

INSTITUTIONAL SUBSIDIARITY IN THE SOUTH AFRICAN CONSTITUTION

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1 Introduction

The Constitution provides for a framework for the division of functions and powers between the three spheres of government. This framework deals with the so-called “original” powers and functions of the three spheres, as allocated in the Constitution but also with the transfer of additional powers and functions to provinces and municipalities. As in all other decentralised states, this division is continuously debated and always a site for contestation. Section 156(4) of the Constitution occupies an important role in the discussion about the division of functions and powers between local government and other spheres of government. It provides:

“The national government and provincial governments must assign to a municipality, by agreement, and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –

- (a) that matter would most effectively be administered locally; and
- (b) the municipality has the capacity to administer it.”

It is the compulsory wording of the provision that sets it apart from the general provisions on transferring additional powers and functions to local government.¹

It may cause anxiety on the part of national and provincial governments who may not wish to be compelled to devolve functions to municipalities. On the part of local government, it may also cause anxiety because of a fear for unfunded mandates. However, it may also be a reason for enthusiasm, particularly on the part of the well-resourced, ambitious municipality that identifies opportunities for accelerated devolution.

It is often said that the underlying rationale for this provision is the principle of subsidiarity. This article explores the connection between section 156(4) of the Constitution and the principle of subsidiarity as it is found in legal theory and practice. It explores the historic background of the principle as well as its articulation in various domestic and international instruments.

It will be argued that, despite the fact that the connection is tenuous, it may assist in the interpretation of this provision. Equipped with this appreciation of the connection between subsidiarity and section 156(4) of the Constitution, the article provides some suggestions for its application.

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¹ For a discussion of transferring additional powers and functions to local government see Steytler & De Visser *Local Government Law of South Africa* (2007) 39-49

2 Different modes of subsidiarity

Before proceeding to the analysis of section 156(4) of the Constitution, it is necessary to reiterate the distinction between various modes of subsidiarity, discussed by Du Plessis in an earlier contribution to this journal. Du Plessis distinguishes between strategic subsidiarity and institutional subsidiarity.

He posits strategic subsidiarity as a “reading strategy” for legal interpretation; if two or more legal norms are applicable to a given situation, an external directive may instruct one of those legal norms to “step down”.² The permission to use force to make an arrest only in instances where no lesser means are available is an example of the application of strategic subsidiarity.³ Another example is an interpretation that holds that, where it is possible to solve a case without reaching a constitutional issue, the case must be solved in that way (without recourse to constitutional argument).⁴

Du Plessis defines institutional subsidiarity as the identification and empowerment of an appropriate institutional actor to perform a certain function. He remarks that the principle “constrains any more encompassing or superordinate institution (or body or community) to refrain from taking for its account matters which a more particular, subordinate institution (or body or community) can appropriately dispose of, irrespective of whether the latter is an organ of state or civil society”.⁵ Jurisdictional subsidiarity is an expression of the broader institutional subsidiarity principle. For example, the notion that the Constitution Court leaves the development of common law to the Supreme Court of Appeal can be regarded as an application of the principle of jurisdictional subsidiarity.⁶ Generally, it is said that the South African court structure, much like the German court structure, is based on the subsidiarity principle:⁷ matters are referred to a higher court only if the court *a quo* is prevented from hearing the matter.⁸

This article examines the relationship between section 156(4) of the Constitution and subsidiarity. It is thus concerned with institutional subsidiarity as it relates to public institutions. However, the other varieties of the subsidiarity principle, even though they are not directly relevant to understanding section 156(4) of the Constitution, both represent a trend that underlies all manifestations of the subsidiarity principle. This trend may be curtly described as an automatic bias towards the small that only gives way to a reasoned argument for the big. It will be argued below that there are important nuances to be made in the manner in which section 156(4) expresses this notion.

² Du Plessis “Subsidiarity: What’s in the Name for Constitutional Interpretation and Adjudication?” 2006 *Stell LR* 209

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⁷ Carpenter “Cooperative Government, Devolution of Powers and Subsidiarity: The South African Perspective” in *Seminar Report: Subnational Constitutional Governance* (1999) 45 46

⁸ Van Wyk “Subsidiariteit as Waarde wat die Oop en Demokratiese Suid-Afrikaanse Gemeenskap ten Grondslag Lê” in Carpenter (ed) *Suprema Lex: Opstelle oor die Grondwet aangebied aan Marinus Wiechers* (1998) 251 255

3 Arguments for institutional subsidiarity

The argument for institutional subsidiarity can and has been peddled from various angles, denominations and beliefs. What follows is a quick survey of some of the most important historic and philosophical foundations for the principle of institutional subsidiarity.

3 1 Liberty and Catholic social philosophy

The subsidiarity argument has been advanced on the basis of the fundamental value of liberty and the sovereignty of the individual. The liberty rationale for subsidiarity holds that communities, religious associations and cultural associations are important for supporting the needs of the individual.⁹ This justifies institutional subsidiarity as a principle for non-interference in families and voluntary associations, such as guilds and unions, but also in cities, provinces and states.

Institutional subsidiarity also has a religious heritage, namely in Catholic social philosophy. In fact, the subsidiarity principle was first articulated in the context of this religious social philosophy.¹⁰ In as early as 1891, Pope Leo XIII placed great emphasis on the importance of the individual and the family. Voluntary associations were deemed of equal importance to the individual and the family as they are necessary for the development of individual dignity and for assisting those who lack ways or means of developing.¹¹ State intervention into matters of the individual, the family and voluntary associations that is not absolutely necessary to protect the common good or prevent injury is thus rejected. Pope Pius XI is widely credited for the first articulation of the Catholic principle of (institutional) subsidiarity due to the following, rather imposing, statement:

“It is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organisations can do.”¹²

The Catholic rationale was that power should be left to individuals, voluntary associations and families because they are more likely to exercise that power in a wise and socially useful manner.¹³

Section 156(4) of the Constitution obviously differs from the above two expressions of subsidiarity in that it refers to the relationship between spheres of government, more specifically, between, on the one hand, national and provincial governments and local governments on the other. The principle of subsidiarity as defined in the liberty and Catholic argument is not limited in scope to public bodies but includes civil society¹⁴ and in fact also extends fundamentally to the relationship between the state and the individual.¹⁵

⁹ Føllesdal “Survey Article: Subsidiarity” 1998 *The Journal of Political Philosophy* 190 200-207

¹⁰ Besselink, Albers & Eijsbouts “Subsidiarity in Non-federal Contexts” 1994 SEW 275 279-28; Van Wyk “Subsidiariteit” in *Suprema Lex* 254; Du Plessis 2006 *Stell LR* 208

¹¹ Føllesdal 1998 *The Journal of Political Philosophy* 207-208

¹² Pope Pius XI *Quadragesimo Anno* (1931)

¹³ Barber “The Limited Modesty of Subsidiarity” 2005 *European Law Journal* 308 314

¹⁴ Van Wyk “Subsidiariteit” in *Suprema Lex* 255; Barber 2005 *European Law Journal* 311

¹⁵ Van Wyk “Subsidiariteit” in *Suprema Lex* 258

As alluded to above, the focus of this article is on a more limited form of institutional subsidiarity, namely its application to public institutions.

3 2 Fiscal federalism

Contemporary arguments for institutional subsidiarity can be launched from the platform of fiscal federalism: public goods should be produced by the government that has jurisdiction over the area where that good is “public”. The objective in this argument is different and perhaps somewhat less noble than in the two arguments above; the goal is to achieve the greatest possible efficiency in decision making.¹⁶

3 3 Democracy

The democratic equivalent of the fiscal federalism argument holds that the people who participate in the deliberative process on the delivery of a public good should be those people that have a significant interest in the delivery of that public good. If too many people with an insignificant interest are included, the deliberative process becomes over-inclusive and democratic control is diluted as a result.

