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DECLARATION

I, Mukapa Tembo, do hereby declare that ‘The decentralisation of powers and functions to local government under the 2016 Constitution of Zambia’ is my original work and I have properly acknowledged all the sources which I have used by means of references. I further testify that it has not been submitted for another degree or to any other institution of higher learning.

Signed.....

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Date.....



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Dedication

This work is dedicated to my parents. I love you mum and dad!



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Abbreviation and acronyms

AU-African Union

MINISTER-Minister responsible for local government

MMD- Movement for Multi-Party Democracy

UNIP- United National Independence Party



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Chapter 1: Introduction

1.1 Background

At independence in 1964, the United National Independence Party (UNIP)-led government in Zambia was, among other things, confronted with the challenge of transforming an inherited dual, undemocratic, racist and exploitative system of local government. Local government was a creature of national legislation, and thus did not have direct constitutional authority.¹ Between 1964 and 1995, the government adopted several reforms aimed at democratising and improving the efficiency, effectiveness and responsiveness of the system of local government. However, local government remained a creature of national legislation. In 1996, local government was for the first time recognised in the Constitution as a tier of government.² Article 109 of the 1996 Constitution of Zambia required the establishment of a system of local government whose details were to be prescribed by an Act of Parliament. The provision further provided that such a system shall be based on democratically-elected councils. Thus, the 1996 Constitution transformed local government from being a mere creature of central government into a tier of government.³ While the institutional integrity of local government in Zambia was enhanced, service delivery by local authorities remained poor.

In 2016, Zambia adopted a new Constitution⁴ which, among other matters, provides for a decentralised system of government. Article 147 provides that government is constituted by the national, provincial and local tiers of government. The local tier of government is composed by city, municipal and township councils.⁵ The Constitution assigns to these local authorities the responsibility to promote democratic and accountable governance; ensure that services are provided in an equitable and sustainable manner; promote social and economic development; promote a clean, safe and healthy environment; and encourage the involvement of communities and community organisations in local affairs.⁶ This is against the background that the local government system is often characterised by, poor service delivery, democratic

¹ Chikulo B. 'Local Governance Reforms in Zambia: A Review' (2009)(98)(2) *Commonwealth Journal of Local Governance* 98-106.

² Constitution of the Republic of Zambia, Amendment, No 18 of 1996 (hereafter referred to as the Constitution of Zambia, 1996).

³ Sakala J. 'Local Government System: Structure and Practice' in Chitembo A. (ed) *50 years of local government in Zambia* (2014) 10.

⁴ Constitution of the Republic of Zambia, Amendment, No 2 of 2016 (hereafter referred to as the Constitution of Zambia, 2016).

⁵ Article 266.

⁶ Article 151(2).

deficiencies and a lack of responsiveness. Article 152(2) of the Constitution prohibits the national and provincial governments from interfering with or compromising the right of these local authorities to govern. Article 151(1)(j) further provides that every local authority has the right to manage its affairs. Thus the Constitution seems to guarantee a certain measure of local autonomy.

Unlike the 1996 Constitution, the 2016 Constitution does not only end in recognising the institution of local government, but goes further to explicitly enumerate the powers and functions of local authorities. Article 147(2) of the Constitution stipulates that the local government has exclusive competence over functions listed in Annexure C of the Constitution. The Annexure lists functions such as local roads, health, water supply, land use planning and sanitation. The central government can also assign additional functions to local authorities.⁷

There is no doubt that the enumeration of local powers and functions has strengthened the system of local government in Zambia to achieve the demanding objectives of local government, highlighted above. The ability of local authorities to realise these objectives does not solely rely on the constitutional protection of local powers and functions. It also depends on the nature of the decentralised powers and functions and the extent to which they are clearly demarcated. The extent to which local authorities can make final decisions over these functional areas is equally important. The ability of local government to deliver on their demanding obligations is significantly diminished in the absence of a proper assignment of powers and functions to the local level. Thus it is important to establish if the manner in which the 2016 Constitution assigns powers and functions to local government, and the nature of these powers and functions, enables local authorities to deliver on their constitutional obligations relating to service delivery, development and democracy. What matters at the end of the day is, among other things, that safe drinking water, street lighting, housing, sanitation and refuse removal services are provided, which local authorities are failing to do.

⁷ Constitution of Zambia, 2016

1.2. Significance of the Problem

The decentralisation of powers and functions to local government partially shapes how local authorities perform in relation to service delivery, development and democracy. Thus, the manner in which the 2016 Constitution of Zambia allocates powers and functions to local government is significant. If the constitutional framework for the allocation of powers and functions to local government is effective and adhered to, then local governments will have greater potential to meet their service delivery mandate and development obligations. However, if the Constitution provides a weak framework for the decentralisation of powers and functions, then poor service delivery and a lack of political accountability, among other challenges experienced under the previous constitutional order, will likely continue. Citizens often fail to access public and social services whenever they require them as service delivery by local authorities is erratic at best.⁸ There is no doubt that the nature of decentralised powers and functions has a bearing on the ability of local authorities to deliver on their obligations. Thus, the problem being investigated in this paper is significant and deserves interrogation which is yet to be undertaken in academic scholarship.

1.3 Research Question

As highlighted above, the manner in which powers and functions are allocated to local government is significant for the potential of decentralisation to be realised. The nature of the decentralised powers and functions, among other things, is equally significant. The question is whether the 2016 Constitution of Zambia allocates powers and functions to local authorities in manner which enable these lower governments to deliver on their constitutional responsibilities of providing public services, deepening democracy and promoting development?' In particular, does the Constitution allocate original, relevant, clearly demarcated, and differentiated powers and functions to local authorities. The extent at which the Constitution allocates final decision making powers to local authorities over their areas of competence is equally important.

1.4 Argument for the Research Question

This research paper argues that the 2016 Constitution of Zambia provides the necessary foundation for the establishment of an effective system of local government that positions local authorities at the centre of service delivery, democracy and development. The

⁸ United Nations Human Settlements Programme (UN-HABITAT), *Zambia: Lusaka urban sector profile* (2007) 15.

Constitution allocates original and relevant powers and functions to local government. Further, it arguably equips local authorities with final decision making powers which are necessary for effective local governance. However, perhaps the main weakness of the Constitution is that it fails to clearly demarcate and differentiate local powers and functions. This may constrain an effective role of local government. There are a number of countries on the continent which have provided for a much stronger constitutional basis for the allocation of powers and functions to local government in many respects. It will be suggested that lessons should be borrowed from these countries to improve the system of local government in Zambia by, among other things, reforming the relevant pieces of legislation governing local government.

1.5 Literature Review

Decentralisation is generally defined as the transfer of power, responsibilities, capacities and resources from national to sub-national entities of government with the aim of strengthening the ability of the latter to both foster people's participation and delivery of quality services.⁹ In practical terms, decentralisation is a process of striking a balance between the claims of the periphery and the demands of the centre.¹⁰ An effective decentralised system of government is a system that is fine-tuned to satisfy local needs and is concerned with improving the well-being of the citizens that live in the relevant communities.¹¹ Accordingly, local governments should be able to deliver public services, as well as promote social and economic development in their respective jurisdictions.¹²

The assignment of powers and functions to local governments, however, vary from country to country. De Visser argues that irrespective of context, local governments should be given full, exclusive and relevant powers and functions to enhance their role in improving the livelihoods of the people in their respective communities.¹³ In support, Litvack argues that the Constitution should be used to enshrine the broad principles on which decentralisation is to operate, including the rights and responsibilities of all levels of government, the description and role of key institutions at central and local levels, and the basis on which

⁹ Article 1 African Charter on the Values and Principles of Decentralisation, Local Governance and Local development, 2014, AU Executive Council Decision EX.CL./Dec.677(XX)(2014). (hereafter referred to as African Charter on Decentralisation).

¹⁰ United Nations 2009: available at <http://www.unpan.org:80/Directories/UNPublicAdministrationGlossary> (accessed on 30 June 2017).

¹¹ Afonso A. & Fernandes S. 'Assessing and explaining the relative efficiency of local government' (2008) 37 *The Journal of Socio-Economics* 1948.

¹² Afonso A. & Fernandes S. (2008) 37.

¹³ De Visser J. *Developmental Local Government: A Case Study of South Africa* (2005) 33.

detailed rules may be established or changed.¹⁴ Manor also states that it is crucial that decentralised units have sufficient powers to exercise substantial influence within the political system and over significant development activities.¹⁵ Thus, the international literature on decentralisation is generally in agreement that if an institutional design for local government aims to unlock the potential at local government level to genuinely stimulate development, it must afford local government sufficient and real powers.¹⁶

In as far as the allocation of powers and functions to local government is concerned, four considerations are paramount, namely: final decision-making power, relevance to the development goal, demarcation of powers, and protection of decentralised powers and functions.¹⁷ A final decision-making power entails the ability to make final decisions on local matters without undue interference from senior governments. It further implies that local powers and functions may not be undermined or limited by the central or regional government except as provided for by law.¹⁸ Local government should also be assigned functional areas which are relevant to the developmental goal. If they are given only functional areas of little or no impact on development, such as, dog-licensing or animal burial places, the developmental potential of local government is negated.¹⁹ Furthermore, the areas of governance in which local government has the final say must be clearly demarcated. The importance of clearly demarcated powers has been recognised at the African Union level. Article 5(1) of the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development stipulates that state parties shall enact domestic laws/regulations recognising different levels of government, with the mandate to exercise their competencies through clearly defined mechanisms.²⁰ This is to avoid a situation where various tiers of government are unsure of their responsibilities. If the assignment of powers and functions is unclear, it may lead to role duplication, resource wastage, trepidation or unnecessary legal wrangling. Thus, there must be a clear allocation of powers to local government,²¹ for decentralisation to succeed. Furthermore, protection of decentralised powers and functions entails that they must be significantly protected by a constitution rather than an act of parliament. When enshrined, these powers may not be altered by national

¹⁴ Litvack J. & Seddon J. 'Decentralisation briefing notes' (1998) 11.

¹⁵ Manor J. *The Political Economy of Democratic Decentralisation* (1999) 5.

¹⁶ De Visser J. (2005) 39.

¹⁷ De Visser J. (2005) 39.

¹⁸ European Charter of Local Self-Governance, 1985.

¹⁹ De Visser J. (2005) 40.

²⁰ Article 5 African Charter on the Values and Principles of Decentralisation, Local Governance and Local development, 2014.

²¹ De Visser J. (2005) 40.

legislation but only by an amendment to the Constitution itself.²² Constitutional recognition of powers, arguably, is the most critical and fundamental feature of the integrity of subnational governments. It provides the highest form of assurance to subnational governments that decentralised functions will not be arbitrarily assumed by the national government.²³

Besides the design features discussed above, a matter of concern for the future of local government systems on the African continent is the threat of recentralisation. In order for any decentralisation process to succeed, the central government must be willing to relinquish power, and have the political will to engage in a shared exercise of power and authority.²⁴

A serious difficulty, however, is the ever-present jealousy of a national government over its powers. It reluctantly gives them up in the process of decentralisation, and then expends much energy in trying to recapture them, which results in subnational governments being undermined.²⁵ In many developing countries, central government's endeavours to recentralise are aided by the fact that national legislation may have built-in provisions which allow national ministries to decree how local government should operate by means of issuing detailed and all-encompassing regulations. In effect, this allows central governments to "claw back" the powers which were previously devolved to local authorities. In addition, local authorities may be so poorly resourced or so poorly designed that a breakdown is inevitable. These, and a host of other similar factors, can lead to a *de facto* "recentralisation" process.²⁶ Nonetheless, the good intentions of decentralisation are acknowledged by most, but whether such intentions can actually be realised in the harsh realities of the day, especially in developing countries is another question.²⁷

It must be noted that much of the development community continues to push with great enthusiasm for greater decentralisation.²⁸ But despite the prevalence of decentralisation in recent years, there is a degree of scepticism about whether the vaunted benefits of decentralisation have been or will be realised particularly because of the evident weaknesses

²² Steytler N. & De Visser J. 'Local government' in Woolman S, Bishop M. & Brickwell J. (eds) *Constitutional Law of South Africa Vol 2, 2nd ed*, (2011) 22-47.

²³ De Visser J. (2005) 79.

²⁴ Kauzya J. 'Political Decentralisation in Africa: Experiences of Uganda, Ruanda, and South Africa' (2007) 6.

²⁵ Manor J. (1999)8.

²⁶ Wunsch J. 'Decentralisation, Local Governance and Recentralisation in Africa' (2001) (21) *Public Administration and Development* 277-288.

²⁷ Heller P. *The Labor of Development: Workers and the Transformation of Capitalism in Kerala, India* (1999)30.

²⁸ Hiskey J. 'The promise of decentralised democratic governance' in Connerly E, Eaton K & Smoke P, *Making Democracy Work: Democracy, Development and Security*(2010) 10.

of local level democratic processes in so many countries.²⁹ This is coupled by the fact that the shifting of powers from the national to local governments has proven to be difficult. Smoke explains that often this has been attempted without an appreciation of the dangers and consequences of inappropriate design and haphazard implementation and with a lack of clarity about what is entailed by decentralisation. It is also sometimes treated as an “all or nothing” phenomenon in which the role of the central government is by definition very limited.³⁰

Lolojih argues that in Zambia there are still many factors that inhibit the ability of the local councils to efficiently and effectively deliver adequate quality services.³¹ He contends that a suitable environment capable of supporting a local government system that can deliver adequate quality services has not been created. Furthermore, he states that there are many aspects of the National Decentralisation Policy of Zambia capable of positively turning around the operations of local councils. The challenge is the lack of sufficient political will by successive governments to ensure that local councils are sufficiently free from political interference.³² In support Chikulo argues that the officially stated Decentralisation Policy has been one of taking power to the people and strengthening local authorities by the decentralisation of power.³³ Both Lolojih and Chikulo do not provide a comprehensive analysis of the manner in which powers and functions are allocated to local government. Moreover, their analysis focused on the previous constitutional order. This paper intends to provide a comprehensive and contemporary analysis of the manner in which the 2016 Constitution allocates powers and functions to local government. In particular, it seeks to establish if the decentralised powers and functions enable local authorities to deliver on their constitutional obligations linked to service delivery, democracy and development.

