

Defining local government powers and functions*

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1 INTRODUCTION

The functional areas of provincial and local government competency are listed in Schedules 4 and 5 of the Constitution, with those appearing in part A of each schedule confined to provincial government and those in part B of each schedule to local government.¹ The schedules list functional areas without providing any detailed definitions of them. Considerable overlap between the functional areas assigned to these two spheres of government leads, in practice, to an overlap of powers and functions.

Overlap is distinct from ‘concurrency’. Within the meaning of the Constitution, concurrency of powers refers to the existence of the same powers over the same functional areas, as is the case for example with national and provincial competencies over Schedule 4 functional areas. Overlap of functions, on the other hand, occurs where more than one level of government has authority (be it legislative, executive, or both) over the same functional area. The constitutional allocation of ‘original powers’ to local government produces at least two areas of overlap.² The first type of overlap can be referred to as supervisory overlap. A provincial government has regulatory and monitoring powers over Schedules 4B and 5B matters in terms of ss 155(6)(a) and 155(7) of the Constitution. Thus, in respect of every Schedule 4B and 5B functional area, provincial government has power, albeit limited, of supervision. The question then arises as to the extent and ambit of such supervisory powers. The other type of overlap arises from an overlap between matters listed in Schedules 4A and 5A and those in Schedules 4B and 5B.

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¹ Constitution of the Republic of South Africa, 1996 (‘the Constitution’). Schedule 4 contains the functional areas of concurrent national and provincial legislative competence and Schedule 5 lists the functional areas of exclusive provincial legislative competence.

² See Nico Steytler ‘Concurrency and co-operative government: The law and practice in South Africa’ (2001) 16 SAPL 241; Nico Steytler ‘The power of local government in decentralised systems of government: Managing the “curse of common competencies”’ (2005) 38 CILSA 271 at 271–3.

In this case, there is no clear definition of the functional areas belonging to each sphere of government, resulting in a lack of clarity about the cut-off points between functional areas. For example, both provincial and local government have authority over health care services, with the only definitional distinction being made through the use of the qualifying term 'municipal'. Due to this overlap there is a degree of confusion about who does what.

This article is confined to the issues of overlap flowing from the latter type of case. The focus is on the overlap between provincial and local government powers that, unlike the intended concurrent jurisdiction that the national and provincial governments have over Schedule 4 matters, is unintended although not unforeseen.

The aim of this contribution is threefold: (a) to determine the nature and extent of overlap between provincial and local government powers and functions as well as problems flowing from such overlap; (b) to examine how the overlap is being dealt with by stakeholders; and (c) to develop a systematic approach to defining provincial and local government powers.

2 OVERLAPS BETWEEN PARTS A AND B OF SCHEDULES 4 AND 5

The overlap between provincial and local government powers arises from the fact that Schedules 4 and 5 list the functional areas in a minimalist manner. This, of course, is not unusual in constitutions that seek to allocate powers and functions between different levels of government. However, such a minimalist approach inevitably results in definitional problems and overlaps. The most obvious example of overlapping jurisdictions is where the functional areas allocated to each sphere of government are circumscribed with reference only to that sphere. For example, 'roads' is a competence of both provincial and local governments with the only distinction resulting from the addition of either 'provincial' or 'municipal' as qualification.³

It is clear that the words 'municipal', 'local' or 'provincial' are in and of themselves not very helpful in demarcating the respective functional areas. In some cases, the term 'municipal' may denote the ownership of a facility or property, such as a municipal airport, abattoir or public works. Often ownership is contested. After 2000 all roads had to be divided between the three spheres of government, requiring changes in ownership and responsibilities. In other cases, distinctions must be drawn between services that are to be rendered. What is the key distinguishing feature between a 'provincial' health service and a 'municipal' health service? The only constitutional distinction may be whether a specific health facility serves (and intends to serve) a community broader than a particular municipal area. Equally difficult is linking a regulatory regime, such as traffic and planning, to a province or municipality.

³ The explicit 'provincial' limitation appears directly only in Schedule 5A. Because Schedule 4A lists concurrent functional areas of both the national and provincial governments, there is no direct reference to 'provincial'; it is, however, implicit.

Amore significant overlap is where a provincial functional area includes or covers a local functional area. It is apparent that most aspects of local government functional areas will fall within one or other provincial functional area. A clear example is the division of functions in the area of the retail of liquor. Liquor licences are an exclusive provincial function in so far as retail licences are concerned.⁴ How is this competency to be aligned with local government's power to 'control undertakings selling liquor'? A liquor licence may include conditions pertaining to how liquor is to be sold to the public. What, then, is the role of the municipality?⁵ Another example is the definition of 'beaches'. When the national department responsible for the environment banned 4x4 vehicles from the beaches in the interest of 'conservation' (a Schedule 4 competence), municipalities raised the question whether this did not interfere with the local Schedule 4B competence of 'beaches'. The only exceptions to this type of overlap appear to be 'electricity and gas reticulation', 'water and sanitation services', 'storm water management systems in built-up areas', 'control of public nuisances' and 'public places' where there are no provincial equivalents or overarching powers.

