

will implement laws that are made, and to ensure that adequate provision is made therefor in the budgets of the different governments.⁸⁰

The observation above was made concerning spheres of government, and not two departments operating in the same sphere, as is the case with the National Treasury and COGTA. The Court also used weak language such as ‘desirable’ to highlight the need to avoid conflicting legislation. What remains certain, however, is that courts have determined that legislative provisions can be challenged for being vague or overly broad, potentially leading to their unconstitutionality if they do not make their meaning clear to those they affect. Importantly, it should be emphasised that laws are not invalidated solely for overlapping with others; rather, the focus is on whether the combined laws convey a meaning a reasonably certain meaning.

Indeed, while municipalities may challenge such regulations for being vague, courts will initially strive to interpret them in a way that prevents conflict and enables them to be read in conjunction with each other.⁸¹ Here, courts may apply the maxim of *lex posterior priori derogat*, which holds that if there is a conflict between two or more enactments, the most recent one will take priority over the earlier ones. The interpretative maxim of *generalia specialibus non derogant*, which holds that general rules are not supposed to deviate in any way from special rules, does, however, make an exception to this rule. It provides that an earlier piece of legislation will be repealed if a subsequent piece of legislation is to regulate the same subject using specified language.⁸² These maxims are clear in theory; nevertheless, when put into practice, it is not always easy to deduce whether or not a law has been repealed. In the case of overbroad provisions, courts have also used the reading-in and reading-down remedies to save a statutory provision from being declared invalid.⁸³ This remedy is not always appropriate and available to courts (i.e., it would amount to interference with the legislature’s role), particularly when courts have to read in multiple qualifications.⁸⁴

In sum, although the principle of legality has been acknowledged as a concept that changes with time in South Africa’s legal system, it does not specifically tackle the regulatory issues that municipalities encounter. The purpose of the following section is thus to investigate whether the Constitution defines a set of higher-level law-making norms that go beyond the purview of legality and PAJA. In particular, it examines whether the Constitution permits a municipality to challenge a valid rule or regulation based on its impact.

⁸⁰ *Premier, Western Cape v President of the Republic of South Africa and Another* [1999] ZACC 2 (*Premier, WC v President RSA*) para 55. See also *In re: The National Education Policy Bill No. 83 of 1995*, 1996 (3) SA 289 (CC).

⁸¹ *Affordable Medicines* para 73: ‘Where, as here, it is contended that the regulation under consideration is vague for uncertainty, the court must first construe the regulation applying the normal rules of construction including those required by constitutional adjudication. The ultimate question is whether so construed, the regulation indicates with reasonable certainty to those who are bound by it what is required of them.’

⁸² De Ville (2000) 78-9.

⁸³ *Daniels v Campbell and Others* [2004] ZACC 14 (interpreting the word spouse to include Islamic marriages).

⁸⁴ *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31 para 125: ‘[C]ourts should not embark on an interpretative exercise which would in effect rewrite the text under consideration. Such an exercise amounts to usurping the legislative function through interpretation.’ See also *Bertie Van Zyl* para 105 (O’Regan J dissenting).

6.4 Constitutional review and intergovernmental relations

6.4.1 Introduction

The Constitution is the supreme law, meaning that any law or conduct inconsistent with it is invalid to the extent of its inconsistency.⁸⁵ It follows that any provision in the Constitution may be invoked to challenge the validity of any law or conduct.⁸⁶ Thus, the reviewing standards of legality (i.e., lawfulness, rationality and clarity) are not the only standards against which government legislative acts can be reviewed. It is contended that the government, when regulating local government, must comply with additional standards beyond lawfulness and rationality as contemplated by the principle of legality. These standards are provided explicitly in the Constitution and are not founded on broad values such as the rule of law. In particular, section 41(1)(g) and s 151(4) of the Constitution envisage constitutional review standards that allow municipalities to challenge any law or conduct that encroaches on, compromises or impedes their right or ability to exercise their powers or perform their functions.

Until now, the courts and scholars have given these two provisions limited attention. In what follows, an interpretation of the provisions' scope and content is discussed. The aim is to ascertain the mischief the provisions are meant to prevent and, by extension, their purpose, and whether they can be used to address the regulatory pathologies faced by municipalities.

6.4.2 Section 41(1)(g): Prohibition against encroachment

The three spheres of government in South Africa, comprising national, provincial and local governments, are subject to the principles of cooperative government and intergovernmental relations.⁸⁷ These principles impose positive and legally obligatory responsibilities which each sphere must adhere to when exercising its powers and interacting with the others.⁸⁸ Among others, the principles require the three spheres to respect the Constitution⁸⁹ and not 'exercise their powers and perform their functions in a manner that encroaches on the geographical, functional or institutional integrity of another sphere'.⁹⁰ This implies that while the Constitution describes the spheres as distinct, meaning that each is afforded autonomy, they are obligated to respect each other's autonomy by not using their lawful powers (i.e., law-making) in isolation of or in competition with each other.⁹¹ In particular, section 41(g) of the Constitution provides as follows:

⁸⁵ Section 2 of the Constitution.

⁸⁶ Chaskalson et al. (2012) 10.

⁸⁷ Section 40(1) and (2) Constitution; see also *First Certification* judgment para 287. See too *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC) para 26.

⁸⁸ Steytler & De Visser (2007) 16-4.

⁸⁹ Section 41(1)(e)-(f) of the Constitution.

⁹⁰ Section 41(1)(g) of the Constitution.

⁹¹ In the words of the Constitutional Court (*First Certification* judgment, para 287), the Constitution does not embody 'competitive federalism but rather a "new philosophy" of "co-operative government'. Elsewhere, the Court mentions 'that unlike in United States of America, the provinces [including municipalities] in South Africa are not sovereign states'. See *In re: National Education Policy Bill No 83 of 1995* [1996] ZACC 3 para 23.

41. (1) All spheres of government and all organs of state within each sphere must—
- (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

Indeed, section 41(1)(g) of the Constitution recognises that the exercise of lawful power by one sphere (e.g., passing legislation aimed at regulating local government) may still be challenged and set aside if it encroaches on the geographical, functional, or institutional integrity of municipalities.

Historically, section 41(1)(g) reflects Constitutional Principle XXII entrenched in the Interim Constitution, which prescribes that '[t]he national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces'. Significantly, regarding the Interim Constitution, the obligation not to encroach was aimed at protecting only provinces. The 1996 Constitution has been expanded to section 41(1)(g) to encompass both provinces and municipalities, making the provision of equal relevance to provinces as well as municipalities.

The verb 'encroach' derives from the Middle English word 'encrochen', which means 'to get or seize'⁹² The term 'encroach' is used interchangeably with 'trespass', 'infringe', and 'invade', and it 'suggests the usurpation of another's rights or possessions' beyond the usual or proper limits.⁹³ The Constitution employs the adjectives 'geographical', 'functional', and 'institutional' to qualify the noun 'integrity', which is defined as the 'state of being whole or undivided',⁹⁴ 'Geographical' is the adjectival form of 'geography', which relates to how a place or institution is arranged.⁹⁵ The word 'functional' refers to something which is 'designed to be practical and useful',⁹⁶ and 'institutional', to 'a value or quality that is considered an important and typical feature of a group'.⁹⁷ Accordingly, read in the light of its terminology's dictionary meaning, section 41(1)(g) aims to prohibit spheres and organs of state from using their lawful power in a manner that invades or usurps an inviolable power which is typical of another sphere and necessary for it to function effectively.

⁹² Merriam-Webster.com Dictionary 'Encroach' available at <https://www.merriam-webster.com/dictionary/encroach> (accessed 21 October 2022).

⁹³ The Cambridge Dictionary entry for 'encroach' available at <https://dictionary.cambridge.org/dictionary/english/encroach> (accessed 17 May 2021) defines 'encroachment' as the ability to 'take control or possession of something in a gradual way and often without being noticed'.

⁹⁴ Merriam Webster Dictionary 'Integrity' available at <https://www.merriam-webster.com/dictionary/integrity> (accessed 10 May 2024).

⁹⁵ Oxford English Dictionary 'Geographical' available at <https://www.oed.com/search/dictionary/?scope=Entries&q=geographical> (accessed 10 May 2024).

⁹⁶ Oxford English Dictionary 'Functional' available at <https://www.oed.com/search/dictionary/?scope=Entries&q=functional> (accessed 10 May 2024).

⁹⁷ Collins Dictionary 'Institutional' available at <https://www.collinsdictionary.com/dictionary/english/institutional#:~:text=An%20institutional%20value%20or%20quality,formal%20More%20Synonyms%20of%20institutional> (accessed 10 May 2024).

The Constitutional Court endorsed this dictionary definition in *Premier, WC v President*. In this case, the Western Cape Government challenged the Public Service Act⁹⁸ amendments. The Public Service Amendment Act⁹⁹ removed provinces' discretion to establish and abolish departments within provincial administrations. Provinces could establish or abolish a provincial department only upon submitting a request to the national minister, who must satisfy him- or herself that such request is consistent with the Constitution and the Public Service Act. The Act further empowered the national minister responsible for the public service to transfer functions between national and provincial governments without consulting the premiers.

The Western Cape Government attacked these amendments on two grounds. The first is that the Amendment Act fell outside of Parliament's legislative competence. The second is that even if they fell within Parliament's legislative competence, these amendments violated the principle of intergovernmental relations by encroaching upon the functional and institutional integrity of provinces.¹⁰⁰

On the first ground, the Constitutional Court accepted that the power to establish and structure the public service is vested in the national government and that national legislation can regulate it as contemplated in section 197(1) of the Constitution. The Western Cape Government thus failed to challenge the national government's competence to pass laws governing provincial public service. Consequently, the Amendment Act was lawful.¹⁰¹

The second ground – section 41(1)(g) – proved more successful. The provision allows a court to review a law in regard to the way in which it impacts the functioning of another sphere, rather than in regard to whether the power to legislate exists. Indeed, as the Constitutional Court explained, the duty not to encroach concerns how power is exercised,¹⁰² and not 'whether or not the power exists'¹⁰³ – the latter being an element that forms part of the legality standard, as explained above. This distinction shows that the duty not to encroach extends beyond lawfulness.¹⁰⁴ As the Constitutional Court explained, the import of section 41(1)(g) is 'to prevent one sphere of government using its [lawful] powers in ways which would undermine other spheres of government and prevent them from functioning effectively'.¹⁰⁵ In assessing whether encroachment has taken place, the Court explained that

[t]he functional and institutional integrity of the different spheres of government must be determined with due regard to their place in the

⁹⁸ Act 103 of 1994.

⁹⁹ Act 86 of 1998.

¹⁰⁰ *Premier, WC v President RSA* para 61.

¹⁰¹ *Premier, WC v President RSA* paras 46-8.

¹⁰² *Premier, WC v President of RSA* para 57.

¹⁰³ *Premier, WC v President RSA* para 57.

¹⁰⁴ Woolman & Roux T 'Chapter 14: Co-operative Government & Intergovernmental Relations' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2009) 2 ed 16. The authors argue that the provision becomes relevant only once it has been determined that the power exists, and that where the power does not exist, the dispute must be resolved on the basis of lawfulness.

¹⁰⁵ *Premier, WC v President RSA* para 58.

constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.¹⁰⁶

Woolman and Roux have criticised this passage, arguing that it ‘blurs the neat distinction between the way power is exercised’ and ‘whether or not the power exists’.¹⁰⁷ They contend furthermore that the more constitutionally dubious the status of the asserted power is, the greater the likelihood that it violates section 41(1)(g).¹⁰⁸ In *Premier, WC v President*, the Constitutional Court adopted a restrictive reading of ‘encroach’, finding only one of the amendments invalid. In particular, it declared section 3(3)(b) of the Amendment Act unconstitutional to the extent that it allowed the national minister to transfer the administration of provincial laws without the consent of the Premier. This constituted an encroachment on the executive authority of provinces to administer their own laws, and as such, it was declared unconstitutional and invalid.¹⁰⁹

The Court rejected the other challenges as not amounting to encroachment. It ruled that the President could establish or abolish a department within a provincial administration only at the request of the Premier.¹¹⁰ This meant that the effective power vested in the Premier, albeit subject to constraints (namely, a request to establish or abolish must be submitted to the President).¹¹¹ As such, it found the provision not to be an encroachment.

Similarly, the Cape Division of the High Court, in a subsequent matter, also declined to invalidate the Municipal Structures Act based on section 41(1)(g) of the Constitution.¹¹² In this matter, the Cape Metropolitan Council (now the City of Cape Town) challenged the Structures Act, arguing that it empowers the provincial government to encroach upon its institutional and functional integrity since it empowers provincial MECs to select the types of municipalities to be established.¹¹³ The municipality contended that this power fell within the exclusive powers of municipal councils to make by-laws regulating their own internal affairs in terms of section 160(6) of the Constitution.

The High Court, while rejecting the municipality’s argument and upholding the Structures Act as constitutional, recognised that municipal autonomy is relative and limited by constitutional restraints, including the national government’s power to determine the categories and types of municipalities through national legislation.¹¹⁴ The Court reasoned that while the local government’s constitutional status has been enhanced, this does not detract from the national and provincial government’s responsibility for directing and monitoring local government. It

¹⁰⁶ *Premier, WC v President RSA* para 58.

¹⁰⁷ Woolman & Roux (2009) 16.

¹⁰⁸ Woolman & Roux (2009) 17.

¹⁰⁹ *Premier, WC v President RSA* paras 74 and 99. The Constitutional Court ruled that vesting such a power in the Minister without qualification, for example without requiring the consent of the Premier, is an encroachment on the executive authority of provinces to administer their laws.

¹¹⁰ *Premier, WC v President RSA* para 82

¹¹¹ *Premier, WC v President RSA* para 80. See section 7(5)(a)(ii) Public Service Amendment Act.

¹¹² *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development and Others* 1999 (11) BCLR 1229 (C) (*Cape Metropolitan Council*).

¹¹³ *Cape Metropolitan Council* para 5.

¹¹⁴ *Cape Metropolitan Council* para 115.

ruled that although the MEC for local government's power to determine the type of executive structures of municipalities is significant, the Structures Act does not constitute an encroachment in terms of section 41(1)(g) of the Constitution.

The above examples are not a closed list. For example, the Court in *Premier WC* observed in an *obiter dictum* that if the functionaries within the provincial administrations had to be appointed by, and were required to act under the directions of, the national government, this would amount to encroachment.¹¹⁵

6.5 Constitutional review standards specific to municipalities

The Constitution establishes several safeguards that are specific to municipalities. In particular, section 151(4) of the Constitution provides that municipalities' right to govern must be respected and that national and provincial governments may not compromise or impede it.¹¹⁶ These safeguards are argued to envisage a higher standard of review for legislation applicable to local government. The duty not to compromise and impede a municipality's right to govern goes further than encroachment, as contemplated in section 41(1)(g) of the Constitution.

6.5.1 Municipal safeguards: The right to govern

The duty to respect and protect municipal autonomy is explicit and prominent in sections 151(3) and 151(4) of the Constitution. Both sections use the word 'right', with section 151(3) stating that 'a municipality has a right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided in the Constitution.' Similarly, section 151(4) of the Constitution imposes a duty on national and provincial governments to respect and protect local government autonomy by not 'comprising or impeding a municipality's right or ability to exercise its powers or perform its functions'.

The meaning of section 151(3) is not defined in the Constitution or legislation. In fact, the Municipal Systems Act recites the Constitution,¹¹⁷ and most scholars have referred to the provision without explaining its content.¹¹⁸ Likewise, courts have not defined the meaning and scope of the provision, and no historical texts or writings exist in which it is explained. This is not to say that the provision is not enforceable in a court of law, but what does the choice of words signify? Does the word 'right' confer more powers on municipalities? The *Oxford Dictionary* defines a 'right' as 'an entitlement or justifiable claim, on legal or moral grounds,

¹¹⁵ *Premier, WC v President RSA* paras 66, 77. This was not the issue in this case. Functionaries within the provincial administration are appointed by the Premier and are required to act under the Premier's directions and instructions. This is in line with what the Constitutional Court demanded in the *First Certification* decision, namely that provinces, at the very least, must have the power to hire people to work in their provincial administrations (para 390).

¹¹⁶ Sections 151(3) and 151(4) of the Constitution.

¹¹⁷ Section 3(1) of the Systems Act.

¹¹⁸ Bekink B *Principles of South African Local Government Law* (2006) 66; Steytler & De Visser (2007) 15.

to have or obtain something, or to act in a certain way'.¹¹⁹ Generally, 'govern' denotes an ability to control, decide, manage, direct, shape and affect.¹²⁰ The ability to rule with authority and conduct a state's policy, actions, and affairs is a primary connotation of the word 'govern'. The phrase 'on its own initiative' relates broadly to 'autonomy', namely the power to make one's own decisions¹²¹ and the ability to assess and initiate things 'without requiring or having been given instruction, prompting, or guidance from others; by one's own effort or energy'.¹²²

Broadly, the term 'right' in the 1996 Constitution serves three purposes. First, the phrase 'right to govern' was inserted in the constitutional text to demonstrate unequivocally that the status and autonomy of municipalities differs fundamentally from the position before 1996. Indeed, the foundation of municipalities' autonomy and power to govern now stems directly from the Constitution, not legislation. The 1996 Constitution, as argued, secures municipalities' autonomy in strong terms, in that it does not only say that 'local government shall be autonomous, within limits prescribed by or under the law and shall be entitled to regulate their own affairs, as under the Interim Constitution',¹²³ but also uses rights language to secure and safeguard the existence of municipalities and their ability of to govern on their own initiative. This is significant, as nowhere in the Constitution is rights language used where the government is a beneficiary and holder of a right. In fact, no similar constitutional protection is afforded to provinces and the national government.

This is not to say that a municipality's right to govern, as contemplated in section 151(3) of the Constitution, is a fundamental human right. The word 'right' here aims to fulfil a different goal: namely, it shows that the constitutional drafters deemed it necessary to safeguard and protect local government autonomy from intrusion by national and provincial governments, as was common before 1994. The court also highlighted this understanding in the *Cape Metropolitan Council* case. Given that the word 'right' is ordinarily used to mean protecting 'warm human bodies against the State',¹²⁴ it is submitted that the phrase 'right to govern' has a similar

¹¹⁹ Stevenson A & Brown L *Shorter Oxford English dictionary on historical principles* (2007) 6 ed 2582. See also Collins English Dictionary – Complete and Unabridged (2014) 12 ed available at <https://www.thefreedictionary.com/govern> (accessed 22 March 2020).

¹²⁰ Oxford University Press *The Oxford dictionary of synonyms and antonyms* (2007) 2 ed 197.

¹²¹ Cambridge 'Autonomous' available at <https://dictionary.cambridge.org/dictionary/english/autonomous> (accessed 20 May 2021).

¹²² *Farlex Dictionary of Idioms* (2015) available at <https://idioms.thefreedictionary.com/on+my+own+initiative> (accessed on 22 March 2020)

¹²³ Historically, the Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution,) as the precursor to the 1996 Constitution, was the first constitutional text that recognised local government as an order of government in that it stipulated that 'local government shall be *autonomous* and, within the limits prescribed by or under the law, shall be *entitled to regulate* its affairs.' Local government autonomy was, however, subject to national and provincial regulation in that '[t]he powers, functions and structures of local government shall be determined by the law of a competent authority.' Nonetheless, under the Interim Constitution the essential content of the autonomy was intended to remain untrammelled: 'Parliament or a provincial legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government.' A duty was thus imposed on higher legislatures to the effect that, before enacting legislation affecting the status, powers, functions, or boundaries of local governments, they have to provide local government, including organised local government, with a reasonable opportunity to comment thereon. This was one method of preventing such an encroachment from occurring, a method which was retained in the final Constitution.

¹²⁴ *Gijima* para 18.

meaning, namely a legal entitlement granted to municipalities to safeguard their core powers.¹²⁵ As discussed in Chapter 4, municipalities before 1994 had no autonomy or power to govern, something which is now entrenched in the Constitution. For example, hitherto municipalities, as creatures of statute, could not adopt by-laws without first getting approval from the provincial government. The provincial government could also reverse decisions made by municipalities regarding their respective planning powers.