1.6 Substantiating the Argument

This study is divided into five chapters. Chapter One provides the background, significance of the problem, research question, argument, literature review and the methodology that is going to be used. Chapter Two will be a theoretical discussion of the assignment of powers

²⁹ Siddle A. & Koelble T. *The Failure of Decentralisation in South African Local Government* (2012) 35.

³⁰ Smoke P. ‘Decentralisation in Africa: goals, dimensions, myths and challenges’ (2003) (23)(1) *Public Administration and Development* 7-16.

³¹ Lolojih P. ‘Local Government and Service Delivery’ in Chitembo A. (ed) *50 years of local government in Zambia* (2014)177.

³² Lolojih P. (2014) 177.

³³ Chikulo B. (2009) 98-106.

and functions to local government. Reference is made to international literature on decentralisation and international ‘best’ practice on local government. The chapter also borrows from international and regional instruments which have provided model frameworks for local government systems such as the European Charter of Local Self-Governance and the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development. The reason for such an enquiry is to develop a set of design features on the basis of which this paper will evaluate the 2016 Zambian Constitution.

Chapter Three provides a discussion of the legal framework relating to powers and functions of local government and how it has been implemented in practice. Chapter Four examines the framework for the allocation of powers and functions to local government under the 2016 Constitution. The analysis is carried against Chapter Two as well as lessons from other jurisdictions which have shaped the constitutional reform process in Zambia, such as Zimbabwe and South Africa. Chapter Five will provide major conclusions as well as recommendations.

1.7 Research Methodology

This is a desktop study which will analyse primary sources of data namely: the 2016 Constitution of Zambia, the 1996 Constitution of Zambia, local government legislation, and decentralisation policies. The research will also make use of secondary sources of data such as journal articles, chapters in books and books relating to decentralisation. Case law will also be referred to so as to show how the courts have interpreted provisions on decentralisation in Zambia and other countries. The research paper will also adopt a thematic comparison research methodology where certain themes linked to decentralisation, rather than jurisdictions, are compared in order to borrow lessons from other countries with similar systems of government.

Chapter 2: A Theoretical Framework for the Decentralisation of Powers and Functions to Local Government

2.1 Introduction

Decentralisation is often associated with a number of benefits linked to improved service delivery and development, among others. International literature suggests that if local government are to realise these benefits there is a need for an appropriate assignment of powers and functions to this lowest tier of government. The question is what does an appropriate assignment entail? This Chapter surveys the international literature, international instruments and best practices on local government and decentralisation in order to identify the nature of powers and functions which are likely to enhance the role of local government. The Chapter is divided into two parts. The first part defines decentralisation and its three forms before exploring its benefits and potential threats. The second part proposes an institutional design for the assignment of powers and functions to local government. The purpose of the proposed institutional design is to provide the yardstick for measuring the manner in which the 2016 Constitution of Zambia assigns powers to local government. It is also to provide a basis for assessing the assignment of powers and functions of local government before the adoption of this new Constitution.

2.2 The Potential of Decentralisation

2.2.1 Defining Decentralisation.

Decentralisation is generally defined as the transfer of power, responsibilities, capacities and resources from national to subnational entities of government with the aim of strengthening the ability of the latter to both foster people's participation and delivery of quality services.³⁴ Diffusion of governmental powers and resources usually involves administrative, political and fiscal instruments.

Administrative decentralisation is defined as a process whereby the authority to administer and execute powers and functions is transferred from national to subnational governments.³⁵ On the other hand, fiscal decentralisation is defined as the process of transferring revenues and also the power to raise revenues from local sources, from national to subnational

³⁴ Article 1 African Charter on Decentralisation.

³⁵ Siddle A. & Koelble K. 'Local government in South Africa: Can the objectives of the developmental state be achieved through the current model of decentralised governance?' (2016) 5.

governments.³⁶ While political decentralisation is defined as the process whereby sub-national governments, elected by local participants, are established within a constitutional or legislative framework and granted political power and authority to govern over particular geographical areas by central government.³⁷

There are three broad forms of decentralisation that involves the vertical transfer of governmental powers, namely: deconcentration, delegation and devolution. Deconcentration occurs when a central government disperses responsibility for a policy to its local offices but retains authority over the local office and exercises that authority through the hierarchical channels of the central bureaucracy.³⁸ Accountability of the deconcentrated offices remains with the national government. Delegation involves the transfer of policy responsibility from the national government to local governments or semi-autonomous organisations, which are not controlled by the central government but remain accountable to it.³⁹ The central government reserves control over key aspects of policy. The distinguishing feature of delegation is that central government must exercise its control through the contractual relationship that enforces accountability on the part of local government and semi-autonomous institutions. Devolution is the process of transferring power, functions, responsibilities and resources to legally constituted and democratically-elected local governments,⁴⁰ which have jurisdiction over clear and legally-recognized geographical boundaries.⁴¹

2.2.2 The Benefits of Decentralisation

In recent years there has been an overwhelming move towards the decentralisation of powers, functions and resources to local and regional governments across the world. Decentralisation has brought sub-national government to the forefront of politics.⁴² Some good examples for such efforts in Africa of allocating powers and functions to local government are Uganda in 1995, South Africa in 1996, Zimbabwe in 2013 and Zambia in 2016. In fact, a recent survey

³⁶ Smoke P. Fiscal Decentralization in Developing Countries Democracy, Governance and Human Rights Programme Paper Number 2 February 2001 United Nations Research Institute for Social Development.

³⁷ Siddle A. & Koelble K. (2006) 5.

³⁸ Schneider A. 'Who Gets What from Whom? The Impact of Decentralisation on Tax Capacity and Social Spending,' *Commonwealth and Comparative Politics* (2006) 44(3), 344-369.

³⁹ Kauzya J M. (2007), *Political Decentralization in Africa: Experiences of Uganda, Ruanda, and South Africa*, United Nations Discussion Paper.

⁴⁰ Kauzya J M. (2007), *Political Decentralization in Africa: Experiences of Uganda, Ruanda, and South Africa*, United Nations Discussion Paper.

⁴¹ Litvack J. & Seddon J. 'Decentralisation briefing notes'(1998) 3.

⁴² Falleti T. 'A Sequential Theory of Decentralization: *Latin American Cases in Comparative Perspective*' *American Political Science Review* (2005)99(3), 327-346.

suggests that since 1980 about 95% of all countries have conferred powers and responsibilities to subnational units with varying degrees of political, administrative and fiscal competences.⁴³ International literature indicates that the potential of decentralisation to deepen democracy, improve service delivery, realise development and promote peace, among other things, has made it more attractive throughout the world.⁴⁴ In this section, the chapter briefly discusses these main benefits of decentralisation.

2.2.2.1 Decentralising for Democracy

Decentralisation can deepen democracy through improved local accountability and responsiveness of government to a broad range of citizens' needs and effectiveness.⁴⁵ Political officials make decisions locally as demanded by the citizen.⁴⁶ This is because decentralisation reduces the power of national governments and brings decisions closer to the populace. It therefore becomes easier for ordinary citizens to identify with local and state/regional governments than with central governments located further away. Focus on lower levels of government offered not only more opportunities for participation but more accountable and responsive governments too. Consequently local and state/regional government elections have gained prominence and attention. Thus when communities' demands are not met these governments are accountable to the citizens within subnational jurisdictions.⁴⁷ Accountability and citizen participation can be through election, referenda, and open governmental processes and procedures. Pressure is mounted on the leadership to account for decisions during, for example, town hall meetings, council hearings and committees where information is provided.⁴⁸ Decentralisation is said to provide better information flows and effectiveness at the local level than at the national level, due to proximity between principals and agents.⁴⁹

⁴³ Schrottshammer E. & Kievelitz U. *Decentralization: A Guideline* (2006) 5.

⁴⁴ Smoke P 'Decentralisation in Africa: goals, dimensions, myths and challenges' *Public Administration and Development* (2003)9.

⁴⁵ Roberts K M. 'Deepening Democracy?' *The Modern Left and Social Movements in Chile and Peru* Stanford, (1998)2 CA: Stanford University Press.

⁴⁶ Smoke P (2003) 9.

⁴⁷ Brinkerhoff DW. & Afzar O. 'Decentralization and Community Empowerment' in Connerly E, Eaton K. & Smoke P. *Making Democracy Work: Democracy, Development and Security* (2010) 12.

⁴⁸ World Bank *World Development Report 2004: Making Services Work for the Poor* (2004)50 Washington, DC: World Bank.

⁴⁹ Brinkerhoff DW. & Afzar O. (2010) 15.

2.2.2.2 Decentralising for Peace

In many developing countries, decentralisation is replacing centralisation which was pursued in the past with such vigour as a nation-building strategy.⁵⁰ Decentralisation has the potential to deflate national level inter-group conflict for power, resources and control, particularly in nations with diverse ethno-religious groups which are regionally concentrated. It offers opportunities for peace in situations where power-sharing can mitigate severe ethnic, religious, and territorial intrastate conflicts.⁵¹ For example, in a system of winner-takes-it-all during elections, it makes it possible for certain regions to be administered autonomously by the opposition or an ethnic group even when they have lost the national elections. Hence, peace is maintained. For all these reasons development partners at local, national, regional, and international levels, including intergovernmental bodies such as the United Nations Agencies, are engaged in efforts at promoting decentralised governance in many countries.⁵²

2.2.2.3 Decentralising for Development

As observed above decentralisation brings government closer to the people. By bringing decision-making closer to the people, decentralisation makes it easier for citizens to voice their demands to government, as well as to better monitor the performance of the responsible politicians or bureaucrats. The better information flows at the local level due to proximity between principals and agents, the easier the identification of the community's needs and preferences. In this sense, local governments will have a higher chance of better matching the delivery of public services to the needs and preferences of their respective communities. Productive and allocative efficiency benefits around the manufacturing and distribution of public services are expected to arise from such a decentralised arrangement. On the other hand, a centralised system may not take into account the conditions under which public services are supplied satisfactorily. It may for instance provide uniform services across all areas irrespective of the needs and preferences of the respective communities.⁵³ In contrast to a centralised system, different demands could be better taken into account in the supply of public goods in a decentralised system, which promotes allocative efficiency.

⁵⁰ United Nations Department of Economic and Social Affairs *Decentralized Governance for Democracy, Peace, Development and Effective Service Delivery* available at <https://publicadministration.un.org/.../2005%20Decentralized%20Governance%20for> (accessed on 4 September 2017).

⁵¹ Abrahamsen R. 'Conflict and Security in Africa' available at <https://books.google.co.za/books?isbn=1847010784> (accessed on 20 November 2017)

⁵² Heijke M. & Van den Berg D. 'Dynamics between decentralisation and peace building' available at www.kpsrl.org/browse/.../dynamics-between-decentralisation-and-peace-building (accessed on 19 October 2017).

⁵³ Heald D. *Public Expenditure* (1993)236.

Decentralisation can contribute to development in various ways. When allocated with appropriate powers and functions as well as resources, local governments are expected to contribute to local economic development by providing services that serve as production and distribution inputs for local firms and entrepreneurs.⁵⁴ Local governments can also help to coordinate key local public, private and community actors in creating partnerships that promote development.⁵⁵ Decentralisation can also contribute to development by improving the delivery of public service through shorter short mechanisms that hold public officials accountable.⁵⁶

2.2.3 The Risks of Decentralisation

It is not in all circumstances that decentralisation programmes have reaped the intended benefits. In some cases, decentralisation has undermined democracy and development (among other benefits) which it is usually associated with. In this section, the chapter briefly discusses the potential weaknesses of decentralisation. Prud'homme identifies capacity constraints, corruption and the threat to macroeconomic stability, as some of the key risks associated with decentralisation.⁵⁷ These risks are discussed in detail below.

2.2.3.1 Capacity Constraints

Carrying out decentralised responsibility requires significant capacity, which most local governments in Africa lack, especially poor/low category local authorities. What is required are a wider range of skills and experience which local politicians and bureaucrats may not necessarily have.⁵⁸ Besides skills and experiences, local authorities need appropriate management systems, accounting, budgeting, procurement, tax administration, auditing, reporting, and personnel management. The lack of the required capacities to fully carry out their responsibilities often results in local governments failing to realise the development, democracy and peace benefits usually associated with decentralisation.⁵⁹ Financial resources which are needed to train personnel, develop systems and processes, strengthen accountability, and ultimately deliver public goods and services are often unavailable and if available they are usually insufficient to meet local requirements.⁶⁰ Therefore, despite having

⁵⁴ Smoke P. (2003)9.

⁵⁵ Smoke P. (2003) 10.

⁵⁶ World Bank *World Development Report 2004: Making Services Work for the Poor* (2004) 14.

⁵⁷ Prud'homme R. 'The Dangers of Decentralization' (1995)(10)2 *The World Bank Research Observer* Published by: Oxford University Press 201-220

⁵⁸ Campos J. & Hellman J. 'Governance Gone Local: Does Decentralization Improve accountability?' in *East Asia Decentralizes: Making Local Government* (2005) 237-252.