The above four rationales based on liberty, Catholic social philosophy, fiscal federalism and democracy appear to be the most commonly used arguments to explain the roots and operation of the subsidiarity principle. It is argued in this article that not all rationales apply with equal force to the South African Constitution and to section 156(4) in particular. The fiscal federalism or “efficiency” rationale appears to top the list in this regard. It is suggested that this has consequences for the interpretation of section 156(4) of the Constitution. However, before this argument can be outlined, it is necessary to further narrow down and define the principle of subsidiarity as it is expressed in section 156(4) of the Constitution.

4 Field of application

What does a principle of subsidiarity do in the relationship between levels or spheres of government? How does a “bias for the small” manifest itself? It is suggested that three areas of intergovernmental relations where the principle has an effect are to be distinguished, namely the protection of competencies, co-operative decision making and the allocation of competencies.

Protective subsidiarity holds that central government should not unduly interfere in subnational matters. Participatory subsidiarity provides a rationale for subnational participation in central decision making. Should subnational governments have “a veto, votes or voice” in national government decision making? Finally, allocative subsidiarity relates to the bias for subnational entities when it comes to the allocation of powers and functions.

With the isolation of the allocative principle of subsidiarity we have arrived at the essence of section 156(4) of the Constitution. The allocative

¹⁶ Føllesdal 1998 *The Journal of Political Philosophy* 205

principle of subsidiarity manifests itself as a logic for regulating the location of competencies at a central or decentralised level. It may thus play a role during the formulation or amendment of a Constitution in that it calls for a bias towards decentralised exercise of powers and functions.¹⁷ It may also play a role in the interpretation of competencies once they have been formulated in a Constitution. It would then insert the same principle, namely a preference for the decentralised unit. Lastly, it may play a role in discussions surrounding the transfer of functions from central government to subnational governments. Section 156(4) of the Constitution deals specifically with the last as it posits a mechanism for a “compulsory” transfer of functions to a municipality.

5 Effects of the principle of institutional subsidiarity

The general principle of institutional subsidiarity can, if applied successfully, have one of a number of effects. Firstly, it can have a proscriptive effect in that it proscribes certain “senior” government action or the extension of government action into a particular functional area. Secondly, it can have a prescriptive effect in that it may require national government action; if the application of the principle dictates that a particular area is not suitable for local government activity it therefore requires of a “senior” government to occupy that space. Similarly, the application of the principle may require national government to take action that empowers lower levels of government. It has also been argued that institutional subsidiarity can have a “creative” effect in that the application of the principle may demand the establishment of new structures.¹⁸ If there is a mismatch between the exercise of public power and the constituency affected by the power and this mismatch cannot be resolved by relocating the power to another existing structure, a new structure may need to be established.

6 Objective

Føllesdal describes the overall objective of institutional subsidiarity as reducing the risk of a “permanent minority status” for lower levels of government.¹⁹ In the context of this article and its reflection on section 156(4) of the Constitution, this refers to the risk of a permanent “minority status” of local government. The allocative variety of institutional subsidiarity seeks to help generate a systematic deliberation about the division of functions with a distinct logic based on a bias towards subnational government.

Its track record, however, on achieving this particular objective is not impressive. Føllesdal remarks that “rather than reducing and removing fundamental political conflicts, the principle of subsidiarity increases and shapes such tensions”.²⁰ When it comes to subsidiarity, representatives of all political and intergovernmental persuasions usually agree enthusiastically

¹⁷ Carpenter Carpenter “Cooperative Government” in *Subnational Constitutional Governance* 46; Van Wyk “Subsidiariteit” in *Suprema Lex* 256

¹⁸ Barber 2005 *European Law Journal* 319

¹⁹ Føllesdal 1998 *The Journal of Political Philosophy* 190-191

²⁰ Føllesdal 1998 *The Journal of Political Philosophy* 190

with the principle. However, they are likely to disagree bitterly over how it ought to be implemented. For example, the principle may be employed by subnational units as a lever to engage in intergovernmental politicking; claims for authority based on subsidiarity actually mask a quest for political point-scoring. Conversely, the principle may be used by senior governments to shed responsibility; the subsidiarity rhetoric is then used to conceal a drive towards loading functions onto local government. In sum, the ability of the subsidiarity principle to “objectify” a discussion on functions and powers should not be overstated.

7 Manifestations of the principle in domestic and international instruments

In this part of the article, the most important manifestations of the allocative principle of institutional subsidiary are discussed. It is safe to say that the contemporary subsidiarity principle owes its popularity to both Germany and the European Union, which is why these two jurisdictions are discussed. Subsequently, expressions of the principle in formal and informal international instruments are examined.

7 1 Europe

The principle gained political currency in the European Union since the late 1980s when it was introduced in response to fears of European centralisation.²¹ The German *Länder*, in particular, were afraid of the effects that Europeanisation would have on their federal system.²² The principle thus entered the European polity on the back of the federal idea as espoused in Germany.²³ The 1992 Maastricht Treaty on the European Union and the 1997 Treaty of Amsterdam codified the principle into the Treaty of the European Community:

“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond that what is necessary to achieve the objectives of this Treaty.”²⁴

It emphasises the recognition of the sovereignty of the Member States that comprise the Union.²⁵ It does this in much the same way as the liberal and Catholic rationales for subsidiarity emphasise the sovereignty of the individual, the community, the association, the city and the province that comprise the

²¹ Lenaerts, Van Nuffel & Bray *Constitutional Law of the European Union* (2005) 101

²² Van Wyk “Subsidiariteit” in *Suprema Lex* 253; Føllesdal 1998 *The Journal of Political Philosophy* 190-191

²³ On the principle of subsidiarity in the German Constitution, see for example Rau “Subsidiarity and Judicial Review in German Federalism” 2003 *German Law Journal* 223 227; Taylor “Germany: A Slow Death of Subsidiarity?” 2009 *Int'l J Const L* 139 139-154

²⁴ Art 5 of the Treaty of the European Community

²⁵ See further Lenaerts et al *Constitutional Law* 100-112 on the principle of subsidiarity in the European Union

state. A more general expression of the principle is found in article 1 of the Treaty of the European Union which states that decisions will be taken “as closely as possible to the citizen”.

Barber identifies three operative elements in article 5 of the Treaty of the European Community. Firstly, there is a preference for power to be allocated to the smaller unit. Second, this allocation is qualified by an efficiency test: power should be shifted downwards unless centralisation will result in efficiency gains. Third, the efficiency test is, in turn, qualified by the instruction that the gains must be sufficient, ie of a certain minimum level to warrant centralisation.²⁶

The symbolic and political importance of the subsidiarity principle in the European polity is undisputed; it is regarded as a principle that reveals the roots and identity of the European project.²⁷ However, it has proved to be difficult to enforce legally. It has certainly not been vigorously enforced by the courts.²⁸ The most elaborate judicial discussion of the principle spans nine paragraphs in *R v Secretary of State for Health, ex. Parte Imperial Tobacco*.²⁹ Barber concludes that –

“[a]s a legal principle, a justiciable constraint on the power of the Community Institutions, subsidiarity has had little obvious effect. Perhaps daunted by the complicated political assessments the principle entails, or less charitably, perhaps disinclined to develop a principle that limits the centralisation of power, the European Court has not made use of the principle.”³⁰

7.2 Germany

As Van Wyk points out, a number of features in the German Basic Law can be highlighted as manifestations of the subsidiarity principle.³¹ Firstly, article 70(1), which provides that the *Länder* have the power to legislate insofar as the Basic Law does not confer legislative powers on the Federation is an expression of the allocative principle of subsidiarity. The same applies to the provision that, where the *Länder* and the Federation have concurrent legislative powers, the *Länder* may legislate as long as, and to the extent that, the Federation does not use its legislative power.³² A third expression of the allocative principle of subsidiarity is the provision that the Federation may only legislate on certain concurrent matters when the subsidiarity principle is complied with.³³ Article 72(2) of the German Basic Law provides as follows:

