaving the matter to the legislature.

BEYOND THE IMMUNITY AND INITIATIVE CONCEPTS: PREEMPTION, INTERGOVERNMENTAL COOPERATION AND PRIVATISATION

Clark's classification of these concepts provides a good starting point for understanding local legal autonomy, but state constitution makers face further significant issues in creating a local government provision. Sho Sato and Arvo van Alstyne point out these interrelated issues, using the example of the practical, everyday problems of those who gave legal advice about the scope of local government powers:

> From the viewpoint of the attorney – whether he represents a public agency or a private client – the significant issues relating to home rule ordinarily cluster around three distinguishable problems: (1) to what extent is the local entity insulated from state legislative control; (2) to

> what extent in the particular jurisdiction does the city (and in some states the county) have home rule power to initiate legislative action in the absence of express statutory authorization from the state legislature; and (3) to what extent are local home rule powers limited, in dealing with a particular subject, by the existence of state statutes relating to the same subject?[9]

It is this third aspect of home rule – the preemption question – that is equally important in determining the true scope of local government autonomy. For example, in states such as Pennsylvania that have adopted the previously mentioned Model State Constitution approach, a home rule unit has the power to act concurrently with the state legislature 'unless the power has been specifically denied'.[10]

The Illinois Constitution speaks directly to this preemption issue when it asserts that 'home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive'.[11]

One other question that initiative and immunity models of local government autonomy do not address is the capacity to contract intergovernmentally (among federal, state and local governments), interjurisdictionally (among counties, cities and special districts) and with the private sector. The collaborative perspective has undoubtedly influenced the entrenchment of rules concerning inter-local cooperation and transfer of functions in state constitutions. Thus, article 7 section 10(a) of the Illinois Constitution provides that:

> Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.

ANALYSING LOCAL GOVERNMENT AUTONOMY

The task of conferring 'discretionary authority' on local governments requires a careful analysis of the components of local government authority. A 1981 report of the US Advisory Commission on Intergovernmental Relations (ACIR), *Measuring Local Discretionary Authority*, will assist state constitution makers in addressing the range of issues involved. In this report, the ACIR defined local discretionary authority as:

> the power of a local government to conduct its own affairs – including specifically the power to determine its own organization, the functions it performs, its taxing and borrowing authority, and the numbers and employment conditions of its personnel.[12]

Examining these four dimensions of local government discretionary authority – structure, function, fiscal and personnel – helps citizens and public officials get a clearer picture of local government autonomy and the trends affecting it. It enables the observer, whether trained in law, public administration or political science, to organise and synthesise the otherwise unwieldy universe of state constitutional provisions, and court cases interpreting them, that bear on the question of local autonomy.

FISCAL AUTONOMY

Fiscal autonomy, whether in the sense of initiative or immunity, traditionally has not been considered a necessary component of home rule.[13] An ACIR study reveals that for local government financial management is a realm of constraint.[14] Forty-eight states, for example, impose debt limits on cities, and 40 impose debt limits on counties. Other detailed restrictions cover referendum requirements (40 states), maximum duration of bonds (41 states) and interest ceilings (24 states). Thirty-eight states impose property tax limits on cities, and 35 impose them on counties. Forty-eight states establish the method of property tax assessment for local governments.

Only a handful of states have provisions that directly address the question of fiscal initiative. Nine state constitutions expressly provide autonomy with respect to borrowing and taxation.[15] Tennessee and Iowa expressly preclude additional taxing authority. Massachusetts and Rhode Island do so for both borrowing and taxation.[16]

Vaguer constitutional grants of power couched in terms like 'municipal matters' or 'local self-government' are unsparingly criticised in the legal literature.[17] Yet, such provisions of the California, Missouri, Ohio and Oregon Constitutions have been interpreted by courts to empower home rule units to diversify their portfolio of revenue-generating measures beyond the property tax.[18] Despite the success in these four states, courts did not approve municipal income taxes in two states with similar constitutional language: Missouri and Colorado.[19] Also, taxation – like other exercises of home rule powers in states giving substantial local autonomy, even if somewhat vaguely stated – may be preempted by statute on the grounds that the subject is of statewide concern.[20]

The only area of fiscal policy in which some state constitutions have recently constrained state government power over local government units, concerns unfunded mandates. The operative definition of unfunded mandates varies from state to state. The New Hampshire Constitution provides a good example:

> The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.[21]

Michigan not only prohibits the state from requiring new or expanded activities without full state financing but also bars both reducing the proportion of state spending in the form of aid to local governments and shifting the tax burden to local governments.[22] A less sweeping approach is found in Tennessee and Hawaii provisions that require sharing between the state and its political subdivisions.[23]

Anti-mandate policies entrenched in 15 state constitutions aim at strengthening accountability for and transparency in state decision-making by linking programme creation and expansion to state funding.[24] Opponents stress the loss of flexibility in dividing and funding programmatic responsibility.

PERSONNEL AUTONOMY

ACIR also delineates the scope of personnel autonomy.[25] Personnel matters include:

- the hiring, promotion, discipline and termination of public employees;
- civil service and the merit system;
- levels of compensation and entitlement to fringe benefits, such as pensions;
- collective bargaining; and
- conflict-of-interest requirements, disclosure requirements and restrictions on partisan political activity.

This area annually produces a flood of local controversies, few of which turn for their resolution on the home rule status of the public employer.

CONSTRAINTS IMPOSED BY FEDERAL LAW

Autonomy in the sense of immunity is hard to come by in personnel matters because public employees' claims are increasingly sheltered by statutes and by individual rights provisions of the federal Constitution applicable to all governments, regardless of home rule status.

A home rule public employer is just as limited as any other public employer by constitutional strictures forbidding patronage hiring, sex discrimination or termination for exercising protected freedoms of speech or association. Similarly, a public employee's due process rights to procedural fairness bind all governments in the federal system.

State judicial activism

An activist state judiciary may fashion protection for public employees that exceeds the floor provided by federal courts, as, for example, in the area of drug or polygraph testing.

Pension and benefits

Public employee pension and benefit rights also may be protected by an express provision of the state constitution or a judicial interpretation of a provision forbidding the impairment of contracts.[26] In Florida and New Jersey, public employees are constitutionally guaranteed the right to organise.[27] In Illinois, financial disclosure by public employees and officials is mandated by the state constitution; in California, however, the extent of disclosure by public employees is limited by their state constitutional privacy rights.[28]

Merit systems

New York became 'the first state to constitutionalize a merit system of civil service employment' in 1894.[29] The New York provision, like that in the Ohio Constitution, applies to both the state and its political subdivisions.[30]

Limited immunity

The most recent state to entrench local autonomy over personnel matters in its constitution is Louisiana. Its 1974 Constitution renders the appointment and functioning of city civil service commissions impervious to state legislative control.[31] The legislature is also forbidden from enacting laws mandating 'increased expenditures for wages, hours, working conditions, pension, and retirement benefits, vacation or sick leave benefits of political subdivision employees', unless the governing body of the affected entity approves or the state legislature appropriates and provides the necessary funds.[32]

CONCLUSION

As local government has developed and become more important to the states – which saw their responsibilities balloon in the 20th century – the states have integrated local government into the complex provision of services to their citizens. To do this, the constitutional relationship between the state and its localities has undergone significant change. In appraising these alternative approaches to state–local relations, state constitution makers should bear in mind the following considerations.

THE ROLE OF CITIZEN CHOICE

State constitutions teach concern not only for the role of institutional actors but also for citizen choice. An exclusive focus on entrenching rules relating to the roles of state and local institutions may divert attention from the claims of local citizens to participation in decisions with respect to structural, functional, personnel or fiscal matters. Neglect of the citizen choice factor may have triggered the 'tax revolt' in California in 1978, as citizens perceived a loss of control over local taxing policy.

Constitutional authority to frame a home rule charter facilitates citizen choice by shifting the locus of consent concerning the institutional form and

functional powers of local government from the state legislatures to the local electorate. The home rule provision may be designed to assure citizen participation in the process of framing and approving the home rule charter. The contents of the home rule charter adopted by the voters may limit as well as expand the locality's preexisting powers.

Pennsylvania's Constitution permits citizens in the affected area to compel local government 'to cooperate, delegate, or transfer any function, power, or responsibility' to 'other governmental units, the Federal government, any other state or its governmental units, or any newly created governmental unit'. Another provision gives the local electorate the right to consolidate, merge or change boundaries 'without the approval of any governing body'.[33]

A local government article of the state constitution can also facilitate citizen choice either by specifying the rules for direct citizen participation in local decision making or by making it clear that the home rule charter can employ any of the devices of direct democracy – referendum, recall and initiative.

ELIGIBILITY FOR LOCAL AUTONOMY

State constitutions have extended various forms of autonomy to general purpose units of government. Counties, as well as municipalities, have been recognised increasingly as appropriate candidates for home rule. Special districts, including school districts, have played a significant role in furthering local self-government through collective action. Consideration may be given to constitutionalising their powers of initiative, as in Arizona, or immunity, as in Virginia.[34]

There is no question that the statutory powers given to a wide variety of local government units present serious issues of jurisdictional overlap. State policies concerning the impact of the grant of autonomy to a whole host of political subdivisions need clarification in most states.

INTERGOVERNMENTAL COOPERATION

Almost as a necessary concomitant to the issue of eligibility, intergovernmental cooperation will become a powerful resource in resolving the questions raised by local government autonomy. Intergovernmental cooperation provides various local governments with options to expand the scope of discretionary authority in a wide range of services provided to the public. As such, it must be

reviewed as a possible constitutional fixture in state–local and local–local government relations. It also allows for the consideration of public–private partnerships in service delivery and government organisation. Indeed, it is one of the most flexible of tools in meeting the ever-changing demands of a local citizenry.

THE ROLE OF THE JUDICIARY

Home rule policies in state constitutions are shaped to a significant degree by the judiciary. Because judicial review is an inevitable feature of the American constitutional framework, policymakers must take into account juridical problems that predictably occur when power is diffused among political subdivisions. These juridical issues include:

- How is the constitutional text to be interpreted?
- Do political subdivisions have the authority to assert constitutional claims against the state and its agencies?
- How are conflicts between state statutes and home rule charters or ordinances to be resolved?

Failure to think through whether or not decisions concerning these recurrent topics are appropriate to include in state constitutions may lead to the kinds of unanticipated consequences that beset the implementation of complex policies.

DRAFTING CONSIDERATIONS

Translating the concepts of local government autonomy into constitutional language will no doubt tax the ingenuity of the drafters because the language must not only articulate agreed-on policy decisions but must also be sensitive to factors concerning the way in which the text will be interpreted. The most important of these are:

- the clarity of the text;
- principles of construction;
- citizen demands to expand, constrict or clarify existing texts; and
- official and institutional demands to expand, constrict or clarify existing texts.

Clarity of the text

The process of selecting language for incorporation into a state constitution should be based on a careful consideration of the precise effect of that language. Thus, the use of the adjective 'local' or 'municipal' in the context of empowering local governments, invites both a limiting interpretation and a body of interpretive case law focusing on whether the matter in question is of local rather than statewide concern. The elimination of a qualifying adjective, however, incurs the risk that a home rule unit will seek to extend its policy reach to areas generally recognised as falling within the competence of state or national, rather than local, authorities.

The language of the text has to be formulated clearly to facilitate its application within the legal, as well as political, culture of a given state. The task of educating generalist judges is particularly demanding when the local government article expresses a significant policy change from that in a previous constitution – as in South Carolina which moved from a strict to a liberal rule of construction of local government powers.[35] Judges must recognise that preexisting precedents are no longer binding or authoritative in view of the policy change embedded in the new constitutional language. In such cases, explanatory language in the legislative history of the provision aids in clarifying intent. So, too, does inquiry into the policy context and language of sister state constitutions.

Citizen demands to expand, constrict or clarify home rule provisions

The state constitution is, by definition, the appropriate vehicle for the exercise of constitutional choice by state citizens. As such, citizen demands to expand, constrict or clarify constitutional provisions for local autonomy have a significant impact on the constitution's contents. This is particularly true in jurisdictions that permit citizens to initiate amendments to the state constitution. California voters, for example, are responsible for the formulation of their particular style of home rule. The state's electorate may shrink local autonomy or expand it, as Californians chose to do with respect to property tax rates and assessment practices.[36]

Official and institutional demands to expand, constrict, or clarify home rule provisions

Local governments are institutions with continuity and their own agendas of power, which may or may not correspond to the interests of their constituents.

Furthermore, local government officials may prefer existing political arrangements instead of constitutional change. Both the Virginia Municipal League and the Virginia Association of Counties, for example, opposed proposals of the Commission on Constitutional Revision that would have empowered any charter city or county 'to exercise any power or perform any function not denied to it' by the constitution, its charter or general law.[37] These organisations preferred the existing regime of special legislation and strict construction to the devolution of powers model recommended by the commission. They were instrumental in excising the contested language from the document submitted to and ratified by the voters.[38] In contrast, the Florida League of Cities sponsored a state constitutional amendment concerning state mandates whose 'thrust is to further the "home rule" movement through which local government has been given increasing autonomy from legislative action'.[39] In Illinois, local officials – particularly Chicago's mayor, Richard J Daley – actively promoted the concept of home rule and shaped its unique language with regard to local revenues and preemption.[40]

Good government is not always good politics, as proponents of Maryland constitutional reform learned when county officials mobilised to defeat a new constitution that would have streamlined county government by eliminating certain elective offices, including sheriffs. The officials to be eliminated, it turned out, were 'of considerable importance to the local political structure almost everywhere'.[41] On the other hand, inclusion of home rule for Chicago materially assisted the successful campaign for adoption of the Illinois Constitution.[42]

ENDNOTES

* This chapter revises and updates parts of a study prepared by the author and published by the US Advisory Commission on Intergovernmental Relations. See US Advisory Commission on Intergovernmental Relations, *Local Government Autonomy* (1993) vi. The update was completed during a study leave granted by the Law School, Temple University.

1 GL Clark, A theory of local autonomy, 74 (1984) *Annals of the Association of American Geographers*, pp 195-199.

2 Colorado Constitution, art XX s 6.

3 Pennsylvania Constitution, art IX s 2.

4 American Municipal Association, *Model Constitutional Provisions for Municipal Home Rule*, 1953. Jefferson Fordham was hired by the National Municipal League to prepare a model state constitution including home rule provisions.

5 Utah Constitution, art 12 s 8.
6 Virginia Constitution, art 10 s 10.
7 Pennsylvania Constitution, art 3 s 20. This kind of provision has been referred to as a 'Ripper Clause'. See DO Porter, The Ripper Clause in State Constitutional Law: An early urban experiment, 1969 *Utah Law Review* 287, at p 450.
8 Connecticut Constitution, art 10 s 1.
9 S Sato & A Van Alstyne, *State and Local Government Law*, 2nd ed, Little, Brown and Co, Boston, 1977, p 136.
10 Pennsylvania Constitution, art 9 s 2; National Municipal League, Model State Constitution 97, 6th ed (1963); Illinois Constitution, art 7 s 6(i).
11 Illinois Constitution, art 7 s10(a).
12 ACIR, *Measuring Local Discretionary Authority*, p 1.
13 R Briffault, Local government and the New York State Constitution, 1 (1996) *Hofstra Legal and Policy Symposium* 79, at p 90.
14 ACIR, *State Laws Governing Local Government Structure and Administration*, 1993, pp 38-41.
15 Coloroda Constitution, art 20 s 6(e),(g); Illinois Constitution, art 7 s 6(a); Kansas Constitution, art 12 s 5(b)(tax); Louisiana Constitution, art 6 s 30; Maine Constitution, art 8 Pt. Second s 2 (industrial development bonds only); Michigan Constitution, art 7 s 2; New York Constitution, art 9 s 2(c)(4),(8); Utah Constitution, art 11 s 5(a)(d); Wyoming Constitution, art 13 s 1(c).
16 Iowa Constitution, art 3 ss 38A & 39A; Massachusetts Constitution, art 2 s 7(2),(3); Rhode Island Constitution, art 28 s 5; Tennessee Constitution, art 11 s 9.
17 See eg HL McBain, *The Law and Practice of Municipal Home Rule*, Columbia University Press, New York, 1916.
18 *Weeks v City of Oakland*, 21 Cal. 3d 386, 579 P.2d 449 (1978) (occupation and business tax measured by gross receipts); *St. Louis v Sternsberg*, 69 Mo. 289 (1879); *Zielonka v Carrell*, 99 Ohio St. 220, 124 N.E. 134 (1919) (occupation tax); *Multnomah Kennel Club v Department of Revenue*, 295 Or. 279, 666 P.2d 1327 (1983) (power to impose business income tax implied out of grant of power over matters of 'county concern').
19 *City and County of Denver v Sweet*, 329 P.2d 441 (Colo. 1958); *Carter Carburetor Corp v City of St. Louis*, 203 S.W. 2d 438 (Mo. 1947).
20 *California Federal Savings and Loan Ass'n v City of Los Angeles*, 54 Cal. 3d 1, 812 P.2d 916 (1991); CE Glander & AE Dewey, Municipal taxation: A study of the Preemption Doctrine, 9 (1948) *Ohio State Law Journal* 72.
21 New Hampshire Constitution, Part I art 28(a).
22 Michigan Constitution, art 9 s 25.
23 Hawaii Constitution, art 8 s 5; Tennessee Constitution, art 2 s 24.
24 Alaska Constitution, art 2 s 19; California Constitution, art 13(b) s 10; Florida Constitution, art 7 s 18; Hawaii Constitution, art 8 s 5; Louisiana Constitution, art 6 s 14; Maryland Constitution, art 11(e)(f); Michigan Constitution, art 9 s 2; Missouri Constitution, art 10 s 21, art 12 s 2(b); New Haven Constitution, Part I art 28(a); New Jersey Constitution, art 13 s 2 para 5(a); New Mexico Constitution, art 10 s 5; Oregon Constitution, art 10 s 15; Tennessee Constitution, art 2 s 24. See RMM Shaffer, Comment: Unfunded state mandates and local governments, 64 (1996) *University of Cincinnati Law Review* 1057.

25 ACIR, *Measuring Local Discretionary Authority*, op cit.
26 Alaska Constitution, art 12 s 7; Illinois Constitution, art 13 s 5; Michigan Constitution, art 9 s 24; New York Constitution, art 10 s 7; See also *Gauer v Essex County Division of Welfare*, 108 N.J. 140,528 A.2d 1 (1987).
27 Florida Constitution, art 1 s 6; New Jersey Constitution, art 1 para 19.
28 *City of Carmel-by-the-Sea v Young*, 2 Cal. 3d 259, 466 P.2d 225 (1970); *Stein v Howlett*, 52 Ill. 2d 570, 289 N.E. 2d 409 (1972).
29 PJ Galie, *The New York State Constitution: A reference guide*, Greenwood Press, Westport, 1991, p 114; New York Constitution, art 5 s 9 (1894).
30 New York Constitution, art 5 s 6; Ohio Constitution, art 15 s 10.
31 Louisiana Constitution, art 10 ss 4 & 10; *Civil Service Commission of New Orleans v Guste*, 428 So. 2d 457 (1983).
32 Louisiana Constitution, art 6 s 14.
33 Pennsylvania Constitution, art 9 ss 5 & 8.
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40 E Gertz & JP Pisciotte, *Charter for a New Age*, University of Illinois Press, Urbana, 1980, pp 248-260.
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Local government: Still a junior government? The place of municipalities within the Canadian federation

HARVEY LAZAR & ARON SEAL

INTRODUCTION

This chapter addresses the place and role of municipalities in Canada's federal system. Three orders of government – federal, regional and local – are common in federal systems, but there is much variation in the authority allotted to each sphere.

Local government in Canada is marked primarily by a constitutionally entrenched subordination of municipalities to provinces that affects every aspect of their activities. Recently, federal and provincial governments have demonstrated an interest in empowering local governments with strong, independent authority and power rather than regarding local governments simply as institutions created by the provinces for provincially defined purposes. However, whether and how this interest is translated into action was still an open question when this chapter was being finalised in early 2005. There was no definitive answer as to whether municipalities would remain a junior order of government.

CONSTITUTIONAL ACCOMMODATION OF LOCAL GOVERNMENT

Municipal government was initially created in Canada primarily as an instrument for service delivery, rather than as a level of democratic government.

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Provincial governments, having been given constitutional power to define municipal responsibilities, have used municipal governments as a means of fulfilling provincial objectives. The provinces have not hesitated to change the structures, roles and boundaries of their municipalities as they have deemed necessary, at times even against the wishes of the affected citizens. The provincial control over municipal government is, however, slowly loosening, with some provinces taking steps over the past decade to acknowledge municipalities as a valuable level of government and to give them increased autonomy.

Local government, as defined by the Canadian Constitution, is a wholly provincial creation. Section 92(8) of Canada's Constitution Act places municipal institutions under the purview of provincial governments. Furthermore, section 92(9) gives provincial governments the power to determine municipal sources of revenue. Owing to this subordinated constitutional position, Canadian municipal governments are often referred to as 'creatures of the province' – incorporated bodies created by provincial governments to fulfill assigned responsibilities.

This status creates a fundamental tension in the operations of local government. Formally, municipal institutions are defined as agents of the provinces existing for the pursuit of provincial ends. At the same time, however, as elected governments, municipalities have a democratic responsibility to pursue the objectives of their constituents. This conflict between municipal roles as provincial mechanisms and as community mechanisms, pervades both the perception and the actions of Canadian municipal government.[1] While conventions of reasonable autonomy and self-determination do exist, provincial control of municipalities has been both exercised by the provinces at will and upheld in judicial decisions, most prominently in the dismissal of challenges to the City of Toronto Act of 1997.[2]

Within the constitutional framework, the roles of local governments are defined in detail by provincial statutes. Each province has its own legislation defining the place, powers and responsibilities of municipal governments within its territory. As such, the nature of municipal government in Canada varies greatly across provinces. For example, in some provinces such as New Brunswick, municipal government does not cover the entire territory of the province, with service provision to scarcely populated areas assumed entirely by the provincial government. Elsewhere, in provinces like Quebec, the entire territory is governed by at least one level of local government, with many areas

falling under the authority of multiple municipal levels. Moreover, while municipalities in Ontario play a significant role in the provision of social services, municipal governments in most other provinces do not.[3]

In addition to province-wide legislation, charters exist for a number of cities. These cities are recognised and empowered by the terms of their charter beyond the general provisions of municipal acts, allowing their role to be more specifically tailored to their particular needs. Saint John, New Brunswick, is given wide-ranging authority through its charter. Unlike many other cities, it holds the legal powers of a natural person; thus, rather than being bound specifically to areas of enumerated authority, it is able to act as it deems necessary in all areas not explicitly precluded by provincial legislation. Montreal's charter supplements general Quebec municipal legislation with additional powers, including those for extensive financial management.[4] The City of Toronto has sought a city charter in recent years, seeking powers deemed essential for addressing its particular concerns as Canada's largest city.

Contrary to the traditional image of municipalities as simply a pragmatic service delivery institution, numerous provinces have taken measures over the past decade to recognise the legitimacy of local government as a valuable level of government and to increase its powers. Alberta, in its Municipal Government Act of 1994, gave local government natural person powers and enumerated broad spheres of municipal authority extending previous specifically delegated roles. It further reduced provincial regulation of municipal affairs, committing the province to restricting its intervention to areas of clear provincial interest. Ontario granted its municipalities natural person powers in its Municipal Act of 2003. Newfoundland and Labrador's Municipal Act of 2000, while stopping short of granting natural person powers, widened the province's range of legislated municipal responsibility and increased municipal autonomy.[5]

Declarations and formal agreements are alternative tools for recognising the place of municipalities as an important level of government. The 1996 Protocol of Recognition between the Union of British Columbia Municipalities (UBCM) and the British Columbia Minister of Municipal Affairs declared the relationship between the province and municipalities a partnership, and committed the province to information sharing and legislative consultation.[6] The principles of this protocol have since been legislated through various provincial statutes, most notably the Community Charter Act of 2003, which affirmed the autonomy, responsibility and accountability of municipalities as democratic governments.[7]

Reforms in municipal affairs have not taken place universally across Canada. The extent of reform has furthermore varied considerably across the provinces that have acted, with Alberta and Ontario instituting the most overarching changes. Throughout the country, however, municipalities are increasingly demanding recognition that would effectively override their subordinate constitutional status. While constitutional reform is unlikely, provincial legislation, declarations and city charters have proven to be effective means of increasing the place, importance and power of local government in Canada.

INSTITUTIONAL ARRANGEMENTS

Canadian municipal governments are incorporated entities whose structures vary greatly across Canada's ten provinces and three territories. Arrangements, defined by provincial statutes, include single and multi-tier governments, differing election systems, and a range of administrative frameworks. While municipal governments generally do not bring together urban and rural areas, some exceptions do exist. Provincial governments have not hesitated to change their municipal structures as deemed necessary, at times even against the will of local residents.

The question of single versus multi-tier local government is significant in Canada. Reorganisations from one structure to another occur regularly. Most of British Columbia is divided into regional districts that supersede the incorporated municipalities of their region. These districts provide services directly to areas without their own municipal government and facilitate joint projects between municipalities. Similar regional structures exist in Ontario and Quebec. In these provinces, regional bodies have more extensive responsibilities. Alberta is entirely divided into single-tier governments, with joint projects and interaction between municipalities occurring through provincial agencies and agreements. Winnipeg, Manitoba abandoned its two-tier structure in 1972 in favour of a unified city. In 1997, six cities that previously constituted the two-tier entity of Metropolitan Toronto were amalgamated into one single-tier structure. In contrast, the province of Quebec undertook an extensive series of municipal amalgamations in 2001, creating five large two-tier governments in the province.[8] As will be discussed later, many of these Quebec municipalities have recently voted by referendum to abandon their megacities.

In addition to structural arrangement differences, significant variations in electoral systems exist across Canadian municipalities. Some municipalities are

divided into wards for city councillor elections, with councillors responsible primarily to the citizens of their particular ward. Other municipalities, such as the city of Vancouver, elect their councillors by general vote. Electoral differences between two-tier municipal governments exist as well. Some upper-tier council members, such as in the regional districts of British Columbia, are automatically appointed to their upper-tier positions by virtue only of having been elected to serve on their lower-tier councils. Councillors on other upper-tier municipal councils, such as the former regional municipality of Ottawa-Carleton, are specifically elected to serve at the top level.[9]

Varying administrative structures are also found across Canadian municipalities. Many small towns employ the council-committee model, where councillors oversee service provision through standing committees in addition to their political council work. City manager and chief administrative officer models – in which one appointed person oversees all management and public administration – are frequently used in both small and large municipalities, including the city of Toronto. Commissioner board systems, in which an appointed board of commissioners oversees administrative departments, are popular in a number of western Canadian cities.[10]

As already noted, most municipalities in Canada do not encompass both urban and rural territory. This divide is a legacy of Ontario's 'Baldwin Act' of 1849, which created a uniform system of municipal government across Ontario and guided the development of municipal government through much of western Canada.[11] Exceptions to this rule do nonetheless exist: recent amalgamations in the cities of Halifax, Ottawa, Hamilton and Sudbury have combined urban centres with large areas of rural territory.[12] Combining urban and rural interests in a single local government body remains, however, controversial.

The most significant recent trend of change in the structure of Canadian municipalities is enlargement through annexation and amalgamation. Provincial governments, seeking benefits such as cost savings through economies of scale and global city stature, frequently fold municipalities together. In a small number of cases – like the merger of the towns of Abbotsford and Matsqui in British Columbia – the processes have been approved by popular referendum. Yet in most cases – such as Halifax, Nova Scotia and Miramichi, New Brunswick – provincial governments have legislated amalgamation without directly consulting the citizens of the municipalities in question.[13] In extreme cases, like the 1997 Toronto merger, provincial governments have gone against referendum results in their pursuit of amalgamation.[14]

The benefits of mergers are disputable and may result in reductions in cost, transition expenses, increased bureaucracy or wage increases which exceed savings. Forced amalgamations may also ignore community attachment to municipal institutions, as was the case in the recent 'de-merger' movement in the province of Quebec. Numerous largely English-speaking cities objected to being amalgamated into megacities where French speakers would be the majority. The Quebec Liberal Party provided all forcibly merged municipalities with the right to vote in a referendum as to whether their mergers should be rescinded. The result was that 32 previously amalgamated Quebec municipalities, most English speaking, voted in 2004 to de-merge from their amalgamated cities.[15] It remains to be seen whether the de-merger movement in the province of Quebec will constitute the beginning of a reversal of the municipal enlargement trend in Canada.

The immediate result of recent amalgamations, however, has been growing calls for municipal autonomy – most notably in Toronto with a population larger than that of six Canadian provinces combined. Proposals have ranged from independent provincial status for the city to the creation of an independent, formal designation for large cities.[16] In the second half of 2004, the premier of Ontario announced that the Ontario Legislature would be granting more autonomy to Toronto and other large cities that wished it.[17] As large Canadian cities gain size – both through growth and amalgamation – these calls for increased autonomy will grow.

FUNCTIONS AND POWERS

The general purpose of municipalities in Canada is two-fold: local government exists both as a political mechanism for the pursuit of community objectives and as a provider of services to local residents.

As Table 1 shows, most municipal spending is on service provision, especially transportation, protection and environment (water and sewers); services that can be best described as 'services to property'. These services either directly address the needs of property owners or increase land value.[18] With the exception of Ontario, municipal governments no longer play a large formal role in the provision of social services, as many provinces have in recent decades assumed most social service functions that were provided by municipalities.[19] However, reductions in municipal social service provision have been controversial. Some argue that social services, as contributors to community

Table 1: Distribution (%) of areas of municipal government expenditures by province, 2001

Municipal services	*New-foundland*	*Prince Edward Island*	*Nova Scotia*	*New Brunswick*	*Quebec*	*Ontario*	*Manitoba*	*Saskatch-ewan*	*Alberta*	*British Columbia*	*Canada*
General administration	16.2	12.9	10.4	11.1	12.2	8.9	13.7	12.4	12.2	10.0	11.0
Protection	4.7	23.2	20.1	21.0	16.7	13.4	19.7	17.6	14.3	18.8	15.9
Transportation	28.6	21.5	16.9	20.2	27.2	18.2	23.4	31.8	28.3	16.5	19.8
Health	0.1	0.1	0.1	0.4	0.2	3.5	2.2	0.6	1.6	1.8	2.0
Social services	0.2	0.0	4.5	0.0	1.4	24.7	0.3	0.5	1.6	0.2	12.6
Education	0.1	0.0	14.2	0.0	0.1	0.0	0.0	0.0	0.3	0.0	0.4
Resource conservation	0.7	1.7	0.8	2.4	2.8	1.6	2.4	3.6	3.4	1.4	2.0
Environment	22.1	12.7	16.8	25.4	12.0	13.3	17.4	15.4	13.9	20.4	14.0
Recreation/culture	14.5	21.9	10.7	12.7	12.4	8.7	9.4	14.2	13.8	19.6	11.1
Housing	0.6	0.0	0.2	0.3	2.9	5.0	0.4	0.4	0.7	0.6	2.6
Regional planning	1.2	2.3	1.5	2.0	2.5	0.1	2.3	1.7	3.0	2.3	2.2
Debt charges	11.1	3.7	3.7	4.2	9.4	2.3	8.5	1.7	7.1	6.3	5.9
Other	0.0	0.0	0.0	0.2	0.0	0.2	0.4	0.1	0.0	2.2	0.5
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: Calculated from Statistics Canada data, Financial Management Systems (FMS), mimeograph, June 2002.[22]

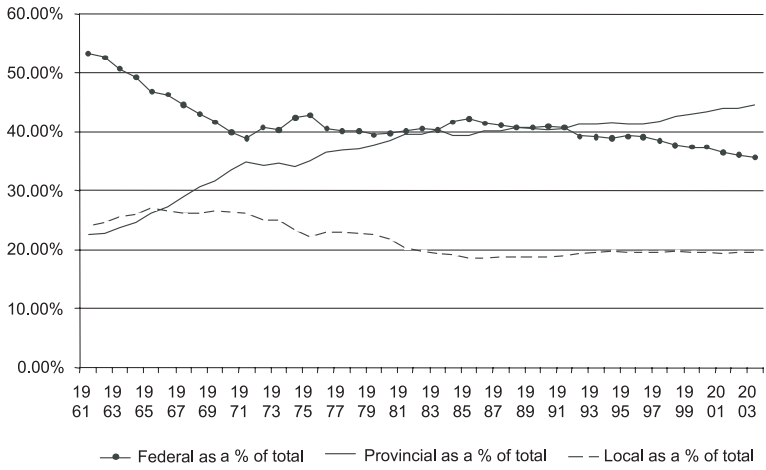
diversity and quality of life, have a fundamental municipal element.[20] Others, noting the inherent redistributive element of social service provision, cite the reliance of municipal governments on regressive property taxes as their primary source of revenue, and thus as evidence of their unsuitability in this area.[21]

One cannot, however, look exclusively at expenditures when considering the functions of Canadian local government: such an analysis undervalues the significance of community development programmes. While the provision of physical services almost invariably requires expenditure, community initiatives can often occur by other means, such as urban planning, legislative action and regulation, administrative guidance and assistance, and information provision. For example, the Greater Vancouver Regional District's Green Zone – a reserved set of lands kept by law as open space and undeveloped – would not appear in an expenditure analysis of municipal functions, nor would the initiatives taken by numerous Canadian cities in the preservation of historic buildings and heritage sites. Municipal support for the organisation of cultural activities, such as Montreal's *Tour de l'Île* bicycle ride, is also ignored by expenditure analysis. Other programmes, such as arts development initiatives, involve both financial and non-financial municipal support.[23] As such, the community aspect of Canadian local government must not be dismissed as lightly as a purely expenditure-based analysis might indicate.

Though some provincial governments, as discussed above, have taken steps to increase the autonomy of municipalities, the majority of local government responsibilities are explicitly set out in legislation. Provincial governments change these legislated responsibilities regularly. For example, the Quebec government in 1990 unilaterally increased municipal responsibility in policing, public transit and transportation infrastructure. Similarly, Nova Scotia accompanied the creation of the Halifax Regional Municipality with a service exchange under which the province took all responsibility for social service provision in exchange for roads and policing. However, the scope of social services actually assumed by Nova Scotia in this case was largely limited to income support, creating social gaps for the municipality to fill.[24]

The starkest example of strong-handed redefinitions of municipal affairs by a provincial government is in Ontario. Seeking to eliminate overlapping responsibilities between levels of government, the province in 1997 took full control of education in exchange for an increase in municipal social service provision. While the provincial authorities promised that their actions would be revenue-neutral, the reality turned out differently. The province assigned to

Table 2: Total Canadian government spending (excluding intergovernmental transfers) proportioned by level of government



Source: Statistics Canada, CANSIM II matrices 3800033, 3800034, 3800035. Accessed August 10, 2004.

municipalities services with increasing costs, while assuming areas of steady or shrinking fiscal need. Though municipal pressure led to some changes to the provincial government's proposals, most reforms remained.[25]

Table 2 shows local government expenditure excluding intergovernmental transfers as a percentage of total Canadian government expenditure over time. The local share of expenditure dropped through the 1960s and 1970s as provincial governments assumed responsibility for provision of a number of social services previously delivered locally, most notably education and hospital care. Since the early 1980s the municipal share of government expenditure has remained relatively constant at around 20%.

FINANCING OF LOCAL GOVERNMENT

As noted, local government in Canada does not have any constitutionally based revenue-raising authority. Any authority it does have to raise its own revenues comes by provincial legislation. Although some provinces authorised municipalities to levy taxes on personal and corporate income for many years prior to the Second World War, these tax bases were never a large source of

local revenues. Following the war's outbreak, these authorisations were quickly reclaimed by federal and provincial governments.[26]

The property tax is the sole large tax that local governments can levy. During the 1930s, property tax constituted over 80% of local revenue. This share declined to under one-half by the beginning of the 1960s, with much of the gap being filled by transfers (or grants) from provincial and, to a much lesser extent, federal government.

Today, the main sources of local revenue include property tax, user fees, and grants from provincial governments. Relatively small sums come from investments, amusement taxes, licenses and permits, and fines and penalties. Table 3 provides data for 2001 showing that over one-half of local revenue is raised from the property tax base. Indeed, in some provinces it accounts for 60% or more of local revenue.

User fees have increasingly become an important source of 'own source' municipal revenue in recent years, now accounting for close to one-quarter of local revenues. In sum, with property taxes, user fees, and miscellaneous revenues taken into account, municipalities often raise five-sixths of their own revenue.

The remaining revenue comes from intergovernmental transfers, equal to about 17% of the total. Relative to the 1960s, there has been a trend away from intergovernmental transfers. As Ottawa cut back on its transfers to the provinces, the provinces did likewise with respect to their local authorities. In 2001, nearly nine-tenths of the 17% of intergovernmental transfers were conditional.

There are advantages and disadvantages to the current distribution of local revenues. On the positive side, own source revenues, especially the property tax, are very visible, facilitating accountability. Property is also a stable and predictable tax base. Furthermore, since the property tax is often used to finance property and related services, there is a direct relation between the sources and uses of revenue. Thus, in important respects this tax is efficient and equitable since people get what they pay for.

On the negative side, the value of the property tax base rises less quickly than economic growth. Thus, it may be necessary at times to raise rates simply to maintain services. Property taxes are also arguably regressive, though this may matter less if it is being used to finance properties rather than people.

More generally, when writing about the merits of user fees and property taxes, Harry Kitchen summarises the situation where user fees are 'appropriate

Table 3: Distribution (%) of municipal government revenue by province and territory, 2001

Revenue source	*New-foundland*	*Prince Edward Island*	*Nova Scotia*	*New Brunswick*	*Quebec*	*Ontario*	*Manitoba*	*Saskatch-ewan*	*Alberta*	*British Columbia*	*Canada*
Property taxes	54.3	62.3	73.7	55.1	64.3	48.3	46.7	54.3	44.4	53.0	52.2
Other taxes	1.1	0.6	0.1	0.5	0.3	1.3	2.5	4.5	1.6	2.7	1.3
User fees	16.4	26.9	16.4	25.3	16.6	23.9	23.4	24.3	26.1	29.3	23.0
Investment income	1.9	1.6	3.6	1.0	2.0	4.2	8.0	4.4	10.3	8.6	4.9
Other	0.6	1.5	0.2	0.5	2.3	1.7	0.8	1.0	1.6	0.6	1.6
Total own source revenue	**74.3**	**92.8**	**94.0**	**82.4**	**85.5**	**79.3**	**81.5**	**88.5**	**84.1**	**94.2**	**83.0**
Unconditional grants	*6.3*	*3.3*	*2.7*	*12.4*	*1.9*	*2.3*	*7.9*	*4.6*	*0.9*	*1.1*	*2.4*
Conditional grants	*19.4*	*3.8*	*3.3*	*5.2*	*12.6*	*18.3*	*10.6*	*6.9*	*15.0*	*4.8*	*14.6*
Federal	2.9	0.3	0.5	1.0	0.2	0.3	1.2	2.1	0.5	0.5	0.4
Provincial	16.5	3.6	2.8	4.2	12.4	18.0	9.5	4.9	14.6	4.3	14.2
Total grants	**25.7**	**7.2**	**6.0**	**17.6**	**14.5**	**20.7**	**18.5**	**11.5**	**15.9**	**5.8**	**17.0**
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

- Property taxes: taxes on real property, developers' contributions and lot levies, special assessments, grants-in-lieu of taxes and business property taxes.
- Other taxes: amusement taxes, licenses and permits.
- User fees: water and sewage, rentals, concessions and franchises.
- Investment income: profits from own enterprises, interest and penalties from taxes.
- Other: fines and penalties

Source: Calculated from Statistics Canada data, Financial Management Systems (FMS), mimeograph, June 2002.

for funding services where specific beneficiaries can be identified', whereas 'property taxes are important for funding those services that generate collective benefits but for which specific users cannot be identified'.[27]

With respect to borrowing, provinces generally do not allow local governments to borrow for operating budgets. Even borrowing for capital purposes is very limited, although more by political convention than by law. As a result, there is a broad consensus within Canada that Canadian cities have been falling behind in the quality of their physical infrastructure. Indeed, during the 2004 federal election campaign the Liberal Party of Canada – the party that formed the government after the election – declared in its party platform:[28]

> The Federation of Canadian Municipalities has estimated that there is a $60 billion infrastructure 'deficit' in our cities and communities that is growing every year. We will work cooperatively with provinces and municipalities to use new financial resources and innovative capital investment techniques, with a goal of eventually eliminating that deficit.

While it is reasonable to speculate that the Federation of Canadian Municipalities has perhaps provided a high-end estimate of the infrastructure deficit, independent observers also provide large numbers.

In sum, the fact that local governments raise five-sixths of their own revenue gives them a degree of self-sufficiency in fulfilling their service mandate. However, local government still relies on conditional provincial cash transfers and inelastic tax bases. Therefore, although local government is well established in Canada, the limits on its access to own source funds and the conditions attached to transferred funds, mean that it is performing below its potential.

Numerous proposals for reforming the system of municipal finance have responded to these realities. While some voices call on provinces to allow municipalities to levy income and/or sales taxes, they are not likely to acquire any political momentum. More important, however, are proposals that would allow municipalities to share in federal gasoline taxes, as discussed below. This will, however, require the cooperation of the provinces.