⁵⁹ Campos J. & Hellman J. (2005) 237-252.

⁶⁰ Campos J. & Hellman J. (2005) 237-252.

powers and functions, the lack of adequate capacity and human technical and financial resources, negates the developmental potential of local government, particularly in Africa.

2.2.3.2 Corruption

Decentralisation of powers and functions to local government may open the door for corruption. Corruption is hard to assess and measure, but there are several reasons why it is likely to be more prevalent at the local than at the national level.⁶¹ For one, there are probably more opportunities for corruption at the local level. Local politicians and bureaucrats are likely to be subject to pressing demands from local interest groups (whose money and votes count) more often in matters such as taxation or authorizations.⁶² In addition, local officials usually have more discretion than national decision-makers and careers are spent in the same function and/or geographical location.⁶³ At the same time, there are fewer obstacles to corruption at the local level. Monitoring, auditing and pressure of the media, in as much as it exists, would also be a greater disincentive at the national than at the local level.⁶⁴ All these conditions create a favourable environment for corruption at the local level.⁶⁵ Where corruption is prevalent it breeds clientelism which tends to undermine efficient and effective delivery of public services.⁶⁶

2.2.3.3 Threat to Macroeconomic Stability

International literature suggests that poorly planned fiscal decentralisation can promote irresponsible fiscal behaviour by local government.⁶⁷ The fact is with fiscal decentralization, subnational governments are granted more power in determining the level of their expenditure as well as in raising their revenues, resulting in the multiplicity of political and budget centres. This in turn will make the fiscal management system become more complicated, especially the oversight system, which is crucial for instilling efficient budget management.⁶⁸ Furthermore, there is also the problem of soft budget constraint that underlies the tendency of fiscal profligacy among subnational governments.⁶⁹ The increase in autonomy accorded to lower level governments may increase the incentives for opportunistic behaviour among them. Local governments may try to shift their expenditure burdens onto

⁶¹ Prud'homme R. (1995) 211.

⁶² Prud'homme R. (1995) 211.

⁶³ Prud'homme R. (1995) 211.

⁶⁴ Prud'homme R. (1995) 211.

⁶⁵ Prud'homme R. (1995) 212.

⁶⁶ Campos J. & Hellman J. (2005) 237-252.

⁶⁷ Smoke P. 'Fiscal Decentralization in Developing Countries' available at <https://www.files.ethz.ch/isn/45958/2.pdf> (accessed on 20 November 2017)

⁶⁸ Prud'homme R. (1995)206.

⁶⁹ Prud'homme R. (1995)207.

the nation as a whole when they overspend. When a national government bails out local government from such expenditure crisis, the coordination of national fiscal and monetary policies as adjustment tools is complicated, posing a challenge to national economic stability.⁷⁰ The experiences of four Latin American countries underline the necessity of careful macroeconomic fiscal management. The transfer and expansion of local government expenditure in Argentina, Brazil, Columbia and Mexico, amidst fiscal decentralisation, made it more difficult for the central governments to control government budget deficits and stabilize inflation during the Latin American economic crisis of 1994-1995.⁷¹ Thus, a poorly crafted fiscal decentralisation policy may prevent macroeconomic stability which is necessary for the realisation of development.

2.3 Institutional Design for the Allocation of Powers and Functions to Local Government

The previous section defined decentralisation and examined its potential benefits and weaknesses. While decentralisation has the potential to promote development, democracy and peace, international literature suggests that it is not just any decentralisation programme that can realise these goals. Only appropriately designed decentralisation programmes, that among other things decentralise powers and functions in the appropriate manner, can realise these objectives. In this section, the chapter proposes an institutional design for the decentralisation of powers and functions that enhances the role of local government. In general, international literature and instruments on decentralisation and best practice on local government suggests that local governments require original, relevant, clearly demarcated and final decision-making powers. In addition, the assignment of such powers and functions should be differentiated so as to take into account local differences. These principles are discussed in detail below.

2.3.1 Original Powers

Decentralisation denotes the sharing of governmental powers between national and subnational governments. Central governments must have the political will to share power.⁷² A serious hindrance, however, is that most national governments are unwilling to share

⁷⁰ Prud'homme R. (1995)207.

⁷¹ Dillinger W. & Perry G. *Macroeconomic Management in Decentralized Democracies The Quest for Hard Budget Constraints in Latin America. In Development in Latin America and the Caribbean: Decentralization and Accountability of the Public Sector (1999)*58.

⁷² Kauzya J M. (2007), *Political Decentralization in Africa: Experiences of Uganda, Ruanda, and South Africa*, United Nations Discussion Paper.

power. In some cases, responsibilities are devolved but at the same time the national government tries to interfere in the affairs of local government.⁷³ In other cases decentralised responsibilities are recentralised arbitrarily. It is against this background that it may be imperative that local government powers and functions are protected by enshrining them in the Constitution. Such constitutional recognition makes the powers and functions to local government original as they are assigned to local government directly by the Constitution. Constitutional protection makes it difficult for central government to reverse local government powers arbitrarily, especially if a Constitution has a cumbersome procedure in amending it.⁷⁴ It gives the necessary assurance to local government that its powers and functions have been decentralised on a permanent or semi-permanent basis. Thus, sub-national governments can concentrate on delivering on their constitutional and legislative obligations without any threat of recentralisation of powers and functions.

2.3.2 Relevant Powers

The African Union (AU) Charter on Decentralisation requires member states to assign relevant powers and functions to local authorities. Relevant powers are those that can meaningfully bring or promote change and improve the livelihood and environment of local communities.⁷⁵ These powers and functions include: local economic development, land use planning and management, public safety, public health, social protection, education, environmental protection, water supply, electricity, waste management and local tourism.⁷⁶ A good example is Uganda where each district performs autonomous competencies in education and social welfare, energy supply, roads, local planning, and local taxation.⁷⁷ Local governments with relevant powers are able to deliver the needs and preferences of their respective communities because the powers and functions directly affect the people.

According to the principle of subsidiarity, public responsibilities should be exercised by those elected authorities who are closest to the citizens,⁷⁸ unless it cannot be effectively done at that level. If this principle is followed when sharing responsibilities among tiers of government, local government is likely to be assigned powers and functions such as water supply, electricity, waste management and local tourism. National government is likely to be

⁷³ Manor J. (1999) 30.

⁷⁴ Steytler N. & De Visser J. *Local government law of South Africa* (2016)5-5.

⁷⁵ Article 8 African Charter on Decentralisation.

⁷⁶ World Bank *Local Government Discretion and Accountability: Application of a Local Governance Framework* (2009) 12.

⁷⁷ Shah A. & Shah S. (2006) 28.

⁷⁸ Article B 1 (1) United Nations International Guidelines on Decentralisation and the Strengthening of Local Authorities, 2007 (hereafter UN International Guidelines on Decentralisation).

assigned powers and functions such as national security as they cannot be effectively exercised at local level. Regional governments can be assigned functions such as provincial planning. Without relevant powers and functions, local authorities cannot achieve its developmental potential and improve service delivery. Therefore, decentralised powers and functions must directly affect people's livelihood for local authorities to live up to their developmental potential.⁷⁹

2.3.3 Clearly Demarcated Powers

Article 5(1) of the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development stipulates that state parties shall enact domestic laws/regulations recognising different levels of government with the mandate to exercise their competences through clearly defined mechanisms.⁸⁰ In essence, what would be the purpose of assigning powers and functions that are not clearly defined? One of the core mainstream decentralisation principles is the need for a clear assignment of powers and functions of/for/from government.⁸¹ Local authorities require clear responsibilities and functions.⁸² There is a need for clarity regarding the levels of authority distributed amongst the relevant decentralised spheres of government.⁸³ Local governments have a clear mandate to provide services. A clear demarcation of powers and functions minimizes overlaps and conflicts among various tiers of government.⁸⁴ It prevents a 'situation where various tiers of government are unsure of their functions resulting into role duplication, resource wastage, trepidation or unnecessary legal wrangling.' Thus, it is important that the allocation of powers and functions across tiers of government is as clear as possible.⁸⁵

2.3.4 Final Decision-Making Powers

Article 6 of the African Charter on Decentralisation stipulates that central government shall create enabling conditions for decision-making, policy and programme initiation, and for adoption and implementation to take place at lower levels of government where local governments or local authorities offer a better guarantee of pertinence and efficacy.⁸⁶ This provision entails an element of final decision-making power. Final decision-making powers

⁷⁹ De Visser J. (2005) 40.

⁸⁰ Article 5(1) of African Charter on Decentralisation.

⁸¹ Smoke P. 'Accountability and service delivery in decentralising environments: Understanding context and strategically advancing reform' (2015) 219-232.

⁸² Shah A. & Shah S. (2006) 26.

⁸³ World Bank (2009) 73.

⁸⁴ Shah A. & Shah S. (2006) 26.

⁸⁵ De Visser J. (2005) 40.

⁸⁶ Article 6(1) of African Charter on Decentralisation.

entail discretion for local government to regulate and procure goods and services that are essential for provision and to make civil service and employment decisions,⁸⁷ including revenue, budgeting and by-law decisions. Local governments require final decision-making powers on issues affecting their jurisdiction without unlawful interference from senior governments.⁸⁸ Local governments require the power to make laws and adopt policies without referring to the national government for some form of authorisation. Such authorisations undermine the institutional integrity and constrain the ability of local authorities to respond to their communities.⁸⁹ It can therefore be argued that local authorities need final decision powers if they are to have greater impact development, democracy and public service provision.

2.3.5 Differentiation

Local governments often differ due to many reasons, including colonisation, which made some regions more developed than others. This has necessitated the establishment of different local structures that preside over varying environments, from rural to urban and demographic and geographic differences. These structures often have varying fiscal and administrative capacities.⁹⁰ This institutional capacity varies considerably, making some municipalities more ready to exercise authority than others. A differentiated approach to assignment of powers and functions is therefore required, which will result in some form of asymmetric decentralisation. The main reason behind the adoption of asymmetric decentralisation is to search for an instrument which could accommodate the differences at the local level in order to pursue development, democracy and improved service delivery. Watts argues that ‘countries with a variety of cultures, languages and religions could find in asymmetry a *modus operandi* for managing them.’⁹¹ Asymmetry allows for subnational governments to enjoy a differentiated constitutional treatment in terms of the assignment of powers and functions, among other things.⁹² Differentiation may lead to each region/locality being able to articulate its own interests/perspectives, which might differ from those of the centre or other regions/localities, thus creating a plurality of interests/ perspectives.⁹³

⁸⁷ World Bank (2009) 3.

⁸⁸ European Charter of Local Self-Governance, 1985.

⁸⁹ World Bank (2009) 37.

⁹⁰ World Bank (2009) 37.

⁹¹ Watts R. ‘Comparing federal systems in the 1990s (1999)57.

⁹² Watts R. (1999)57.

⁹³ Watts R. (1999)57.

Uganda is a very good example of a country which has applied the principle of differentiation in the allocation of powers and functions. Districts are responsible for the provision of education services in primary, secondary, vocational and technical higher education and adult education, while lower councils are assigned specifically kindergarten education, by discretion of district councils.⁹⁴ South Africa also allocates different power and functions between district and local municipalities. The assignment of uniform responsibilities creates problems for local authorities with no capacity to perform them, among other challenges. An evaluation of local authorities and local environments must be carried out before any assignment of powers and functions is implemented, so that local differences are considered.

2.4 Conclusion

Decentralisation is commonly regarded as a process through which powers, functions, and resources are transferred from central to local government and/or other decentralised entities. Central to the decentralisation debate is the relationship between the various levels of government and the balance of power between those levels. If well implemented decentralisation has the potential to promote development, improve service delivery and deepen democracy. If these benefits of decentralisation are to be realised, among other things, there is a need for an appropriate assignment of powers and functions to local government. This chapter proposes that powers and functions of local government ought to be original, relevant, clearly demarcated, have final decision-making powers and be differentiated. The question is whether the 2016 Constitution of Zambia allocates original, relevant, clearly demarcated, final decision-making powers and differentiated powers and functions to local government? This question will be answered in Chapter 4.

⁹⁴Commonwealth Local Government Forum *The local government system in Uganda* available at www.clgf.org.uk/uganda (accessed on 19 October 2017).

Chapter 3: The Assignment of Powers and Functions to Local Government in Zambia: A Historical Analysis

3.1 Introduction

The previous chapter demonstrated that local governments with appropriate powers and functions, among other things, have the potential to deliver public services that meet the needs and expectations of their respective communities. This Chapter examines the assignment of powers and functions to local government in Zambia since 1889, when modern state institutions were established and 2016 when a new Constitution of Zambia was adopted. It seeks to establish whether the nature of powers and functions assigned to local government enabled this lower tier of government to realise benefits usually associated with decentralisation. The first section examines the colonial system of local government with particular focus on the Municipal Ordinance Corporation of 1927, Township Ordinance of 1928 and Native Authority Ordinance of 1929. The second section examines the assignment of powers and functions to local government in the independence era. Attention is given to the Local Government Act of 1965,⁹⁵ the Local Administration Act of 1980,⁹⁶ the Local Government Act of 1991⁹⁷ and the 1996 Constitution of Zambia.⁹⁸

3.2. Colonial Local Government

3.2.1. Early Development of Local Government under Company Rule (1889-1924)

The British government awarded a loyal charter to the British South African Company in 1889 to administer the territory north of the Zambezi River.⁹⁹ According to the British Government's Order of the Council of 1889, two administrative territories were created, namely: North Western Rhodesia whose capital was Kalomo and North Eastern Rhodesia whose capital was Fort Jameson (Chipata). The two regions were later amalgamated in 1911 into Northern Rhodesia (which is now modern day Zambia) with Livingstone as the Capital.¹⁰⁰ Communities started growing as farms and shops were established along the newly created railway line. The white population increased along the line. There were demands for some form of local government in places such as Livingstone. This led to the

⁹⁵ Local Government Act of 1965, No. 69.