“Auf den Gebieten des Artikels 74 Abs. 1 Nr. 4, 7, 11, 13, 15, 19a, 20, 22, 25 und 26 hat der Bund das Gesetzgebungsrecht, wenn und soweit die Herstellung gleichwertiger Lebensverhältnisse im

²⁶ Barber 2005 *European Law Journal* 311 See also Lenaerts et al *Constitutional Law* 103

²⁷ Barber 2005 *European Law Journal* 308

²⁸ Taylor “Germany: The Subsidiarity Principle” 2006 *Int’l J Const L* 115 116

²⁹ Case C-491/01, *R v Secretary of State for Health, ex. Parte Imperial Tobacco* [2002] ECR I-11453, 177-185

³⁰ Barber 2005 *European Law Journal* 324 (footnotes omitted)

³¹ Van Wyk “Subsidiariteit” in *Suprema Lex* 256-259

³² Article 72(1) of the German Basic Law

³³ Von Münch *Staatsrecht Band I* (2000) 214

*Bundesgebiet oder die Wahrung der Rechts- oder Wirtschaftseinheit im gesamtstaatlichen Interesse eine bundesgesetzliche Regelung erforderlich macht.*³⁴

Therefore, the issue as to whether the Federation may legislate on these concurrent subject matters is determined by more than just the answer to the subject-matter question. In addition, the above test must be satisfied. This sets the German Federation apart from other federations that use a subject-matter catalogue as issues such as these can then usually be decided on the first question only. It renders the provision a clear expression of the subsidiarity principle.³⁵

The power of the Federation to pass framework legislation on certain *Länder* competencies, which has been abolished as a result of the federal reform of 2006, was also a manifestation of the subsidiarity principle. This limit on Federal legislative power stems from a “bias for the small”, ie the *Länder*. Finally, the provision that permits the *Länder* to execute Federal laws “as matters of their own concern” insofar as this Basic Law does not otherwise provide or permit, can be pointed out as an expression of subsidiarity.

The above features all concern the role of the *Länder vis-à-vis* the Federation and don’t have an immediate impact on the powers of local government. However, one provision in the Basic Law deals specifically with local government and can be seen as an expression of institutional subsidiarity with regard to local government. Article 28(2) provides that:

“[t]he communities must be guaranteed the right to regulate on their own responsibility all the affairs of the local community within the limits set by law. The associations of communities also have the right of self- government in accordance with the law within the limits of the functions given them by law.”

It is suggested that the explicit guarantee for “associations of communities” to have the right of self- government harks back to the historic origins of subsidiarity discussed above.

When it comes to judicial enforcement of the subsidiarity principle, Germany has travelled further than the European Union. In a number of cases, the Constitutional Court has indicated that the abovementioned section 72(2) is justiciable. The most prominent example is the 2002 *Geriatric Caregivers* case,³⁶ in which the Court struck down federal legislation insofar as it dealt with the occupational registration and training for those who care for the aged.³⁷ Initially, the impact of section 72(2) was limited. The conflict with section 72(2) was usually added as an afterthought to the conclusion that the legislation failed the traditional subject-matter enquiry (ie whether the

³⁴ Article 72(1) of the German Basic Law reads as follows:

“In the fields of article 74(1)(iv), (vii), (xiii), (xv), (xixA), (xx), (xii), (xv) and (xvi), the Federation has the power to enact legislation if, and to the extent that federal legislation is necessary in order to bring about living standards of equivalent standard within the Federation or the maintenance of legal or economic unity in the interests of the whole state” (Author’s translation)

See also Hopkins *Devolution in Context: Regional Federal and Devolved Government in the European Union* (2002) 86

³⁵ Taylor 2006 *Int’l J Const L* 115

³⁶ BVerfGE 106, 62 (2002)

³⁷ The federal legislation regarding geriatric care givers was held to be valid but the legislation regarding assistant geriatric care givers was invalidated, BVerfGE 106, 62 (166)

matter falls within the list of concurrent subject-matters).³⁸ However, in more recent cases, the Court struck down legislation that had indeed passed the traditional subject-matter test on the basis of a violation of the subsidiarity principle in section 72(2) of the German Basic Law.³⁹ These judgments caused anxiety on the part of the Federation. During the 2006 reforms of Germany's federal structure, the ambit of the subsidiarity principle in section 72(2) was significantly reduced by limiting its applicability to a selected number of concurrent subject matters.⁴⁰

7 3 Local Government instruments

The subsidiarity principle has found expression in a number of international instruments that seek to promote local government.

7 3 1 *United Cities and Local Governments of Africa*

The recently established United Cities and Local Governments of Africa (UCLGA) has sought to embrace the notion of subsidiarity in its founding documents. Generally, the UCLGA adopts the “distinct but subsidiary” maxim as a rallying cry for constitutional recognition of local government.⁴¹ The juxtaposition of distinctiveness and subsidiarity connotes a somewhat twisted version of the subsidiarity principle which says that local government is a subsidiary of national government. As will be clear from the above discussion of the arguments for subsidiarity, this emphasis is an anathema to the notion of subsidiarity.

7 3 2 *Commonwealth Aberdeen agenda*

The Aberdeen Agenda: Commonwealth Principles on Good Practice for Local Democracy and Good Governance was formally adopted by the Commonwealth Local Government Forum in 2005 and endorsed by Commonwealth Heads of State in the same year.⁴² It represents a set of standards to promote healthy local democracy and good governance throughout the Commonwealth.

Article 4 of the Aberdeen Agenda reads:

“Defined legislative framework: Local democracy should ensure local government has appropriate powers in accordance with the principle of subsidiarity.

³⁸ Taylor 2006 *Int'l J Const L* 120

³⁹ In the *Shop Trading Hours* case BVerfGE 111, 10 (2004), the Court held that a federal law on shop trading hours, fell outside the ambit of federal legislative power for want of compliance with article 72(2). In the *Student Fees and Unions* case BVerfGE 112, 226 (2005), the Court condemned a federal prohibition of student fees for first degrees under s 72(2) of the Basic Law even though the Federation was legislating within a concurrent subject-matter

⁴⁰ The following opening sentence was added to article 72(2):

“The Federation shall have the right to legislate on matters falling within clauses 4, 7, 11, 13, 15, 19 a, 20, 22, 25 and 26 of paragraph (1) of Article 74”.

⁴¹ “UCLGA Seeks a Direct Relationship with the African Union” 2005 *United Voices* 3 http://www.uclgafrika.org/newsletters/uclga_newsletter_dec_2005.pdf (accessed 23-03-2010)

⁴² Commonwealth Local Government Forum *Aberdeen Agenda: Commonwealth Principles on Good Practice for Local Democracy and Good Governance* (2005) www.clgf.org.uk (accessed 10-04-2008)

Democratic local government, with clearly defined powers, serves as the means by which the community can shape their livelihoods.

Effective devolution enables the views of the local community to be expressed and their views taken into account in decisions implemented to improve the quality of life of all citizens locally.⁴³

The Agenda explicitly introduces the principle of subsidiarity. It does not proffer any definition of the principle, except for introducing “appropriateness” as a criterion. In its further provisions it emphasises that powers should be clearly defined. Three important notions are put forward that may shape the interpretation of the subsidiarity principle as put forward in the Aberdeen Agenda. Firstly, the Aberdeen Agenda links subsidiarity to the shaping of livelihoods, which relates to the “place-shaping” role of municipalities and may offer guidance on which government functions attract the operation of the subsidiarity principle. Secondly, it finds a rationale for subsidiarity in the opportunities for community participation in decision making. Thirdly, it speaks of “effective” devolution, thereby promoting a functional approach to devolution.

The Aberdeen Agenda is a statement of commitment by the Commonwealth. It has no discernable legal application.

