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The supervision of local government in Zambia: An imbalance between supervisory powers and local autonomy?

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Declaration

I, Lutangu Maina, do hereby declare that “The supervision of local government in Zambia: An imbalance between supervisory powers and local autonomy” is my own 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 to any other institution of higher learning.

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CHAPTER ONE: INTRODUCTON

1. 1 Problem Statement

Since gaining independence in 1964, Zambia has embarked on a number of reforms, including legislative, aimed at improving the effectiveness of its decentralised system of government. Local government received constitutional recognition in 1996.¹ In 2002, the national government adopted the National Decentralisation Policy (NDP) which was reviewed in 2013. The NDP established Ward Development Committees (WDCs) as the lowest tier of government. It also defined the roles and responsibilities of local authorities, provinces, and national government.² The NDP aimed to address, among other things, the problem of poor service delivery in Zambia that was partially attributed to a high concentration of power at the centre.³ Despite these various legislative and policy reforms, service delivery remained largely poor in many parts of Zambia.⁴ Local government still failed to supply potable water, maintain roads, provide proper sanitation and collect refuse on time, among other service delivery failures.

In 2016, Zambia adopted a new Constitution partially to address the challenges the country had been experiencing since independence, such as poor service delivery at local level. Among other things, the 2016 Constitution provides for a devolved system of governance where the management and administration of some state functions are mandated to be performed by local authorities.⁵ The Constitution also stipulates that the functions that are to be performed by the local authorities should be accompanied by adequate resources for their performance.⁶ It guarantees local authorities the 'right' to manage the affairs of their respective areas.⁷ Furthermore, the Constitution guarantees local authorities the right to perform their functions without any interference or compromise from the national government or provincial administration.⁸ Thus, there is no doubt that the place and role of local government in Zambia has been enhanced.

¹ Constitution of Zambia (Amendment) Act (No 18 of 1996) Art 109.

² Republic of Zambia *Revised National Decentralization Policy-Empowering the People* (2013) 5 - 8.

³ Republic of Zambia *Revised National Decentralization Policy-Empowering the People* (2013) 4-5.

⁴ Chikulo B C 'Decentralization Reforms in Zambia 1991-2010' (2014) 40(1) *Journal of Social Sciences* 102.

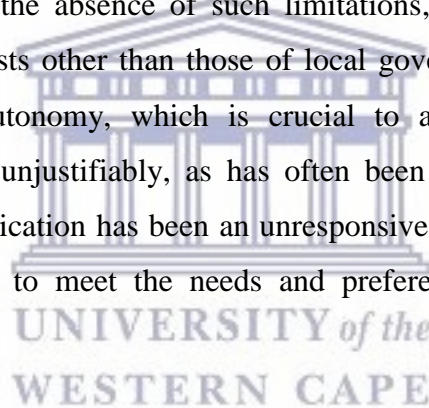
⁵ Constitution of Zambia (Amendment) Act (No. 2 of 2016) Art147 (1).

⁶ Constitution Art148 (2).

⁷ Constitution Art 147(3)(c).

⁸ Constitution Art 152(2).

While guaranteeing a certain level of local autonomy, Article 117(3)(c) of the 2016 Constitution requires the Provincial Minister⁹ to ensure that the functions of local authorities are performed in accordance with the Constitution and relevant legislation. This provision suggests that the national government, through the Provincial Minister, has a responsibility to supervise local authorities. The Constitution also assigns to the Local Government Service Commission (LGSC) the powers to appoint, confirm, promote and hear appeals from officers in the Local Government Service.¹⁰ The Local Government Act also assigns supervisory powers over local authorities to the Minister of Local Government.¹¹ The constitutional and legislative provisions that recognise the need for the national government and/or provincial administration to supervise local governments have the potential to put the country on a path leading towards a greater achievement of the benefits of decentralisation. Although the 2016 Constitution recognises the need for national government and provincial administration to supervise local authorities, it however does not provide for mechanisms of limiting the exercise of such powers. In the absence of such limitations, supervisory powers may be abused to pursue other interests other than those of local governments and their respective communities. Thus, local autonomy, which is crucial to an effective system of local government, will be limited unjustifiably, as has often been the case under the previous constitutional order. The implication has been an unresponsive and unaccountable system of local government that failed to meet the needs and preferences of citizens in different communities.