⁹⁶ Local Administration Act of 1980, No. 15.

⁹⁷ Local Government Act of 1991, No. 22.

⁹⁸ Constitution of the Republic of Zambia, Amendment, No 18 of 1996 (hereafter referred to as the Constitution of the Republic of Zambia, 1996).

⁹⁹ Green A. & Howell J. 'Urban local authorities' in Tordof W. (ed) *Administration in Zambia* (1980)163.

¹⁰⁰ Ministry OF Local Government Councillors Manual (2011) 6.

creation of a village management board in 1911 whose powers and functions were to deal with environmental health, streets and buildings for Livingstone.¹⁰¹ Following the establishment of the Livingstone management board, the management boards for Lusaka and for Broken Hill (now Kabwe) in 1913 and 1915, were created respectively. This marked the development of a modern system of local government.¹⁰²

3.2.2. Powers and Functions of Local Government under British Colonial Rule (1924-1964)

3.2.2.1 Urban and Township Councils

In 1924, the British government took over the administration of Northern Rhodesia which became its colony. It was immediately confronted with the challenge of rapid land developments and community expansions which required some form of regulation by the colonial administration.¹⁰³ In 1927, the British Colonial Government enacted the Municipal Ordinance Corporation which created and regulated urban councils, which presided over the entire urban area, but only represented white interests. A year later, in 1928, the Township Ordinance was also enacted, creating and regulating township councils which administered smaller towns. The local authorities were also composed of minority white representation.¹⁰⁴ The nature of the colonial state meant, among other things, that whites lived separately from blacks and usually along the line of rail or in some other relatively urban areas.¹⁰⁵ This, in effect, meant that the delivery of public services was not a phenomenon that equitably covered the whole community in a given locality. Both pieces of legislation enumerated the powers of local authorities which included markets, parks, slaughter houses, sewage systems, refuse collection, water supplies and electricity.¹⁰⁶ Their functions extended to include maintenance of order in communities, control of firearms, garbage disposal, trespass control and the controlling of prostitution in their respective areas.¹⁰⁷ However, the powers were not enshrined in the Constitution; as a result they could be revoked or amended at any politically convenient time. It can be argued that these powers and functions were relevant because they had a developmental agenda in focus. However, local authorities had no final decision-making powers. All policies and by-laws were adopted and enacted respectively with

¹⁰¹ Green A. & Howell J. (1980)163.

¹⁰² Vosloo WB, Kotze WJ. & Jeppe WJO. Local Government in Southern Africa (1974) 271.

¹⁰³ Tordoff W. *Politics in Zambia* (1974)3.

¹⁰⁴ Vosloo WB, Kotze WJ. & Jeppe WJO.(1974)272.

¹⁰⁵ Chikulo B. (2009) 98-106.

¹⁰⁶ Green A. & Howell J. (1980) 164.

¹⁰⁷ Green A. & Howell J. (1980) 164.

consultation of the Governor who was the head of the colonial territory of Northern Rhodesia (President). Further, the powers and functions were not differentiated. Both urban and township councils were allocated similar responsibilities.¹⁰⁸ Thus, capacity matters were not considered by allocating the same powers to councils. As a result, urban areas developed more rapidly because they had more capacity in terms of human and financial resources as compared to townships.

3.2.2.2 Native Authorities

Rural areas were administered through provincial and district commissioners under the Native Authority system which involved tribal chiefs.¹⁰⁹ Provincial commissioners were in charge of provinces while district commissioners were in charge of districts. The Native Authorities Ordinance No. 32 of 1929¹¹⁰ was the legal machinery for indirect rule which empowered the colonial governor to appoint and recognise chiefs. The functions of Native Authorities were to assist government to maintain the law, order and good governance in rural areas under the guidance and control of central government. The powers and functions of Native Authorities were not really relevant for development but for control and peace. Under British colonial rule, emphasis with regard to the delivery of public services was placed on areas that were clearly occupied by whites, but not those inhabited by black people. It follows from this that different local government structures, with different powers and functions, were established for these areas. The absence of relevant powers for Native Authorities meant that they were not in a position to deliver public services that met the needs and preferences of black people.

Besides lacking relevant powers, Native Authorities had no final decision-making powers over maintenance of law, order and good governance. The provincial and district commissioners had the final decision-making powers over these issues. These Native Authorities were mere tools for local administration rather than genuine local government bodies since they were not directly elected by the citizens, among other issues.¹¹¹ They did not have the power to adopt policies and enact laws. They were just agents of central government.¹¹² Their powers and functions were more for control rather than for serving the people. Therefore, the manner and nature of the assignment of powers and functions to local

¹⁰⁸ Vosloo WB, Kotze WJ. & Jeppe WJO. (1974)271.

¹⁰⁹ Native Authority Ordinance Chapter 157 of the Laws of Northern Rhodesia.

¹¹⁰ Native Authorities Ordinance No 32 of 1929.

¹¹¹ Mukwena RM 'Situating decentralisation in Zambia in a political context' available at unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan017692.pdf. (accessed on 9 November 2017).

¹¹² Vosloo WB, Kotze WJ. & Jeppe WJO. (1974)272 .

government during the colonial period was problematic in many respects. It was no surprise that local government, particularly Native Authorities responsible for areas inhabited by black people, failed to meet the service delivery needs of the people in their respective areas, let alone their developmental aspirations.

3.2.3. Powers and Functions of Local Government under the Federation of Rhodesia and Nyasaland (1953-1963)

In 1953 Northern Rhodesia (now Zambia) joined Southern Rhodesia (now Zimbabwe) and Nyasaland (now Malawi) to form The Federation of Rhodesia and Nyasaland. Under the federation, the Federal Constitution provided for an Executive Council which was presided over by the governor. It consisted of five official members and four unofficial members.¹¹³ One of the unofficial members was a nominated member of the Legislative Council representing African interests. The other three unofficial members were elected members of the Legislative Council. All the nine members of the Executive Council held ministerial positions and were accountable to the governor and the Legislative Council for the administration of their respective government portfolios.¹¹⁴ The Legislative Council, comprised by official and unofficial members, was presided over by a speaker. The Legislative Council established the Ministry of Local Government and Social Welfare¹¹⁵ to supervise urban local government. Rural areas remained under the administration of provincial and district commissioners under the Native Authority system which involved tribal chiefs.¹¹⁶ Nothing changed during this period with regards to the assignment of powers and functions to local government. The Municipal Ordinance Corporation of 1928 and the Township Ordinance of 1929 were still in use.¹¹⁷ Local government in rural areas was still being regulated by the Native Authorities Ordinance of 1929 with the same powers and functions analysed in the previous section. This means the local government system continued being used as a tool of local administration in areas inhabited by black people. The local government system continued to marginalise black areas. As a result, councils were ineffective in meeting the service delivery needs of their respective communities.

¹¹³ Sakala J. (2014) 4.

¹¹⁴ Sakala J. (2014) 3.

¹¹⁵ Municipal Corporations Ordinance Chapter 119 of the Laws of Northern Rhodesia.

¹¹⁶ Native Authority Ordinance Chapter 157 of the Laws of Northern Rhodesia.

¹¹⁷ Green A. & Howell J. (1980) 164.

3.3 Local Government under the Independence Era

Zambia attained independence from Britain in 1965 following the disintegration of the Federation of Rhodesia and Nyasaland. Upon attainment of independence, the country was confronted by a number of challenges relating to development and an undemocratic governance system, among others. The United National Independence Party (UNIP)-led government embarked on a number of reforms aimed at democratising the system of government and promoting development, including ensuring universal access to public service irrespective of skin colour.¹¹⁸ The reforms included decentralisation of powers and functions to the local level. This chapter analyses the assignment of powers and functions to local government after independence. The question is whether the nature of the assignment enabled local government to deliver on the above-mentioned objectives. The discussion is divided into four major legal phases.

3.3.1 Powers and Functions of Local Government under the Local Government Act of 1965 (1965-1980)

At independence, the UNIP-led government inherited a dual system of local government: one for black people and the other for white people, as discussed above. There was also the central government field administration, which operated alongside elected local government in some areas. The ministry responsible for local government was established, which was charged with the supervision of all local authorities.¹¹⁹ Zambia was divided into eight administrative provinces consisting of 44 districts. In 1965, the majority-led government adopted the Local Government Act¹²⁰ with an objective to democratise and improve the effectiveness of the system of local government among other objectives.¹²¹ However, local government was not recognised in the 1962 Constitution which was operational then. The Act replaced the Native Authority Ordinance No. 32, of 1929 in its entirety while the Municipal Corporations Ordinance of 1927 and Township Ordinance of 1928 had some sections repealed while others were merely amended.¹²²

The Local Government Act provided for the establishment of three types of local authorities, namely: urban councils (city and municipal); township councils; and rural councils.¹²³ Thus,

¹¹⁸Mukwena RM. 'Situating decentralisation in Zambia in a political context available at unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan017692.pdf. (accessed on 9 November 2017).

¹¹⁹ Vosloo WB, Kotze WJ. & Jeppe WJO. (1974) 273.

¹²⁰ Local Government Act, No 69 of 1965, Chapter 480 of the Laws of Zambia.

¹²¹ Chikulo B. (2009) 98-106.

¹²² Sakala J. (2014) 4.

¹²³ Local Government Act, No 69 of 1965.

as in the colonial era, local government remained a creature of the state. Following the enactment of the Local Government Act, 67 local authorities were established for the entire country. Of these 67, 24 were urban authorities, and 43 were rural councils. The local authorities were governed by a council constituted of elected councillors and mayors or chairpersons.¹²⁴

The Act assigned local authorities wide-ranging powers to discharge over sixty functions in their areas of jurisdiction.¹²⁵ Part I of the First Schedule of the Act enumerated those functions which all councils were authorised to carry out irrespective of category. It enumerated functions such as road maintenance, waste management, water supply, markets and public health. Part II of the Schedule enumerated those functions which were additional to municipalities such as civic apparel and electricity. Part III of the Schedule assigned electricity supply function to township councils while Part IV assigned additional functions of agriculture, grazing grounds for animals, the control of local forests and the maintenance of mail services to rural councils.¹²⁶ The enumeration of local powers and functions in the Local Government Act meant that they lacked sufficient protection usually offered by constitutional recognition. It also meant that the powers and functions were not original since they did not originate directly from the Constitution but from an ordinary Act of Parliament. They could be recentralised at any time by a mere legislative amendment. Much of the threat of recentralisation or political interference came from the presidential-appointed district governor who was the political administrative head of a district and chairperson of a council.¹²⁷

However, the functional areas were relevant for socio-economic development. This is because functions like agriculture, public health and electricity supply have a developmental agenda. They directly affect the well-being of the citizens. On the negative side, the functions were not clearly defined in the schedules of the Act. For example, in all districts the Department of Water Affairs sunk boreholes and the Roads Department worked on feeder roads. However, at the same time, councils were given the responsibility of sinking boreholes

¹²⁴ Local Government Act, No 69 of 1965.

¹²⁵ Chikulo B. (2009) 98-106.

¹²⁶ Local Government Act, No 69 of 1965.

¹²⁷ Lolojih P K. 'Local Government Administration and Service Delivery in the Third Republic: A Case Study of Lusaka City Council, Choma Municipal Council and Luwingu District Council' (2008) 4.

and working on feeder roads.¹²⁸ Hence, this resulted in the overlapping of responsibilities that would result in conflicts among different spheres of government.

Local authorities also suffered from the lack of final decision-making powers because of the excessive role of the central government in local affairs. Even though all local authorities were allowed to make by-laws and policies in their functional areas, their adoption and enactment respectively, had to be approved by central government. There was a highly centralised influence on decision-making in local affairs.¹²⁹

The Act differentiated the assignment of powers and functions depending on a number of factors, such as capacity, and of a locality a local authority was to administer. For example, the reticulation of electricity was for urban and township councils because they had the manpower and finances to perform this role. Establishment and control of forest areas was assigned to rural councils.¹³⁰ This was because rural councils had the advantage of being set up within areas which were covered by forests. Thus proximity allowed them to perform this function effectively. Despite the powers and functions being relevant and differentiated, poor services were recorded across Zambia due to a number of reasons, including capacity constraints.¹³¹ The next phase shows a bleak picture of local government. Therefore, we cannot really say the Local Administration Act improved the Local Government Act.

3.3.2 The Assignment of Powers and Functions under the One Party State (1972 to 1991)

On 13th December 1972, Zambia became a one-party state. UNIP as the governing party was granted, 'constitutional paramountcy over the entire state administrative apparatus' by the Constitution.¹³² The Local Government Act of 1965 was replaced by the Local Administration Act of 1980 but local government remained a creature of statute. This was followed by an enactment of the 1973 Constitution which unfortunately did not enshrine local government. The major objective of the 1980 Act was to 'ensure the effective integration of the primary organs of the party and other local administration units in the district'.¹³³ The 1980 Act abolished city, municipal and township councils and established district councils in both urban and rural areas. The newly created district councils were headed by district

¹²⁸ Ministry of Local Government Councillors Training Manual (2011)8.

¹²⁹ Dixon AJ. 'Local government in Southern Africa' (1975-6), 4 (2) *Essay Review* Michigan University, 108-110.