7 3 3 *European Charter on local self-government*

The clearest articulation of the subsidiarity principle with regard to local government can be found in the European Charter on Local Self-Government.⁴⁴ This Charter is a treaty open for adoption by Members of the Council of Europe. Article 4(3) of the Charter reads:

“Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.”⁴⁵

The Charter does not quite contain the “automatic bias” of the classic principle of subsidiarity, as it is expressed in European Union law. It rather speaks of a “preference” and stipulates that allocation to another authority requires motivation. This motivation should balance the extent and nature of the task on the one hand and the requirements of efficiency and economy on the other. While the rationale for the bias towards local government is not immediately apparent from the provision (“extent” and “nature” are notoriously vague terms), the rationale for allocation to a higher order must be based on “efficiency and economy” arguments.

The provisions of the Charter of Local Self-Government are binding on the states that signed and ratified it.⁴⁶ However, the legal application of the Charter is limited. The Courts in the Member States generally do not view the provisions as capable of direct application as they are not “self executing”; no individual person or organ of state can realistically invoke any of its provisions in a court of law. For example, when the Netherlands, a signatory

⁴³ Commonwealth Local Government Forum *Aberdeen Agenda*

⁴⁴ European Charter of Local Self-Government, Strasbourg, 15 X 1985

⁴⁵ European Charter of Local Self-Government

⁴⁶ The Charter has been ratified by 44 Member States and entered into force on 1 September 1988

to the Charter, adopted legislation that partly abolished property rates, the Dutch Association of Municipalities launched a challenge in the High Court. It argued that the law was inconsistent with article 9(3) of the Charter, which states that at least part of local government's revenue should be derived from taxes and charges. The High Court held that it could not test the statute against this treaty provision as it is formulated in general terms and not intended to be binding on everyone.⁴⁷ The enforcement of compliance with the Charter thus takes place within the confines of the Council of Europe; the Council itself assesses whether or not Member States comply with the Charter. It relies on reports from Member States for its monitoring. The configuration for enforcement does not include a supranational court structure such as the court structure that enforces the Council of Europe's Convention on Human Rights and Fundamental Freedoms.

8 Subsidiarity, local government and the Constitution

After having discussed the background to the principle of subsidiarity and the manner in which it is articulated in various domestic and international instruments, the attention now shifts to the South African Constitution and section 156(4) in particular.

Neither the Constitution nor the Constitutional Court employs the term subsidiarity. In this respect, Van Wyk remarks that the principle of subsidiarity was propagated during the constitutional negotiations by those who supported a federal solution.⁴⁸ He cites this as one of the reasons why the principle was not formally embraced in the Constitution. However, many authors, writing about subsidiarity in the South African Constitution, stress that the Constitution does not establish a closed system of values and that it therefore can be argued that the subsidiarity principle is one of the values in the Constitution. Flowing from the above description of the areas of application of the principle, it has been argued that the Constitution contains a number of manifestations of institutional subsidiarity. Detailed descriptions of the various clauses in the Constitution that can be viewed as manifestations of the subsidiarity principle have been traversed in other writings.⁴⁹ In the context of this article, only the manifestations of subsidiarity that relate to local government are dealt with shortly.

Firstly, the terminology in the Constitution can be viewed as the outcome of the application of subsidiarity. Van Wyk argues that the use of the term "spheres" instead of "tiers" renders the Constitution in principle one of the most "subsidiarity-friendly" Constitutions.⁵⁰ Section 151(4) of the Constitution is clearly connected to the "protective" operation of subsidiarity: national and provincial governments "may not compromise or impede a municipality's

⁴⁷ *VNG vs Staat* LJN: BA3438, High Court of the Hague 4 3

⁴⁸ Van Wyk "Subsidiariteit" in *Suprema Lex* 260

⁴⁹ Van Wyk "Subsidiariteit" in *Suprema Lex* 262-266; Carpenter "Cooperative Government" in *Subnational Constitutional Governance* 47-52

⁵⁰ Van Wyk "Subsidiariteit" in *Suprema Lex* 263, 265

ability or right to exercise its powers or perform its functions”.⁵¹ The notions of local government representation in Parliament⁵² and the duty of national and provincial governments to seek local government’s input in the preparation of legislation affecting local government can both be considered as the offspring of “participatory” subsidiarity.⁵³

As stated earlier, section 156(4) of the Constitution can be viewed as an expression of the “allocative” principle of institutional subsidiarity. It has been argued that section 156(4) is “the embodiment of the principle of subsidiary”.⁵⁴ It is suggested that this argument requires two nuances. Firstly, the argument that section 156(4) embodies the subsidiarity principle does not do justice to the protective and participatory elements of subsidiarity that appear elsewhere in the Constitution. Secondly, as will be argued in this article, this provision does not embrace the classic concept of institutional subsidiarity but rather gives its own expression to it. This expression, it will be contended, is more calculated and functional than the grand, principled approach to subsidiarity in its original, historic form and its manifestation in Germany and the European Union.

9 Rationale for subsidiarity in the South African Constitution

In order to understand notions of subsidiarity in the Constitution, it is useful to examine whether any of the rationales of institutional subsidiarity that were discussed earlier in this article are relevant to guiding the interpretation of section 156(4) of the Constitution. It is suggested that both the Catholic rationale and the efficiency rationale deserve to be highlighted in the South African context.

9 1 Catholic rationale

Comparing a modern Constitution and something as archaic as a nineteenth century Catholic argument for subsidiarity can easily be dismissed as far-fetched. However, there are some compelling linkages between, on the one hand, historic and current concepts of local government in South Africa and, on the other, the values pursued by the Catholic subsidiarity principle. Firstly, the architecture of local government before 1994 was based on the notion that the municipality as a body is made up by inhabitants of the municipality. For example, in the opening line of their work on municipal law, Dönges and Van Winsen described a municipality thus:

“A municipal corporation is a form of *universitas*, ie an aggregate of natural persons forming as a group a new subject of rights and duties, separate and distinct from the rights and duties of the individual persons who constitute the group. It is thus a legal abstraction or fiction by which the law

⁵¹ 266

⁵² S 67

⁵³ S 154(2); Van Wyk “Subsidiariteit” in *Suprema Lex*

⁵⁴ Budhu & Wiechers “Current Judicial Trends Pertaining to Devolution and Assignment of Powers to Local Government” 2003 *SAPL* 468 473

has created a new entity out of a group of natural persons and has endowed it with a distinct juristic personality, capable of functioning in various respects as a natural person.”⁵⁵

The ordinances established the principle that a municipality consisted of the inhabitants, or more restrictively, the ratepayers, of the municipality. For example, the Cape Municipal Ordinance of 1912 declared that the inhabitants of the municipality were the “corporators” of the body corporate – the municipality. Given this basis, Watermeyer J had the following to say about the nature of the municipal council:

“The council therefore by a Statute is made the agent of the body corporate, but the council itself is not a body corporate; it consists of a number of members whose acts are determined by the majority, and when they act collectively by resolution properly taken then they act as agents for the body corporate, the municipality.”⁵⁶

The dismantling of the old local government architecture and the emergence of a new local government dispensation created a notion that is not altogether dissimilar, despite the fact that it was based on a radically different rationale. Section 2(b) of the Local Government: Municipal Systems Act⁵⁷ (“Municipal Systems Act”) provides that the municipality consists of the political structures, administration *and the community* of the municipality. Historic as well as current perspectives on the notion of a municipality in South Africa thus portray the municipality not just as a public body or as a subsidiary of the national government but as an association of individuals, communities and public structures. Both historic and current perspectives of local government in South Africa thus establish the relevance of the Catholic subsidiarity principle which cherished the small-scale association as an essential conduit for the attainment of personal dignity.