2.1 Drivers of contestation

While a theoretical analysis of the schedules may highlight the lack of clarity about the ambit of most functional areas, the question should be asked as to the factors that may drive conflict over overlapping functions and powers. Two factors are pertinent.

First, the financial dimension of powers and functions will most often drive contestation over definitional problems. Where a function entails expenditure, there are often keen attempts by governments to define their functions narrowly in order to escape the financial responsibility that a more generous definition would bring about. This is particularly the case with the definition of roads. On the other hand, where the assertion of power with regard to a functional area may raise revenue, then, of course, there may be a healthy scramble to claim sole entitlement to that source.

Secondly, political agendas may also lead to conflict. Where a municipality wants to assert its power, often motivated by party-political interests, functional areas may be interpreted expansively. Even outside the partypolitical context, there are turf battles between provinces and local government. Where local government has historically provided a service, it is often reluctant to give it up.

Currently, the issue of the overlap of powers and functions does not arise from a demand by municipalities for more powers. On the whole municipalities are not in an expansive mode. Rather, the issue often boils down to costs: which sphere of government is responsible for the cost burden of a particular function. The most graphic example is roads — who should maintain which particular stretch of road?

⁴ Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC). Hereafter 'Liquor Bill'.

⁵ See Jaap de Visser 'Demarcating provincial and local powers regarding liquor retail' (2004) 19 SAPL 364.

2.2 Problems flowing from overlap

With the dominance of one political party in all provinces and most municipalities, conflicts over functions and powers have not spilled over in litigation. Nevertheless, a number of state institutions have raised the issue. As early as 2001 the Municipal Demarcation Board (MDB), in seeking to assess the capacity of district and local municipalities to perform their functions, noted that the definitions of functional areas ‘may lead to confusion if the definitions and performance of these functions are not clarified’.⁶ A research report produced for the Department of Provincial and Local Government (DPLG) also concluded that the functions listed in the schedules are ‘unclear, [and] create confusion’.⁷ The report noted that ‘[t]here is confusion whether or not municipalities have the authority to perform a function. In some cases, municipalities are simply not sure whether they have the authority at all, even when they actually do perform some activities’.⁸ The Special President’s Coordinating Council (PCC) Workshop held on 14 December 2001 considered it important that the current distribution of functions, as contained in Schedules 4 and 5 and other laws, including the power and functions of local government, be re-assessed in order to build strong local government.⁹ It is submitted that, however much the schedules may be reviewed and functional areas shifted from one sphere of government to the other, the question of the definition of (newly) allocated functions will always be present. This is an issue inherent to any system of decentralized government.

The lack of clarity on definitions of powers and functions may be an irritant for government, but the issue becomes critical when definitional problems hamper service delivery. This may occur in a number of areas.¹⁰

2.2.1 Service-delivery problems

Different types and degrees of service-delivery problems are likely to arise due to the lack of clarity on definitions of powers and functions. First, where both provincial and local government are responsible for a functional area, both spheres of government may provide the same service, resulting in duplication of services. Secondly, uncertainty about which sphere of government is responsible for a particular functional area may cause confusion with regard to their respective mandates and responsibilities, weak coordination, and ineffective communication, resulting in poor service delivery.

⁶ Municipal Demarcation Board Division of Powers and Functions: Discussion document (2001) 6.

⁷ Human Sciences Research Council Review of Schedules 4 & 5 research report submitted to the Department of Provincial and Local Government (2003) Executive summary paras 7.4 and 7.5.

⁸ Ibid.

⁹ Nico Steytler ‘President’s Coordinating Council sets agenda for local government’ (2002) 4(1) Local Government Bulletin 1.

¹⁰ See Steytler ‘The power of local government’ op cit note 2 at 271–84.

The worst scenario is where lack of clarity on roles and responsibilities results in the total lack of service delivery. Where consumers complain about the lack of services, then one sphere of government may blame the other for the service failure.¹¹

Lack of certainty regarding responsibility for particular functional areas may also lead to so-called ‘unfunded mandates’. In the Western Cape, municipalities have complained that they perform twenty-nine functions on behalf of the provincial government.¹² While the extent of the ‘unfunded mandates’ is contested, this nevertheless indicates that, where uncertainty prevails, a municipality may easily find itself in a situation where it provides a much-needed service that, legally speaking, does not fall in its domain. Insufficient funds then result in poor service delivery.

2.2.2 Lack of accountability

Where there is no certainty as to which sphere of government is responsible for what service, it stands to reason that the consumers of services, the citizens, do not know who to hold accountable for a service failure. As noted above, blame can easily be shifted from one sphere of government to the other.

If there is no certainty of responsibility, the legislative and municipal oversight structures are compromised. Elected representatives might find the integrity of their oversight questioned if they do not know whom to hold accountable. One cannot expect a duly charged elected representative to exercise effective oversight when the mandate for delivery is not established clearly.