¹³⁰ Sakala J. (2014) 9.

¹³¹ Sakala J. (2014) 4.

¹³² Chikulo B. (2009) 98-106.

¹³³ Chikulo B. (2009) 98-106.

governors who were appointed by the president.¹³⁴ District governors were chairpersons of district councils which were constituted by officials referred to as councillors, who were elected through party structures. The Act also provided for the district executive secretary (now referred to as a town clerk for city and municipal councils and council secretary for township councils) who headed the district secretariat. In other words, the office was an administrative wing of the council which assisted the district governor.¹³⁵ The Act apportioned most of the functions listed in the First Schedule of the Local Government Act of 1965 to the district councils. These included housing, health, waste management, road maintenance, markets and water supply. Part I of the 1980 Act required district councils to carry out party programmes of the UNIP. It placed emphasis on district political programmes within the guidelines stipulated by the overall UNIP policies and programmes.¹³⁶ Officially, the 1980 Act had three principle objectives: (a) to reflect the government and ruling party's desire to decentralize power to the people; (b) to ensure an effective integration of primary organs of the local administration; and (c) to enable district councils to play a more direct and substantial role in the development process than they had been expected to undertake in the past. However, despite these reforms local government units still failed to deliver adequate and quality services that met the expectations of their respective communities, despite the decentralisation reforms, due to a number of reasons.¹³⁷ Their powers and functions were not original given that they were assigned through an ordinary Act of Parliament. Without constitutional protection, there was constant threat of recentralisation and interference by central government through the district governor. A good example of recentralisation was when the Zambia Electricity Supply Corporation Limited (ZESCO) was formed to assume electricity supply, a function previously carried out by local authorities.¹³⁸

The powers and functions of local government were however relevant. Functions of housing, waste management, health and road maintenance hinged directly on the citizens' welfare (developmental agenda). In addition, the powers and functions were not clearly defined. This resulted in overlaps and conflict with the national government because of unclear demarcation of powers and functions.¹³⁹ The district secretariat directly consulted provincial

¹³⁴Mukwena RM. 'Situating decentralisation in Zambia in a political context' available at unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan017692.pdf. (accessed on 9 November 2017).

¹³⁵ Local Administration Act, No 18 of 1980.

¹³⁶ Local Administration Act, No 18 of 1980.

¹³⁷ Lolojih P. (2014)177.

¹³⁸ Zambia Electricity Supply Corporation Limited (ZESCO) available at www.zesco.co.zm (accessed 9 November 2017).

¹³⁹ Ministry of Local Government Councillors Training Manual (2011)8.

organs of the party and government on any technical matters pertaining to the administration and management of the district, including the performance of functions by district councils.¹⁴⁰ The role of district governor, a central government appointee, as chairperson of the councils who - oversees administration of the council, implementation of party and government policies and programmes in the district - significantly curtailed final decision-making powers of the councils. The district secretariat consulted party and government structures when preparing the budget and annual reports, to prepare district development plans and programmes for submission to the council for approval.¹⁴¹ Resolutions or decisions of district councils were adjusted to suit those of the party, meaning the local authority was deprived of final decision-making powers.¹⁴²

Assessing the 1980 Local Administration Act, according to Lolojih, it is clear that local government administration still remained highly centralised and district councils were far from being front-liners in the development process. Most local councils became top-heavy, so there was a lot of bureaucratic in-fighting coupled with the overlapping of functions.¹⁴³ The assignment of powers and functions to local authorities under the 1980 Act was not differentiated. Both urban and rural councils were assigned uniform powers and functions despite the fact that capacity levels varied between rural and urban local authorities and also within these categories. Thus the assignment never took capacity issues into consideration. As a result, some councils, particularly rural councils, experienced serious challenges in performing their developmental and service delivery functions. Thus, it was not a surprise that local authorities failed to respond to the needs and preferences of the respective communities.

3.3.3 The Return to Multiparty Politics and the Assignment of Powers and Functions to Local Government (1991-2016)

In 1991 Zambia returned to multiparty politics when the Movement for Multi-party Democracy (MMD) political party came to power.¹⁴⁴ Among other legislative reforms, the MMD-led government enacted the Local Government Act in 1991,¹⁴⁵ and a new Constitution which never recognised local government, came into effect. The Local Government Act is

¹⁴⁰ Local Administration Act, No 18 of 1980.

¹⁴¹ Local Administration Act, No 18 of 1980.

¹⁴² Vosloo WB, Kotze WJ. & Jeppe WJO. (1974)287.

¹⁴³ Lolojih PK. (2008) 32.

¹⁴⁴ United States Agency for International Development (USAID) Democracy and Governance Assessment report available at pdf.usaid.gov/pdf_docs/Pnacs264.pdf (accessed on 9 November 2017).

¹⁴⁵ Local Government Act No 22 of 1991.

currently operational as of November 2017. One of the main objectives of the 1991 local government reforms was to create a clear institutional divorce of political party structures from district councils witnessed during the days of the one-party state. The delinqueage was to democratise local government by turning them into independent agents for development and efficient service delivery.¹⁴⁶ The Act provided for the establishment of councils and defined their powers and functions. Section 3 of the Act established three types of councils, namely: city councils, municipal councils and district councils.¹⁴⁷ There were 72 councils that were provided for in the Act. Currently, there are 109 councils in Zambia. Section 6 provides that every council will be a legal entity which can sue and or be sued in its corporate name. Local powers are exercised subject to the provisions of the Act and of any other written law. Local authorities are required to perform functions and powers as set out in the Act.¹⁴⁸

Section 61 of the Local Government Act empowers the councils to carry out various functions listed in the Second Schedule of the Local Government Act.¹⁴⁹ The functions are listed in Fig. 1 below

Fig. 1: Functions of a Council (section 61 of the 1991 Local Government Act)

<p>1. To establish and maintain offices and buildings for the purpose of transacting the business of the council and for public meetings and assemblies.</p>	<p>(2) To provide space (on) which debris and derelict vehicles may be deposited;</p>
<p>2. To insure against losses, damages, risks and liabilities which the council may incur.</p>	<p>(d) to tidy the premises; (e) to remove from the premises any unsightly debris, including derelict vehicles.</p>
<p>3. To maintain law and order and ensure national security and the good administration of the Council.</p>	<p>(f) To prohibit, control and require the fencing of land to control the use of barbed wire and other dangerous materials for fencing;</p>
<p>4. To prohibit and control the erection and display of advertisements and advertising devices in, or in view of, streets and other public places.</p>	<p>(g) In the event of the statutory leaseholder or occupier failing to comply with a notice from the council requiring him to perform any of the acts specified in sub-paragraph (1), to</p>

¹⁴⁶ Chikulo B. (2009) 98-106.

¹⁴⁷ Local Government Act, No 22 of 1991.

¹⁴⁸ Local Government Act, No 22 of 1991.

¹⁴⁹ Local Government Act, No 22 of 1991.

<p>5. To establish and maintain farms and allotment gardens.</p> <p>6. To take and require the taking of measures for:</p> <p>(a) storage, market and preservation of agricultural produce;</p> <p>(b) conservation of natural resources; and</p> <p>(c) prevention of soil erosion, including the prohibition and control of cultivation.</p> <p>7. To take and require the taking of measures for control of grass weeds and wild vegetation and for the suppression and control of plant and insect pests and diseases.</p> <p>8. To maintain, protect and control local forests and woodlands.</p> <p>9. To control the keeping and movement of livestock.</p> <p>10. To establish and maintain ponds.</p> <p>11. To establish and maintain grazing grounds.</p> <p>12. To take measures for the destruction and control of bees and of dangerous animals and reptiles.</p> <p>13. To control the slaughtering of animals, the meat of which is intended for human consumption; to control the sale of such meat; and to require the disposal of diseased animals and carcasses and of meat which is unfit.</p>	<p>undertake the work and charge the statutory leaseholder or occupier with the cost thereof.</p> <p>32. To assign names to localities and numbers to premises and to require the number assigned to any premises to be displayed thereon.</p> <p>33. To establish and maintain parks, zoos, gardens, pleasure grounds, camping grounds, caravan sites and open spaces.</p> <p>34. To plant, trim and remove trees, shrubs and plants and other public places, and to prohibit and control the planting, camping, destruction and removal of trees, shrubs, and plants in streets and other public places.</p> <p>35. To establish and maintain swimming baths and bathing places.</p> <p>36. To establish and maintain art galleries, libraries, museum(s) and film services.</p> <p>37. To establish and maintain social and recreational facilities and public entertainments.</p> <p>38. To establish and maintain a public transport service.</p> <p>39. To establish and maintain colleges, schools and day nurseries.</p> <p>40. (a) To establish and maintain hospitals, clinics and health centres; and</p> <p>(b) to establish and maintain environmental health services.</p>
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<p>14. To establish and maintain abattoirs, cold storage facilities and plans for the processing of by-products from abattoirs.</p> <p>15. To control the movement of carcasses of animals.</p> <p>16. (a) to establish and maintain roads;</p> <p>(b) to exercise general control, care and maintenance of all public roads, streets, avenues, lanes, sanitary lanes and foot-walks forming part thereof, bridges, squares, ferries and water courses and to remove all obstacles there from;</p> <p>(c) to close or divert any public road, street or thoroughfare;</p> <p>(d) to close or divert ferries and water courses;</p> <p>(e) to declare a street or road to be a public street or road;</p> <p>(f) to compile and maintain a register of all public streets or roads; and</p> <p>(g) to make up to tar macadamised standard any private street and to charge the statutory leaseholders or occupiers of the land abutting on such streets in proportion to frontage and to recover the costs as a civil debt; and</p> <p>17. To prohibit and control the erection and laying in, under or over, and the removal from streets and other public places of-</p> <p>(a) posts, wires, pipes, conduits, cables and</p>	<p>41. To establish and maintain cemeteries, crematoria, and mortuaries and otherwise to provide for and control the burial of the dead, and destitute persons who die in the area of the council.</p> <p>42. To control the manufacture, storage, sales and use of petroleum, fireworks, gas and other combustible or dangerous substances; and to establish and maintain magazines and other facilities for the storage thereof.</p> <p>43. To take and require the taking of measures for the preservation and improvement of public health and the prevention and abatement of nuisances including measures for the extermination of mosquitoes and other insects, rats, mice and other vermin.</p> <p>44. To control persons, premises and land engaged in or used for the holding of any fair, circus, fete or other entertainment, recreation or assembly to which the public are entitled or permitted to have access, whether on payment or otherwise.</p> <p>45. To prohibit or control the collection of money from door-to-door and in streets and other public places.</p> <p>46. To preserve public decency.</p> <p>47. To prevent damage and trespass to property, whether public or private.</p> <p>48. To establish and maintain public</p>
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<p>other apparatus;</p> <p>(b) temporary platforms, seats and other structures; and</p> <p>(c) street decorations;</p> <p>18. To control traffic and the parking of vehicles and for that purpose to establish and maintain parking meters and premises for the parking of vehicles.</p> <p>19. To take measures for the promotion of road safety.</p> <p>20. To prepare and administer schemes for the encouragement of and participation in, community development.</p> <p>21. To establish and maintain a system of lighting in streets and other public places.</p> <p>22. To establish and maintain fire fighting and prevention services, and to take and require the taking of measures for the protection of life, property and natural resources from damage by fire.</p> <p>23. To control persons and premises engaged in or used for the manufacture, preparations, storage, handling, sale or distribution of items of food or drink.</p> <p>24. To brew beer.</p> <p>25. To establish and maintain premises for the sale of and to sell there from, items of food and drink (including beer and other intoxicating liquor) for consumption on or off</p>	<p>information services; and to advertise and give publicity to the advantages and amenities of the areas of the council.</p> <p>49. To provide for and maintain:</p> <p>(a) the enumeration and registration of persons or property for any purpose connected with the administration of the area of the council;</p> <p>(b) the registration of births, marriages and deaths;</p> <p>(c) the registration of clubs; and</p> <p>(d) the registration of such transactions in connection with land charges as may be prescribed in any written law relating to land charges.</p> <p>50. To establish and maintain sanitary convenience and ablution facilities, and to require, whenever necessary, the establishment and maintenance of such facilities.</p> <p>51. To establish and maintain sanitary services for the removal and destruction of, or otherwise dealing with, all kinds of refuse and effluent, and compel the use of such services.</p> <p>52. To establish and maintain drains, sewers and works for the disposal of sewerage and refuse.</p> <p>53. To take and require the taking of</p>
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<p>the premises.</p> <p>26. To establish and maintain catering services.</p> <p>27. To erect, purchase and maintain buildings used as dwellings or clubs and, where it is in the public interest, for use for business or professional purposes.</p> <p>28. To erect, purchase and maintain buildings and facilities and encourage the erection of dwellings needed for the accommodation of persons residing in the area of the council.</p> <p>29. To prohibit and control the development and use of land and buildings and the erection of buildings, in the interest of public health, public safety, and the proper and orderly development of the area of the council.</p> <p>30. To control demolition and removal of building(s) and to require the altering demolition and removal of buildings which -</p> <p>(a) do not conform to plans and specifications in respect thereof approved by the council; and or</p> <p>(b) are a danger to public health or public safety.</p> <p>31. To require the statutory leaseholder or occupier of land to do all or any of the following acts:</p> <p>(a) to remove, lower or trim to the</p>	<p>measures for the drainage of water.</p> <p>54. To require and control the provision of drains and sewers and to compel the connection of any drains and sewers established by the council.</p> <p>55. To prohibit and control the carrying on of offensive, unhealthy or dangerous trade.</p> <p>56. To establish and maintain weighing machines.</p> <p>57. To sell products and by-products resulting from the carrying on of any of the undertakings or services of the council.</p> <p>58. To establish and maintain the business of</p> <p>(a) manufacture;</p> <p>(b) wholesale; and</p> <p>(c) retailer.</p> <p>59. To undertake mining operations.</p> <p>60. To provide and maintain supplies of water and, for that purpose, to establish and maintain waterworks and water mains.</p> <p>61. To take and require the taking of measures for the conservation and the prevention of the pollution of supplies of water.</p> <p>62. With the consent of the Director-General of [the] Posts and Telecommunications Corporation, and subject to such conditions as he may impose, to establish and maintain</p>
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<p>satisfaction of the council any tree shrub or hedge over-hanging or interfering with traffic in any street or with any wires, or with any works of the council:</p> <p>(b) to remove any dilapidated fence or structure; and</p> <p>(c) to paint, distemper, whitewash or colourwash the outside walls or roof of any building forming part of the premises.</p>	<p>postal services.</p> <p>63. To establish and maintain twin-town contacts.</p>
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These functions are divided into nine broad categories, namely: general administration; advertisement; agriculture; community development; public amenities; education; public health; public order; and sanitation and drainage. The Local Government Act of 1991 empowers all categories of local authorities to undertake wide-ranging functions. The councils are recognised as the primary bodies responsible for development at district level. They are the statutory deliberative and consultative bodies concerned with the determination of broad policy objectives and critical assessment of development programmes, as well as the efficient and effective management of their areas.¹⁵⁰ The assignment powers and functions of local government however lack constitutional protection. Thus they can easily be recentralised and this has occurred previously. For example, the MMD government arbitrarily removed the function of motor vehicle licences provision from councils and created the Road Transport and Safety Agency (RTSA) through the Road Traffic Act.¹⁵¹ On a positive note, functions of agriculture; community development; public amenities; education and public health are relevant for improving the wellbeing of the citizens. It can be argued that the powers listed in the second Schedule of the Local Government Act,¹⁵² were not clearly demarcated from national functions which led to role confusion between central and local governments.