9.2 Efficiency or functionality rationale

The expression of subsidiarity in section 156(4) of the Constitution appears to be mostly based on efficiency rather than generic, sweeping values or principles such as liberty or individual autonomy. Van Wyk remarks that the emphasis in the South African version of subsidiarity is on effectiveness.⁵⁸ Effectiveness and efficiency are not the same concepts: effectiveness connotes impact while efficiency connotes good organisation. Both can be captured under the term functionality and it is argued that the expression of subsidiarity in the South African Constitution is strongly influenced by a concern for functionality. The inclusion of capacity as a condition for the operation of section 156(4) is the clearest indication that a functionality rationale is envisaged: subsidiarity in its purest, principled form based on liberty takes no note of factors as “mundane” as capacity. However, a subsidiarity principle based on functionality does take note of such factors. Also, the fact that section 156(4) recognises and encourages asymmetry, a government *à la carte*, is an

⁵⁵ Dönges & Van Winsen *Municipal Law with Special Reference to the Cape Province* (1953) 1

⁵⁶ *De Villiers and Others v Beaufort West Municipality* 1924 CPD 501 504. See further Steytler & De Visser *Local Government Law* 1-5

⁵⁷ Act 32 of 2000

⁵⁸ Van Wyk “Subsidiariteit” in *Suprema Lex* 267

indication of a functional basis for this expression of subsidiarity rather than an overtly principled basis.⁵⁹

One of the consequences of relying on the functionality rationale is that it renders the subsidiarity principle more amenable to arguments that larger units are sometimes more likely to make the right decision than smaller ones for external reasons. These external reasons do not necessarily have to be derived from dogmas surrounding liberty or autonomy. For example, access to an expert civil service may give a larger unit an advantage over a lower unit.⁶⁰ A dogged application of subsidiarity along autonomy or liberty rationales would be less amenable to the incorporation of such arguments.

9 3 Establishing an endogenous rationale: developmental local government

Both the Catholic rationale of protecting the community association and the functionality rationale of configuring an effective state are thus relevant for the interpretation of section 156(4) of the Constitution. It is argued that the Constitution itself, however, offers the strongest rationale. This rationale consolidates the Catholic and functionality rationale into one that is based on the concept of the developmental local state.

If the functionality rationale is taken as a starting point, it becomes clear that functionality in and of itself is a hollow shell. Measuring effectiveness and efficiency can only be done if it is known what goals must be achieved.⁶¹ The objects of local government, as set out in section 152(1) of the Constitution are particularly instructive in that regard. They set out the overall goals to be achieved by local government, namely to:

- provide democratic and accountable government for local communities;
- ensure the provision of services to communities in a sustainable manner;
- provide social and economic development;
- promote a safe and healthy environment; and
- encourage the involvement of communities and community organisations in the matters of local government.

It is thus suggested that subsidiarity in local government and section 156(4) of the Constitution in particular, must be understood in light of the objects of local government as set out in section 152 of the Constitution. The Constitution envisages municipalities to strive towards the abovementioned developmental goals, which take the municipal function beyond being an instrument for service delivery at the behest of national and provincial governments. This constitutional vision needs to match with a distribution of powers that ensures that municipalities are enabled to achieve these objects. The Constitution itself recognises that the distribution set forth by it may not be adequate in all circumstances. This is why it makes specific provision for the transfer of

⁵⁹ Føllesdal 1998 *The Journal of Political Philosophy* 206

⁶⁰ Barber 2005 *European Law Journal* 320

⁶¹ Barber 2005 *European Law Journal* 308 318

powers and functions to local government or to individual municipalities. The Constitution supplements its framework for assignment with a guiding provision in section 156(4). The subsidiarity principle of section 156(4) thus exists to insert a logic that promotes a distribution of powers between spheres of government that enables the State to achieve the developmental objects of local government effectively and efficiently.

10 Observations on section 156(4) of the Constitution

The above examination of the background to the allocative principle of institutional subsidiarity as expressed in section 156(4) of the Constitution and the construction of an endogenous rationale for it should guide the interpretation of and approach to this provision. A few proposals are made below.

10 1 Limited functional scope

The Constitution makes it clear that the blessings of small government apply to certain functional areas, not all. The functional scope of institutional, allocative subsidiarity is limited. The Constitution limits the scope of its application to Schedule 4A and 5A matters, to the exclusion of the residual national matters. The normative value of the subsidiarity principle is thus limited. This limitation, it is suggested, further supports the contention that the normative value of the institutional allocative subsidiarity principle is less pronounced: to the extent that the principle is expressed in section 156(4), this is born out of concern for efficiency rather than liberty or individual autonomy. Institutional, allocative subsidiarity appears to be a calculated premise rather than an overtly principled one.

10 2 A-political subsidiarity?

It appears from the brief description of the experience with subsidiarity that its ability to neutralise the politics around division of powers and functions should not be overestimated. It may thus be appropriate to caution against viewing section 156(4) as the Constitution's best kept secret on how to approach devolution of powers and functions: it does not contain a recipe for the alchemy of optimal division of functions.

10 3 Preference rather than automatic bias

Section 156(4) of the Constitution does not fit in well with the basic notion of "a bias for the small that gives way only to a reasoned argument for the big". The provision rather works the other way around. The classic notion of subsidiarity contains a burden of argument for centralisation on the central government. In its purest form, subsidiarity goes even further and holds that the power originally rests with the subnational unit and is delegated upwards at the discretion of the latter, and not at the discretion of the central authority. Conversely, the expression of subsidiarity in section 156(4) contains a burden of argument for decentralisation. Van Wyk points towards this difficulty

when he refers to the debates on the 1993 Constitution, in which arguments based on allocative subsidiarity were proffered to determine the relationship between national and provincial governments. The problem, he argues, is that these arguments are based on a top-down approach or a shifting of powers, implying that all powers vest in the centre.⁶² Despite this, both the 1993 and the 1996 Constitution clearly proceed from that assumption.

The difference in approach between section 156(4) and classic notions of subsidiarity is evident from the application of the efficiency test. Both the European and the South African variety of allocative subsidiarity contain an efficiency test. However, the similarity is more apparent than real. The European test relates to efficiency gains that may be had by centralisation while the South African test relates to gains that may be had by decentralisation. In terms of article 5 of the Treaty of the European Community, powers go up only if and so far as they can be more efficiently exercised at a decentralised level. Section 156(4) of the Constitution provides that powers go down if the objectives can be better achieved at the decentralised level. An important driver for the approach in the Treaty of the European Community is the notion that the smaller unit should reap the benefit of error: if a function is misallocated, let it be misallocated to the smaller unit rather than to the larger body.⁶³ This premise derives from the notion that state sovereignty resides in the people as a corporate body constituted by cities and provinces. It is difficult to locate a similar argument within the South African Constitution.

These observations do not detract from the fact that the overall objective remains the same, namely to recognise a preference for local government when it comes to the allocation of powers. In sum, it may be appropriate to view the subsidiarity principle for local government as a “preference for the small”, rather than an “automatic bias towards the small”. This is also in line with the manner in which relevant international instruments such as the European Charter and the Aberdeen Agenda formulate the principle in its application to local government.

10 4 Residual powers

The location of residual powers can be seen as a function of whether or not the principle of subsidiarity has been embraced.⁶⁴ For example, the location of residual powers with the *Länder* in Germany (see above) is an expression of subsidiarity. Van Wyk argues that the location of residual powers with the national government does not mean that only Parliament may exercise those powers: nothing prohibits Parliament from assigning anyone of those residual powers to other spheres of government. However, whether or not a residual power is assigned to another sphere of government is really a “top-down matter”, decided within the discretion of the national government. Importantly, decision making in this regard is not subject to section 156(4)

⁶² Van Wyk “Subsidiariteit” in *Suprema Lex* 259

⁶³ Barber 2005 *European Law Journal* 313

⁶⁴ Van Wyk “Subsidiariteit” in *Suprema Lex* 256

of the Constitution. It is therefore, argued that the fact that the Constitution allocates residual powers to Parliament points towards a modest embracement of the subsidiarity principle.

10 5 Whose principle is it to apply?

The question as to who applies the subsidiarity principle as set forth in section 156(4) relates to the issue of judicial enforceability. The overview of comparative and international examples shows that judicial enforceability has certainly not been the defining feature of subsidiarity; its symbolic and political importance far outweighs its legal importance in the jurisdictions and instruments reviewed.