3 CURRENT STRATEGIES FOR MANAGING OVERLAPS

The problem encountered with definitional overlaps has been approached along four avenues — judicial interpretation, statutory definitions, administrative solutions and negotiated compromises.

3.1 *Judicial interpretation*

As an integral part of the Constitution, the meaning of Schedules 4 and 5 is, in the final analysis, determined by the courts. Given the brief description of the functional areas, the judicial determination of their content is no easy task. Some authors suggest that ideological considerations could play an important role in determining which functional area must be performed at which level of government.

¹¹ This is not an unlikely scenario in the area of road maintenance. It is reported that where there is uncertainty about which sphere of government is responsible for a particular road, the inevitable result is that both the provincial and local government hold back on maintaining that road.

¹² Western Cape Provincial Treasury Provincial/local Interface: Functions — Situation Analysis: Functions Between the Provincial and Local Spheres of Government in the Western Cape (2005).

Rautenbach and Malherbe thus remark:

‘A view that functional areas can be dealt with most effectively at national level (centralization) will result in relatively few functional areas allocated to other levels. The opposite view (decentralization) will cause more functional areas to be allocated at the regional and local levels.’¹³

A decision guided by the ideology of centralization will tend to interpret an exclusive provincial functional area narrowly. Proponents of decentralization, on the other hand, are likely to follow a more generous approach when interpreting the same functional area.

The Constitutional Court has made it clear that questions relating to the interpretation of functional areas are not questions of politics but a matter of legal principle.¹⁴ This is evident, for instance, from the manner the court approached the issue in *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another*.¹⁵ The court made it clear that there is no presumption in the Constitution that directs judges on how to interpret the functional areas. Rather, the determining factor in interpreting the functional areas is enabling the respective legislatures to discharge their responsibilities completely and successfully. Ngcobo J thus wrote:

‘In 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.’¹⁶

Given that the same approach would be followed for the interpretation of local government powers and functions, the content of each and every functional area would be decided on a case by case basis.

The Constitutional Court stated in the Liquor Bill case¹⁷ that the drafters of the Constitution allocated powers to each sphere of government based on a ‘functional vision of what was appropriate to each sphere’. It held that the ambit of each functional area must be determined in light of this ‘functional view’. What does this ‘functional vision’ approach to the division of power between the different spheres of government entail in determining the ambit of each functional area?

The issue of interpreting a functional area was one of the questions dealt with in the Liquor Bill case. The Bill at issue was designed to regulate the production, distribution and sale of liquor, including the licensing thereof. The question the court had to answer was whether this national Bill did not interfere with an exclusive provisional matter, namely liquor licences. In order to answer this question it was necessary to establish the scope of ‘liquor licences’. The court approached the issue by analyzing Schedule 5 matters in light of the overall constitutional scheme.

¹³ Ignatius Rautenbach & Rassie Malherbe Constitutional Law 3 ed (1999) 81.

¹⁴ Victoria Bronstein ‘Legislative competence’ in Stuart Woolman et al (eds) Constitutional Law of South Africa 2 ed (Original Service, 2004) 15–8.

¹⁵ 2001 (1) SA 500 (CC). Hereafter ‘DVB Behuising’.

¹⁶ Ibid para 17.

¹⁷ Supra note 4 para 6.

Accordingly, the court held that Schedule 5 matters need to be interpreted as having distinct identities, which can be differentiated from other functional areas.¹⁸ The court, following its 'functional approach', distinguished matters on the basis of whether they require regulation 'inter-provincially, as opposed to intra-provincially'.¹⁹ It concluded that 'where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially'.²⁰ The functional area 'liquor licences' was thus interpreted to mean 'intra-provincial liquor licences'.

Based on this 'functional analysis' of competencies, the court was convinced that the licensing of the production and distribution of liquor should be regulated nationally as both manufacturers and distributors of liquor are likely to operate across provincial boundaries. Conversely, the retail trade in liquor rarely operates across provinces and it is appropriate for it to be regulated provincially. As a result, retail licensing was held to be exclusively within the legislative competence of the provincial legislature.

Important consequences follow from the court's functional approach to the interpretation of local government's legislative competencies. First, the territorial principle applies — only matters that have no extra-municipal dimension fall within local government's domain. This element is reinforced by the reference to 'municipal' and 'local' services and goods. Secondly, any interpretation of the functional areas must be guided by 'the functional view of what [is] appropriate to each sphere' of government. Factors other than territorial limitation may then determine what is appropriate for local government. De Visser thus argues that the competencies of local government should reflect the constitutional vision of developmental local government.²¹

The competencies must enable local government to discharge its development-driven functions fully and effectively.

There are also situations where the ambit of a functional area could expand to include matters that under normal circumstances would not be considered to form part of such a functional area. This is attributable to the 'incidental power' doctrine which allows legislation by one sphere of government to contain a provision or provisions that intrude into a matter that should be regulated by another sphere of government.²²

¹⁸ Ibid para 48.