¹⁵⁰ Chikulo B. (2009) 98-106.

¹⁵¹ Road Traffic Act No 11 of 2002.

¹⁵² Local Government Act, No 18 of 1991.

Furthermore, local authorities lacked final decision-making powers to make policies and by-laws in their functional areas. In 1996, the then Zambian President Chiluba made a political decision of selling council houses to sitting tenants without consulting local authorities. Housing units were a huge source of income for local authorities. Thus, local authorities were later crippled financially. Therefore, it was very difficult for them to deliver on their developmental promise. The channel of decision-making was also too long and very politically inclined. A good example of this is where the councils' developmental projects, such as building a clinic or a market and even adoption of by-laws were supposed to be approved by the minister responsible for local government.¹⁵³ The assignment of responsibilities was also not differentiated in that all local authorities were allocated the same powers and functions.¹⁵⁴ This resulted in a huge challenge to most local authorities, especially district councils, because of limited capacity. As a result most local authorities were unable to deliver public services effectively and play any effective role in fostering local democracy and local development.¹⁵⁵

3.3.4 The Assignment of Powers and Functions under the 1996 Constitution of Zambia (1996-2016)

The first, second and third (1991) Republican Constitutions did not make any mention or reference to local government or local administration. What this meant is that constitutionally speaking, Zambia did not have a system of local government. Thus, if the government of the day preferred, it could have administered the whole country through deconcentrated institutions or political appointees answerable only to the central government.¹⁵⁶ In 1996, local government was for the first time in the history of Zambia recognised in the Constitution¹⁵⁷ as a tier of government. The motivation behind the constitutional recognition of local government was to strengthen this lowest tier of government by making it more democratic, effective and efficient.¹⁵⁸ Article 109 of the Constitution required the establishment of a system of local government whose details were to be prescribed by an Act of Parliament. The provision further provided that such a system 'shall' be based on democratically-elected councils. Thus, the 1996 Constitution transformed the institution of

¹⁵³ Local Government Act, No 18 of 1991.

¹⁵⁴ Sakala J. (2014) 9.

¹⁵⁵ Sakala J. (2014) 7.

¹⁵⁶ Sakala J. (2014) 4.

¹⁵⁷ Constitution of the Republic of Zambia, 1996.

¹⁵⁸ United States Agency for International Development (USAID) Democracy and Governance Assessment report available at pdf.usaid.gov/pdf_docs/Pnacs264.pdf (accessed on 9 November 2017).

local government from being a mere creature of central government into a tier of government.¹⁵⁹ However, the 1996 Constitution did not go further to explicitly enumerate the powers and functions of local government. This was left to legislation. The relevant legislation still remained the Local Government Act of 1991, discussed above, which was not reformed after the constitutional recognition. This means that the powers and functions of local government remained the same. Despite the recognition of local government in the 1996 Constitution, local authorities continued facing various challenges. Constitutional recognition does not seem to have strengthened local government in practice.¹⁶⁰

3.4. Conclusion

The modern system of local government in Zambia developed when the British government took over administration of Northern Rhodesia from the British South African Company in 1924. From this period, several pieces of legislation were enacted to regulate the various forms of local government which existed in different parts of the country, which was racially based. Upon gaining independence in 1964 the UNIP-led government adopted reforms to create a democratic, efficient and effective system of local government. However, the reforms failed to protect local powers and functions constitutionally. Moreover, councils lacked final decision-making powers over their functional areas. Thus local authorities were prone to central government and political interference. All the Acts enacted between 1965 and 1991 provided for powers and functions which were relevant but were not clearly defined. Lack of clarity led to conflict and role confusion between national and local government. Only the 1965 Local Government Act differentiated the assignment of functions to local authorities. Local government received constitutional recognition only in the 1996. However, the 1996 Constitution did not enumerate powers and functions to local government. Thus, local government's powers and functions remained prone to arbitrary recentralisation. The combination of weaknesses discussed in this chapter has a local government system that fails to adequately respond to the needs and preferences of the people in various local communities in Zambia.

¹⁵⁹ Sakala J. (2014) 10.

¹⁶⁰ Lolojih P. (2014)177.

Chapter 4: An Analysis of the Constitutional Framework for the Assignment of Powers and Functions to Local Government

4.1 Introduction

The previous Chapter analysed the assignment of powers and functions to local government in Zambia prior to the adoption of the 2016 Constitution. The analyses revealed several challenges relating to the assignment of powers and functions which constrained the role of local government. This Chapter examines the 2016 Constitution in order to establish the extent to which it has resolved some of the challenges experienced by local government prior to its adoption. In particular, the Chapter seeks to establish whether the assignment of powers and functions to local government enables this lower tier of government to play an enhanced role in improving service delivery, among other objectives. The first section of the Chapter briefly discusses state organisation under the 2016 Constitution. The second section assesses the manner in which the Constitution assigns powers and functions to local government against the backdrop of the institutional design framework proposed in Chapter Two. The conclusion then follows.

4.2 State Organisation under the 2016 Constitution

In 2016, Zambia adopted a Constitution¹⁶¹ which among other matters, provides for a decentralised system of government. Article 147 of the Constitution provides that government in Zambia is constituted by the national, provincial and local tiers of government. The provincial tier of government is composed of a minister of the province and permanent secretary appointed by the President, while the local tier of government is constituted by local authorities. Article 266 categorises local authorities into three categories, namely: city, municipal and town councils (district). Article 148(1) provides that local governance shall be undertaken through these subnational structures. The Constitution mandates central government to provide adequate resources for the performance of the functions by local authorities.¹⁶² This requirement is particularly significant given that adequate resources are needed if local authorities are to carry out their duties and exercise their powers effectively.

The Constitution recognises the need for a system of devolved governance in Zambia. It states that the management and administration of political, social, legal and economic affairs

¹⁶¹ Constitution of Zambia, 2016.

¹⁶² Constitution of Zambia, 2016.

of the State must be devolved from the national to local level.¹⁶³ Devolved governance entails that the national government must transfer power, responsibilities and resources to legally constituted and democratically-elected local governments,¹⁶⁴ which have jurisdiction over clear and legally-recognized geographical boundaries.¹⁶⁵ It also entails that local authorities should have a certain measure of autonomy when undertaking its obligations.¹⁶⁶ Thus, unlike the previous constitutions of Zambia, the 2016 Constitution of Zambia explicitly recognises the need for a certain measure of local autonomy.

The autonomy given to local authorities by the 2016 Constitution is to enable them to carry out the objectives of local government. These objectives are listed in the Constitution. Local authorities are required to promote democratic and accountable governance; ensure that services are provided in an equitable and sustainable manner; promote social and economic development; promote a clean, safe and healthy environment; and, encourage the involvement of communities and community organisations in local affairs.¹⁶⁷ Besides the issue of resources mentioned above, among other factors, the ability of local authorities to meet these objectives depends on the nature of their powers and functions. Thus, the question is whether local government has been assigned the 'right' powers and functions which enable them to deliver on these objectives. For example, local authorities cannot deliver a healthy environment if they do not have powers over environmental health provision. In short, what local government can achieve partially depends on the powers and functions they have. The following section will attempt to answer this question relating to the assignment of powers and functions to local government, under the 2016 Constitution of Zambia.

4.3 Constitutional Assignment of Powers and Functions to Local Government

It was contended in Chapter Two that local government requires original, relevant, clearly defined, final decision-making and differentiated powers and functions if they are to live up to the full potential of decentralisation. The question is whether the 2016 Constitution provides for such kind of powers and functions. If not, what are the implications of such failure on the role of local government? First, this section establishes if the powers and functions are original before evaluating the extent to which they are relevant. A discussion of

¹⁶³ Constitution of Zambia, 2016 (Article 147).

¹⁶⁴ Kauzya J M. (2007), *Political Decentralization in Africa: Experiences of Uganda, Ruanda, and South Africa*, United Nations Discussion Paper.

¹⁶⁵ Litvack J. & Seddon J. 'Decentralisation briefing notes' (1998) 3.

¹⁶⁶ Chigwata T. & De Visser J. 'Local Government in the 2013 Constitution of Zimbabwe: Defining the Boundaries of Local Autonomy' (2017)2.

¹⁶⁷ Constitution of Zambia, 2016(Article 151(2)).

the demarcation of powers and functions among tiers of government then follows. The section discusses the extent to which local authorities can make final decisions, followed by an examination of whether the powers and functions are differentiated.

4.3.1 Original Powers

It was contended in Chapter 2 that local government requires original powers and functions if they are to effectively carry out their role of being service delivery and development agencies.¹⁶⁸ Original powers are those which are assigned to local government directly by the constitution. Such constitutional protection provides the highest level of safeguards to powers and functions.

The 2016 Constitution of Zambia has recognised the importance of assigning original powers and functions to local government. For the first time in the history of Zambia, the 2016 Constitution enumerates the powers and functions of local government. Article 147(2) stipulates that the concurrent and exclusive functions of national, provincial and local government levels are listed in the Annex as prescribed.¹⁶⁹ The powers and functions of local government are explicitly enumerated in Part C of the Annex.¹⁷⁰ The Constitution requires the national government and provincial administration not to interfere with or compromise a local authority's ability or right to perform these functions.¹⁷¹ Thus the Constitution protects local government powers and functions against any form of unconstitutionally-permitted interference. The Constitution should be commended for providing safeguards against arbitrary changes to local government powers and functions.¹⁷² The constitutional enumeration of local powers and functions simply means that these powers and functions have been accorded a significant form of protection which reduces the likelihood of arbitrary alterations and recentralisation. Any form of alteration or recentralisation of any of these powers and functions must be undertaken through the complicated process of amending the Constitution. The advantage of this safeguard is that councils can plan effectively for the future with the assurance that their powers and functions will not be arbitrarily changed. It creates a situation where, for example, a council can make a long-term investment in building a hospital or clinic without fear of the function of health provision being recentralised.

¹⁶⁸ Chigwata T. & De Visser J. (2017)5.

¹⁶⁹ Constitution of Zambia, 2016.

¹⁷⁰ Constitution of Zambia, 2016.

¹⁷¹ Constitution of Zambia, 2016(Article 152(2)).

¹⁷² Steytler N. & De Visser J. 'Local government' in Woolman S, Bishop M. & Brickwell J. (eds) *Constitutional Law of South Africa Vol 2, 2nd ed*, (2011) 22-47.

Local authorities now have a constitutionally protected right to administer and legislate on these functional areas. However, it can be argued that the use of the word ‘as prescribed’ in Article 147 (2) of the Constitution may raise doubts about the originality of local powers and functions. The question is who prescribes, how, when and also what functions to prescribe? The implication is that there may be conflict between Article 152(2) which seeks to protect local powers and functions and 147(2) which seems to bring back central government’s hand in the discharge of local functions. Taken together this does not present coherent legal framework for local government. It is submitted, however, that the words ‘as prescribed’ should be interpreted to mean the regulation of procedure and not the substance of these powers and functions. It amounts only to the setting of a national framework within which local authorities must exercise their powers and functions. This interpretation is in line with the constitutional requirement for devolution which requires local authorities to enjoy a certain measure of autonomy.

Besides the original powers and functions discussed above, local authorities may also carry out assigned powers and functions.¹⁷³ Article 152(d) provides that a local authority ‘shall’ perform ‘other’ prescribed functions.¹⁷⁴ The national government is encouraged to assign powers and functions to local authorities, especially when such powers and functions can be effectively exercised at the local level. Unlike other modern constitutions such as the Constitution of South Africa, the 2016 Constitution of Zambia does not however explicitly state the provision of financial support and any other necessary forms of support in cases of such assignment. The implication is that there is the danger of unfunded mandates.