It is suggested that the same may apply to section 156(4) of the Constitution. A number of reasons may be advanced. Firstly, the fact that the rationale for subsidiarity lies in the realm of assessing effectiveness of governance renders the principle less open to judicial interpretation.⁶⁵ The courts may be reluctant to be drawn into debates on the technical merits of locating a function at municipal level. This is as these are likely to centre on issues such as the efficiencies generated by municipal performance of the function, intergovernmental fiscal ramifications of the transfer, economic imperatives such as spill-over effects and intergovernmental efficacy, capacity assessments of municipalities etc. If more than seventeen years of experience with the European concept of subsidiarity is anything at all to go by, judicial enforcement of the principle seems unlikely to take hold. As Koopmans remarks with regard to the European concept:

“The concept of subsidiarity is concealed behind a screen of economic and legal technicalities. That may be the reason why the courts have not yet been invited to trace the limits of the concept.”⁶⁶

Secondly, courts will, before hearing a dispute on the location of functions, insist on the exhaustion of intergovernmental remedies, as instructed by section 41(3) and (4) of the Constitution. Thirdly, section 156(4) requires assignment “by agreement”; the impact of this on judicial enforceability is unclear. It is common for a court to order parties to return to the negotiating table and work towards a settlement. However, it is not possible for a court to determine and impose upon the parties the content of an agreement. Judicial enforceability of section 156(4) suggests that, after a court order to assign, it is left up to the parties to formulate an agreement. Fourthly, whose obligation is it to assign Schedule 4A matters? Schedule 4 matters are concurrent national and provincial matters. Both national and provincial executives thus have the authority to assign a Schedule 4A matter to a municipality within their jurisdiction. Arguably, a municipal claim for assignment can be exercised against both, but which one of the two must be compelled to do so under the operation of section 156(4)? For example, can a provincial government, when confronted with a legal challenge on the basis of section 156(4), escape

⁶⁵ 257

⁶⁶ Koopmans “Subsidiarity, Politics and the Judiciary” 2005 *European Constitutional Law Review* 1 112, 116

liability by arguing that national government must assign, and *vice versa*? Fifthly, a calculated, programmatic approach to devolution that is managed through intergovernmental relations seems to fit in better with the emphasis on functionality in the South African principle of subsidiarity. It fits in better than a rights-based approach that delivers the full spectrum of decision making on the division of powers to the courts. In a rights-based approach, the spectre arises of, what can be termed, “slapstick asymmetry” whereby the invocation of section 156(4) of the Constitution by individual municipalities results in functions and powers tumbling up and down mitigated by a court with the unenviable task of mediating the endless intricacies of governance. This does not accord with the emphasis in the Constitution on cooperative government. Courts have on occasion resorted to the principle to ward off overly litigious organs of state.⁶⁷ The Constitutional Court has made it clear, in the context of national-provincial relations, that cooperative government, rather than competitive federalism is the guiding principle.⁶⁸ An unmitigated competition for competencies, refereed by the courts, does not accord with this trend in jurisprudence.

It was argued above that a functionality-based approach to subsidiarity is more amenable to taking into account external factors. It is suggested that one such external factor is particularly important. This concerns the indisputable reality of a grossly uneven distribution of skills among municipalities. This factor should play a role in the application of section 156(4) of the Constitution. Decentralisation inevitably results in competition for skills; indeed healthy competition is one of the virtues of decentralisation. However, it needs little argument that the distribution of skills among municipalities is inequitable to such an extraordinary degree that competition becomes a curse rather than a virtue. The unmitigated application of subsidiarity on a rights-based footing may result in these inequities being compounded rather than addressed. The capacity condition in section 156(4) does not suffice in mediating this risk. In an unmitigated, rights-based operation of section 156(4), the presence of an abundance of skill in a municipality may assist in attracting new functions to the municipality, especially since the capacity condition in section 156(4) is less problematic. These functions, in turn, attract funds and enhance the skills requirements of the municipality. The result of an “un-managed” application of section 156(4) may very well be a compounding of the inequitable distribution of skills. Again, a programmatic approach to devolution, mediated through intergovernmental relations would be better placed to confront these challenges.

⁶⁷ See *Uthekela District Municipality v President of the Republic of South Africa* 2002 11 BCLR 1220 (CC) 19. See also *Ngqushwa Local Municipality v MEC for Housing, Local Government and Traditional Affairs* 2005 JOL 14776 (CK); *National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 2 BCLR 156 (CC) 41.

⁶⁸ *In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) 287.

11 The role of the subsidiarity principle

The justiciability of section 156(4) of the Constitution is thus not without problems. However, it is argued that the Constitution intends for the principle of subsidiarity to be recognised by government, Parliament and the courts as an important principle and value underlying the South African constitutional order. The general principle of subsidiarity should play a role in lawmaking, ie the drafting and adoption of laws, including amendments to the Constitution. Courts may also be guided by the principle of subsidiarity when they interpret existing competencies and when they are called upon to apply the rules on assignment of powers to local government.

11 1 Lawmaking

As contended earlier, the broader principle of subsidiarity has found its way into various provisions of the Constitution. It has thus already played a role, albeit a modest one, in the drafting of the Constitution. It is suggested that amendments to the Constitution should be made with recognition of the fact that the Constitution has established a governance system that acknowledges subsidiarity. This applies in particular to changes in the division of powers and functions among spheres of government.

In reality, both past and pending amendments to the Constitution that relate to the division of powers and functions among spheres seem to have little regard to the principle of subsidiarity. The most important amendment for local government thus far, the Constitution of the Republic of South Africa Eleventh Amendment Act,⁶⁹ significantly enlarged the scope for national or provincial intervention into the affairs of a municipality. A considerable component of a municipality's autonomy, ie its budgetary power, may now be appropriated by the provincial government if that is necessary to avert certain defined financial emergencies.⁷⁰ Recently proposed amendments to the Constitution⁷¹ will, if adopted, deviate even further from the concept of subsidiarity. The amendments seek to authorise national government to extensively regulate the exercise by municipalities of their constitutional authority over matters listed in Schedule 4B and 5B of the Constitution. In terms of the proposed amendment, national government will be empowered to do so "when it is necessary to achieve regional efficiencies and economies of scale in respect of a specific municipal function".⁷² The precondition for such legislation is that "municipal boundaries and executive authority negatively impede regional efficiencies and economies of scale".⁷³ Once the above hurdles are cleared, the national legislation itself may be far-reaching

⁶⁹ Act 3 of 2003

⁷⁰ S 139 of the Constitution. See De Visser *Developmental Local Government – A Case Study of South Africa* (2005) 194. It must be added that an earlier attempt at introducing, more draconian, intervention powers was rejected by Parliament with the argument that it was overly intrusive and lacked safeguards for local government. De Visser *Developmental Local Government* 193. For a discussion of the intervention powers, see further Steytler & De Visser *Local Government Law* 15-16 ff.

⁷¹ Constitution Seventeenth Amendment Bill

⁷² New s 156(1A)(a) as proposed in s 1 of the Constitution Seventeenth Amendment Bill

⁷³ New s 156(1A)(d)(i) as proposed in s 1 of the Constitution Seventeenth Amendment Bill

as it may provide for the re-arrangement of local government institutions and the compulsory transfer of municipal assets.⁷⁴ The proposed amendments, if adopted, will pave the way for unprecedented levels of intrusion into municipal governance by national government. In fact, the amendments are aimed at removing from municipalities the authority to sell electricity as well as all the assets associated with that function.⁷⁵ In addition to constricting local government policy making authority, the amendments restrain provincial governments who stand to lose their exclusive authority over Schedule 5B.⁷⁶ The conclusion must be that neither the protective nor the allocative aspect of the subsidiarity principle played any significant role in the minds of the drafters of these amendments.