The constitutional entrenchment of municipalities' right to govern was thus intended to correct this specific mischief. Several other constitutional provisions support the abovementioned meaning of the phrase – the protection element of autonomy. In particular, sections 154(1) and 155(6)(a) of the Constitution enjoin other spheres and organs of state to respect, protect and promote the self-governing powers of municipalities by supporting and strengthening the capacities of municipalities through legislative and other means to 'manage their own affairs'.¹²⁶ This protective approach to municipal autonomy is consistent with the courts' jurisprudence, where it safeguards municipalities' fundamental autonomy when defining local government functions in the schedules.¹²⁷

Finally, the phrase 'right to govern', aside from its primary objective – protecting core powers against improper interference from higher levels of government – also signifies that municipalities' self-governing powers, such as those regarding fundamental rights, can be

¹²⁵ The provision aims to protect municipalities' inviolable powers from being usurped. This includes their ability to initiate policies and by-laws and administer them so as to govern the functional areas listed in schedules 4B and 5B of the Constitution. Moreover, it extends to municipalities' the ability to raise their own revenue, determine and adopt their own budgets, and recruit and dismiss their own personnel. The Municipal Systems Act reflects a similar meaning in section 11(3).

¹²⁶ Importantly, the Constitution does not provide provincial governments with such protection, underscoring the constitutional drafter's concerns about protecting local government. The Constitutional Court, in its decision regarding the *First Certification* para 371, highlighted the importance that 'the legislative and executive powers to support [local government] are ... not insubstantial. Such powers can be employed by provincial governments ... to prevent a decline or degeneration of [local government] structures, powers and functions'. The obligation to support municipalities is a positive obligation and justiciable in a court of law, in that courts are allowed to assess the reasonableness of the steps taken by the national and provincial governments to exercise their duty of support. See *MEC for Local Government, Mpumalanga v IMATU* 2002 (1) SA 76 (SCA), where the court held that section 154(1) of the Constitution does not apply between citizen and government. Therefore, it cannot be utilised by the creditors of a municipality to force a province into making payments for municipal debts. For more on this, see Steytler N 'Province not liable for Municipal Debt' (2002) 4(1) *Local Government Bulletin* 1-3. See also Steytler and De Visser (2007) 15-18(1).

¹²⁷ Although not with direct reference to the right of municipalities to self-government, the Constitutional Court, in 2014, safeguarded municipal planning powers, ruling that provinces (the Western Cape) cannot act as an appeal body for municipal planning decisions. See *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* [2014] ZACC 9. See also *Pieterse NO v Lephalale Local Municipality* [2016] ZACC 40. One year later, in the case of *Tronox*, the Constitutional Court came to a similar conclusion that a provincial appeal body made up of independent specialists established in terms of a provincial law tasked with appealing municipal planning decisions was also not permissible. See *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* [2016] ZACC 2 para 28. Again, in 2018, the Constitutional Court protected local government's autonomy to make planning decisions by finding that National Regulations Review Board cannot act as an appeal authority for municipal building regulation decisions. See *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others* [2018] ZACC 15.

limited. Indeed, municipal power to govern is not absolute.¹²⁸ The internal qualification envisaged in section 151(3) of the Constitution further clarifies that municipal autonomy is not without limitation: a municipality's right to govern is 'subject to national and provincial legislation, *as provided in the Constitution*'.¹²⁹ Notwithstanding this, limiting municipal autonomy comes with conditions. Indeed, compared to other multi-level government systems, such as Germany,¹³⁰ local government autonomy is not automatically limited or subject to national and provincial legislation, as was the case under the interim Constitution. For instance, under the interim Constitution, local autonomy existed 'within the limits of the law', meaning it could be more closely defined by ordinary acts of Parliament.¹³¹ This is no longer the case, as the 1996 Constitution provides that municipalities' right to govern is subject to national and provincial legislation 'as provided in the Constitution'.

The contention is that the 1996 Constitution, by inserting the phrase 'as provided in the Constitution', indicates that an additional safeguard must be observed when limiting municipal autonomy. The phrase denotes that municipal autonomy can only be qualified or constrained by law and 'only to *the extent that the Constitution permits*'.¹³² As a corollary of this, neither the national nor the provincial governments have free rein when it comes to regulating or monitoring the activities of local government. Any law or conduct regulating municipalities must comply with constitutional prescripts, which include the duty not to compromise or impede.¹³³ Consequently, the phrase 'right to govern', considered in its broader context, reflects Clark,¹³⁴ De Visser and Chigwata¹³⁵ and Ladner's¹³⁶ understanding of the concept as relative rather than absolute. As such, the word 'right' does not confer more powers on local government; rather, it aims to demonstrate that any limitation of local government powers by regulation, particularly where such regulation impacts the core of local autonomy, must be justified. These limitations are considered next.

6.5.2 Obligation not to 'compromise' or 'impede'

As noted, municipalities' self-governing powers are limited and subject to national and provincial legislation. The Constitution, however, qualifies the interference by higher spheres

¹²⁸ *Premier, WC v President of RSA* para 29.

¹²⁹ Section 155(2); section 155(3)(a)-(c); and section 157(2) of the Constitution.

¹³⁰ Burgi M 'Federal Republic of Germany' in Steytler N (ed) *Local Government and Metropolitan Regions in Federal Countries* (2009) 144.

¹³¹ Section 173(3) of the Interim Constitution. See also the position before 1994, in which the court in *CDA Boerdery* confirmed that provinces could largely determine the powers of municipalities through regulation.

¹³² *Robertson* para 60 (emphasis added).

¹³³ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* [2014] ZACC 9.

¹³⁴ Clark GL 'A Theory of Local Autonomy' (1984) 74(2) *Annals of the Association of American Geographers* 198-99.

¹³⁵ De Visser J, Steytler N & Chigwata TC 'Fact Sheet on Decentralisation in Africa: A Short-Cut Guide' (2020) 11 available at https://dullahomarinstitute.org.za/siteworkspace/fact-sheets-on-decentralisation-in-africa_english.pdf (accessed 11 September 2011). See also Chigwata & De Visser (2017) 167; Rondinelli (2010) 5.

¹³⁶ Ladner et al. (2019) 22-4.

in that national and provincial governments ‘may not compromise or impede a municipality’s ability or right to exercise its powers and perform its functions’.¹³⁷ Bekink suggests that the provision may appear contradictory when not considered within the wider constitutional framework. The Constitution grants national and provincial governments authority to regulate municipalities while also directing them not to compromise or impede them.¹³⁸ Section 151(4) of the Constitution does not imply that municipalities should be unregulated. Rather, it specifies how the government should regulate local government. This is made clear by the use of the word ‘may’ in section 151(4), and it is also reflected in several other constitutional provisions which demonstrate that the autonomy of municipalities is not unrestricted in any way. Moreover, the section is not limited to national and provincial legislation. Instead, it refers to ‘national and provincial governments’, implying that the section binds executive and legislative actions.¹³⁹

6.5.2.1 Literal meaning

The meaning and scope of section 151(4) have not been defined in legislation or by the courts. The *Oxford Dictionary* defines ‘compromise’ as a ‘weakening or undermining of a party’s principal position’.¹⁴⁰ The word suggests a lowering or weakening of standards, with limitation serving as the primary constituent of the concept. The word ‘impede’, the antonym of ‘facilitate’, is a verb that relates to ‘the slowing down of a process or activity from making progress’.¹⁴¹ Synonymously, ‘impede’ is associated with words such as ‘hinder’ and ‘block’. These suggest different degrees of impediment. ‘Block’, for instance, implies complete obstruction, whereas ‘hinder’ implies the slowing down an activity due to obstacles and annoying delays relating to a process.¹⁴² The connection formed between the two words via ‘ability’ indicates that the constitutional framers recognised municipalities’ varying capacities and resources, suggesting that what hinders one municipality might not hinder another. In addition, by including the word ‘or’, the Constitution suggests that section 151(4) differentiates between the two words, as they cover different regulatory pathologies.

6.5.2.2 Legal meaning: ‘Compromise’ and ‘impede’

What are the legal consequences of section 151(4) of the Constitution? Can municipalities legally contest legislation that significantly compromises or impedes their operations? What procedures or requirements must national and provincial governments follow to regulate municipalities without compromising or impeding them? As noted, the meaning of ‘compromise’ and ‘impede’ is not defined in legislation. The Constitutional Court in *Premier*,

¹³⁷ Section 151(4) of the Constitution.

¹³⁸ Bekink (2006) 65-6.

¹³⁹ Bekink (2006) 66.

¹⁴⁰ Cambridge Dictionary ‘Compromise’ available at <https://dictionary.cambridge.org/dictionary/english/compromise> (accessed 23 October 2022).

¹⁴¹ Cambridge Dictionary ‘Impede’ available at <https://dictionary.cambridge.org/dictionary/english/impede> (accessed 23 October 2022).

¹⁴² Merriam-Webster ‘Impede’ available at <https://www.merriam-webster.com/dictionary/impede#synonyms> (accessed 23 October 2022).

WC v President similarly referred to section 151(4) without defining these words when it observed that ‘the powers of municipalities must be respected by national and provincial governments which may not use their powers to compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.’¹⁴³ Likewise, the Cape Division of the High Court did not define the scope of section 151(4) when the Cape Metropolitan Council asked it to declare the Municipal Structures Act unconstitutional.

In this particular matter, the municipality challenged the Structures Act on two grounds, one of which was that it encroaches upon the autonomy of municipalities by interfering with their functional and institutional integrity, the exercise of their powers, and the performance of their functions. While rejecting the challenge, the Court repeated much of the established principles, confirming that while the national government may regulate local government, Parliament must do so within the restraints of the Constitution.¹⁴⁴ The Court, specifically with reference to section 151(4) of the Constitution, rejected the municipality’s claim. It was found that the detailed provisions of the Municipal Structures Act did not compromise or impede municipalities when the Act was challenged.¹⁴⁵ Significantly, the Court acknowledged while it found that there was no violation of section 151(4), ‘it may eventuate that much of the detail in the Act is unnecessary or even redundant’, suggesting that section 151(4) imposes a continuous duty on the national and provincial government to see that legislation remains fit for purpose. Indeed, as the Court suggests, section 151(4) requires the ‘legislature, at the appropriate time, to trim [the Act] down to size and make it more consumer friendly.’¹⁴⁶

As such, legally, section 151(4) does have significance. This is apparent from section 156(3) of the Constitution, dealing with powers and functions of municipalities, where it states that ‘subject to section 151(4), a by-law in conflict with a national or provincial legislation is invalid’. The reading of section 156(3) with section 151(4) confirms that the provision has the effect of invalidating national or provincial laws. In particular, by-laws that conflict with national and provincial legislation are invalid only if the legislation complies with the qualitative requirements of section 151(4) of the Constitution. Again, the point is here confirmed that national and provincial governments do not have *carte blanche* when regulating municipalities or passing laws in general.

6.5.2.3 The difference between sections 41(1)(g) and 151(4)

A key question now arises: Is section 41(1)(g) the same as, or distinct from, section 151(4) of the Constitution, and if it is, what is the difference? As explained above, both provisions have been inserted in the constitutional text, given the justifiable apprehension that national and provincial governments may oppress municipalities, even when using their lawful powers, such as in enacting legislation. Both provisions empower a municipality to challenge the constitutionality of legislation (a regulation passing the legality-review standard) to the extent that it impacts on another sphere’s functioning. Moreover, both clauses are concerned with how

¹⁴³ *Premier, WC v President* para 29.

¹⁴⁴ *Cape Metropolitan Council* para 84.

¹⁴⁵ *Cape Metropolitan Council* para 118.

¹⁴⁶ *Cape Metropolitan Council* para 118.

power is exercised, not with whether the power exists. Steytler and De Visser share this interpretation, contending that non-compliance with section 151(4) renders legislation invalid and not inoperative.¹⁴⁷ The authors rely on the Constitutional Court's interpretation of section 41(1)(g) of the Constitution in *Premier, WC v President*, which held that if an Act of Parliament is inconsistent with such constraints, it would, to that extent, be invalid.¹⁴⁸

The argument is that section 41(1)(g) 'encroached' is somewhat different to section 151(4) in that the former is focused on the removal of the powers of another sphere that are necessary for it to function effectively. This includes its power to employ personnel and administer and enforce laws. The contention is that section 151(4) is much broader than section 41(1)(g) in that it implicitly recognises that while a law may not remove the inviolable power of municipalities, it may still have the effect of limiting municipalities from exercising their powers fully, which is equally intrusive, if not more so. Indeed, many of the regulatory pathologies discussed in Chapter 4 do not directly strip municipalities of their inviolable power (i.e., municipalities are still allowed to enter PPPs). Instead, the regulation style (i.e., multiple laws and departments regulating PPPs) has made it extremely difficult for municipalities to venture into PPPs. Section 151(4) addresses this mischief by regulating how national and provincial governments can limit (not take away) local government autonomy. As argued further below, the provision requires national and provincial governments to justify such limitations when limiting local government autonomy through legislation.

6.5.3 Towards a methodology for assessing compromising and impeding

The study proposes that the government, including the courts, draw on the limitation-analysis factors used to limit fundamental rights, as listed in section 36 of the Constitution, to assess whether a law or conduct compromises or impedes municipalities. The argument is not that section 36 applies directly to municipalities; rather, it is that the listed principles be used as guiding factors when balancing the self-governing authority of municipalities, expressed through their right to govern, and the regulatory authority of national and provincial governments.¹⁴⁹ The section provides as follows:

36. Limitations

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;

¹⁴⁷ Steytler & De Visser (2007) Ch 5-28.

¹⁴⁸ *Premier, WC v President* para 29. See also Steytler & De Visser (2007) Chs 5-28.

¹⁴⁹ *Premier, WC v President* para 29. In this judgment, the Constitutional Court already remarked that the 'Constitution ... protects the role of local government, and places certain constraints upon the powers of Parliament to interfere with local government decisions'. This point is also recognised by Steytler (2008) 534-35.

- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

Using the factors listed in section 36 is not a far-fetched idea when it comes to interpreting and developing a methodological framework applicable to section 151(4). Several reasons can be offered to support this, with the first being that, although they have different effects, what ‘compromising’ and ‘impeding’ have in common is that they limit local autonomy. Secondly, section 36 factors are not limited to fundamental rights. De Vos and Freedman note (in a view shared by Woolman and Botha)¹⁵⁰ that section 36 also serves as an analytical framework for how legislation should be developed, written, and discussed.¹⁵¹ Thus, when determining if a restriction or obligation placed on municipalities breaches section 151(4) of the Constitution, one should consider municipalities’ right to self-government, the purpose of the restriction or obligation, the nature and extent of the limitation, the relationship between the obligation or restriction and its purpose, and the exploration of less restrictive alternatives.

6.5.3.1 Nature of the right: Local autonomy

The Constitution recognises a municipality’s right to govern, on its own initiative, the local government affairs of its community. The entrenchment of this provision in the Constitution signifies the constitutional drafter’s commitment to recognise municipalities as a form of government in their own right.¹⁵² The provision further aims to safeguard different aspects of local self-governance, including the power of municipalities to develop and implement policies and legislation (by-laws) to regulate matters of their local communities; to approve and implement municipal budgets; and to set tariffs for local taxes and ensure the collection thereof. It also safeguards the inherent powers of municipalities to determine their organisational structures and appoint and dismiss their staff. The general import of local government autonomy expressed in section 151(3) of the Constitution is consistent with how other jurisdictions, such as Germany,¹⁵³ have defined autonomy as the protection of the core powers of municipalities, powers which includes their power to

¹⁵⁰ Woolman S & Botha H ‘Chapter 34: Limitations’ in Woolman S et al (eds) *Constitutional Law of South Africa* 2ed (2012) 2: ‘[T]he limitation clause ... represent an attempt to finesse the “problem” of judicial review by establishing a test that determines the extent to which the democratically elected branches of government may craft laws that limit our constitutionally protected rights and the extent to which an unelected judiciary may override the general will by reference to the basic law.’

¹⁵¹ De Vos P & Freedman W (eds) *South African Constitutional Law in Context* (2021) 431.

¹⁵² *Fedsure* para 38: ‘The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates.’

¹⁵³ Article 28(2) of the Basic Law for the Federal Republic of Germany 1949 states: ‘The Municipality shall be guaranteed the right to manage all the affairs of the local community of their own responsibility within the limits set by law. Within the framework of their statutory functions the association of municipalities likewise has the right of self-government in accordance with the law. The right of self-government shall include responsibility for

- determine their internal administrative organisation (*Organisationshoheit*);
- recruit their personnel and determine their division of work (*Personalhoheit*);
- have their own budget, with the responsibility for their resources (including taxation) and expenditure (*Finanzhoheit*).¹⁵⁴

The protection of these core powers cannot be overstated: they are buttressed in several constitutional provisions,¹⁵⁵ suggesting that the constitutional drafters recognised that without these powers (e.g., the ability to raise revenue through local taxes), municipalities cannot effectively govern and so address the needs of their local communities. Indeed, municipalities are at the coal-face of service delivery and development¹⁵⁶ and hence directly responsible for realising fundamental rights (i.e., the right to access sufficient water),¹⁵⁷ and, as such, need funds to carry out their functions listed in schedules 4B and 5B of the Constitution.

In essence, the first factor requires identifying whether a regulatory act impacts the core of the autonomy which is necessary for municipalities to carry out their functions effectively. The regulatory pathologies outlined in Chapter 4 have been shown to affect many aspects of municipal autonomy, including the authority of municipalities to recruit their personnel, the power to decide on the service delivery mechanism they use to render a particular service, and their revenue (fiscal autonomy).

6.5.3.2 Purpose and importance of the restriction and obligation

It is trite that municipalities' right or legal entitlement to govern is not absolute. Legislation or conduct (such as requests for information) can limit municipalities' autonomy. When assessing whether such legislation or conduct compromises or impedes a municipality's self-governing powers, reference must be made to the purpose and importance of such restriction or obligation.

The objective of legislative enactments may be ascertained objectively from the legislative text where it is not explicit in the text.¹⁵⁸ For example, the Municipal Systems Act's broad purpose

financial matters. The municipalities have the power to levy trade taxes according to the rates for assessment determined by them.'

¹⁵⁴ Burgi (2009) 144. Municipalities can invoke their right to self-government in the German Federal Constitutional Court when federal or *Länder* legislation violates these constitutional guarantees. See Ruge K & Ritgen K 'Local self-government and administration' (2021) *Public administration in Germany* 132.

¹⁵⁵ Section 156(1)(a) and (2) of the Constitution (power to make by-laws and administer it); section 160 (1)(a) (power to employ personnel); section 160(2)(a)-(d) approval of the budget and revenue-raising measures. See also section 229(1)(a) of the Constitution.

¹⁵⁶ Steytler & De Visser (2007) Ch 5, 5. In *Fedsure* para 80, the Constitutional Court defined the new role of municipalities as being 'to eliminate the disparities and disadvantages ... of the past and to ensure, as rapidly as possible, the upgrading of services in the previous disadvantage areas ...'.¹⁵⁶ As O'Regan J explained, '[T]his task is particularly important given the deep divisions in our towns, the scars of spatial apartheid which still exist and the fact that many poor communities are still without access to basic facilities such as water, adequate sewerage systems, refuse collection, electricity and paved roads.' See *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (2) BCLR 150 (CC) para 105.

¹⁵⁷ Sections 27(1)(b) and (2) of the Constitution. For example, the right to access sufficient water corresponds with a municipality's functional area of water and sanitation, limited to portable water supply systems.

¹⁵⁸ Woolman & Botha (2012) 74.

is to ‘establish a framework for support, monitoring and standard-setting progressively build local government into an efficient, frontline development agency’. To this end, the Act allows municipalities to decide on the method of delivering services – a key feature of their autonomy. The legislature acknowledges in section 78 that municipalities may face limitations in providing services directly to their citizens due to capacity and skills limits. It thus permits municipalities to outsource services to address these constraints and guarantee service delivery. However, the legislature knows municipalities may misuse this authority by relinquishing their responsibility for service delivery to external service providers. The Act thus places specific duties (i.e., the need to consult the local community and conduct feasibility studies) on municipalities before deciding to outsource a municipal service. Overall, these legislative obligations are designed to reinforce the constitutional objectives of local government, which, amongst others, are to ensure the sustainable provision of service to communities and encourage the involvement of local communities.¹⁵⁹

6.5.3.3 Nature and extent of the restriction and obligation

The next factor assesses the nature and extent of the restriction and obligation. The focus here is on the regulations themselves and assessing the detail of what they prescribe (i.e., the extent to which they reduce the discretion of municipalities). Let us again consider the outsourcing of municipal services regime contemplated in section 78 of the Systems Act. The Act does not wholly or permanently deny municipalities the right to decide which service delivery mechanism they employ. On the contrary, the problem relates to how this process is regulated. The nature of the rules and process set out in sections 78-80 of the Systems Act, including the MFMA (as discussed in Chapter 4 of this study), has resulted in municipalities not being given much of a choice other than to renounce PPPs when it comes to outsourcing municipal services. In particular, the process has proven to be cost-prohibitive,¹⁶⁰ and requires municipalities to comply with multiple consultative requirements in different statutes, often resulting in delays since municipalities must obtain feedback from various departments (i.e., national and provincial treasuries). Consequently, the decision to outsource municipal services is not truly one that municipalities can make. The result is that, as of the start of 2023, only four municipal PPPs have been concluded successfully.