In South Africa, assignment entails the transfer of authority to local government over a function or competence that falls outside of its Schedule 4B and 5B of the Constitution.¹⁷⁵ Schedule 4B and 5B enumerates the powers and functions of local government. The national and/or provincial government powers and functions may be assigned to local government by legislation. Section 156(4) provides that the national and provincial government may assign to a municipality, by agreement, the administration of a matter listed in Part A of Schedule 4 and 5, which provides functional areas for national and provincial governments.¹⁷⁶ This is however subject to the condition that the matter would most effectively be administered

¹⁷³ De Visser J. ‘Powers of Local Government’ *Local Government Working Paper Series No. 2 2002*.

¹⁷⁴ Constitution of Zambia, 2016.

¹⁷⁵ 156 (1)(b) of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution of the Republic of South Africa).

¹⁷⁶ Constitution of the Republic of South Africa.

locally – recognition of the principle of subsidiarity - and the municipality has the capacity to administer it.¹⁷⁷ The Constitution requires that such assignments are funded so that financial sustainability of local government is not compromised.¹⁷⁸ This requirement, therefore, safeguards local authorities against unfunded mandates.

4.3.2 Relevant Powers

The AU Charter on Decentralisation encourages member states to assign powers and functions to local authorities that can meaningfully bring change or promote and improve the livelihood and environment of local communities.¹⁷⁹ Thus, as It was argued in Chapter Two, local government requires relevant powers and functions in order to be effective in their respective localities. The 2016 Constitution of Zambia recognises the importance of assigning relevant powers and functions to local government. Part C of the Annex to the Constitution lists a variety of functional areas which includes refuse removal, waste management, libraries, firefighting services, health services, local tourism, water supply, sanitary services and land use planning. Figure 2 below lists all local government functions as provided for in the Annex.

Fig. 2 Local Government Powers and Functions (Part C of the Annex to the Constitution)

1. Pollution control	22. Storm water management systems in built-up areas	44. Billboards and the display of advertisements in public places
2. Building regulations	23. Trading	45. Cemeteries, funeral parlours and crematoria
3. Child-care facilities	24. Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems	46. Local cleansing
4. Electricity	25. Veterinary services, excluding regulation of the veterinary profession	47. Control of public nuisances
5. Fire fighting services	26. Vehicle licensing	48. Control of undertakings that sell liquor to the public
6. Local tourism	27. Abattoirs	49. Facilities for the accommodation, care and burial of animals
7. District airports, Aerodromes and Airships	28. Ambulance services	50. Fencing and fences
8. District planning	29. Archives	51. Licensing of dogs
9. District health services	30. Libraries	52. Licensing and control of undertakings that sell food to the public
10. District public transport	31. Liquor licensing	53. Public places
11. District public works only in respect of the needs of Districts in the discharge of councils responsibilities to 12. Administer functions specifically assigned to them under this Constitution or other law	32. Museums	
13. Levies, tariffs and tolls	33. Local spatial planning	
14. Pontoons, ferries, jetties, piers and harbours, excluding	34. Cultural matters	
	35. Recreation and amenities	
	36. Sport	

¹⁷⁷ De Visser J. & May A. 'Functions and powers of devolved units' in Steytler N. & Ghai Y. (eds) *Devolution in Kenya and South Africa* (2015) 6.

¹⁷⁸ De Visser J. (2005) 148.

¹⁸⁰ De Visser J. (2005) 5.

the regulation of international and national shipping matters 15· Local amenities 16· Local sport facilities 17· Markets 18· Local parks and recreation 19· Local roads 20· Noise pollution 21· Pounds	37· Refuse removal, refuse dumps and solid waste disposal 38· Street trading 39· Street lighting 40· Traffic and parking 41· Gardens and landscaping 42· Roads and traffic automation and maintenance 43· Amusement facilities	
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It can be observed that the 2016 Constitution has assigned a variety of relevant functional areas to local government. These responsibilities enhance democratic and accountable local government. For instance, the functional areas of local tourism, firefighting services, local roads, markets and land spatial planning have an impact on social and economic development, one of the objectives of local government. Functions such as water and sanitation, refuse removal, dumping sites, cleansing and control of undertakings that sell food to the public, abattoirs, ambulance services, cemeteries, funeral parlours, crematoria, pollution control and district health services all are relevant in order to promote a clean, safe and healthy environment. Thus, it can be submitted that the Constitution has allocated relevant responsibilities to local authorities.

4.3.3 Clearly Demarcated Powers

It was argued in Chapter Two that local government requires clearly demarcated powers and functions if they are to deliver on their obligations effectively.¹⁸⁰ Unfortunately, the 2016 Constitution of Zambia does not clearly demarcate all local competencies against those of national and provincial governments even though they are listed in the Annex.¹⁸¹ There is overlapping of some functional areas among the tiers of government, as illustrated in the Figure 3 below. The Figure is an extract of some of the functional areas of the national and/or provincial governments which overlap with those of local government.

Figure 3: Functional Overlap between National, Provincial and Local Government Competencies

National functions (Part A, Annex)	Concurrent national and provincial functions (Part B, Annex)	Ecl/Local government powers and functions (Part C, Annex)
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¹⁸⁰ De Visser J. (2005) 5.

¹⁸¹ Article 147(2).

National Libraries		Libraries
Road traffic regulation		Traffic and parking
Public roads		Local roads
	Pollution Control	Pollution Control
Museums		Museums
Airports		Airports
	Public Transport	District Public Transport
	Health Services	District Health Services

It can be observed from the above table that there are a number of functional areas of the different levels of governments that overlap. For example the difference between national libraries, a national government competence, and libraries as a local competence is not clear. In addition, the difference between road traffic regulation as a national responsibility and traffic and parking as a local responsibility is also not clear. Public roads and local roads are also not clearly defined. Furthermore, it is observed that the concurrent national and provincial function/competence of pollution control cannot be clearly distinguished from pollution control as a local function. Other areas which lack proper demarcation are: control of museums, spatial planning, airports control and urban/rural development. The challenges of such lack of clear demarcation of competences are many, including resource wastage. For example, if both national and local governments make a decision to renovate the same library, it would mean that finances are being expended on the same project by different spheres of governments of which the financial resource could have been utilised on different development projects. Such resource wastage negates the developmental potential of the local authorities.

The problem of inadequate clarification of competencies of tiers of government is not found in Zambia alone. In South Africa, the South African Constitution similarly fails to clearly demarcate local powers from those of the national and/or provincial governments. De Visser and May caution that the ambit of the powers and functions designated to local government in the Schedules to the Constitution is a source of concern.¹⁸² For example, in the case of South Africa, nothing in the Constitution demarcates the ambit of the national and provincial

¹⁸² De Visser J. & May A. (2015) 9.

function of ‘health services’ from that of ‘municipal health services’.¹⁸³ Lack of clarity has often resulted in duplication of duties, confusion, inefficiencies and arguably even deterioration in the delivery of services to communities in that country. In worst case scenarios it has led to intense animosity between provincial governments and municipalities, who reach an impasse in respect of which sphere should perform a particular function. There are situations where neither sphere wishes to take responsibility for fulfilling a contested duty.¹⁸⁴ This has also led to several litigations over competences, such as powers over ‘municipal planning’ and the granting of mining permits, which had to be determined by the Constitutional Court.¹⁸⁵

In the *Gauteng Development Tribunal* case, for example, the Constitutional Court dealt with an impasse between the Gauteng Provincial government and the City of Johannesburg over land-use planning powers. The provincial government had appointed a development tribunal to rezone land by using its Development Facilitation Act 67 of 1995. The City of Johannesburg called into question the granting of land use approvals in its jurisdiction by the tribunal by arguing that the role of the tribunal violated its constitutional power over “municipal planning”. The City contended that the powers to rezone land and to approve of the establishment of townships are components of “municipal planning”, a function assigned to municipalities by section 156(1) of the Constitution, read with Part B of Schedule 4 to the Constitution.¹⁸⁶ It further contended that the Tribunal committed a material error of law in approving two development applications and that these decisions should be set aside. The Court agreed and declared the relevant national or provincial law unconstitutional.¹⁸⁷ Thus, the lack of clear demarcation of powers and functions among tiers of government has huge negative implications. In this case legal battles are not just costly but create animosity among tiers of government which may affect effective governance by government as a whole.

4.3.4 Final Decision-Making Powers

Article 6 of the African Charter on Decentralisation stipulates that central government shall create enabling conditions for decision-making, policy and programme-initiation, and for adoption and implementation to take place at lower levels of government where local

¹⁸³ De Visser J. & May A. (2015) 9.

¹⁸⁴ Williams W. & Steytler N. Squeezing out provinces “legislative competence in *Premier: Limpopo Province v Speaker Legislature I and II South African Law Journal* (2012) 631.

¹⁸⁵ See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (335/08) [2009] ZASCA 106; 2010 (2) SA 554 (SCA); 2010 (1) BCLR 157 (SCA); [2010] 1 All SA 201 (SCA) (22 September 2009). *Macssand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC); BCLR 690 (CC).

¹⁸⁶ Constitution of the Republic of South Africa.

¹⁸⁷ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*.

governments or local authorities offer a better guarantee of pertinence and efficacy.¹⁸⁸ This provision in part emphasises the need for an element of final decision-making at the local level. Local authorities, with such a discretion, are generally not required to consult or to seek approval of the central government before adopting or implementing certain resolutions/policies and legislation.¹⁸⁹ The question is whether the 2016 Constitution of Zambia grants local government such discretion.

The Constitution recognises the need for final decision-making powers at the local level in a number of provisions. Article 147 of the Constitution of Zambia recognises the need for the management and administration of political, social, legal and economic affairs of the State to be devolved from the national level to local level. Article 151(1)(d) states that local authorities must be equipped with an enhanced capacity to initiate, plan, manage and execute policies in respect of matters that affect the people within their respective districts. Article 151(1)(j) states the right of local authorities to manage their affairs in order to further develop in their respective districts. This provision is supported by Article 152(2), which provides that ‘the national government and the provincial administration shall not interfere with or compromise a local authority’s ability or right to perform its functions’.¹⁹⁰ All these constitutional provisions suggest that local authorities have final decision-making powers over their affairs. A legal or policy requirement for local government to seek the approval of the national government arguably undermines the ability or right of a local authority to perform. The threat of rejection of a decision, policy or law takes away the right of local authorities to manage their own affairs. Thus, the Constitution empowers them to adopt laws and implement policies for example, without seeking approval of the national government. This however does not mean that the exercise of these powers cannot be regulated.

The Local Government Act, however, which is yet to be aligned with the 2016 Constitution, takes away final decision-making powers of local authorities in a number of ways. For example, local authorities cannot adopt policies and enact by-laws without central government approval as stipulated by section 82(1) of the Local Government Act.¹⁹¹ Thus the Act takes away the final decision-making powers from the local authorities. Approval of policies and by-laws by the minister responsible for local government may lead to delayed policy implementation. Furthermore, it decreases community proximity to decision-makers,

¹⁸⁸ Article 6(1) of African Charter on Decentralisation.

¹⁸⁹ European Charter of Local Self-Governance, 1985.

¹⁹⁰ Constitution of Zambia, 2016.

¹⁹¹ Local Government Act of 1991.

reduces efficiency, reduces community participation in development and stifles the possibility of citizen's checks and balances.¹⁹² If the local governments are not in control of their policy and law-making powers, they are unlikely to reach their full developmental potential.¹⁹³ Thus, it is submitted that the Local Government Act is now inconsistent with the Constitution.

The need for final decision-making powers at the local level is not only recognised in international instruments but also at national level. Uganda is one of the many countries where local authorities have been granted the final decision-making powers. Section 178(9) of the Constitution of Uganda stipulates that, 'a regional assembly shall have power to legislate on matters within its jurisdiction within conformity of the Constitution'.¹⁹⁴ In addition, section 178(11) states that 'the laws made by the regional assembly shall be in conformity with this Constitution and the national laws shall be consistent with national policies'.¹⁹⁵ Thus the Constitution allows local authorities to adopt and enact laws without approval from central government. This is on condition that the by-laws and policies are enacted within or consistent with the national Constitution. As discussed in detail in the following chapter, it is recommended that this approach should be adopted in Zambia so that local authorities are in a position to exercise some final decision-making powers with respect to these matters.

4.3.5 Differentiated Power

Local authorities are likely to have uneven capacity due to a number of reasons, including varying endowment of resources.¹⁹⁶ The institutional capacity among local authorities is likely to vary considerably, making some municipalities more ready to exercise authority than others. Moreover, local authorities may be of different categories and may preside over varying environments. Therefore it was contended in Chapter Two that it may be prudent for the assignment of powers to take into account these differences.¹⁹⁷ The main reason for such asymmetry is to search for an instrument, which could accommodate the differences at the local level to pursue: development effectively; democracy and improved service delivery. The 2016 Constitution of Zambia does not adopt such a differentiated approach to the

¹⁹²Mudacumura G. & Shamsul M. Handbook of Development Policy Studies available at <https://books.google.co.za/books?isbn=082470602> (accessed 25 October 2017).

¹⁹³ World Bank (2009) 37.

¹⁹⁴ Constitution of the Republic of Uganda, 1995 (hereafter referred to as the Constitution of Uganda).

¹⁹⁵ Constitution of Uganda.