With respect to national and provincial legislation, there are many examples of provisions that do not accord with the principle of subsidiarity. Some of these provisions may be remnants of the constitutional order predating the current Constitution that have not been brought in line with the new dispensation. Others may have been enacted after the 1996 Constitution came into effect, yet conflict with its subsidiarity principle. A comprehensive review of provisions that are inconsonant with subsidiarity falls outside of the scope of this article but a few examples are mentioned below.

The Development Facilitation Act 67 of 1995 permits provincial development tribunals to consider and approve land development applications, establish townships and make amendments to town planning schemes, irrespective of a municipality's role in managing land use.⁷⁷ The Subdivision of Agricultural Land 70 of 1970 provides that the national Minister for agriculture approves each subdivision of agricultural land, again irrespective of a municipality's role in managing land use within its municipal area.⁷⁸ The recently enacted Local Government: Municipal Property Rates Act 6 of 2004 empowers the Minister for local government to instruct a municipality to limit a specific property rate if he or she deems the rate to be inconsistent with the Constitution.⁷⁹ This provision violates the principle of protective subsidiarity in that it bypasses the constitutional safeguards for intervention into the affairs of a municipality.⁸⁰ There are also examples of provisions in provincial laws that conflict with the principle of subsidiarity. For example, section 26 of the KwaZulu-Natal Road Traffic Act 7 of 1997 provides that in the event of a conflict between municipal and provincial law, the latter shall prevail in all instances. Such automatic submission of municipal law violates the principle of subsidiarity. Another example is the recently proposed Western Cape Noise Control Regulations which, due the great level of detail, completely appropriate municipal policy making on the constitutional competency "noise pollution".

⁷⁴ New s 156(1A)(b)(i) as proposed in s 1 of the Constitution Seventeenth Amendment Bill

⁷⁵ Para 2 of the Explanatory Memorandum, Constitution Seventeenth Amendment Bill

⁷⁶ S 44(a)(ii) of the Constitution

⁷⁷ See in particular s 33 of the Act

⁷⁸ S 3 of the Act

⁷⁹ S 16(3)(a) of the Act

⁸⁰ S 139 of the Constitution

There are positive examples as well. The recently enacted National Land Transport Act 5 of 2009 includes specific references to section 156(4) of the Constitution.⁸¹ The Act defines the responsibilities of national, provincial and local governments surrounding land transport and recognises that municipalities may invoke section 156(4) of the Constitution to be given additional functions.

11 2 Interpretation of competencies

The subsidiarity principle should play a role in the adjudication of disputes over competencies if they reach the courts. Van Wyk argues that the Constitution leaves room for “a competency bias in favour of the smaller sphere”, especially where there is uncertainty about the interpretation of the scope of competencies.⁸²

Thus far, the Constitutional Court appears to have adopted an approach to the interpretation of competencies that is functional. For example, in *DVB Behuising (Pty) Limited v North West Provincial Government* the Court, when dealing with the division of powers and functions between the national and provincial legislatures, remarked that:

“[i]n the interpretation of those schedules there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively”.⁸³

This decision was handed down in the context of a dispute over provincial powers and makes it clear that there is little room for a presumption or an automatic bias in favour of the provincial sphere. Does the same apply to local government? Or does subsidiarity contain more added interpretative value with respect to local powers than it does with respect to provincial powers? It is suggested that it does. Subsidiarity has found more explicit recognition with respect to local government if it is compared with provincial government. The Constitution entrenches participatory subsidiarity with regard to provincial government (through the National Council of Provinces) but does not contain the same strongly worded expressions of protective and allocative subsidiarity with respect to provincial government. It is thus submitted that the principle of institutional subsidiarity and particularly its functional rationale, embedded in the developmental objects of local government should play a role in the interpretation of competencies by the courts. As it is the general principle of institutional subsidiarity that plays a role, it is not limited to Schedules 4 and 5 but could extend to residual matters.

It is unfortunate, therefore, that the courts have not yet given much tangible recognition to the principle of subsidiarity when interpreting competencies. In *Basson v City of Johannesburg Metropolitan Municipality and Eskom Pension and Provident Fund v City of Johannesburg Metropolitan Municipality*⁸⁴ and

⁸¹ S 11(2)-11(4) of the Act

⁸² Van Wyk “Subsidiariteit” in *Suprema Lex* 268

⁸³ *DVB Behuising (Pty) Ltd v North West Provincial Government* 2000 4 BCLR 347 (CC) para 17

⁸⁴ 2005 JDR 1273 (T)

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal,⁸⁵ the abovementioned provisions of the Developmental Facilitation Act were challenged on the basis that they trespass on a municipality's original authority on "municipal planning". Instead of adopting a purposive approach to the interpretation of the municipal competency in accordance with the principle of subsidiarity both courts adopted a literal interpretation that is difficult to follow and sanctioned the intrusion in town planning schemes by provincial tribunals.

The abovementioned right of the Minister of Agriculture, Forestry and Fisheries to approve subdivision of agricultural land was challenged in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*.⁸⁶ The Constitutional Court considered whether the Schedule 4A competency "Agriculture" provided an adequate basis for this national power in the context of local government's enhanced constitutional status. The majority of the Court interpreted "agriculture" to include direct control over individual municipal land use decisions pertaining to agricultural land. It based this interpretation on a purposive interpretation of national authority and responsibility with regard to agriculture and food production. The minority judgment, written by Yacoob J held that the "Municipal planning" competency gives rise to municipal authority over land use planning. It found that national and provincial governments have adequate regulatory machinery at their disposal to protect agriculture and food production interests without requiring direct control of subdivisions of agricultural land. The dissenting judgment is to be preferred as it is consonant with the principle of subsidiarity. The Minister did not argue that less intrusive means to protect agriculture and food production interests were inadequate. The Minister simply sought to hold on to direct executive control. Yacoob J, writing for the minority, captured the essence of how the principle of subsidiarity should have guided the adjudication of this conflict:

"The fear that agricultural land will disappear if the interpretation contended for in this judgment is accepted is wholly unjustified. The idea is based on the misplaced notion that the only way in which agriculture is to be developed and food made more readily available would be to preserve the power of the Minister to approve each and every sale and each and every subdivision of agricultural land."⁸⁷

11 3 Assignment of powers to local government

National and provincial governments have the authority to assign matters to local government in addition to the original powers local government already has on the basis of section 156(1) and Schedules 4B and 5B of the Constitution.

The Constitution contains a legal framework for the assignment of legislative and/or executive powers to local government. Sections 44(1)(a)(iii) and 104(1)(c) provide for the assignment of legislative powers by Parliament and provincial legislatures. Sections 99 and 126 provide for the assignment of executive powers by national and provincial cabinet members. An assignment

⁸⁵ 2008 2 All SA 298 (W)

⁸⁶ 2008 11 BCLR 1123 (CC)

⁸⁷ Para 139

can be directed at local government or at (groups) of municipalities. Sections 9, 10 and 10A of the Municipal Systems Act 32 of 2000 provide for substantive and procedural criteria that must be followed when powers are assigned to local government.⁸⁸ It is suggested that the principle of allocative subsidiarity as set forth in section 156(4) of the Constitution should play a role in the application of this framework. It is not a separate legal basis for assignment. It refers to the assignment, by agreement, of the administration of a Schedule 4A or 5A matter to a specific municipality. All of these ingredients point towards the assignments that have their basis in the abovementioned provisions of the Constitution that deal with assignment. It is therefore submitted that section 156(4) is not an additional procedure or basis for assignment, but is rather a principle that sets out the circumstances under which assignment becomes compulsory.