The rules governing the selection and appointment of senior managers can be similarly described. As discussed in Chapter 4, the rules governing the appointment of senior managers at a municipal level are shown to overlap and contradict each other (i.e., multiple laws from different departments regulate the appointment of senior managers), undermining the ability of municipalities to act lawfully. The result is that municipalities have been restricted in exercising their original power of appointing their staff, as they are forced to outsource the appointment and disciplinary processes to consultants for fear of making mistakes.

¹⁵⁹ Section 152(1)(b) and (e) of the Constitution.

¹⁶⁰ The rules incorrectly assume that all municipalities possess the necessary ability and internal expertise to conduct feasibility studies. Smaller towns, especially those in rural areas, are disproportionately affected by this, as they lack in-house legal departments.

6.5.3.4 The connection between a restriction and its purpose

As part of the analysis, it is necessary to determine whether the restriction serves its purpose. This is a factual inquiry. Thus, any party that wishes to rely on an impugned law must adduce evidence to establish a connection between the restriction and its purpose. This factor is not concerned with whether more appropriate methods exist to achieve the restriction's purpose; rather, it assesses whether a rational connection exists between the restriction and its purpose. At its simplest, the law must be capable of serving the purpose it aims to achieve.¹⁶¹ In other words, the details of the restrictions must be able to achieve the restriction's goal.

In the outsourcing example, regulating PPPs seeks to ensure that municipalities provide services effectively. However, the details of the regulations have fundamentally undermined the achievement of this goal, making the nexus between the restriction and its purpose weak. For example, the Systems Act, taken together with the MFMA's detailed regulation of the outsourcing of municipal services, has limited the scope of municipalities' ability to enter into PPPs, resulting in only four PPPs having been completed at a municipal level even though the MFMA and the SCM regulations have been in place since 2005.

6.5.3.5 Less restrictive means

The fifth, and last, factor assesses whether the purpose of the restriction can be achieved by a less restrictive and intrusive measure impacting municipal autonomy. The factor requires the national and provincial governments to consider whether alternative measures exist to address a problem. The idea is that the self-governing powers of local government should be limited no more than necessary, meaning that the legislature 'should not use a sledgehammer to crack a nut'.¹⁶²

In the context of the regulatory pathologies identified in this study, this factor requires that, instead of having multiple laws regulating a particular area, line departments should coordinate their legislative action. So, instead of enacting more laws governing the appointment of senior managers at a municipal level, a less restrictive measure would entail one law regulating the process. This should also be the case for outsourcing municipal services and where municipalities are subjected to duplicative reporting requests. Indeed, while monitoring municipalities through information requests is necessary, the nexus between the means and the goal is often weak, especially where the information has already been obtained by the national government. This practice has resulted in municipalities investing resources (e.g., personnel costs and time) to meet compliance without any meaningful purpose (e.g., information is duplicated or not used optimally, whereby feedback is not provided to municipalities).¹⁶³ A less stringent measure would be to require that every department, when seeking information

¹⁶¹ Woolman & Botha (2012) 84.

¹⁶² Currie & De Waal (2014) 168. See also *S v Manamela* 2000 (3) SA 1 (CC) para 34.

¹⁶³ Chetty (2008) 372. Local Government National *Treasury Rationalisation of the Local Government Data Collection Process Report* (2007) 9.

from municipalities, first evaluate whether the desired information is already accessible. This may also involve creating a single, central database where such information can be accessed.

The less-restrictive factor does not come without limitations. In interpreting this factor, the Constitutional Court has held it does not ‘empower courts to second-guess the wisdom of policy choices made by legislators.’¹⁶⁴ Less restrictive measures will almost always be available. Even in such cases, the courts have declined to adopt them, especially where implementing such measures would significantly burden the government.¹⁶⁵ Thus, when contemplating alternative measures, one must consider the administrative burden on the state, the probability of encountering implementation issues, and the potential diversion of resources.¹⁶⁶ It is argued that the above alternatives would not result in implementation challenges or impose compliance expenses. On the contrary, they would have the opposite effect, specifically by diminishing the costs associated with compliance and ensuring certainty, as municipalities would no longer be obligated to adhere to several statutes enforced by separate departments.

In sum, the less-restrictive factor requires policy-makers always to consider alternatives to regulation when regulating local government. It also requires law-makers to enact laws without ‘casting the net too [wide]’ and to use legislation in a ‘narrowly tailored’ manner.¹⁶⁷ This implies that laws enacted for local governments must not be designed and implemented uniformly with solely the ‘weakest links in the chain’ in mind. Instead of implementing a law that prohibits the use of credit cards for all municipalities (i.e., the last municipality had a credit card in 2009), an alternative approach would have been to issue an executive action targeting the few municipalities that have defaulted on their credit card usage, rather than imposing a law that applies to all 257 municipalities.

6.5.4 Balancing the burden of justification

The five factors above could assist a court in establishing whether a restriction or obligation violates section 151(4) of the Constitution. They should not be viewed as a sequential checklist that has to be applied mechanically. Instead, these factors are to be considered as part of a balancing exercise, where the impact (i.e., harm done by the law) is weighed against its benefits to determine if it is proportionate. As the Constitutional Court explained in *S v Bhulwana* in regard to the weighing exercise, ‘the purpose, effects and importance of the infringing

¹⁶⁴ *S v Makwanyane and Another* [1995] ZACC 3 para 156. See also *Case & Another v Minister of Safety and Security & Others*; *Curtis v Minister of Safety and Security & Others* 1996 (1) SA 984 (CC) para 62.

¹⁶⁵ *Manamela* para 94. See also *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1 paras 129-142. In the *Prince* case, the majority of the Constitutional Court rejected the proposal of implementing a permit system for the use of cannabis as a less stringent alternative to a complete prohibition. The Court concluded that implementing such a permit system would pose challenges in terms of enforcement and place substantial financial and administrative costs on the state.

¹⁶⁶ *Woolman & Botha* (2012) 92.

¹⁶⁷ *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) para 11.

legislation [must be put] on one side of the scales, and the nature and effect of the infringement caused by the legislation on the other'.¹⁶⁸

In the case of municipalities, the grounds of justification must be more persuasive where a restriction or obligation goes to the core of a municipality's autonomy (i.e., the ability to appoint its own personnel). Let us use the outsourcing regime as an example. Several consultative restrictions require municipalities to consult different stakeholders, line departments, national and provincial treasuries, and communities when they intend to outsource municipal service provision. These consultative requirements ensure municipalities do not abuse the outsourcing regime, requiring transparency. The restrictions (multiple consultative requirements) have been proven to outweigh their benefits. This is because projects take years to commence and complete (due to delays in departmental feedback provided to municipalities), increasing costs. Consequently, municipalities do not see the value of outsourcing despite its potential to help address service-delivery backlogs. This is not to say that the outsourcing regime should not be regulated. The contention is that unconstitutionality extends to how it is regulated (overlapping laws) by multiple departments, making it difficult to undertake.

It is important to emphasise that municipalities are responsible for demonstrating a violation of section 151(4) of the Constitution.¹⁶⁹ The burden will shift to the national and provincial governments to show that the restriction or obligation is justifiable.¹⁷⁰ The duty is not limited to specific constitutional cases, such as where the state has a specific evidentiary burden, as in the case of limitation of fundamental rights. As Chaskalson, Marcus, and Bishop correctly contend, the evidentiary burden extends to all aspects of constitutional litigation.¹⁷¹ The Constitutional Court emphasised the duty to provide information in *Moise* as follows:

If the government wishes to defend a particular enactment, it then has the opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but placing before the court the requisite factual material and policy considerations.¹⁷²

Placing this evidentiary burden on national and provincial governments is appropriate, given that they can access information that would assist in this justification analysis. This information may include statistical data that will demonstrate the important purpose served by the law and the adverse consequences that may follow if the law is set aside or the administrative or financial impact if the law changes.¹⁷³ The absence of this information, or where the state fails

¹⁶⁸ *S v Bhulwana* 1995 (12) BCLR 1579 (CC) para 18. See also Cheadle MH, Davis C & Haysom NRL *South African Constitutional Law: The Bill of Rights* (2002) 711; *S v Manamela* 2000 (3) SA 1 (CC) para 53.

¹⁶⁹ *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC) (*Ferreira*) para 44: 'The task of interpreting ... fundamental rights rests, of course, with the courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of a particular right in question.'

¹⁷⁰ In *S v Makwanyane* para 102, Chaskalson P laid down the basic principle that 'it is for the legislature, or the party relying on the legislation to establish this justification, and not the party challenging it to show that it is not justified'.

¹⁷¹ Chaskalson et al. (2012) 25.

¹⁷² *Moise v Greater Germiston Transitional Council* 2001 (4) SA 491 (CC) para 19.

¹⁷³ Chaskalson et al. (2012) 25.

to put up a justification¹⁷⁴ (i.e., not presenting factual and policy materials), may result in the scales tipping against the national and provincial governments to support a claim of invalidity.¹⁷⁵

6.5.5 Judicial remedies and their limitations

Several enforcement mechanisms can be employed by courts when faced with a violation of section 151(4) and section 41(1)(g) of the Constitution. These include declaring the law or conduct invalid through an order of invalidity, reading-in (adding words to a statute to render it constitutional), severance (striking out words that are unconstitutional), allowing law-makers to rectify the defect by suspending the order of invalidity, and, lastly, granting interdicts. While Blackadder observes that ‘law without remedies is like a broken pencil. Pointless’,¹⁷⁶ it is important to emphasise that judicial remedies have limitations. Below, we consider these remedies, their limitations, and their potential to address the regulatory pathologies identified in Chapter 4.

6.5.5.1 Declaration of invalidity

Failure to comply with sections 151(4) and 41(1)(g) would result in the nullity of the law or conduct. Importantly, courts do not have discretion in the matter and cannot decline to declare such law or conduct not to be invalid.¹⁷⁷ In principle, a declaration of invalidity will apply retroactively from the moment the violation occurred, not from when the court pronounced it invalid. This is referred to as the doctrine of objective invalidity.¹⁷⁸

However, before a court declares a law or conduct invalid, it must first determine whether it is possible to interpret the challenged provision in a way that renders it constitutionally valid. The Constitutional Court in *Hyundai Motor* explained that ‘[j]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such interpretation can be reasonably ascribed to the section’.¹⁷⁹ This has been described as ‘the presumption of constitutionality’ or reading down.¹⁸⁰ In practice, this is not a constitutional remedy in a strict sense but rather an obligatory norm for interpreting statutory language.¹⁸¹

¹⁷⁴ *S v Steyn* [2000] ZACC 24 para 32; see also *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35 para 84.

¹⁷⁵ *South African Municipal Workers Union v Minister of Cooperative Governance and Traditional Affairs and Another* [2023] ZALCJHB 323 paras 34-40. The court found that the Minister of COGTA failed to provide evidence justifying the limitation of municipal workers’ political rights enshrined in section 19 of the Constitution. In this case, section 71(B) of the Municipal Structures Amendment Act 2022 prohibited municipal staff from holding an office in a political party while being employed by the municipality. See also *Moise* para 19; Woolman & Botha (2012) 44.

¹⁷⁶ Bishop M ‘Chapter 9: Remedies’ in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2012) 1.

¹⁷⁷ Section 172(1)(a) Constitution. *Doctors For Life International v Speaker of the National Assembly and Others* [2006] ZACC 11 para 24.

¹⁷⁸ *Ferreira* paras 26-7.

¹⁷⁹ *Hyundai Motor* para 23.

¹⁸⁰ Devenish (1992) 210-12. See also De Ville (2000) 223-25.

¹⁸¹ De Vos & Freedman (2021) 486.

Similarly, courts can and have employed interpretative techniques to bring flexibility to the legal framework by reading down peremptory words into directory provisions (i.e., reinterpreting a ‘must’ into a ‘may’). This method of interpretation allows a court to reduce the burdensome effects of rigid rules by enabling municipal officials to comply with the rules substantially rather than strictly adhering to them.¹⁸² Again, this is not a remedy in the strictest sense of the term, as it is not dependent on a court’s declaring the law invalid. In fact, it is not within the court’s scope to invalidate a law because it is inflexible. That said, the reading-down method of interpretation is not a viable long-term solution to address the causes of inflexibility in the local government regulatory framework.¹⁸³ Indeed, municipalities cannot contest and request a court reinterpretation of every mandatory provision in legislation (i.e., thousands of provisions scattered throughout different legislative acts), as each circumstance is unique and what is suitable in one instance might not be applicable in another.

6.5.5.2 Reading-in

As stated previously, if a provision or conduct cannot be read down in a way that makes it constitutional, namely compliant with sections 151(4) and 41(1)(g), a court is obligated to declare it unconstitutional. The court has the authority to implement a remedy to correct the invalidity. In particular, courts may read words into a statute that are vague or unclear in its implementation as a remedy.¹⁸⁴ The reading-in remedy can be utilised in situations in which the absence of a word or phrase in a statute either results in unconstitutionality or amounts to a *casus omissus*.¹⁸⁵ Additionally, this remedy can be used to limit the scope of a provision that excessively infringes on a right (e.g., municipal autonomy).¹⁸⁶

The reading-in remedy is not without limits. As was recognised in the case of *Umvoti Municipality and Others*, it is not the courts’ responsibility to rewrite the laws.¹⁸⁷ Reading-in is not always appropriate as a remedy to cure an impugned law. For example, it would not be appropriate if it results in fiscal consequences or is not supported by the legislative scheme.

¹⁸² *Liebenberg NO and Others v Bergrivier Municipality* [2013] ZACC para 26. See also De Ville (2000) 197. He notes, while referring to old authorities, that statutory provisions which imposed burdens should be construed strictly, giving preference to the least onerous interpretation.

¹⁸³ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17 (*National Coalition*) paras 25-6. In this matter, the Constitutional Court held that the word ‘spouse’ in section 25(5) of the Aliens Control Act 96 of 1991 was incapable of being interpreted to include partners in a same-sex relationship.

¹⁸⁴ De Vos & Freedman (eds) (2021) 487. The reading-in remedy differs from the reading-down method of interpretation in that that it can be employed only once a court has declared a law invalid.

¹⁸⁵ De Ville J (2000) 135.

¹⁸⁶ De Waal J, Currie I & Erasmus G *The Bill of Rights Handbook* (2000) 180. See also *S v Manamela* 2000 (3) SA 1 (CC) para 56.

¹⁸⁷ *Mkhize v Umvoti Municipality and Others* [2011] ZACC 184 para 12: the ‘sole function of the [courts] is to render the legislation compliant with the provisions of the Constitution. It is not vested with any general legislative capacity...’ Note that while courts may rewrite laws by reading-in words, they do not have the final say on how provisions must be formulated. This was recognised in *National Coalition* para 76. See also *Case and Another v Minister of Safety and Security and Others*, *Curtis v Minister of Safety and Security and Others* [1996] ZACC 7 (*Case and Another*) paras 72-3.

The reading-in remedy depends on the language of a particular statute and its objectives; hence, it is not open-ended and always appropriate.¹⁸⁸

6.5.5.3 Severance

After declaring it unconstitutional, a court may also sever and remove certain parts of an enactment. The severance remedy aims to sever the bad part of the law and retain the good. The test for severance is whether ‘the good is dependent on the bad’.¹⁸⁹ The question must be asked whether it is possible to give effect to the good part after the bad has been severed. This also means that the good part that remains must be able to give effect to the objectives of the statute.

Severance is not always possible. It was not considered an appropriate remedy in a judgment concerning the constitutionality of AARTO. The AARTO Act compromised and encroached on the revenue stream of municipalities (fiscal autonomy) in that it required municipalities to share 50 per cent of the revenue they generated from traffic fines with the national government. The High Court heard arguments in this matter and concluded that it was impossible to decouple the problematic portions of AARTO and the Amendment Act. For example, it was not possible to separate the problematic provisions (which dealt with infractions of provincial traffic law and municipal traffic law) from the rest of the AARTO because doing so would make it impossible to achieve the primary goal of the AARTO, which was to establish a unified national framework for the administrative enforcement of road traffic laws. Resultantly, the Court declared the AARTO and the Amendment Act unconstitutional in their entirety.¹⁹⁰

This judgment demonstrates that severance is not always appropriate. It is not a viable remedy if the unconstitutionality ‘cannot be laid at the door of any word, or groups of words, and permeates the entire text or [legal framework].’¹⁹¹ Consequently, courts cannot apply a blue pencil to every legislative provision that presents a problem. By doing so, the court would effectively usurp the legislature’s functioning. In respect of the pathologies, it is argued that courts cannot use the severance remedy to decrease the overall burden of legislation that applies to municipalities.

6.5.5.4 Suspension of invalidity allowing parties to rectify the defect

As explained above, a law declared invalid for violating section 151(4) of the Constitution will be invalid from the moment the inconsistency arises. This also means that any action performed under the ostensible authority of that legislation will be invalid. Courts have acknowledged that an order of invalidity can lead to pandemonium if its retrospective effect is not restricted.¹⁹² If

¹⁸⁸ *National Coalition* para 75.

¹⁸⁹ *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* [1995] ZACC 7 para 16.

¹⁹⁰ *Organisation Undoing Tax Abuse v Minister of Transport and Others* [2022] ZAGPPHC 1 para 50.

¹⁹¹ *Case and Another* para 71.

¹⁹² *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* [2018] ZACC 23 para 93.

a provision is found to compromise and hinder a municipality, as claimed in the case of the rules regulating the outsourcing of municipal service, the courts are likely to restrict their order of invalidity so as not to impact on prior decisions or ongoing processes. This was seen in the case *South African Municipal Workers Union*, where the Constitutional Court declared the Systems Amendment Act of 2011 unconstitutional. In this matter, the Court limited the retrospective effect of its order, explaining that ‘to allow the invalidity to operate retrospectively would disrupt the orderly and effective administration of municipalities. This would be untenable’.¹⁹³ It thus ruled that the declaration of invalidity must operate prospectively.

Courts often also suspend orders of invalidity to allow Parliament or the executive to rectify the defective law or conduct within a set period. A suspension of invalidity is usually employed in complex cases in which ‘multifarious and nuanced legislative responses might be available to the legislature to resolve the problem’.¹⁹⁴ It has also been accepted as an appropriate remedy if the declaration of invalidity would result in a gap or lacuna in the law.¹⁹⁵ Courts have also suspended orders of invalidity if the challenged statute is flawed due to a procedural error (e.g., failing to consult).¹⁹⁶ This was the situation in *South African Municipal Workers Union*, where Parliament wrongly classified the Municipal Systems Amendment Act 2011 as a section 75 bill not affecting provinces. The Constitutional Court found the Act unconstitutional on procedural grounds; however, to ‘minimise disturbance in the running of the municipal administration’, it suspended its order of invalidity for 24 months to give the legislature time to fix its procedural defect.¹⁹⁷

The same logic would follow if a court declared a second set of regulations invalid to the extent that it duplicates another, as we have seen with the MFMA and the Systems Act concerning outsourcing municipal services. So, instead of only declaring the second set of regulations invalid, the court could suspend the order of invalidity to allow Parliament and the executive to rectify the defect (i.e., bring about harmony) while ensuring that municipal operations continue with minimal disturbance.

6.5.5.5 Interdicts

It is also open to courts to grant an interdict to compel a party to do or refrain from doing something. If a court determines that the practice of national line departments, such as requesting redundant information, violates section 151(4) of the Constitution, the court could direct the departments to cease this conduct. The court may, in exceptional cases, also grant structural interdicts (a type of interdict that requires the government to report on the steps taken to comply with the Constitution) and direct that the departments (through the responsible

¹⁹³ *SAMWU* para 86.

¹⁹⁴ *Fraser v Children’s Court Pretoria North and Others* [1997] ZACC 1 para 50.

¹⁹⁵ *J and Another v Director General, Department of Home Affairs and Others* [2003] ZACC 3 para 21. See also Bishop (2013) 118.