SUPERVISION OF LOCAL GOVERNMENT

The broad generality in Canada is that provincial governments have broad powers of supervision relative to local governments that are exercised as and

when provinces deem appropriate. According to McAllister, provinces dictate through municipal acts,

> the rules of incorporation, the procedures for financing and running an election or other forms of voting, the kinds of by-laws that might be passed for municipalities, the rules governing taxation, debt management and auditing, licensing and regulation, acquisition and disposal of property, the management of various local services, community planning, and so forth.[29]

This effective system of provincial tutelage is a product of Canadian history. Local government in Canada effectively pre-dates Canada's 1867 act of federation. Previously, the colonial rulers established local bodies to further colonial goals, most notably 'effectiveness, efficiency, and … the British economic interest'.[30] Local government was thus focused on functional goals, not local self-expression. When Canada was formed in 1867 – with a federal constitution that made municipal government a creation of the newly establishing Canadian provinces – those former colonies inherited pre-confederation local bodies that had evolved with very narrow functional purposes.

Writing as late as the 1950s, Crawford observed that the Newfoundland provincial municipal law required 'the approval of the Lieutenant-Governor in Council for the appointment of officers, the annual budget, the borrowing of money, the enactment of regulations … and, in most cases, the rate of taxation'.[31] He noted that the provincial cabinet also had the power to 'disallow work done or being done or proposed to be done by the [municipal] council'.[32]

Provincial supervision today is perhaps less strict than when Crawford wrote. Nonetheless, provinces remain ultimately accountable for municipal government output and finance. If a municipality were to face bankruptcy, the province would be forced to bail it out. Over time, however, there have been a variety of developments intended to make local authority independently responsible for the tasks assigned to it.

As noted above, different models of local government have been tried (council-committee model, city manager and chief administrative officer model, commissioner and board of management model). All aimed at finding some kind of appropriate balance between accountability to locally elected officials and functional goals.

As part of this balancing, there is also a long tradition of provincial governments creating agencies, boards and commissions, and assigning various mandates to them for specified purposes. These have had varying degrees of autonomy from the provincial government and sometimes permanence. Police commissions, transit and housing authorities, and school boards are examples. These bodies are generally associated with the idea that certain kinds of local responsibilities are too sensitive or too important to be managed by locally elected councils.

While the experience with these bodies varies, what they have in common is that they reflect the power of provinces to organise local powers as they see fit. For better or worse, they reflect a belief in a kind of bureaucratic rationality over local democracy.

In summary, there is a tension between provinces as supervisors of municipal government and municipalities as a democratically elected order of government, and the way this tension gets played out varies over time and by province. At present, there may be some momentum to easing the supervisory role of provincial governments.

INTERGOVERNMENTAL RELATIONS

Three types of intergovernmental relations involving municipal government exist: provincial–municipal; inter-municipal; and federal–municipal. The third type warrants deepest consideration, as it is the most evident area of change in municipal intergovernmental relations at present.

The role of provincial–municipal relations has already been discussed. Provinces determine the powers assigned to local governments and their access to sources of revenue. Needless to say, this ensures a permanent dialogue between municipal officials and provincial authorities. It is, however, a relationship dominated by the supervisory role of the provinces.

Organised local government concerns the extent to which municipal governments join with one another and put forward an integrated point of view to provincial and federal governments. The leading organisation in this regard is the Federation of Canadian Municipalities, founded in 1937 to put pressure on the federal government to finance unemployment relief. Its current agenda includes lobbying for federal and provincial funds for infrastructure rebuilding (including transit), housing, promoting urban Aboriginal settlement issues and environmental matters, as well as publicising municipal revenue shortfalls.

There are also comparable inter-municipal associations at the provincial level that can, at times, both support and oppose the work of the Federation of Canadian Municipalities. Municipalities further interact through voluntary programme action outside the structures of formal intergovernmental relations.

The place of local government in national and federal intergovernmental relations is a contested area. At one end of a spectrum, for example, the Government of Quebec actively discourages all direct federal–municipal relations, preferring to mediate between the federal and local authorities. At times, Ontario has been almost equally adamant that the federal government stay out of local affairs.

Conversely, the provinces of Manitoba and British Columbia have traditionally been far more open to direct federal–local interaction, provided the province was informed and present at the table when final arrangements have been struck.

In the early 1970s the federal government created a Ministry of State for Urban Affairs (MSUA) – an initiative intended to provide a kind of coordinating mechanism for the federal government relative to the urban areas it was so heavily influencing. The federal government was already a huge land owner in many municipalities. It also owned and operated (directly or indirectly) city structures such as airports, train stations and ports. Moreover, it had, since the depression in the 1930s, played a large role in encouraging house building by the Dominion Housing Act of 1935 and then the 1946 federally owned Central (later re-named Canada) Mortgage and Housing Corporation (CMHC). It helped determine the number of immigrants entering Canada and thus affected the way in which the demographic structure of cities evolved. The federal government was also often a major local employer, as many ministries had offices across the country.

Prior to the creation of the MSUA, the large presence of the federal government in urban areas inevitably meant that federal decisions would affect municipal affairs. For example, after 1945 Ottawa provided federal financial assistance through its housing legislation and CMHC for single-family dwellings in a way that reinforced low-density sprawl.[33] This in turn put pressures on local governments to create needed physical infrastructure (i.e. roads, sewers, water) and transit. Similarly, federal decisions about the location of municipal airports and the placement of railway lines affected the lives of communities.

According to Tindal and Tindal, when the federal government acted in the urban areas, 'municipalities had no opportunity for advance consultation and

little hope of obtaining adjustments after the fact'.[34] Indeed, federal ministries within the same city often failed to coordinate their local actions.[35]

The MSUA was created in 1971 as the federal government's institutional response to these coordination failures. The ministry was not intended as a line department, but as a vehicle for urban policy development, coordination of the projects of other federal ministries, and catalysing consultation and coordination among all three orders of government in matters of urbanisation.

The history of the MSUA was brief and unhappy. Its horizontal coordinating role created conflict with other federal agencies, and its efforts at tri-level coordination were generally unfruitful. Provinces generally saw the federal initiative as meddling in provincial affairs. By the end of the 1970s it had been abolished.

Informal intergovernmental relations nonetheless continued despite the failure of the MSUA. During the 1980s, there were a number of big city tri-level projects, including the 1981 Winnipeg Core Area Initiative, the 1988 tri-level task force to deal with the Greater Vancouver Regional hazardous waste transportation, and the 1990s Halifax Gateway Committee dealing with external transportation links in the metropolitan region.

During the life of the Jean Chrétien Liberal government (1993–2003), much effort was focused on a national infrastructure programme. Andrew and Morrison contend that 'it was a tri-level initiative in every respect'.[36] All three orders of government contributed financially. During the same period, less costly but medium-profile tri-partite initiatives were also undertaken in relation to homelessness, housing investments, immigration settlement and urban Aboriginals. These for the most part reflected a case-by-case approach and did not represent an overarching integrated approach to the challenges of urban governance.

Just before he became Liberal leader and prime minister in late 2003, Paul Martin showed considerable public interest in continuing with these kinds of tri-level arrangements and also in building a special fiscal arrangement with Canada's larger cities. Once Martin became prime minister, the Liberal government even began a process of revenue sharing with the municipalities by removing the federal Goods and Services Tax on municipal purchases. Furthermore, during its 2004 election campaign it suggested that it might gradually transfer a share of the federal gas tax to the community level to help reduce the ongoing funding shortfall at municipal level. The 2005 federal government budget promised to act on this idea.

Two things are noteworthy about this commitment. First, as a result of lobbying, the government had diluted its fiscal commitment to cities with a more general commitment to communities. Second, since such revenue sharing can be offset by provinces through reductions in their transfers to the local level, the federal proposal will need the cooperation of provincial authorities.

The Canadian federal government is unlikely to return to the experiment of the 1970s' MSUA. In practice, its functioning was impractical and much too sensitive politically. Instead, the new federal prime minister appears to be trying a more flexible coordinating mechanism by appointing a minister of state for infrastructure and communities. John Godfrey, the Minister of State, recently enunciated a federal 'new deal' for communities in 2004:

> Let me start with my Infrastructure and Communities Portfolio … . The portfolio was formed in part to pursue one of the government's key priorities – the New Deal for [Canada's] Cities and Communities. And let me remind you that this is a top priority of the Prime Minister and it is an 'all of government' priority.
>
> What makes the New Deal for Canada's Cities and Communities a truly new one is that it marks a significant rethinking of our approach. We're moving toward an approach that considers communities as a whole – one that takes each piece of the puzzle and considers how it fits with others to create the big picture.
>
> That's why the first of the four elements to our New Deal is our work on a vision, with the help of the Advisory Council, a vision of where Canadian cities and communities of all sizes can be in 30 years. A vision of what the federal government can do as a partner with municipal governments and most certainly with the provinces, whose jurisdiction we respect completely.
>
> The second element to our New Deal is what the policy people in government call 'the urban lens'. What I also call 'the rest of government' and its involvement with the cities and communities. [37]

Time will tell whether Godfrey's words result in an enhanced role for communities in the national dialogue. For now, it seems likely that there will be modestly enhanced federal coordination within the federal government in terms of its impact on cities, although past experience suggests that programme ministries may resist being 'coordinated' (or slowed down) by Godfrey's group.

Moreover, local government is likely to remain a junior and non-constitutional partner in national intergovernmental relations. At the same time, as Canada's highly urbanised population becomes even more urbanised, perhaps there will also be a further groundswell to give larger cities a privileged unconstitutional place in national discussions, as many crucial decisions will require a municipal perspective. In any case, the focus for the cities, at least in the short run, is likely to be on enhancing their fiscal autonomy and thus giving them more room for influence at the intergovernmental table.

CONCLUSION: EMERGING ISSUES AND FUTURE DEVELOPMENTS

In the short term, the largest political issue facing Canadian municipalities is whether or not they will be offered a new deal that enhances their autonomy both from a fiscal and a problem-solving perspective. The answer, especially for the larger cities, is likely to be in the affirmative; but only on the basis of pragmatic adjustments to funding arrangements and invitations to participate in national discussions of key big city issues, rather than through any constitutional change. In other words, municipalities will have more of a national voice, but only when federal and provincial governments judge that their presence is needed for solving problems.

There is a school of thought that says that this kind of pragmatic response will be insufficient. Tom Courchene, among others, argues that nothing less than a total restructuring of the role of municipal government in Canada is necessary. Nonetheless, he remarks,

> … while cities may in theory be ideal places for democracy and accountability to flourish, the Canadian reality is, with some notable exceptions, quite different. Understandably, citizens will not become too excited about democracy and accountability at the city level as long as cities are largely administrative units.[38]

For the moment at least, the pragmatists have the upper hand. Canadian municipalities have not yet graduated from their junior status.

ENDNOTES

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3 For detailed descriptions of the various municipal acts across the provinces, see ML McAllister, *Governing Ourselves? The Politics of Canadian Communities*, UBC Press, Vancouver, 2004, pp 99-117.
4 City of Toronto, Corporate Services Department, Legal Division, *Powers of Canadian Cities – The Legal Framework* (June 2000), <http://www.city.toronto.on.ca/ourcity/citycharterrep1.pdf> (27 October 2005), p 3.
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21 H Kitchen, Provinces and municipalities, universities, schools and hospitals, in H Lazar (ed), *Canada: The State of the Federation 1999/2000, Toward a New Mission Statement for Canadian Fiscal Federalism*, McGill-Queen's University Press, Montreal & Kingston, 2000, p 318.
22 Table from Harry Kitchen. Protection includes courts of law, correction and rehabilitation, police, firefighting and regulatory measures. Transportation and

communications includes roads and streets, snow and ice removal, parking and public transit. Health includes hospital and preventive care. Resource conservation and industrial development includes agriculture, tourism, trade and industrial development. Environment covers water, sewer, solid waste collection and disposal, and recycling. Regional planning and development covers planning, zoning and community development. Debt charges cover interest payments.

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24 Graham et al, op cit, pp 178-80.

25 Ibid, pp 180-3.

26 Specifically, for purposes of financing the war, the provinces entered into wartime tax rental agreements with the federal government which, among other things, entailed temporarily giving up their right to tax income. In the years following the Second World War, provinces gradually reclaimed their constitutional right to levy income taxes. But since then, income taxes have been centralised in federal and provincial hands with municipalities excluded.

27 Kitchen, op cit, p 319.

28 Liberal Party of Canada, *Moving Canada Forward: The Paul Martin Plan for Getting Things Done*, <http://www.liberal.ca/platform_en.pdf> (17 September 2004), 2004, p 32.

29 McAllister, op cit, p 119.

30 Ibid, p 44.

31 KG Crawford, *Canadian Municipal Government*, University of Toronto Press, Toronto, 1954, p 322.

32 Ibid. The word in brackets is my addition for clarity.

33 Tindal & Tindal, op cit, chapter 4.

34 Ibid, p 227.

35 Ibid.

36 Cited in Graham et al, op cit, p 187.

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Constitutional recognition of local government in Australia

CHERYL SAUNDERS

INTRODUCTION

This chapter deals with one particular aspect of the position of local government in Australia: its struggle for recognition as a third tier of government, deriving its legitimacy from election by the people that it serves. Recognition may come in many forms, but in a federation, in which a constitution typically recognises the constituent units of the polity, national constitutional recognition is the ultimate goal.

For almost 40 years, Australian local government has pursued this goal, with limited success. Local government is now recognised in the constitutions of all Australian states, although in a somewhat weak form. National constitutional recognition has, however, so far proved elusive. In 2005, local government has lost none of its enthusiasm for the cause, but its achievement seems far from secured.

The principal purpose of this chapter is to describe and explain the course of the struggle for constitutional recognition of local government in Australia and the outcomes that have been reached. The results necessarily throw light on the status of local government in Australia and the regard in which it is held. In addition, as I argue in the conclusion, this story has broader significance as well, as a window into both federalism and democracy in Australia.

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THE CONSTITUTIONAL STATUS OF LOCAL GOVERNMENT

The constitutional status of Australian local government is similar to the position of local government in Canada, with two notable differences that will emerge in due course. Like Canada, the Australian federation essentially comprises two spheres of government, which in Australia are termed the Commonwealth and the states.[1] As in Canada, each of the spheres is structured as a parliamentary democracy, broadly along British lines. Both spheres of government in both federations use electoral systems that tend to consolidate parliamentary parties, generally producing strong, stable governments based in the Lower House of the legislature. In Australia, at least, it is assumed that the winner will take a great deal, if not almost all, and that both federal or state governments, once elected, will have the capacity to implement their policies quickly and effectively.

The colonial predecessors of the Australian states predated federation. The new Constitution that provided the framework for the federation in 1901 recognised the colonies as the original states of the federation and saved their constitutions, powers and laws.[2] Each of the colonies already had systems of local government, created by legislation during the course of the 19th century. Following federation, these remained subject to state law. The relationship of local authorities to the state was described in 1903 as follows:

> The State, being the repository of the whole executive and legislative powers of the community, may create subordinate bodies, such as municipalities, hand over to them the care of local interests, and give them such powers … as may be necessary for the proper care of these interests. But in all such cases these powers are exercised by the subordinate body as agent of the power that created it.[3]

Much changed over the course of the 20th century. Most relevant for present purposes, the franchise broadened and electoral democracy deepened. Local government was affected by these forces as well, although property-based voting entitlements still exist in most states.[4] Until relatively recently, however, there was no corresponding change either in the formal legal status of local government or in the attitudes of the other governments towards it. Local government remained the creation of the states, organised separately by each state in discrete systems of local government. The boundaries of local government areas, the constitution and powers of local government bodies and

the very existence of a system of local government were matters for the government and the parliament of the state concerned.

Inevitably, there are similarities between the systems of local government in the various Australian states. There are differences as well, however, at least some of which are the result of successful experiments by one state, adopted or adapted by others over time. The conferral of general competence powers on local authorities, the direct election of the local mayors and the introduction of postal voting in local elections are examples of generally beneficial initiatives taken by individual states, in an illustration of a potential advantage of state-based local government arrangements of this kind.

Less obviously benevolent examples could be given as well, drawn from the upheavals that accompanied local government changes in most parts of Australia during the 1990s. These included: the forced amalgamation of local government areas; the replacement of elected local authorities by state-appointed administrators, often for considerable periods of time; and the compulsory introduction of competitive tendering for local government services.[5]

Australian local government is not mentioned in the Australian Constitution in any form or any context. This represents the first relevant difference between the position in Australia and the position in Canada, where local government is included in the list of legislative powers assigned to the provinces, as a by-product of the particular Canadian approach to the division of powers for federal purposes. It is unlikely, however, that this form of recognition would satisfy Australian local government. In effect, it merely reinforces the position of local government as a subject of provincial power and does not offer recognition as a sphere of government in its own right.

In 1974, an attempt to amend the Constitution would have recognised local government as a by-product of the power of one of the other spheres of government, although in this case it was the national sphere.[6] The proposal would have conferred new power on the Commonwealth Parliament to borrow money for and grant financial assistance to local government, rather than using states as conduits for the purpose.[7] The proposal was defeated at referendum, failing to attract even a national majority and securing a majority in only one state.[8] Had the referendum passed, local government undoubtedly would have welcomed the direct relationship with the Commonwealth and the financial benefits that would have followed from it. For reasons already given, however, it is unlikely that a constitutional provision of this kind would have provided

the symbolic recognition that local government seeks. Nor would it have provided the substantive constitutional protection that, arguably, has emerged as a more recent goal in the wake of the restructuring of local government during the 1990s.

By the end of the 20th century, constitutions aside, Australian local government nevertheless had a national presence in a variety of ways, arguably amounting to recognition of another kind. There is a peak local government organisation in each state, which in turn is a member of the peak national Australian Local Government Association (Alga) in a distinctly federal-type arrangement. Alga is a most effective lobby group, through which local government is represented on the Council of Australian Governments (COAG) and on several other ministerial councils, including the Local Government and Planning Ministers' Council (LGPMC), comprising the ministers responsible for local government in each state and the Commonwealth. A Commonwealth Minister and Department of Transport and Regional Services has specific portfolio responsibilities in relation to local government, which include administration of a programme of general federal grants to local government[9] and some specific-purpose funding programmes.[10]

THE EARLY DEBATE ON RECOGNITION

The contemporary Australian debate on constitutional recognition of local government began in the early 1970s. As will be seen, there are distinctively Australian reasons why the debate began at that time. With hindsight, however, it coincided with the development of a new appreciation of local government elsewhere in the world, as a consequence of democratisation and in recognition of the more responsive governance that local government potentially can provide.[11]

The debate in Australia coincided with the election of the Whitlam government, which also was a catalyst for it. The government led by Prime Minister Whitlam from December 1972 to November 1975[12] was the first non-conservative Commonwealth government for more than 20 years. It came to office with a platform of wide-ranging proposals for social and legal reform, to which it anticipated that the federal system would be a constitutional impediment and that the states (many of which still had conservative governments) would be political impediments. The new prime minister favoured a policy of regionalism to bypass the states as far as possible, to which local government would be a key. Inevitably, but not entirely reluctantly, local

government thus was drawn into a wider battle over constitutional and political power between the Commonwealth and the states, which lasted throughout the period of the Whitlam government and which played a role in its eventual destruction.[13]

Proposals for constitutional recognition of local government, as well as ominous signs of opposition to them, emerged initially in the Australian Constitutional Convention (ACC). The ACC originally was conceived as a meeting of delegations of parliamentarians from the Commonwealth and all state parliaments, to try to develop consensus proposals for constitutional change, which might also prove acceptable to the voters at referendum.

Planning for the first session of the ACC was under way before the election of the Whitlam government: the first meeting of the ACC was held after it, however, in October 1973. In preparation for this meeting, the new government made it clear that Commonwealth participation depended on local government participation as well.[14] The states initially resisted. In the end, a compromise was reached, entitling local government to a limited form of representation in the 1973 session, which subsequently applied to other sessions and committee meetings as well.[15] Local government in each state was entitled to three representatives, but one vote. Local government representatives had 'full status to speak [and vote] upon questions of constitutional financial matters (sic) of direct interest to local government'. Their rights in relation to other matters were left to decision by the ACC from time to time.

The behind-the-scenes struggle over representation of local government in the ACC was both a manifestation and a source of suspicion on the part of the states about the motives of local government in seeking constitutional recognition. The effects of state mistrust of the constitutional aspirations of local government persisted long after the Whitlam government was gone. Matters were not improved in 1974 when the government put to referendum four proposals which had not been approved by the ACC,[16] including the local government financing proposal (to which reference was made earlier), all of which failed to attract national majorities.[17] Significantly, the local government proposal attracted the least national support.

On the other hand, the involvement of local government with the ACC, even with its more limited status, gave the issue of constitutional recognition a higher profile than it might otherwise have had at that stage. Constitutional recognition of local government was among the issues identified as requiring further investigation by the Sydney session of the ACC in 1973, and thus

formed part of the work programme of successive ACC committees. Local government appeared as an item on the agenda for most plenary sessions of the ACC after 1973: in 1975, 1976, 1978 and 1985.[18]

In the first session held after the fall of the Whitlam government, in 1976, a resolution was passed calling on the states to recognise local government in state constitutions, encouraging further ACC committee examination of the best means of Commonwealth recognition of local government, and inviting the prime minister to raise at the premiers' conference 'the question of the relationships which should exist between Federal, State and Local Government'.[19]

This last recommendation led to the establishment of an Advisory Council of Inter-government Relations (ACIR), broadly modelled on the body then existing in the United States (US), with full participation of local government through Alga, which did work of its own on constitutional recognition.[20] In due course, both the ACC and the ACIR recommended a form of recognition of local government in the national Constitution, although nothing so far has come of either proposal. And the recommendations of the ACC in 1976 provided the impetus for the recognition of local government in state constitutions.

Discussions in the ACC tended to focus on how national constitutional recognition of local government might be achieved without affecting the federal balance of power in an essentially rigid constitution. The solution ultimately developed by the ACC Structure of Government Sub-Committee in 1984 involved what the sub-committee described as a 'minimum' and a 'maximum' position.

The minimum position was a non-justiciable *Declaration as to the Principles to be applied in the Constitutional Operation and Regulation of Local Government Authorities in Australia*,[21] to be adopted by legislation in all Australian jurisdictions and added 'as an attachment … to the publication which contains the Australian Constitution'.[22] The declaration would have recognised 'the fundamental role of Local Government in the system of government in Australia'; recognised its 'value ... in ensuring that local communities may participate to the maximum extent in the management and regulation of their districts'; and identified the following six principles:

(1) Within every jurisdiction in Australia there be a system of local government;
(2) The system extend to all areas in which a sufficient number of people reside to warrant a Local Authority in their area;

(3) Except in special circumstances the Local Authority be elected by all adults resident – but not so as to exclude property-owners – in the area administered by the Local Authority;
(4) Local Authorities be granted adequate powers and the right to manage and regulate the affairs of the local community within the framework of the laws applying to such Local Authorities;
(5) Each Local Authority be provided with access to adequate funds to enable it to perform its function with equity and efficiency; and
(6) A Local Authority not be subject to arbitrary dismissal or suspension.

The maximum position – about which the sub-committee was somewhat more tentative – involved recognition of local government in the Commonwealth Constitution. The draft clause that it recommended be 'pursued further' read as follows:

> Subject to such terms and conditions as the Parliament of a State or the Northern Territory or in respect of any other Territory the Parliament of the Commonwealth may from time to time determine, every State and Territory of the Commonwealth shall provide for the establishment and continuance of Local Government bodies elected in accordance with such laws and charged with the peace, order and good government of the local areas for which they are elected. Each such Local Government body shall have power to make by-laws for the peace, order and good government of its area to the extent and in accordance with the laws prescribed by the respective Parliaments in that behalf.[23]

The sub-committee's report was approved by the plenary session of the ACC in Brisbane in 1985, for forwarding to the premiers' conference 'with the strong recommendation that a clause for insertion in the Commonwealth Constitution be proposed by referendum in terms of the draft clause'.[24] The ACIR endorsed an effectively similar clause in the same year, noting that it would achieve no more than 'purely formal recognition'[25] of local government.

RECOGNITION IN STATE CONSTITUTIONS

We showed earlier how the possibility of constitutional recognition of local government in state constitutions emerged as an alternative to national

constitutional recognition in the ACC in 1976. It was endorsed by subsequent sessions of the ACC and by the ACIR. We now examine the extent and effectiveness of the recognition of local government in this form.

In a second significant difference between Australia and Canada, each Australian state has its own constitution. As a generalisation, state constitutions can be readily altered by state parliaments, sometimes as easily as can ordinary laws. Special alteration procedures involving various degrees of difficulty can, however, be put in place by the state itself. These may involve a requirement for special majorities in the legislature or even submission to referendum by the people of the state.

Recognition of local government in state constitutions began in Victoria in the late 1980s, and spread gradually to other states. By 1984 the state constitutions of South Australia and Western Australia recognised local government; in 2005 all state constitutions do so.[26]

The rationale is evident. The role of state constitutions is to provide a framework for the principal institutions of state governance and the principal rules by reference to which it is conducted. Inclusion of local government in state constitutions thus recognises its significance, but in a context that underscores the status of local government as a state rather than as a national institution.

This approach had at least one other potential advantage from the standpoint of local government. An ongoing concern about national constitutional recognition was its effect on the balance of power between the Commonwealth and the states, whether intended or not, in consequence of judicial interpretation of the Constitution over time. No such problem arises in connection with recognition in state constitutions. In theory, at least, state constitutional recognition thus offered greater scope to provide more effective protection for key aspects of the status, structure and operation of local government. For present purposes these might be categorised as follows: the existence of local government in each state as an elected sphere of government; the powers of local authorities; and the protection of councils against arbitrary dismissal by state institutions.

As a generalisation, this potential has not been realised. The provisions in state constitutions dealing with local government are drafted cautiously, and local government achieves relatively little effective protection as a result. A particular cause of difficulty evident in all state constitutions is the tension between the legitimacy of elected local government on the one hand, and the responsibility of the states for local government on the other.

The logic of the former is that local government is responsible to its electors, who can respond to maladministration or worse at regular elections by voting local representatives from office. The latter, however, assumes that the state is responsible for significant deficiencies in the operation of local government, as for any other aspect of the governance of the state, and may (and should) intervene to ensure effective performance.

The extent of the protection actually offered to local government by the constitutional provisions of their respective states can be analysed by reference to the three aspects of the structure and operation of local government identified earlier.

First, all state constitutions guarantee a 'system' of local government, but only Victoria does so in terms that reflect the democratic significance of local government: 'Local government is a distinct and essential tier of government …'.[27] And only one state, Western Australia,[28] guarantees the elected status of the system of local government, without express reservations to allow parts of the system to be appointed, permanently[29] or temporarily[30] or, as in the case of New South Wales, to provide that local government bodies may be either 'duly elected or duly appointed'.[31]

No state constitution guarantees any particular content for the powers of local government. In each case, the Constitution explicitly leaves it to the state legislature to prescribe the powers of local government from time to time. Some do this more elegantly than others: the Constitution of Queensland, for example, defines local government as 'an elected body … charged with the good rule and local government of a part of Queensland' allocated to it,[32] before making it clear that the parliament can prescribe 'the nature and extent of its functions and powers'.[33] In four states, by contrast, the constitution makes no attempt to prescribe an objective general standard for determining the powers of local government, referring only to the powers that the state parliament 'considers necessary' for the government of the areas concerned.[34]

Finally, the state constitutions provide surprisingly patchy protection for local government against arbitrary dismissal. Necessarily, as a matter of ordinary legal principle, the dismissal of a legally constituted authority (of any kind) can take place only under or pursuant to legislation. Only two state constitutions seek further to structure and constrain the process by which an elected local authority may be removed. The Constitution of Queensland requires ministerial action to dissolve a local authority to be tabled in and ratified by the Legislative Assembly of Queensland, in order to be effective.[35]

And the Victoria Constitution provides that 'a Council cannot be dismissed except by an Act of Parliament' specifically relating to it.[36] Significantly, the Victoria provision cannot be altered without a state-wide referendum.[37] In Queensland, a referendum is required only for legislation 'ending the system of local government in Queensland':[38] an extremely unlikely occurrence. Notice of other legislation 'affecting' local government must be given to the local government representative body in Queensland 'a reasonable time' before the bill is introduced into Parliament 'if the member [introducing the Bill] considers it practicable' to do so.[39]

1988 REFERENDUM AND ITS AFTERMATH

The ACC's Structure of Government Sub-Committee suggested in its 1984 report that its 'maximum' position – namely, recognition of local government in the Australian Constitution – might be achieved in the period leading to the bicentennial of European settlement in Australia, in 1988.[40] But partly due to the pending bicentennial, the session of the ACC that adopted the sub-committee's report was to be its last. During the Brisbane session in 1985, Commonwealth Attorney-General Bowen announced the intention of the Commonwealth government to withdraw from the ACC and to establish another, more effective constitutional review body to carry out a 'fundamental review of the Australian Constitution' and to report in the bicentennial year.[41]

The Constitutional Commission and five advisory committees duly were established in December 1985. Former Prime Minister Whitlam was one of the six commissioners. The terms of reference of the commission mentioned local government, albeit in the context of 'an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government'.[42] The effective replacement of the ACC by the Constitutional Commission was opposed by the federal opposition and by most of the states: an inauspicious start for a constitutional review process, particularly in Australia with its referendum requirement for constitutional change.

Two of the advisory committees considered the constitutional recognition of local government in the course of carrying out their terms of reference. The distribution of powers committee advised against constitutional recognition on a range of grounds that included the unpredictable legal effects of a provision of this kind in the national Constitution, and the undesirability of entrenching in the Constitution 'another level of government which would be in

competition with the States'.[43] The Trade and National Economic Management Committee, on the other hand, recommended constitutional recognition of local government 'but … refrained from citing specifically the form which such recognition should take'.[44]

In the event, the commission recommended alteration of the Australian Constitution to recognise local government.[45] The recommendation was, however, made more controversial than it might otherwise have been as a result of political by-play between the government and the commission. The commission was due to report at the end of June 1988. In January 1988 the attorney-general sought an earlier report from the ACC on 11 listed matters, including recognition of local government.[46]

The commission responded with an interim report on 28 April. Constitution alteration bills on a selection of the commission's recommendations in its interim report, including constitutional recognition of local government, were introduced into parliament on 10 May – well before the submission of the final report of the commission in June.[47] Constitution Alteration (Local Government) 1988 would have added to the Australian Constitution a new section 119A, as follows:

> Each State shall provide for the establishment and continuance of a system of government, with local government bodies elected in accordance with the laws of the State and empowered to administer, and to make by-laws for, their respective areas in accordance with the laws of the State.

Although the commission noted that some of the Constitution alteration bills varied 'from what we recommended',[48] the variation in the case of the local government bill was not great, although it may have been significant in due course. The commission's proposal would have provided for the 'establishment and continuance' of 'local government bodies …' rather than of a 'system' of local government. It may thus have had some greater effect in deterring arbitrary dismissal – an expectation that the commission itself appeared to have had. In its explanation of the proposal, it noted that its effects would require the people to be represented by an elected local government body; would restrain arbitrary dismissal; and would ensure that any local body that was 'lawfully suspended' would be 'restored within a reasonable period by elections'.[49]

The purpose of the approach by the attorney to the commission for an early report on selected issues appears to have been designed to ensure that proposals to change the Constitution would be put to referendum in the bicentennial year. The particular selection of proposals appears to have been designed to ensure that they would pass. The latter, at least, was a grievous miscalculation. All four proposals were rejected at referendum, with historically large majorities. The only comfort for local government was that, in terms of popularity, this proposal attracted a slightly larger 'yes' vote than two of the others.[50] The rejection nevertheless was decisive, with almost twice as many voters opposing constitutional recognition as supporting it, and without attracting a majority of voters in any state.[51]

The failure of the 1988 referendum was the last formal phase, so far, in the struggle for national constitutional recognition of local government in Australia. The issue, however, remains alive in local government circles.[52] The constitutional aspirations of local government have expanded, with greater sophistication and new emphases on democratisation. The concerns of local government about the absence of effective constitutional protection have been heightened by the experiences of amalgamations and dismissals in the 1990s. Nor does local government regard the 1988 result as sufficiently discouraging to deter it from further attempts. There is a tendency to explain 1988 as an anomaly: on this view, the referendum was an accidental casualty of a political struggle between parties and the other spheres of government, having no bearing on the merits of the proposal or the attitude of Australians to it. Time will tell whether this is right. It seems likely, however, that another attempt to change the Australian Constitution to recognise local government will be made in due course. Ironically, it seems likely also that a future proposal will be less timid than the one that failed in 1988.

CONCLUSIONS

It is possible to understand the processes and outcomes of the struggle for constitutional recognition of local government in Australia from a variety of perspectives.

From a historical perspective, which retains some contemporary influence, there is nothing particularly remarkable about it. On this view, local government was and remains a creation of state governments and parliaments. Local government thus is more appropriately recognised in the constitutions of

the states, rather than in the Australian Constitution. The limited effective protection obtained even from the state constitutions is explicable on the ground that the states retain final responsibility for the performance of local government, as for other emanations of the state. This view gives no weight to the elected status of local government, reflecting a particular (but prevalent) conception of democracy in Australia, to which further reference is made below.

From another perspective, the story of the constitutional recognition of local government is a case study in the problems of constitutional change. Alteration of the Australian Constitution typically is heavily politicised due to the need for proposals for change to be initiated by the Commonwealth Parliament. Change is difficult because of the requirement for proposals, thus initiated, to be accepted by the voters at referendum. The difficulty is exacerbated by the manner in which voters are informed about referendum proposals, namely, through the distribution of highly partisan cases for and against the change proposed, prepared by the adversaries within Parliament and designed to win votes rather than to advance knowledge. Some of the arguments made in the official pamphlet against the local government referendum in 1988 were predictable: it 'could result in local government being replaced by large, impersonal, regional government ultimately controlled from Canberra'; the proposal was 'uncertain and vague'; it would not in any event stop 'arbitrary dismissals or amalgamations'.[53] But a final objection is so obviously designed simply to scare voters into rejecting the proposal that it is almost embarrassing to recite as an argument in an official pamphlet. Acceptance of the proposed change would, it was claimed (picking up on a phobia that was widespread at the time) 'allow the federal government to use its external affairs power to intrude into local government by entering into international treaties'.[54]

From another perspective, again, the story is one about the challenge of constitution drafting. Finding the right form of words is always difficult, and particularly in circumstances where the results are exposed to judicial interpretation over a long period of time, and where remedial change is an unlikely option. In this case, however, there was an additional dimension. Outwardly at least, the task that the drafters had was to find a form of words that would formally recognise local government in the national Constitution but that would not substantively affect the powers of the states or the federal division of powers in relation to local government. The various versions of the draft discussed in the ACC from 1973 were claimed by its proponents to

achieve this goal and criticised by it opponents for failing to do so, at least with a sufficient degree of certainty.

To complicate the analysis further, other agendas almost certainly were at work as well. For the most part, proponents of constitutional recognition of local government would have been comfortable with an outcome that delivered some substantial constitutional protection, although for a long time it was not politic to say so. Equally, opponents of constitutional recognition, for their part, often were uncomfortable even with the symbolism of national constitutional recognition, although these were not the terms in which their argument was couched.

Finally, this 30+ year struggle over constitutional recognition of local government in Australia provides insight into Australian federalism and Australian democracy, both generally and at the point where the two intersect. The system of categorisation developed by Peter Pernthaler is useful for this purpose.[55] The difficulties encountered by local government in securing constitutional recognition are explicable in part because, in Pernthaler's terms, Australia was, remains, and continues to perceive itself as a classic federation, constituted by two spheres of government, and not by three.

Equally, again in Pernthaler's terms, the demand for democracy in Australia generally is considered to be met by the processes of majoritarian parliamentary representative government, in which considerations of the virtues of local self-administration play only a small role, at best. From the perspective both of federalism and of democracy, therefore, the role and status of local government is diminished. The problem is particularly acute in the capital cities, where the seats of state governments are based. Voters in these areas are likely to turn to the state, rather than to local democracy, to remedy deficiencies in the delivery of local services.

If this is correct, it may be that in the short-term constitutional recognition of local government should be less of a priority for governance reform in Australia. The real challenge is to achieve deeper change. The underlying strength of local government lies in its potential to enrich democracy by enabling the engagement of voters and by demonstrating the responsiveness of public institutions at a time of significant cynicism about representative government. Development of this potential would assist a move to a new-style democracy as a step towards a new-style federalism, out of which national constitutional recognition might naturally emerge: or perhaps, would not matter so much any more.

ENDNOTES

1 Australia also has two self-governing territories, the Northern Territory and the Australian Capital Territory (ACT), which are treated as states for most practical purposes. The former has a distinct system of local government. There is no separate system of local government in the much smaller ACT, which carries out local government functions itself.

2 Australian Constitution, ss 106, 107 & 108, respectively.

3 *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208, at 240 (per O'Connor J).

4 R Kiss, Local government, local autonomy and local democracy in Australia (14 February 2002), <http://www.une.edu.au/clg/lgconf/papers/kiss.htm> (viewed 23 May 2005).

5 R Kiss, Local government to local administration: The new order, in B Costar & N Economou (eds), *The Kennett Revolution – Victorian Politics in the 1990s*, UNSW Press, 1999, p 110.

6 All proposals to change the Australian Constitution must be approved at referendum, after passage by the Commonwealth Parliament: s 128. Double majorities are required: approval by a national majority and by majorities in a majority of states (in other words, in at least four states).

7 Constitution Alteration (Local Government Bodies) 1974.

8 Only New South Wales voted in favour, by a majority of 1,350,274 to 1,308,139. The proposal failed to attract a national majority by 458,053 votes: House of Representatives Standing Committee on Legal and Constitutional Affairs *Constitutional Change*, February 1997, pp 101-102.

9 Local Government (Financial Assistance) Act 1995 (Cth).

10 See Budget Paper No.3, *Federal Financial Relations 2005-2006*, Appendix B, <http://www.budget.gov.au/2005-06/bp3/html/index.htm> (viewed 23 May 2005).

11 See e.g. *Draft European Charter of Local Self-Government 1982* in Advisory Council for Inter-government Relations (ACIR), *Implications of Constitutional Recognition for Australian Local Government*, Commonwealth Parliamentary Paper No. 322/1985, Appendix A.

12 Strictly speaking there were two Whitlam governments: a double dissolution election took place in 1974, following which the government was returned.

13 See generally G Sawer, *Federation under Strain 1962-1975*, Melbourne University Press, Melbourne, 1977.

14 Proceedings of the Australian Constitutional Convention, Sydney, October 1973, p 15 (Gough Whitlam).

15 Australian Constitutional Convention, Votes and Proceedings, Sydney, October 1973, pp xxv-xxvi.

16 Constitution Alteration (Simultaneous Elections); Constitution Alteration (Mode of Altering the Constitution); Constitution Alteration (Democratic Elections); Constitution Alteration (Local Government Bodies).

17 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Constitutional Change*, op cit, pp 98-102.

18 Australian Constitutional Convention, Structure of Government sub-committee, Local Government Report, 1984, p 4, in *Proceedings of the Australian Constitutional Convention* 2, Brisbane, 1985.

19 Ibid.
20 ACIR, Constitutional Recognition of Local Government, Discussion paper, 1980; Responsibilities and Resources of Australian Local Government, Report No.7, 1982; ACIR, Implications of Constitutional Recognition for Australian Local Government, Commonwealth Parliamentary Paper No. 322/1985, Appendix A.
21 ACC, Structure of Government sub-committee, Local Government Report, op cit, p 35.
22 Ibid, p 13.
23 Ibid, pp 12-13.
24 ACC, Votes and Proceedings, Brisbane, 1985, pp xxxiii-xxxv.
25 ACIR, *Implications of Constitutional Recognition for Australian Local Government*, op cit, Appendix A, p 14.
26 Constitution Act 1902 (New South Wales) s 51; Constitution of Queensland 2001 (Queensland) ch 7; Constitution Act 1934 (South Australia) s 64A; Constitution Act 1934 (Tasmania) ss 45A & 45B; Constitution Act 1975 (Victoria) Part IIA; Constitution Act 1889 (Western Australia) ss 52-53.
27 Constitution Act 1975 (Vic) s 74A(1).
28 Constitution Act 1889 s 53. The significance of this provision, such as it is, is considerably lessened by the fact that it is not entrenched and thus has the status of an ordinary act of parliament which can be overridden by another law.
29 The Victoria provisions contemplate that in some areas local government may be carried out by a 'public statutory body': Constitution Act 1975 (Vic) s 74A(2)(b).
30 Constitution of Queensland 2001 s 71(3); Constitution Act 1934 (Tas) s 45B (b); Constitution Act 1934 (SA) s 45B.
31 Constitution Act 1902 (NSW) s 51(1).
32 Constitution of Queensland 2001 s 71(1).
33 Ibid, s 71(2). See also the Constitution Act 1902 (NSW), which describes local authorities as 'constituted with responsibilities for acting for the better government' of the relevant parts of the state: s 51(1).
34 Constitution Act 1934 (SA) s 64A; Constitution Act 1934 (Tas) s 45A(2); Constitution Act 1975 (Vic) s 74A(1), Constitution Act 1889 (WA) s 52(2). New South Wales falls between these extremes.
35 Constitution of Queensland, 2001 ch 7 part 2.
36 Constitution Act 1975 (Vic) s 74B(2).
37 Constitution Act 1975 (Vic) s 18 (1B)(j).
38 Constitution of Queensland 2001 s 78.
39 Ibid, s 77.
40 ACC, Structure of Government sub-committee, Local Government Report, op cit.
41 Constitutional Commission, *Report 1988*, p 33.
42 Ibid, p 34.
43 Ibid, p 438.
44 Ibid, p 439.
45 Ibid, p 435.
46 Ibid, p 46.
47 The Bills were: Constitution Alteration (Parliamentary Terms); Constitution Alteration (Fair Elections); Constitution Alteration (Local Government) and Constitution Alteration (Rights and Freedoms).