1.2 Significance of the problem

Unlimited supervisory powers have adverse consequences on the ability of local authorities to perform their obligations. The ability of local authorities to provide local solutions to deliver on the obligations of service delivery and development, among others, partially depends on the discretion they have when undertaking their functions. Without such discretion, the challenges being experienced at local government level in Zambia, such as poor service delivery and unaccountable local government structures, will likely remain unresolved. Unlimited and regulated supervisory powers may be exercised in a manner that undermines local autonomy. It is, therefore, important for supervisory powers to be limited and regulated

⁹ See Constitution Art 116(2) & Art 117(1). The President has power to appoint cabinet ministers and provincial ministers among other constitutional office holders. Cabinet ministers are in-charge of line ministries while provincial ministers represent government at the provincial level.

¹⁰ Constitution Art 228(2)(c). Officers in the local government service are employees employed in the local authorities.

¹¹ Local Government Act No 22 of 1991 Part VIII & IX.

in order to safeguard the minimum level of local autonomy necessary for local authorities to undertake a significant role in service delivery and development, among other areas. Thus, the nature of the relationship between local autonomy and supervision, as provided for in the 2016 Constitution of Zambia, presents a significant problem which deserves investigation. If not properly investigated and solved, the problems of poor service delivery and unresponsive local government, which the 2016 Constitution partially seeks to address, will likely continue causing harmful effects to the wellbeing of ordinary citizens.

1.3 Research question

The main research question which this study seeks to answer is ‘Does the 2016 Constitution of Zambia sufficiently balance the need for local autonomy and the requirement for supervision?’ If not, what are the reforms which are necessary to establish such a balance? In seeking to answer these questions, the paper will provide answers to the following sub-questions:

- What does the concept of supervision entail?
- What is the nature and extent of supervisory powers provided for in the 2016 Constitution of Zambia?
- How far does the 2016 Zambian Constitution go in resolving the challenges relating to local government supervision which characterised the previous constitutional order?
- What are the legislative and policy reforms that are necessary to give effect to the values and objectives of the 2016 Constitution of Zambia relating to devolution?

1.4 Argument or answer

International literature on decentralisation suggests that the supervisory powers of the national and/or provincial government over local government must be regulated and limited to safeguard the minimum level of local autonomy which local authorities require to deliver on their functions efficiently and effectively.¹² It is argued that the 2016 Constitution of Zambia fails to limit such powers. Limiting supervisory powers entails, among other things, setting up oversight mechanisms over the use of such powers. Further, supervision should always be undertaken following constitutionally and legislative specified grounds and

¹² De Visser J *Developmental Local Government: A case study of South Africa* (2005) 44. Litvack J & Seddon J (eds) *Decentralisation Briefing Notes* (1999) 13.

procedures.¹³ There is also a need to have predictability in the way supervisory powers are exercised. This means that local authorities should be able to easily predict what, when and how supervisory powers can be used on them. It is further argued that the inclusion of these design features in the institutional architecture of a decentralised system of government promotes equilibrium between the need for autonomy on one hand, and the requirement for supervision, on the other. Such a balanced relationship between supervision and local autonomy enhances the ability of local authorities to deliver public services, respond to the needs and preferences of their respective communities and to adjust to the ever changing economic and social environment.

1.5 Literature review

In a multilevel system of government, establishing different orders of government implies not only the division of powers between the different levels of government but also adopting different frameworks through which the relationship between the different orders of government¹⁴ should be regulated. International practice and literature on decentralisation suggests that if well designed and implemented, decentralisation has the potential to improve the lives of ordinary citizens.¹⁵ The closer the decision making process is to the communities, which is often the case under a decentralised system of government, the more it enhances government's ability to gauge the needs of local communities.¹⁶ De Visser argues that local governments must also be given substantial powers to govern their areas, without due interference from the national government.¹⁷ Furthermore, local governments require some level of autonomy which is defined as the freedom to discharge functions as provided for by the constitution and legislation, without national and/or provincial government interference.¹⁸ It is only when local governments are autonomous that they are likely to be responsive to the needs of the local people and able to improve their well-being.

The need for local autonomy, however, at times creates misconceptions. There is a conviction that if national and/or provincial government devolve power to local governments, they must cease to have any role to play in the running of the affairs of local governments. There is

¹³ Constitution of South Africa (1996) S 100 & 139.

¹⁴ This relationship is known as Intergovernmental Relations. See Department of Provincial and Local Government, South Africa *A guide document on Provincial – Local Intergovernmental Relations* (2007) 5.