¹⁹⁶ *Doctors For Life* para 114.

¹⁹⁷ *SAMWU* para 91.

minister) and the President, who heads the executive, develop a plan to show how they would rectify a breach of the Constitution.

6.6 Conclusion: The limits of judicial remedies

The chapter evaluates the extent to which the 1996 Constitution provides principles and rules to address the regulatory problems faced by local governments. This question is important because all laws and conduct must adhere to the Constitution. Undoubtedly, the issue holds great significance in the South African context, as the Constitution seeks to govern how the government exercises its regulatory authority over municipalities, rather than questioning the existence of such power. Currently, no legislative framework is in place to govern the process of creating regulations. Specifically, there is still ambiguity in South African law as to whether the creation of delegated legislation is considered an administrative action and is subject to the review criteria outlined in PAJA.

However, in the absence of such a clear framework, the chapter contends that the South African Constitution establishes stringent review criteria to govern how national and provincial governments carry out their supervisory legislative functions with respect to municipalities. This occurs in two cases, specifically in sections 41(1)(g) and 151(4) of the Constitution. In particular, section 41(1)(g) envisages a higher threshold of review that enables a court to declare a statute invalid (even if it falls within the scope of the national and provincial competence) where such law encroaches (i.e., has the effect of taking away the inviolable powers of local government to function effectively – the power to administer their by-laws).

While both sections aim to safeguard local autonomy, it is argued that section 151(4) further regulates how municipal autonomy may be limited. It is not concerned with stripping municipal power but rather with setting boundaries on how municipal autonomy may be limited. It states that national and provincial governments are not allowed to compromise or impede the municipalities' right or ability to exercise their powers and fulfil their duties. As the courts have yet to give meaning to section 151(4), the chapter proposes that the courts use similar factors outlined in section 36 of the Constitution when giving meaning to section 151(4). Such a methodological framework would require law-makers to balance their regulatory powers with municipal autonomy by considering what aspect of local autonomy is restricted, the objective of the restriction, the scope and extent of the restriction, whether there is a connection between the restriction and its purpose, as well as whether there is a less restrictive alternative. By endorsing this approach and giving meaning to section 151(4), courts will make a much more significant impact in addressing regulatory issues, by guiding law-makers in exercising their law-making powers related to municipalities.

Indeed, such a framework would help guide and force law-makers to think through their regulatory acts, especially where these impact on municipalities. This does not mean that courts can invalidate and remedy all regulatory pathologies impacting municipalities. Indeed, while

it is accepted as a general principle that ‘where there is a right, there is a remedy,’¹⁹⁸ courts have, under certain circumstances, declined to grant relief. For instance, courts will likely not grant relief if there are several ways available to the legislature to cure the invalidity.¹⁹⁹ Moreover, courts will not grant remedies if they involve massive financial costs.²⁰⁰ Similarly, the ability of courts to address systematic regulatory pathologies affecting municipalities is limited. Specifically, courts are not best placed to deal with the accumulation of rules and reporting obligations – the complaint is aimed at the entire legal framework. For instance, which rule should remain in place, and which should be eliminated? This is a difficult question for courts to determine, as it would require a detailed analysis of each law. Thus, managing the cumulative load of the legal framework is best left to the legislative and executive branches of government.

In sum, the court’s role is thus limited to using well-established legal remedies, such as reading down, reading in, and severance, to address some of these pathologies. For instance, it can read authoritative ‘musts’ into discretionary ‘mays’ to promote adaptability. Additionally, it can remove terms from problematic clauses to mitigate their intrusive impact on local self-governance. As stated previously, these remedies depend on the facts of each case, meaning they are not lasting solutions. In fact, if they are used frequently, this poses the risk of courts rewriting the laws and thus infringing upon the legislative function. Therefore, it is essential to give equal consideration to the non-judicial mechanisms that could be employed to tackle the causes of the regulatory pathologies before they arise. Chapter 7 outlines a scheme to implement section 151(4) of the Constitution and address the underlying causes of regulatory pathologies.

¹⁹⁸ This principle, *ubi jus ibi remedium*, was first raised in *Minister of the Interior v Harris & Others* 1952 (4) SA 769 (A), 780, and adopted officially in *August & Another v Electoral Commission & Others* 1999 (4) BCLR 363 (CC) para 34.

¹⁹⁹ *Dawood* para 64.

²⁰⁰ *Bishop* (2012) 76.

Chapter 7:

Executive and Legislative Remedies: Towards a Model for Efficient, Effective and Purposive Regulation in South Africa

7.1 Introduction

This chapter calls on the executive and legislative branches to solve the regulatory pathologies faced by municipalities. The need for executive and legislative remedies cannot be understated, given the limitations on courts to eradicate these pathologies. Notably, courts cannot manage all the municipal regulatory pathologies, especially the broad pathology of cumulative burden, over-reporting in the form of duplicative data requests, and the non-usage of reporting information. Likewise, courts cannot adequately address the absence of departmental feedback observed under the municipal PPP system. They cannot remedy, moreover, the pathology of regulatory generalisation or the one-size-fits-all pathology, which assumes erroneously that all the necessary skills and resources exist in a regulatory setting for a law's effective implementation.

The chapter thus develops and proposes a framework consisting of principles, procedures, and institutions to avoid and treat current and future regulatory pathologies as they pertain to municipalities, with the ultimate objective of improving local autonomy for better governance. It argues that a complete halt to regulation is not a viable option. The solution involves adopting rigorous regulatory quality checks with prospective and retroactive applicability.

The proposed model promotes better regulation for local governance by addressing the specific regulatory pathologies municipalities face. Specifically, the model aims to ease governance within government, which is often impeded due to inefficient and ineffective regulation. To this end, the model is based on and informed by four sources.

First, it is influenced by existing institutional policies and structures in South Africa, such as the national policy for regulation formation, known as the Socio-Economic Impact Assessment System (SEIAS),¹ and the Regulatory Impact Assessment Model of the Western Cape Government.² These two regulatory policies have already developed ideas and principles for effective and efficient regulation, although they are not specifically meant for local government. Moreover, these policies align with the general principles of regulatory design

¹ Department for Planning, Monitoring and Evaluation *Socio-Economic Impact Assessment System* (2015) available at <https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/SEIAS%20Documents/SEIAS%20guidelines.pdf> (accessed 5 April 2023).

² Western Cape Government Guidelines for the Implementation of Regulatory Impact Assessment in the Western Cape' available at https://www.westerncape.gov.za/assets/departments/premier/office_premier/regulatory_impact_assessment_brochure_2019.pdf (accessed 5 April 2023).

proposed by the OECD, including those highlighted in Australia. As such, the model draws on these guides and calls for them to be revised and not abandoned altogether.

Secondly, the model is informed by the experiences, and failures, of earlier local government reform initiatives undertaken in South Africa. In particular, the impact of these initiatives, as revealed in Chapter 5, has been minimal, largely due to the absence of local government participation and the lack of a detailed framework for assessing existing regulations. The regulatory pathologies experienced by municipalities, identified in Chapter 4, are also drawn on as lessons and a standard for developing efficient and effective rules applicable to local government.

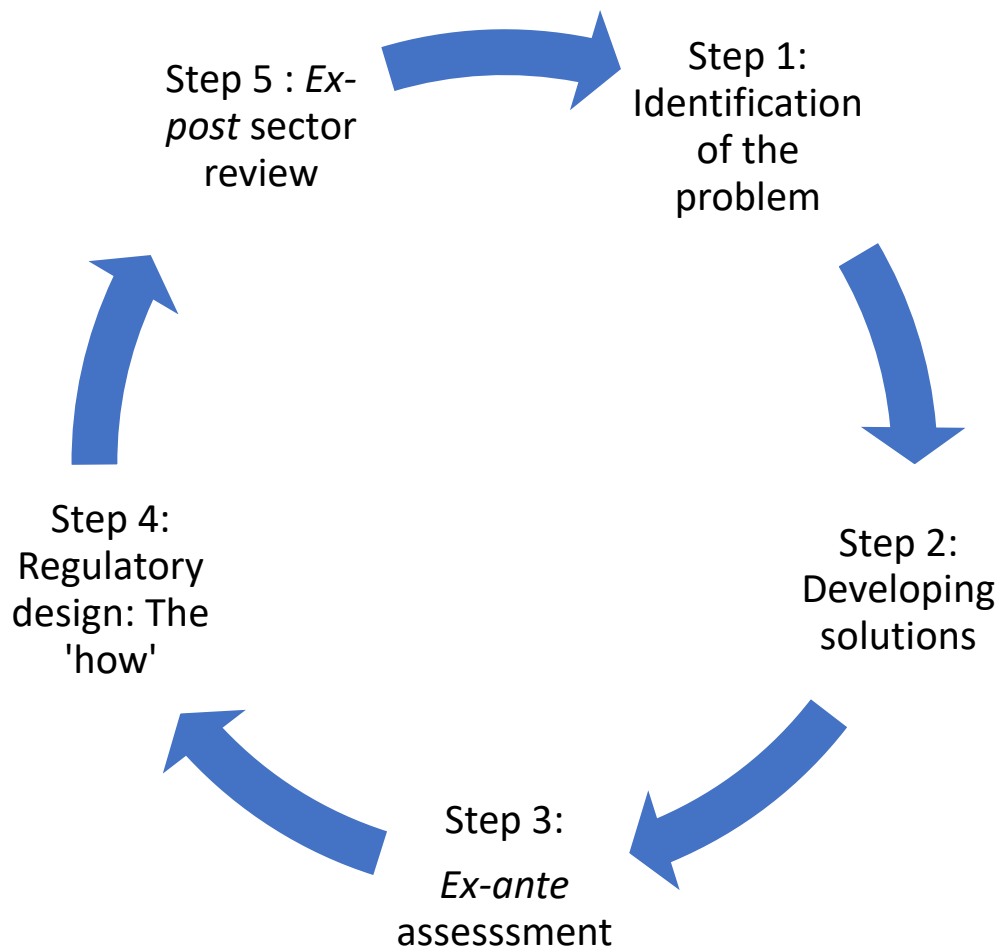
Finally, and more significantly, the model aims to give effect to two key constitutional provisions, namely section 151(4)'s requirement not to compromise and impede, and section 101(4) of the Constitution, which requires national legislation to specify how regulations and subordinate legislation must be tabled and approved in Parliament. At the time of writing (March 2024), no national legislative framework for approving subordinate legislation pursuant to section 101(4) of the Constitution exists in South Africa. This chapter addresses this deficiency, and argues for an evidence-based approach to law-making that necessitates the constant examination of primary legislation and regulations. This model is preventative, not reactive, and serves as a guide for legislators and reformers in South Africa and worldwide in its scope and design.

The chapter is structured in four sections. Section 7.2 discusses the principles and procedures for developing efficient and effective local government regulation. Section 7.3 identifies institutions responsible for driving efficient and effective regulation relating to municipalities in the South African context. Finally, section 7.4 provides an overall analytical model and develops a detailed table listing the tenets and procedures for promoting efficient and effective regulation for better local governance.

7.2 Principles and procedures for efficient and effective regulation

The principles and procedures outlined below are comparable to those in international literature and best practices, as well as the South African RIA and SEIAS guidelines. The need to define the problem, the statement of objectives to achieve, the identification of options to address the problem, the *ex-ante* assessment of options, and the post-scrutiny of adopted options has long been recognised by the OECD as a key regulatory design principle. However, these requirements are seldom met in practice; hence, there is room for their development and implementation, which is a primary objective of this model.

Figure 8: Model for efficient, effective and purposive regulation in South Africa



Source: Author's design

Essentially, the model adopts a 'survival of the fittest' approach, requiring that laws applicable to local government be subjected to a rigorous justificatory process. The main idea behind the model is that regulators and policy-makers should stop and think before adopting regulation for local government; as such, it comprises six steps, with each requiring different competencies and skills. As shown below, these steps are often not compartmentalised in practice, as they tend to overlap. Many of the principles, such as the need for consultation, have been accepted as legal obligations imposed on the legislature. These principles now warrant our attention.

7.2.1 Step 1: Identifying the problem and policy objectives

7.2.1.1 Scope of the problem and understanding its causes

Generally, the government adopts regulations to solve or ameliorate a particular problem. The main goal of government regulation is to give legal effect to government policy decisions for deliberate change to address social, economic and political needs. There are, however, several

ways in which a problem may be addressed other than by government regulation. In general, in South Africa (as revealed in this study) laws are often enacted without a clear link to a problem, resulting in laws serving no purpose. This arises when a problem and its cause(s) are incorrectly conceptualised. Thus, policy-makers (line departments) need to identify and define the problem and its cause(s) which they seek to address through regulation. This would require that departments depart from the current practice in which RIA reports contain brief statements about a problem with little or no examination of its relevance. In particular, RIA reports relevant to local government regulation must contain information on the scale of the problem, such as how many individuals or institutions (i.e., municipalities) are affected and in what way.

This point cannot be emphasised enough. The extent of the problem gives a general idea of whether the government needs to address it with a unified rule. In instances where a problem is not widespread (i.e., it impacts only a few municipalities within a regulatory setting), it will be appropriate for the government to adopt more specific interventions instead of a unified rule.

The OECD recognises the need to define the problem and its extent as a well-established principle.³ Similarly, the national SEIAS guidelines in South Africa require line departments to clearly define the problem and understand its root causes.⁴ The Western Cape Government RIA guidelines provide a detailed, step-by-step guide on problem identification, and could be replicated at the national level.⁵

7.2.1.2 Defining policy objectives

The objectives, goals, or targets that the government intends to achieve when addressing a problem must be clearly defined and clearly linked to that problem. The effectiveness of the adopted action (i.e., regulation) must be assessed against progress in achieving these objectives. This means that the objectives or targets must not be specified in abstract terms or phrases, such as values expressed in the Constitution. Instead, they must be capable of being assessed and evaluated. The Western Cape RIA guidelines emphasise this requirement, stating that the '[t]he objective should be more specific than the problem definition and should be developed in consultation with stakeholders, the regulator, and regulatory and industry experts.'⁶

No mention is made in the national SEIAS guide of requirements that objectives be clearly defined and linked to the problem. Currently, no such guidance is provided to departments, other than the requirement that they 'summarise the aims of the proposal and how it will address the problem in no more than five sentences.'⁷ This step is critical, as everything hinges on the correct and accurate diagnosis of the social or governance problem. It is proposed that departments receive far more guidance in specifying objectives. This would include requiring line departments to clearly define the objectives and link them with the identified problem.

³ OECD (2012) 10.

⁴ The Presidency Republic of South Africa, *Socio-Economic Impact Assessment System (SEIAS) Application Manual* (2020) 11.

⁵ Western Cape Government *RIA Guidelines* (2019) 17.

⁶ WC *RIA Guidelines* (2019) 17.

⁷ *SEIAS Template* (2020) 2.

7.2.1.3 Initial consultation aimed at understanding the problem

Defining the problem, its causes and scope is not a standalone activity undertaken by the government alone. On the contrary, policy-makers must always consult affected groups to understand the problem better. This is necessary as problems do not exist in a vacuum. It should be emphasised that the views of municipalities must be sought early in the legislative cycle so as to identify other factors (ones not readily known) that may contribute to the problem. Indeed, while the Constitution requires organised local government and municipalities to be consulted on draft legislation, public consultation, it is submitted, must not occur after the development of draft legislation but before a preferred solution to the problem has been identified and adopted. On several occasions, the OECD has emphasised the importance of consultation, describing it as the ‘most cost-effective means to identify the problem, and [undertake] assessment of the best type of action’.⁸

Early consultation on the problem allows decision-makers to receive more accurate data to support their analysis and understanding of the problem and its causes. Successful implementation of this principle requires a commitment to transparency as well as sufficient time and opportunity for stakeholders to respond. This entails that line departments should give adequate notice to affected parties (municipalities) in which they set out their preliminary understanding of the problem, its causes, and potential remedies. This would allow those impacted by the problem to provide informed commentary.

7.2.2 Step 2: Developing solutions

7.2.2.1 Consideration of alternative non-regulatory solutions

As stated previously, there are several ways the government may respond to problems impacting municipalities, with acts of Parliament and ministerial regulations being among the many instruments for addressing them.⁹ Thus, line departments need to identify and consider various options to solve the identified problem. The national and the Western Cape RIA guidelines recognise the requirement for alternative measures.¹⁰ The interpretative framework developed in Chapter 6 reaffirms this principle, with the argument being that the constitutional requirement not to compromise and impede requires national and provincial governments to adopt the least intrusive measure.¹¹

Indeed, there are several alternatives to addressing a problem, which include doing nothing. Instead of introducing uniform rules to solve a localised problem (specific to a particular group of municipalities), policy-makers should first consider whether there are other, more targeted executive or administrative measures besides regulation to solve the problem. This is necessary to avoid the pathology of overbreadth, where regulated (well-functioning) institutions, i.e.,

⁸ OECD (1995) 18.

⁹ OECD (2012) 10.

¹⁰ *SEALS Template* (2020) 12. *WC RIA Guidelines* (2019) 17-8.

¹¹ Chapter 6, see discussion under heading 6.5.2 Obligation not to compromise or impede.

municipalities, do compliance work that is not relevant to them. Non-regulatory options may also include establishing a general information campaign to inform municipalities of a problem, its causes, and ways to remedy it. In addition, when a problem is confined to a small number of municipalities, an appropriate solution would be to offer assistance to each of those municipalities rather than imposing a uniform rule on the entire group. Granting financial assistance only to well-performing municipalities as a financial incentive is another instrument that may encourage other, struggling municipalities to change their behaviour.

Using self-regulation instruments, where the industry regulates itself, is a further alternative to direct state regulation. This was recently proposed as a remedy, with some advocating for creating a professional organisation to oversee municipal managers to solve the problem of hiring inept managers and accomplish the more general objective of professionalising local government.¹² This is a viable proposal, considering that multiple laws and departments (the National Treasury and COGTA, including their provincial departments) regulate the appointment of senior managers at a municipal level, causing confusion thanks to the existence of multiple reporting lines. Establishing a professional body (one that regulates senior managers by setting competency standards and disciplining its members) would assist in streamlining appointment processes and laws governing the appointment of senior managers.

It is important to stress that enumerating regulatory and non-regulatory options alone is insufficient. Each option must be evaluated, and the justifications for rejecting each one, and the reasons for adopting a particular option, be given. This ensures that policy-makers think through their actions. Moreover, it is also an effective mechanism to manage and control regulatory inflation impacting municipalities, as it requires regulators to use legislative instruments as a last resort, especially when other less intrusive measures exist.

7.2.2.2 Duty to avoid additional regulation and reports

The consideration of alternative non-regulatory solutions also requires policy-makers to consider whether an existing body of law is geared towards solving the problem, especially where regulation is preferred. This would prevent policy-makers from adopting overlapping, duplicative and conflicting laws covering the same subject area, a consideration which is especially important where multiple departments and spheres of government are empowered to regulate a particular industry.

The requirement to avoid additional regulation is also an effective method for controlling the cumulative burden imposed on municipalities, as policy-makers are compelled to use existing instruments rather than creating extra requirements. The need to avoid duplication and check whether a proposed law aligns with existing legal instruments is a recognised requirement in the SEAIS final template.¹³ As such, when national departments plan to handle a specific

¹² Ntliziywana P 'Professionalisation of Local Government Management in South Africa' in Chigwata TC, De Visser J & Kaywood L (eds) *Developmental Local Government Series: The Journey to Transform Local Government* (2019) 75-8.

¹³ SEAIS (2020) 13.

subject in which they are all interested, they are urged to actively engage with one another. This would help reduce conflict and duplication in the local government regulatory regime. Additionally, it would significantly lessen the overall burden of regulations, which is increasing as a result of silo law-making in which departments enact laws to further their agendas.

The same principle should apply to municipalities subject to multiple reporting lines. Instead of having multiple reporting lines where the same information is requested from municipalities in different formats, it is recommended that the reporting lines be streamlined, with one agency collecting information based on a single template. Such information should then be shared with line departments and made available on a central portal to which all departments have access.

Similarly, before requesting additional information, any state agency or organ that exercises its monitoring power, such as by requesting performance information from municipalities, should first analyse existing information, such as the annual report. The Systems Act regards this as a mandatory legal obligation; however, its scope is limited to the Minister responsible and MECs for local government.¹⁴ It is recommended that this requirement be extended to include all state agencies and line departments that request information from municipalities. For municipalities, this would help reduce the administrative burden of supplying such information and the associated expenditure. Municipalities should be incentivised with analytical feedback on reports in order to improve performance and address reporting fatigue (which occurs when municipalities submit reports without receiving feedback).