¹⁹ See Bronstein op cit note 14 at 15–10.

²⁰ Liquor Bill supra note 4 para 53.

²¹ Jaap de Visser Developmental Local Government (2005) 117.

²² It is considered undesirable 'to be too rigid about disallowing such provisions where they are necessary for the coherence of legislation'. In fact, incidental legislative competence has been given broad recognition in other federal jurisdictions. See Bronstein op cit note 14 at 15–3.

The Constitution provides for incidental powers for the national,²³ provincial²⁴ and local governments.²⁵ The notion of incidental powers was an important factor in the outcome of *DVB Behuising*, a case involving a question of categorization. In that case, the court concluded that the provisions that dealt with land tenure in proclamation R293 of 1962 were within the competence of a provincial government despite the fact land tenure, under the interim Constitution, was a matter of national competence. The majority of the court maintained that the provisions on land tenure ‘were an integral part of the legislative scheme of the Proclamation’²⁶ that introduced ‘an orchestrated scheme for the establishment, management and regulation of informal townships and establishment of local government’.²⁷ The functional area ‘regional planning and development, urban and rural development and local government’ is thus made to include, in this particular case, matters that would otherwise have fallen under a national legislative competence.

De Visser argues with reference to local government’s incidental powers in terms of s 156(5) of the Constitution that this doctrine ‘is not intended to increase the number of functional areas that local government can legislate on’.²⁸ Rather, this doctrine is meant to inject a purposive approach when interpreting and determining the ambit of the functional areas. It is submitted that the same applies to the incidental competence of both national and provincial governments.

Judicial interpretation of the functional areas unfortunately provides inadequate guidance because (a) few functional areas have been subjected to interpretation, and (b) the Constitutional Court’s functional approach is very broad and general. In the absence of more litigation, judicial interpretation will serve a limited though crucial role in providing greater clarity.

3.2 Legislative interpretation

Given the limited judicial guidance available from the courts, it is open to the various legislatures to define the contours of the functional areas. This has happened in all three spheres of government – national, provincial and local. In the case of the national and provincial governments, this flows from their regulatory function in terms of s 155(7) of the Constitution. With local government, it is a case of self-definition when a by-law is passed to define the ambit of a particular functional area.

Legislative definitions of local government powers and functions are not in abundance. Moreover, very few post-1997 laws have sought to define the specific formulations in Schedules 4B and 5B. By default, a number of old-order laws still apply, often at odds with the new local government dispensation. There are, however, a few examples of national legislation.

²³ Section 44(3) of the Constitution.

²⁴ Section 104(4) of the Constitution.

²⁵ Section 156(5) of the Constitution.

²⁶ *DVB Behuising* supra note 15 para 96.

²⁷ *Ibid* para 48.

²⁸ See De Visser op cit note 21 at 122.

According to the National Road Traffic Act 39 of 1996 (promulgated before the new local government dispensation), local government's authority in the areas of traffic and parking includes the appointment of persons as traffic wardens to exercise or perform within its area the powers and duties of traffic officers. A municipality also has the power to make by-laws in respect of the appointment of an advisory traffic control board, the use of any public road by traffic in general, the limitation of the age of drivers of vehicles drawn by animals, and any form or token which a local authority may deem expedient for the purposes of any by-law.

The National Health Act 61 of 2003 addressed the difficult task of defining 'municipal health services' by stipulating that:

'Municipal health services means—

(a) water quality monitoring

(b) food control;

(c) waste management

(d) control premises;

(e) communicable disease control;

(f) vector control;

(g) environmental pollution control;

(h) disposal of the dead;

(i) chemical safety, but excludes port health, malaria control and control of hazardous substances.'²⁹

3.2.1 Weaknesses of legislative definitions

Definitions err when they are either underinclusive, thus unduly restricting local government powers, or overinclusive, thus extending local government powers beyond their constitutional mandate. A case in point is the definition of 'municipal health services' in the National Health Act of 2003 quoted above. It is overinclusive with regard to other local government functions in Schedules 4B and 5B. The following elements of the statutory definition of 'municipal health services' overlap with other local government functions:

- (a) 'Water quality monitoring' intrudes on the municipal function of 'potable water supply systems';
- (b) 'food control' intrudes on 'licensing and control of undertakings that sell food to the public';
- (c) 'waste management' includes 'solid waste disposal sites'.
- (d) 'health surveillance of premises' includes 'local amenities', 'markets', etc;
- (e) 'environmental pollution control' includes 'air pollution', 'noise pollution', 'refuse removal', etc; and
- (f) 'disposal of the dead' includes 'facilities for the accommodation, care and burial of animals' and 'local cemeteries'.

In this case, the overinclusiveness of the definition upsets the allocation of functions between district and local municipalities. While the 'municipal health services' function is a district

²⁹ Section 1 of Act 61 of 2003

function in terms of s 84 of the Local Government: Municipal Structures Act,³⁰ the ‘licensing and control of undertakings that sell food to the public’ and ‘air pollution’ are local functions. Its overinclusiveness may also intrude on the constitutional domain of provincial government, including ‘animal control and diseases’, ‘environment’, and ‘pollution control’.