¹⁹⁶Scheepers L. 'An Institutional Capacity Model of Municipalities in South Africa' available at scholar.sun.ac.za/bitstream/handle/10019.1/.../scheepers_institutional_2015.pdf?...2 (accessed 9 January 2018)

¹⁹⁷ World Bank (2009) 37.

assignment of powers and functions even though it recognises different categories of local authorities.¹⁹⁸ It assigns all local authorities the power to carry out all functional areas listed in Annex C. Thus, the Constitution does not seem to recognise that the local authorities have different capacities which affect the extent to which they perform. The implication of this is that some local authorities are likely to fail to deliver on a variety of responsibilities because of a lack of capacity.

As was discussed in Chapter Two, Uganda is an example of a country which has applied the principle of differentiation in the allocation of powers and functions. Districts and lower councils are assigned different responsibilities depending on their capacity.¹⁹⁹ Districts have been exercising educational functions such as primary, secondary, vocational, technical and adult education while lower councils have competence over kindergarten education. The South African Constitution similarly provides for asymmetry in Section 155. The Constitution and national legislation²⁰⁰ provide mechanisms of ensuring that the assignment of powers and functions is equal to the capacity of local government outside of metropolitan municipal areas. Basically, local government at this lower level is comprised of district municipalities and local municipalities. Responsibilities are assigned between these district and local municipalities by local government legislation.²⁰¹ Functions like potable water supply, bulk electricity supply, waste water and sewage disposal, municipal health and fire-fighting services are assigned to district municipalities, on one hand. On the other, local municipalities are responsible for the remaining functional areas listed in Part B of Schedule 4 and 5 of the Constitution of South Africa. These include childcare facilities, street lighting, local sports facilities and trading regulations. However, some district municipalities lack the capacity to deliver on their expectations.²⁰² ‘The legislation therefore makes provision for local municipalities to perform district functions on behalf of districts.’²⁰³ Therefore, it can be submitted that the assignment of the function must depend on both capacity issues and the local environment at large. Therefore, an evaluation of local authorities must be carried out before any assignment of powers and functions is implemented. After the evaluation, the assignment of functional areas should then follow the capacity to deliver.²⁰⁴ This then means

¹⁹⁸ Constitution of Zambia, 2016.

¹⁹⁹ Commonwealth Local Government Forum *The local government system in Uganda* available at www.clgf.org.uk/uganda (accessed on 19 October 2017).

²⁰⁰ Municipal Systems Act 32 of 2000, South Africa.

²⁰¹ Local Government: Municipal Structures Act 117 of 1998, South Africa.

²⁰² Municipal Demarcation Board (2012) 151.

²⁰³ De Visser J. & May A. (2015) 8.

²⁰⁴ De Visser J. & May A. (2015) 8.

decentralisation is incremental, which may reduce the pace of realising development and democracy at the local level.

The Zambian Constitution has avoided the incremental approach to decentralisation. Unlike the Constitution of Zimbabwe (2013),²⁰⁵ the 2016 Constitution of Zambia does not tie the devolution of powers and functions to capacity or other considerations. This approach has several advantages including the fact that it does not allow the pace of devolution to be determined by the national politicians and bureaucrats, who are often reluctant to devolve power. Rather, the Constitution allocates power directly to all local authorities irrespective of category. The absence of a differentiated constitutional approach to assignment of powers and functions to local government, nevertheless, may mean that significant support will likely be required by poor and low category local authorities if they are to carry out the functions effectively. Such support may be financial, administrative and technical. The key question then becomes whether the national and provincial governments in Zambia are able and willing to provide such kinds of support? Otherwise decentralisation will fail even though the Constitution strengthens local government in Zambia by, among other ways, directly allocating powers and functions to local government.

4.4 Conclusion

For the first time in the history of Zambia, the 2016 Constitution has enumerated the powers and functions of local government. The constitutional recognition has undoubtedly improved the status of local government. Local government now has original and relevant powers; a development which is likely to enhance its role. However, some of the powers and functions of local government are not clearly defined from those of the national and provincial governments. The implication is likely going to be resource wastage, distorted lines of accountability and litigations; all of which tends to constrain effective local government. The Constitution has nonetheless given the necessary final decision-making powers to local government. With such powers, local government is likely to play an enhanced role in public service delivery, among other development objectives. The 2016 Constitution does not adopt a differentiation approach to the assignment of powers and functions to local government as all local authorities, irrespective of category, have been assigned equal powers and functions. The implication is that some local authorities may fail to carry out the constitutional responsibilities due to lack of capacity. Despite these flaws, local government has benefitted significantly from the constitutional assignment of powers and functions, particularly their

²⁰⁵ See section 264(1) Constitution of Zimbabwe.

enumeration as seen in Part C of the Annex to the Constitution. The 2016 Constitution can therefore be considered the most progressive in as far as local government in Zambia is concerned.



Chapter 5: Conclusion

5.1 Introduction

Since independence in 1964, Zambia has adopted various reforms to democratise and improve the efficiency and effectiveness of the system of local government. However, most of these reforms have failed to improve effectiveness of the system of local government, partially due to the weaknesses in the manner in which powers and functions were assigned to this lower tier of government. Zambia adopted a new Constitution in 2016 which seeks to address challenges experienced under the previous constitutional orders, including those relating to local government. This research paper examined the 2016 Constitution of Zambia with an objective to determine if the manner in which this Constitution assigns powers and functions to local government enables local authorities to undertake a significant role in the delivery of public services and in realising other benefits usually associated with decentralisation.

Chapter Two proposed an institutional design for the assignment of powers and functions to local government, which served as a yardstick for measuring the 2016 Constitution. Chapter Three examined the assignment of powers and functions to local government prior to the adoption of the 2016 Constitution. It sought to establish if the powers and functions assigned to local government at various stages enabled this lower tier of government to live up to its full potential. The Chapter exposed several challenges relating to the assignment of powers and functions to local government, which constrained the role of local authorities. Chapter Four then examined the allocation of powers and functions to local government under the 2016 Constitution. The objective was to establish if this new Constitution has sufficiently empowered local government by allocating them original, relevant, clearly demarcated, final decision-making and differentiated powers.

The main aim of this chapter is to provide major findings of this study, recommendations and conclusive remarks. The chapter presents major findings before major recommendations are proposed.

5.2 Major Findings of the Study

It was contended in Chapter Two that the potential of a system of local government to realise benefits usually associated with decentralisation, partly depends on its institutional design. The assignment of original, relevant, clearly defined, final decision-making and differentiated

powers was identified as one of the key determinants of the effectiveness of a system of local government.²⁰⁶ It was argued that without such powers, local government is unlikely to undertake a significant role in developmental objectives, among other objectives. The question was therefore whether the 2016 Constitution assigns such powers and functions. The major findings of the study of this question are provided below.

5.2.1. Original Powers

Original powers and functions are those which are assigned to a particular level of government directly by the Constitution. It was observed in Chapter Three that local government in Zambia lacked constitutional recognition until 1996. While the 1996 Constitution recognised local government, its powers and functions were not enumerated in the Constitution. On the other hand, the 2016 Constitution has not only recognised local government but also enumerated its powers and functions. Local government now has original powers and functions which cannot be changed or recentralised without amending the Constitution. The significance of that is that local powers and functions now have the highest level of protection which will likely enhance the role of local government. Thus, in as far as allocating original powers and functions to local government is concerned; the 2016 Constitution is the most progressive one Zambia has ever had.

5.2.2. Relevant Powers

When it comes to relevant powers and functions, it was observed that local government in independent Zambia has always enjoyed relevant powers and functions. Relevant powers and functions are those which impacts on people's daily lives. The 2016 Constitution recognises this culture of assigning relevant powers and functions to local government. A perusal of Part C of the Annex to the Constitution, which provides for the powers and functions of local governments, shows that local government has a significant number of relevant functions such as water supply, health provision, refuse removal, waste management, firefighting services and local tourism. Hence, local government has the necessary competencies to change people's lives for the better.

5.2.3. Clearly Demarcated Powers

It was contended in Chapter Two that local government requires clearly demarcated powers and functions if they are to delivery on their obligations effectively.²⁰⁷ On the contrary, local authorities in Zambia, both during the colonial and independence eras lacked clearly

²⁰⁶ See paragraph 2.3, Chapter Two.

²⁰⁷ See Article 5(1) of African Charter on Decentralisation.

demarcated powers and functions. The 2016 Constitution of Zambia has not gone very far in rectifying this challenge as quite a number of local functions cannot be easily demarcated from those of the provincial and national government.²⁰⁸ The implication is that ambiguous accountability channels, resource wastage and the neglecting of the delivery of certain public services by governments, among other problems - which often characterise decentralised countries with no clearer sharing responsibilities among tiers of government - are likely to be witnessed in Zambia.

5.2.4 Final Decision-Making Powers

Local governments without final decision-making powers are unlikely to make a meaningful contribution in improving people's lives.²⁰⁹ In Chapter Three, it was observed that local authorities during the colonial and independence era lacked the crucial final decision-making powers. For instance, they could not enact laws and adopt certain policies without seeking the approval of the central government. The 2016 Constitution has rectified this abnormality by granting local authorities final decision-making powers. Local authorities now have the right to manage their affairs and the national and provincial government is constitutionally prohibited from compromising this right. Armed with final decision-making powers, with other relevant factors in place, more local innovation and experimentation that improves service delivery should be expected.

5.2.5 Differentiated Assignment of Powers

Given the differences that exist at the local level, it was submitted that a differentiated assignment of powers and functions to local authorities may be required. The process of differentiating can be informed by factors such as the local economic potential, population size, capacity constraints, inequality and geography.²¹⁰ On the contrary, it was observed in Chapter Three that only the 1965 Local Government Act provided for differentiated assignment of powers and functions to local government. The 2016 Constitution assigns all local authorities the same powers and functions. The implication is that some local authorities are likely to fail to deliver on their obligations given the varying capacity levels that exist in the local government sector.

²⁰⁸ See the Annex, Constitution of Zambia.

²⁰⁹ Article 6(1) of African Charter on Decentralisation.

²¹⁰ World Bank (2009) 37.

5.3 Answering the Research Question

The main research question which this study sought to answer is, ‘Does the manner in which the 2016 Constitution of Zambia allocates powers and functions to local authorities enable them to deliver on their constitutional responsibilities of providing public services, deepening democracy and promoting development?’ It is clear from the above findings that the Constitution has assigned original, relevant and final decision-making powers to local authorities. The main weaknesses are, however, that these powers and functions are not clearly demarcated and their assignment is not differentiated. As discussed in detail in the following section, these weaknesses are not insolvable. Thus, it is submitted that to a larger extent, the 2016 Constitution allocates powers and functions to local government in a manner which allows local authorities to undertake a significant role in providing public services, among other responsibilities.

5.4 Recommendations

In its current form, the 2016 Constitution of Zambia provides the necessary foundation for the establishment of an effective system of local government that positions local authorities at the centre of service delivery and democracy. However, local government may not fully promote the realisation of the benefits of decentralisation if the pitfalls in the constitutional assignment of powers and functions to local government, discussed above, are not addressed. It is against this backdrop that this section proposes a set of recommendations in a bid to strengthen the system of local government. The proposals are discussed in detail below.

5.4.1. Regulation of Local Powers and Functions

While the 2016 Constitution enumerates the powers and functions of local government, it provides that these can be regulated by national legislation. When enacting this piece of legislation it is important to ensure that local government enjoys a certain level of autonomy required by the Constitution. To protect that level of autonomy, it is suggested that legislation should be limited to setting the norms and standards (national framework setting) or procedures to be followed when carrying out the local powers and functions. It should avoid extending to the core of local government activities.

5.4.2. A Clearer Demarcation of Powers and Functions

A clearer demarcation of national, provincial and local powers and functions is required. Legislative clarification is one way of achieving that objective. Competence agreements or implementation protocols between different tiers of government (national and local) which would show how far each sphere could go when undertaking its responsibilities, for example,

of health and public transport, are other ways of addressing the challenge of an ambiguous constitutional sharing of powers and functions among tiers of government. These mechanisms are some of the many that can be effective in reducing an overlap of powers and functions among different tiers of government. Given that the Constitution provides for the assignment of powers and functions to local government by the national government, legislative mechanisms of guarding against unfunded mandates become essential.

5.4.3. Alignment of the Local Government Act with the Constitution

The Local Government Act of 1991 takes away the final decision-making power of local governments in a number of ways. For instance, it requires local authorities to seek the approval of the minister responsible for local government before implementing a by-law. Thus, it is suggested that there is a need to reform this Act to ensure that it is consistent with the new Constitution. In particular, the supervision of the minister should be limited so that local authorities have a fair amount of discretion when adopting and implementing laws and policies.

5.4.4. The Need for Support to Local Authorities

It has been observed above that the Constitution allocates equal powers and functions to local authorities irrespective of category. This means that all local authorities have no option but to undertake all the assigned functions even in cases where they lack capacity. The result is that low category or poor local authorities are likely to fail to carry out the decentralised functions effectively, given that they are not on an equal footing with high category or rich local authorities. Thus, significant support is likely to be required by these local authorities, which the national and provincial governments should be willing and capable to render. Otherwise, the low category or poor local government will fail to carry out their constitutional obligations.

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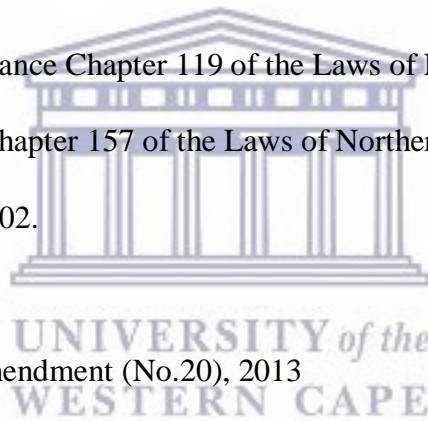
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