7.2.2.3 Consultative process: Proposing solutions

When identifying possible solutions, the views of those (municipalities) impacted by the problem should be solicited. This must be done early on during the formulation-of-remedies stage. This is necessary to ensure the full appraisal of all the options and strengthen the legitimacy of the preferred solution, thereby enhancing voluntary compliance among municipalities.¹⁵ Indeed, while this requirement is recognised in both the national and Western Cape RIA guidelines,¹⁶ officials within municipalities complain that they are not consulted. Thus, they tend not to support regulatory proposals.¹⁷

There is thus a need to strengthen stakeholder consultation and participation in local government, something which, as argued below, is an ongoing process. Consultation with stakeholders, especially municipalities, may take several forms. These include public hearings and verbal and written submissions subject to adequate notice, discussions, open dialogues, workshops, and seminars. The government may also establish a working group comprising experts and officials to develop specifically local government-related legislation. As stated earlier, the views of key intergovernmental institutions, such as the President's Coordinating Council, Premier's Coordinating Forum and Municipal Managers Forums, should also be

¹⁴ Section 105(3)(a) of the Systems Act.

¹⁵ Chapter 2, section 2.4.3.2 Consultation; Chapter 3, section 3.2.1.2 Consultation and transparency.

¹⁶ WC RIA Guidelines (2019) 18, SEIAS (2020) 13.

¹⁷ Chapter 4, section 4.4.7 Neglecting the consequential impact of legislation.

obtained, as the problem of overregulation of local government was first raised in these forums. These forums hold key information on how local government is impacted by legislation, and should be consulted along with organised local government (SALGA).

Consultation with other line departments, such as the National Treasury, COGTA, Water and Sanitation department, to mention a few, should also be undertaken to ensure that the preferred option is in line with existing policies and regulations. The aim would be to prevent or minimise duplicative or conflicting reactions within government and foster whole-of-government law-making. The information and comments gathered from the public and other line departments must be considered, with a clear explanation given as to how key concerns are to be addressed.

7.2.3 Step 3: Assessment of options – *ex-ante* assessment

Each of the options, both regulatory and non-regulatory, must be assessed and considered to identify the most efficient proposal that achieves the desired objective (i.e., is effective) at the lowest possible cost (i.e., is efficient). The assessment must take place before the proposal is implemented.

There is no universally used method or approach to *ex-ante* assessment of regulatory and non-regulation measures. Several guides, including the SEIAS guideline, focus on different impacts, including economic, social, and environmental ones. The SEIAS guideline in South Africa, last updated in 2015, requires the impact of new rules to be measured against national priorities, which include social cohesion and security (safety, food, financial, energy, etc.), economic inclusion, economic growth, and environmental sustainability.¹⁸

7.2.3.1 Quantifiable costs considerations

The SEIAS final impact assessment template (2020) lists local government as one of the national priorities that line departments must consider when proposing new laws.¹⁹ The SEIAS guide does not provide a great deal of guidance on how the impact of regulatory proposals on local government should be assessed, except by stating that the costs of compliance and unintended consequences arising from regulatory proposals must be considered. In particular, it emphasises that the impact of regulatory proposals should be quantified where possible, indicating thereby that it is not always possible to quantify the costs of regulatory proposals.²⁰ The SEIAS guide correctly notes that *ex-ante* assessment of regulatory proposals is not solely focused on costs; thus, it avoids prescribing detailed appraisal methodologies, showing that the government's intention is to 'go beyond a simple cost-benefit analysis'.²¹ The SEIAS manual (2020) specifically calls on departments to quantify implementation costs such as human resources, infrastructure and equipment associated with a proposal and identify groups likely

¹⁸ SEIAS Guidelines (2015) 6.

¹⁹ SEIAS Template (2020) 2.

²⁰ OECD (2012) 10.

²¹ SEIAS Guidelines (2015) 7. In contrast to the national guide, the Western Cape Guide lists several appraisal methodologies, including the cost-benefit analysis method, to assess the costs and benefits of regulations. See WC RIA Guidelines (2019) 23.

to incur such costs. Thus, when assessing a regulatory proposal cost impacting local government, typical compliance costs include the following:

- purchasing new equipment to comply with the regulation;
- employing additional staff to comply with the regulation;
- employing consultants to help with regulatory compliance;
- coordinating workshops to train staff; and
- collecting and storing information.

Specifically, regarding the costs associated with legislative reporting obligations imposed on local government, it is recommended that the Standard Cost Model (SCM) be used to quantify and assess the administrative costs incurred by municipalities. The SCM, first introduced in the Netherlands, is a well-established tool for measuring the administrative costs of legislation, particularly information obligations.²² It breaks legislation into various components that can be measured, such as information obligations (for example, reports), data requirements (i.e., data that must be provided to comply with information obligations), and administrative activities, which refer to the activities that must be carried out to comply with reporting and data requirements (i.e., collection and archiving data). A basic cost methodology must be applied, comprising three components:

- Price: tariffs, wage costs, internal overheads, and/or hourly rate for external services.
- Time: the amount of time taken to complete the administrative activity.
- Quantity: the frequency at which the activity must be carried out (yearly, quarterly, monthly or weekly).

Combining these elements (Price x Time x Quantity) gives the administrative costs. It is proposed that the SCM apply as well to non-regulatory information responsibilities, specifically those emanating from circulars. As stated previously, estimating the costs and benefits of regulatory proposals is not always possible.²³ Doing so can be challenging, as it is likely to vary from one agency to another within a regulatory setting, such as in metropolitan areas and the country's poorest regions.²⁴ This underscores the need for the collection of qualitative evidence, whereby those who bear the implementation costs are directly engaged in providing estimates of costs. This may be done through interviews and surveys with regulatees (i.e., municipalities and companies), or gathered from official government statistical reports or studies by government departments. Policy-makers may also rely on the experiences of other countries, particularly where proposed regulation may already be in effect. The cost of regulatory proposals must be clearly listed and shared with the public.

7.2.3.2 Indirect costs: Assessing impacts, minimising unintended consequences

Government regulations do not only result in costs; they often have unintended effects that cannot be quantified. Thus, subjecting regulations only to a cost assessment is an insufficient

²² Chapter 3, section 3.2.1.5 Business orientation.

²³ *SEIAS Guidelines* (2015) 4.

²⁴ *SEIAS Guidelines* (2015) 6-7.

screen against bad regulation. Both the national and Western Cape RIA guidelines recognise this and point to the need to consider the unintended consequences of any policy option in addition to its costs.²⁵ The SEIAS guide lists several unintended consequences, including the non-consideration of alternative mechanisms, which lead to costly compliance and time-consuming reporting and approval systems, and result in excessive delays.²⁶

The foregoing unintended consequences have also manifested in municipalities. In particular, as evidenced by the Municipal Property Rates Act, the excessive use of prescriptive processes for the publication of rates evaluation rolls has resulted in municipalities being unable to adopt less expensive means of achieving the law's intended aim.²⁷ Similarly, the overuse of peremptory words such as 'must' and 'shall' and the national government's obsession with tightening the legislative framework for local government have increased the compliance burden on municipalities and the likelihood of errors. The result: municipal officials prefer to tick off boxes to minimise the risk of being held personally liable, which results in decisions being grossly delayed, stifling innovation and experimentation.²⁸

The non-consideration of the existence of skills and appropriately trained staff before the implementation of a law, for instance, and the uniform imposition of laws, have resulted in municipalities' permanent reliance on the services of consultants, at the expense of service delivery, as resources intended for service delivery are redirected to buy compliance. The opposite is also true. Municipalities that do not have the resources to engage the services of consultants are often forced to abandon lawful governance, which results in their providing fewer services than expected.²⁹ The pathology of uniformity seen with the salary limits for senior managers has also made it extremely difficult for municipalities to attract competent personnel. This is mainly because the uniform prescribed salary limits do not compensate candidates in accordance with the demands of the job, an issue which is more challenging in poor-performing municipalities. The result: municipalities have high vacancy rates and are forced to hire low-skilled staff, which negatively impacts service delivery.³⁰

The imposition of legislation has also brought unforeseen negative incentives and financial consequences for municipalities. For example, the implementation of AARTO has led to a decline in municipal revenue collected from traffic fines, as municipalities are now required to share 50 per cent of the revenue collected from fines with the national government. Consequently, municipalities are dissuaded from enforcing and collecting traffic penalties, which results in fewer resources available for service delivery. Essentially, the absence of

²⁵ SEIAS (2015) 5, WC RIA Guidelines (2019) 26.

²⁶ SEIAS (2015) 5. Chapter 4, section 4.4.6 Regulatory incoordination and overlap. The multiple approval processes for municipal public-private partnerships have resulted in the minimal use of PPPs at the municipal level, as these projects are often delayed at the expense of service delivery and development.

²⁷ Section 49 of the Municipal Property Rates Act, read with section 115 of the Systems Act. City of Cape Town: Finance Department in South Africa Law Reform Commission: *Submissions to Issue Paper 37* (2019) 22-3.

²⁸ Chapter 4, section 4.4.2.2 Prescriptive rules resulting in compliance-driven culture.

²⁹ Chapter 4, section 4.4.3.2 Cost of compliance and shifting of resources.

³⁰ Chapter 4, section 4.4.3 Uniformity and generalisation.

municipal incentives to enforce traffic fines undermines the Act's purpose of encouraging compliance with national, provincial, and municipal traffic by-laws, thus defeating its purpose.

In essence, full compliance and implementation should not be assumed. Instead, policy-makers should identify any unintended consequences and specify what measures will be taken to address them. Both the Western Cape RIA and SEIAS Guidelines make no mention of the consequences that regulation may have on municipal governance, notwithstanding that the SEIAS final template listed local government as a 'national priority.'³¹

There is thus a need for these two manuals to be revised so as to include a step dealing with the impact of regulatory proposals on local governance. The interpretative framework developed in Chapter 6 serves as a guide in this regard. In particular, it is suggested that while undertaking the *ex-ante* assessment exercise, reference should be made not only to implementation costs and unintended consequences but to which aspect of local autonomy is restricted such as municipal revenue, the scope and extent of that restriction, and whether less restrictive measures could be employed. For example, does the proposal restrict or remove municipalities' ability to generate their own revenue (a fundamental element of municipal autonomy)? The more the regulatory proposals impact the core of local autonomy, the more compelling the justification would need to be.

7.2.3.3 Regulatory justification, accountability and transparency

The reasons for adopting a regulatory proposal and rejecting the other options must be shared with the public, including the impact assessment results. The OECD has long emphasised that impact reports must be made publicly available.³² After all, the primary aim of impact assessments is to promote public accountability and ensure that both the government and affected groups understand the aims of the regulation.³³ Moreover, making impact reports available and exposing them to public scrutiny encourages rigorous analysis of regulatory proposals. Although the SEIAS guidelines require them to be made public, South Africa has no established practice of sharing impact reports on a dedicated portal or posting them on departments' websites.³⁴

It is recommended that all impact reports prepared by line departments for both primary and secondary legislation be made available to the public as soon as the *ex-ante* assessment has been completed. These reports must be published on the relevant department's website and remain accessible for the duration of the regulatory proposal lifecycle so that the predicted impact can be compared with the actual results at a later stage.³⁵ Similarly, the adequacy

³¹ Presidency of Republic of South Africa *Socio-Economic Impact Assessment System (SEIAS) Revised Template: Final Impact Assessment - Phase 2* (2020) 2 available at <https://www.thepresidency.gov.za/sites/default/files/2022-05/SEIAS%20Final%20Impact%20Assessment%20Template%202020.pdf> (accessed 20 September 2024).

³² OECD (2012) 10.

³³ Chapter 2, section 2.4.3.1 Regulatory impact assessment: *Ex-ante* evaluation.

³⁴ Presidency *RIA Guidelines* (2012) 14 prescribes that RIA reports must be published together with relevant draft bills or regulations on department websites; SBP (2005) 8, 9 and 11.

³⁵ Transparency and accountability are greatly enhanced when impact reports are published on a central online register maintained by an oversight body, with links pointing to line department websites, as practised in Australia.

assessment report prepared by the central oversight unit for each impact assessment must also be publicly available.³⁶ The impact reports of the line department and national regulatory body must be tabled in Parliament along with the proposed legislation and the explanatory memorandum. Publishing impact and adequacy assessment reports would strengthen the incentive for line departments to undertake rigorous assessment of their regulatory proposals.

7.2.4 Step 4: Regulation design – the ‘how’

Practice shows that the design of rules influences whether a law is effective and efficient. There are several principles and structural design features that the government should consider where it intends to enact legislation for local government. These include the limited use of command-and-control rules, which preclude other forms of compliance, and avoidance of unintelligible language as well as unintended or unnecessary command words.

7.2.4.1 Limit the usage of command rules

National and provincial government, when regulating local government, particularly the functional areas listed in Schedule 4B and 5B of the Constitution, must regulate by not usurping the decision-making powers of local authorities in respect of their functional areas. This is a well-established constitutional principle, and it entails that, when regulating local government functional areas, the government should prefer adopting outcome-based regulation as opposed to prescriptive command regulation. This is to allow for local discretion and innovation and for municipalities to employ creative and less costly means to meet the substantive requirements of the law. Rather than prescribing in the Property Rates Act that the publishing of the rates evaluation roll ‘must’ be shared with ratepayers via ‘ordinary mail’, policy-makers should avoid command regulations that prescribe in detail the exact method of communication, which is no longer viable. In an era of fast social, economic, and technological change, policy-makers should refrain from regulating primarily through prescriptive and blanket norms, particularly in situations when common sense ought to prevail.

7.2.4.2 Intelligible language

A law’s effectiveness hinges significantly on its choice of words and how precise they are. This study demonstrates that terms like ‘shall’ and ‘must’ are frequently used interchangeably with ‘may’ in legislative documents, leading to considerable challenges in interpretation, particularly when the penalties for non-compliance are ambiguous. Of particular concern is the excessive use of authoritative language, which has led to the weaponisation of the law by officials, particularly in instances where a specified action using ‘must’ has not been adhered to. It is suggested that the false imperative of the usage of ‘must’ and ‘shall’ should be avoided by drafters, and the word ‘may’ should be used only to introduce discretionary actions. This

In 2010, the Office of Better Regulation in Australia established an online Regulatory Impact Statement register. Several other jurisdictions in Australia have developed online registers, including New South Wales, Victoria and Queensland. See the discussion in Chapter 3, section 3.3 Local government regulatory reforms in Australia.

³⁶ Chapter 3, section 3.5.3 Local government reforms in Australia.

thus calls for the content of legislative proposals to be clear and executable, a principle that has been embraced as ‘essential for the rule of law – a constitutional value’.³⁷ It requires laws to be clear and intelligible so that the parties seeking compliance know the steps they must take to conform.³⁸ It further requires that laws not contradict one another or impose duties that conflict with each other.³⁹ This implies that regulators are responsible for ensuring that proposed regulation does not overlap with, duplicate, or contradict any pre-existing legislation.

7.2.4.3 Embedded review clauses

Law-making is an ongoing process that involves enacting and monitoring laws to ensure their effectiveness through continuous evaluation.⁴⁰ Since the actual repercussions of legislation on local government are not fully known until after it has been put into effect, it is essential to build review clauses into local government legislative enactments. This review would require that policy-makers periodically assess and verify the underlying assumptions of a law or regulation, focusing on whether the objectives or mischief to which the law is directed are still relevant and, if so, whether regulation is the best way of achieving the objectives, considering alternatives. If the regulation is still justified, then the task is to determine if the existing regulation can be improved. The review thus revisits assumptions made during the *ex-ante* assessment by assessing whether the problem identified still exists and whether the law meets its objective.⁴¹

Embedding review clauses into legislative acts would also assist in slowing down the ever-growing volume of regulation directed at local government and help identify outdated, duplicative and difficult-to-implement rules. A desktop examination of the stock of legislation applicable to local government (e.g., the Systems Act and the MFMA) shows that none of these instruments have embedded review clauses. Indeed, there are few indications that *ex-post* reviews occur in South Africa,⁴² even though the SEIAS and Western Cape RIA guides recognise the need for regulatory proposals to be monitored and reviewed after implementation.⁴³ This is also the case notwithstanding that embedded review clauses are viewed as an enlightened approach to regulatory design. The model calls on the legislature to be innovative when designing legislation by making greater use of embedded review clauses, particularly where a principal Act empowers a minister to issue regulations that have a significant impact. The review clause must specify who, when and how the *ex-post* review will occur. In particular, the review clause must specify when the review must occur, with a degree of flexibility (the average review period spans two to five years after the introduction of a law). Some laws may warrant examination within two to five years of their enactment, but others

³⁷ *Mighty Solutions* para 27

³⁸ *Beadica* para 81; *Dawood* para 47; *Affordable Medicines Trust* para 108; *Kruger* paras 64–7.

³⁹ In *Premier; WC v President of RSA* para 55, the Constitutional Court stressed that ‘it is desirable for [spheres] where possible to avoid conflicting legislative provisions’.

⁴⁰ OECD (2012) 16; Chapter 3 of this study, section 3.2.1.3 Law-making: Continuous law-making and learning.

⁴¹ OECD (2011) 10.

⁴² Chapter 5, section 5.2.1.2 Institutionalising regulatory impact assessments.

⁴³ *WC RIA Guidelines* (2019) 29.

may not show apparent results until five or 10 years later; therefore, the timeframe of *ex-post* reviews will vary.⁴⁴

The review clause must specify the department or institution undertaking the *ex-post* review. This should preferably be the department responsible for the law's administration (i.e., the Minister of COGTA to review the Systems Act and its associated regulations) or it may assign the reviewing responsibility to a dedicated agency such as the Law Reform Commission.

The review clause must also specify how departments collect information necessary for *ex-post* review, such as through questionnaires or interviews. This should not be a spur-of-the-moment activity like the current law reform initiative into the regulatory compliance burden imposed on municipalities undertaken by the South African Law Reform Commission. Instead, it should be a permanent activity undertaken throughout the law's life-cycle. To this end, departments may establish a dedicated page or portal where those impacted by the law lodge complaints, which will be considered as part of the *ex-post* review process. For example, a dedicated Red Tape Reduction hotline in the Western Cape has been established for businesses. It is recommended that departments regulating local government create a similar hotline to receive feedback from municipalities.⁴⁵

The review process must conclude with a report containing its findings and recommendations, which must be posted on the department's website, tabled and considered in Parliament. Both the SEIAS and RIA guides do not assign any role to Parliament, even though the findings and results emanating from the *ex-post* reports would assist Parliament and line departments in revising and amending existing legislation. It is recommended that the SEIAS and RIA guides be amended to include Parliament, requiring that *ex-post* review reports be submitted to Parliament.⁴⁶ This will enable Parliament to hold line departments accountable for correcting defective laws and addressing municipalities' concerns.

Finally, the mere inclusion of *ex-post* monitoring and review clauses in legislation is just half the answer. Additional resources and capacity need to be developed, since even in countries where *ex-post* scrutiny is well embedded, monitoring and evaluation are rather weak owing to capacity constraints. In South Africa, the government's prioritisation of reviewing existing legislation is low, with its focus being on developing and implementing new policies and laws. Besides requiring the necessary capacity in government, the inclusion of review clauses also necessitates a culture shift in government. This is evident in the context of local government, where there is a tendency to create further laws to address a problem even though current laws are not having the desired result.

⁴⁴ For example, in Australia, sunseting occurs automatically after 10 years, whereas in Germany legislation is reviewed two years after enactment.

⁴⁵ Western Cape Government 'Red Tape Reduction' available at <https://www.westerncape.gov.za/red-tape-reduction/> (accessed 12 March 2023).

⁴⁶ Chapter 2, section 2.4.4.1 Parliament; see also Chapter 5, section 5.2.6 Parliament: Scrutiny of bills and regulations.

7.2.5 Step 5: Ex-post evaluation and monitoring of sector legislation

7.2.5.1 Ex-post scrutiny through consolidation

Multiple legislative texts introduced annually to the statute book regulating local government have produced complexity and annoyance for the user, who, despite legal expertise, is often confronted with fragmented primary and secondary legislation. *Ex-post* scrutiny of one law may show that the existing legal instruments should be simplified, as they present problems such as duplication and contradiction. However, cleaning up a legislative framework, even in jurisdictions like South Africa with a dedicated law reform commission, is no easy task.