This definition illustrates a further problem, namely a lack of uniformity in the approaches followed by the various national departments. Every national (and indeed provincial) department that deals with local government may have its own conception of how local government powers should be defined and consequently implemented in practice. For example, the Department of Health’s definition of ‘municipal health services’ in so far as water quality monitoring is concerned may be at odds with the regulation of water quality by the Water Services Act 108 of 1997, which is administered by the Department of Water Affairs.

3.3 *Administrative definitions*

In view of the departments’ ‘silo approach’ to local government, where every department (at national and at provincial level) does its own thing, there is clearly a need for a uniform approach to local government competencies. The Municipal Demarcation Board (MDB) has sought to provide this.

The need for definitions of the powers and functions of local government quickly became apparent to the MDB when it was faced with carrying out its statutory duty of assessing whether district and local municipalities have the capacity to perform their respective powers and functions.³¹ The first set of definitions was published in 2002 and a consolidated version appeared in March/April 2003.³² A further, refined, version was produced in June 2005.

The 2003 report notes that the Constitution does not provide any definitions for the functions listed in Schedules 4B or 5B.³³ It notes that some description is given to the functional areas in the Municipal Structures Act when these functional areas are divided between district and local municipalities. Section 84(1) of the Act, as amended in 2000,³⁴ only provides definitions for district municipalities. The report further notes that the provision of definitions in national legislation is the exception rather than the rule.

In an effort to guide the exercise of its own statutory mandate, the MDB consequently developed a set of definitions. It was careful to note that these definitions have ‘no legal status and may well in the future be superseded by documents published by the Department of Provincial and Local Govern-

³⁰ Act 117 of 1998 (‘the Municipal Structures Act’).

³¹ Section 85 of the Municipal Structures Act.

³² Municipal Demarcation Board op cit note 6.

³³ Ibid.

³⁴ Section 6(a) of Act 33 of 2000.

ment'.³⁵ It nevertheless recommended that the DPLG should publish the definitions as guidelines.

Although the MDB's definitions are very useful as the first and only attempt at devising a general set of definitions, they are deficient in a number of respects. First, little attention is paid to defining functional areas in relation to the overall objects of local government as listed in s 152 of the Constitution. Although these objects are broadly defined, they do in some instances provide valuable guidance. In the case of 'child care facilities', the MDB definition correctly links the subject matter to the object of a safe and healthy environment. Second, a number of definitions do not attempt to assign a meaning to the subject of the functional area. For example, there is no definition of the range of institutions that 'child care facilities' may cover. Third, some of the definitions do not include the range of activities permitted in relation to the subject of the functional area. The definition of 'air pollution', for example, gives an extensive description of air pollution, but there is no reference to the kinds of activities that a municipality may engage in when dealing with air pollution. On the other hand, the definition of 'airports' refers to a range of activities, including, the establishment, maintenance, control and regulations of airports. Fourth, most qualifications have not been defined, in particular 'municipal' and 'local'.

The obvious weakness of administrative definitions by a central institution such as the MDB is that they are merely guidelines with no formal status and are not binding on any sphere of government.

3.4 Negotiated definitions

Given the difficulty of determining neat cut-off points between functional areas, the need for 'negotiated definitions' is apparent in some laws. One of the constitutional principles of cooperative government is that all spheres of government should cooperate with one another in mutual trust and good faith by 'co-ordinating their actions and legislation with one another'.³⁶ This entails dealing, among other things, with legislative definitions. Through intergovernmental forums the practical implementation of powers and functions could be agreed upon between a province and municipalities in that province.

The KwaZulu-Natal Tourism Act³⁷ provides an example of an attempt to deal with the elusive functional area of 'local tourism'. This Act provides for the establishment of a sectoral intergovernmental forum between the Province and the municipalities with the aim of facilitating cooperation by, among other things, defining the functional areas of both the local government and the provincial government in the area of tourism.³⁸

³⁵ Municipal Demarcation Board op cit note 6 at 4.

³⁶ Section 41(1)(h)(iv) of the Constitution. (Emphasis added.)

³⁷ Act 11 of 1996.

³⁸ Ibid s 25.

4 A SYSTEMATIC APPROACH TO MANAGING OVERLAP OF FUNCTIONS AND POWERS

In order to deal with the overlap of competencies between provincial and local government, the following systematic approach is suggested:

- (a) The competencies of local government should be defined first, establishing a hierarchy of definitions.
- (b) The key elements of the definition of a competence should be identified.
- (c) Guiding principles should be developed that may shape the content of the definitions.
- (d) Finally, a process should be developed in terms of which content to each competence could be given.