As indicated earlier, the abovementioned National Land Transport Act, with its references to section 156(4) of the Constitution, recognises the importance of institutional subsidiarity. After setting out the national, provincial and municipal responsibilities surrounding land transport, the Act continues:

- “(2) The Minister may assign any function contemplated in subsection (1)(a) to a province or municipality, subject to sections 99 and 156(4) of the Constitution and sections 9 and 10 of the Systems Act, to achieve the objectives of the Constitution and this Act.
- (3) The MEC may assign any function contemplated in subsection 0)(b) to a municipality, *subject to section 156(4) of the Constitution* and sections 9 and 10 of the Systems Act to achieve the objectives of the Constitution and this Act.
- (4) Any municipality may request the Minister or MEC to assign a function contemplated in subsection (1)(a) or (b) to it, *subject to sections 156(4) of the Constitution* and sections 9 and 10 of the Systems Act, where such municipality has an acceptable integrated transport plan.”⁸⁹

The references to section 156(4) of the Constitution are not entirely clear though. The combination of the verb “may” and section 156(4) of the Constitution is potentially confusing. A reading of sections 11(2)-(4) that seeks to remove or even fudge the compulsory nature of the assignment in terms of section 156(4) would be unconstitutional as the text of section 156(4) is clear in this respect: assignment is compulsory when the criteria are met. A reading that makes the MEC or the Minister’s assigning power subject to the principle, set out in section 156(4) of the Constitution, is therefore the only correct interpretation, it is submitted. Subsection 4 adds little value. Firstly, without this provision, a municipality may also request an assignment as it is the Constitution itself that empowers it to do so. Secondly, if a municipality were to request assignment without having an acceptable transport plan, what would be the difference between asserting that it was never permitted to make the request and simply refusing the request? It would thus appear that the importance of the references to section 156(4) of the Constitution in the National Land Transport Act may be easily overstated.

⁸⁸ The legal framework is augmented by a set of guidelines, promulgated by the Minister of Provincial and Local Government. See *Guidelines on Allocation of Additional Powers and Functions to Municipalities*, Notice No 490, *Government Gazette* 29844, 26 April 2007

⁸⁹ S 11(2)-11(4) of the Act (emphasis added)

The recognition of section 156(4) of the Constitution, however inadequate, does bring to the fore the question of justiciability. Can section 156(4) be invoked before a court in order to compel a provincial or national executive to assign a Schedule 4A or a Schedule 5A matter to a municipality? As pointed out above, there are fundamental and practical difficulties that render section 156(4) difficult, yet not impossible, to enforce. Eminent among these is the conundrum regarding the required level of deference shown by the judiciary to decisions of the other branches of government.

It may be useful to have regard to the manner in which courts in other jurisdictions have dealt with this matter. Of the two jurisdictions, where the principle of subsidiarity plays an important role, namely the EU and Germany, Germany offers the clearest example of justiciability. However, there are important limits to the extent to which Germany offers useful guidance to South African courts with regard to section 156(4) of the Constitution. Firstly, the German jurisprudence surrounding section 72(2) of the German Basic Law deals with federal-state relationships while section 156(4) of the South African Constitution deals exclusively with local government. Secondly, the application of section 72(2) of the Basic Law ultimately results in a negative sanction, ie the invalidation of legislation. The application of section 156(4) of the Constitution ultimately results in a court order, positively instructing the executive to assign. Thirdly, as indicated above, the South African provision, compared to its German (and EU) equivalent works in the opposite direction. Rather than determining when powers “may go up”, it determines when powers “may go down”. Fourthly, the criteria, offered by the two provisions are different, although not wholly dissimilar. The German provision revolves around necessity, endangerment to economic and legal unity and equal living standards. These are criteria that are common to the constitutional treatment of federalism and they generally relate to the degree of difference between states that must be tolerated in a federation. The first two criteria in section 156(4) fall in a similar category. The questions whether the matter “necessarily relates to local government” and “would be most administered locally” relate to similar questions about appropriate decentralisation. They visit the theme of the degree of difference to be tolerated in a decentralised state. However, the third criterion, namely whether the municipality “has the capacity to administer it”, is foreign to the consideration required under section 72(2) of the German Basic Law and the German jurisprudence offers no assistance here.

It is submitted, however, that a cautious regard to the German approach is apposite insofar as it relates the general approach to the conundrum of judicial deference to political matters. The German Federal Constitutional Court’s decision in the *Geriatric Caregivers* case⁹⁰ offers a useful distinction that may be helpful in approaching the issue of justiciability of section 156(4) of the Constitution. The Court distinguished between, on the one hand, the legislature coming to conclusions as to whether the law complies with the

⁹⁰ Judgment of Oct 24, 2002, BVerfG, 2 BvF 1/01 (*Geriatric Caregivers case*), available at <http://www.bverfg.de/entscheidungen/2002/10/24> (accessed 23-03-2010)

requirements of article 72(2) and, on the other, with the legislature determining the facts underlying such an assessment. On the first issue, the Court may review and on the second issue, the courts should show deference.⁹¹

A similar distinction should be made between the two actions of a national or provincial executive that make up a decision surrounding assignment to a municipality. Firstly, the executive gathers facts. For example, what financial, human and other resources and capabilities are present within the municipality in order to administer the matter for which assignment is requested or considered? Secondly, it considers such facts in order to answer the question whether the criteria of 156(4) are met. Does the municipality have the capacity to administer the matter? It is suggested that the executive should be afforded leeway in deciding how it gathers the facts that support its decision. Here, the courts' review should be limited to ensuring that those facts actually exist without second-guessing the method of gathering facts. However, in considering whether the existence of those facts bring the matter within the ambit of section 156(4) of the Constitution and thus render assignment compulsory, the executive's decision should be fully reviewable by a court of law.

Another area where the principle of subsidiarity may be applied by the courts is the compliance with intergovernmental consultation around assignment and delegation. The procedural requirements for assignment referred to earlier are designed to ensure effective assignments and to avoid the transfer of functions without resources and capacity for local government to execute those functions. The courts may be called upon, after intergovernmental dispute settlement has failed, to judge whether the Constitution and the Municipal Systems Act have been adhered to in the transfer of functions to local government or to a municipality. In assessing such claims, courts may be influenced by the principle of subsidiarity, particularly the protective and participatory aspects contained therein.

12 Conclusion

This article attempted to clarify the role played by section 156(4) of the Constitution by tracing some of the origins and manifestations of the principle of subsidiarity, on which this provision is modelled. It was argued that, although modelled on it, section 156(4) is different from the classic manifestation of subsidiarity, which would have established a principled and automatic bias for local government that only gives way to a reasoned argument in favour of other spheres of government. Section 156(4) works the other way around. It establishes a preference and not an automatic bias for local government. This preference must be substantiated with an argument that the assignment of the power to local government is functional in that it enables such government to achieve its developmental objects. It was further argued that section 156(4) of the Constitution may not be easily enforced separately by the courts, in part because of the deference shown by the courts

⁹¹ Taylor 2006 *Int'l J Const L* 118

to political decisions surrounding the configuration of the state. However, the experience of judicial enforcement of the subsidiarity principle in Germany may offer some guidance in this respect. The principle of subsidiarity should play a guiding role in lawmaking and the interpretation of competencies by the courts. A brief review of legislation and court judgments surrounding, for example, local government's role in land use management, indicate that the principle is not given nearly the recognition it deserves.

SUMMARY

This article attempted to clarify the role played by section 156(4) of the Constitution by tracing some of the origins and manifestations of the principle of subsidiarity, on which this provision is modelled. It was argued that, although modelled on it, section 156(4) is different from the classic manifestation of subsidiarity, which would have established a principled and automatic bias for local government that only gives way to a reasoned argument in favour of other spheres of government. Section 156(4) works the other way around. It establishes a preference and not an automatic bias for local government. This preference must be substantiated with an argument that the assignment of the power to local government is functional in that it enables such government to achieve its developmental objects. It was further argued that section 156(4) of the Constitution may not be easily enforced separately by the courts, in part because of the deference shown by the courts to political decisions surrounding the configuration of the state. However, the experience of judicial enforcement of the subsidiarity principle in Germany may offer some guidance in this respect. The principle of subsidiarity should play a guiding role in lawmaking and the interpretation of competencies by the courts. A brief review of legislation and court judgments surrounding, for example, local government's role in land use management, indicates that the principle is not given nearly the recognition it deserves.