As stated previously, the *ex-post* scrutiny of legislation allows policy-makers to establish whether there are any obstacles to implementation and any interpretative challenges that were not foreseen when the legislation was drafted. In the context of local government, the review of local government or sector legislation should not be done in isolation, with each act reviewed separately. Instead, legislative instruments should be consolidated into different thematic areas. In other words, although each legislative instrument should have review clauses (as recommended earlier), it is suggested that these legislative instruments be reviewed together since there are often overlaps. Such a holistic approach is needed, and must be encouraged, to deal effectively with the regulatory pathologies that permeate the entire regulatory framework.

The first step is to identify important thematic areas in the law under review and identify sector-related legislation. The sectoral legislation related to the primary reviewed law should be listed in chronological order, considering the date and hierarchy of the sources of law. For example, the laws governing the appointment of senior managers and employment conditions (broad-theme HR-related matters) or the laws governing municipal PPPs may be consolidated in a single text. It should be emphasised that consolidating the body of laws (relating to a topic) does not involve adopting a new legal act. Thus, the consolidated text should combine all the original acts, amendments, and associated regulations in a single document without any changes. The consolidated text is meant purely as a documentation tool with no legal status and as a precursor to codification and detailed review. The consolidated text would enable the reviewer to identify obsolete provisions, duplication, or contradictions.

7.2.5.2 Codification

Consolidating all the rules governing the appointment of municipal managers and other senior appointment conditions, rules which until now have been confusing, will undoubtedly make the legislative framework governing municipal managers' appointments more accessible. However, given its limitation, consolidation will not address other pathologies, such as duplication and contradiction, as the consolidated text would not itself be altered. Consequently, codification must follow consolidation; here, law-makers rationalise, systematically arrange, and update the collections of laws by proposing textual amendments in a particular field.⁴⁷ Codification holds the advantage of dealing with the pathology of

⁴⁷ Chapter 2, section 2.4.3.4 Law maintenance: Simplification.

excessiveness and complexity. It creates a single document in an area of the law to reflect the whole picture of regulation in a particular area and propose amendments and corrections in the consolidated text. So, instead of regulating municipal PPPs in three separate statutes and sets of regulations, each requiring public participation, codification would remove the extraneous requirements by regulating PPP public participation in a single statute.

Since various departments generate legislation regulating local government, line ministries must coordinate their codification efforts rather than compete with each other for regulatory control over local government. This would require that departments share their scheduled legislative review plans with each other, inviting comments. If two departments (COGTA and the National Treasury) cannot agree on the proposed amendments in the consolidated text, for example, removing a law that contradicts another department's law, such matters must be referred to the central regulatory oversight unit. This unit would act as a clearinghouse that oversees and enforces the government's efforts to simplify the regulatory framework across government (discussed below). This means that simplification through consolidation is not a task that can be accomplished solely by individual line ministries, considering that multiple departments across the government regulate municipalities. It must be a joint effort overseen by a central body.

7.3 Institutional design arrangements

The above principles will remain lofty ideals unless backed by key institutional arrangements. Several institutions should be entrusted with executing the regulatory governance model relevant to municipalities. The institutions, in no particular order, include line departments such as the Department of COGTA and the National Treasury; the national regulatory monitoring unit in the Presidency; the Office of the State Law Advisor; and Parliament.

7.3.1 Line departments: COGTA

The Department of COGTA, formerly the Department for Provincial and Local Government, is the principal line department that oversees municipalities, along with the National Treasury. These two transversal departments are primarily responsible for enacting and enforcing most of the legislative instruments applicable to municipalities. As such, the task of complying with the requirements in steps 1–5 resides mainly with these two departments. Indeed, both the impact assessment guidelines indicate that line departments are primarily accountable for meeting these requirements. Developing the appropriate capacity within line departments is crucial for efficiently integrating regulatory tenants into the policy-making stage, considering that many departments do not have the time or resources to undertake impact assessments.

7.3.1.1 Data collection management: One-stop shop

The Department of COGTA should not only adhere to the principles aimed at improving regulation, but its mandate should include overseeing and collecting local government data. To this end, it is suggested that the national COGTA should become the host of a central repository for all data on local governments from which all state agencies may request data or reports.

Instead of requesting information directly from municipalities, line departments must first extract and use information from the central portal. To reduce the total number of information requests, the central portal must be open and accessible to all the state's line departments and organs. This necessitates the creation of a standardised data and reporting template that considers the reporting priorities of the national and provincial government departments, including other organs of state.

7.3.1.2 Creation of a standardised reporting template

A central portal and standardised reporting template would help prevent contradictory and duplicative data requests. The standardised template should comprise legislative reporting requirements, including those derived from soft-law instruments such as circulars and policies. As such, the template should identify the source of the reporting obligation, similar to those identified in Australia.

Creating the template and the central repository is not a simple fix to municipal over-reporting, as it would also require a shift in thinking on the part of line departments and significant capacity-building on the part of local governments. Indeed, many municipalities do not have specialised information-gathering units in their administration due to a lack of financial resources.⁴⁸ This situation is even more difficult because municipalities are frequently expected to provide reports, yet no feedback is provided, resulting in wasted limited resources. Moreover, line departments have not been helpful in this area, with many of them operating in silos and, at times, refusing to share information. It is recommended that more resources, such as automated and integrated reporting systems, be invested in improving intergovernmental and departmental cooperation. The development of this one-stop-shop and the rule of requiring departments to extract information from the central portal first before requesting information directly from the municipalities would assist in dealing with the over-reporting pathology, where multiple government entities request the same information from municipalities as a result of operating in a silo.

7.3.2 Establishment of a national unit for data collection

All stakeholders monitoring local government would develop and update the standard reporting template. As stated, COGTA is not the only department monitoring local government and, hence, not the only department responsible for maintaining the repository. Establishing a dedicated agency or unit within government to oversee information-gathering across the government, one specifically tasked with the identification of common areas of reporting, is recommended. This Unit should be based at the centre of the government and not be an interdepartmental task team without a budget and institutional basis. As such, it is recommended that it be based in the Presidency. Its work would support the Department of Planning Monitoring and Evaluation (DPME), which is also tasked with assessing the

⁴⁸ Chapter 4, see section 4.4.2 Over-reporting and reporting fatigue.

performance of municipalities across six key indicators.⁴⁹ The Unit must not duplicate the work of the DPME.⁵⁰ Rather, it must enhance the DPME's work by updating and identifying common reporting areas across sectoral departments to develop a general template for information-gathering from municipalities. The central data collection unit should comprise representatives across government, including COGTA, the National Treasury, the Financial and Fiscal Commission, Stats SA, SALGA, and the Auditor-General, with the latter having access to audit financial information.

7.3.3 National regulatory control unit

7.3.3.1 Dedicated champion or ministry for better regulation

The study proposes that the government establish a national regulatory oversight body to ensure that departments and entities adhere to the proposed regulatory principles. The unit should comprise a diverse group of institutions and specialists, such as lawyers and economists trained in regulatory governance.

The unit must preferably be near or at the centre of government – located at the highest administrative level – and supported by the political head of government.⁵¹ As such, this national regulatory body must be in the Presidency and have a dedicated Minister supporting it. This would help reduce the frequency of ministers not complying with the SEIAS process. The DPME is currently tasked with ensuring the implementation of SEIAS. However, this department has not been visible or active in promoting SEIAS across government. In fact, a review of the DPME website shows that the department only has SEIAS guidelines and assessment templates. No reports or other information related to SEIAS compliance are available on the DPME website.

7.3.3.2 Legally backed

Legislation must support the National Regulatory Control Unit's work and functioning. Indeed, international experience demonstrates that central regulatory units are more effective if they enjoy autonomy, operate under a clear regulatory framework, have a wide reach across government, and are adequately resourced with staff and experts. In particular, the

⁴⁹ Department of Planning, Monitoring and Evaluation *Local Government Management Improvement Model (LGMIM): Implementation Guide (2015/16)* available at [https://www.dpme.gov.za/keyfocusareas/Local%20Government%20Performance%20Assessment/LGPA%20Guidelines/150915_%20LGMIM%20implementation%20guidelines%202015_16%20\(Final%20Final\).pdf](https://www.dpme.gov.za/keyfocusareas/Local%20Government%20Performance%20Assessment/LGPA%20Guidelines/150915_%20LGMIM%20implementation%20guidelines%202015_16%20(Final%20Final).pdf) (accessed 27 August 2024).

⁵⁰ The DPME monitors municipalities on six key indicators: Integrated Development Planning and Implementation, Service Delivery, Human Resource Management, Financial Management, Community Engagement/Participation, and Governance. The DPME does not duplicate existing monitoring by sector departments, or the auditing conducted by the Auditor-General. Instead, its assessment draws on existing evidence from municipalities and secondary data from oversight bodies. For more on the DPME, see <https://www.dpme.gov.za/keyfocusareas/Local%20Government%20Performance%20Assessment/Pages/Overview.aspx> (accessed 27 August 2024).

⁵¹ OECD (2019) 26; Chapter 2 of this study, section 2.4.4.2 Regulatory units. See also Chapter 3, section 3.2.1.4 Regulatory scrutiny bodies.

requirements and principles outlined in this study (rules for rule-making), including those in the SEIAS and RIA guides, should be translated into clear legal requirements in the form of the Regulatory Impact and Evaluation Act requiring that line departments subject draft laws and regulations impacting municipalities' to impact assessments. This would ensure certainty and uniformity in making and reviewing legislation across government. The translation of these requirements into hard legal rules for rule-making would ensure the government's commitment to evidence-based law-making, as the RIA within the government is currently viewed as a mere convention that can be ignored, considering that it is an internal guide to the cabinet lacking legal status.

The recommendation to make impact assessment a legal requirement is not new, as a similar proposal was first proposed in 2010 with the Red Tape Reduction Bill and, more recently, with the Ease of Doing Business Bill. However, the scope of both private membership bills was limited to examining the impact of rules on businesses. There is a need for this to be extended to include assessing the impact of rules on municipalities.

7.3.3.3 Regulatory oversight unit: Mandate and powers

The centralised regulatory body's primary responsibility would be to review and assess the adequacy of RIA reports prepared by line departments and, when requested, offer technical assistance to line departments such as COGTA and the National Treasury. This is particularly important in institutions where capacity or resources are limited. We have seen that in-house capacity is limited within the government, as most of the RIA work is outsourced to consultants, demonstrating that in-house capacity, time, and resources to undertake RIA have not yet been developed. Thus, it is suggested that the centralised regulatory unit provide advice and training to line departments across government.

In addition to advice and training, the national regulatory unit may create an outpost officer, as seen in Australia, where officials from the national regulatory unit are assigned to line departments for a particular period to assist in developing an impact assessment. Several jurisdictions in Australia require that individuals tasked with making regulations attend and complete formal training courses on RIA. In other instances, oversight units have additionally provided training on specific agency challenges and RIA components.⁵² This study proposes that the regulatory unit introduce similar programmes and develop dedicated programmes for each line department.

As the Regulatory Oversight Unit is based in and reports directly to the Presidency, it is appropriate that it also regulate any conflicts between the National Treasury and COGTA and related line departments. For example, it must be empowered to instruct line departments to harmonise their regulatory actions, failing which the suggested draft proposal would not be tabled and considered by the cabinet. Any unresolved issue between line departments must be

⁵² Australian Productivity Commission (2012) 95.

shared with the President, as the head of the cabinet, who will then be entrusted with ensuring that line ministries coordinate their regulatory activities.

The national regulatory unit must not only exist on paper: it must be an active and visible champion that promotes the proposed regulatory principles and processes across government. It must publish and update the regulatory principles reflective of international best practices and annually publish evidence of the model's usefulness in improving the quality of regulatory outcomes, as witnessed in the European Union.⁵³ As such, the regulatory unit must publish impact reports prepared by line departments and its own assessments of impact reports to allow the public to scrutinise its work – a practice lacking in South Africa.⁵⁴ The Unit must also share its reports with Parliament to enhance Parliament's ability to evaluate the merits of regulatory measures.

Relatedly, the Unit should ensure that all bills and draft regulations tabled in cabinet for consideration have been subjected to impact assessments. The Unit would thus serve as a gatekeeper and support the work of the Cabinet Secretariat, which is entrusted with ensuring that all regulatory measures tabled before the cabinet are subjected to the SEIAS requirements. Importantly, the Unit should not only focus on *ex-ante* assessments (new laws), but also monitor departments' subjection of their laws (existing laws) to *ex-post* assessments.

7.3.4 Office of the Chief State Law Advisor

The Office of the Chief State Law Advisor (OCSLA), a subdivision based in the Department of Justice, could play a role in identifying and preventing contradictions between laws. The Chief State Law Advisor is not directly involved in undertaking impact assessments; rather, its role is limited to assessing the constitutional compliance of all draft laws before it is tabled in Parliament. This is not a statutory requirement but an internal requirement of Parliament, one which does not apply to subordinate legislation. Submitting draft regulations to the OCSLA for pre-legislative scrutiny to assess constitutional compliance is completely voluntary for line departments. In fact, the study finds that it is not a widespread practice to submit draft regulations to the OCSLA. This is an area for improvement, and it is recommended that all draft laws, including regulations issued by a minister, be subjected to OCSLA for constitutional pre-legislative scrutiny. This is necessary, as most local government complaints are directed at, and stem from, regulations that overlap or are misaligned.

It must be pointed out that the OSCLA is not involved in the *ex-post* scrutiny of legislation or rules after their implementation, meaning that the OSCLA cannot address the pathologies stemming from legislative instruments already in the statutory book. Moreover, many municipalities' complaints are not directed at the constitutionality of legislation or regulations but rather at the impact and consequences of regulations after their implementation.

⁵³ Chapter 3, section 3.2.1.2 Consultation and transparency and section 3.3 Local government regulatory reforms.

⁵⁴ The OCED in 2012 called for periodic assessments of oversight bodies' performance. The National Audit Office in the United Kingdom has reported annually on the quality of the RIA process since 2004. Similarly, the European Court of Auditors has released reports on whether RIA supported decision-making in the European Union.

This is not to argue that OCSLA has no role in identifying or addressing the pathologies in draft bills, particularly where a draft law impacts local government. Indeed, the study in Chapter 6 presents a constitutional review framework applicable to local government legislation, which the OSCLA should also employ when it assesses the constitutionality of legislation. The model goes beyond the typical lawfulness standard of review and requires the OSCLA to analyse whether a draft law encroaches, impedes and compromises the powers or ability of municipalities to exercise their powers and functions.

7.3.5 Parliament

7.3.5.1 Parliamentary committees applicable to local government

The study proposes that Parliament play a more active role in scrutinising *ex-ante* and *ex-post* legislation. This proposal is consistent with recent developments regarding Parliament's position in scrutinising legislation. In most jurisdictions in the OECD, parliamentary committees have been established and tasked with ensuring that impact assessment requirements are complied with.⁵⁵ The mandate of these committees varies, but it can include considering whether RIA requirements and legislative processes have been complied with. These committees are sometimes mandated to consider and assess whether RIA requirements have been complied with.⁵⁶

In South Africa, Parliament has several committees that discuss bills of Parliament relating to local government. In particular, the Portfolio Committee on Cooperative Governance and Traditional Affairs, comprising members from the National Assembly and the Select Committee on Cooperative Governance and Traditional Affairs, in turn comprising members of the National Council of Provinces (NCOP), often comment on and consider draft bills impacting local government.

As revealed by the meeting's agenda and minutes, these two committees do not evaluate the *ex-post* impact of proposed laws or regulations. Instead, the two committees' primary task is to invite and consider comments on draft bills to be processed in Parliament.⁵⁷ In some limited instances, the Portfolio Committee is exposed to municipalities' regulatory challenges, particularly when considering amendments to existing laws, as seen with the Municipal Systems Amendment Bill of 2019.⁵⁸ There is no specific occasion where the implementation of existing legislation is examined or discussed, save when an amendment bill is considered. It

⁵⁵ See Chapter 2, section 2.4.4.1 Parliament, where it has been shown that the European Parliament, as well as several national Parliaments in the EU, has established dedicated agencies or committees to scrutinise legislation.

⁵⁶ For example, the states of New South Wales, Victoria and Tasmania all have dedicated parliamentary scrutiny committees that assess whether the RIA requirements have been followed. The Legislative Review Committee in NSW ceased to function in 2011 and has been replaced by a new committee system in which each portfolio committee scrutinises legislation in its respective area.

⁵⁷ Parliamentary Monitoring Group 'Cooperative Governance and Traditional Affairs: National Assembly Committee available at <https://pmg.org.za/committee/65/?filter=2022#cc> (accessed 6 April 2023).

⁵⁸ Parliamentary Monitoring Group 'Municipal Systems Amendment Bill [B2-2019]: stakeholder engagement Day 2' (27 February 2019) available at <https://pmg.org.za/committee-meeting/27986/> (accessed 15 March 2023).

is suggested that parliamentary committees, especially the Committee overseeing local government, should review comments and check if departments have developed legislation after subjecting it to an impact assessment.

7.3.5.2 Joint Legislative Scrutiny Committee

There is no coherent framework for scrutinising regulations; this depends on whether an Act requires parliamentary approval. In particular, since 2014, Parliament has retracted from its pre- and post-scrutiny of legislation role when it abandoned the joint committee which was in place to oversee the assessment of draft delegated legislation. Neither the committee nor the framework was maintained in the Fifth Parliament.

It is proposed that Parliament resurrect this committee and, unlike in the past, make it a permanent part of the institution, similar to how the Gauteng Provincial Legislature formed an oversight committee to examine draft delegated legislation. In contrast to the past, the Committee should consider and participate in the *ex-post* review of legislation and assess the *ex-ante* constitutional conformity of draft laws. Its focus should not be confined to draft bills but extend to existing laws. Thus, all documentary complaints, reports submitted by line departments and law reform investigation findings on regulations should be submitted to and considered by this Joint Legislative Scrutiny Committee (JLSC).

It is not suggested that creating the JLSC – a specialised committee – replaces the workings of the dedicated Portfolio or Select Committees. Instead, the JLSC would act as a devoted clearinghouse within Parliament to advise and assist the portfolio committees, and be tasked with assessing all draft laws and existing laws emanating from line departments that impact municipalities. The JLSC would thus work closely with other line departments and portfolio committees to minimise the silo approach to law-making across government, a concern that Parliament has previously recognised.

As noted above, it is essential that this joint committee's powers and functioning be established in law, not simply in terms of a parliamentary resolution. To enhance the committee's effectiveness and avoid repeating the past shortcomings documented in Chapter 5, the legislative scrutiny committee should have analytical expertise, resources, and time in which to undertake its work.⁵⁹ It is also important that the committee, including the relevant portfolio committees, work closely with the national regulatory unit. If the RIA process has not been followed, the scrutiny committee should be empowered to refer the matter back to the responsible minister, seeking clarity or additional information and recommending the regulatory instrument's disallowance.⁶⁰ Such an arrangement would help increase the attention

⁵⁹ Chapter 5, section 5.2.6.2 Scrutiny of delegated legislation.

⁶⁰ For example, in Victoria, the Subordinate Legislation Act empowers the Scrutiny Acts and Regulations Committee to recommend the disallowance or suspension of regulation, especially where the RIA process has not been met.

given to RIA principles and, in turn, lead regulators to give more thought to designing regulations.

7.4 Conclusion: The model’s principles and procedures

This chapter examines whether the other branches of government in South Africa, namely the executive and the legislature, could take further steps to address the regulatory pathologies municipalities face, particularly those not subject to judicial review. To this end, the chapter lists several principles and identifies institutions in South Africa responsible for the model’s enforcement. The governance model for efficient and effective regulation is designed to ease the governance flow and enhance municipal autonomy by ensuring that municipalities perform their functions more efficiently and effectively. It does so by requiring regulators to consider the likely impact of their actions on local governance as part of their regulatory responsibilities. A tenet of the model is that the best way to deal with regulatory pathologies is to look at them holistically rather than dwell simply on single pieces of legislation, given that, as we have seen, the pathologies permeate the legal system. While the model is aimed at municipalities, it may also be helpful to other institutions (such as universities) that use rules for internal governance.

Table 9 provides a condensed version of the tenets outlined earlier by formulating a series of prescriptive steps that can serve as pointers for legislators when drafting new regulations or reviewing existing laws applicable to local government.