4.1 *Hierarchy of definitions*

The division of powers between more than one sphere of government can be done in a number of ways. A dualist approach would seek to list exhaustively each sphere's powers. Another approach is to define one sphere's powers and leave the residual powers to the other. A further technique is to give both spheres the same powers in a concurrent list and then provide an override clause in cases of conflict. The Constitution reflects a combination of these approaches with regard to national/provincial competencies, combining concurrent powers with exclusive powers. In the case of local government, 'exclusive' powers are given to this sphere of government in the sense that national and provincial government may not legislate on the core of those competencies.³⁹

The starting premise is that where the Constitution allocates exclusive powers to one sphere of government, those powers should be defined first because they have been singled out from the full range of government powers. Once the exclusive powers have been defined, the residue of powers falls under the jurisdiction of the other sphere(s).

In the case of the provincial powers, Schedule 5 contains a list of exclusive provincial powers. Inevitably, there will be an overlap between them and national powers in Schedule 4 (and residual powers). For example, while the national and provincial governments have jurisdiction over the concurrent functional area of 'trade' (including the liquor trade), provinces have power over 'liquor licences'. As such, the latter falls within the exclusive area of 'trade'. Rather than defining 'trade', the functional area of 'liquor licences' should be defined, leaving all residual matters in the concurrent functional area.

The same approach should apply to differentiate between provincial and local government functional areas. As indicated above, most functional areas listed in parts B of Schedules 4 and 5 respectively can be included in one or more of the functional areas of parts A of Schedules 4 and 5.

³⁹ See De Visser op cit note 21 at 111–13.

Thus, rather than attempt an exhaustive definition of both parts, the more specific and exclusive local government functional areas should be defined, leaving the residual areas to the provinces. For example, to manage the overlap between (provincial) environment and (local) beaches, the latter should be defined, rather than the broader, inclusive provincial competence. This approach is already used in allocating power among district and local municipalities in s 84 of the Municipal Structures Act. The districts' powers are defined in s 84(1), leaving the remainder of the Schedule 4B and 5B functional areas to local municipalities.

Defining local government's competence with precision makes for good governance. Municipalities are the primary building blocks of government and as such require clearly demarcated powers and functions. Moreover, with 284 municipalities having to apply the Constitution, clear definitional guidance is essential for coherent and consistent local government.

4.2 Elements of a definition

In defining the authority of a municipality over a functional area, four aspects should be dealt with. First, the object for which a power is exercised with respect to a functional area must be identified. Secondly, the subject matter of the functional area (whether it is a thing, a place, a social or natural phenomenon, or a service) should be delineated. Thirdly, the activity (or activities) by which a municipality may realize the objects of local government in respect of the subject matter should be defined. Finally, any specific qualifications in respect of either the subject matter or the activities should be defined.

4.2.1 Objects of local government powers and functions

Section 152 of the Constitution sets the objects of local government, that is, the elements of the goal of developmental local government, that every municipality must strive to achieve. The definition of any power or function must thus be conceived and interpreted with these broad objects in mind. Apart from the object of democratic and accountable government, the following objects define the goals or purposes towards which powers in respect of the functional areas should be exercised:

- (a) The provision of services to communities in a sustainable manner, which is to provide those services that give members of the communities a dignified life from birth to death.
- (b) The promotion of social development, which can be interpreted as the improvement of the non-material well-being of communities through culture, sport, recreation and the promotion of social solidarity as well as the quiet enjoyment of life.
- (c) The promotion of economic development, by seeking to improve the material well-being of its communities.
- (d) The promotion of a safe environment, by protecting the physical integrity and lives of residents.

- (e) The promotion of a healthy environment, by protecting and promoting the health and well-being of residents.

Although these objects are broad and all-encompassing, they nevertheless give guidance on how both the subject matter and the activities relating to a particular subject matter should be defined. For example, the object of promoting a safe and healthy environment gives meaning to the type of activities that should be brought to bear on ‘child care facilities’. The object of promoting economic development, on the other hand, informs the nature of activities that local government may take in relation to ‘local tourism’. The objects are not mutually exclusive; a particular power or function could be exercised with more than one object in mind.

4.2.2 Subject matter of local government powers and functions

The functional areas listed in Schedules 4B and 5B refer to various aspects of social life. These aspects may be grouped into four categories:

- (a) places;
- (b) things;
- (c) social/natural phenomena; and
- (d) services.

Some are self-explanatory, such as ‘harbours, jetties and piers’. In many instances, however, a definition is essential because the terms used are vague, such as ‘local amenities’ or ‘public nuisances’.

4.2.3 Activities in relations to subjects of local government

Having defined the subject matter of a municipal power, the next step is to demarcate the activity that the municipality may bring to bear on that subject matter. In some cases, the schedules already define the activity: ‘trading regulations’ or ‘control of public nuisances’. In most cases, no activity is indicated and must thus be added. A typical definition includes activities couched as ‘regulate’, ‘administer’ or ‘control’.

4.2.4 Limitations to the subject and/or activities

In a number of cases the subject matter is described by the addition of the qualifier ‘municipal’ or ‘local’. Additional qualifications may be deduced from the context and wording of a particular functional area.