48 Constitutional Commission, *Report 1988*, op cit, p 48.
49 Ibid, p 443.
50 Parliamentary Terms and Rights and Freedoms, respectively.
51 3,163,488 voters supported the proposal; 6,248,166 opposed it.
52 For example, *Alga News*, 25 February 2005 reported a recent resolution of the Alga Board 'to develop a roadmap to constitutional recognition for local government', <http://www.alga.asn.au/news/20050225.php> (viewed 30 May 2005).
53 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Constitutional Change*, op cit, p 113.
54 Ibid.
55 See, Local government in Austria, p 65 of this volume.

Local government in Austria

PETER PERNTHALER & ANNA GAMPER

INTRODUCTION

The theory of federalism suggests that a federation and its constituent states comprise a federal system; local government – though regularly at the bottom of the territorial order – does not typically play a particular role within the context of federalism. A federal constitution therefore does not need to recognise local government in the same way as it needs to recognise the federation or the constituent states. In particular, it may leave any detailed provisions regarding local government to ordinary law, be it that of the federation or of the constituent units, which is more often the case. As a federal system does not necessarily require any kind of government below the level of the constituent units, the very decision whether local government ought to be established could, in principle, be left to the constituent units.

However, if a federal constitution itself chooses to recognise local government, it thereby protects its existence from elimination by ordinary law. A constitution may recognise the normative existence of local government or it may provide the rules necessary for the organisation and operational sphere of local government. The extent to which federal constitutions explicitly determine local government is usually rather moderate. It is therefore surprising to find how extensively local government is regulated by the Austrian Federal Constitution, *Bundes-Verfassungsgesetz* (B-VG).[1]

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TYPES OF LOCAL GOVERNMENT

According to article 2 B-VG, Austria is a federal state that consists of nine constituent *Länder*. Within the context of this fundamental programme,[2] no mention is made of local government. Forming a chapter entitled 'municipalities' (*Gemeinden*), articles 115 to 120 B-VG, however, determine local government *in extenso*.[3] Article 116 B-VG stipulates that each *Land* is constituted by municipalities and that each municipality is a territorial body of its own, enjoying the right of self-administration, and an administrative unit. While the municipalities do not take part in the federal system, they constitute the lowest (third) territorial tier in Austria. Since district administrative agencies and inter-municipal associations are not territorial bodies of their own (even though they perform important functions), there is no other territorial tier below the *Länder* than that of the municipalities. Therefore, when the term 'local government' is used in the following context, it always refers to municipalities.

The Federal Constitution does not generally distinguish between different kinds of municipalities, but follows the 'principle of the abstract municipality', which means that the municipalities' legal treatment is equal, irrespective of their size, population and economic criteria. Nevertheless, some municipalities are given a particular status which is basically determined by the Federal Constitution itself. According to article 116 paragraph 3 B-VG, a municipality with at least 20,000 inhabitants may, if *Land* interests are not thereby jeopardised, apply for its own statute. Such a statute is a specific kind of *Land* law that needs the approval of the federal government. If the federal government does not, within eight weeks, inform the *Land* governor of its veto, the statute enters into force.

At the moment, 15 towns have statutes of their own, mostly because they are *Land* capitals or for historic reasons, but the option is open to other municipalities if the aforementioned conditions are met. The difference between 'normal' municipalities and towns with their own statute is two-fold. First, article 116 paragraph 3 B-VG imposes on the latter the obligation to carry out those administrative tasks within their territory that are usually performed by district administrative agencies. Second, the Federal Constitution uses slightly different terms when speaking of the same administrative bodies within the municipal organisation.

All municipalities with at least 20,000 inhabitants are subject to auditing performed by the Court of Auditors pursuant to article 127a paragraphs 1 and

3 B-VG. Another asymmetric feature that is established by federal constitutional law[4] is the status of Vienna. It is not merely a municipality, but also the capital of Austria and a *Land* which also constitutes a feature of asymmetric federalism.[5] Finally, the 'principle of the abstract municipality' does not apply to tax equalisation since municipalities receive different revenues depending also on the size of their population.

Furthermore, article 120 B-VG provides a possible basis for the future establishment of so-called 'regional municipalities' (*Gebietsgemeinden*) that would require a federal constitutional amendment. The political idea behind this provision was to exchange the district administrative agencies for super-local agglomerations of municipalities, the organs of which could be elected directly by the citizens (and not just appointed by *Land* authorities).[6] This idea, however, has been opposed for a long time and, although it was discussed under the auspices of the Constitutional Convention, it is not likely to be realised in the future.[7]

LOCAL GOVERNMENT AND THE ALLOCATION OF POWERS

Articles 115-120 B-VG mainly determine the organisation of municipalities, their bodies, functions and the relations between them and the federation or the *Länder* respectively. Article 115 paragraph 2 B-VG generally entitles (and obliges) *Länder* legislation to set up more detailed rules pertaining to municipalities, save where competence on the part of the federation is expressly stipulated.[8] Although the *Länder* – and not the ordinary federal legislature – are thus regularly competent to adopt legislation on local government, their legislation is bound to the extensive set of rules pertaining to municipalities that are established by the Federal Constitution itself.

Apart from the B-VG, another federal constitutional act is of particular importance in this context: under the Fiscal Constitutional Act municipalities are, if only in principle, allowed to raise taxes and to receive revenues. A more detailed determination is made by the Fiscal Adjustment Act, which is usually re-enacted every four years in order to adapt it to the current financial situation. Moreover, two constitutional concordats, both of which seek to coordinate their fiscal relations, were concluded between the federation, the *Länder* and, on behalf of the municipalities, the Austrian Association of Towns and the Austrian Association of Municipalities.[9]

At the *Länder* level, both the *Länder* constitutions and ordinary *Länder*

legislation deal with local government in adherence to the federal constitutional rules. Adherence means that the federal constitutional rules are repeated or implemented in a more or less detailed manner. With regard to the *Länder* constitutions, however, the Federal Constitution allows some sub-constitutional space that is called the 'constitutional autonomy' of the *Länder*.[10] According to this principle, the *Länder* are allowed to legislate freely – also with respect to local government – unless this would violate federal constitutional law. This clause severely restricts the *Länder*'s autonomous space, since the Federal Constitution not only provides a wide range of explicit rules that must be adhered to, but also several implicit principles that are somewhat unpredictably applied by the Constitutional Court. Within this framework, *Land* constitutional legislation usually determines the rearrangement of the local territory, the electoral process at the local level, local taxes, the representation of local interests in the *Land* law-making procedure and the municipalities' right to initiate legislation, plebiscites and opinion polls.

The *Länder* have also adopted a number of ordinary laws in order to implement the rules set up by the Federal Constitution and by their own constitutions respectively. Examples include local government acts, town statutes, inter-municipal associations acts, local election acts and local civil servants acts.

FUNCTIONS OF LOCAL GOVERNMENT

INTRODUCTION

According to the Federal Constitution, municipalities are not merely administrative units but also autonomous bodies with the right to self-administration.[11] Self-administration means that public tasks are performed by legal bodies under public law that are different from state entities, such as the federation and the *Länder*. It is a characteristic of self-administrative bodies to have their own (autonomous) functions as well as a delegated sphere of functions. If they perform tasks within their own sphere of functions, they cannot be bound to instructions of federal or *Länder* authorities, though they are subject to their supervision. Only if they perform tasks within their delegated sphere of functions are they bound to instructions given by federal or *Länder* authorities. It should be noted, however, that even within their autonomous sphere of functions municipalities do not have original competencies of their own since it is inherent in every federal system that competencies are shared only between the federation and the *Länder*. The

administrative tasks which are performed by municipalities – whether falling within their autonomous or delegated sphere of functions – in any case belong to either a federal or a *Länder* competence which have to be conferred to them expressly by the relevant federal or *Länder* laws.

AUTONOMOUS FUNCTIONS

Local self-administration is the only kind of self-administration which is explicitly embodied in the Federal Constitution: the abstract definition of their autonomous sphere of functions, given in article 118 paragraph 2 B-VG,[12] finds its rationale in the principle of subsidiarity.[13] In accordance with this principle the autonomous sphere of local functions comprises those tasks which are exclusively or preponderantly the concern of the municipality and suited to performance by the local community within its local boundaries.

In addition to – or rather, a concretisation of – this general clause, the autonomous sphere comprises the matters that are mentioned in article 116 paragraph 2 B-VG, namely the municipalities' capacity to act as private economic entities. Furthermore, article 118 paragraph 3 B-VG enlists particular matters which belong to the municipalities' autonomous sphere, such as the settlement of the internal arrangements for the performance of local functions, the appointment of local authorities and local civil servants, local security, local events control, local traffic police, (local) crops protection police, local market police, local building police, local fire control, local environmental planning, local public decency, and local sanitary police.

This list is not exhaustive but concretises the most important fields of those comprised by the general clause *in abstracto*. The municipalities, however, need not perform these tasks directly on the basis of article 118 B-VG. Instead, the federal and *Länder* laws that, according to the allocation of powers regulate the administrative fields falling into the municipalities' autonomous sphere, have to authorise them explicitly. If these laws omit doing so, they are unconstitutional (though they remain in force until the Constitutional Court repeals them).

An exception to the general rule that autonomous functions must not be performed without a specific enabling clause in either a *Land* or federal law is the so-called 'local police ordinance' (*ortspolizeiliche Verordnung*). According to article 118 paragraph 6 B-VG, the municipality is entitled in matters pertaining to the autonomous sphere of local functions to issue local police ordinances on its own initiative for preventing nuisances interfering with local communal life, as well as

to declare non-compliance with them an administrative contravention. Such ordinances, however, even though they may be issued directly on the basis of article 118 paragraph 6 B-VG, must not contravene federal or *Länder* legislation.[14]

Although municipalities within their autonomous sphere cannot be bound to instructions of federal or *Länder* authorities, they are supervised by the district administrative agencies in the first instance, and in the last instance by the *Land* government on behalf of the *Länder*, and by the *Land* governor on behalf of the federation.

According to article 119a paragraph 1 B-VG, however, supervision applies only to the aspect of lawfulness: namely as to whether local authorities do not infringe laws and ordinances, in particular if they do not exceed their sphere of functions and if they perform their legal duties. In addition to this instrument of legal control, the *Länder* – but not the federation – are entitled to audit the financial handling of a municipality with respect to its thrift, efficiency and expediency. Within three months after the result of the audit has been conveyed to the mayor for submission to the local council, the mayor has to inform the supervisory authority of the measures taken by reason of the result of the audit.[15]

Moreover, the supervisory authority is entitled to inform itself about every kind of local business.[16] Municipalities are bound to impart the information demanded in individual cases by the supervisory authority and to allow examinations to be conducted on the spot. Insofar as the competent legislature contemplates the dissolution of the local council as a supervisory expedient, this measure rests with the respective *Land* government in exercise of the *Land*'s right of supervision, and with the *Land* governor in exercise of the federation's right of supervision. The admissibility of effecting a substitution shall be confined to cases of absolute necessity. Supervisory expedients shall be applied with greatest possible consideration for third parties' acquired rights.[17]

Whoever alleges infringement of his/her rights through the decree of a local authority in matters pertaining to its autonomous sphere of functions must exhaust all channels of (ordinary) appeal before, within two weeks after issue of the decree, lodging an (extraordinary) appeal against it to the supervisory authority.[18] The latter shall rescind the decree if the rights of the intervener have been infringed by it, and must then refer the matter back to the municipality for a new decision. The municipality, however, has the status of a party to the supervisory proceedings and may lodge another (extraordinary) appeal against the decree of the supervisory authorities, to either the Administrative Court or the Constitutional Court.[19]

If municipalities have issued ordinances in their autonomous sphere of functions they shall without delay advise the supervisory authority accordingly.[20] The supervisory authority shall, after a hearing of the municipality, rescind ordinances which are contrary to law and simultaneously advise the municipality of the reasons.

Individual measures to be taken by a municipality in its own sphere of competence, but which especially affect supra-local interests, particularly those that have a distinct financial bearing, can be tied by the competent (federal or *Länder*) legislature to a sanction on the part of the supervisory authority. Only a state of affairs which unequivocally justifies the preference of supra-local interests may come into consideration as a reason for withholding the sanction.[21]

On application by a municipality, the performance of certain specified matters in its autonomous sphere can be assigned by ordinance of the *Land* government or by ordinance of the *Land* governor to a *Land* authority. Insofar as such an ordinance is meant to assign competence to a federal authority, it requires the approval of the federal government.[22]

DELEGATED FUNCTIONS

According to article 119 paragraph 1 B-VG, the delegated sphere of local functions comprises those tasks which municipalities have to perform in adherence to federal and *Länder* laws that are subject to instructions given by federal or *Länder* authorities. It depends entirely on the competent legislature to decide whether an administrative task is delegated to the municipalities. In contrast to the tasks assigned to the municipalities' autonomous sphere, the Federal Constitution neither enumerates the tasks falling into the delegated sphere nor enshrines them by a general clause. With regard to delegated functions, municipalities do not have the right to self-administration (autonomy), but serve as mere administrative units.

Pursuant to article 119 paragraph 2 B-VG, the mayor is competent to perform delegated tasks. From a functional perspective, s/he is either a federal or a *Länder* authority, depending on whether s/he carries out a federal or a *Länder* (delegated) task. Whereas functions pertaining to the autonomous sphere may be exercised more freely, the mayor is bound to instructions given by superior federal or *Länder* authorities when exercising delegated functions. S/he may only refuse compliance if the instruction was given by an authority not

competent in the matter or if compliance would infringe the criminal code.[23] The mayor can transfer individual categories of matters pertaining to the assigned sphere of functions to members of the local board, or to certain other local authorities for performance in his/her name if the matters are factually connected to matters pertaining to the municipality's autonomous sphere of competence. In these matters the authorities concerned (or their members) are bound by the instructions of the mayor.

ORGANISATION OF LOCAL GOVERNMENT

INTRODUCTION

Under article 117 B-VG the authorities of each municipality shall at least include the local council (*Gemeinderat*), being a representative body elected by those entitled to vote in the municipality, the local board (*Gemeindevorstand*), also known as the city council (*Stadtrat*) or as the city senate (*Stadtsenat*) in towns with their own statute, and the mayor (*Bürgermeister*).

The Federal Constitution establishes that both the local council and the local board are collegiate bodies, whereas the mayor is a monocratic organ. *Länder* legislation is entitled to enlarge this 'minimum institutional standard' by establishing other local authorities[24] or by authorising municipalities to do so.

Länder legislation is moreover competent to provide more detailed rules with regard to the specific functions of local authorities; accordingly, the local government acts and town statutes contain such provisions. They may also expressly authorise municipalities to issue an ordinance if competencies need to be transferred to an authority other than that originally provided by law.

LOCAL COUNCIL

As the details of the organisation and competencies of local authorities depend on the respective local government act or town statute of a *Land*, these rules may differ from *Land* to *Land*. Generally, the local council and the mayor are the organs which are most important in practice. The local council is a general representative body, which, as the Federal Constitution stipulates, is elected by all local citizens entitled to vote. A simple majority of members present in sufficient numbers to form a quorum is usually requisite to a vote by the local council.[25] Article 117 paragraph 2 B-VG establishes the principles applying to the election procedure, which resemble the principles applying to elections to

the National Council (which is the lower house of the federal parliament) and to the *Länder* parliaments.[26]

Still, the local council is not a parliament since it has no legislative powers and merely represents the citizens of a sub-state entity. It is, however, competent to deliberate and decide a wide range of issues pertaining to the autonomous sphere, including budgetary questions. Article 118 paragraph 5 B-VG stipulates that the mayor, the members of the local board and, if appointed, other local officials are responsible to the local council for the performance of their functions relating to the municipality's autonomous sphere. The local council thus serves as the supreme local body regarding those functions that are exercised in the autonomous sphere. Although this is not expressly stipulated by the Federal Constitution, the local government acts of the *Länder* regularly vest the local council with residual competence, authorising it to perform all tasks which no other body is explicitly competent to perform.

MAYOR

The mayor regularly has the power to represent the municipality externally – in particular with regard to private law matters. If s/he performs administrative tasks pertaining to the municipality's autonomous sphere, s/he is responsible to the local council.[27] Tasks pertaining to the delegated sphere of municipalities generally have to be performed by the mayor[28] who is entitled, however, to transfer – without detracting from responsibilities – individual categories of matters pertaining to the delegated sphere of local functions to other local authorities on account of their factual connection with matters pertaining to the municipality's autonomous sphere of functions.

In these matters, the authorities concerned are bound by the instructions of the mayor. As a rule, the mayor is the president both of the local council and of the local board. Moreover, s/he is the head of the local office and local civil servants and also manages the local property and budget.

Formerly, the Federal Constitution did not explicitly allow for a direct election of the mayor. *Land* legislation that had provided such a system was declared to be unconstitutional by the Constitutional Court in 1993.[29] In order to enable the *Länder* to decide for a direct election system, the Federal Constitution was amended in 1996.[30] Article 117 paragraph 6 B-VG now stipulates that the mayor is elected by the local council, unless a *Land* constitution provides that s/he is to be elected by those entitled to elect the local

council (i.e. the local citizens that are entitled to vote according to article 117 paragraph 2 B-VG). This explicit provision enlarges the constitutional autonomy of the *Länder*, as it is now left to their constitutional law to stipulate whether the mayor is elected by the local council or directly by the local citizens. So far, six (out of nine) *Länder* have adopted legislation that provides for the direct election of the mayor, though sometimes excluding towns with a statute of their own. This example demonstrates how the Constitutional Court, often in quite an unforeseeable manner, may apply implicit constitutional principles in a manner that considerably restricts the constitutional autonomy of the *Länder*, thus requiring an explicit constitutional amendment to enlarge their constitutional space.

OTHER LOCAL AUTHORITIES

The electoral parties represented in the local council have a claim to representation on the local board in accordance with their strength. The Federal Constitution does not itself determine which tasks the local board is responsible for, but mentions its members among those that are responsible to the local council when performing autonomous tasks.[31] According to article 119 paragraph 3 B-VG, the mayor may also confer tasks belonging to the delegated sphere to members of the local board who, in this case, are bound to his/her instructions and are responsible for any illegality.

Article 117 paragraph 7 B-VG stipulates that the local office (or administration) has to perform 'local business'. This provision, however, is not to be understood as if it would itself confer the powers of an authority upon the local office. Neither does it prohibit *Länder* legislation to vest the local office with such a position. Basically, the local office is meant to assist local authorities in performing 'local business', which in principle means all local tasks, whether pertaining to public administration, private law, or to the autonomous or delegated sphere of local functions.

In contrast to other municipalities, Vienna is divided into districts, the inhabitants of which are represented in sub-municipal district assemblies. Lately, the Constitutional Court repealed a provision of the Local Elections Act enacted by the Viennese *Land* parliament which entitled non-Austrian (and non-European Union [EU]) citizens to vote in the elections to the district assemblies if they had had their permanent residence in Vienna for at least five years.[32] The Constitutional Court held that the district assemblies were general

representative bodies (such as the National Council, the *Länder* parliaments or the local councils), and that the elections to all general representative bodies had to follow certain constitutional principles, such as electoral homogeneity. According to the Constitutional Court, the elections to general representative bodies relate to article 1 B-VG ('Austria is a democratic republic. Its law emanates from its people'), which embodies the fundamental principle of representative democracy so that the 'Austrian people' may be understood as the sum of all federal citizens. However, the 'federal people', which indeed is the sum of all federal citizens, is not equivalent to the 'Austrian people' mentioned in article 1 B-VG. This article rather seeks to constitute the inseparable spiritual unity of the federal people and the peoples of the *Länder*.

Since Austrian citizenship is explicitly demanded by the Federal Constitution only with regard to elections to the National Council, to the *Länder* parliaments and the local councils, it is at least doubtful whether this parameter also applies to elections to the district assemblies. Such a strong idea of homogeneity would again restrict the constitutional autonomy of the competent *Land* parliament, which essentially belongs to the principle of federalism.

In accordance with the modern, non-etatistic doctrine, even, all persons living within the borders of the Austrian territory must be considered to belong to the Austrian people since they are all bearers of human rights and human dignity and therefore recognised by law. If the Constitutional Court had taken heed of this new approach – that is also presupposed by the United Nations covenants on human rights and that combines human rights and democracy – this would likely have led to a different decision.

CITIZENS' PARTICIPATION

Within a multi-tier state, the local level is surely the most amenable to citizen participation since it is much easier to organise citizens' initiatives and to confront familiar politicians with their issues of interest. It is also notable that the strengthening of direct democracy at the local level has increasingly become a political demand that has been partly embodied in law, including even federal constitutional law.

Although article 117 B-VG stipulates a minimum institutional standard in the form of certain local authorities, it has been shown that at least part of these bodies is elected directly by local citizens. Moreover, article 117 paragraph 8 B-VG determines that *Länder* legislation can, in matters pertaining to the

municipalities' autonomous sphere of functions, provide for the direct participation and assistance of those entitled to vote in the local council elections.

In contrast to the direct election of the mayors, provisions relating to citizens' participation do not need to be embodied in the *Länder* constitutions, but an ordinary *Land* law is sufficient. Accordingly, the local government acts of the *Länder* include provisions regarding local plebiscites, citizens' meetings and participation in select committees of the local council.

ECONOMIC AND FISCAL RELATIONS

ECONOMIC ACTIVITIES OF LOCAL GOVERNMENT

Each municipality is an independent economic entity. Pursuant to article 116 paragraph 2 B-VG, each municipality is entitled, within the limits of the ordinary laws of the federation and the *Länder*, to possess assets of all kinds, to acquire and to dispose of such at will, to operate economic enterprises as well as to manage its budget independently within the framework of the Fiscal Constitutional Act and to levy taxes. In addition to article 17 B-VG – according to which both the federation and the *Länder* are allowed to act under private law without any restrictions arising from the allocation of competencies[33] – the municipalities are also given the right to deal under private law.

The tasks enumerated by article 116 paragraph 2 B-VG form the basis of what is called the 'freedom of economic activities' of municipalities.[34] Article 118 paragraph 2 B-VG expressly stipulates that these issues belong to the autonomous sphere of municipalities. It has, however, been difficult to construe the clause 'within the limits of the ordinary laws of the Federation and the *Länder*'.

Is a municipality legally bound to the same extent as any other private person (i.e. merely by federal or *Länder* laws in general) or can it be obliged specifically to engage in business, particularly with regard to public services? According to the ruling doctrine, the freedom of economic activities is at least subject to several federal constitutional bounds, such as the principle of thrift, efficiency and expediency, and the criteria of the autonomous sphere of functions and fundamental rights. Ordinary federal or *Länder* laws are allowed by law if they concretise these constitutional bounds.

FISCAL APPROACH TOWARDS A THREE-LAYERED SYSTEM OF FEDERALISM

As previously mentioned, the financial status of local government is also

established by federal constitutional law. The B-VG does not itself regulate fiscal relations but explicitly refers to the Fiscal Constitutional Act, *Finanz-Verfassungsgesetz (*F-VG)[35] which is a constitutional law of its own. Pursuant to section 2 F-VG, municipalities have to cover the expenses which accrue from the performance of their tasks, whether they belong to their autonomous or delegated sphere of functions, unless federal or *Länder* laws stipulate otherwise (which is quite usual).[36] Such laws, however, must not contravene section 4 F-VG, which embodies the principle of fiscal equality and which obliges federal or *Länder* laws to heed the limits of efficiency of each territorial entity and the distribution of public tasks between them.

Pursuant to section 6 F-VG, municipalities are entitled either to levy exclusive local taxes or to share taxes with the federation and/or the *Länder* according to various distribution keys. Moreover, section 7 F-VG grants the federal legislature competence to regulate shared federal taxes, to declare specific taxes to be exclusive local taxes and to authorise municipalities to levy certain taxes on account of resolutions issued by the local council.

Länder legislation is mainly competent to determine shared *Länder* taxes and exclusive local taxes (in general), but not without considering the financial viability of municipalities.[37] It may also authorise municipalities to levy certain taxes on account of resolutions issued by the local council and even oblige them to levy certain taxes if the budgetary position of municipalities requires it.

The F-VG also provides that financial allocations may be granted to municipalities both by the federation and the *Länder*, either in the form of rate support grants or allotments in accordance with specified requirements.[38] Under certain conditions, the municipalities may be endowed with subsidies earmarked for specific purposes.[39] However, under section 3 F-VG the *Länder* are entitled to apportion their needs to a certain extent, as far as they are not covered by other revenues, to municipalities or municipal associations.

According to section 3 F-VG, the ordinary federal legislature is entitled to adopt ordinary legislation on tax equalisation. The Fiscal Adjustment Act, *Finanzausgleichsgesetz* (FAG)[40] is usually re-enacted every four years following negotiations between the federation, the *Länder* and, on behalf of the municipalities, the Austrian Association of Towns and the Austrian Association of Municipalities. However, the federation clearly dominates, forcing the other parties to agree to a draft Fiscal Adjustment Act, although this may be detrimental to their interests ('tax equalisation pact'). The Constitutional Court, when reviewing a Fiscal Adjustment Act, will presume that the act treats all

parties fairly and equally, if a tax equalisation pact had been concluded on a political basis before the act became a law.[41]

The *Länder* have made use of the limited financial space granted to them by the F-VG. They adopted their own *Länder* tax acts and other more specific acts that include provisions with regard to exclusive local taxes and taxes shared between the respective *Land* and its municipalities. Under the *Länder* apportionment acts, municipalities are obliged to assign to the *Länder* part of their revenues in order to cover financial needs of the *Länder*.

Mention has already been made of two constitutional concordats that were concluded in accordance with article 15a B-VG and that relate to the fiscal relations between the concluding parties (federation, *Länder*, and, in this exceptional case, the municipalities as represented by the Austrian Association of Towns and the Austrian Association of Municipalities).[42]

The first establishes a consultation mechanism according to which consultation must take place if one of the parties intends to adopt legislation (except, for example, on matters of tax equalisation) that would impose financial obligations on the others. If, however, the consultation committee – consisting of the representatives of all three bodies – does not reach an agreement, the party that intends the respective piece of legislation will be responsible for financing its own legislation.[43] The other concordat establishes the Austrian Stability Pact, which obliges the concluding parties to restrict their expenditure in order to meet the rigorous EU convergence criteria. Whereas the *Länder* are obliged to show an annual surplus and whereas the federation must not exceed a certain deficit, the municipalities have to achieve a budget that is at least balanced.[44]

These two recent concordats as well as the tradition of negotiating the tax equalisation pact, follow the idea of a three-layered type of federalism[45] that not only includes the federation and the *Länder*, but also local government. In general, such a concept seems to be incompatible with the classic concept of federalism,[46] but, if limited to the arena of fiscal federalism, may prove to be a pragmatic and politically efficient instrument that to some degree balances the federation's dominance also with regard to fiscal relations.

CONCLUSION

Austria clearly belongs to the category of federal systems where local government is most extensively regulated by the Federal Constitution. The

more rigorous the federal constitutional regime, however, the less space remains for the *Länder* and their legislation.

Although the competence to regulate local government is mainly assigned to the *Länder* and not to the federal legislature, their legislation is restricted by a wide range of federal constitutional rules that determine the organisation, functions and fiscal relations of the municipalities. In some cases, even, the Constitutional Court recognises implicit federal constitutional rules, deriving them from the leading principles of federal constitutional law and applying them to *Länder* legislation on local government. Quite paradoxically, this may even lead to constitutional amendments under the aegis of which the *Länder* are explicitly authorised to choose their own system, whereas the taciturnity of the Federal Constitution – instead of enlarging their constitutional autonomy – is rather seen as a token of the applicability of general constitutional principles that suppress any individual *Land* legislation. These principles, even though they do not at all expressly relate to local government or even the *Länder*, are thereby construed as an overall set of homogeneity rules.

The consequence of this kind of constitutional recognition is therefore that the *Länder* are formally competent to regulate local government more or less unrivalled by the (ordinary) federal legislature. Since the Federal Constitution itself assumes responsibility to establish an extensive legal basis of local government (which is even more extended by the jurisdiction of the Constitutional Court), the *Länder* competence does not remain unaffected. However, as the Constitutional Convention[47] has recently failed to find a compromise regarding the future relationship between the federation and the *Länder*, it is not likely that the latter will gain full power to legislate on issues relating to local government without rigorous constitutional restraints.

ENDNOTES

1 The Austrian legalistic, civil law system has a hierarchic structure with the Federal Constitution as its supreme law. It not only consists of the main document, i.e. the Federal Constitutional Act, but also of a large number of additional federal constitutional acts, single federal constitutional provisions within ordinary federal laws and several laws dating back to the former Austro-Hungarian monarchy (until 1918), which, as well as certain state treaties, were given the status of federal constitutional law.

2 P Pernthaler, *Österreichisches Bundesstaatsrecht*, Verlag Österreich, Vienna, 2004, p 300.

3 A general overview is given by P Oberndorfer, *Gemeinderecht und Gemeinde-*

wirklichkeit, Institut für Kommunalwissenschaft, Linz, 1971; K Gallent, *Gemeinde und Verfassung*, Leykam, Graz, 1978; H Neuhofer, Gemeinden, in H Dachs et al (eds), *Handbuch des politischen Systems Österreichs*, 3rd ed, Manz, Vienna, 1997; H Neuhofer, *Gemeinderecht*, Springer, Vienna, New York, 1998; and L Fröhler & P Oberndorfer, *Das österreichische Gemeinderecht*, Jugend & Volk, loose-leaf edition, Vienna.

4 Arts 108-112 B-VG.

5 P Pernthaler, *Der differenzierte Bundesstaat*, Braumüller, Vienna, 1992.

6 J Demmelbauer & W Pesendorfer, *Demokratisierung der Bezirksverwaltung* 2nd ed, Trauner, Linz, 1980; Neuhofer, *Gemeinderecht*, op cit, p 577 ff.

7 The Austrian Constitutional Convention, consisting of 70 functionaries and experts and headed by the President of the Court of Auditors, resumed its work in June 2003. It ought to have prepared a draft constitution by the end of December 2004, but failed ultimately.

8 See art 116a para 2, art 118 para 7 & art 119a para 3 B-VG.

9 See below 'Fiscal approach towards a three-layered system of federalism'.

10 F Koja, *Das Verfassungsrecht der österreichischen Bundesländer*, 2nd ed, Springer, Vienna, New York, 1988; R Novak, Art 99 B-VG, in K Korinek & M Holoubek (eds), *Österreichisches Bundesverfassungsrecht*, Springer, Vienna, New York, 1999; W Pesendorfer, Art 99 B-VG, in HP Rill & H Schäffer (eds), *Bundesverfassungsrecht*, Verlag Österreich, Vienna, 2002; Pernthaler, *Österreichisches Bundesstaatsrecht*, op cit, p 459 ff.

11 Pernthaler, ibid, p 213 ff.

12 See especially K Weber, Art 118 para 1-7, in Korinek & Holoubek (eds), op cit; and H Stolzlechner, Art 118, in HP Rill & H Schäffer (eds), *Bundesverfassungsrecht*, Verlag Österreich, Vienna, 2004.

13 Pernthaler, *Österreichisches Bundesstaatsrecht*, op cit, p 216 ff.

14 See C Ranacher, Das ortspolizeiliche Verordnungsrecht im Spiegel der Rechtsprechung, 2004 *Rechts- und Finanzierungspraxis der Gemeinden*, p 161.

15 Art 119a B-VG.

16 Art 119a para 4 B-VG.

17 Art 119a para 7 B-VG.

18 Art 119a para 5 B-VG.

19 Art 119a para 9 B-VG.

20 Art 119a para 6 B-VG.

21 Art 119a para 8 B-VG.

22 Art 118 para 7 B-VG.

23 Art 20 para 1 B-VG.

24 Such as the local office (*Gemeindeamt*, *Stadtmagistrat*), the chief magistrate (*Ortsvorsteher*), specific commissions, etc.

25 Art 117 para 3 B-VG.

26 Elections to the local council take place on the basis of proportional representation by equal, direct, secret and personal suffrage of all Austrian nationals who have their principal domicile in the municipality. *Land* laws can, however, stipulate that nationals who have a domicile, but not their principal domicile, in the municipality are also entitled to vote. In the electoral regulations the conditions for suffrage and electoral

eligibility may not be more restrictive than in the electoral regulations for the *Land* parliament. The provision can, however, be made that individuals who have not yet been a year resident in the municipality shall not be entitled to vote or to stand for election to the municipal council if their residence in the municipality is manifestly temporary. Among the conditions to be laid down by the *Länder* is the entitlement to suffrage and electoral eligibility also for nationals of other EU member states.

27 Art 118 para 5 B-VG.

28 Art 119 para 2 B-VG.

29 VfSlg 13.500/1993.

30 BGBl 1996/659. See also R Novak, *Bürgermeister-Direktwahl*, Leykam, Graz, 1995.

31 Art 118 para 5 B-VG.

32 30 June 2004, G 218/03-16.

33 See generally K Korinek & M Holoubek, *Grundlagen staatlicher Privatwirtschaftsverwaltung*, Leykam, Graz, 1993.

34 See K Weber, Art 116 B-VG, in K Korinek & M Holoubek (eds), *Österreichisches Bundesverfassungsrecht*, Springer, Vienna & New York, 1999.

35 BGBl 1948/45 as amended by BGBl I 2003/100. See e.g. HG Ruppe, F-VG, in K Korinek & M Holoubek (eds), *Österreichisches Bundesverfassungsrecht*, Springer, Vienna, New York, 2000; P Pernthaler, *Österreichische Finanzverfassung*, Braumüller, Vienna, 1984; Pernthaler, *Österreichisches Bundesstaatsrecht*, op cit, p 391 ff.

36 See also S Buchsteiner, *Die Verpflichtung der Gebietskörperschaften zur Tragung ihres Aufwandes*, Braumüller, Vienna, 1998. The 'consultation mechanism' (see below) seeks to protect the municipalities from financial obligations imposed on them by federal or *Länder* laws.

37 S 8 para 2 F-VG.

38 S 12 para 1 F-VG.

39 S 12 para 2 F-VG.

40 BGBl I 2004/156.

41 Pernthaler, *Österreichische Finanzverfassung*, op cit, p 416.

42 A particular Federal Constitutional Act had to be passed in order to empower the Austrian Association of Towns and the Austrian Association of Municipalities to conclude the concordat (BGBl I 1998/61): K Weber, BVG Gemeindebund, in Korinek & Holoubek (eds), *Österreichisches Bundesverfassungsrecht*, op cit, p 4.

43 P Bußjäger, Rechtsfragen zum Konsultationsmechanismus, 2000 *Österreichische Juristen-Zeitung*, p 581; and H Schäffer, Konsultationsmechanismus und innerstaatlicher Stabilitätspakt, 56 (2001) *Zeitschrift für öffentliches Recht*, p 145.

44 A Gamper, Der Stabilitätspakt 2001 im Spannungsfeld von Budgetkonsolidierung und Finanzausgleichsgerechtigkeit, 2002 *Journal für Rechtspolitik*, p 240.

45 Pernthaler, *Österreichische Finanzverfassung*, op cit, p 229 ff.

46 Ibid, p 397 ff.

47 P Bußjäger, Der Österreich-Konvent als Chance oder Inszenierung? – der Bundesstaat Österreich vor einem neuen Anlauf der Verfassungsreform, in Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed), *Jahrbuch des Föderalismus 2004*, Nomos, Baden-Baden, 2004, p 248.

Local government and city states in Germany

JUTTA KRAMER

INTRODUCTION

German local government is characterised by diversity, especially in its unique city states. The Federal Republic of Germany consisted of 11 *Länder* (excluding Berlin, a city state under allied control) when founded. Since reunification in 1990, Germany now comprises 16 *Länder*, including the three city states of Hamburg, Bremen and Berlin. Germany's population of 82 million is spread over an area of 357,000 km^2. The population density of *Länder* ranges from 3,800 inhabitants per km^2 in Berlin to a mere 88 in the *Land* Brandenburg. *Länder* sizes also differ considerably: the smallest *Land*, Bremen (consisting of the two cities – Bremen and Bremerhaven) has 680,000 inhabitants while the largest, North Rhine-Westphalia, has more than 17.9 million. Most of the population is urban. Following a slow process of consolidation in *Länder* from 1995 to 2004, the number of districts has decreased from 426 to 323 and the number of municipalities has decreased from 16,127 to 12,477. The average number of people per local government is just 6,572. A large percentage of municipalities are quite small – 37% have less than 1,000 inhabitants.

THE *LÄNDER*

Regarding the assignment of *Land* tasks, the Basic Law merely distinguishes

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between two orders: the federation and the *Länder*. This means that all the *Länder* must fulfill the same tasks regardless of their size, number of inhabitants, and economic or financial strength. They also have equal rights in dealing with the federation. Germany therefore has symmetric federalism, if one disregards the different weighting of votes in the Federal Council (*Bundesrat*).

Germany has traditionally favoured the legal equality of all the *Länder*. The German constitutions of 1871 and 1919 established a symmetric federal state, even though two-thirds of the territory of the Reich at that time consisted of one *Land*, Prussia. The costs of this symmetric federalism are obvious: the great economic and social differences between the *Länder* are compensated by means of an extensive system of equalisation payments.

MUNICIPALITIES (*KOMMUNEN*)

Germany's Constitution, the Basic Law of 1949, continues the traditional recognition of the role of local government in the federal system.[1] The Basic Law requires that districts and municipalities be democratically governed and entrenches the right to local self-governance as follows:

> The Municipality shall be guaranteed the right to manage all the affairs of the local community on their own responsibility within the limits set by law. … The right to self-government shall include responsibility for financial matters. The local governments have the power to levy trade taxes according to the rates for assessment determined by them.[2]

This guarantee also extends to financial autonomy, including the right of municipalities to a source of tax revenue based on their economic ability.

Given the general guarantee in the Basic Law of local self-government, the protection of local government in the *Länder* constitutions may only add, and not subtract, from this guarantee. In only a few *Länder* have local government powers been further articulated. The Bavarian Constitution, for example, contains a list of 16 competencies.

Politically, local government is the level closest to the people. It is therefore important to include local government in the political system in order to mobilise people to participate in the issues closest to their daily lives and to democracy as such. However, municipalities are not incorporated as a third order in Germany's governmental system.[3] They are rather a part of *Land*

administration. There is therefore no representation of the inhabitants of a municipality in a parliamentarian system of democratic representation, but rather representation within an administrative structure of self-organisation.

There is also no direct legal relationship between the federation and the municipalities. Supervision of the municipalities is exclusively the task of the *Land* authorities. In reality, however, the municipalities are strongly influenced by federal policies. For example, municipalities must fund all social aid from their own budgets. Although the relevant laws always require the consent of the *Bundesrat*, the *Land* governments represented there often ease their financial burdens at the expense of the municipalities. The financing gaps thus arising for the municipalities are not always completely compensated by the redistribution of funds to them within the *Land*. This explains the constant complaint by municipal officials about a structural financial crisis.

The municipalities' right to self-government includes cultural matters (e.g. museums, theatres, sports facilities and schools) and public services (e.g. the provision of water and power, waste disposal, abattoirs, cemeteries and hospitals), as well as the maintenance of public roads and streets within a municipality. Municipalities are independent in this regard *vis-à-vis* planning and personnel. They have their own independent administration which is not subject to the specialist supervision of the *Land* administration, but only to its legal supervision.

In addition, municipalities carry out delegated tasks for the federation and the *Länder*. To fulfill these duties, municipalities have a right to adequate funds (so-called principle of connection). Examples of this are the administration of traffic (e.g. driver's licenses and vehicle registration) and matters concerning registration of the population and aliens, food inspection, job safety and health control. Within this framework, in addition to legal supervision, municipalities are also subject to supervision by the *Land* authorities, which have a right to examine the effectiveness of each individual measure. If the municipalities do not observe the instructions of the supervising bodies of the *Land*, the supervising bodies can take over the task themselves (substitution measure). In the most extreme case, the supervising bodies can also replace the head of the municipal administration by a *Land* commissioner.[4]

The federation itself has no supervisory rights with regard to municipalities. However, if a *Land* does not fulfill its supervisory duties regarding its municipalities, or does not fulfill them satisfactorily, the federation can take steps to compel the *Land* to comply with its duties.[5] If, in the case of an internal

emergency, the *Land* is in fact willing to combat the disturbance of internal order but is not able to do so with its own forces, it can request other *Länder* to provide help or call upon the Federal Border Police.[6] This provision has, however, never been applied in the history of the Federal Republic and it is hard to imagine that this situation would occur in the future.

The Basic Law does not contain special regulations concerning the self-government of national minorities or original inhabitants. Some *Land* constitutions (e.g. Schleswig-Holstein, Lower Saxony and Saxony) merely include regulations that compel the *Land* and its municipalities to protect the language and culture of ethnic minorities (e.g. Frisians, Wends or Sorbs).