Table 9: Principles to combat regulatory pathologies impacting on municipalities

Checklist for efficient and effective regulation	
Step 1: Identifying and defining the problem	<p>1.1 Identify and define the scope of the problem and its cause(s) (i.e., identify those impacted by the problem and describe how frequent the occurrence of the problem is.)</p> <p>1.2 Establish whether any measures were undertaken to address the problem. If so, establish why these earlier measures were unsuccessful.</p> <p>1.3 Define the objective or purpose to be achieved in addressing the problem.</p> <p>1.4 Undertake research and consult with persons and entities affected by the identified problem.</p>
Step 2: Developing solutions	<p>1.5 Describe the options for dealing with the problem and explain how far each option is likely to address the problem.</p> <p>1.6 Identify alternative options other than legal regulation (i.e., less intrusive measures) that may effectively address the problem.</p> <p>1.7 Consider whether the problem is widespread or localised; if it is localised to a particular group (i.e., municipalities), targeted executive actions should be preferred. This may include:</p> <ul style="list-style-type: none"> ○ general information campaign about the problem; ○ training; and ○ incentives (financial). <p>1.8 If legal regulation is preferred, determine whether an existing body of law exists to address the issue to avoid overlaps and contradictions (i.e., make provision for a single approval stage to avoid cumulative engagements and approval requests with multiple line departments.)</p>

	<p>1.9 Avoid requesting duplicative information from municipalities by consulting existing information portals and reports, considering the costs and time associated with furnishing reporting information.</p> <p>1.10 Incentivise and reward municipalities with analytical feedback on reports to help improve performance.</p> <p>1.7 Consult affected groups (e.g., organised local government, municipalities, and fellow line departments) on proposed solutions to foster a whole-of-government approach to law-making and minimising duplication and conflict.</p>
<p>Step 3: <i>Ex-ante</i> assessment</p>	<p>1.12 Subject regulatory and non-regulatory proposals to an <i>ex-ante</i> assessment to assess the costs and benefits before implementation (i.e., costs for proving the administrative mechanism – personnel and non-personnel expenditure. This would include the direct costs to the government and compliance costs incurred by those from whom compliance is sought).</p> <p>1.13 Consider and highlight the likely unintended consequences, side-effects or risks of each option if implemented and describe the impact and likelihood of their occurring (i.e., the impact on local governance).</p> <p>1.14 Consider how the regulatory proposal impacts local autonomy (i.e., identify the element and its importance, e.g., municipal revenue). Take into account the nature and extent of the limitation by the regulatory proposal (i.e., does the regulatory proposal take away or limit municipalities’ ability to generate their own revenue, and could a less restrictive measure be used to achieve the legislative objective).</p> <p>1.15 Explain which option is preferred by publicly making the reasons and impact report available.</p>
<p>Step 4: Regulation: Style and design</p>	<p style="text-align: center;">Style and Design:</p> <p>1.16 Avoid the use of command regulations which identify precise communication methods or compel forms of compliance that are no longer viable.</p> <p>1.17 Avoid command words where they are not intended or are unnecessary.</p> <p>1.18 Use intelligible language so that those seeking compliance know what is expected of them.</p> <p>1.19 Establish whether the proposed rule is coherent and consistent with existing laws and policies.</p> <p>1.20 Adopt a targeted approach to regulation to limit the application of the rule, particularly where the problem is not widespread or where the capacity to implement the law has not yet been developed.</p> <p>1.21 Make provision for the <i>ex-post</i> review of the law to determine whether it is still fit for purpose by adding a review clause that:</p> <ul style="list-style-type: none"> • identifies the institution responsible for undertaking the review; • specifies the purpose of the review and the standard to be used; • indicates the timeframe in which the review is to be undertaken (e.g., 3–5 years); • describes how data and information pertaining to the law’s implementation will be collected (i.e., the establishment of a dedicated portal to submit compliance-related concerns); and • prescribes that the review process must result in a report, which must be made publicly available and submitted to Parliament for consideration.
<p>Step 5: <i>Ex-post</i> review and monitoring of sector legislation</p>	<p>1.21. Conduct an <i>ex-post</i> review of a law in conjunction with other sector-related legislation.</p> <p>1.22. Take steps to consolidate the reviewed law with other sector laws by:</p> <p style="padding-left: 40px;">1.22.1. listing sectoral laws in chronological order, considering the hierarchy of the sources of law;</p> <p style="padding-left: 40px;">1.22.2. identifying thematic areas in the reviewed law and sector laws and grouping the sections under thematic headings in a consolidated text; and</p>

1.22.3. identifying and rectifying any overlaps and contradictions between the reviewed and sectoral laws.

Source: The author

The regulatory principles above are not exhaustive, and hence allow for expansion and further development. The government should prioritise and enforce these principles to enhance the regulatory landscape for municipalities. The responsibility for implementing the principles does not rest solely with line departments or the executive: it also involves Parliament.

Chapter 8: Conclusion, Findings, and Implications

8.1 Introduction

In multilayered contexts such as we find in South Africa, enacting and enforcing laws which impact municipalities presents significant obstacles and challenges. The laws enacted by the national government must respect the autonomy and diversity of municipalities, yet must also be effective and coherent, and consider the capacities of local authorities. So, how does one both secure the autonomy of subnational entities but also provide a legal framework that unlocks the best of autonomy and avoids the worst of it? In the case of South Africa, how does one reduce the cumulative load of legislation impacting on municipalities, and include the practical knowledge of municipalities in the legislative process?

Both the challenges and their proposed solutions are discussed in this study with specific reference to South Africa. The study investigates the national-local regulatory relations in South Africa, with the purpose of establishing whether the legal framework applicable to local government is overregulated and, as such, in need of reform. This chapter provides a concluding analysis of the study's findings and answers the primary research questions. To recap, they are:

- Does international literature and practice advance any principles and processes to address the regulatory pathologies impacting local government?
- Are municipalities in South Africa impacted by regulatory pathologies? If so, what form do these take, and what causes them?
- Has the South African government taken any steps to solve the current regulatory pathologies faced by municipalities? And, if so, have these initiatives been effective in managing them? If not, why have they failed?
- Are there any legal remedies that might be deployed by the courts to address the regulatory pathologies?
- What principles and institutions should be included in a comprehensive design model for the regulation of local government to enhance effective local governance?
- Finally, what does the South African case study bring to the theory and literature on regulatory governance and decentralisation?

The chapter is organised as follows. Section 8.2 provides an overview of the international literature and practice on regulation. Section 8.3 discusses whether the regulatory pathologies in South Africa's local government system are similar to those identified in global literature and practices. Section 8.4 provides an overview of the steps taken by the South African government to address regulatory pathologies. Specifically, it examines what efforts, if any, the government has made to address these pathologies. This section further discusses the minimal

responses by the courts in managing regulatory pathologies. Section 8.5 explores the constitutional and executive remedies that can be used in South Africa to tackle regulatory pathologies, with this serving as the basis for the study's major policy proposals for the government and the courts. Finally, the chapter concludes with a discussion on the contributions of the South African case study to the theory and practice on decentralisation and regulatory governance.

8.2 Searching for local government regulatory design principles

Until now, relatively little has been written on the state of regulation and its impact on local governance internationally.¹ Much of the regulatory governance and design literature discusses the challenges associated with laws in general terms and with scant reference to local government. Several recurring pathologies appear in the scholarship (including inadequate preparation and deliberation of bills,² poor drafting, and, more generally, 'hasty and reckless law-making').³ Moreover, the legislature as well as the executive have been accused of making excessive laws, resulting in detailed rules and lots of paperwork that prove costly and burdensome to implement.⁴

The OECD has produced several guidelines to tackle these pathologies and improve the overall quality of government regulation. These guides do not apply specifically to local government. In fact, no universal model that guides the design of a regulatory framework within which local governments exercise their authority exists. The OECD guides, including the scholarship, have almost exclusively focused on scrutiny frameworks to improve business regulatory settings.⁵ This is incomplete. As shown in Australia, many of the general regulatory pathologies documented in the literature have also impacted local governments. Indeed, local councils in Australia also suffer from the cumulative impact of regulations, lack of consultation, redundant reporting requests, and inflexibility. As such, the NSW state has recognised the need to revise its Better Regulation guideline and RIA System to include a requirement that the impact of laws on local government must also be considered when enacting legislation.⁶

In the absence of a universal regulatory scrutiny model applicable to local government, the study argues that the literature and the OECD guides do bring to light certain fundamental

¹ Uhlmann F & Popelier P 'Chapter 1: Multi-level lawmaking. Form/ Arrangement and Design in Theory and Practice' in Popelier P, Xanthaki H, Robinson W, Silveira JT & Uhlmann F (eds) *Law-making in Multi-level Settings: Legislative Challenges in Federal Systems and the European Union* (2019) 17-41.

² Samuels A 'Ensuring Standards in the Quality of Legislation' (2013) 34 *Statute Law Review* 297. See also Griglio E & Fasone C 'The 'Time-Factor' within the Law-making Process: A limit to Legislation Quality Improvement' in Mader L & Tavares de Almeida (eds) *Quality of Legislation: Principles and Instruments: Proceedings of the Ninth Congress of the International Association of Legislation (IAL)* (2010) 86-108.

³ Bamberger MA *Reckless Legislation: How Law-makers Ignore the Constitution* (2000) 5. See also Waldron J *Parliamentary Recklessness: Why We Need to Legislate More Carefully* (2008) 10.

⁴ Beales H 'Government Regulation: The Good, The Bad, & The Ugly' (2017) 4 available at <http://regproject.org/wp-content/uploads/RTP-Regulatory-Process-Working-GroupPaper.pdf> (accessed 8 August 2019). See also Chapter 2, section 2.3 Current critiques: In search of good and bad regulation.

⁵ Popelier (2015) 316.

⁶ Chapter 3, section 3.3.2.2.1 Regulation-making: Non-consideration of impact on councils.

principles and tools for the creation of improved legislation. These principles include the proper assessment of a problem; the identification of solutions, including alternatives to regulation; the necessity to subject regulatory proposals to an ex-ante assessment before their implementation; the duty to develop regulations that are clear, and coherent; and the requirement to subject legislation to periodic reviews. These general principles, if adopted, adapted and enhanced, hold the potential to improve the regulatory environment for municipalities, both in South Africa and elsewhere.

8.3 Local government regulatory pathologies in South Africa

The study finds that the regulatory pathologies documented in the literature and experienced in New South Wales, Australia, have also manifested in South Africa's local government system. Indeed, these pathologies have also been shown to impact municipalities, and, as such, it is not general in scope. The study reveals that municipalities in South Africa, compared to provincial and national governments, are overwhelmed by the number of regulations and reporting requirements, including circulars regulating their functioning. These laws cumulatively have forced municipalities to invest more time and resources into compliance than to service delivery. Moreover, the status of the circulars issued by the National Treasury and COGTA, including provincial departments, has caused confusion, as there is uncertainty about the legal status of these circulars.

In addition, the regulatory framework is not only dense and complicated, but also tends to be inflexible. This is because it has a large number of obligatory rules (as denoted by the frequent use of the word 'must'). The framework is also shown to follow a 'one-size-fits-all' design approach. This does not take into consideration the fact that different municipalities have different capacities and resources. The framework was developed with only large, well-resourced municipalities in mind, and thus cannot handle smaller 'municipalities and the resource constraints they face in an effective manner. The result is that many municipalities that lack the necessary skills and resources are finding it difficult to comply with the niceties of the framework.

The lack of regulatory coordination between line departments like COGTA and the National Treasury has not helped municipalities. Indeed, it is a factor which has contributed to over-regulation and the density of the regulatory environment. The two departments above have both enacted separate rules determining (for example) the competency standards and disciplinary rules for municipal officials. Standing alone, each of these laws would make sense. The problem is that municipalities are forced to make sense of overlapping legislative instruments, with this leading to different interpretations and resulting in legal uncertainty.

Inconsistencies across departments and a lack of coordination have sometimes resulted in municipalities receiving duplicate data requests from multiple line departments. Frequently, this information is neither used nor is any feedback provided, bringing its usage into question. There are also cases in which legislation is forced on municipalities without considering the

effect it would have on their internal governance structure and the time and resources required for compliance.

Table 10: Pathologies in the local government system

	Regulatory pathology	Description	Consequences
1	Cumulative burden	the cumulative effect of multiple regulations, circulars, and reporting responsibilities imposed on municipalities.	<ul style="list-style-type: none"> - This frequently results in excessive administrative and financial costs. - Municipalities are forced to focus more on compliance than service delivery, thus stifling innovation and experimentation. - Instead of ensuring better governance, it results in greater lawlessness as municipalities cannot cope with the demands.
2	Inflexible command-and-control rules	Regulations that lack adaptability or responsiveness to local contexts and realities of municipalities owing to their peremptory nature.	<ul style="list-style-type: none"> - Municipalities are precluded from being innovative and adopting less costly measures to meet compliance. - In a regulatory environment dense with multiple laws on the same subject matter, where the risk of making errors is high, municipal staff are overly cautious when making decisions, resulting in delays. - As municipal authorities are compelled to jump through numerous hoops (i.e., mandatory provisions), these regulations can be easily weaponised and employed to frustrate their intended purpose.
3	Uniformity/one-size-fits-all	Rules fail to take into account the diverse needs, capacities, and conditions of different municipalities. This standardised regulatory framework is imposed on all	<ul style="list-style-type: none"> - Smaller municipalities find it difficult to comply with the legal framework as it is costly and human-resource intensive. - Municipalities, especially those with limited

		municipalities, whether large or small.	resources, become dependent on external consultants and are forced to shift funds meant for service delivery to meet compliance
4	Regulatory lack of coordination or overlap	Regulations overlap or cover the same subject matter. Two or more national laws are enacted by the same or different government departments on the same topic using different criteria.	<ul style="list-style-type: none"> - Leads to legal uncertainty. - Results in unnecessary bureaucratic processes and confusion. - Causes delays as officials need to ascertain the correct legal position.
5	Over-reporting	Municipalities get several requests for the same information from the same or different departments.	<ul style="list-style-type: none"> - Municipalities are compelled to devote time and resources to completing reports for which they get no value (no feedback provided).
6	Neglecting consequential impact	Rules are imposed without considering their impact on the internal governance arrangement of municipalities.	<ul style="list-style-type: none"> - Undermines the stability of municipal administration. - Causes loss of revenue.

Source: The author

Each regulatory pathology has its own unique causes as well unique effects on municipal governance. In most cases, their combination contributes to the dysfunctional state of municipalities. For example, it slows down the decision-making processes of municipalities due to legal uncertainty caused by duplicated and contradictory laws. This redundancy results in a waste of time and resources, forcing municipalities to divert resources and attention away from more pressing matters. The increase in reporting and regulation has not translated into better governance. Instead, it results in greater lawlessness and non-compliance, as well as poor service delivery. The increase has also increased the risk of compliance errors, forcing municipal officials to become more risk-averse, especially since the Auditor-General is now empowered in law to hold officials personally liable.

Multiple explanations exist for the regulatory pathologies. It is argued that the proliferation of regulation, which appears at the time to be overlapping and contradictory, is driven by the culture of ‘silo law-making’ that exists between line departments. In the case of the National Treasury and COGTA, this lack of coordination is driven by a desire to fight for regulatory dominance and control over local government. Indeed, there is no agency or department in government that checks for coordination and overall impact. COGTA has not been given the

task of performing a clearinghouse function, despite having been advised decades ago to be a 'clearing house' for all legislation. Similarly, the lack of departmental coordination and sharing of local government information through a dedicated one-stop shop is the fundamental source of excessive reporting. The lack of subjection of legislation, including regulations, to thorough impact assessments, is another reason that the government neglects to examine the consequential impact of its regulatory acts on municipal governance. There is a need to focus less on treating the symptoms of the disease than on addressing its causes.

As indicated above, the study provides an affirmative response to the primary research question by determining that there is merit in concluding that the legal framework that regulates the functioning of municipalities is guilty of over-regulation. This over-regulation has been shown to have manifested itself in a variety of forms. The study finds that while South Africa's constitutional framework enshrines local government autonomy and allows for the advancement of municipal autonomy, the legal framework, and a combination of other factors, such as weak capacity, continue to impact on the practical performance of municipal autonomy. This is not to argue that municipalities should not be regulated. Instead, the above pathologies, taken together, serve as a useful checklist that regulators can use to measure their efforts.⁷ These pathologies hold important lessons about how they arise and how they could be avoided.

8.4 Government reform initiatives aimed at pathologies threatening municipalities

Many of the pathologies in Table 10 were recognised by three arms of the state operating in the national sphere (the national executive branch, the legislature, and the courts). Indeed, the study shows that the South African government is not oblivious to the regulatory pathologies impacting on municipalities, with the executive in the form of the Presidency, National Treasury, and COGTA leading the way. However, the research reveals that a considerable number of measures initiated by the executive, Parliament, and the courts did not result in substantial improvement.

8.4.1 Executive-led initiatives

The study finds that, in general, executive-led initiatives have had minimal impact. Many of the recommendations made by these earlier studies (such as the requirement to streamline laws and harmonise reporting requirements) are yet to be implemented. The study provides several explanations as to why these efforts did not result in meaningful reform.

First, the executive reforms failed due to the lack of consensus among departments over the precise nature and extent of the issue, as well as regarding the most effective strategy for its resolution. Specifically, the study reveals that while certain national departments such as COGTA called for the reduction in the number of municipal reporting requirements, other national departments (such as the National Treasury and the Financial and Fiscal Commission)

⁷ Grasbosky (1995) 362.

urged that these reporting requests should be kept.⁸ This dissonance between departments and data collection agencies has made it difficult to come to an agreement on how to deal with the pathology of over-reporting.

Secondly, many of the executive initiatives failed due to their being limited in scope. Instead of focusing on identifying and rectifying the underlying causes of the pathologies, they dealt mainly with the symptoms of over-regulation (the so-called ‘low-hanging fruit’). They never investigated what caused the pathologies or who was responsible for them. Because of this, departments neglected to accept responsibility for the regulatory acts they took.

Thirdly, executive reforms were thwarted due to the lack of structural arrangements. Indeed, no specific department or agency in government, backed by the cabinet, has been assigned the responsibility of driving these reforms.⁹ This contrasts with international literature and practice, which indicates that streamlining or simplifying regulations is not a once-off activity but a resource and time-intensive activity that must be conducted annually and sustained by political support, especially from the national government. In particular, the study finds that the Department for Provincial and Local Government (DPLG), currently known as COGTA (and which oversaw the study in 2010 as the lead department), lacked the statutory authority to organise meetings or advise that other line departments modify problematic laws. This explains why line departments and municipalities hesitated to attend meetings and submit reports, ultimately leading to the initiative’s collapse.¹⁰

Fourth, the insufficient distribution of resources further hindered the effectiveness of the executive reform endeavours. Indeed, the Law Reform Commission, which has been entrusted with the responsibility of investigating regulatory pathologies that affect municipalities since 2019, has, to date, employed only a single dedicated researcher. Ultimately, the scarcity of resources has been exacerbated by the absence of a universally applicable framework or standard in South Africa law-making. Law-makers had no reference point for examining legislation pertaining to local government. This absence has proved to be a significant obstacle to evaluating the laws relevant to local government. The study acknowledges that the RIA guidelines (and, more recently, the SEIAS guidelines) contain essential ideas that can be employed to evaluate laws, both prospectively and retrospectively. It is not quite clear how these guidelines pertain to legislation made for local governments, and it remains to be seen whether they have the capacity to rectify the pathologies that municipalities face.

⁸ Financial and Fiscal Commission *Sustaining Local Government Finances: Final Report on the Financial and Fiscal Commission’s Public Hearings on the Review of the Local Government Fiscal Framework* (2012) 48. See also South African Law Reform Commission *Submissions to Issue Paper 37: Project 146: Review of Regulatory, Compliance and Reporting Obligations Imposed on Local Government by Legislation* (2019) 3.

⁹ FFC (2014) 19.

¹⁰ SALRC (2019) 6. Between 2003 and 2014, only 52 out of 257 municipalities participated in these earlier initiatives, accounting for less than 20 per cent of inputs made to them.

8.4.2 Legislature: Parliament

Many of the complaints of municipalities are directed to statutes and delegated legislation – regulations. A review of Parliament’s lawmaking practice shows that Parliament has done very little to manage the pathologies impacting municipalities emanating from acts of Parliament. There is no evidence to suggest that Parliament, in its deliberations, makes use of impact reports or checks whether regulations or draft laws have been subjected to scrutiny prior to them being tabled.