(a) ‘Municipal’

In view of the Constitutional Court’s approach in the *Liquor Bill* case to provincial competencies, it seems clear that a municipal competence must be interpreted to deal with intra-municipal activities and concerns only and excludes activities with an extra-municipal

dimension. What constitutes an intra-municipal concern can only be determined in the context of each functional area.

A key area of contestation has been ‘municipal roads’ as distinguished from ‘provincial’ roads. It is argued that, in terms of a purposive approach to definitions, the primary criterion is the purpose of a road.⁴⁰ If the purpose of the road is to link two or more municipalities, there is an extra-municipal dimension to the road and it must be regarded as provincial. There are various indicators of the purpose of a road, notably its usage. If the road serves primarily the inhabitants of the municipality, it is a ‘municipal’ road. Roads that begin and end within a municipality are likewise ‘municipal’ roads. In short, ‘municipal’ roads are those roads that have a ‘municipal’ purpose in that they primarily serve the inhabitants of the municipality and do not have a linkage function between municipalities.

(b) ‘Local’

In three instances the subject matter is limited by the term ‘local’: tourism, amenities, and sport facilities. In as much as all municipal functions should have an intra-municipal purpose only, the term ‘local’ reflects this and thus serves the same purpose as the term ‘municipal’. The difference between the two terms seems to be that ‘municipal’ refers primarily to municipality owned or controlled objects, be they airports, health services, public transport, public works, parks and roads.⁴¹ On the other hand, ‘local’ tourism, amenities, and sport facilities may denote primarily private activities and places. Thus, a municipality may regulate the tourism industry of its locality, including the provision of accommodation and the like. In short, there would appear to be no inherent difference between the two concepts.

(c) Language and contextual limitations

Limitations may also be deduced from the language used to describe, and the context of, a functional area. For example, the linking of ‘beaches’ with ‘amusement facilities’ in the same description of a functional area suggests that the nature of activities relating to beaches should be similar to those relating to ‘amusement facilities’. Thus, the authority of a municipality over a beach is the exploitation and regulation of the use of beaches for recreational purposes rather than their environmental aspects.

4.3 Guiding principles for definitions

Defining a functional area is not an easy task as the concepts to be interpreted often do not lend themselves to obvious legal definitions. Moreover, the Constitutional Court does not show a bias to a particular sphere of government when interpreting the scope of a power. It is, however, suggested that the interpretation of functional areas should be guided by the principles of subsidiarity and developmental local government.

⁴⁰ Jaap de Visser, Nico Steytler & Johann Mettler *Legal Options on Roads* unpublished report, Community Law Centre, University of the Western Cape (2000).

⁴¹ Although ownership is the dominant link, it is not conclusively so. A ‘municipal’ airport may be in private hands but nevertheless serve the residents of the municipality.

The principle of subsidiarity means that a function should be performed at the lowest possible level where that particular function can be carried out.⁴² This is also a constitutional principle guiding the allocation of executive authority over Schedule 4A and 5A matters. A municipality is entitled to the assignment of the administration of a function, which falls in a province's jurisdiction, if it can most effectively be administered locally and if a municipality has the capacity to do so.⁴³ Subsidiarity is, however, a notoriously vague and imprecise principle. What is best administered at the lowest level? In answering this question, the principle of subsidiarity holds that when in doubt one must favour the lowest level of government.⁴⁴

In defining the powers of local government, the purpose must be to realize the constitutional goal of developmental local government as expressed in s 152. Developmental local government means the social and economic development of local communities with the full participation of those communities. Since developmental local government is conceived as giving local communities control over their own lives, an expansive rather than a restrictive interpretation should be adopted.⁴⁵

4.4 Defining each local government competence

Given this framework for defining local government competencies, the next step is to provide definitions for each competence. It is not, however, advisable to do so in the abstract. Definitions are sector-specific requiring a detailed analysis of each functional area. To devise appropriate definitions, the following three-step process could be followed:

- (a) Develop and adopt official guideline definitions;
- (b) develop and adopt statutory definitions; and
- (c) if required, negotiate the practical implementation of definitions.

4.4.1 Guideline definitions

Given the broad framework for definitions, the first step is to develop a set of guideline definitions that will guide all spheres of government in the exercise of their constitutional powers. The Minister responsible for local government can issue such regulations in terms of s 92 of the Municipal Structures Act in order to provide a holistic approach to municipal powers and functions.

The aims of the guidelines would be three-fold:

- (a) They will give municipalities guidance in determining the ambit of their powers and functions.

42 See Gretchen Carpenter 'Cooperative government, devolution of powers and subsidiarity: The South African perspective' in Konrad Adenauer Stiftung Subnational Constitutional Governance (1999) 45. See also Peter Hogg Constitutional Law of Canada (2004) 115.

43 Section 156(4) of the Constitution.

44 Bertelsmann Commission Disentanglement 2005: Ten Reform Proposals for Better Governance in the German Federal System (2000) 18.