While the *Länder* governments can introduce their own legislative initiatives in the federal arena via the *Bundesrat*, the municipalities cannot participate formally in the legislative procedure of the federation; at best, they appear as lobbying groups (e.g. the German Conference of Municipal Authorities).

INSTITUTIONAL ARRANGEMENTS

The institutions of local government are districts (*Kreise*) and municipalities (*Gemeinden*). Districts consist of a number of municipalities with the function of providing services more effectively through the pooling of resources and expertise. Districts also coordinate functions that, due to the nature of the function, a municipality cannot perform adequately on its own. Such services include water services and social welfare. Districts also play a supervisory role over constituent municipalities on behalf of *Länder*. Districts are directly elected and their powers are derived from *Land* legislation and delegations from the *Land* and municipalities. In practice most of their powers are delegated from the *Länder*. Districts are seen as usurping municipal functions due to financial necessity.

Some large cities have the same status as districts and are referred to as district-free cities (*kreisfreie Städte*). Cities with populations over 100,000 become a city-district (*Stadtkreis*).

The German Basic Law also guarantees the right to local self-government of associations of municipalities. Unlike the *Kreise* that are area specific, the associations are function-specific, usually related to planning or service delivery. They are public entities entrusted by the participating municipalities with certain powers. Participating municipalities may delegate a specific function – such as schooling, education, fire services or waste disposal – to an association.[7]

By agreement, associations render services such as electricity, roads, transport or hospitals. There are a wide variety of associations, depending on their purpose. Membership does vary and one municipality could belong to more than one association.

POWERS AND FUNCTIONS

Local government is in principle responsible for, and to administer within its own discretion, all affairs within its territory.[8] Local self-government has two dimensions: one administrative (*Selbstverwaltung als Verwaltungsmodus*) and the other functional (*Selbstverwaltungsaufgaben*). The administrative dimension relates to a municipality's management powers (*Organisationshoheit*), power to appoint staff (*Personalhoheit*),[9] power to make by-laws (*Satzungshoheit*), power to administer its own finances (*Finanzhoheit*),[10] and zoning and planning powers (*Planungshoheit*). These powers are not dependent on enabling legislation but stem from the Basic Law.[11] Other powers are conferred by *Land* law.

The range of local government functions guaranteed not only by the Basic Law but also by each *Land* constitution, is divided into compulsory duties and other functions that could be regarded as optional. The compulsory duties (*Pflichtaufgaben*) are those that the local authorities are under a statutory obligation to fulfill. Most important is the construction of public schools and nurseries and social welfare at a local level, which consume most of the budget. This leaves hardly anything to spend on the voluntary functions (*freiwillige Selbstverwaltungsaufgaben*), such as public amenities, public transport, museums, concert halls and adult education. Other duties include the maintenance of a fire service, rescue and disaster protection services, waste disposal, the provision of electricity, gas and water, and organising municipal elections.

In addition, some state matters are transferred from the *Land* to the local authorities for execution and are therefore in principle state duties (*übertragene Aufgaben*, *Pflichtaufgaben zur Erfüllung nach Weisung*). The local authorities, by managing both their own and *Land* affairs, have a dualistic nature: they are at the same time self-administrative bodies with regard to their compulsory duties and optional functions, as well as representatives, without becoming an organ of the *Land* with regard to transferred matters.

Functions that are usually transferred by the *Länder* to the local authorities include: organising a population census, registration of persons liable for military service, organising parliamentary and regional elections, danger

prevention, building inspection, trade supervision, traffic regulation, health and veterinarian matters, nature conservation and environmental protection.

Despite their assured autonomy, most powers of municipalities or districts and the functions they perform are delegated powers. They act as agents for either federal or *Land* governments to implement and manage programmes. The state makes use of official municipal organisations and supervises the implementation of delegated responsibilities by means of instructions, so that these can be carried out uniformly throughout the country. According to the principle of all-responsibility of the municipalities, municipalities are also in charge of all those competencies within their territory that are not explicitly distributed to a *Land* or the federation, which are necessary for organising the daily living conditions of the local people.[12]

FINANCIAL ARRANGEMENTS

Local government is a significant order of government: it is responsible for 22% of total state expenditure, in comparison to 40% by the federal government and 38% by the *Länder*.

Local self-government autonomy includes fiscal autonomy.[13] A municipality has the power to levy trade taxes, although the federal and *Länder* governments are entitled to a portion of this revenue. Both property tax – a significant source of income – and local excise taxes fall under the domain of municipalities.

Apart from the taxes raised itself, a municipality is entitled to a specific share of the revenue from income tax and general sales tax on the basis of the taxes paid by its residents. It is also entitled to an overall percentage of the total revenue from joint taxes (15%) accruing to the *Länder*. In 2000, local government raised nearly a quarter of its revenue. The principal sources were trade tax (73.7%) and property taxes (24.1%). The remaining three-quarters of local government income came from its share of income and general sales tax revenue, as well as its portion of the *Länder*'s share of the joint taxes.

Länder constitutions usually provide for sufficient financial resources to accompany any duties delegated to local authorities. For example, the *Land* Constitution of Lower Saxony provides that:

> *Land* duties may statutorily be delegated to the local authorities and districts by way of a directive provided that proper arrangements are made to cover the expenses for executing such delegated duties.

This principle does not apply to duties which local authorities must execute as part of their self-government duties, and a gap between duties and their financing can occur. An example is the duty of *Landkreise* and *Kreisfreie Städte* for social welfare aid, where the federal government sets the level of benefits but the *Länder* must provide funding.

INTERGOVERNMENTAL RELATIONS

The German local authorities are organised in three structures: a council of cities and towns (*Städtetag*); a league of towns and municipalities (*Städte- und Gemeindebund*); and the council for districts (*Kreistag*). These are voluntary associations without statutory authority. Municipalities are free to join any of these, and in practice most do.

There are on the whole few institutions that structure the relationship of coordination and cooperation between the *Länder* and the municipalities. The Bavarian Constitution, however, did provide for representation of local authorities in its second chamber, the Senate, until its recent abolishment. Out of the 60 members, municipalities elected six representatives in accordance with procedures determined by their own organisations.

The Senate included a wider range of interests groups, including representatives of agriculture and forestry, unions, industry, religious communities and higher education, and thus was not a body representing principally local government interests.

A recent innovation has been the establishment of a dedicated structure, the *Kommunale Rat*, a council of municipalities in the *Land* of Rhineland-Palatinate. Created by a *Land* statute in 1996, the *Kommunale Rat* is an advisory body to the *Land* legislature consisting of 27 members indirectly elected by organised local government. The function of this institution is to provide advice to the *Land* legislature on matters affecting local government, thereby strengthening cooperation between the two levels of government. The council may, by a two-thirds majority vote, make recommendations to the *Land* legislature.

Since the establishment of the European Committee of Regions flowing from the Maastricht Treaty, local government has had representation in the formal structures of the European Union. The three structures of organised local government mentioned above each have a seat in the German delegation to the committee.

THE CITY STATES

The names of the *Länder* are only listed in the preamble of the Basic Law, without any distinction being made between the city states and the other *Länder*. The city states of Hamburg and Berlin are at the same time municipalities divided into dependent boroughs. Here the characteristic of being a *Land* coincides with the self-governing character of being a municipality. The situation in the city state of Bremen is different: it consists of two municipalities, Bremen and Bremerhaven, where the Bremen city parliament acts simultaneously as the *Land* parliament and as the body representing the municipality of Bremen.

In constitutional terms, the symmetric shape of the German federal system ensures the city states are equal to the territorial *Länder*. In practice, however, there are many peculiarities. The city states are not only a *Land* as one level of government within the federal system, but are at the same time local government bodies and therefore share the same tasks and problems as all major cities throughout the republic.

In constitutional terms, the position of the head of state, the first mayor of Hamburg (*Erster Bürgermeister von Hamburg*), the governing mayor of Berlin (*Regierender Bürgermeister von Berlin*), and the president of the Senate of Bremen (*Präsident des Senats von Bremen*), already distinguishes city states – notwithstanding differences among them – from the territorial *Länder*.

With regard to the regulations on local government, moreover, city states are hardly comparable with *Länder*. One common area, however, is that politicians in city states have to be expert in all fields concerning the *Land* as well as all local government issues.

FREE HANSEATIC CITY OF BREMEN (FREIE HANSESTADT BREMEN)

The city state Bremen – with 680,000 inhabitants and covering an area of 404 km^2 –has two distinguishing features. First, it comprises two corporate entities of public law – Bremen and Bremerhaven – which are territorially disconnected by about 80 km from each other.[14] Second, the city state's government has a dual function, as it is both a *Land* and a local government at the same time.

While Bremerhaven has its own city council and mayor, Bremen City has two *Land* representative bodies as government: the Bremen Citizens' Assembly (*Bremische Bürgerschaft*) and the Senate. Bremerhaven and Bremen together form a city association, the Free Hanseatic City of Bremen (*Freie Hansestadt*

Bremen). As far as the *Land* has to perform supervisory functions over municipalities, this can be applied in the case of Bremen only with regard to Bremerhaven. It is therefore constructed mainly as legal supervision.[15] Bremerhaven even has its own Constitution and governs with laws rather than by-laws.

Although the affairs of Bremen City and Bremen *Land* are dealt with by the same bodies, in legal terms they are kept strictly separate; that is, legislation and budget plans are separate, as is the administration at the lowest level. A senator has a dual function by being a *Land* executive as well as an officer of local self-government. In practice, however, these boundaries are blurred as it is sometimes difficult to distinguish clearly at what level a problem can best be dealt with.

Regarding the principle of separation of powers, a peculiarity occurs insofar as the Bremen legislature (the Citizens' Assembly) decides on guidelines that determine how the Senate must handle the administration, whereas with other *Länder* the head of government has the power to decide on political and administrative guidelines. The Citizens' Assembly also rarely establishes own commissions, but rather creates joint ones with the Senate (so called *Deputationen*). These *Deputationen* advise and even decide on administrative matters directly and report only to the assembly and the Senate. Non-delegates can serve in these commissions, which is a way of involving the public more directly in decision-making processes. There are five *Land* and ten municipal commissions of a permanent nature; the most influential is the *Deputation* on finances.

STATE OF BERLIN (LAND BERLIN)

The *Land* of Berlin is even more peculiar. It is a city state that is the new capital of Germany and is surrounded by the *Land* of Brandenburg. But Berlin is also a municipal entity that has to overcome the past East–West separation.

Berlin was formed as a greater municipality in 1920 by joining several surrounding cities, municipalities and small districts within a dual administrative structure under one greater city. After the Second World War, Greater Berlin was divided into four sectors occupied by the Allied forces. When the German Democratic Republic was formed in 1948, the Russian sector of Berlin became its capital. The western part was treated as a *Land* of the Federal Republic of Germany. Berlin was formally reunited on 3 October

1990 and now forms a city state with a population of 3.39 million covering 883 km^2.

In order not to totally abandon their former independent nature, 26 boroughs were created as non-legal entities of Berlin and these enjoy the right of self-government similar to that of municipalities with regard to administration.[16] The Senate is in charge of establishing guidelines for the administration and acts directly in matters of general concern, while the borough departments deal with all other administrative matters. Senate supervision depends on whether subjects are 'own activities' similar to municipalities, or activities allocated by the city state. For the latter, the Senate can give direct orders on how to administer a matter.

The citizens of Berlin are represented in the House of Delegates (*Abgeordnetenhaus*) at *Land* level and in the borough Delegates' Assembly (*Bezirksverordnetenversammlung*). The Delegates' Assembly proposes the budget plan to the Senate, elects members of the borough council according to proportional representation (who chair the borough administration departments) and elects the borough mayors (*Bezirksbürgermeister*).

*FREE AND HANSEATIC CITY OF HAMBURG (*FREIE UND HANSESTADT HAMBURG*)*

In comparison with Bremen and Berlin, Hamburg is the simplest city state. It is Germany's second largest city at about 1.73 million inhabitants, covering an area of 755 km^2 (nearly one-tenths water) and surrounded by the countryside of Lower Saxony.

Unlike the other two city states, the Constitution of Hamburg declares that *Land* and communal affairs shall not be separated.[17] The Senate is therefore the *Land* government as well as the administrative head of the municipality. Likewise, the Citizens' Assembly (*Bürgerschaft*) of Hamburg is the *Land* parliament as well as the city council. Due to the nature of the undivided functions of all bodies, the Citizens' Assembly also has to apply the legal form of *Land* legislation when it acts with regard to municipal affairs (thus acts, not by-laws). On the other hand, the Senate is accountable to the assembly with regard to *Land* affairs and local affairs.

The *Land* government is in principle organised as a collegium but recently the president of the Senate has been given the right of political directive. The individual members of the Senate (*Staatsräte*) form the heads (*Präses*) of departments, as well as the administrative offices together with the

Deputationen consisting of 15 ordinary citizens. A political agreement had determined that these *Deputierte* are elected according to the proportional representation of the parties in the Citizens' Assembly. The Senate remains the single supervisory and final decision-making body due to the indivisible functions of government. This creates a very shallow hierarchy within the administration. All together about 1,000 organs involve citizens in the administrative affairs of the city.

Although the coherent and unilateral structure of the city state of Hamburg has been emphasised, seven boroughs and 15 village offices have been established. They are administrative structures which fulfill *Land* and communal tasks that the Senate delegates to them and where the matter requires no unilateral handling throughout the city state. The administration comprises departments (*Dezernate*), supervised regarding civil service regulations by a special department of the Senate (*Senatsamt für Bezirksangelegenheiten*) and regarding other subjects by the various departments of the Senate (*Fachaufsicht durch zustaendige Fachministerien*). The head of the borough departments (*Bezirksamtsleiter*) is subject to directions from the Senate, as well as by the elected borough assembly (*Bezirksversammlung*) to whom s/he is accountable. The elected borough assembly is independent and can dismiss the head of the borough departments by means of a constructive vote of no-confidence (*konstruktives Mißtrauensvotum*), which has to be approved by the Senate.

CONCLUSION

Local government in Germany plays a significant role in the life of its citizens. The autonomy of municipalities is assured by the Basic Law. In addition to this, these bodies have a number of specific powers. Municipalities must also fulfill the duties delegated to them by state law. However, there is a reciprocal duty to ensure sufficient funding to complete this mandate. The budgetary constraints of municipalities limits their functions largely to compulsory ones, such as constructing public schools and social welfare, with little left for voluntary functions. Fiscal autonomy is also ensured by the municipalities' significant revenue-raising powers. Other revenue comes primarily from the *Länder* as a percentage of their income.

The city states, moreover, are a comparison in contrasts. Bremen, Berlin and Hamburg are all a unique mix of *Land* and municipal government. While

adhering to the principle of decentralised, autonomous local government, the case of Germany reveals the importance of historical evolution in the diversity of powers and functions in its local government landscape.

ENDNOTES

1 Decision of the Constitutional Court confirming the conformity of art 127 of the Constitution of Weimar 1919 with art 28 para 2 of the Basic Law (*Grundgesetz*) of 1949: BverfGE 1, 167 (174).
2 Art 28 para 2 Basic Law.
3 Decision of the Constitutional Court confirming the importance of local government structures for the life of the people and the political system: BverfGE 11, 266 (275).
4 Art 28 para 3 Basic Law.
5 Art 37 Basic Law.
6 Art 91 para 2 Basic Law.
7 Decisions of the Constitutional Court with regard to associations of municipalities: BverfGE 21, 117 (129); BverfGE 79, 127 (150 & 152).
8 Decisions of the Constitutional Court confirming the general omnipotence of local government within their territory: BverfGE 21, 117 (128 ff); BverfGE 79, 127 (146).
9 Decisions of the Constitutional Court confirming the competence of local government structures for their personnel and organisational structure: BverfGE 1, 167 (175); BverfGE 17, 172 (182 ff); BverfGE 91, 228 (245).
10 Decision of the Constitutional Court confirming the financial independence of local government: BverfGE 71, 25 (36).
11 Art 28 para 2 Basic Law: 'The municipalities shall be guaranteed the right to manage all the affairs of the local community on their own responsibility within the limits set by law. Within the framework of their statutory functions the associations of municipalities likewise have the right of self-government in accordance with the law. The right of self-government shall include responsibility for financial matters. The local governments have the power to levy trade taxes according to the rates for assessment determined by them.'
12 Decision of the Constitutional Court confirming subsidiarity of competencies of municipalities for all residual powers within their territory: BverfGE 79, 127 (146).
13 Art 28 para 2 Basic Law.
14 *Gebietskörperschaften des öffentlichen Rechts*, art 144 Constitution of Bremen (*VerfBR*).
15 Art 147 Constitution of Bremen.
16 Art 50 para 2 Constitution of Berlin (*VerfBE*).
17 Art 4 para 1 Constitution of Hamburg (*VerfHA*).

Local government in Spain

ENRIC FOSSAS & FRANCISCO VELASCO

INTRODUCTION

The Spanish system of government is quite different from the old federations, not only because Spain does not work as a federal system in many ways, but also because the constitutional recognition of local government in those systems is a modern phenomenon. Indeed, to understand the complex multilevel government in Spain, it is important to take into account that the present system is the result of a constitutional process of political decentralisation from a unitary state that involved devolving powers to sub-national units.

Moreover, the level of government – the Autonomous Communities – was superimposed on a local government structure; a legacy of the centralistic Spanish state previously established and partially preserved during the democratic transition by the Constitution of 1978.

This explains many questions addressed in this chapter: the constitutional status of local government; the significance of the central state legislator to regulate it; the maintenance of the old local structures overlapping those of the Autonomous Communities; and the attempt to enlarge local powers. Since the political debate in Spain has so far been focused mainly on the process of devolution and the new territorial system, there has been a lack of debate on the place and role of local government within this system.

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CONSTITUTIONAL ACCOMMODATION OF LOCAL GOVERNMENT

At present, public authority in Spain is vested in four levels of government: the central state (referred to as the state), the Autonomous Communities, provinces and municipalities. Spain consists of 17 Autonomous Communities (plus two autonomous cities: Ceuta and Melilla) and two types of local bodies – 50 provinces and 8,108 municipalities.[1] This basic scheme is complemented in the archipelagos of the Canary and Balearic islands with singular local bodies – the islands.

Moreover, the Spanish constitutional system makes allowances for – although it does not impose – the existence of other local bodies such as those established by the Autonomous Communities (as is the case of the *comarcas* [counties] in Catalonia and Aragon) and those established by the municipalities for efficient management of local public services (such as the metropolitan commonwealths). This chapter focuses on the local bodies with constitutional recognition and therefore common to all of Spain, namely, the provinces and municipalities.

The four-level government in Spain is not a new development in comparative constitutionalism. Federal states, such as Germany, are frequently organised into four territorial levels of government, namely: federal, state, and two levels of local government – municipal and regional (or provincial). The place and role of each of these territorial bodies in a federation is another matter. In the case of Spain, the structures established in the Constitution of 1978 can only be understood completely if one takes into account the organisation of the dictatorial regime that existed from 1939 to 1975.

The military dictatorship of General Franco, in power until 1975, initiated a clear centralisation of public authority. The authoritarian regime eliminated all forms of regional autonomy. Only two local organisations survived: the provinces and the municipalities. These entities were in both cases under strict – even hierarchical – control of the central state. The democratic transition embodied by the 1978 Constitution did not radically change the territorial organisation described. Rather, it supplemented and readjusted it by creating the Autonomous Communities and reorienting the local bodies (provinces and municipalities) towards democratic local self-government.

The constitutional pursuit of a progressive 'adaptation' of the dictatorial structure expresses the spirit of the democratic transition, which seeks to avoid a break with the past. The Constitution established the grounds of a decentralised state; however, it did not precisely establish the functional limits of the four levels of government (the central state, Autonomous Communities, provinces and municipalities).

The statutes of autonomy (of each Autonomous Community), the basic laws of the state and, above all, the decisions of the Constitutional Court, are the elements that have progressively delimited and specified the major features of the multi-layered structure of Spain established by the Constitution.

With regard to the local administration, the Constitution includes two principles: the right to 'local autonomy' from all public authorities (including the state legislature) and the legislative powers over local government vested in the state as well as the Autonomous Communities.

CONSTITUTIONAL RIGHT TO LOCAL AUTONOMY

According to article 137 of the Spanish Constitution,[2] the Spanish state is structured into municipalities, provinces and Autonomous Communities. This implies that the municipalities and provinces are no longer merely internal divisions of the Autonomous Communities, but rather of the state as a whole. Moreover, article 137 of the Constitution asserts that '[a]ll of these bodies have autonomy to manage their respective interests'. The constitutional recognition of local autonomy does not, however, imply directly conferring power to the local authorities.

Unlike the constitutional regulation of the Autonomous Communities (articles 148 and 149 of the Constitution contain a distribution of powers between the Autonomous Communities and the state), local bodies are only granted the right to local autonomy, and the Constitution does not include any specification of what powers such autonomy entails.

From the constitutional point of view, priority was given to the recognition of the Autonomous Communities and their effective powers. Local government, and therefore local powers, was basically defined by statutory law; thus not only by state law but also by regional laws of the Autonomous Communities. In fact, according to the constitutional system of distribution of powers, the Autonomous Communities assume legislative powers over the local government in their statutes of autonomy. In some cases, like Catalonia, this power was even described as an 'exclusive' competence. Therefore, the establishment of local autonomy was, to a great extent, the responsibility of the Autonomous Communities legislature. The distribution of powers between the state and the Autonomous Communities regarding local government is elaborated below.

The legal configuration of local autonomy was limited by its constitutional recognition. The rulings of the Constitutional Court have been decisive in

identifying these constitutional limits. In several decisions relating to the enforcement of the local system of the dictatorship (formally valid until 1985) and concerning sectoral laws on local government, the Constitutional Court has outlined the characteristics of local autonomy directly safeguarded by the Constitution against the action of any other public authority.

First of all, the Constitutional Court declared early on that the Constitution distinguishes between local autonomy and the autonomy recognised to the Autonomous Communities.[3] The Constitutional Court clarified the comparison between the administrative autonomy of local bodies and the political autonomy of the Autonomous Communities.[4] The autonomy of the latter includes legislative and executive functions. Local bodies are therefore always entitled to limited powers (autonomy), which are less than those of the state and the Autonomous Communities. The distinction between political and administrative autonomy, which sought to be clear, has shown serious flaws and incoherencies in the subsequent constitutional case law. The description of local autonomy as 'merely administrative' is not compatible with the recognition of the 'political vocation' of the local bodies,[5] or the proclamations of the representative government of the citizens of the municipality.[6]

The description of local autonomy as an 'institutional guarantee' is also based on constitutional case law. Thus, using a legal concept coined by Carl Schmitt to explain the German Constitution of the Weimar Republic (1919), the Spanish Constitutional Court supports the eminently negative nature of local autonomy guaranteed by the Constitution. The essential core of local autonomy, as an 'institutional guarantee', is protected by the Constitution against the legislative authority of the state or Autonomous Communities. According to the Constitutional Court, the institutional guarantee of local autonomy '... does not ensure specific contents or spheres of authority established and fixed once and for all, but rather the preservation of an institution in terms that are recognisable for the image the social conscience has of such institution in each time and place'.[7]

Over the past 20 years, the legal concept of an 'institutional guarantee' has posited a negative concept of local autonomy: a limit for the legislators of local government. Nevertheless, this legal concept is insufficient to explain the constitutional reality of local autonomy. One must take into account that the 'institutional guarantee', as formulated by Schmitt, seeks to explain resistance to local self-government (and even of the principle of subsidiarity) by the legislatures of the other levels of government. However, the present opinion of the Constitutional Court shows that the local autonomy guaranteed by the

Spanish Constitution not only limits legislation, but is also a 'positive mandate' for the legislatures of the other levels of government to grant sufficient powers and financing to local bodies.

The Constitutional Court has thus stated, with special emphasis in recent years, that article 140 of the Constitution guarantees the 'right to participate' in matters of local interest, and that for such purposes (state or Autonomous Communities) legislation must confer sufficient powers to municipalities. Here we are not considering the protection of existing powers from legislation but rather a mandate to the legislatures to fulfill a constitutional obligation. The positive duty on the legislatures, already clearly indicated by the Constitutional Court, has led some authors to propose replacing the present category of 'institutional guarantee' with that of the 'constitutional principle' of local autonomy.

The Constitutional Court links the local autonomy guaranteed by the Constitution to the existence of 'local interest'. Where there is local interest, action or participation by the appropriate local body should be possible. This does not necessarily imply that the state or Autonomous Communities must confer powers to local bodies. Depending on the type and level of local interest, in some cases it may be sufficient for the municipalities and provinces to confer some kind of effective participation in the procedures or bodies of the supra-local public administrations. According to the Constitutional Court,

> [t]he autonomy guaranteed [by the Constitution] to each level depends on the criteria of respective interest: the interest of the Municipality, the Province, and the Autonomous Community. However, specifying such interest with regard to each matter is not simple and, sometimes, power can only be distributed according to the predominant interest, although this does not entail an exclusive interest that justifies exclusive decision-making powers.[8]

According to this statement, sometimes the laws confer exclusive powers to the municipalities (for instance on urban regulations) and sometimes they only confer some type of organic participation, for instance on the hydrographic confederations (state bodies in charge of water management).

Local autonomy, as an institution guaranteed by the Constitution, is contrary to any hierarchical or semi-hierarchical position of the local bodies with regard to the central state or the Autonomous Communities.[9] Any relation of indiscriminate or generic protection of local corporations by superior

administrations is therefore prohibited. Nevertheless, this does not prevent the state or Autonomous Communities from exercising certain controls 'of legality', as long as these controls are specific (not general) and as long as the concurrent powers or interests of the state or Autonomous Communities are involved.[10]

Along with the previous descriptive notes, stated positively, the Constitutional Court has also explained the concept of local autonomy through its negative characteristics: autonomy is not sovereignty.[11] Local government does not wield greater autonomy than the Autonomous Communities.[12] Financial autonomy, as an integral part of municipal autonomy, only guarantees sufficient income, but not the public authority to provide income for itself.[13]

POWERS OF THE STATE AND THE AUTONOMOUS COMMUNITIES OVER LOCAL GOVERNMENT

The legal system of local government is a matter under the concurrent jurisdiction of the state and Autonomous Communities. According to article 149.1.18 of the Constitution, the state has the power to establish (initially by law) the 'basis of the legal system of the Public Administrations'. Therefore, by describing the provinces and municipalities as 'public administrations', one acknowledges the regulatory powers of the state over local government. On the other hand, the statutes of autonomy confer to the Autonomous Communities exclusive powers over local government 'notwithstanding' the fundamental regulation of the state under article 149.1.18 of the Constitution.[14]

Interpreting this article together with the statutes of autonomy, the Constitutional Court has concluded that the Spanish local system has a 'two-fold nature'.[15] In other words, it is defined by the laws of the state as well as the laws of the different Autonomous Communities. The state is responsible for the 'fundamental' regulations and the Autonomous Communities are responsible for the 'non-fundamental' regulations (the so-called 'development' regulations). The state has also interpreted its own 'fundamental' powers broadly. The extent of the 'fundamental' regulations of the state has severely constrained the regulatory powers of Autonomous Communities.

LEGISLATIVE DEVELOPMENT OF CONSTITUTIONAL MODEL

BASIC STATE LEGISLATION

At present, the fundamental regulations of the state on local government are found primarily in two laws:

- Act 7/1985 of 2 April, on Regulation of the Basis of the Local System (RBRL) (*Ley reguladorada las Bases del Regimen Local*); and
- Royal Legislative Decree 2/2004 of 5 March, which approved the Restated Text of the Local Tax Authorities Act (LRHL) (*Ley reguladora de las Haciendas Locales*).

Basis of Local System Act, 1985

Until 1985 the law of the dictatorship regulated Spanish local government systems (which were afterwards reinterpreted in line with the Constitution) and, even partially, sectoral laws: state law (i.e. electoral matters) or the Autonomous Communities law (i.e. on urban planning or urban environment). Under the RBRL, the state established the fundamental system common to all local administrations in Spain. The state considered that, based on the constitutional competence to regulate 'the basis of the legal system of the Public Administrations',[16] it was entitled to regulate (initially, in a basic manner) all aspects of local government.

This extensive interpretation of state powers was controversial and several Autonomous Communities challenged the Act before the Constitutional Court. The court held that the main provisions of the RBRL were constitutional.[17] The Constitutional Court argued that the organic and functional articulation of local institutions, to make local autonomy effective, is a significant or 'fundamental' question and therefore under state authority. Ultimately, when a state regulation is really useful for local autonomy, its authority is covered under article 149.1.18 of the Constitution.

According to the Constitutional Court:

> As holders of a constitutionally guaranteed right to autonomy, the definition of their powers and their bodies of government can not be left to the interpretation of each Autonomous Community, since that right is not complemented, as occurs in other systems, with the right to challenge statutory law before the constitutional jurisdiction.[18]

The Constitutional Court therefore conferred wide regulatory powers to the state over local government to the detriment of the Autonomous Communities, which hardly have their own regulatory sphere to exercise their exclusive powers in this field.

The RBRL has been revised following this important ruling of the Constitutional Court,[19] although its structure as a complete (and basic) legal system of local government has not changed significantly. There are several guiding principles of the RBRL that remain valid.

First, the RBRL distinguishes primarily between provinces and municipalities, which it regulates comprehensively, and other possible local institutions (i.e. *comarcas*, authorities below municipal level, metropolitan areas, and commonwealths). For the latter, the RBRL provides few regulations and this regulatory sphere is covered by each Autonomous Community and, if appropriate, by the municipalities.

Second, with regard to the provinces and municipalities, the RBRL provides detailed regulations of their organisation as well as their system of operation. Concerning the organisation, the RBRL regulates what it refers to as 'essential bodies' of the municipalities and provinces, leaving the Autonomous Communities (and local institutions) to establish and regulate the 'complementary organisation' of the municipalities and provinces.

The following are essential bodies of the municipalities: the mayor, the plenary session of the town council (assembly of elected council members), the government commission (presently, the local government council: the body that supports the mayor, formed by several council members selected by the mayor) and the deputy mayors (representatives of the mayor in specific areas). The essential bodies of the provinces are the president and vice-president of the provincial council (*Diputación*), the plenary session of the provincial council (assembly of representatives of the different municipalities located in each province) and the government commission (body that supports the president, formed by several members of the provincial council selected by the president of the provincial council).

Third, in its original draft the RBRL chose a corporate form of government for municipalities as well as for provinces. Therefore, many local, even daily, decisions are conferred to the plenary sessions (municipal or provincial) where the different political parties are represented.

At present this is still to a great extent the form of local government in Spain. However, the different reforms of the RBRL have partially corrected the model in two ways: greater power of the political leadership of the mayor (of the municipality) or the president (of the province); and the progressive 'parliamentarisation' of the plenary sessions (municipal and provincial) that are increasingly less concerned with administrative tasks and focus their work on

strategic decisions or regulations, and on controlling the mayor or the president.

Fourth, the RBRL directly regulates the municipal powers. In 1985 the state considered (and its decision was not annulled by the Constitutional Court) that state authority to regulate the 'basis of the legal system of the Public Administrations'[20] would allow it not only to establish the general structure of the local institutions but also to directly confer powers to these public administrations.

Fifth, the broad interpretation of state authority under article 149.1.18 of the Constitution also led the RBRL to include regulations regarding many different aspects of the local government. The RBRL therefore regulates (although basically) contracting, property, services and local employment. There is hardly any area of municipal activity that is not regulated by the RBRL.

Local Tax Authorities Act

In 1988 the financing of local institutions was defined by the new state law, the LRHL.[21] This act was found constitutionally sound when challenged before the Constitutional Court.[22] Once again, state power to regulate the 'basis of the legal system of the Public Administrations'[23] was considered sufficient to grant it the power to regulate the local system in great detail (this time regarding finances). Following several different minor amendments, the 1988 Local Tax Authorities Act was last revised in 2004. Therefore, at present the basic aspects of the local tax authorities are formally regulated by Royal Legislative Decree 2/2004 of 5 March, which approves the Restated Text of the Local Tax Authorities Act. Nevertheless, this new legal text is quite similar to the 1988 law.

The 1988 LRHL law, as well as the present 2004 version, establishes a 'mixed system' of local financing. A basic distinction is made between 'local assets' and 'assets granted' by the state or Autonomous Communities. Local assets include income from local property, earnings from local taxes, profit from credit transactions and income from fines. Of all these local assets, taxes are the most relevant.

In terms of local taxes, a distinction is made between public prices and fees (for individualised delivering of local public services), special contributions (presently hardly used, which impose taxes on those who benefit especially from public action) and five municipal taxes.

Although we refer to 'local taxes', it must be pointed out that local institutions lack their own authority to establish taxes as this function is reserved for the law of the state or the Autonomous Community. But the LRHL recognises the power of the local administrations to configure non-essential elements of local taxes established by this law, such as tax rebates or tariffs. Among the tax income of local institutions, the following municipal taxes are the most important: buildings, facilities and construction tax; increased value of urban land tax; real estate tax; power haulage vehicle tax and the business tax (residual at present).

The system of 'local assets' is clearly insufficient for financing local tasks. The LRHL therefore also considers, as a supplementary element, financing local institutions by receiving a share of state or Autonomous Community taxes or by grants. Formerly only the state, and not the Autonomous Communities, transferred revenue from state taxes to local tax authorities. Now both the state and the Autonomous Community participate in the financing of specific sectors and local projects, especially for undertaking construction of infrastructure to render local services.

In recent years the different political parties as well as many scholars have insisted on the need to undertake a basic reform in the system of local financing. It has been proposed, in this regard, that local institutions should manage up to 25% of the general revenue of the state; a figure much higher than the current 13%. To obtain this level of income, however, the proposition for a greater share of state tax revenue is generally regarded as preferable to an overall increase in the tax powers of the local institutions.

ENLARGEMENT OF LOCAL POWERS THROUGH THE PACTA LOCAL *OF 1997*

An in-depth political debate began in Spain in 1992 about the place and role of local government. Several factors contributed to this emerging discussion.

First, the local administrations began to play an important role in the European context in accordance with the principles of democracy and subsidiary. This was no doubt a reaction to the process of globalisation, which distances public decisions from the citizens. The European Charter of Local Autonomy (1985), ratified by Spain in 1988, is an expression of this renewed prominence of local institutions.

Second, the local system established by the RBRL already had a number of flaws that required correction. Some of them were political, including the trend

towards instability of the representative bodies of the municipalities and provinces. Others were functional and financial. For example, the local administrations were increasing the number and complexity of their functions without legal coverage and without the appropriate financing. The significant increase of local tasks was not accompanied by improved financing. In 1979, the distribution of public expenditure by the public administrations was as follows: 87.3% for the state; 0.8% for the Autonomous Communities; and 11.9% for the local authorities. By 1992 the ratios had changed: 62.3% for the state; 24.9% for the Autonomous Communities; and 12.8% for local authorities. The increase in local institutions was hardly noticeable. Ten years later, in 2004, local institutions' share of revenue remains stagnant: 53% for the state administration; 33.9% for the Autonomous Communities; and 13.1% for the local authorities. So, municipalities have constantly insisted on implementation of the principle of financial self-sufficiency.

Finally, the centralist trend of the national political parties regarded the reinforcement of local government as compensation for the political decentralisation attained by the Autonomous Communities. In this way, the main national political parties (the Popular Party and the Socialist Party) conceded to the demands of local institutions concerning the competencies of the Autonomous Communities.

The demands of the Spanish municipalities rose in this context, primarily through the Spanish Federation of Municipalities and Provinces (FEMP). These claims, with heterogeneous content, were summarised under the expression *Pacta Local*. The demands considered legislative reforms as well as minor administrative measures and political initiatives. It involved improving local government by regulatory and administrative measures, and agreements between political parties.

Among the heterogeneous list of proposals, the *Pacta Local* had two primary objectives: redefining the sphere of authority of the local administration; and reinforcing its institutional position through a process of decentralisation from the state and the Autonomous Communities towards local institutions by transferring or delegating powers. Of the 92 powers demanded by the municipalities and provinces, 60 referred to the Autonomous Communities and 32 to the state.

The 'base document' for the negotiation of 24 September 1996 made provision for the reinforcement of local government in three major areas associated with the state or Autonomous Communities:

- Sectors of public activity regulated by the state: traffic, road safety, consumer protection, education, employment, environment, citizen safety, civil defence, administration of justice, tourism and housing.

- Organisation of the general institutions of the state: this includes the reform of the Organic Law of the Constitutional Court to include specific proceedings for defence of local autonomy.

- Matters under the authority of the Autonomous Communities: consumer protection, sports, education, employment, youth, environment, women, town and urban planning, historic and artistic heritage, civil defence, health, social services, transport, tourism and housing.

The bases for negotiation submitted by the FEMP in 1996 were followed by the government proposal on the *Pacta Local* of 21 July 1997 and the 'Foundations for Negotiation of the Agreement for Development of the Local Pact' of 29 July 1997.

The negotiation process concluded on 21 April 1999 when government approved the agreement known as 'Measures for Development of Local Government'. Since the powers of the state and Autonomous Communities converge in local matters, the *Pacta Local* had to be enforced by the state and the Autonomous Communities.

State enforcement of the Pacta Local

From the perspective of the state, the enforcement of the *Pacta Local* took the form of six legislative proposals. In most cases, these reforms refer to minor matters of local management. The most urgent problem of the present local system – financing of the municipalities and provinces – was not considered in the legislative amendments. The legislative reforms of 1999 included:

- allowing local authorities direct access to the Constitutional Court in order to challenge laws of the state or Autonomous Communities undermining the principle of local autonomy (conflict in defence of local autonomy);[24]

- introducing in the local political sphere the vote of confidence linked to specific projects (such as approval of corporate budgets, organic regulations,

tax regulations, municipal planning), as well as a new regulation on votes of confidence, seeking to break the stalemate in institutional crises;[25]

- permitting the town councils to be informed and issue their opinion on exercising the rights to assembly and demonstration on public highways;[26]

- facilitating more active participation by the municipalities in planning academic curricula;[27]

- increasing the penal powers of the municipalities;[28] and

- reforming the traffic system, flow of motor vehicles and road safety, and sewage. It also introduces new municipal and organisational aspects, such as reinforcement of the duties of the mayor.[29]

Only two of all these legal reforms can be considered truly significant from an institutional perspective. On the one hand, through the new procedure called 'conflict in defence of local autonomy', local institutions, acting jointly, can directly challenge before the Constitutional Court the laws of the state or Autonomous Communities which, in their judgment, undermine the constitutional guarantee to local autonomy. On the other hand, Act 11/1999 (which partially amends the RBRL) established a new distribution of power between the mayor and the plenary session of the municipal council (assembly of all elected councillors); the mayor reinforces his/her political leadership within the municipality and, at the same time, the methods used by the plenary session to control the mayor's actions are strengthened.

Autonomous communities' enforcement of the Pacta Local

The essential core of the *Pacta Local*, in its original draft, necessarily consisted of the transfer of functions or powers from the Autonomous Communities to the local institutions. This second phase of the *Pacta Local* is to a great extent not enforced. There is currently no agreement among different Autonomous Communities as to what should constitute the so-called 'second decentralisation' in favour of the local administrations.

In the Autonomous Community of Galicia it was understood that the *Pacta Local* consisted of conferring management of the different matters included in

the *Pacta Local* to the most efficient administration in each case (local or autonomous). In Castilla-La Mancha, enforcement of the *Pacta Local* has only begun in one specific domain – urban planning. In Asturias, the *Pacta Local* has taken shape, at present, in the creation of consultative and decision-making bodies that facilitate relations between the Autonomous Community and the municipalities.

In general, the effective enforcement of the *Pacta Local* by the Autonomous Communities has two serious disadvantages. The first is the reluctance of the Autonomous Communities to grant powers to the local authorities. Second, municipalities oppose receiving transfers of power without being assured of the requisite financing. In this regard, the case of the Autonomous Community of Madrid is significant.

On 11 March 2003, in Act 3/2003, the parliament of this Autonomous Community approved a development of the *Pacta Local*. This Act sets out and enumerates the powers held by the Autonomous Community that may be transferred or delegated to the municipalities of Madrid. However, due to lack of agreement on the financing of the transferable powers, a year-and-a-half after the approval of that Act, no definitive decision has been taken on its enforcement. Moreover, this matter is not included in the political agenda of the government of Madrid.

THE MODERNISATION OF LOCAL GOVERNMENT IN 2003

During the 1990s the seven most populated cities in Spain, all with populations over 500,000, demanded that the state grant them a special legal status in terms of organisation, as well as powers and financing. These demands were included in a draft bill, finally approved as Act 57/2003 of 27 November, on Measures of Modernisation of Local Government Act (LMMGL). This Act includes, along with a special local system for 'cities with large population', certain technical improvements in the legal system common to all municipalities in Spain.

Act 57/2003 was the subject of an agreement between the two major Spanish political parties: the Popular Party and the Socialist Party. Two Autonomous Communities – Aragon and Catalonia – challenged Act 57/2003 before the Constitutional Court, arguing that the state had gone far beyond its competencies on local government, regulating the local regime excessively (this time, by establishing a 'special' basic system for certain municipalities) and thus

occupying the sphere of powers that belongs to the Autonomous Communities and municipalities.