A significant portion of the rise in executive regulations targeting local government can be attributed to the failure of the national legislature, Parliament, to exercise sufficient control over the executive’s delegation of legislation-making authority. In fact, no dedicated body or committee in Parliament scrutinises delegated legislation (i.e., regulations). Such a body ceased to exist in 2014, and currently, no standard practice or procedure requires that all draft regulations impacting municipalities undergo parliamentary scrutiny. Moreover, a review of parliamentary committee meetings indicates that no follow-up review of the impact of the regulations has been done. Parliament has made it a standard practice to ask the Office of the Chief State Law Advisor to vet draft bills to check if they comply with the Constitution and standard drafting requirements. Significantly, regulations are not subject to this practice. Notwithstanding this, section 101(4) of the Constitution grants Parliament the authority to create norms and procedures for the tabulation and approval of regulations via national legislation. At the time of writing, no such law has been established. Overall, the legislative branch has been relatively dormant in its efforts to promote better law-making and hold the executive accountable for developing better laws and preventing departmental silo legislation.

8.4.3 Judicial response

The study observed that courts have also played a limited role in the management of certain regulatory pathologies encountered by municipalities in South Africa. They have dealt with the pathology of inflexible rules primarily on a case-by-case basis. They have done this by reading down mandatory sections (the word ‘must’) into discretionary provisions (‘may’). This has the effect of relieving municipalities of the burdensome obligations of the law. In addition, the courts have devised and adopted principles of interpretation to deal with laws that either conflict with one another or overlap in their coverage.

In the fight against these pathologies, the function of the courts (as with the executive branch) has been restricted. Up to this point, courts have only addressed the symptoms and not the causes of the problem. In addition, important pathologies (such as cumulative burden, over-reporting, and the failure to consider the ability and resources of municipalities) have not yet been considered by the courts. In South Africa, courts are unable to compel the executive branch to submit draft regulatory proposals to the scrutiny of the RIA or SEIAS systems. This is the case since it is not law but rather a cabinet-internal rule.

8.5 Towards principles and institutions dealing with overregulation

The legislature, the executive and the courts have a considerably larger role to play when it comes to examining regulations that have an effect on local government. Indeed, the study adopts a novel interpretation of the South African Constitution. It is argued that the Constitution requires laws impacting municipalities to be subjected to both *ex-ante* and *ex-post* scrutiny. This is so because the Constitution establishes a safeguard, one which enables a municipality to challenge a law on the basis that the law ‘impedes or comprises’ the municipality’s ability to exercise its powers and conduct its functions. This constitutional clause (although it yet to be put to the test) broadens the reviewing powers of the courts in South Africa. It offers a fresh constitutional framework to evaluate legislation which is relevant to local governments.

The study presents a model with the awareness that there is no universal framework or guide for local government legislation. The model is both legal and executive in nature, and is the first step in guiding law-makers in designing regulations and laws that impact on local authorities.

8.5.1 Constitutionally based model: A South African approach

With regard to South Africa, the study establishes that the traditional grounds of reviewing legislation (such as PAJA and the principle of legality) are simply not broad enough to deal adequately with regulatory pathologies.¹¹ The study nevertheless finds that section 151(4) of the Constitution imposes an obligation on law-makers at the national and provincial level of government to consider the impact of their legislative acts on the functioning and powers of municipalities. This constitutional provision is unique as it specifically encourages national and provincial governments not to compromise and impede the functioning or powers of municipalities. The provision, purposively interpreted, does not preclude national and provincial governments from regulating local governments. Rather, the provision aims to safeguard municipal autonomy by encouraging regulators to justify their regulatory actions where these are directed at municipalities and where they limit the functioning or exercise of municipal powers.

Indeed, while the terms ‘impede’ and ‘compromise’ have no specific meaning in the context of the law, they both relate generally to a limitation. When examining section 151(4) alongside section 151(3) of the Constitution, the use of the term ‘right’ further substantiates this view. The study thus recommends that similar guiding principles to those that are used to limit the operation of fundamental rights can be used to balance the regulatory powers of the national government and the self-governing powers of municipalities. The argument for this position is that if a law or conduct aims to regulate and limit a municipality’s right to govern (i.e., which

¹¹ In fact, it emerged in contemporary case law that organs of state such as municipalities cannot rely on PAJA to review regulation. The question of whether regulations can be reviewed within the parameters of PAJA is far from settled in South African law.

amongst other things includes its ability to appoint people), then such a law must be justified by taking into account the nature of the problem the law is directed at, the extent to which the law limits municipal autonomy, and whether there are alternative ways (other than regulation) to address the problem. Consequently, the national government is obligated to furnish a rationale for the existence of two separate regulatory frameworks from two different national departments that regulate the selection process for senior government positions at the local level.

It does not follow, however, that section 151(4) is a panacea for all the regulatory pathologies. This constitutional safeguard is not intended to serve as a substitute for executive and administrative safeguards. Indeed, the study acknowledges the limits of the judicial system in dealing with regulatory pathologies. As we have seen, the issue confronting local government in South Africa is one which is directed at the entire regulatory framework. The courts' remedies are not always capable of effecting systemic change. Moreover, while the South African case demonstrates that a robust and independent judiciary is essential to the protection of municipal autonomy from regulatory abuse, it is both unsustainable and impossible for courts to remedy each and every one of the regulatory pathologies faced by municipalities. The remedies available to courts are not infinite, and as a result, they are not always accessible. For example, the severance remedy will not be appropriate to address the cumulative burden pathology (a widespread complaint). This is because the blame for constitutional invalidity 'cannot be laid at the door of any word, or groups of words, but rather permeates the entire [legal framework]'.¹²

Therefore, even though the constitutional ground of review in terms of not impeding or comprising is broad enough to include the majority of the regulatory pathologies, the existing remedies that are available to courts do not permit them to develop properly tailored relief to deal with these pathologies. This is not to say that s 151(4) is meaningless, or courts cannot play a meaningful role in addressing these pathologies. On the contrary, the study argues that by endorsing the methodological framework developed in Chapter 6, courts would play a more impactful role by guiding law-makers in exercising their law-making powers related to municipalities. Indeed, these principles (i.e., the objective of the restriction, the scope and extent of the restriction, the connection between the restriction and its purpose, as well as whether there is a less restrictive alternative) would force law-makers to consider the repercussions of their actions on local governance, ultimately leading to more effective and efficient regulation.

¹² *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* [1996] ZACC 7 para 71.

8.5.2 Executive-led model

8.5.2.1 Overview: Principles and procedures

The limitations that courts face in the attempt to remedy and mitigate regulatory pathologies impacting municipalities necessitate the adoption of a rigorous framework, one that the executive should apply before it considers adopting or reviewing regulations. Considering that the majority of laws are initiated by line ministries, line departments bear the primary duty for drafting effective legislation. The study puts forward several recommendations in this regard.

Significantly, the study proposes that a framework to scrutinise and review regulations and laws applicable to local government be based in law through the enactment of an Act of Parliament – a ‘Regulatory Impact & Evaluation Act’. Such a requirement is implicit in section 151(4) and explicit in section 101(3)(4) of the Constitution, which requires that national legislation specify how subordinate legislation (i.e., regulations) may be tabled and approved by Parliament. The proposal makes *ex-ante* assessment of legislation (which includes regulations) compulsory. This would strengthen the current RIA guides and compel line departments to draft laws by putting them through a comprehensive evaluation in accordance with the proposed model’s principles.

This is necessary as current practice shows that line departments across government do not adhere to or embrace the current SEAIS Guides principles (such as making impact reports available to the public throughout a law’s lifecycle). To this day, no *ex-ante* assessment reports have been made publicly available on proposed laws that would have an effect on local governments. Furthermore, there is no evidence that these assessments are used during parliamentary debates, where legislative proposals that would impact local governments are discussed. Currently, these guides function as signposts and not as definite instructions: they lack legal standing.

The model’s end goal is not to encourage the deregulation of local government. Its primary objective (aligned with the Constitution) is to compel regulators to pause and reflect before enacting regulation which addresses a specific issue. This objective is most in line with the Constitution, particularly with the interpretation of section 151(4). As such, before issuing regulations to deal with a problem, a review and analysis of the type, cause, and breadth of the problem must be undertaken. This is a crucial element that is emphasised in the model. It is all too often the case that a rule which is directed at a problem does not have the capacity to address it. This requires policy-makers to engage and involve those impacted by a problem (i.e., municipalities) through public consultations and feedback mechanisms.

In a similar vein, the formulation of solutions ought to incorporate both regulatory and non-regulation approaches. In this regard, decision-makers are first required to determine if existing rules are directed at the problem. So, instead of having multiple laws on the same subject emanating from different departments, line departments must first take active steps to consolidate their existing legislative acts before proposing new laws with the goal of controlling the cumulative impact of legislation. This would also ensure that overlapping and

contradictory rules are restricted and avoided. As a result, collaboration and coordination across line departments throughout the spheres of government becomes a critical component of the model.

Moreover, the model entails that the evaluation of proposed regulatory proposals should not be restricted to cost analysis. Rather, analysis should be conducted to identify both the direct and indirect impacts of proposed regulations. This is necessary because regulating by the numbers (costs of regulations) is, as demonstrated in South Africa, an inadequate safeguard against poorly written rules and the multiplicity of pathologies that are encountered by municipalities. In this regard, the study presents a number of the pathologies that are currently being experienced by municipalities. These serve a useful role in evaluating unintended consequences.

The model further calls on government departments to make all information (including the problem statement, the suggested remedy, and an evaluation of its impact) available to the public, preferably on the websites of the relevant line departments. This information must also be submitted to Parliament for consideration. It is imperative too that any exclusions from this requirement, as well as the justifications for an such exemptions, be publicly available. Such a requirement would not only be essential to the process of justifying regulatory proposals, but also serve as a stronger incentive for line departments to undertake a careful review of their regulatory proposals.

Finally, the model proposes that government should, as a general principle, continually examine regulations that are applicable to local municipalities. At the moment, periodic reviews are not automatically built into legislation, and hence is not an established practice across government. Hardly any emphasis is placed on the review of regulations. There is thus a need for the culture to change in government. The first step in this is to pass legislative acts that include clauses requiring frequent reviews of effectiveness. The use of periodic review clauses would assist in managing the annual increase in regulatory inflation as well as the overall burden placed on municipalities. Such clauses would also help in identifying and combatting regulatory pathologies impacting on local government, thereby forcing regulators to check whether their regulatory actions are still fit for purpose.

The formation of a learning environment through the establishment of review instruments is the easy part of the process. More difficult is the creation of institutional capability and the development of the appropriate culture. These conditions cannot be produced overnight. In order for such changes to take place, organisational leaders within the government need to advocate for regular review: this is an essential component currently lacking in South Africa. International experience has shown that it is not enough to simply incorporate review provisions; much more than this needs to be done. There is a need for the government to get the expertise and resources and set up dedicated institutions necessary to conduct *ex-post* reviews.

8.5.2.2 Institutional design

Institutionally, a number of structural recommendations are made. These structures are necessary to ensure that the model's principles are implemented.

First and foremost, Parliament must take its role more seriously in holding the executive accountable when exercising its oversight mandate, especially as it relates to the making of regulations. Parliament, as the highest legislative authority, should reconstitute the Joint Committee for Legislative Scrutiny, which has been defunct since 2014. This committee should collaborate with the National Regulatory Unit, outlined below, as well as other committees of Parliament, in order to fulfil its special mission: to evaluate regulations that have been promulgated by line ministries. The work of this committee would supplement the work of the Office of the Chief State Law Advisor. As the study reveals, the Office is not obligated to check and verify the constitutionality of regulations issued by Ministers at the present time. This needs to change, as most complaints are lodged against regulations.

There is a further need for the current SEIAS unit (tasked with ensuring that impact assessments are conducted across government in accordance with the SEIAS guide) to become visible. The study reveals that the unit has not been an active or visible champion in promoting the regulatory principles contained in the SEIAS guideline. Very little guidance or work is published by the unit, and it offers little in the way of training across government. The SEIAS Guideline was last updated in 2015. There is considerable scope for updating the guideline and for sector-specific guidelines to be further developed, particularly where a law impacts on local governance. The model and the principles highlighted in this study may be of assistance in this regard.

Furthermore, the study proposes that the SEIAS Unit's mandate be clearly defined in statute and its independence protected. Its task is not only to report to a specialised ministry but also to communicate its findings and work on legislative proposals directly to Parliament. Such a step is consistent with international best practice, which reveals that Better Regulation (BR) programmes are likely to have more influence on law-making if managed within government by the so-called Regulatory Units or by an independent regulatory body supported by the central government.

It is further recommended that government establish a one-stop-shop (a central data gateway for all local government-related information) to deal with the problem of duplicative and contradictory reporting requirements. This one-stop shop is best based in COGTA and updated with input from the National Unit for Data Collection, a unit based in the Presidency. This is not a new proposal, and it has recently been made by the Western Cape Department of Local Government, with collaborative input from all other line departments within the province. It is suggested that a similar initiative be adopted nationwide. The experience with the Municipal Standard Chart of Accounts (MSCOA) system requires national and provincial governments to actively invest in data collection technology, training and the creation of a single basic data template.

Finally, a proposal is made that a specialised clearinghouse (National Regulatory Unit) should be established in the Presidency to avoid or minimise the promulgation of rules that either overlap with one another or contradict each other. This clearinghouse should be the conduit through which all legislation that affects municipalities must pass. Although suggested in a previous study, there is no such clearinghouse.

8.6 Contribution of the South African case study: Theory and practice

This study contributes novel perspectives to the global body of literature on regulatory governance and local government. It achieves this on multiple fronts. First and foremost, the South African case study is one of the few where the impact of laws imposed on local government in a multilevel federal context has been explored. This study is unique, as South Africa is hybrid federal system that gives local government a measure of autonomy. It shows that despite this level of constitutional autonomy, municipalities in South Africa are not exempt from the phenomena of over-regulation.

Undoubtedly, the numerous regulatory pathologies that have been reported in the literature (including those encountered in Australia) are corroborated by the South African experience. Specifically, the study demonstrates that the accumulation of rules has led to an excessively regulated landscape in which municipalities struggle to adhere to the cumulative weight of laws. Notably, the cumulative weight has escalated as a result of both hard law (Acts of Parliament or regulations) and regulatory creep (through soft law documents, such as circulars). These circulars are not only adding to an already dense regulatory environment, but also creating confusion, a pathology not yet fully explored in the literature. The South African case study exemplifies the new regulatory pathologies and their consequences (including reporting fatigue). This refers to the futility of regulations that require reports and information without providing feedback (thus removing any incentive to report). The research also sheds new light on the one-size-fits-all pathology of uniformity. Here it finds that this has the additional effect of preventing under-resourced municipalities from hiring highly qualified candidates due to the uniform enforcement of salary caps.

Overall, in comparison to the local government system in Australia, the South African case study demonstrates that the pathologies encountered by South African municipalities are not exclusive to their jurisdiction but are now emerging as a global phenomenon as well. This underscores the necessity for additional research to be conducted in other jurisdictions.

As a second contribution, the South African experience offers insights and lessons on why certain regulatory reform initiatives fail. It demonstrates, for instance, that reform initiatives are prone to failure if:

- there is no shared understanding of the problem or solution to the problem;
- elected officials do not make these initiatives a priority and provide the necessary funding and resources for their execution;

- there is no dedicated regulatory unit tasked with overseeing these reforms;
- there is resistance to change from stakeholders who benefit from the existing system;
- there is a lack of participation from those impacted by reform efforts;
- Parliament neglects its responsibility to scrutinise regulations passed by the executive; and
- there is no *ex-post* review of laws to ensure the upkeep and maintenance of the existing legal framework, such as that which is applicable to local government.

Ultimately, the failure of the reform efforts in South Africa demonstrates that significant political backing, a robust and well-funded oversight body, and explicit guidelines need to be allocated to reform efforts for there to be any chance of real-world progress in the reform of local government. Addressing these challenges requires a collective effort from policy-makers, government agencies, courts, stakeholders, and municipalities. It involves building a solid understanding of the issues, growing political will, allocating appropriate resources, and fostering a culture of collaboration. The South African experience provides critical lessons to other countries that are contemplating embarking on reform efforts that are analogous to those discussed here.

Thirdly, while the scholarship does not focus on the role of courts in safeguarding local government from regulatory pathologies, the South African context demonstrates a distinct, albeit restricted, function for the courts in this regard. It shows and argues that courts can play a more instructive role in managing the pathologies if a much more rigorous interpretation of section 151(4) of the Constitution is adopted. The argument is that although South African courts have historically had the authority to interpret mandatory requirements' 'musts' as discretionary 'mays' to provide greater implementation flexibility, they are capable of accomplishing much more when confronted with regulations impacting municipalities negatively. In the process of regulating local government, courts may probe whether national and provincial governments have implemented measures to prevent the compromise and obstruction of municipalities' functions and exercise of their powers. By virtue of its inclusion in the South African Constitution, this protection places regulators under a constructive duty to contemplate the ramifications of their regulatory conduct for local governance. Beyond the South African Constitution, there is no other constitution that incorporates a provision which is designed to safeguard the autonomy of local governments against regulatory abuse to the same degree.

However, South Africa serves as an illustration that relying predominantly on courts to address regulatory pathologies is not a viable long-term strategy. To overcome regulatory pathologies, municipalities should undertake proactive and preventative methods and utilise courts only as a supplement to other preventative measures. The case studies of South Africa and Australia provide clear evidence that addressing these pathologies requires more than simply constitutional protection. Dealing with this problem effectively depends greatly on political will, the capacity of policy-makers, resources and dedicated institutions created to promote and

enforce the goal of effective and efficient regulation. Until now, this has been lacking in South Africa.

Finally, the model developed, and the recommendations made, in this study validate and promote the principles of Better Regulation, particularly those put forth by the OECD. It expands upon pre-existing models, which are sometimes overly generic and unsuitable for situations involving local government as the regulated institution. Furthermore, the study supports the over-regulation theories put forth by Beck, Haines, Windholz, Richardson, Manning, and Niskanen. It further deduces that the over-regulation of local governments in South Africa can be attributed to a lack of trust in the higher echelons of government regarding local affairs. This phenomenon exemplifies the abundance of prescriptive and command-and-control rules. The cumulative burden of rules is likely to increase further given the South African government's fixation on legislation as a panacea for all the governance challenges that municipalities encounter. This has been amplified by the fact that the government does not target municipalities when addressing identified problems; instead, it opts for legislation with broad applicability, which forces well-performing municipalities to comply with regulations that are irrelevant to them. The phenomenon of silo law-making, wherein departments compete for regulatory control over particular facets of local governance (such as human resource management), has additionally led to the development of regulations that are, at times, either redundant or in conflict with each other.

Much of the study's recommendations are designed to tackle these underlying causes. Indeed, although created for South Africa and in the absence of a universally applicable framework, the regulatory scrutiny model proposed by the study serves as an initial stride towards constructing a manual for legislators to follow when regulating local government.

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INTERVIEWS

Anton Groenewald, Municipal Manager of Midvaal Municipality, held via Zoom on 3 February 2022.

Stephen Berrisford, a consultant who worked on establishing RIA in South Africa, via Zoom on 7 February 2022.

Jaap De Visser of the Dullah Omar Institute (and current Committee member forming part of the South African Law Reform Commission, Project 146), held via Zoom on 28 February 2022.

Dawid Joubert, Principal Legal Advisor at the City of Cape Town, held via Zoom on 11 April 2022.

Kossie Haarhoff of George Local Municipality, held via Zoom on 22 April 2022.

Matsie James of South African Local Government Association (SALGA) held via Zoom on 19 April.

Seraj Johaar, section 56 manager at Drakenstein Municipality, held via Microsoft Teams on 20 April 2022.

Johann Mettler, the appointed administrator of Lekwa Local Municipality and current City Manager at Tshwane Metropolitan Municipality, held via Zoom on 22 April 2022.

Nico Steytler, the Project Head of the South African Law Reform Commission, Project 146, held via Zoom on 4 May 2022.

Jonathan Klaaren, a consultant who worked on establishing RIA in South Africa, held via Zoom on 4 May 2022.

Neva Makgetla, a consultant who established the SEIAS system in South Africa, held via Zoom on 17 May 2022.

Ayesha Johaar, acting chief state law advisor, held via Zoom on 28 April 2022.

Hugh Corder, a consultant who previously advised Parliament on establishing a Scrutiny framework for delegated legislation within Parliament, held via Zoom on 3 June 2022.

Mike Sutcliffe, former Municipal Manager of the City of eThekweni Metropolitan Municipality, held via Zoom on 20 June 2022.

Graham Paulse, the Head of Local Government in the Western Cape, held via Microsoft Teams on 5 May 2023.