45 See De Visser op cit note 21 at 114.

This will be of great relevance to the drafting of by-laws and the structuring of the executive authority, including the drafting of Integrated Development Plans.

- (b) They will guide national and provincial departments in drafting statutory definitions of powers and functions concerned with a particular sector of government.
- (c) They will guide provincial governments in defining the scope of their monitoring and support functions with regard to municipalities.

The aim of the guidelines is to secure a uniform and consistent approach to Schedule 4B and 5B competencies. This will promote a coherent overarching view of the nature and ambit of local government powers and functions. The guideline definitions would not, however, have the binding force of law, but would provide municipalities and sector departments at both national and provincial level with a framework in terms of which the details of a particular functional area can be determined.

The guidelines should be developed in consultation with the various national and provincial departments as well as local government so as to achieve an informed and sector-specific definition as possible. The value of the guidelines would thus lie in (a) incorporating the four elements of a competence, (b) providing consistency with the Constitution by avoiding over- or underinclusiveness, and (c) being sector specific.

4.4.2 Statutory determination of definitions

All three spheres of government may, as was pointed out above, adopt definitions of local government competencies. Any such definitions should be guided by the guidelines referred to above, which may mitigate to some degree the dangers of over- or underinclusiveness of definitions.

Before any law that defines local government competencies is adopted, a full process of consultation with local government should be conducted. In terms of s 154(2) of the Constitution, draft national or provincial legislation that ‘affects the status, institutions, power or functions of local government’, must first be published for public comment before its is introduced in Parliament or a provincial legislature ‘in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to draft legislation’.

This duty of consultation is elaborated further in the Intergovernmental Relations Framework Act (IRFA).⁴⁶ First, the Premiers’ Intergovernmental Forum must be used as a consultative forum where provincial legislation relating to the statutory definitions of functions and powers can be discussed.⁴⁷ Second, in the chapter dealing with the conduct of intergovernmental relations, the Act specifies that a province must consult with local government on any policy or law that may affect the interests of the latter.⁴⁸

⁴⁶ Act 13 of 2005

⁴⁷ Ibid s 18(1)(a)(v).

⁴⁸ Ibid s 36(1)(b).

In particular, consultation must be appropriately focused and include a consideration of the impact that such policy or legislation may have on the functional, institutional and financial integrity and coherence of local government.⁴⁹

A municipality can define the ambit of its powers and functions in a by-law. Such a by-law is, however, subject to valid national and provincial laws that do not compromise or impede a municipality's right to govern its own affairs.⁵⁰ To assist municipalities, and to give effect to their duty of support, both the national and provincial governments may issue standard by-laws, defining, among other things, municipal competencies. Again, such standard by-laws should be informed by the guidelines.

4.4.3 Negotiated definitions or application of competencies No definition, whether in the form of a guideline or a statute, will resolve all definitional ambiguities. Often more questions are raised than answered. Moreover, while the general principles can be captured in law, their application may require decisions. The final step towards defining competencies is using the political process whereby the contours of competencies can be finally settled. This can be done through the conclusion of protocols and memoranda of understanding on a particular competency. Part of the negotiations would include the funding of the function. An example of the need for an intergovernmental protocol is the classification of roads. While a provincial Act could define the broad framework of how to distinguish between provincial and municipal roads, the application of the Act to actual roads could best be done in an intergovernmental agreement.

As pointed out above, the principles of cooperative government require the coordination by all spheres of government of their respective legislative authority.⁵¹ The IRFA has taken these principles forward. In the case of provincial-local relations, the Act requires the establishment of a Premiers' Intergovernmental Forum⁵² and, if necessary, sectoral intergovernmental forums⁵³. Although intergovernmental forums are for consultation and discussion and are not decision-making bodies, they can make agreements that, once ratified by their constituent members, are binding.⁵⁴ These agreements may provide a secure base on which both spheres of government can function effectively and in a coordinated manner in overlapping functional areas by defining the cut-off points more closely.

5 CONCLUSION

Overlapping powers and functions are an integral part of any decentralized system of government. Because such overlaps tend to hide lines of responsibility — the public does not know who is responsible for what function — clarity with regard to function allocation and responsibility is important for the enhancement of both democratic accountability

⁴⁹ Ibid s 36(2).

⁵⁰ Section 156(3) of the Constitution.

⁵¹ Section 41(1)(h)(iv) of the Constitution.

⁵² Section 17 of Act 13 of 2005.

⁵³ Ibid s 21.

⁵⁴ Ibid s 32.

and, in the end, effective service delivery and development. The question, then, is how to manage effectively the problems that flow from this inherent consequence of allocating state power between more than one sphere of government. The task is thus to seek greater role clarification. This is done at both legislative and executive levels. Effective intergovernmental relations and structures are an important method through which the effective coordination of overlapping competencies can be achieved.

There will inevitably be tension between local government and provincial government with regard to competencies. This is also part of a decentralized system of government. There is a limit to which the overlap between competencies can be minimized through definitions. For the rest it must be effectively dealt with through the principles of cooperative government.