With regard to the cities with large populations (those with over 250,000 inhabitants, provincial capitals with over 175,000 inhabitants and others established by the Autonomous Communities), Act 57/2003 amends the RBRL to establish a new special organisational system that is suitable for these large cities. However, it does not confer new powers on these cities, nor does it make any changes to their financing system.

From an organisational point of view, the most relevant aspect is the progressive symmetry between the structure of local government and the structure of the parliamentary government of the state and the Autonomous Communities:

- The political dimension of the mayor is reinforced;[30] nearly all of his/her administrative powers are transferred to the local government council (formerly government commission).

- The plenary session of the municipal council (which includes all elected councillors) is also deprived of its authority in most administrative decisions. Its functions focus on controlling the mayor and the local government council, and on regulatory and strategic decisions (such as municipal ordinances, urban planning and the annual budget).

- The local government council now exercises most of the administrative powers (contracting, public services, local public employment, economic management, permits and authorisations, and others). Unlike the former 'government commission' that acted by delegation of the mayor or the plenary session, the present local government council directly holds the powers it exercises (and, therefore, can also delegate the exercise of some of these powers to lower-level municipal bodies). Members of the local government council are fully and freely chosen by the mayor and, unlike what occurred up until now (and continues to occur in the local system of the ordinary cities), members are presently not limited to the elected councillors; up to one-third of the members of the board may be professionals not elected democratically. This represents a change for the first time in local government in Spain since it contravenes the principle of local government through the councillors directly elected by residents.

FUNCTIONS AND POWERS

The Constitution does not confer specific powers to the local institutions. It grants the right to local autonomy,[31] but assigns to the state and Autonomous Communities the task of specifying that generic right in competencies and powers.

OBLIGATION TO CONFER POWERS

Conferring powers to the local authorities is not merely an option for the state or the Autonomous Communities; it is also a constitutional and legal obligation. The Constitutional Court considers that local autonomy is not recognisable if local institutions have not been conferred their own, sufficient powers to participate in matters of interest to the local community. However, the RBRL imposes on the state and Autonomous Communities the obligation to confer sufficient functions to the local institutions. In this regard, the RBRL states:

> For the autonomy guaranteed to local institutions by the Constitution to be effective, the legislation of the State and the Autonomous Communities, which regulates the different sectors of public action, according to the constitutional distribution of powers, shall ensure that the municipalities, provinces and Islands have the right to intervene in all matters that directly affect their circle of interests, conferring on them the appropriate powers based on the characteristics of the local institution, in accordance with the principles of decentralization and maximum proximity of administrative management to the citizens.[32]

This obligation does not specify which powers should be conferred to the local institutions. It only establishes the need to recognise participation by local institutions in the management of public matters of local interest.

ASYMMETRICAL ALLOCATION OF POWERS

The Constitution clearly distinguishes between the autonomy of provinces and that of the municipalities. This basic distinction also leads to a clear differentiation in powers. Moreover, according to constitutional jurisprudence, nothing prevents the state from conferring different types of powers to the same types of local institutions (based, for example, on the number of inhabitants in

each municipality). Even special local systems or *à la carte* are possible.[33] In fact, articles 25 and 26 of the RBRL confer more powers to the municipalities with the largest populations. The same population criteria to differentiate different municipal systems are included in the recent State Act 57/2003, on Measures of Modernisation of Local Government. On the other hand, each Autonomous Community can also confer more or fewer functions to the different local institutions in matters that are within its sphere of authority. The provinces and municipalities of different Autonomous Communities may therefore have different powers or functions.

Municipalities

The constitutional right to municipal autonomy is specified by state legislation (RBRL) in a list of matters within which conferring powers to the municipalities is compulsory. Since they are basic regulations, the laws of the Autonomous Communities must always respect this 'minimum standard of powers'. This does not prevent the Autonomous Communities from raising that minimum standard and so reinforcing the powers of the municipalities. The fundamental legal state regulations distinguish between several different types of powers.

First, article 25.2 RBRL sets forth a list of matters on which the laws of the state or the Autonomous Communities must confer powers to the municipalities. This article enumerates as 'municipal matters' those areas in which there is local interest, and which directly affect the residents of the municipality, namely: safety in public places, planning for vehicle traffic and pedestrians on urban roads, civil defence, fire fighting and prevention, urban regulations, historic-artistic heritage, environmental protection, supplies, abattoirs, markets and consumer and user protection, public health, cemeteries and funeral services, social services, water and public lighting, street cleaning, waste collection, sewage, public transport, cultural and sport activities, and academic curricula.

In these matters, the legislation of the state or Autonomous Communities must confer powers to the municipalities, although not necessarily exclusively. The powers referred to in article 25.2 RBRL may consist of administrative power (as in the field of civil defence, consumer and user protection), issuing required reports (as established by state law on waters, coasts and ports), participation in the management of independent public institutions (such as savings banks), bodies of other public administrations (like education) or performing controls and inspections (like public health).

In general, laws relating to a particular sector tend to confer on the municipalities functions of inspection, control or audit in subjects where decision-making power is reserved for the state administration or that of the Autonomous Communities. There are few cases in which those laws confer on the municipalities full planning powers or full management of a specific matter. Politicians who hold municipal public office frequently complain that the most modern laws relating to a particular sector eliminate or reduce the traditional powers of the municipalities, especially in the field of urban planning.

Second, under article 26.1 RBRL the municipalities are responsible for certain minimum public services. These required services increase according to the number of inhabitants.[34] On a complementary basis, article 86.3 RBRL 'reserves' certain essential activities or services for the local institutions: water supply and purification, waste collection, treatment and use, gas and heat supply, abattoirs, central exchanges and markets, and public transport. The recent and progressive liberalisation and privatisation of public services, accepted by the state from 1996 to the present, has eliminated from municipal authority two of the matters listed by the RBRL, namely, mortuary services[35] and gas supply.[36]

Last, article 28 RBRL completes this outline of the powers of the municipalities by authorising the municipalities to perform 'complementary activities' to those of other administrations in the following areas: education, culture, promotion of women, housing, health and environmental protection. These local activities have clearly surpassed their 'complementary' nature and have become essential tasks of the municipalities, which are in high demand and valued by people. This is the case of the policies on equality, children's education, treatment of substance abuse and emergency health care. Besides the complementary activities formally included under article 28 RBRL, the municipalities also perform new tasks (especially social services) without express empowerment. An especially noteworthy example is the social integration of legal as well as illegal immigrants, which is basically the responsibility of municipalities.

The Spanish local system lacks a 'universal clause', such as one that occurs in German local law. It is true that in recent years some scholars state that article 137 of the Constitution (right to local autonomy) or article 25.1 RBRL[37] are based on this general clause. Moreover, they argue that such universal powers can only be limited by law and under the principle of proportionality. These opinions have clearly been influenced by German public law and,

especially in recent years, by the principle of subsidiarity under article 4.3 of the European Charter on Local Autonomy of 1985.

Under the present Spanish constitutional system, these opinions can clearly be rejected. The principle of subsidiarity in favor of local administration (in the German version) can only be understood correctly in a system of territorial distribution of power in which the federation and the *Länder* are also ruled, with some minor differences, by constitutional preference for the *Länder* over the federation. In other words, the principle of subsidiarity rules the entire range of territorial powers, not only the local level. This is quite different from a system, such as the Spanish one, where the Autonomous Communities have limited powers under an organic law approved by the state (Statute of Autonomy), which includes a residual clause of powers granted to the state.[38] Proclaiming the principle of subsidiarity in favour of local authorities therefore entails, ultimately, the defence of municipal powers over powers of the different Autonomous Communities without, at the same time, defending the priority of the Autonomous Communities over the state powers. This option clearly alters the distribution of powers established in the Constitution, as interpreted by the Constitutional Court.

Provinces

The provinces experienced a significant reduction of their functions to the benefit of the nascent Autonomous Communities after the new constitutional order of 1978. This was in contrast to municipalities that suffered no substantial change in their powers (although it did change the way they are exercised: with full autonomy and without governmental controls).

The Constitutional Court accepted the reduction of the provincial powers in favour of the Autonomous Communities and only pointed out that it must not exceed the 'essential core' of local autonomy. As stated in STC 32/1981, on Catalan provincial councils:

> [the functional adaptation of the provinces to the new scheme of functional distribution of power] could not lead, except through an amendment of the Constitution, to the elimination of the Province as an entity with autonomy for the management of its own interests.

So far, constitutional case law has identified the essential core of provincial

autonomy with the traditional function of 'cooperation and assistance' to the municipalities. Accordingly, 'the removal or substantial reduction of such an essential stronghold had to be considered detrimental to the provincial autonomy guaranteed by the Constitution'.[39] This cooperative function is expressed, to a great extent, as spending power, so that here the core of provincial autonomy is in essence financial autonomy (in terms of spending power).

The constitutional right to provincial autonomy is specified by the RBRL in a reduced list of provincial powers based on the idea of cooperation and assistance to municipalities. This narrow framework of powers has not been extended by the Autonomous Communities. For the Autonomous Communities – especially Catalonia and the Canary Islands – the provinces compete with the Autonomous Communities for territorial public authority. From their perspective, provinces are frequently considered as remains of the centralised state of the dictatorship that held the territorial power, which should be transferred to them.

SUPERVISION OF LOCAL GOVERNMENT

In general, the local system in Spain includes very limited governmental supervision or control of the activities of the municipalities and provinces by the state or by the Autonomous Communities. Moreover, the Constitutional Court considers that the local autonomy guaranteed by article 137 of the Constitution excludes these governmental controls to a great extent. In the absence of such controls, the judicial power is responsible for controlling the administrative activities of local institutions.

The limited external governmental controls and their constitutional prohibition must be understood as a reaction to the local system during the dictatorship era when the state had extensive control over municipalities and provinces. The mayors of the municipalities and the civil governors of the provinces could be easily removed from office by the state. Moreover, there were numerous instances – facilitated by the Local System Act of 1955 – where municipal and provincial decisions could be overruled or annulled by the state administration. When the Local System Act of 1955 was challenged before the Constitutional Court due to its possible contradiction of the right to local autonomy, the Constitutional Court declared that most governmental controls on local institutions were unconstitutional.[40]

According to this leading case, and repeated in many subsequent decisions, the local autonomy guaranteed by the Constitution radically excludes all administrative or political control of local public offices, which therefore cannot be removed by supra-local administrations. In contrast to the subjective controls established in the Local System Act of 1955, the Constitutional Court considers that the local autonomy proclaimed by the Constitution includes specific guarantees of the indemnity of local bodies and offices: it prohibits any form of governmental elimination of municipal offices, it forbids penalisation of presidents of local corporations for 'lack of commitment to fulfill the functions delegated by the State', and it ensures that local government bodies cannot be dissolved due to faults in management.

The local autonomy guaranteed by the Constitution also excludes all 'generic power' of the state to run the activities of municipalities and provinces. Moreover, it excludes, in this sense, all controls of opportunity and generic controls of legality.

Among the controls and supervisions of local activity established in the Local System Act of 1955, the Constitutional Court only considers the following to be compatible with the Constitution:

- Dissolution of the commonwealths (groups of municipalities that provide common services) in the event of danger to public order or national security.
- Final approval, by supra-local authority, of the name of the municipalities and the capital of the province.
- Annulment of the enforceability of by-laws and regulations challenged by the supra-local administration.
- Control by the supra-local administration of the municipalisation of services under monopoly.
- Control of the fulfillment, by local authorities, of powers delegated by the supra-local administration.
- Resolution of conflicts between different local authorities by the supra-local administration.
- Control by the supra-local administration of disposal of community property (public property assigned to community use by residents).
- Control by the supra-local administration to ensure the defence and integrity of municipal assets from its own administrators.
- Control of budget legality.
- Control of legality of new charges and tax regulations.

In general, the controls not declared unconstitutional are those over the legality of the activities of the local institutions.

The small constitutional margin for governmental controls of local institutions has been further reduced by the RBRL. Although the Constitution does not prevent other administrations (state and autonomous) from selectively controlling the legality of local action, articles 63 and others of the RBRL have ruled out this possibility. And since it is a 'fundamental' state regulation, it prevents the laws of the Autonomous Communities from adding specific controls of legality. This was the argument of the Constitutional Court in a case concerning a Catalan law on urban planning, where the Court considered that certain specific controls of legality (on municipal urban planning activity) surpassed the highly restrictive system of governmental controls stipulated in the RBRL.[41]

In the RBRL, governmental control of local institutions was replaced by a complex system of 'intergovernmental relations' based on the idea of full respect for the powers of local institutions and the principle of cooperation. Beyond the minor obligation of providing information to the supra-local administrations,[42] the RBRL basically establishes legal instruments to prevent conflicts between the state and the Autonomous Communities, on one hand, and local authorities on the other. To prevent or resolve conflicts of authority, articles 57 and 58 RBRL promote the 'free cooperation' of public administrations,[43] either in the form of agreements or by participation in bodies of collaboration, by performing procedures to allow participation by a public administration body (primarily local) in the decision-making procedures of another administration.

Only when voluntary cooperation is not technically possible, does the RBRL provide for the possibility that the state or Autonomous Communities establish (by law) procedures of 'coordination' through which the possible confrontation or conflict with local powers is resolved by a final decision of the state or the autonomous administration.[44]

However, articles 10.2 and 59 RBRL require that in those procedures a channel be established to facilitate the relevant and effective participation of local institutions. This technique of coordination is included in several laws of the state or Autonomous Communities concerning main infrastructures (ports, airports, water works) and urban planning. Through these laws, municipal powers are limited to urban planning of its municipal area and, therefore, to deciding on the location of supra-local infrastructure. This limitation of powers

is compensated with the necessary hearing for the municipality affected by the state or autonomous decision on the location of a state or autonomous public work or infrastructure.

These arrangements for coordination, undoubtedly limiting municipal powers, have been accepted repeatedly in constitutional case law. A pertinent example is a case concerning planning for ports of general interest under state authority.[45] In any case, it must be repeated that this is a technique of 'coordination' of powers, in the field of concurrence or conflict between the supra-local powers of the state or Autonomous Communities and those of local institutions.

The provision of article 60 RBRL must also be seen as an instrument to articulate the exercise of powers, rather than a technique of supra-local control. Here the RBRL stipulates that in some cases the supra-local administration can replace the local institution by taking over the exercise of its powers. However, this is only possible when the action or omission by the local institution has violated legal regulations and, in addition, this violation has affected competencies exercised by the state or Autonomous Community. It is therefore not really a control of the legality of a local action by a supra-local administration, but rather an instrument that allows the latter to defend its powers when faced with possible interference by a local institution. Nevertheless, given the requirements set forth in article 60 RBRL for exercising this power, as well as the relevance of the principle of local autonomy, such a mechanism of coercive exercise of local powers by supra-local bodies has become useless.

Furthermore, the strongest mechanism of supra-local control under article 61 RBRL also lacks practical relevance. For truly extreme cases (action by a local administration affecting seriously general interests with violation of constitutional obligations), the RBRL provides for dissolution by the state government of local bodies. Such dissolution must be followed by a call for partial elections to replace the body of government dissolved. In this case, it is clearly an instrument of control of local authorities. Nevertheless, due to its absolutely extraordinary nature, it reaffirms the general conclusion that there are no (at least ordinary) subjective controls of local institutions by the state or Autonomous Communities.

The lack of a system of ordinary governmental supervision of local administrations is compensated by a special regulation for legal proceedings in which the state or Autonomous Communities can go to the courts for violation

of legal regulations by a local institution. According to the RBRL, there are three types of special challenges:

- In the event of a minor violation of legal regulations, article 65 RBRL directly legitimises the state or Autonomous Community to challenge local action. It does, however, require the submission of prior notice to the local institution which, if it does not answer, would open the procedures for filing the appropriate claim before the Administrative Court. As the Supreme Court has pointed out, such a challenge does not require an impact or usurping of supra-local powers; it requires only a minor violation of legal regulations.

- In the event of usurpation of powers, article 66 RBRL provides for direct challenge to local activity with no need for prior notice, and facilitates provisional interruption (by the Administrative Court) of the local action that violates legal regulations.

- Finally, in the event of local agreements that seriously undermine the general interest of Spain, article 67 RBRL authorises the Delegate of the State – the highest governmental authority of the state in the territory of each Autonomous Community – to directly stop the effectiveness of the local agreement and challenge it, within the brief period of ten days, before the Administrative Court. In this case, annulling the enforcement of the local agreement is a decision by the supra-local administration, not by a tribunal, although such annulment can be maintained or removed by judicial decision as soon as the appropriate claim has been filed by the supra-local administration.

CONCLUSION

The Spanish Constitution of 1978 established the foundations of a decentralised state. But it did not define the precise operative limits of the four primary territorial organisations: the state, the Autonomous Communities, provinces and municipalities. The statutes of the different Autonomous Communities, the basic laws of the state and, above all, the rulings of the Constitutional Court have been the instrumental factors in defining and specifying the model of territorial organisation in Spain. Furthermore, some Autonomous Communities

have created other local bodies (such as the *comarcas*), which are not guaranteed directly by the Constitution.

In contrast to the constitutional regulation of the state and the Autonomous Communities, where articles 148 and 149 of the Constitution contain extensive lists of powers applicable to one of the two territorial organisations, the local entities are only guaranteed 'local autonomy'; although the Constitution contains no specification concerning the competencies that this autonomy should entail. The priority, from the constitutional perspective, was the recognition of the Autonomous Communities and the fulfillment of their effective powers. Local government, and therefore the local competencies, remained fundamentally defined by law – not only state law but also the laws of the Autonomous Communities. The state is responsible for 'fundamental' regulation and the Autonomous Communities are responsible for the 'non-fundamental' or 'development' regulation.

The state has primarily exercised its fundamental competence over the local administration in two laws: the RBRL and the LRHL. In both laws there is an evident tendency by the state towards total and detailed regulation of the local system, beyond the strict terms of its 'basic' competence. The Constitutional Court did not consider this over-reaching tendency of the state competencies as unconstitutional.[46]

Two reforms of the local state system took place in the 1990s. The first, known as the *Pacta Local*, took its form in the modification of six general laws of state in relation to local entities. From an institutional perspective, only two of these legal reforms can be considered truly significant. First – through the new procedure called 'conflict in defence of local autonomy' – local institutions, acting jointly, can directly challenge before the Constitutional Court the laws of the state or the Autonomous Communities which, in their judgment, undermine the constitutional guarantee to local autonomy. Second, the new distribution of power between the mayor and the plenary session of the municipal council has been established.

The constitutional right to municipal autonomy is established through the RBRL in a list of matters, which assert the attribution of powers to the municipalities as compulsory. Since they are basic regulations, the laws of the Autonomous Communities must always respect these 'minimum standards of powers'. This does not prevent the Autonomous Communities from raising this minimum standard and so reinforcing the powers of the municipalities.

In general, the present local system in Spain includes very limited

governmental supervision or control of the activities of municipalities and provinces by the state or by the Autonomous Communities. Moreover, the Constitutional Court considers that the local autonomy guaranteed by article 137 of the Constitution excludes these governmental controls to a great extent. In the absence of such controls, the judicial power assumes the responsibility of controlling the administrative activity of local institutions. In addition, the RBRL establishes a complex system of intergovernmental relations based on the idea of full respect for the powers of local institutions and the principle of cooperation. Only when voluntary cooperation is not technically possible, does the RBRL consider the possibility that the state or Autonomous Communities might establish statutory procedures of coordination through which the possible confrontation or conflict with local powers is resolved through a final decision of the state or the autonomous administration.

ENDNOTES

1 For a detailed list of all local bodies in Spain see <http://www.dgal.map.es>.
2 *Constitución Española* (the Constitution).
3 'The Constitution prefigures a vertical distribution of public authority between entities of different levels that are primarily the State, holder of sovereignty; the Autonomous Communities, characterised by their political autonomy; and the provinces and municipalities, granted a different sphere of administrative autonomy' (STC 32/1981).
4 STC 4/1981 and STC 32/1981.
5 STC 193/1988.
6 STC 5/1983.
7 STC 32/1981.
8 STC 32/1981.
9 STC 4/1981.
10 STC 213/1988.
11 'Autonomy refers to limited power. In fact, autonomy is not sovereignty – even this power has its limits – and since each territorial organisation granted autonomy is part of the whole, the principle of autonomy can never be opposed to that of unity, but rather it is precisely within such unity where it reaches its true meaning, as stated in article 2 of the Constitution' (STC 4/1981).
12 'Autonomy guaranteed by management of respective interests does not appear to have to include – according to FJ 11 of Judgment 4/1981 – the power to have a government and administration or an economic system different from that provided in general by law with no control whatsoever' (STC 32/1981).
13 'The Constitution does not guarantee local corporations economic-financial autonomy in the sense of having their own resources available – assets and taxes – and sufficient to fulfil their duties. It states that such resources shall be sufficient, but they need not be

entirely their own.' Thus they do not have their own regulatory tax powers, although their budgets can be approved 'ex Constitution' as territorial public authority and the power to have full access to financial funds. It is precisely the state legislation which is responsible for the effectiveness of the principles of sufficiency of the local tax authorities (art 142 of the Constitution) and for territorial balance and solidarity (art 138 of the Constitution). Therefore, it is responsible for stating the criteria for distribution of the share of the state revenue they are granting' (STC 96/1990).

14 See e.g. art 9.8 of the Statute of Autonomy of Catalonia.
15 STC 214/1989.
16 Art 149.1.18.
17 STC 214/1989.
18 STC 32/1981.
19 STC 214/1989.
20 Art 149.1.18.
21 Act 39/1988 of 28 December.
22 STC 233/1999.
23 Art 149.1.18.
24 Organic Law 7/1999 of 21 April, amending Organic Law 2/1979 of 3 September of the Constitutional Court.
25 Organic Law 8/1999 of 21 April, amending Organic Law 5/1985 of 19 July on the General Electoral System.
26 Organic Law 9/1999 of 21 April, amending Organic Law 9/1983 of 15 July regulating the right to assembly.
27 Organic Law 10/1999 of 21 April, amending Organic law 8/1985 of 3 July regulating the right to education.
28 Act 19/1999 of 21 April amending Organic law 1/1992 of 21 February on protection of citizen safety.
29 Act 11/1999 of 21 April amending Act 7/1985 of 2 April that regulates the basis of the local system.
30 Act 11/1999.
31 Arts 137, 140, 141 & 142.
32 Art 2 RBRL.
33 STC 214/1989.
34 Art 26.1 of the RBRL:
'The municipalities shall individually or in association provide, in all cases, the following services:
a) In all municipalities: public lighting, cemetery, garbage collection, street cleaning, residential supply of drinking water, sewer system, access to population centres, paving public highways, and control of food and drink;
b) In municipalities with population over 5,000 inhabitants-equivalent, also: public park, public library, market, and waste treatment;
c) In municipalities with population over 20,000 inhabitants-equivalent, also: civil defence, provide social services, fire extinction and prevention, and public sport facilities; and
d) In municipalities with population over 50,000 inhabitants-equivalent, also: urban public transport of travellers and environmental protection.'

35 Royal Decree Law 7/1996 of 7 June on urgent tax measures and promotion and liberalization of economic activity.
36 Act 34/1998 of 7 October on the Hydrocarbon Sector, eliminated consideration of the gas sector as a public service.
37 Art 25.1 of the RBRL: 'The Municipality, by managing its interests within the scope of its powers, can promote all sorts of activities and render any public services that contribute to satisfying the needs and aspirations of the community of residents.'
38 Art 149.3.
39 STC 109/1998.
40 STC 4/1981.
41 STC 159/2001.
42 Art 56 of the RBRL
43 Art 57.1 of the RBRL.
44 Arts 10.2 & 51.9 of the RBRL.
45 STC 40/1998.
46 STC 214/1989 (regarding the RBRL) & STC 233/1999 (regarding the LRHL).

Local government in Switzerland

PASCAL BULLIARD

INTRODUCTION

The state structure of Switzerland has three levels: the confederation, the cantons, and the municipalities. From a historical perspective, the municipalities existed before the building of the confederation, with deep roots in the political tradition of the country. Moreover, at the level of cultural identity, a Swiss citizen enjoys three citizenships: municipal, cantonal and national. This explains the strong feelings that link the Swiss citizen with his/her municipality and the challenges facing local government in the future.

CONSTITUTIONAL ACCOMMODATION OF LOCAL GOVERNMENT[1]

Switzerland is a small federal country covering about 41,000 km^2 and divided into 26 cantons and (in 2004) 2,815 municipalities. The size of cantons varies from some 37 km^2 to 7,106 km^2, with population sizes from 13,500 to 1.5 million. At local level, the largest municipality has over 400,000 inhabitants. Although the average is 2,100 inhabitants, 45% of Swiss municipalities have less than 500 inhabitants, and 240 municipalities less than 100 inhabitants. (See Table 1.)

Swiss municipalities are a feature of the decentralised administration and at the same time an instrument of political decentralisation. Despite this important

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Table 1: Number of municipalities and population per cantons, 2001

Canton	Municipalities (#)	Population Total (in 1,000s)	Population Density (pop per km²)	Canton	Municipalities (#)	Population Total (in 1,000s)	Population Density (pop per km²)
ZH	171	1,229	711	SH	34	73	245
BE	400	947	159	AR	20	53	219
LU	107	351	235	AI	6	15	87
UR	20	35	32	SG	90	453	223
SZ	30	131	145	GR	212	186	26
OW	7	33	67	AG	232	551	392
NW	11	39	140	TG	80	228	230
GL	29	38	56	TI	245	312	111
ZG	11	101	422	VD	384	626	195
FR	226	239	143	VS	160	278	53
SO	126	245	310	NE	62	166	207
BS	3	187	5,046	GE	45	414	1,469
BL	86	261	505	JU	83	69	82
Totals					**2,880**	**7,261**	**176**

Source: Federal Office of Statistics, Statistics Yearbook of Switzerland*, 2003.*

role, according to the federal principles written into the Swiss Constitution, municipalities only have a general residual competence. This means that they can take charge only of those tasks that are not reserved for the confederation and the cantons (see 'Functions and powers' below).

Contrary to the Federal Constitution of 1874, the Federal Constitution of 1999 contains a specific article regarding municipalities. Article 50 reads:

1. The autonomy of the Municipalities is guaranteed within the limits fixed by cantonal law.
2. In its activity, the Confederation shall take into account the possible consequences for the Municipalities.
3. In particular, it shall take into account the special situation of cities, agglomeration, and mountainous regions.

The municipalities are, however, not an institution of federal law. It is the respective legislation of each of the 26 cantons that sets up the municipalities and defines their organisation, competencies and resources, as well as the power

of control and intervention of the cantonal authorities in municipal affairs. For example, the new Constitution of the canton of Fribourg adopted in May 2004 defines the roles, status, tasks, institutions and finances of its municipalities, as well as the territorial structure of the canton.

INSTITUTIONAL ARRANGEMENTS AND SUPERVISION OF LOCAL GOVERNMENTS

TYPES OF MUNICIPALITIES[2]

There are different types of municipalities in Switzerland. The ordinary type is the political municipality that is composed of all citizens who live in the territory of a particular municipality. Some cantons also have what is known as a 'bourgeois' municipality where the main criterion is not territorial, but personal. In Geneva, the political municipalities of Vaud and Neuchatel are the sole type of local government. These three types of cantons have a unitary system. In other cantons, 'bourgeois' municipalities exist alongside the political ones in a dual system. Four cantons (Fribourg, Glarus, Schaffausen and Zürich) chose a mixed system whereby the political municipality manages the 'bourgeois' municipality.

Other types of municipalities exist, including church municipalities (*communes ecclésiastiques*, *Kirchgemeinden*), school municipalities (*communes scolaires*, *Schulgemeinden*) and, only in the German-speaking cantons, assistance municipalities (*communes d'assistance, Armengemeinden*).

MUNICIPAL ORGANISATION[3]

In terms of institutional arrangements, the Swiss municipalities may be divided into two main categories.

The organisation with two organs (*organisation bipartite, ordentliche Gemeindeorganisation*) has no parliament, only an executive branch and electoral body. This type of organisation exists in all cantons, except in the cantons of Geneva and Neuchatel. In Uri, Schwyz, Obwalden, Nidwalden, Glarus and Appenzell-Inner Rhodes, it is the sole form of organisation. Almost 2,500 municipalities share this type.

The organisation with three organs (*organisation tripartite, ausserordentliche Gemeindeorganisation*) has an electoral body, an executive branch and a parliament. This type of organisation is mandatory in the cantons of Geneva and Neuchatel, and exists in all big municipalities of Switzerland, except in the six above-mentioned cantons. Less than 400 municipalities have

this type of organisation, but the majority of the Swiss population lives in a municipality with a parliament.

For example, the May 2004 Constitution of the canton of Fribourg states:

> Article 131 (c) Institution
> 2. Each municipality has an assembly of all citizens (*une assemblée communale*) or a communal parliament (*un conseil général*) and a municipal council (*conseil communal*).[4]

And the 1847 Constitution of the canton of Geneva has the following sections:

> Article 146 Administration
> 1. In municipalities of more than 3,000 inhabitants other than the City of Geneva, the municipal administration is entrusted to an administrative council of three members elected by all the electors of the municipality.
> 2. In the other municipalities, the municipal administration is entrusted to a mayor and two deputies.
>
> Article 149 Composition
> The Law determines the number of members of municipal councils.
>
> Article 154 Municipal Council
> The City of Geneva has a municipal council of 80 members.
>
> Article 155 Administrative Council
> 1. The administration of the City of Geneva is entrusted to an administrative council of five members, nominated by the electoral body of the City of Geneva called together in a single college. The administrative council shares out its functions between its members.[5]

Whatever the type of organisation, the principle of separation of powers exists in municipal law.

Another characteristic of the municipal organisation is the absence of judicial power. In Switzerland, the courts are essentially a cantonal matter and, at the last level, a federal one.

The executive power is called the municipal council (*conseil communal, gemeinderat*) and is in most cases a collegial body, elected by the citizens. As a

rule it consists of five to ten members. The supreme organ of the municipality is either the assembly of all citizens (*assemblée communale*, *gemeindeversammlung*) or – as presented above – a communal parliament (*parlement communal, gemeindeparlament*, often called *conseil général*, *generalrat*).

The municipal electoral body differs from canton to canton, but the cantons are not totally free to define the composition of the municipal electorate. Two provisions of the Federal Constitution put in place the following principles:

> Article 39 Exercise of Political Rights
> 2. The political rights shall be exercised at the residence. The Confederation and the Cantons may foresee exceptions.
>
> 4. The Cantons may provide that new residents may exercise political rights in cantonal and municipal matters only once a waiting period of no more than three months has been observed.

In three cantons – Neuchatel, Jura and Vaud – cantonal law directly gives foreigners the right to vote in municipal matters. In the canton of Appenzell-Outer Rhodes, cantonal law allows the municipalities to give this right to foreigners, whereas in the canton of Thurgau, foreigners only have a consultative power in municipal affairs. The new Constitution of Fribourg sets up the right for foreigners to vote in municipal matters:

> Article 48 Active Citizenship
> 1. Have the right to vote and to elect in municipal matters, if they are of age:
>
> a) the Swiss women and men who have their residence in the municipality;
>
> b) the foreign women and men who have their residence in the municipality and [have lived] at least five years in the canton and have legal authorisation to live there.[6]

A law on this matter has yet to be written and adopted by the cantonal parliament and the electoral body.

In March 2003, Geneva launched two initiatives for foreigners: one for the right to vote and the other for the right to be elected at municipal level.[7]

DIRECT DEMOCRACY

A discussion on the Swiss federal system would be incomplete without a few words regarding direct democracy. On this subject, Dafflon and Perritaz wrote as follows:

> Direct democracy participation is provided in most cantonal constitutions for the Communes so that citizens themselves may take an active part in the decision-making process on all important political and economic issues. In local public finance, this competence concerns: current budget, individual investment items of the capital budget, annual tax coefficients, user charges regulations (taxation according to the benefit-principle in general), local public property sale or purchase, horizontal cooperation in the form of inter-communal association or special purpose district for the joint production of public facilities, and the amalgamation of Communes.
>
> In addition to participation, control and audit competencies of some sort exist in all direct democracies. The communal assembly of citizens, or the communal 'parliament' where it exists, elects a finance committee for the length of the political term of office. This committee has not only traditional audit competencies, but also the duty to report to the assembly about the financial aspects of capital expenditures and changes in taxation. In addition, it has the power to investigate financial matters without warning, if necessary. In some cantons, it may lodge a complaint against individual members of the local authorities for misuse of public funds.[8]

The authors continue:

> Obviously these institutions of the federal system [such as referenda] do not have a unique purpose of (economic) efficiency in the performance of expenditures and taxation. The more direct and democratic the institutions are, the better is their general capacity to strengthen the system of checks and balances, by both dividing and sharing political decision-making power. They give citizens/voters/taxpayers multiple accesses to government, increase their capacity to control the budget and reduce political and bureaucratic leeway in rent-seeking behaviour. In Hirschman's terminology, they not only have the 'exit' (Tiebout-style mobility), but also the 'voice' solution.[9]

Another important observation is the difficulty facing some municipalities when it comes to finding candidates for elections. According to Dafflon, in the cantons of Fribourg, 70% of those municipalities with populations of less than 20,000 had tacit elections because the number of candidates was the same as the number of seats. This problem is less acute in municipalities with more than 20,000 inhabitants.[10]

Furthermore, inter-municipal collaboration raises the issue of the accountability of municipal authorities. In the canton of Fribourg, municipalities had 63 tasks of public law. Between 1960 and 2001, 30 were centralised at the level of the canton. Among the remaining municipalities, 30 are subjects of inter-municipal collaboration. The process of designing who will take the lead, manage, control and pay is often decided by the authorities without clear consequences for the public. Who, for example, does a citizen complain to in case of misuse of public funds? It is for this reason that the merger of municipalities appears to be a more democratic solution, offering greater guarantees regarding accountability and respect for the principles of good governance.[11]

SUPERVISION OF MUNICIPALITIES[12]

Swiss municipalities are subject to cantonal supervision. This control is greater than that of the confederation on the cantons, but it has to respect the municipal power of self-organisation and municipal autonomy.

As noted above, municipal autonomy is currently guaranteed by article 50 of the Constitution. Before this, the guarantee was a principle of cantonal constitutional law and often acknowledged by the Federal Court in its jurisprudence. However, if the municipalities are autonomous, a major difference exists between the position of cantons in relation to the confederation, and those of the municipalities in relation to the cantons.

First, the relationship between the confederation and the cantons is looser than that between the cantons and the municipalities. Second, the cantonal competencies are guaranteed by the Federal Constitution in article 3, while the municipal competencies are not guaranteed by the constitutions of the cantons. Municipal autonomy is found in general terms in cantonal constitutions. For example, the 2004 Constitution of the canton of Fribourg states in article 129 (a)(2) that 'municipal autonomy is guaranteed in the limits of the cantonal law'.[13] Moreover, municipal competencies are often written in cantonal laws.

Cantons may therefore decide to modify the respective law and thus change the municipal competencies and autonomy.

The supervision of municipalities differs also with the types of activities controlled: supervision will be quite strict in areas where municipalities execute cantonal or federal law and less so when municipalities act in their own fields of competencies.

The supervision of municipalities is done under the responsibility of the Council of State (the cantonal executive branch), which may delegate this task to a department. This supervision is limited to the legal aspect of the municipal competence.

The means of control are various and may be of two kinds: preventive or repressive. However, the policy of supervision is changing, especially regarding financial matters. For example, due to the high rate of debt in the municipality of Loeche-les-Bains in the canton of Valais, the Council of State nominated a guardian to manage this locality (see further below). The municipality's mayor was also sued and sentenced to imprisonment.

FUNCTIONS AND POWERS[14]

There is a general principle that all tasks not under federal or cantonal rule fall to the municipalities. This principle, called subsidiarity, states that a task has to be transferred to the higher level of government only if the lower level cannot, or is no longer able, to carry out this task. Moreover, the management of financial and administrative affairs belongs to municipalities. Municipalities are responsible for the building of local streets and squares, water and sewage systems, schools, etc., and have more recently been charged with responsibility for welfare, education, health, town and country planning, environmental protection, sports and recreation, culture, etc. (see Table 4 below).

Differences between cantonal regulations can be considerable. Some cantons, usually German-speaking, give their municipalities very broad autonomy. Other cantons – usually French-speaking and influenced by the French system – prefer a more centralised approach.

FINANCING OF LOCAL GOVERNMENT

TAX SYSTEM OF SWITZERLAND[15]

Regarding fiscal policy, a citizen's share of the combined tax revenue of all three

tiers of government as a share of gross domestic product is low when compared to Switzerland's neighbouring European Union (EU) countries. Yet the trend is for an increase. The global tax share for a representative citizen not only differs widely among cantons, between 57 and 131 index points (mean=100), but there has been no convergence of individual tax share over the past decade.

Taxing assignment

At the level of the confederation, taxation is restricted to those taxes explicitly provided in the Federal Constitution.

> Article 134 Exclusion of Cantonal and Municipal Taxation
> What federal legislation subjects to value added tax, to a special consumption tax, to stamp tax, or to withholding tax, or declares to be exempt from these taxes, may not be taxed by the Cantons and the Municipalities with taxes of the same kind.
>
> Article 128 Direct Taxes
> 2. In establishing the tax scales, the Confederation shall take into account the share of direct taxes on the Cantons and the Municipalities.

The constitutional authority to levy direct taxes and value-added tax grossing more than 50% of the total federal tax revenue was granted in 1993 and expires in 2006.[16] The ability of the confederation to raise taxes is further limited by the fact that maximum tax rates are set by the Federal Constitution.

> Article 128 Direct Taxes
> 1. The Confederation may raise a direct tax:
> a. of at most 11.5 percent on the income of natural persons;
> b. of at most 9.8 percent on the net profit of legal entities;
> c. of at most 0.0825 percent on the capital and reserves of legal entities.
>
> Article 130 Value Added Tax
> 1. The Confederation may levy a value added tax with a maximum tax rate of 6.5 percent on the supply of goods and services, including own use, and on imports.

Other substantial revenues are generated by the tax on financial transactions (stamp duty), the withholding tax on the revenue from movable capital assets, lottery wins, insurance benefits as well as on several special consumer taxes (tobacco and mineral oil products). Table 2 sets out the taxes of the three levels of government.

Table 2: Three levels of governments collecting taxes

Federal	*Cantonal*	*Municipal*
Income tax	Income and wealth tax	Income and wealth tax
Tax on profits	Tax on profits and capital	Tax on profits and capital
–	Household tax	Household tax
Swiss withholding tax	–	–
–	Inheritance and gift taxes	Inheritance and gift taxes
Military and civil service exemption tax	–	–
Stamp duties	Stamp duties	–
VAT	–	–
Tobacco tax	–	–
Tax on beer and distilled spirits	–	–
Tax on mineral oil	–	–
Automobile tax (motorway & trucks)	–	–
Customs duties	–	–
–	Immovable property gains tax	Immovable property gains tax
–	Real estate tax	Real estate tax
–	Transfer tax	Transfer tax
–	Lottery tax	Lottery tax
–	Motor vehicle tax	–
–	Dog tax	Dog tax
–	Entertainment tax	Entertainment tax
–	Tax on hydro power stations	–
–	Sundry taxes	–
–	–	Trade tax
–	–	Miscellaneous tax

Source: Swiss Tax Conference, The Advantages of the Swiss Tax System, *p 10.*

While municipalities enjoy a high degree of fiscal autonomy, fiscal sovereignty belongs to the confederation and the cantons. At cantonal level, cantonal tax revenue consists mainly of direct taxes, motor vehicle license fees, revenue sharing in federal taxes, indemnities and sales. The direct taxes are the most important source of finance for cantons and are levied on personal income and wealth, and corporate profit and capital.

Municipalities have no absolute authority over taxation. Their fiscal flexibility resides in the choice of the tax rate (how much the municipality will tax given what the confederation and canton have determined as taxable) concerning income and wealth taxes.[17] At local level, the municipalities rely primarily on direct taxes, property taxes and on rents, indemnities and sales.

In addition to their own tax revenues, the cantons and municipalities receive grants-in-aid amounting to around 25% to 13% respectively of their total revenues. This means 87% of municipalities' revenue comes from their own tax revenues.[18]

The division of tax revenue for the confederation, cantons and municipalities in 1999 was as follows: confederation 44.8%; cantons 31.4%; and municipalities 23.8%. The revenues of municipalities are set out in Table 3.

Table 3: Revenues of municipalities, 2001

Types of revenue	*Swiss francs (millions)*	*Per cent*
Current collection (*recettes courantes*)	**41,483**	**96.4**
Income and wealth tax	20,998	48.8
Individuals	16,626	38.6
Legal entities	3,024	7.0
Others[1]	1,347	3.1
Real estate tax	58	0.1
Trade tax	136	0.3
Immovable property gains tax	2,789	6.5
Interest	613	1.4
Taxes for services, fines	10,904	25.3
Other taxes for services[2]	1,508	3.5
Subsidies	6,888	16.0
Investment collection (*recettes d'investissement*)	**1,550**	**3.6**
Total	**43,033**	**100**

1 Household tax, inheritance and gift taxes, transfer tax, lottery tax.
2 Services organised by a municipality for other municipalities too and paid by these ones.

Source: Federal Office of Statistics, Statistics Yearbook of Switzerland*, 2004, p 811.*

Expenditure assignment

According to the Federal Constitution, legislative sovereignty of the confederation is restricted to the powers explicitly attributed to it by articles 3, 42 and 43. This means that all residual powers remain with the cantons, though they may, and in fact often do, delegate them to their municipalities.

The cantons not only enact the necessary regulatory statutes to render operational the sometimes rather general federal rules, but they also have to provide the infrastructure needed for the implementation of 'cooperative or administrative federalism'. The financial consequences of this implementation are solved by the Constitution in article 46:

> The Confederation shall take into account the financial burden that is associated with implementing federal law by leaving sufficient sources of financing to the Cantons, and by ensuring an equitable financial equalization.

But the confederation often delegates the execution of tasks coming from federal law directly to the municipalities. Moreover, 65% of municipal expenditure is made without any freedom of decision, coming directly from decisions taken at cantonal level.[19]

Existing laws do not accurately reflect the municipal spending competencies because, according to the cultural, historical and institutional peculiarities of a canton, and due to its revenue-raising powers, implementation will differ. Broadly speaking, however, we can summarise the salient points as follows:

- The share of the three tiers of government is as follows: the federal budget accounts for 32%, the cantons for 41% and the municipalities for 28% of the total public expenditures.
- The main federal competencies are social security, external affairs and security, transportation (road and rail infrastructures) and agriculture.
- The main cantonal competencies are internal security and justice, education, and social services.
- The main municipal competencies (with differences according to cantons) are primary school, sport, local culture and fire brigades.

Table 4 sets out the competencies of the confederate, cantons and municipalities.

Table 4: Competencies by government level

Federal competencies	*Cantonal competencies*	*Municipal competencies*
Organisation of the federal administrative body	Organisation of the cantonal authorities	Organisation of the municipal authorities
Foreign affairs and international treaties		
Army		
Economic and financial politics		
Post and railway		
Transport	Traffic (cantonal roads, public transports)	Traffic (local roads, public transports)
Energy		
Social insurance (old age, pension, disability, unemployment)	Social welfare	Social welfare
Labour law		
Civil law		
Criminal law		
Civil and criminal procedures		
Custom offices		
Environmental care	Environment	Environmental care
Territorial arrangement		Local land use planning
Agriculture		
Federal tax power		
Citizenship	Citizenship	Citizenship
	Education	Primary schools
	Culture	Local infrastructure (culture, sport, leisure)
	Police	Local police and fire brigades
	Public health	Health
	Relationship state-church	
	Language	
		Communal taxes
		Waste disposal

Source: Bulliard, Presentations to foreign delegations visiting Switzerland (unpublished).

There are two limits on the extension of federal competencies. First, the cantons must decide what new competence should be given to the confederation. Second, article 175 of the Constitution limits the number of ministers, or members of the executive (the Federal Council), to seven members. This explains why Switzerland has (sometimes strangely) combined ministries, for example, the Ministry of Environment, Transportation, Energy, and Communication or the Ministry of Defence, Protection of the Population, and Sport.

There are some competitive competencies. In case of disputes, article 44(3) of the Constitution states that, '[d]isputes between Cantons, or between Cantons, and the Confederation shall, to the extent possible, be resolved through negotiation or mediation.'

An interesting case could arise regarding two principles of Swiss taxation: one is that each citizen has to pay his/her taxes according to his/her canton of residence; the second is that inter-cantonal double taxation is prohibited. At the end of the 1990s, Geneva sent fiscal declaration to be filled out by people working in the canton's territory, but living in the neighbouring canton of Vaud, in order that their taxes could be paid to the Geneva administration.

Table 5: Expenditures of municipalities, per functions (2001)

Functions	*Swiss francs (millions)*	*Per cent*
Education	9,663	23.2
Health	7,741	18.6
Only hospitals	7,328	17.6
Social welfare	5,885	14.1
General administration	3,691	8.8
Environment	3,603	8.6
Traffic	3,018	7.2
Only local roads	2,433	5.8
Communal taxes	2,945	7.1
Culture and leisure	2,206	5.3
Police and fire brigades	1,897	4.5
Public economy	820	2.0
National defence	239	0.6
Total	**41,709**	

Source: Federal Office of Statistics, Statistics Yearbook of Switzerland*, 2004, p 817.*

Geneva had for years tried to find a solution to this issue: a great many people work in Geneva and use the infrastructure there (roads, leisure and sport complexes, etc), but Geneva does not see the tax revenue because these people live in another canton. The relevant ministers in both cantons discussed the matter for several years and at the end, upset and exhausted, Geneva's finance minister sent out the fiscal declarations.

Of course, the fiscal administration of Vaud told their citizen not to respond to the declaration, nor pay. Vaud's finance minister referred the matter to the Federal Council, which asked the Federal Court to decide the issue. The Federal Court, following the two above-mentioned principles, passed judgment in favour of Vaud and requested the Geneva authorities to stop its 'campaign'. We are now at an impasse, with Geneva not happy, but unable to change anything.

Table 5 sets out the main expenditure items of municipalities.

FISCAL EQUALISATION SYSTEM

The federal–cantonal fiscal equalisation system

A fiscal equalisation system exists at federal and, to some extent, cantonal levels (see below). The aim is to try to maintain equality among the cantons, which differ with respect to size, population and gross domestic product. Formal fiscal equalisation was introduced in 1959 through article 135 of the Constitution. The fiscal equalisation law has the objective of providing all cantons with the means necessary to carry out their functions within the federal states and to provide their citizens with a basic level of services.

The main instrument is the grading of federal grants to the cantons and the cantonal contributions to the funding of federal tasks according to what the law calls financial capacities,[20] but which also includes tax effort. In other words, those cantons with an index number of at least 120 are considered to be of high financial capacity and will therefore get no or only fixed grants, while cantons with an index of 60 or below will get grants at the maximal rate, and for the cantons in between a floating scale will be applied.

Two main problems, however, exist. First, the cantons are unhappy with the 16 rating criteria and some want to change their category. Second, the performance of the equalisation system is poor. In order to be more efficient, the Federal Council launched a reform of the system, a discussion of which lies outside the scope of this chapter.

The cantonal–municipal fiscal equalisation system

As previously mentioned, the respective financial weight of municipalities may differ greatly from one municipality to another. Many small municipalities are heavily dependent on cantonal subsidies and are thus less independent from their cantonal authorities.

The cantonal–municipal fiscal equalisation system reflects similar problems as that at the federal–cantonal level. However, the system has adopted different approaches, especially since it is easier for cantons to impose a more balanced system on the wealthier municipalities.

The cantonal–municipal system of fiscal equalisation varies across all cantons,[21] but each one has such a system. For example, the 2004 Constitution of the canton of Fribourg provides as follows:

> Article 132 (d) Finances
>
> 1. The municipalities enjoy autonomy in determining the rate of and to levy taxes and other municipal duties in the limits of the legislation.
> 2. They have to establish a financial plan.
>
> Article 133 Fiscal Equalization
>
> The State takes measures in order to diminish the effects of differences between municipalities; among other measures, it institutes fiscal equalization.[22]

As Dafflon and Tóth propose, the characteristics of local fiscal equalisation in the cantons have to be clearly delineated following the theory of public finance.

Two types of equalisation exist: vertical and horizontal. Vertical fiscal equalisation is a set of transfers provided to municipalities by the canton. Horizontal fiscal equalisation, by contrast, is a financial linkage among the municipalities themselves.

Dafflon and Tóth draw the following distinctions:

> *Direct fiscal equalisation* is effected when the mid-tier government, or in some cases the municipalities themselves, participate in the maintenance of a general equalisation fund. This fund is allocated on the basis of the fiscal capacity of municipalities and, optionally, by an additional set of criteria. Such grants are neither specific nor conditional, which means that they are not linked to any specific local public service.

> *Indirect fiscal equalisation* is being pursued when the transfers provided by the mid-tier government to the constituent municipalities are assigned to well-defined local public tasks and at the same time are differentiated on the basis of the fiscal capacity of recipient communities. Accordingly, these transfers are specific conditional or specific block grants.
>
> *Mixed fiscal equalisation* refers to the combination of direct and indirect systems. It implies the simultaneous existence of a common equalisation fund and a set of specific equalisation grants provided to municipalities by the intermediate level of government.[23]

A final distinction has to be made related to the budget controls:

> Vertical indirect and vertical mixed fiscal equalisation may be financed either through open-end or close-end grants.
>
> *Open-end grants* are provided to the local community for the execution of a certain public responsibility, whereby the amount of the grant is unlimited by law. The municipality can claim the specific subsidy as long as it meets the eligibility criteria, whatever the financial position of the canton.
>
> *Closed-end grants:* contrary to open-end grants, the amount of a close-end grant is kept between certain limits fixed by law.[24] In cases where the aggregate demand for funding exceeds the available resources, one or more selection criteria need to be introduced.[25]

Cantons then use the index of fiscal capacity for calculating the equalisation grant amount for each municipality. The canton of Fribourg is peculiar since it divides its municipalities into six classes, then uses the classes to fix the amount of the grant.[26]

SUB-NATIONAL BORROWING POWER

This topic is not dealt with much in the literature regarding municipalities in Switzerland. One reason may be that until the end of the 1990s, municipalities were considered serious debtors. A number of problems related to the bankruptcy of the municipality of Loëche-les-Bains in Valais changed the view of investors who no longer consider that municipalities, as debtors, present a zero risk.

Borrowing power of municipalities[27]

Swiss municipalities have the power to borrow. A few comments can be made in this respect using the example of the canton of Vaud, but it is difficult to give a general picture of the state of municipal borrowing in Switzerland.

Municipalities in Vaud have been granted the following types of loans by the Cantonal Bank:

- Construction loans
- Working capital loans
- Long-term, variable rate loans
- Medium/long-term, fixed-rate loans
- Private investments (Sfr 5 to SFr 50 million)
- Bond loans (more than Sfr 100 million)
- Rate insurance via 'interest rate swaps' (offered only by the Cantonal Bank of Vaud).[28]

Besides the Cantonal Bank, other typical financial lenders to these municipalities are:

- Pension funds
- Insurance companies
- Large Swiss and foreign banks
- Regional banks
- Centre for issuing bonds for the Swiss municipalities
- Swiss Old Age and Survivors' Insurance
- Intra-communal financing
- Cantonal and federal aid through LIM (Law on Investments in Mountain regions) or LDR (Law on Regional Development) loans.[29]

In 2003, the Cantonal Bank of Vaud handled 14% of the financing of the Vaud municipalities, representing Sfr 725 million.[30]

Banks that want to lend to municipalities have since 2000 developed their own rating systems regarding these specific customers.

In the case of severe financial difficulty where a municipality cannot repay a loan, the cantonal authorities order that the municipality be under strict official supervision. In a second stage, the cantonal authorities order that the municipality be administered by a third party – an administrator – whose role is to minimise costs and increase tax income. At the same time, the municipal

council members are relieved of their responsibilities.[31] This poses the questions of accountability and legitimacy of the new municipal authority and shows that things are not yet really clear.

Cantonal control of local finances[32]

As mentioned above, municipalities in Switzerland have extensive autonomy. The freedom to make financial decisions is often great as well, although the general trend is to control more what the municipalities are doing in terms of investments and public finances.[33] This trend is recent, beginning in 1999 with the so-called 'financial debacle of Loëche-les-Bains', involving a municipality in the canton of Valais. Since then, rules regarding the finances of municipalities have changed in Switzerland.

This new trend can only be appreciated in the context of the old rules and procedures that obtained. All cantons have their own specific laws and legal instruments in order to control municipal finances, and there are big differences among the cantons. It is thus difficult to delineate general rules.

Generally speaking, however, municipalities have to nominate an audit organ, independent from the executive and from the administration. This audit company may be a public institution or an external private company. But only seven cantons describe the capacities and competencies that such organ must have.

All cantons have a central office in charge of the supervision of their municipalities. In every canton except one, the municipalities have to give their financial statements to this office. The budget for the next year is requested in only 18 cantons. A financing plan is mandatory in only a few cantons and often only for municipalities already in financial difficulties or for municipalities that are subject to the cantonal system of equalisation, where this system exists.

We can distinguish between controls over the past, controls during the fiscal year and controls over the future.

While only 17 cantons control the annual financial statements, 20 cantons control the amortisation and budgetary equilibrium. These two important issues regarding the self-financing capacity and financial health of municipalities are thus formally controlled by most cantons. However, only nine cantons ask their municipalities to provide them with revised financial statements.

Regarding control during the year, 13 cantons do not in any way control the financing decisions of their municipalities. Seven cantons control these

decisions when municipalities are borrowing money, seven when municipalities asked their cantons to grant a financial guarantee, five if municipalities need a loan and three if municipalities think that the canton might be interested in investing in a project.

For controls over the future, only eight cantons control the budget. Yet 18 ask their municipalities to give them a budget! It is not clear what the ten cantons are doing with the budgets when they do not control them.

All cantons have intervention mechanisms which can be used against municipalities that do not respect the federal or cantonal laws. In practice, these measures are quite general and not a real constraint. Often the political implications might be an obstacle to judicial actions.

As part of the new trend, a 'conference of cantonal authorities for supervising the finances of municipalities' was created. This organ is mostly consultative, but tries to give general guidelines and to promote harmonisation of rules regarding the financial control of municipalities in Switzerland. In order to improve supervision of municipalities, this conference made a proposal regarding the following:

- Objectives regarding the audit of annual financial statements.
- Objectives regarding control of financial obligations and fiscal decisions taken by municipalities.
- Objectives regarding control of financial investments for projects through public and/or private borrowing.
- Objectives regarding budgetary controls.

Three recent developments in municipal borrowing deserve mention. First, some private banks, mostly cantonal ones, are currently developing a rating system for the finances of municipalities in order to be informed of the risks involved when lending money. Second, Switzerland is one of the most developed countries in the world, yet it lacks reliable and effective statistics regarding municipal finances. This is needed to improve not only the international comparability of such statistics, but also inter-canton comparability.

Finally, some numbers illustrate the debt issue. Between 1970 and 1998 the debt of the confederation increased from Sfr 31 billion to Sfr 101 billion, the debt of the cantons increased from Sfr 22 billion to Sfr 66 billions, while the debt of municipalities remained relatively static, increasing by only Sfr 5 billion, from Sfr 23 to Sfr 28 billion.

INTERGOVERNMENTAL RELATIONS

INTRODUCTION[34]

Relations between the confederation and cantons have always been informal, but since the mid-1990s the cantons have been calling for their institutionalisation. At the same time the establishment of inter-cantonal associations and an association (called a conference) of all cantonal governments tends to give more weight to the cantons in their discussion with the confederation.

European integration and the internal issues raised by this process have made necessary a closer collaboration between the confederation and the cantons, and thus the creation of new consulting organs. Moreover, the Swiss Federal Constitution of 1999 set up new procedures of association with the cantons. Globalisation is also putting pressure on the confederation, the cantons and the municipalities to find new ways of organising their multiple tasks and relationships – that is, their vertical relations.

But horizontal relations exist too. At cantonal level, relations take the form of inter-cantonal treaties, even of attempts to merge cantons. At municipal level, relations take the form of associations of municipalities and, in two cantons at least, Fribourg and Ticino, the form of merging municipalities.

FEDERAL-CANTONAL-MUNICIPAL RELATIONS

It is not easy in Switzerland (nor in other federal countries) to draw a clear distinction between 'formal structures and institutions' and 'other non-constitutional forums' since we are, when dealing with intergovernmental relations, at the edge of law and non-law.[35]

There has nevertheless been a trend starting more than a decade ago to improve cooperation between the confederation and the cantons, both constitutionally and institutionally. Starting from cooperation that was mostly informal – and often managed by the confederation – progress is being made with institutions of inter-cantonal cooperation.

Horizontal relations

As mentioned, two types of horizontal cooperation exist at municipal level, namely: inter-communal collaboration and mergers. Some cantons have legal

dispositions regarding this field, others not. For example, the Constitution of the canton of Fribourg explicitly mentions the two ways:

> Article 134 Inter-municipal collaboration
> 1. The State encourages inter-municipal collaboration.
> 2. Municipalities can create an association in order to accomplish one or more tasks. They must accept all the aims of the association.
> 3. The State can oblige municipalities to be part of an association or to create one.
> 4. Municipalities can create regional administrative structures.
>
> Article 135 Mergers
> 1. The State encourages and favours the merger of municipalities.
> 2. A merger can be proposed by the municipal authorities, by a popular initiative or by the State.
> 3. …
> 4. When the municipal, regional or cantonal interests ask for it, the State can give the order to merge. The concerned municipalities must be consulted.[36]

CONCLUSION: EMERGING ISSUES AND FUTURE DEVELOPMENTS

> The case of Switzerland shows the essence of what federalism is: a multi-level state architecture in which the architects are always drawing new plans and building new constructions according to people's will.[37]

As the role of local government in Switzerland's multi-level government evolves, the possible future challenges facing the government include the following:

- What will future relations between the confederation, cantons and municipalities look like, regarding the assigning of taxes and competencies?
- Will a 'flat tax' be introduced in Switzerland? What would be the consequences of this for Swiss federalism?
- If higher orders of government download responsibilities and competencies

to the municipal level, is it fair that municipalities have no right to refuse (especially if they do not have the capacity to fulfill these tasks)?

- Regarding the political integration of foreigners at municipal level: will their right to vote and to be elected, change Switzerland's political landscape?

- Merger of municipalities: when will the democratic limits be reached?

- Inter-cantonal and inter-municipal cooperation: what about the democratic control of such cooperation? What about the accountability? Who is responsible for what and to whom?

- Centralisation-decentralisation tensions: where will these tensions lead?

- In cantons like Neuchatel and Vaud, some municipalities are asking for the possibility of a referendum for municipalities based on the principle of article 141 of the Federal Constitution: is this a solution?

- The introduction of e-voting and e-government: what are the future consequences for poor municipalities or for poor cantons?

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Constitutional reform: Local government and the recent changes to intergovernmental relations in Italy

BENIAMINO CARAVITA DI TORITTO

INTRODUCTION

In 1999 and 2001, two important constitutional laws radically altered Title V of the Constitution of Italy: namely Constitutional Law 1/1999 of 22 November and Constitutional Law 3/2001 of 18 October. They concern the regions, provinces and municipalities.[1] Constitutional Law 1/1999 introduced the direct election of the presidents of the regions and gave the Italian regions the power to approve autonomously their own statutes, within the framework of the Italian Constitution. Under Constitutional Law 2/2001 of 31 January 2001, regions with special status will be able to organise their own forms of government, in keeping with the innovations regarding forms of government and statutory autonomy introduced for the other regions under Constitutional Law 1/1999.

CENTRAL, REGIONAL AND LOCAL GOVERNMENT RELATIONS

Constitutional Law 3/2001 has radically altered the overall relationship between central government, regional government and local governing bodies. Article 114 of the revised constitutional text reads: 'the Republic consists of municipalities, metropolitan cities, provinces, regions and the State.' The previous text, however, read: 'the Republic is divided into regions, provinces

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and municipalities.' Moreover, paragraph 2 of the amended article 114 has extended the status of regions in the abolished article 115[2] to the provinces, metropolitan cities and municipalities. Under this law, they join the regions as autonomous entities with their own statutes, powers and functions defined in the Constitution.[3] Therefore, the Constitution is today the means by which powers of autonomy are guaranteed, and relations between central government and sub-national bodies are determined.

The final paragraph of article 114 constitutionalises the role of Rome as capital of the Republic and provides for state law to regulate its legal status.

As a consequence of article 114, the components of the Republic are presently in a situation of 'equal dignity', characterised by their differing functions: under Constitutional Law 3/2001, heteronomous controls of one governing body over another have been abolished. In particular, the Constitution no longer provides for preventive state control over regional laws,[4] state control over regional acts,[5] or regional control over acts of local governing bodies.[6]

As a result of Constitutional Law 3/2001, the central government's regional commissioner no longer exists. This figure's role was to oversee central government administrative functions in each regional capital and to coordinate those functions with those exercised by the regions.[7]

The revised Title V of the Constitution does not fail to make reference to the concept of 'unity of law' and 'unity of economy'. These are cited in the revised text[8] as a basis for the substitutive powers of the state over the regions and local government and were introduced partly to counter-balance the above-mentioned abolition of central government control.

In a recent Constitutional Court ruling, while pointing out that 'the national interest no longer limits regional legislative authority, by legitimacy or merit', the Court clarified that the Italian constitutional system had the capacity to respond to the demands of unity.[9] In this ruling, the Constitutional Court affirmed that the Italian constitutional system contained the necessary apparatus which could be implemented in response to the demands of unity present in the most varied contexts of life, which, on the level of legal principles, finds support in the principle of unity and indivisibility of the Republic as laid down in article 5 of the Constitution.

NEW DIVISION AND INTEGRATION OF LEGISLATIVE AND REGULATORY POWERS

In modifying the text of article 117, Constitutional Law 3/2001 has introduced

a new division of legislative and regulatory powers[10] between the central government and the regions, thereby constitutionalising the regulatory power of local governing bodies.

With regard to areas of legislative competence, the revised text of article 117 contains a list of matters in which the state has exclusive legislative power, matters which were not present in the previous text of article 117.[11] It also contains a longer list of matters subject to concurrent state and regional legislative powers.[12] A closing provision assigns to regional legislative powers all matters not reserved to exclusive state law and concurrent powers of the state and the regions.[13]

This model of federalism tends towards the integration of powers rather than to their separation. Maintaining concurrent powers and widening the scope of those matters they concern illustrate this, as well as the greater freedom left to the regions in exercising such powers.

The provision stating that the state holds transversal legislative competence – for example, 'the determination of essential levels of service regarding civil and social rights which must be guaranteed nationally', or 'environmental protection' and protection of competition – demonstrate the collaborative nature of the federalist choice made in the constitutional changes of 2001. In exercising such powers, the state may even intervene in areas of exclusive regional legislative powers.[14] A further change introduced by article 116 paragraph 3 of the Constitutional Law 3/2001 is that ordinary regions may request and obtain 'further particular forms and conditions of autonomy' in matters relating to concurrent legislative powers, as well as in some matters reserved to the exclusive authority of central government.[15] These 'further conditions of autonomy' may be granted to other regions, under state law, on the initiative of the region concerned and following consultation with local administrations, according to the principles laid down in article 119 of the Constitution in matters of financial autonomy.

This state law requires the approval of parliament with an absolute majority, as well as prior agreement between the state and the region concerned. However, concerns arose that too much freedom had been given on questions of autonomy to those regions with an ordinary statute. Thus the constitutional legislator of 2001 established the principle according to which the provisions dictated by Constitutional Law 3/2001 are applicable to special status regions and the autonomous provinces 'in those parts which provide for greater forms of autonomy compared to those already assigned'.[16]

Finally, with regard to regulatory powers, the new article 117 of the Constitution states that the power to issue by-laws is vested in the state regarding all matters where it has exclusive legislative power. This power is vested in the regions in all other matters and also where the state devolves such power to the regions. Local administrations have regulatory power with respect to the organisation and fulfilment of the functions assigned to them.[17]

STATE AND REGION SUBSTITUTIVE POWERS

As already mentioned, article 120 paragraph 2 of Constitutional Law 3/2001 has introduced the provision of a substitutive 'government' authority with regard to the regions and local governing bodies to guarantee values such as 'legal and economic unity', 'public safety and security', the safeguarding of 'basic standards of welfare', and respect for international and Community law.[18] Some experts believe that the constitutional provision of substitutive state authority constitutes a means whereby the demands of national unity may prevail.

This assumption is demonstrated by the fact that, unlike the provisions of state legislation and confirmed by constitutional law, the constitutional provision does not subordinate state intervention to the inertia of the regional or local body, but, on the contrary, links the possible exercise of this substitutive authority to much wider assumptions. With regard to substitutive authority, the question of government intervention at legislative as well as administrative levels remains open. It must be noted, however, that in deference to traditional constitutional law on substitutive authority, article 120 paragraph 2 delegates to state law the task of defining the procedures to guarantee that such powers are exercised within the limits set by the principles of subsidiarity and fair cooperation.

In a recent ruling, the Constitutional Court also stated that,

> [A]rticle 120 paragraph 2 does not preclude, on principle, the possibility that regional law, intervening in matters of its own area of competence, and organising, in accordance with article 117 paragraphs 3 and 4, and article 118 paragraphs 1 and 2 of the Constitution, the exercise of administrative functions within the municipalities' field of competence, provides for substitutive powers with respect to regional bodies, for the fulfilment of acts or obligatory activities, in the case of inertia or non-

> fulfilment on the part of those bodies responsible, in order to safeguard unitary interests which would otherwise be compromised by that same inertia or non-fulfilment of duties.[19]

In the same ruling the Court identified the conditions and limits on the regions' exercise of substitutive powers towards local governing bodies.

THE CONSTITUTIONAL PRINCIPLE OF SUBSIDIARITY

The reference to the principle of subsidiarity in article 118 paragraphs 1 and 3 of the Constitution is another indicator of the collaborative nature of the federalist model chosen by the constitutional legislator in 2001. Such reference is made both to the principle of subsidiarity in a vertical sense, with which the Constitution provides for the exercise of administrative functions in favour of the local bodies closest to the citizens; and the principle of subsidiarity in a horizontal sense, which provides for the exercise of activities of general interest by individuals or associations working in society.[20] On this question, paragraphs 1 and 4 of article 118 state:

> 1. Administrative functions belong to the municipalities except when they are conferred to provinces, metropolitan cities, regions or the State in order to guarantee uniform practice; the assignment is based on the principles of subsidiarity, differentiation and adequacy; and
>
> 4. State, regions, metropolitan cities, provinces and municipalities support autonomous initiatives promoted by citizens, individually or in associations, in order to carry out activities of general interest; this is based on the principle of subsidiarity.

Subsidiarity is therefore a powerful constitutional principle of intergovernmental devolution and autonomy.

THE COUNCIL OF LOCAL GOVERNMENTS

The new text of article 123 paragraph 4 required the new regional statutes to provide for a Council of Local Governments to function as 'a body for consultation between the regions and local authorities'. Prior to the

Constitutional Law 3/2001, article 3 paragraph 5 of Administrative Order 112/1998 had assigned to the regions the power to provide, within their area of legislative autonomy,

> means and procedures to meet and consult, on a permanent basis, which give rise to forms of structural and functional cooperation which will enable collaboration and concerted action to take place between regions and local authorities within their respective fields of competence.

In implementing this decision, many regions had instituted 'conferences' of local authorities. The composition, functional nature and decision-making authority of the Council of Local Governments are currently under discussion.

METROPOLITAN CITIES AND DEVELOPMENT

An initial response to the needs of the larger Italian cities for better governance dates back to 1990.[21] Ten years later, Law 267/2000, Consolidated Law on Local Government (CLLG),[22] laid out a more detailed system for the institution of metropolitan cities and areas. Special status regions are vested with the legislative power to issue laws to create metropolitan cities in their areas.

On the basis of article 22 paragraph 1 of CLLG, 'the areas including the municipalities of Turin, Milan, Venice, Genoa, Bologna, Florence, Rome, Bari, Naples and the other municipalities which are closely integrated territorially' are considered metropolitan areas.[23] In these areas, 'the capital municipality and the other municipalities are closely connected territorially …',[24] and they can become metropolitan cities and thereby acquire 'the functions of the province'.[25]

Under Constitutional Law 3/2001, the metropolitan cities are constitutionally recognised for the first time. The revised text of article 114 of the Constitution states that:

> The Republic consists of municipalities, provinces, metropolitan cities, regions and the State. The municipalities, provinces, metropolitan cities and regions are autonomous entities with their own statutes, powers and functions according to the principles defined in the Constitution. Rome is the capital of the Republic. State law regulates its legal status.

Metropolitan cities are also mentioned in article 118 governing the division of

administrative functions between state, regions and local government. They are also mentioned in article 119, which equates them with the regions, municipalities and provinces in dealing with their financial autonomy.

In accordance with Law 131/2003 implementing article 2 of Constitutional Law 3/2001, the government must adopt, within two years from its coming into effect, one or more legislative decrees aimed at determining the essential functions to enable the metropolitan cities, as well as the municipalities and the provinces, to function in order to satisfy the primary needs of the community. This law also mandates the government, within its legislative competence, to revise the decisions regarding local government and adapt them to Constitutional Law 3/2001.

An ad hoc government of the metropolitan cities, however, was becoming increasingly necessary in the face of the economic and demographic burden of the 14 metropolitan cities in Italy: almost 40% of the population of Italy reside in these areas, producing about 42% of the national wealth.

THE ALLOCATION OF ADMINISTRATIVE FUNCTIONS

PRE-REFORM ADMINISTRATIVE ORGANISATION

Prior to the reform of Title V of the Constitution, the system allocating administrative functions was essentially based on the principle of 'parallelism' between legislative and administrative functions. The repealed article 118 stated that the regions normally held administrative functions in matters of concurrent legislative competence in accordance with article 177 (their own functions). However, three exceptions were considered in the Constitution.

First, the state could subtract from the regions those administrative functions 'of exclusively local interest' and assign them, through legislation, directly 'to the provinces, municipalities or other local authorities'.[26] Second, the state could, through legislation, 'delegate other administrative functions to the regions' in matters of their legislative fields of competence.[27] Last, the regions had to exercise their own administrative functions, normally 'delegating them to the provinces, the municipalities or other local authorities, or availing themselves of their offices'.[28]

Furthermore, article 128 (now repealed) stated that, 'the provinces and the municipalities are autonomous entities within the limits of the principles laid down by the general State laws, which determine their function'. The regions, therefore, had their 'own' administrative functions in matters of their own fields

of legislative competence, and 'delegated' functions in matters of state fields of competence (should the state decide through legislation to delegate to them the exercise of those administrative functions).

For local government, unlike the regions, their 'own' functions could not be traced back to the Constitution but were those assigned to them by the state legislator on the basis of article 118 paragraphs 1 and 128, while the 'delegated' functions were those conferred to them by the regions in accordance with article 118 paragraph 3.

THE NEW ORGANISATION

In the new constitutional text, the system of allocation of administrative functions has been radically amended. There are essentially three important provisions:

- Article 117 paragraph 2(p): The State has exclusive legislative competence in matters of 'electoral law, local government and fundamental functions of the municipalities, provinces and metropolitan cities'.

- Article 118 paragraph 1: 'The administrative functions belong to the municipalities except when they are conferred to the provinces, metropolitan cities, regions or the State in order to guarantee uniform practice; the assignment is based on the principles of subsidiarity, differentiation and adequacy.'

- Article 118 paragraph 2: 'The municipalities, provinces and metropolitan cities have their own administrative functions and, in addition, those conferred to them by the law of the State or the region, according to their respective fields of competence.'

This is a normative framework which definitively breaks with the principle of parallelism, since it completely de-constitutionalises matters on which the different territorial bodies will exercise their administrative competence.

Two fundamental questions arise. First, how are the first and second paragraphs of article 118 to be reconciled? On the one hand, the first paragraph seems to assign, with immediate effect, all administrative functions to the municipalities, allowing them to be 'pulled up' towards authorities higher up

the territorial scale only at a later date. On the other hand, the second paragraph, while recognising that provinces and metropolitan cities have their 'own' functions, includes those very same municipalities among the bodies which could possibly have further administrative functions conferred to them. Second, is there a difference between the 'fundamental functions' of article 117 paragraph 2(p) and 'their own functions' of article 118 paragraph 2? And if so, what is the difference?

Critics are near unanimous in attributing only a symbolic significance to article 118 paragraph 1. They hold it does not in any way transfer all administrative functions directly to the municipalities as this would have contradicted Title VIII of the Constitution, 'transitory and final disposition', which would have made illegitimate the legislative decrees in the implementation of the Bassanini Reform and the regulation of the assignment of functions to bodies other than the municipalities. This provision's function is one of principle and orientation; it is a directive criterion, which commits the legislators, at the moment of 'conferral', to give a general preference to the municipalities.

The second question has proven more controversial. Experts in fact appear divided principally between a majority who equate 'fundamental' with 'their own' functions and a minority who attempt to distinguish between the two. In a re-constructive hypothesis based on regulatory traditions, 'their own' functions would be understood to mean 'traditional' functions, or rather all those functions which (at the moment the Constitutional Law 3/2001 came into effect) belonged to the respective local authority in accordance with the laws already in force. Municipalities, provinces and metropolitan cities would come under the provisions of the new Title V and their functions would be based on the laws in force when Title V came into effect.

Redefining and revising fundamental local government functions

Article 2 of Law 131/2003 contains a complex and detailed authorisation for the government to implement article 117 paragraph 2(p) of the Constitution and to adjust those provisions in matters of local government to the reform of Title V. The state must legislate on:

- the definition of the fundamental functions of the municipalities, provinces and metropolitan cities;[29]

- the revision of provisions in matters regarding local government, with a view to their adjustment to Constitutional Law 3/2001;

- the adjustment in procedures for creating metropolitan cities, identification and regulation of governing bodies and the relative electoral system, as well as defining the regulation of cases of ineligibility, incompatibility and unsuitability to stand for elective offices in the metropolitan cities;[30] and

- the identification of principles and criteria that local bodies will follow in the fields of their regulatory autonomy in matters of (i) internal systems of control[31] and (ii) financial and accounting systems.[32]

The state is thus charged with a comprehensive review of local government functions.

Defining fundamental functions

In defining the fundamental functions of municipalities, provinces and metropolitan cities, the state will have to consider:

> the features of each local body and the nature of its functions, which are necessary for the authority to function and to satisfy the essential needs of the relevant community, bearing in mind, above all else, for municipalities and provinces, the functions they traditionally performed.[33]

It will therefore be necessary to identify the fundamental functions characterised by their essential and indivisible nature, by their ability to satisfy the primary needs of the community in question.

THE METROPOLITAN CITIES

The reform of Title V includes the metropolitan cities among constituent parts of the republic, and places them on an equal footing with the other local governing bodies. Since the metropolitan cities are described as a necessary body, there is an evident need to revise the provisions concerning them in the consolidated law, and in particular, those provisions which concern the

procedure for their institution. There is a need for a procedure which will lead to the institution of the metropolitan city as a constitutional requirement.

The delegated law contains principles[34] that allow for legislative interventions to be deemed more far-reaching compared to those required for the adjustment of the CLLG to the reform of Title V. The state has been called upon to provide for:

- adjustment of the procedure for the establishment of metropolitan cities in accordance with article 114 (i.e. the principle of participation of the local authorities and the population concerned being understood);

- identification and regulation of governing organs and their relative electoral system (guaranteeing representation and democracy, and stable majorities and minority representation); and

- regulation of unsuitability, ineligibility and incompatibility for elective offices in the metropolitan cities.

In order to adjust the establishment procedure, the starting point is undoubtedly article 22 of the CLLG. Two alternative methods, however, are available. First, the institution of metropolitan cities must necessarily be preceded by the definition of the territory, characterised by a well-integrated urban, economic, cultural and social network of the municipalities included. Second, the boundary of the area is not a necessary condition for the procedure to establish a metropolitan city.

According to the first theory, the metropolitan city would stand as 'an organ of government in a metropolitan area' and therefore 'an organ of single government' replacing the municipalities and the provinces.

According to the second theory, however, we must move away from the presumption that there exist municipal capitals which, for reasons of size and social and economic development, involve and condition the communities situated around them, thereby requiring organisational models to be adopted that differ and are adjusted to the requirements of the urban area to be governed.

The 'metropolitan model' would arise where there are actual cities that are too vast to guarantee efficient services for its populace and too limited to ensure the optimal functioning of services in matters of layout and utilisation of the

territory. Here the concept of the metropolitan city finds its own justification in the priority needs of the metropolitan municipality, while still taking account of other municipalities in the surrounding area.

When considering the creation of a metropolitan city, it may prove undesirable or impractical to include territory from adjoining municipalities other than the municipal capital itself. In this instance, political or pragmatic necessity will limit the territory for the proposed city to that of the municipal capital. The extent of this problem reflects who is responsible for establishing the procedure for creating the metropolitan city.

While it is clear that the municipal capital has an essential role to play in the implementation of this procedure, the role the provinces are to play is not so evident. According to an initial theory, the province should cooperate with the municipal capital from the outset, actively participating in the complex operation of 'aggregation'. An alternative theory is that the municipal capital would be the sole player in the process of aggregation. The region could play a consultative role, or better still it could become a unifying point of reference in the process of aggregation, with the task of engaging the interested parties in dialogue.

DIFFICULT RELATIONS BETWEEN REGIONS AND AUTONOMOUS LOCAL BODIES

An ongoing difficulty in the Italian situation is the relationship between regions and autonomous local government. It is a relationship of intense contrast and often conflict, with the local government continuously searching for dialogue and state protection. Unlike other countries, in Italy the regions do not have organisational power over the local bodies (with the exception of special status regions) since this has always been within the field of competence of the state. Organs such as the Council for Local Governments would like to find a solution to this situation since, by giving a voice to the local governments of their regions, they are attempting to enhance dialogue and agreement between the regions and local government.

FINANCIAL ASPECTS OF INTERGOVERNMENTAL RELATIONS

EXISTING REGULATION OF LOCAL FINANCE

In 1990, a first step was taken towards emphasising the autonomous features of legislation on local government finance with Law 142/1990. This law defined

the dichotomy between allocation of state funds and local government revenue. The former were to guarantee essential local services and the latter were to finance those public services deemed necessary for the development of the community.

With regard to state funds, Law 142/1990 stated that these funds must be allocated on the basis of objective criteria taking into account population, territory and socio-economic conditions, as well as an equalised distribution of resources which takes account of local fiscal imbalances. In an attempt to contribute to local government investment policy, the law set up an 'ordinary fund' for public works deemed to be of social and economic interest and a 'special fund' to finance, with equalisation criteria, public works in areas and situations defined by state legislation. Law 142/1990 defined the amount of funding, stating that it should be determined on the basis of parameters set by law for each of the years provided by the long-term state budget.

In implementing the authority conferred to the government by Law 421/1992, legislative decrees 504/1992 and 507/1993 were issued. Legislative Decree 504/1992 introduced a municipal property tax in order to ensure that the municipalities had autonomous fiscal revenues. In this context, the aforementioned decree, besides introducing this tax, assigned to the municipalities the faculty to introduce an additional personal income tax and recognised in favour of the provinces an annual tax connected to the organisation of refuse collection, to the protection and defence of land, and a tax for vehicle registration.

For state funds, the same legislative decree defined general and regulatory dispositions for their allocation, stating that 'beginning in 1994, the State will contribute to the financing of provincial and municipal administrations with the allocation of an ordinary fund, a consolidated fund and an equalisation fund for the redress of local fiscal imbalances' together with ordinary and special state funds for investment.

Legislative Decree 507/1993 introduced the municipal advertising tax and public bill-posting duties, a tax on the use of public areas and domestic waste disposal tax.

Since the 1990s there has been a growing trend for local authorities to increase autonomy in levying taxes. Evidence of this is shown by the introduction of *Irap* (regional tax on productive activity), which concerned the municipalities and the provinces insofar as they are destined to receive a quota of regional revenues as well as the revenues from an additional *Irap*.[35]

Legislative Decree 446/1997 marked an important stage in matters of local and regional taxation as it introduced *Irap*. Following this, Legislative Decree 56/2000 provided for the abolition of co-participation of municipalities and provinces in *Irap* revenue, but they were assured that they would receive substitutive revenues.

THE NEW RULES ON FINANCIAL AUTONOMY

The reform of Title V of the Constitution has brought new rules regarding the financial autonomy of regions and local government. These rules are mainly found in the revised article 119 of the Constitution.

The first paragraph of article 119 states that, 'municipalities, provinces, metropolitan cities and regions have financial autonomy regarding revenues and expenditures'. This implies that the regions and local government are self-supporting, meaning that they finance their own functioning, intervention and administrative costs with funds from their own collection (as a rule), except of course when there is a need for equalisation in less favourable situations.

Compared to the former text of article 119, there is no longer any reference to 'the forms' and 'limits laid down by the laws of the Republic'. In the revised text, financial autonomy is specified as 'autonomy regarding revenues and expenditures'. The reference, in particular to autonomy regarding revenues, could indicate that the regions and local government have been assigned the power to fix tax rates.

The second paragraph of article 119 of the Constitution states that:

> municipalities, provinces, metropolitan cities and regions have autonomous resources. They establish and implement their own taxes and revenues in harmony with the Constitution and in accordance with the principles of coordination of the public finances and the tax system. They receive a share of the proceeds of State taxes related to their territory.

This provision identifies the legal framework within which financial autonomy is practised and also refers to 'the principles of coordination of the public finances and the tax system'. Reference is made then in the revised text of article 119 to the 'coordination', in particular the principles of coordination, subject to which the regions and local government must 'establish and

implement their own taxes and revenues'. Article 117 paragraph 3, as amended by Constitutional Law 3/2001, assigns to the concurrent powers of the regions 'the coordination of public finance and the taxation system'. This combination of constitutional rules would lead one to believe that, with regard to the aforementioned coordination, the state will only be required to define the 'fundamental principles', while the regions will be responsible for the details of the regulation.

Regarding 'their own taxes', the former text of article 119 assigned 'their own taxes' to the regions. Constitutional Law 3/2001, however, provides for a wider regional taxation system since it no longer refers only to 'their own taxes', but also speaks of 'their own taxes and revenues'. Added to this is the provision that the regions and other local bodies may 'establish and implement' these taxes; the revised article 119 would seem to have effectively broadened the existing regional powers on this matter. In particular, in granting the power to 'establish' their own taxes, it could be interpreted as a real extension of regional power on this matter.

With regard to this law, the regions could believe they are authorised to autonomously establish their own taxes, in the absence of a state law that explicitly provides for it, since they have the legislative power.[36] In support of this interpretation, the revised text of article 117 paragraph 2 assigns 'the State taxation system and accounting' to the exclusive legislative competence of the state. However, the third paragraph, speaking of concurrent legislative powers, merely mentions 'the coordination of public finance and the tax system'.[37]

The last sentence of the revised text of article 119 paragraph 2 states that the regions and other local authorities 'receive a share of the proceeds of State taxes related to their territory'. The most important change in this law is in the use of the phrase 'related to their territory'. This phrase indicates that the regions' and local authorities' share in the tax proceeds is now proportional to the taxes raised in the territory.

In other words, this law has introduced what some experts have defined as the principle of 'tax territoriality'; that is, the principle according to which the proceeds taken from a certain territory, even though they are collected by the state finance system, will have to be returned to the territory from which they originally came. Therefore, following the amendments to article 119, in the present situation, the proceeds of state taxes to which the share refers should be the proceeds produced within the territory of the authority to which the share belongs.

The third paragraph of the revised text of article 119 also states that, 'the law of the State establishes an equalisation fund to the benefit of areas where the fiscal capacity per inhabitant is reduced'. This rule identifies the third and final component of the finance of regions and local authorities, as described in article 119.

Regional and local finances are composed of their own revenues, a share of the proceeds of state taxes and a share of the equalisation fund. With regard to the equalisation fund (newly introduced 'with no restrictions as to the allocation of its proceeds'), the rule in paragraph 3 of article 119 raises an important question of interpretation: that is, to define the meaning of 'where the fiscal capacity per inhabitant is reduced'.

In identifying reduced fiscal capacity, should reference be made to the richest region or should a parameter of average wealth be used? A second question concerns the goal of this equalisation. Unlike the former text of article 119, the objective now is to reduce and not to eliminate differences between fiscal capacity per inhabitant in the areas in question. While in the former text of article 119 the reference criteria was the expenditure needs of the region, in the revised text of article 119 equalisation aims to reduce the differences between the fiscal capacity per inhabitant in the regions.

The fourth paragraph of article119 states that 'the funds deriving from the sources mentioned in the previous paragraphs have to enable municipalities, provinces, metropolitan cities and regions to finance in full the functions attributed to them'. According to this provision, therefore, their own revenues, the share of the proceeds of state taxes and the share of the equalisation fund 'enable' the regions to 'finance in full the functions attributed to them'. This rule constitutes the general parameter by which to assess the 'adequacy' of resources allocated to the regions, meaning that the total amount of those resources mentioned in the first three paragraphs of article 119 must permit regional public functions to be carried out adequately.

The fifth paragraph of article 119 states that:

> [I]n order to promote economic development, social cohesion and solidarity, to remove economic and social inequalities, to foster the actual exercise of human rights, to pursue ends other than those pertaining to the exercise of their ordinary functions, the State may allocate additional resources to carry out special actions to the benefit of certain municipalities, provinces, metropolitan cities and regions.

The rule corresponding to the former article 119 reads that the state, through legislation, could allocate 'special contributions' to single regions for 'particular and specified aims to benefit the south of Italy'. However, the revised text significantly widens the ends for which the state may allocate additional special resources. Therefore, while the first three sources of financing mentioned in article 119 would appear to leave differences between the per capita resources for each region, the fourth source of financing – the one provided for in the fifth paragraph of article 119 – seems destined to remove the economic inequalities between the regions.[38]

The sixth paragraph of article 119 states that 'municipalities, provinces, metropolitan cities and regions have their own assets, assigned to them according to general principles established by state law. They may only contract loans in order to finance investment expenditure. State guarantees on such loans are excluded'. Regarding the regions, the most obvious changes concern the allocation of their own assets, which no longer depends on the law of the state but on the general principles established by state law, and the disappearance – compared to the repealed text of article 119 – of regional state property. The provisions in these final two sentences of the fifth paragraph raise problems as to whether a state law is necessary to regulate its actual implementation.

CONCLUSION

The constitutional reforms of 1999 and 2001 significantly altered intergovernmental relations in Italy. Municipalities, metropolitan cities and provinces now have autonomous powers defined in the Constitution. Regions gain greater control over their statutes from the central government. A series of fundamental powers are also allocated to local government first, thus making real the promise of local control over local matters. The changes reflect a shift in federal models towards decentralisation and the integration of governmental powers. This in turn reflects an international trend (at least within Europe) that places more power in the hands of local government.

ENDNOTES

1 In accordance with article 131 of the Constitution, 'the following regions are instituted: Piedmont, Aosta Valley, Lombardy, Southern Trentino, Veneto, Friuli-Venezia-Giulia, Liguria, Emilia-Romagna, Toscany, Umbria, Marche, Lazio, Abruzzo, Molise, Campania, Puglia, Basilicata, Calabria, Sicily, Sardinia'. With regard to special status regions, article 116 paragraphs 1 and 2 state that: 'According to their special statutes adopted by constitutional law, particular forms of autonomy are enjoyed by Friuli-Venezia-Giulia, Sardinia, Sicily, Southern Trentino and the Aosta Valley. The region Southern Trentino consists of the autonomous provinces of Trento and Bolzano.' There are currently 8,104 municipalities and ten provinces. The National Association of Italian Municipalities (Anci) was founded in 1901 and is currently represented by 6,406 municipalities, while the Union of Italian Provinces (Upi) has been active since 1908 and all 103 provincial administrations take part. These associations are well represented at the local level and participate at national, supra-national and community levels.

2 Art 115 of the Constitution, abolished by Constitutional Law 3/2001 stated that, 'the regions are autonomous entities with their own powers and functions, according to the principles laid down in the Constitution'.

3 Particularly regarding local authorities, the new text of art 117 of the Constitution assigns exclusive legislative powers to the state in matters of electoral laws, state organs and fundamental functions of municipalities, provinces and metropolitan cities.

4 Art 127 Constitution (previous text).

5 Art 125 para 1 Constitution (previous text, repealed).

6 Art 130 Constitution (repealed).

7 Art 124 Constitution (repealed).

8 Art 120 para 2.

9 303/2003.

10 At state level, Law 400/1988 provides for 'executive' regulations (for the enforcement of laws, administrative orders and community regulations); 'implementation and integration' regulation (for the implementation and integration of laws and administrative orders concerning rules of principle, excluding those relating to matters reserved to regional fields of competence); regulation of 'organisation' (for the organisation and functioning of public administrations according to the provisions of law); 'independent' regulations (for matters were there are no law provisions in force, as long as it does not concern matters reserved to the law); and 'authorised' regulations (for matters not absolutely reserved to laws in the Constitution and for which the laws, authorising the government to exercise regulatory power, determine the general regulatory directives of the matter and can abrogate existing laws with effect from when the regulatory directives come into force). In the hierarchy of sources of law, regulations are subordinate to formal laws. In some cases (independent and authorised regulations) the substantive effectiveness of the regulation is the same as that of the law. At the state level, these regulations are issued by the government. At the regional level, following the reform of Title V of the Constitution, the statute will determine the organ(s) (Legislative Assembly or regional government) that hold regulatory power (Constitutional Court 131/2003).

11 Art 117 para 2.

12 Art 117 para 3.
13 Art 117 para 4.
14 See Constitutional Court 282/2002 and 536/2002 on hunting.
15 This concerns matters in art 117 para 2 of the Constitution: limited to (l) 'jurisdiction and procedural laws; civil and criminal law; administrative tribunals', (n) 'general rules on education', and (s) 'protection of the environment, of the ecosystem and of the cultural heritage'.
16 Art 10 Constitutional Law 3/2001. On this point, see Constitutional Court 8/2004.
17 Art 117 para 6.
18 Art 120 para 2 states that 'the government may act as a substitute for regional, metropolitan city, provincial or municipal authorities whenever those should violate international rules or treaties or Community law, whenever there is a serious danger for the public safety and security, and whenever such substitution is required in order to safeguard the legal or economic unity of the nation, and particularly in order to safeguard the basic standards of welfare related to civil and social rights, irrespective of the boundaries of local governments. The law defines appropriate procedures in order to guarantee that substitution powers are exercised within the limits set by the principles of subsidiarity and fair cooperation.'
19 43/2004.
20 Art 118 para 1.
21 Law 142/1990 on autonomous local governing bodies.
22 *Testo Unico degli Enti Locali* (TUEL).
23 The list of metropolitan cities of special status regions include, Cagliari (Sardinia), Catania, Messina, Palermo, (Sicily) and Trieste (Friuli-Venezia-Giulia).
24 Art 23 para 1 CLLG.
25 Art 23 para 5 CLLG.
26 Art 118 para 1.
27 Art 118 para 2.
28 Art 118 para 3.
29 Art 117 para 2(p).
30 Art 2 para 4(h), (i) & (l).
31 Art 2 para 4(b) & (e).
32 Art 2 para 4(f).
33 Art 2 para 4(b).
34 Art 2 para 4(h), (i) & (l).
35 Legislative Decree 446/1977 of 15 December 1997, arts 27 & 28.
36 Regarding local authorities that do not hold legislative power (Constitutional Court 37/2004). The Court stated that:

> with regard to local taxes, it must be added that, in view of the saving clause which covers the whole field of personal services and taxation (art 23 of the Constitution) and makes it necessary to regulate at legislative level the fundamental aspects of the duty, and given the lack of legislative powers of sub-regional authorities, it is to be defined, on the one hand, the area (within the limits of the saving clause) in which those authorities may exercise their regulatory power; and on the other, the relation between State legislation and regional legislation as regards the regulation, in the first instance, of local

taxation: in the abstract, envisaging either three regulatory levels (State legislation, regional legislation and local regulation) or two levels (State and local, or rather regional and local).

37 Regarding legislative competence in matters of taxation after the reform of Title V (Constitutional Court 296/2003 & 297/2003).

38 The Constitutional Court (36/2004) has stated that:

> the implementation of this constitutional law requires as a necessary premise the intervention of the State legislator who, in order to coordinate public finance, will have to establish, not only the principles which the regional legislators will follow, but also establish the guidelines of the entire taxation system, and establish the areas and boundaries in which the State, the regions and local government can exercise their taxation authority.

The normative autonomy of local government in Italy

PAOLA BILANCIA

INTRODUCTION

The terms 'autonomy' and 'decentralisation' escape easy definition in Italian constitutional law as they reflect a long history of transforming forms of state. In general, 'autonomy' refers to something wider and deeper than 'decentralisation'. There are different kinds of autonomy, and therefore various levels of powers related to the kind of autonomy that is recognised and guaranteed. For example, a single body or level of government may possess political or administrative autonomy; it may have autonomy in spending, fundraising or taxation.

When all the territorial levels of government are entitled to some autonomy (even more if this autonomy is directly guaranteed by a constitution, rather than by state law) this is a 'polycentric' system. However, when there is only some decentralisation, the government is neither a unitary state nor a truly effective 'polycentric' system, since not all the powers and functions are located at the central level of government. Indeed, in a merely decentralised form the different levels of sub-national government are entitled to some public functions, but these are few and limited. In contrast, in a 'polycentric' or 'autonomistic' form of state (*stato delle autonomie* or *stato autonomico*), the different levels of sub-national government (regional, provincial and municipal) have more powers and they can exercise these powers on a wider scale.

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There is another kind of decentralisation, called deconcentration, which refers to the transfer of administrative function from the central government to the periphery. In this case, however, the local apparatuses exercise this function in the name of, and on behalf of, the central government.

It is important to realise that what distinguishes a form of so-called 'regional state' from a polycentric or autonomic one is that its autonomy – and consequently the administrative and normative power (not necessarily the legislative ones) – is conferred not only to the regional level of government (in a 'dualistic view'), but to all the different levels of sub-national government, namely, the regions, provinces and municipalities. These issues of decentralisation and autonomy are clearly illustrated in the Italian constitutional reform of 2001.

CONSTITUTIONAL REFORM IN 2001

The reform of Title V of the Constitution significantly changed the configuration of the Italian Republic which, although remaining one and indivisible (article 5 of the Constitution, not affected by the reform) 'consists of municipalities (*comuni*), provinces, metropolitan towns, regions and the State. Municipalities, provinces, metropolitan towns and regions are autonomous bodies with their own Statutes, powers and functions, according to the principles established by the Constitution'.[1]

Considering that in Italy there are 8,104 municipalities, 103 provinces and 20 regions, it appears that there was the intent to redesign the national legal order on the basis of article 5. (Commentators invoke the image of a three-cornered hat, recalling a fashionable hat worn by men in the 18th century, when referring to the new 'three-cornered' federal system.)

The latest constitutional reform has therefore established a new constitutional order based on a state–regions–local government trilogy, rather than on a dualistic state–regions approach. This new order is neither 'federalist' nor a 'unitary regional state' since the strengthening of local government bodies creates a third corner on the constitutional hat.

The concept of a 'polycentric order'[2] was thus introduced into the jurisprudence, although the state legislature and even the Constitutional Court resisted its actual implementation. However, a textual reading of the new article 114 of the Constitution identifies the innovations permeating the entire text of the reform:

- The composition of the Republic is now seen from a 'bottom-up' view with respect to the corresponding, repealed constitutional provision (the previous article 114 read: 'the Republic is subdivided in regions, provinces and municipalities'), since the new rule starts from the smallest local government body (municipality) closest to the citizen and moves upwards towards the biggest one (the state).

- The state is simply one government body among others; thus it is merely a component of the republic.

- The new provision constitutionalises the statutory[3] power of minor government bodies, such as municipalities and provinces – since 1990 this power only had its foundation in ordinary state law.

Raising the statutory power of municipalities and provinces to the constitutional level means attributing to the municipal and provincial Statutes a certain degree of insulation with respect to the other sources of law. Indeed, no ordinary law of the state or region could undermine the statutory autonomy of municipalities and provinces.

Municipalities and provinces also have normative, organisational and administrative autonomy, as well as tax levying and financial autonomy concerning revenues and expenditures within the framework of their Statutes and regulations. Finally, these bodies are also assigned their own properties according to the general principles provided for by the state law. They can take out loans, but only for the purpose of funding investment expenditures.

Above all, the legislative role of the regions has been enhanced by this reform (and not only the municipal and provincial regulatory powers). Indeed, the regions now have ample statutory autonomy[4] and 'shared legislative competence' with the state for a list of significant matters: a list that is much wider than the one originally attributed to them by the 1948 Constitution. These matters range from traditional local government to communication rules, and from health care to the care of the cultural heritage and the environment.

The regions also have some 'residual', or exclusive, legislative powers on matters that are not defined in a specific catalogue, but could be identified *a posteriori* since they are not included in the catalogue of matters under the exclusive competence of state legislative power, nor in the one of matters under the 'shared competencies' of both the state and regions. Moreover, both the

state and regional legislatures are obliged to respect European Community law, international obligations and the Constitution.

STATUTORY AUTONOMY OF MUNICIPALITIES AND PROVINCES

Since 1990, each municipality and each province has adopted its own Statute: this kind of autonomy was, however, designed in general terms by the state law, indicating the adoption procedure, the necessary and optional content, as well as the necessary legitimacy control to be performed by a regional body (the Regional Control Committee). The Statute is defined as a source of law of a 'reserved' nature because it is exclusively applicable to municipalities and provinces. It is not subordinate to the state law, but rather has an integrating character of adapting both state law and constitutional principles to local policy orientations. The Council of State – the highest counsellor to the executive branch for administrative and legal affairs, and also the highest administrative court – has emphasised that the relationships between law and a Statute is ruled by the competition criterion, as the state law establishes the principles of the matter and the Statute specifically dictates the regulation.[5]

Before the constitutional reform, the limits of the statutory power were both the constitutional principles and the principles of state law (also included in the *testo unico* – a sort of 'consolidation law' – on local government bodies). Each Statute had a required content consisting of the fundamental organisational rules for the body itself and of the provisions regarding the functions assigned to the bodies and the modalities[6] for the participation and protection of political minorities, as well as the modalities for the legal representation of the local government body, including representation before courts.

The general criteria in matters of organisation of the local government body, the modalities for collaboration with the other local government bodies and for popular participation, the kind of decentralisation preferred, and the modalities for the access of citizens to information and to administrative procedures, all belong to the required contents of the Statute too. Moreover, the Statute has to provide positive action in order to achieve equality between men and women, and to further gender equality within the councils and boards of the municipalities (or provinces), as well as in authorities, their corporations and their subsidiary institutions.

The state legislature has imposed the requirement that the Statutes should provide institutions for public participation in the life and activities of local

government. Every Statute therefore adopted its own rules for such institutions, thereby fostering the creation of collective participation systems or strengthening already existing ones. Moreover, the Statutes were a means of regulating the participation of persons directly involved in administrative proceedings, such as persons whose rights or interests were affected, different forms of popular consultation, and the admission of requests and petitions submitted to safeguard collective interests. The Statutes also guaranteed the prompt examination of proposals submitted by individuals or associations to public bodies.

The Statutes provide for deliberating, repealing, suspending and orientating referendums as well. The only restrictions imposed by state law for such popular votes were that they could only deal with matters exclusively lying within the local competence and that they could not be held on dates coinciding with other elections.

There were further provisions which may be the object of a Statute, insofar as each single body can decide whether to include them or not; for example, establishing an ombudsman or the possibility of holding an official position on a fixed-term employment contract. Sub-national bodies can freely decide these matters.

The state law meticulously defined the procedure for the adoption of a Statute: the act has to be deliberated by the municipal council (or by the provincial council, if reference is made to the Statute of a province) before it voted on its adoption, which passes with a qualified majority of two-thirds. If this majority was not attained, voting would take place again within the next 30 days and the Statute would be adopted if an absolute majority approved it twice, consecutively. Once the Statute passed, the Regional Control Board checked its legality (*Comitato Regionale di Controllo*).[7] After satisfying this control (which no longer exists), the Statute was published in the official journal of the region and came into legal force 30 days after its publication. All Statutes of the municipalities and provinces followed this procedure both for their adoption and successive revisions.

However, the constitutional reform of 2001 changed the procedure of adoption and revision of the Statute and the scope of the Statutes themselves, with the purpose of strengthening them. In fact, the reform repealed the previous system, which assigned the region a higher ranking with respect to the other local government bodies, by deleting the parts of the constitutional text requiring the (normative) acts of the provinces and municipalities, already

approved by their councils, be checked for legality before a specific regional committee. Moreover, the law regulating the implementation of the constitutional reform fixed other 'precise' limits, derived from a systematic interpretation of the reform. This law not only confirms the 'harmony' (i.e. the compliance of) that must exist between the Statutes and the Constitution, but also refers to the fact that Statutes must necessarily comply with the general principles in matters of public organisation, with the state electoral law concerning government bodies, and with the state law defining the fundamental functions of municipalities and provinces.

The 'general principles for the public organisation' can be established by means of state laws, but also by the regional legislation in cases of matters being deferred by the regions to municipalities or provinces. The state law must provide the principles in such matters as the right of access to administrative documents, popular initiative, the duty to justify administrative acts, regulations for local government employees (insofar as they belong to the matter of 'civil law', which is within the exclusive legislative competence of the state legislature), and identifying the ideal scope for the exercising of combined functions for state public services. Regional law, meanwhile, will provide for identifying the optimal scopes for carrying out combined functions for the regional public services.

It is, however, questionable that the implementation law for the constitutional reform states that the fundamental functions of municipalities and provinces must be defined not in the Statutes but in state law, because it restricts the contents and competencies of the Statutes themselves. Indeed, one must consider that the state law would be binding for the Statute, while the Constitution in fact makes direct provisions for the Statute as an independent source of law that local government authorities are entitled to adopt.

According to commentators, the Statute should find both its legal roots and its unique limit only in the Constitution.[8] The compliance of the Statute with the state law shall be acceptable only if the state law provides (as a mere recall) for the minimum content of the Statute, while the rest of the content is created by each body autonomously.

REGULATIONS OF THE MUNICIPALITIES AND PROVINCES

The regulatory power of the municipalities and provinces over the organisation, implementation and managing functions, now has its source in the

Constitution. In general, one can make a distinction between the regulations concerning the organisation and activities of the local government authorities – including the regulations of the municipal council, the regulations concerning the boards and the services, the participation bodies, as well as the regulations concerning the right of access – and those regarding local public utilities.

Examples of regulations concerning the activities of the various bodies include regulations concerning accounting, contracts and tenders, taxation, building, and setting up gasoline stations in the territory. Among the regulations concerning the local public utilities, some examples are management of waterworks and drinking water systems, chemists' shops, local police, mortuary police,[9] hygiene and healthcare, waste management, and communal nurseries.

The regulations need to be adopted in compliance with the Constitution and the Statute of the local government body, but as the reform implementation law stresses, 'within the scope of the State and regional law, ensuring uniformity requirements within the scope of the respective competencies'.[10]

From this formulation no restriction to the regulating power as such should be derived; rather, the state and the regional law assigning competencies and administrative functions to municipalities (or provinces) could define limits and requirements with the purpose of guaranteeing their uniform exercise. For instance, the regional law on trade could require uniform hygiene control standards for open-air markets, which municipal rules on markets would have to comply with. If there are no regional laws, the municipalities can, however, adopt their own regulation for the markets and fix their own standards. Also, in matters concerning regulations for the municipal council, the state law may competently define the objectives – that is, protection of political minorities, respecting the majority principle, transparency and disclosure of acts. Afterwards, however, it is the council itself that has to determine, in its own regulation, the control instruments the minorities can use, the quorum for resolutions (provided they are not already foreseen in the Statute), possible new information tools and the types of citizen participation at meetings.

In sum, the municipal and provincial regulations adopted in compliance with the Statute could also provide rules which are different from those established in state and regional laws that do not refer to those uniformity requirements.

ADMINISTRATIVE FUNCTIONS OF MUNICIPALITIES AND PROVINCES

From the perspective of decentralisation, the Constitution states that

administrative functions shall in general be assigned to municipalities since they are closest to the citizens, unless for the purpose of ensuring their uniform exercise such functions should be assigned to the provinces, metropolitan towns, regions or the state, according to the principles of subsidiarity, differentiation and adequacy.

The subsidiarity principle specifically reflects the flexibility aspect of the system, since, although combined with the principles of adequacy and differentiation, it allows administrative functions to be transferred to a higher local government level (i.e. from the municipality to the province, from the province to the region, from the region to the state).

It is also worth noting that it was, in fact, the application of the subsidiarity principle to which recent judgments from the Constitutional Court referred in order to declare state laws constitutional, which had again taken over legislative competencies which *prima facie* belonged to the regions.

In brief, the Court decided that a state law which assigned administrative powers in matters of public works to the state was not constitutionally invalid, despite the fact that the matter of public works did not belong to the list of matters for which the state is exclusively competent. Since the administrative activity must have its foundation in the law, the legality principle dictates that a state law should govern this activity. Thus, the allocation of the legislative competencies between the state and regions – as outlined in the Constitution – was understood in a 'flexible' way, by identifying new types of matters to be considered either as state or regional matters, according to their reference object (public works of regional or state relevance).

This interpretation was possible due to the subsidiarity principle in combination with the principle of fair collaboration among different local government bodies. The Constitutional Court underlined the decisive interference of the principle of fair cooperation between the different local government levels (to be achieved through agreements between state and regions) so that, on the basis of subsidiarity, competencies can 'migrate' from one level to another.

CONNECTING LINKS OF THE NEW POLYCENTRIC SYSTEM

The new shape of the decentralised unitary state, as outlined by the constitutional reform, is still in progress as far as its implementation is concerned. Meanwhile parliament is already discussing a new reform of the

Constitution, with stronger federal features. The reform generates a series of questions of interpretation, causing a high caseload before the Constitutional Court with regard to the legislative competencies of the state and the regions, and before the Council of State with regard to the regulating activity.

Once the system of cascade-type controls (on the administrative and regulating activity of the state with respect to the regions, and of the regions with respect to local government bodies) was repealed, there was no longer the kind of superordination among bodies that had characterised administrative decentralisation in Italy.

The only possibility of the state again taking on certain functions from other bodies arises from the enforcement of the substituting power of the government. This power can be applied with respect to the bodies of the regions, provinces and municipalities that do not respect provisions of international treaties or Community law, or in the case of severe danger for public safety or public security, or if necessary to the safeguarding of the juridical or economic unity, and particularly the essential standards of performance concerning civil and social rights.[11]

If one does not want to dwell on such a hypothesis, the overall picture of the reform appears intent on creating a 'reticular system' of autonomous bodies linked by some connecting features.

A system of intergovernmental conferences was established by ordinary law in 1997. This is a network of boards mediating between the state and local government bodies.[12] The Constitution also expressly states that each region should set up a council as a consultation board for the interests of local government bodies.

Even if the regions have not yet passed new statutes – and consequently no such councils have been established – each region has already introduced their own laws, such as 'autonomy tables' or consultation boards with other local government bodies in order to mediate the transfer of duties and administrative functions to the municipalities and provinces, as foreseen by the so-called Bassanini Reform in 1997.[13]

These are the steps taken through understandings, agreements and requests of opinions, in order to try and introduce the fair cooperation principle among different local government bodies. The Constitutional Court has requested this principle be implemented for a number of years so as to foster a more constructive development of relations between the different sub-national government levels.

CONCLUSION

An overall view of the Italian constitutional framework reveals a highly complex, polycentric system combining hierarchical structures (that are indeed gradually fading) with cooperative ones (that are, on the contrary, gradually flourishing).

This multi-level system, which entails various levels of government, from municipalities to provinces to regions to state, needs new sophisticated methods of governance to combine the necessity of uniform legislative rules established at the national and/or regional level, with the safeguard of the degree of autonomy, and with the respect of the amount of statutory and regulatory power that the 'new' Title V of the Constitution (as rewritten by the 2001 constitutional reform) has given to the provinces and the municipalities.

Moreover, municipalities play an important role in this renewed system as the level of government closest to the needs of citizens.

From all these perspectives, the regional legislature faces a complex exercise of its duties in providing minimum uniform legislation at the regional level while also engaging in coordinating and harmonising local level policy-making. On the one hand, the regional legislatures cannot overthrow or repeal the autonomy of provinces and municipalities because it is guaranteed directly by the Constitution. On the other hand, however, the same regional legislature must ensure a proper and effective political response to the economic and social needs and requests that come from the communities and the socio-economic actors established in the regional territory.

One key solution to this dilemma may be the creation and implementation of a 'regional system of local government bodies'. This would be an institutional network composed of the regional level of government, on one side, and by each municipality or province, on the other. They would all be linked together in a dynamic and flexible way, designed to guarantee the efficient governance of the entire system. More specifically, this system should be articulated into two different levels: one in charge of the policy-shaping activity at the regional level by the regional legislature; and the other responsible for the implementation of various policies by the provincial and municipal governments.

The first level must be designed so as to guarantee (by means of some institutional agreements or understandings) the relevant and proper participation of some representatives of municipalities and provinces in that decision process by which the various regional policies and statutes are elaborated and discussed. In this way, it will be easier for the region to share

with the other levels of government the responsibility of choices that have an effect on the entire regional territory. It will also be easier for several provinces and municipalities to implement those regional policies, once vested into regional statutes, using their local regulatory powers and administrative functions.

The second level must be designed directly by regional law so as to guarantee a minimum core of legal principles and instruments, which must be binding for local government bodies in the exercise of their autonomous powers within matters of their competence. This will ensure that minimum uniformity exists through an entire region, no matter in which province or municipality of a particular region one has decided to establish a residence or enterprise. The same regional law must provide another set of rules that, from a different perspective, should not be wholly binding for local bodies but may be easily circumvented by the exercise of local powers.

If the first type of above-mentioned legislation searches for equilibrium between the necessity of a minimum core of uniform rules and the respect of local government bodies' autonomy and power, the second one, just hypothesised, answers another kind of problem: What if a municipality or a province is inactive in carrying out some regional policies or cannot pass some regulations which are absolutely necessary to implement a regional statute? In this case, it is clear that the region must have the power to intervene with a proper regulation so as to avoid the risks of a normative vacuum; but it is also necessary that, in principle, the autonomy and normative power of the municipality or the province still be fully respected and guaranteed.

This second kind of legislation must therefore be applicable in a provincial or municipal territory, and must be binding for the local government body only until the province or the municipality has adopted its own regulations. After that point, this kind of legislation must yield to the new provincial or municipal regulations in order to ensure that the local rule expressing local autonomy prevails.

Only the future will reveal how this complex multi-level and polycentric system of governance in Italy – which is at the same time also an example of a multi-level constitutionalism practice and framework – will work and which direction it will take.

It is now certain, however, that a reticular, networked institutional system which properly combines the autonomy of its periphery (i.e. the local level of government) with the robustness of its centre (i.e. the regional and, most of all,

the national level of government), and which evolves on the premises of the principles of subsidiarity and fair cooperation (these two principles are regarded as key instruments to guarantee a balance of hierarchical and non-hierarchical, cooperative ways of governance), will be able to deal with and to overcome the challenges that face Italy in the coming decades.

ENDNOTES

1 Article 114 of the Constitution, as amended by Constitutional Law 3/2001.

2 P Bilancia & FG Pizzetti, *Aspetti e problemi del costituzionalismo multi-livello*, Giuffrè, Milan, 2004.

3 I have used the term 'Statute' (with a capital 'S') as the translation of the Italian *Statuto*, specifically to indicate the charter enacted by municipalities and provinces, exercising their constitutionally guaranteed autonomy. From this point of view, the term 'Statute' is radically different from the term 'statute' (without a capital 's'), as the translation *legge*, which refers to the 'parliament statute' (or the 'regional council statute'). To be more precise, the Constitution gives legislative powers only to the state and the regions; municipalities and provinces have some 'normative' powers which allow them to enact the so-called 'statute' and 'regulations': the first contains the 'fundamental' norms that the municipality or the province approves, exercising their autonomy; the latter are the detailed and day-by-day norms they approve in the matters of their competence. Due to our 'sources of laws' hierarchical system, the 'regulations', generally speaking, are set at a lower level in respect of the state parliament (or the regional council) statutes.

4 This autonomy was already enhanced with Constitutional Law 1/1999, which has modified art 123 of the Constitution in the following terms:

> Each region has a Statute that, in compliance with the Constitution, determines its government form and the fundamental organisational and functioning principles. The Statute regulates the exercising of the right of initiative and referendum about laws and administrative provisions of the region and the publication of the regional laws and regulations. The Statute is approved and modified by the regional Council by means of a law passed by an absolute majority of its members, with two successive deliberations with at least two months between them … The Government of the Republic can raise the constitutional legality issue about the Statutes before the Constitutional Court within thirty days after their publication. The Statute is submitted to popular referendum if within three months of its publication one fifth of the electors of the region or one fifth of the members of the regional Council request it. The Statute, *which is the object of the referendum*, is not passed unless the majority of valid votes approve it.

5 State Council, opinion 741/2000 of 26 July, s I.

6 'Modalities' are the legal instruments, tools and means by which participation is assured. It is a literal translation of the Italian word *modalità*, which can be read in various interpretations as a 'set of means', 'system of tools' or 'variety of instruments'.

7 The *Comitato Regionale di Controllo* (CRC) was a regional board (the region has

legislative competencies with respect to this entity) whose duty was to verify the legality of the Statues and other acts (e.g. regulations or budgets) of municipalities and provinces. The CRC must verify only the conformity of municipal and provincial acts with laws – the Constitution, the state laws and the regional ones – and it cannot evaluate the political aspects of such acts, nor the public interests they pursue.

8 F Pizzetti, *Commento all'article 4*, in F Bassanini, P Bilancia, G Buonuomo, V Cerulli Irelli, L Ciaurro, C Cittadino, S Piana, C Pinelli, F Pizzetti & L Vandelli (eds), *Legge 'La Loggia' – Commento alla L. 5 giugno 2003, n. 131 di attuazione del Titolo V della Costituzione*, Maggioli, Rimini, 2003, p 91 ff.

9 *Polizia mortuaria* does not refer to ordinary police or 'mortuary police', but rather to the custody, surveillance and management of city cemeteries, prescriptions for funerals and burials, and the rules and inspections for the conservation of dead bodies in hospitals and homes before and after their burial.

10 Article 41, Law 131/2003.

11 The Constitutional Court granted the possibility for the regional law, when it rules in matters of its own competence, to define the exercise of the administrative functions for which the municipalities are competent. It is also meant to foresee the assignment of substituting powers to regional bodies for the performance of actions or compulsory activities, in case of inactivity or non-fulfilment on the part of the municipality, in order to safeguard the unitarian interests that would otherwise be endangered by its inactivity or non-fulfilment (Constitutional Court 43/2004).

12 A state–regions conference was actually already provided for by Law 400/1988, but first fully applied in 1997. State–towns conferences had seats for representatives of the national government and representatives of the municipalities and provinces. The Unified Conference is a *de facto* combination of the two.

13 This refers to the reform introduced by Law 95/1997, which created 'administrative federalism'. This implies the assigning of most functions and administrative tasks to the local government bodies. With this law, and the majority of legislative measures that followed, the intention was that of realising the maximum administrative decentralisation possible while keeping the Constitution unchanged. The reform is yet to be completed.

Local government in South Africa: Entrenching decentralised government

NICO STEYTLER

INTRODUCTION

Ten years ago, local government comprised small, fractured municipalities organised along racial lines, giving effect to the policies of the highly centralised apartheid state. Today, local government is constitutionally recognised along with provincial and national government as a sphere of government, and has an entrenched though limited degree of autonomy. As such, it is one of the building blocks of South Africa's decentralised state structure and may still become its fundamental building block.

While the future shape and form (and even existence) of provinces are debated, local government is seen as an indispensable feature of our state structure. The only questions concern its nature, status and extent as a self-governing institution.

The current local government system has been in place for five years and is still in its formative stages. Whether South Africa will become a centralised state or retain some federal elements in its state organisation, it will be argued, depends to a large degree on the entrenchment of the practice of local self-government.

When the first democratic elections were held in April 1994, local government was a racist institution, giving effect to the spacial separation of blacks and whites. The black community was further divided between African,

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coloured and Indian, each with their own local authority. These racial divisions meant massive inequality in services – white communities were well serviced, while black communities received inferior or no services at all.

Local government was the lowest tier of government in a strict hierarchical structure. As creatures of statute, municipalities derived their powers from national and provincial government and served, by and large, as their administrative arm. The transformation of local government was thus directed at removing the racial basis of government and making it a vehicle for the integration of society and for the equitable redistribution of resources. Fundamental to this enterprise was the entrenchment of local government in the 1996 Constitution as a fully-fledged sphere of government.

CONSTITUTIONAL ACCOMMODATION OF LOCAL GOVERNMENT

The race-based local government institutions of pre-1994 were creatures of statute and under the direct control of both the national government and provincial administrations. During the constitutional negotiations of 1991–93, local government was not a central focus; decentralisation questions were devoted to the role and position of the provincial government. Indeed, parallel to the Kempton Park negotiations were local government negotiations seeking to deracialise local authorities. The resulting Local Government Transitional Act of 2003 paralleled the Interim Constitution of 1993. However, the Constitution did signal a change in the status of local government; municipalities were recognised in the Interim Constitution of 1993 as a 'tier of government', although still falling within the functional areas of provincial competency.

The 1996 Constitution further enhanced the status of local government. As a distinctive sphere of government, alongside national and provincial government, it was no longer subject to their absolute control. The enhanced status of local government is seen in a number of provisions.

In the chapter on Cooperative Government, the Constitution provides that: '[I]n the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.'[1]

The word 'sphere' was a deliberate deviation from the term 'tier' used in the 1993 Constitution, in an attempt to move away from the notion of hierarchy. In a lengthy chapter on local government, the Constitution provides that the local sphere consists of municipalities covering the entire country and that a municipality 'has the right to govern, on its own initiative, the local government

affairs of its community, as provided for in the Constitution'.[2] The flipside of this right is that '[t]he national and provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its duties'.[3]

Local self-government must, however, be 'developmental' in purpose, pursuing the following objects:

> (a) to provide democratic and accountable government for local communities;
> (b) to ensure the provision of services to communities in a sustainable manner;
> (c) to promote social and economic development;
> (d) to promote a safe and healthy environment; and
> (e) to encourage the involvement of communities and community organisations in the matters of local government.[4]

Municipalities have administrative and legislative power with regard to 38 listed functional areas. Both national and provincial legislation may intrude on these areas, but may do so only in a regulatory fashion. Even where they may legislate, such legislation could be trumped by a local law if a national or provincial law would 'compromise or impede' local government's functioning.

Fiscal powers are also entrenched. Unlike the provinces that require enabling national legislation to impose taxes,[5] municipalities have the original power to impose rates on property and surcharges on user fees for services provided.[6] Local government is further entitled to transfers from the national government. While municipalities are subject to supervision, intervention by provincial governments to assume responsibilities on behalf of a municipality is also permitted. Finally, as a full partner in the system of cooperative government, local government has a non-voting right of participation in the National Council of Provinces (NCOP).[7]

Why the shift towards local government in the 1996 Constitution? While the constitutional principles entrenched in the Interim Constitution required the recognition of local government in the final Constitution, there was no constitutional imperative for its new elevated status. It has been argued that its new status was the product of both political and policy factors.[8]

From a developmental policy perspective, the argument was that the central government's ability to effect social and economic development has its limits.

Unless the full participation of the communities that are to be developed is obtained, developmental efforts will founder on the rocks of central planning and bureaucracy. This was never more apparent than in the apartheid era. Moreover, civic organisations in the black urban communities played an important role in the struggle against apartheid, mobilising residents behind political initiatives, including massive rent and service payment boycotts. The aim was to capture and institutionalise the energy of community participation.

The developmental perspective dovetailed with the African National Congress's (ANC) reluctant acceptance of the provincial dispensation. In the first round of constitutional negotiations it argued for a strong central state that could effect the transformation required for the fractured society. The federal option proposed by the minority parties, it was feared, would reinforce the ethnic divisions of the past. In the second round of negotiations in the Constitutional Assembly – where the provincial dispensation was embedded in the constitutional principles – local government was thus promoted at the expense of the provinces.

Given the arguments for strengthening the status of local government, questions remain. Does the constitutional entrenchment of local self-government matter? Does it promote democracy and accountability? Does it enhance development?

The first legal skirmish concerning the status of local government emphasised the value of entrenching democratic rule. The object of the newly unified metropolitan municipality of Johannesburg – amalgamating wealthy white suburbs with the impoverished black townships – was the redistribution of resources and services.

In a complex set of institutional arrangements, a metropolitan sub-council in a predominantly white area dramatically increased its property rates on business premises. The funds were then transferred to the overarching metropolitan council which, in turn, distributed them to sub-councils servicing black townships. The irate rate payers sought to challenge the property rates on the grounds of administrative law. This was the appropriate legal weapon before 1995 since the municipality, as a statutory body, exercised only delegated powers. Thus its decisions could be reviewed by a court of law on various administrative grounds, including the reasonableness of the rate increases. The Constitutional Court held that even under the Interim Constitution, local government no longer exercised powers delegated to it by the national or provincial governments, but received its powers from the

Constitution.[9] Municipal councils were legislative assemblies and their legislative acts, which included the levying of taxes and the adoption of budgets, were thus not subject to administrative review.

With democratic space entrenched, it has also allowed minority parties to occupy sub-national institutions, thus giving effect to the constitutional principle of multiparty democracy. In the conflict-ridden KwaZulu-Natal, decentralised government accommodated antagonistic political parties. Until the 2004 national elections, the leading party in the provincial government was the Inkatha Freedom Party (IFP), while the metropolitan hub of Durban was in the hands of the ANC. Collectively, the governance of that province as a whole was in the hands of both parties. Even with the ANC becoming the leading party in KwaZulu-Natal in April 2004, it has to contend and cooperate with a number of rural councils that are still under the control of the IFP.

A similar situation has applied in the Western Cape where the ANC only became the majority party in the City of Cape Town and the provincial government in 2002.[10] While political alignment between a province and its main metro brings greater synergy and development – which is evident in both KwaZulu-Natal and in the Western Cape – it does not detract from the value of accommodating minority political formations in government.

INSTITUTIONAL ARRANGEMENTS

The institutional arrangements of local government in South Africa have been driven by two concerns. The first was the de-racialisation of local authorities into democratic institutions and the second the establishing of viable institutions of self-government that could redistribute resources equitably. The resultant institutions – metropolitan, district and local municipalities – have a profound impact on the place and role of local government in the South African decentralised system of government.

TRANSFORMATION PROCESS

Before 1994 there was a wide array of local authorities, ranging from large urban municipalities to small rural ones with limited functions. They were all neatly compartmentalised into over 1,000 race-based white, coloured, Indian and black local authorities that came in many forms and sizes.[11] The transformation of local authorities after 1994 followed a three-phased process.

The first, pre-interim phase commenced with the replacement in 1994 of race-based local authorities in cities and towns with non-racial transitional local councils, consisting of nominated members, half of which came from the then existing statutory authorities, and the other half from non-statutory community organisations in the black townships.

The second, interim, phase of transformation was the demarcation of the country into 843 municipalities during 1995. Elections were held in 1995 and 1996 for transitional metropolitan councils in the urban areas and transitional local municipalities elsewhere. In the election, 40% of councillors were elected by proportional representation, with the rest elected in wards. The ward representation was further divided: half of the councillors represented traditional white, coloured and Indian areas, while the other half represented black communities. The principal institutions were two-tiered metropolitan structures, local municipalities in built up areas and a few regional councils in rural areas.

The 1996 Constitution institutionalised these three forms of local government – metropolitan, local and district municipalities – almost by accident. The constitutional text that was adopted on 8 May 1996 by the Constitutional Assembly, provided only that national legislation must determine '(a) the different categories of municipalities that may be established; [and] (b) appropriate fiscal powers and functions for each category'.[12] When the Constitutional Court[13] reviewed this provision, it found that Chapter 7 dealing with local government did not comply with Constitutional Principle XXIV that required a 'framework for local government powers, functions and structures' in the Constitution since there was no framework for the structures of municipalities.

The amended text, adopted on 11 October 1996, contained three categories of municipalities – A, B and C. Category A comprised self-standing municipalities, later referred to as metropolitan municipalities. Categories B and C municipalities have 'shared' authority over areas falling outside the metropolitan areas. The basic unit is a local municipality (Category B), with a number of these constituting a district municipality (Category C). A metro exercises all local government powers, while these powers are divided among a district and its local municipalities. The Constitution further required local government for the entire area of the country – establishing the principle of so-called wall-to-wall local government.

The demarcation process conducted in 2000 created six metropolitan municipalities and 231 local municipalities under 47 district municipalities. To

complicate matters, during the demarcation process it became apparent that the provincial borders (hastily drawn in 1993) did not make sense from a municipal perspective; in a number of places the provincial borders ran through functional communities that should be served by one municipality. Through a constitutional amendment in 1998, the prospect of cross-border municipalities was created. The Municipal Demarcation Board demarcated 15 such municipalities. They proved difficult to manage and the national government is in the process of abolishing them by aligning provincial boundaries with municipal boundaries.

The local government election of 5 December 2000 brought into existence the first fully democratically elected 284 municipal councils.

METROPOLITAN GOVERNMENT

Up to 1995, the cities of South Africa were rigidly divided and governed along racial lines. The white authorities controlled the urban centres and hence the strong tax base. Blacks were confined to the periphery of the cities, receiving no or limited municipal services. With race and class coinciding, the cities consisted of centres of business activity surrounded by vast slums of poverty. With the advent of democracy the immediate object was to establish integrated cities where the benefits of the central tax base could be redistributed equitably to disadvantaged areas. At the same time, after years of isolation, the cities – as the country's hub of economic activity – had to become globally competitive.

The transformation of metropolitan governance occurred in two phases. In terms of the Local Government Transition Act of 1993, a two-tier metropolitan system with a weak centre and strong substructures was established in Johannesburg and Durban in 1995 and in Cape Town in 1996. An amendment to the Act in 1996 sought to strengthen the metropolitan council with an exhaustive list of the powers and functions of both tiers. However, the tiers could negotiate the reallocation of powers and functions, provided that issues of practicality, technological and economic efficiency were taken into account. In practice, it was found that the system led to a costly and unintelligible division of functions and powers.[14] By and large, the metros did not, or could not, redistribute resources from the wealthier substructures to the poorer areas as effectively as hoped.

Immediately on the establishment of the two-tier metropolitan system, the process of designing the final phase of metropolitan government commenced.

The government in 1998 produced its White Paper on Local Government, which included a new vision for the governance of metropolitan areas.

The point of departure was the importance of metropolitan areas. While they generated the bulk of the country's gross domestic product, they were also home to large (and increasing) numbers of poor who lacked access to basic services. The form of urban government, the White Paper concluded, was 'a critical factor in determining the future economic prosperity and social stability of the nation'.[15]

It thus opted for a policy of strong, unified metropolitan government for three reasons.[16] First, due to the country's history of apartheid, there was a need for the equitable redistribution of resources and services across the metropolitan area. The past was characterised by exclusionary practices where the poor were pushed to the periphery into spatial 'pockets of poverty'. Strong metropolitan government could ensure that everyone who contributes to the metropolitan tax base benefits from it. Second, metropolitan government was necessary to promote strategic land-use planning and to coordinate public investment in physical and social infrastructure. To overcome the legacy of apartheid, spatial integration and socially inclusive forms of development were required. Third, strong metropolitan government was necessary to develop a city-wide framework for economic and social development for enhancing the cities' global competitiveness.

Having a unified metropolitan government for large populations and areas would place a distance between the residents and their political representatives.[17]

Two forms of internal deconcentration of power were enacted in the Municipal Structures Act of 1998. The first takes place at a micro level where delegated powers can be invested in the ward committee of each municipal ward (the geographic area electing one councillor). The second form combines a number of wards to form a metropolitan sub-council, which by the nature of its size could be delegated more administrative and decision-making powers. Functions involving a high degree of interaction with local communities would be suitable for delegation to metropolitan sub-councils.[18]

Six large metropolitan municipalities have been established in the major urban areas, as shown in Table 1. The result in the central province of Gauteng – the business and industrial heartland of South Africa – was that three contiguous metropolitan municipalities were established, containing most of the provincial population. Individually their resources are in excess of some

Table 1: Metropolitan cities – population size, land area and province

City	*Population (1996)*	*Land area (km²)*	*Province*
eThekwini (Durban)	2.7 million	2,291	KwaZulu-Natal
Johannesburg	2.6 million	1,664	Gauteng
Cape Town	2.5 million	2,498	Western Cape
Ekurhuleni (East Rand)	2.0 million	1,923	Gauteng
Tshwane (Pretoria)	1.6 million	2,198	Gauteng
Nelson Mandela City (Port Elizabeth)	1 million	2,198	Eastern Cape

provinces, and collectively equal to that of the Gauteng provincial government. The metropolitan City of Cape Town has 70% of the Western Cape's population. In the more rural KwaZulu-Natal and Eastern Cape, the metropolitan municipalities in the Durban and Port Elizabeth conurbations have a third and a sixth of the provincial populations, respectively.

Large municipal councils with between 150 to 210 members are elected, with half of them in wards and the rest drawn from party lists to ensure a high degree of proportionality. A system of executive mayors has been introduced in all metropolitan councils. Only a few metros have established ward committees, comprising ten community-based representatives who, under the chairpersonship of the ward councillors, perform advisory and communication functions.[19] The development of sub-councils has also been slow.

LOCAL MUNICIPALITIES

Outside metropolitan areas, the 231 local municipalities form the basic local government institution. They vary considerably in size and significance: the smallest has a population of 6,844 residents and covers a vast expanse of desert, while the largest municipalities – Buffalo City (East London), uMsunduzi (Pietermaritzburg) and Mangaung (Bloemfontein) – are provincial capitals and have declared themselves aspiring metros. In demarcating the local municipalities, the overriding concern was that of viability, with the result that most municipal areas cover more than one town.

This has, of course, brought its own dynamics. The lack of a sense of community has so far resulted in the collapse of one municipal council. Two adjacent towns in North West Province were joined to form the Lekwa Teemane Local Municipality. Although belonging to the same political party,

the councillors representing the two towns were never able to work together, each mistrusting the other side. In the end, the political standoff affected the administration of the towns so severely that the provincial government dissolved the council and new elections were held.[20]

The municipal councils are fully elected in terms of a system of proportional representation. Except for the smallest municipalities, 50% of councillors are elected in wards while the rest are drawn from party lists. Like the metros, most councils have elected full-time executive mayors.

As successors to the pre-existing councils, local municipalities sought to perform their traditional functions of service delivery. However, governing has become infinitely more complex with the overlay of a second tier of local government – district municipalities. Their role and functions are still contested terrain.

DISTRICT MUNICIPALITIES[21]

While the notion of shared authority is embedded in the Constitution, the purpose of district municipalities received only scant attention. Section 155(4) merely provides that the division of powers and functions effected by national legislation, 'must take into account the need to provide municipal services in an equitable and sustainable manner'. Such division can also be asymmetrical, as the powers of all local municipalities within a district need not be the same.

A district municipality's objectives are two-fold: it must first redistribute resources within a district according to need; and second, it must assist and capacitate local municipalities in order for them to provide, and sustain the provision of, services in their areas. The overall objective of the district municipality is thus described by the Constitutional Court as the performing of 'coordinating functions'.[22] They were not meant to be the primary service delivery agent.

The White Paper on Local Government and the later Municipal Structures Act of 1998 fleshed out these 'coordinating functions'. The objectives were:

- coordinating development planning of the district as a whole;
- the provision of bulk services to local municipalities;
- the equitable redistribution of resources throughout the district; and
- direct service delivery in areas of low population density (so-called district management areas falling outside local municipalities).

However, a significant shift occurred in the Municipal Structures Amendment Act of 2000, transforming the district municipality from a coordinator and provider of bulk services to that of a regular end-user service provider of water, electricity, waste water and sewage disposal systems and municipal health services. Moreover, the national minister of provincial and local government may shift the functions back to local municipalities where the district did not have the capacity for the functions. In the end, the local municipalities retained their primary functions, with the impact of the shift in responsibilities more apparent in rural areas.

As an institution of local government, the governance patterns have not yet settled. Although local municipalities can collectively control the district council – 60% of the district councillors are indirectly elected by the constituent local councils (the rest are directly elected through proportional representation party lists) – districts are often seen as being in competition with local councils for resources and power. Moreover, because the distribution of powers and functions between the two are flexible, the contest for resources is an ongoing saga. While the coordinating function of the district in terms of planning is not contested, its capacity to be a mechanism for the equitable redistribution of resources is in many instances weak. The amalgamation of towns in large districts has not resulted in cross-subsidisation by well-resourced municipalities of their poorer cousins. What it has produced outside the metropolitan areas, is a complex set of institutional arrangements where political issues dominate those of service delivery.

DIVERSITY OF INSTITUTIONS

The outcome of the process of institutional transformation has seen the establishment of, comparatively speaking, a small number of municipalities. The object of the consolidation enterprise was to ensure viability as self-sustaining institutions of government. With resources unevenly distributed in the country, size alone has not achieved this. In some rural areas amalgamation merely meant the consolidation of poverty. On the other hand, in the urban areas, powerful and resource-rich self-sustaining institutions have been formed.

The size of the urban municipalities has, of course, placed strain on the concept of local democratic accountability. The notion of the municipal governance as the organised village community is no longer sustainable. The distance between the residents and the councillors has increased considerably.

Although nearly half of all councillors are elected in wards – imposing a level of direct accountability not present in the national or provincial electoral systems – new methods of participatory democracy are being forged. The system of ward committees and, in metropolitan areas, sub-councils, is still new and is yet to prove its public participatory credentials.

The creation of large municipalities has also meant that the notion of a municipality as an apolitical community of interests is not tenable. Political parties are now an integral and indispensable part of local government, facilitating the organisation of local interests across large areas and numbers of residents. It has also meant that local politics have become part of national politics. Within an ethos of strong party discipline across the political spectrum, national agendas dominate and national party leaders determine local leadership questions.

Even within the consolidated framework of local authorities, the size and shape of municipalities, as elsewhere in the world, vary enormously. They range from mega-city metros with budgets that exceed those of some provinces, to small, rural, impoverished local municipalities. Yet, formally, a symmetrical legal regime applies to all municipalities. This of course places strain on the poorly resourced and skilled municipalities to comply with the rigours of that regime, as well as to exploit the legal space for local self-government. Ironically, governance in these non-metropolitan areas is more complex and difficult to manage because of shared government by local and district municipalities.

The institutional arrangements of local government have resulted in a *de facto* asymmetrical system working within the symmetrical legal framework. The large urban municipalities are able to exploit the constitutional space open to them, exercising a wide range of powers and raising their own revenue. As significant actors in their own right, they have forged direct relations with the national government. They have their own interests and have organised themselves in the Cities Network. In sum, the large metros and urban local municipalities are not the same animal as a rural local or district municipality. This is most apparent when it comes to the powers and functions they execute and perform.

FUNCTIONS AND POWERS

CONSTITUTIONAL DIVISION OF POWERS AND FUNCTIONS

Local government derives its executive and legislative powers and functions from the Constitution. Schedules 4B and 5B list the functional areas of its

competencies.[23] These functional areas may not be reduced by ordinary statute, but both the national and provincial government may add further areas by assigning some of their own powers to local government.

Schedules 5 and 4 list exclusive provincial competencies and those concurrent with national government, respectively. These lists are further divided into parts A and B, of which the latter names 38 items falling within local government's competence. (See Annexure A.) In the concurrent list of functions of Schedule 4B are the following matters:

- planning and building regulation
- household services (electricity, gas, water and sanitation)
- social services (child-care facilities, health care)
- protective services (firefighting)
- economic activities (tourism, trading regulations)
- transport (airports, public transport, ferries, traffic)
- infrastructure (stormwater management, public works)
- environment (air pollution)

In the exclusive list of Schedule 5B are the following matters:

- economic regulations (bill boards, liquor sales, food sales, street trading, markets, abattoirs)
- infrastructure (roads)
- household services (waste removal)
- social services (cemeteries)
- public spaces (public places, cleansing, public nuisance, fences, amenities, street lighting, noise pollution, traffic and parking)
- recreation (beaches and amusement facilities, sport facilities, parks)
- animals (care, pounds, impounding, licensing of dogs)

National and provincial government can also make laws on these matters, but to a limited degree. With regard to Schedule 4B matters, both the national and provincial legislation may 'regulate' the exercise of local authority by setting a framework which can include minimum requirements and monitoring procedures.[24] Any national or provincial law exceeding the limits of 'regulation' by being unduly prescriptive is invalid. With regard to Schedule 5B matters, the national parliament can legislate only on the same limited basis that it may

intrude on a provincial exclusive competence, namely when it is necessary to maintain national security, economic unity, and essential national standards. In the case of a provincial law, the rule applicable to Schedule 4B also applies to Schedule 5B matters, so it may only regulate, and not prescribe, outcomes.

The division of powers and functions between provincial and local government in schedules 4 and 5 lacks clarity and precision. The distribution of powers and functions is done in broad strokes with no neat separation of powers. To a large extent there is concurrency of powers in respect of most areas of governance. In a number of functional areas the only distinction lies in the provincial–local dichotomy; for example, 'provincial health services' (Schedule 4A matter) and 'municipal health services' (Schedule 4B matter). In some instances the overlap is not explicit but inherent in the nature of the functional areas. For example, the exercise of the provincial competence relating to liquor licenses (Schedule 5A matter) will inevitably overlap with a municipality's power to control undertakings that sell liquor to the public (Schedule 5B matter).

In the case of a conflict between a local by-law and a national or provincial law, the general rule is that the by-law is invalid.[25] However, the by-law may still trump a valid national or provincial law if the latter 'compromise or impede a municipality's ability or right to exercise its powers or perform its functions'.[26] Given the rules effecting the division of powers, it can be argued that local government has real, albeit limited, autonomy since the division of powers is protected from encroachment by other spheres of government.

Both the national and the provincial governments may increase the legislative and executive powers of municipalities by assignment of their own powers. The assignment may apply generally to all municipalities or may be to a particular municipality. To counter the danger of unfunded mandates through assignment, national legislation has instituted a mandatory process of consultation that aims at avoiding this outcome.[27]

Before introducing a bill in the national or provincial legislature that might allocate additional functions to local government, the relevant minister must publish it for public comment and consult with the ministers responsible for local government and finance and organised local government. The Finance and Fiscal Commission must also be requested to access the financial implications of the legislation. Where the assignment imposes a duty on the municipality, and the duty falls outside schedule 4B and 5B functional areas and has financial implications for the municipalities concerned, the minister must take

appropriate steps to ensure sufficient funding and capacity-building initiatives as may be needed for the performance of the assigned function.

In a clear expression of the principle of subsidiarity, the municipalities may lay a constitutional claim to the administration of certain provincial functions. The provincial government must, in terms of section 156(4) of the Constitution, assign to a municipal council the administration of a matter listed in schedules 4A or 5A if the matter in question 'necessarily relates' to local government, would most effectively be administered locally, and the municipality has both the will and capacity to administer it.

PRACTICE

In the main, municipalities are empowered to deal with functional areas that are relevant to their developmental mandate and matter to local communities. The principal shortcoming has been in the area of housing, which is a national and provincial concurrent function. Municipalities deal with all the issues related to housing (building regulations, water, electricity, sanitation), but the core function of providing houses is done on an agency basis for the provinces. This matter may be addressed in the revision of the Schedules that is currently under consideration by the national government.

While the outer limits of municipal competencies have not yet been tested in court, metros have extended themselves to larger issues of governance, such as economic development. In Cape Town and Durban the metros, in partnership with the provincial government, entered the ambitious enterprise of financing international convention centres. Even rural municipalities have endeavoured to promote economic development through forays abroad to attract foreign investment.

Difficulties do not lie so much in the legal constraints, but in the capacity to exploit existing competencies. A significant number of municipalities are unable to be active in more than half of their functional areas. In a capacity assessment for the year 2003, the Municipal Demarcation Board has found that 10% of municipalities rendered less than 30% of their allocated functions.

Given the wide range of powers, the question arises whether municipalities are effective institutions of local self-government. Are they expressing local preferences, or have they become implementers of national or provincial policy? Policy and practice suggest the emergence of the latter. Local government is seen by the national government as the site of service delivery of

national programmes. This is achieved through both the delegation of specific functions, such as housing, and the imposition of national policy. The provision of free basic municipal services is a case in point.

The provision of free basic services came to the fore in the ANC's local government election campaign of 2000.[28] After the election it became government policy and municipalities had to subsidise a basic level of service of water and electricity for poor households. The provision of free water and electricity (and sanitation from 2005) obviously has major implications for municipalities' financial viability. The provision of free basic services to poor households requires massive service extension, especially in rural areas.[29] The policy directive has thus been followed by increased transfers from the national treasury, but municipalities have to subsidise part from their own resources.

EXPENDITURE

The significance of local government's activities is also reflected in its expenditure. Of all government expenditure (national, provincial and local), municipalities were responsible for 23%. The total 2003–04 municipal budgets, including capital and operating budgets, were an estimated R86 billion,[30] an increase of 15.3% over the previous year.[31] In comparison, the overall 2003–04 provincial budgets were R170 billion and the national budget R110 billion (excluding debt repayment). Not surprisingly, the six metropolitan municipalities' combined 2003–04 budgets of R50.5 billion represent 58.8% of all municipal budgets. Their budgets were:

- Johannesburg R12.2 billion
- Cape Town R10.2 billion
- EThekwini (Durban) R9.8 billion
- Ekurhuleni (East Rand) R8.0 billion
- Tshwane (Pretoria) R7.0 billion
- Nelson Mandela (Port Elizabeth) R3.3 billion

The relative size of these budgets becomes evident when compared with the 2003–04 budgets of the nine provinces which were:[32]

- KwaZulu-Natal R34.1 billion
- Eastern Cape R29.6 billion

- Gauteng R28.3 billion
- Limpopo R21.3 billion
- Western Cape R16.3 billion
- North West R13.3 billion
- Free State R11.5 billion
- Mpumalanga R11.5 billion
- Northern Cape R 4.1 billion

The large metro budgets are equal to or larger than the smaller provincial budgets, and the combined budgets of the three metros in Gauteng equal that of the province's budget.

The local municipalities are responsible for 30% of the total local government budgets. With the shifting of the functions of water, sanitation and refuse removal to some district municipalities from 1 July 2003, their budgets increased significantly but still account for only 6% of the total local government budgets.

Operating expenditure consumes the bulk of the budgets (80.6%) with the remainder devoted to capital budgets. Of the operating budgets, salaries of the 210,000 municipal employees take up the largest share at 32.9%.

The significant difference between the local government budgets and provincial budgets is that provinces are dependent on national transfers for 96% of their activities, while local government receives only 17% of its revenue from the national and provincial governments. This reflects the significant revenue-raising powers of local government and a high degree of self-sufficiency.

FINANCING OF LOCAL GOVERNMENT

In terms of the Constitution, a municipality has the original revenue-raising powers of imposing rates on property and surcharges on fees for services provided by or on behalf of it.[33] Unlike the provinces' taxing powers that must be regulated by national legislation, this is discretionary in the case of local government. However, all other taxes, levies and duties may only be imposed if authorised by national legislation. Excluded from local government's reach are income tax, value-added tax, general sales tax or customs duty. Municipalities may also raise loans for capital or current expenditure, but in the latter case it must be for bridging purposes only and must be repaid within 12 months.[34]

A further source of revenue is transfers. Municipalities, along with provinces, are entitled to 'an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it'.[35] In addition, the national government may give further conditional or unconditional grants. Importantly though, municipalities' equitable share may not be affected if they raise additional revenue or, conversely, fail to exploit their fiscal capacity and tax base.

The national statutory regulation of local finances is extensive. The recently enacted Municipal Finance Management Act of 2003 (MFMA) and the Property Rates Act of 2004 regulate in detail both the expenditure and revenue-raising activities of municipalities.[36] The national minister of finance is empowered, for example, to provide guidelines on budget growth parameters and to cap an annual increase in property rates. However, the overall policy is that municipalities are responsible for their own financial well-being. The MFMA thus articulates this principle as follows: 'The primary responsibility to avoid, identify and resolve financial problems in a municipality rests with the municipality itself.'[37] There is also no implicit guarantee that either the national or provincial government will stand in for the bad debts of a local government.[38]

The operating income budgets for 2003–04 of R72.9 billion (comprising 82.4% of the total budgets) were based on the following revenue sources:

- User charges (mainly electricity and water) 42.5%
- Property rates 19.6%
- Other (tariffs, fines, subsidies, etc) 19.6%
- Intergovernmental grants 11.1%
- Business payroll and turnover levies 7.1%

For the capital expenditure budgets of R16.7 billion, 45.9% of the revenue came from national and provincial transfers. Municipal borrowing has remained at low levels, the bulk (93%) of which is done by the metros.

Overall, transfers play a small role in the budget of the larger municipalities, including all the metros, which collect at least 94% of their own revenue. Poorer rural municipalities are much more reliant on transfers, which in the worst case amounts to 92.1% of its revenue. Table 2 shows that, relative to the provinces, local government's share of income raised nationally remains small, as the division of that income in terms of the Medium Term Expenditure Framework shows.[39]

Table 2: Government shares of national revenue by year (R billions / percentage)

Sphere of government	*2003/04*		*2004/05*		*2005/06*		*2006/07*	
National	110.5	38.9	120.6	38.2	131.0	37.8	139.6	37.4
Provincial	161.4	56.8	181.9	57.3	199.7	57.6	216.3	58.0
Equitable share	.	50.9		50.6		50.1		50.1
Conditional grants	.	5.9		6.7		7.5		8.0
Local	12.3	4.4	14.2	4.5	15.9	4.6	17.0	4.6
Equitable share		2.2		2.4		2.5		2.5
Conditional grants		2.1		2.1		2.1		2.1
Total	**284.3**		**315.9**		**373.1**		**373.1**	

Transfers have increased rapidly over the past four years, doubling to R8.8 billion in 2002–03 and rising to R12.3 billion in 2003–04. This trend is projected to continue over the next four years, yet the share going to provinces increasing in a greater amount. The portion of the equitable share will be 53% of all transfers, reflecting a slow movement over the next four years towards greater discretion for local government.

In comparison to the provinces – which received 96% of their income from transfers – the majority of municipalities would appear to be self-sustainable, giving them wide discretion to pursue the preferences of local voters. There are, however, a number of factors that limit this self-sufficiency.

First, municipalities are set to lose direct control over the surcharges on electricity. In an effort to rationalise electricity distribution for the entire country, national government is establishing a number of regional electricity distributors (REDS) that would take over the electricity function from municipalities. Although municipalities will be shareholders in the REDS, the flexibility of the use of income to cross-subsidise other expenditure will be curtailed.

Second, municipalities are increasingly required to implement national policies that impact directly on their financial status. As indicated above, implementing the free basic services policy was accompanied by an increase in the equitable share, increasingly making them implementors of policies devised nationally.

Third, municipalities' own revenue-gathering efforts are under strain. By 2004 municipalities have accumulated R28 billion in unpaid consumer bills. This increases by about R1.8 billion a year. The bulk of the debt (65%) is owed to the metros. Many municipalities do not yet budget for bad debts, requiring annual adjustments of their budgets.[40]

Fourth, the financial relationship of transfers is primarily between the national government and the municipalities. The role of provinces is peripheral in this area and is getting more so. With transfers constituting the bulk of provincial income, and much of their expenditure predetermined by national norms on the payment of pensions, social grants and salaries, there is little left to transfer to struggling municipalities. Moreover, the administration of conditional grants for municipal infrastructure that was previously done by provinces, is now done by the national departments. With hardly any funds at their disposal for transfers to municipalities, provinces are finding it increasingly difficult to give effect to their supervisory obligations.

SUPERVISION OF LOCAL GOVERNMENT

A key feature of the South African system of decentralisation is the extensive supervision that both the national and provincial governments exercise over municipalities. The supervisory function entails the establishment and structuring of municipalities, regulating the exercise of their competencies, monitoring the exercise of those competencies and, in certain circumstances, intervening in municipalities.

The establishment and determination of the basic features of the municipalities in a province are done jointly by the Municipal Demarcation Board, the national government and the provinces. National legislation determines the basic structures, operational system and financial management of municipalities.[41] National and provincial legislation further regulates the various sectoral areas of local competencies. The high level of regulations has not only evoked protests of overregulation,[42] but has also meant that considerable skills and resources are required to meet the various legislative prescripts.

While provinces are specifically entrusted in the Constitution with the task of monitoring local government to ensure that it remains within its legislative framework when exercising its powers and functions, national government does so on an implicit basis. Extensive reporting duties have been imposed. With a national emphasis on fiscal discipline, the National Treasury is increasingly playing a prominent role in scrutinising municipal finances.

Following the monitoring duty, both the national and provincial governments have a constitutional obligation towards local government to 'support and to strengthen the capacity of municipalities to manage their own

affairs'.[43] This obligation of support is justiciable, and a court may review the reasonableness of steps that the responsible governments have taken in executing their duty of support. It does not, however, include the obligation to pay the creditors of a bankrupt municipality.[44] As shown above, financial assistance comes mainly from the national government in the form of conditional grants, leaving provinces to provide institutional and capacity-building support.

When it comes to intervention powers, only a province has constitutional authority to intervene in a municipality when the latter fails to comply with a statutory executive obligation. In terms of section 139 of the Constitution, a province may intervene in a municipality by issuing directives and, on prescribed grounds, acting in the place of the municipal council to execute unfulfilled executive obligations subject to NCOP approval.

Importantly, a province could not usurp a municipal council's legislative function – a principle that was muted in a constitutional amendment in 2003. Not only were provincial powers of intervention extended, but the national government was brought into the picture for the first time. In 'exceptional circumstances', a province may dissolve a council.[45] More importantly, a province may, and in some instances must, intervene when a municipality does not, or cannot, approve a budget or a revenue-raising measure giving effect to the budget, or implement a financial rescue plan, by doing so in place of the municipality. In these financial emergencies, the national government hovers in the background. Not only does the national treasury prepare financial rescue plans, but if a province does not intervene, or does so inadequately, the national government may intervene in its place.

There is an extensive supervisory framework covering almost every aspect of local government. Ironically, the most intense supervision is with regard to the raising and spending of local government's own funds. This may place a question mark behind strong claims of self-governance. The system has also produced a complex set of intergovernmental relations. Since supervision is a concurrent competency, a coordinated and coherent approach between the national and provincial governments is required – an objective that is not always achieved in practice.

Provinces are also finding it difficult to perform their share of supervisory functions. First, as noted above, they lack any effective financial stick or carrot to keep municipalities in line. Second, the monitoring and support of metros are largely beyond the reach of provinces. So is the duty to support them. When the

city of Johannesburg required substantial funds to carry out its restructuring plans, it approached the national treasury for a R525 million grant. Such a request the Gauteng province would not have been able to entertain.

The overall supervisory framework points to the close interaction that exists between the three spheres of government. Given the many points of interaction, intergovernmental relations in South Africa resemble a three-layered marble cake. In some instances, the primary relationship of local government is with provinces, in other instances it is with the national government. There is no neat 'layered' structure to the relationships, as none was intended in the Constitution.

INTERGOVERNMENTAL RELATIONS

South Africa's system of decentralisation is conceptualised as a three-cornered hat – the three spheres of government are 'distinctive' in their powers, 'interrelated' in a hierarchy of supervisory powers, and 'interdependent' to perform the task of government in a cooperative manner. Indeed, within the system of cooperative government prescribed in the Constitution, local government is reserved a place in both national and provincial decision-making. To function effectively, local government, consisting of numerous municipalities, is required to act as a collective. Organised local government has thus been institutionalised in the Constitution and legislation.

Section 163 of the Constitution requires an Act of Parliament to provide for the recognition of national and provincial organisations representing municipalities, and to determine procedures by which local government may consult with the national or provincial government and designate representatives for various bodies. The Organised Local Government Act of 1997 thus provides for the recognition of a national organisation representing the majority of provincial associations, which in turn must represent the majority of municipalities in each province. The South African Local Government Association (Salga) – a voluntary body representing all nine provincial local government associations – was established in 1996 and has been recognised as the body representing local government. Salga is not a statutory body but has official status through the executive act of recognition.

Salga represents local government interests through its membership of a number of key formal intergovernmental structures.[46] First, it has limited membership of the NCOP, the second house of the national Parliament. Alongside the ten-member delegations of the nine provinces, Salga's ten-

member delegation is entitled to participate in NCOP proceedings when matters affecting local government are dealt with, but it has no vote. Second, Salga has representation on the Finance and Fiscal Commission, a constitutional body that advises government concerning the equitable division of nationally raised revenue between spheres of government. Third, Salga is a member of the Budget Forum, a statutory intergovernmental forum where the minister of finance consults with his/her counterparts in the provinces and Salga on, among other things, the annual Division of Revenue Bill.

Perhaps the most important communication channel for Salga has been its participation in a number of executive intergovernmental forums. The most important of these forums are the President's Coordinating Council (PCC) and the various sectoral forums called MinMECs.[47] The PCC comprises the president, the minister of provincial and local government, provincial premiers and, since December 2001, the Salga chairperson. Salga also participates in a number of MinMECs, the forum where a national minister meets with provincial counterparts along sectoral lines.

The PCC and the MinMECs are now statutory intergovernmental relations bodies, mandated by the Constitution and formalised by national legislation on intergovernmental relations, with Salga as regular member.[48] Salga also has membership in a number of administrative bodies, including the Committee for Environmental Coordination[49] and the Road Traffic Management Corporation's shareholders committee.[50] At a technical level, Salga participates in various technical working groups, task teams and flagship programmes such as the Integrated Sustainable Rural Development Programme, Urban Renewal Programme and Local Economic Development.

The Constitution further establishes the general principle that organised local government must be provided with the opportunity to make representations on behalf of its members on national and provincial legislation affecting their interests.[51] In addition a number of legislative instruments oblige the national government, before initiating legislation, to consult Salga. For example, section 229(5) of the Constitution requires that national legislation that regulates the powers of municipalities to impose revenue-raising measures, may be enacted only after organised local government has been consulted.

Despite its constitutionally entrenched position, Salga remains a voluntary body. It consists of office bearers who are full-time councillors, drawn mostly from the leadership of metropolitan and large municipalities, supported by a sizeable administration. As a full partner in government, Salga is expected to be

an active participant in the various intergovernmental forums, to provide policy and positions on numerous issues, and to articulate and defend all local government interests. It is widely accepted both from within and outside Salga that it has not, as an organisation, been able to perform this task adequately.[52] For example, its participation in the NCOP has been very patchy and ineffective.

The inadequate performance of Salga in intergovernmental relations has been attributed to a number of factors. Time constraints on the political leadership are the most pervasive. All elected office bearers are full-time office bearers in metros or district municipalities – usually the mayor or speaker. The time given to Salga is voluntary and competes with the high demands of being executive officers of large institutions. Often it has been difficult to represent local government collectively because there is no agreed position that has been widely canvassed and for which there is political backing. Unlike premiers who represent only their own province's interests, Salga's political leaders must represent all categories of municipalities, as well as rural and urban interests. This mandate may often compete with their own municipal mandate.

Salga faces a crisis as it must either participate effectively in the key institutions or face marginalisation. In dealing with its underperformance it has adopted a two-fold strategy.[53] First, the recognised national body of organised local government is the representative body of the majority of municipalities instead of the majority of provincial associations. By losing its federal character, the argument is that it will gain in unity of purpose. Second, to bolster its profile, Salga has made provisions in its Constitution for full-time Salga office bearers, drawn from the organisation's top leadership. This will enable office bearers to give their undivided attention to Salga's numerous intergovernmental commitments, including participation in the NCOP.

Increasing the participation levels of organised local government may only partly address the problem of representing the wide variety of municipal interests. The institutions of local government – ranging from self-sufficient mega-cities to small rural municipalities dependent on national handouts – do not always have shared interests and concerns, save for the common burden of the national supervisory framework. The large cities move on a different trajectory to their poor rural cousins. Already the metros and the four largest local municipalities have joined forces in the Cities Network, thus far referred to as a 'learning network'. Moreover, the six metros, like provinces, deal directly on their own with national departments, international development agencies and financial institutions.

By the very nature of the three-cornered relationship, provincial–local relations are also extensive. In executing their supervisory role, provincial administrations are in daily contact with the municipalities in their jurisdiction. In a number of provinces cooperative relations have been sought through a variety of intergovernmental forums.[54] In Gauteng, for example, the Premier's Coordinating Forum comprises the premier and the mayors of the three metros and two district municipalities, meeting quarterly to consult on the coordination of service delivery. This body is augmented by the bi-annual Gauteng Intergovernmental Conference, consisting of the provincial cabinet and all mayors, focusing on the alignment of policy. The absence of organised local government, emphasising the reality that intergovernmental relations are between executives, is, however, the exception rather than the rule.

In other provinces the provincial association of organised local government is the partner in the provincial intergovernmental forums. This has changed with the Intergovernmental Relations Framework Act of 2005, which prescribes that membership of the provincial intergovernmental forums consists of the premier and the mayors of the metropolitan and district municipalities. While organised local government may be the vehicle to discuss broad policy and legislative proposals, the business of coordinating government is best not mediated through collectives.

CONCLUSION

Local government is entrenched in the 1996 Constitution as a sphere of government alongside national and provincial government. Significant competencies are bestowed on municipalities, protected from full encroachment by the other two spheres. With original taxing powers of property rates and user charges, the majority of municipalities are capable of financial self-sustainability. The supervisory powers of regulating, monitoring and intervention are significant, and are increasingly being used to ensure financial rectitude. As an important partner in the government of the country, local government has been given a place at the table by being included in all significant intergovernmental relations forums.

In many respects, local government has become an essential element of the South African system of decentralisation. By creating large, often viable, municipalities which can exercise significant powers (and have the capacity to generate revenue), at least some municipalities have made self-governance

possible. Whereas provinces are often seen as mere administrators of policies and funds generated by the national government, municipalities have the competence and resources to give direct effect to local preferences. Put differently, without the entrenchment of local government, South Africa would be very much a centralised state.

It is, however, not a foregone conclusion that local self-government will come to fruition. Hearing during the election campaign from residents about the poor quality of services they received from their municipalities, President Thabo Mbeki remarked in April 2004 that it may have been a mistake to give local government all the responsibilities they have. Indeed, local government faces considerable challenges. First and foremost, municipalities must convince the public that they are able to provide clean and effective government on matters that concern their residents.

Local government's legitimacy as a sphere of government is not high. A recent opinion survey indicated that politicians closest to the people, the municipal councillors, enjoyed the lowest esteem of all three spheres. The level of interest in local elections is also significantly lower than that for provincial and national elections. In both the 1995/6 and the 2000 municipal elections, voter turnout was 49%, in contrast to the national/provincial election percentages of 89% in 1999 and 76% in 2004.[55] The average turnout for by-elections in 2004 has been 35%. Poor administration and corruption will bring calls for greater central control over local government.

A radical redesign of the place and role of local government in the system of government is not yet on the cards. In the meantime, the development of local government is impacting on the system itself. First, local government is becoming less and less a uniform institution. Inasmuch as pressures for asymmetry are always present in any decentralised system, the uneven distribution of resources and skills among South African municipalities is leading to the questioning of the present symmetrical system of powers and functions. The mega-city metros are not comparable with rural municipalities – a divide that will become more conspicuous as urbanisation accelerates. Arguments are thus surfacing for an asymmetrical system where competencies match capacity.[56] Whereas the constitutional design foresaw the asymmetrical increase in powers of municipalities, the call is now for the asymmetrical decrease in competencies.

Second, the development of strong municipalities led by the metros is questioning the role and place of provinces in South Africa. Already, the power of metros relative to provinces is coming to the fore. There is some truth in the

following comment by Peter Marais, who had served first in the provincial cabinet in the Western Cape before becoming mayor of the Cape Town: 'I am about 20 times more effective as mayor of a unicity than I ever was as minister [in the provincial government], and during my career I had virtually all the portfolios.'[57]

The present configuration of provincial government has also been questioned. The then premier of the Eastern Cape has argued that in the long term, provincial powers must be devolved to local government and that provinces should be stripped down to mere oversight bodies, and the thousands of provincial civil servants be deployed to local government.[58] The outcome may be an hourglass configuration – a strong, dominating national government at the top with an expanding local government at the bottom, both tightening the corset around the provincial waist. How the long-term future of South Africa's system of decentralisation will evolve, will to a large degree depend on how municipalities give effect to their constitutional mandate of effecting democratic government and development. What remains clear is that local government will be an essential part of it.

ENDNOTES

1 Constitution of the Republic of South Africa 1996, S 40(1).
2 S 151(3).
3 S 151(4).
4 S 152(1).
5 S 228(2).
6 S 229(1).
7 S 67.
8 R Mastenbroek & N Steytler, Local government and development: The new constitutional enterprise, 1(2) (1997) *Law, Democracy and Development*, p 233.
9 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC).
10 With the implosion of the New National Party, the last remnants of the party crossed over to the ANC on 1 September 2002, giving the ANC for the first time a majority in the city council.
11 N Ismael & CJJ Mphaisha, *The Final Constitution of South Africa: Local Government Provisions and their Implications*. Occasional Paper, Konrad-Adenauer-Stiftung, Johannesburg, 1997.
12 S 155(1).
13 *In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC).
14 R Cameron, *The Democratisation of South African Local Government: A Tale of Three Cities*, JL van Schaik Academic, Pretoria, 1999, p 232.

15 White Paper on Local Government 1998, p 61.
16 Ibid, pp 58-60.
17 S Kongwa, Igoli 2002: Towards a megacity government, in *Provincial Government in South Africa*, Seminar Report, KAS, Johannesburg, 2001.
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23 Annexure A.
24 J de Visser, The powers of local government, 17 (2003) *SA Public Law*, p 223.
25 S 156(3) Constitution.
26 S 151(4).
27 S 9 Municipal Systems Act of 2000.
28 For the origin of the policy, see: P Wheelan, *Local government and Budget 2004*, Occasional Papers, IDASA-Budget Information Service, May 2004, p 6.
29 Ibid, p 7.
30 In 2005, US$1.00 was equal to R6.50.
31 National Treasury, *Trends in Intergovernmental Finances: 2000/01-2006/07*, National Treasury, Pretoria, 2004, Table 3.1.
32 Ibid, Table 2.3.
33 S 229(1)(a) Constitution.
34 S 230A.
35 S 227(1).
36 Both are phased in as from 1 July 2004.
37 S 135(1) Local Government: Municipal Finance Management Act 2004.
38 *MEC, Mpumalanga v Imata 2002* (2) SA 76 (SCA).
39 Compiled from Whelan, op cit, tables 2 and 3.
40 Salga, Transparency and accountability in local government finance, Final draft of the Report on the Analysis of the Municipal Budgets for the 2004/2005 Financial Year, August 2004, unpublished.
41 The principal legislation is the Municipal Structures Act of 1998, Municipal Demarcation Act of 1998, Municipal Systems Act of 2000, Municipal Finance Management Act of 2003 and Municipal Property Rates Act of 2004.
42 For the complaint of a municipal manager about compliance with the Municipal Finance Management Act, see J Koekemoer, Responsibilities of municipal managers, 6(2) (2004) *Local Government Bulletin*, p 4.
43 S 154(1).
44 *MEC, Mpumalanga v Imata 2002* (2) SA 76 (SCA).
45 The dismissal of the Lekwa Teemane Council, referred to above, was the first use of this provision, see Issa & Baantjies, op cit.
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48 Intergovernmental Relations Framework Act 13 of 2005.

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Annexure A: Local government functional areas

Schedule 4B	**Schedule 5B**
Air pollution	Beaches and amusement facilities
Building regulations	Billboards and the display of advertisements in public places
Child care facilities	Cemeteries, funeral parlours and cremetoria
Electricity and gas reticulation	Cleansing
Firefighting services	Control of public nuisances
Local tourism	Control of undertakings selling liquor to the public
Local airports	Facilities for the accommodation, care and burial of animals
Municipal planning	Fencing and fences
Municipal health services	Licensing of dogs
Municipal public transport	Licensing and control of undertakings selling food to public
Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law	Local amenities
	Local sport facilities
	Markets
	Municipal abattoirs
	Municipal parks and recreation
	Municipal roads
Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto	Noise pollution
	Pounds
	Public places
Stormwater management systems in built-up areas	Refuse removal, refuse dumps and solid waste disposal
Trading regulations	Street trading
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems	Street lighting
	Traffic and parking

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