¹⁵ Afonso A & Fernandes S 'Assessing and explaining the relative efficiency of local government' (2008) 37 *The Journal of Socio-Economics 1947*. Litvack J & Seddon J (eds) *Decentralisation Briefing Notes* (1999) 6.

¹⁶ Smoke P *Fiscal Decentralisation in Developing Countries: A Review of Current Concepts and Practice* (2001) 6 at 8.

¹⁷ De Visser J (2005) 35.

¹⁸ Oguna A E C *A handbook on Local Government in Nigeria* (1996) 350.

evidence suggesting that the absence of supervision from national and/or provincial government's role undermines the effective functioning of a decentralised system of government.¹⁹ In view of the fact that a devolved system of decentralisation requires the creation of multiple decision-making centres, it is argued that national government and/or provincial government should always retain a certain amount of supervisory powers over local governments.²⁰ If unfettered, autonomy of local governments is likely to bring about a number of undesirable consequences such as corruption, elite capture, and abuse of office by both elected and appointed officials at local level.²¹ These unwanted consequences will in turn undermine local governments' performance in terms of achieving their service delivery obligation and development mandate. Hence, scholars such as Chigwata *et al*, express caution that local autonomy should always be fettered.²²

Supervision of local government can be exercised in various forms.²³ Steytler and De Visser identify four forms of supervision: regulation, monitoring, support, and intervention.²⁴ In the context of intergovernmental supervision, regulation refers to determining a legal framework or setting up parameters within which local governments can exercise their autonomous responsibly.²⁵ It can be undertaken through the establishment of local government institutions and regulating their institutional framework.²⁶ Regulation may involve the establishment of performance standards which local authorities must comply with when delivering public services. Another way of supervising local government is through monitoring. Monitoring is the establishment of mechanisms aimed at continuously looking into the general performance of local government to see whether there is compliance with the relevant constitutional, legislative and policy provisions.²⁷ Monitoring is not only necessary to ensure that there is compliance with the legislative and policy frameworks, but also indicates when support is required to enable local governments to exercise their mandates effectively.²⁸ Intervention is the most intrusive form of supervision which may be necessary if the monitoring mechanisms reveal serious shortcomings and support mechanisms have been unable to remedy these

¹⁹ De Visser J (2005) 43.

²⁰ Steytler N & De Visser J *Local Government Law of South Africa* (2016) 5–15.

²¹ Machingauta N 'Supervision of local government' in De Visser J, Steytler N & Machingauta N (eds) *Local Government Reform in Zimbabwe: A Policy Dialogue* (2010) 140.

²² Chigwata T. C *et al* (2017) 41-56.

²³ Machingauta N (2010) 140.

²⁴ Steytler N & De Visser J (2016) 5-15.

²⁵ De Visser J (2005) 170.

²⁶ Machingauta N (2010) 140.

²⁷ Machingauta N (2010) 142.

²⁸ Department of Provincial and Local Government, South Africa (2007) 5.

shortcomings.²⁹ It goes beyond normal monitoring and sometimes can require national or provincial governments to get involved intrusively in the affairs of local authorities by assuming local responsibilities, for example. However, it is important that such supervisory powers are regulated and limited to safeguard local autonomy.³⁰

There are various ways of limiting the supervisory powers of senior governments. First, regulation should be limited to setting the regulatory and performance framework within which local authorities exercise their functions and avoid extending to the core of local functions.³¹ Such a framework should provide minimum norms and standards of service delivery and appointment of key personnel, among other issues.³² Second, senior governments should not exercise supervisory powers on any grounds other than on those provided for in the constitution and legislation.³³ Third, the exercise of supervisory powers should be reviewed by independent institutions, such as parliament and the judiciary, for checks and balances.³⁴ Fourth, the supervisory framework must be predictable, that is, local governments should easily anticipate the rules they are required to adhere to.³⁵ Fifth, the supervisory framework should accommodate the different categories of local authorities. A one-size-fits-all approach for local governments when they are called upon to comply with the supervisory framework may not be appropriate.³⁶ The reason is that local authorities, especially in developing countries such as Zambia, have different levels of capacities owing to factors such as colonialism which created disparities. Last, when determining the supervisory framework, local governments should be consulted as they will ultimately be responsible for compliance.³⁷ Supervisory frameworks formulated in a participatory way result in better quality laws and that in turn assists in better informing local governments on the extent and nature of their applicability.³⁸

The study by Lolojih on local government in Zambia revealed that unregulated supervision by the national government, through policies and directives, was partially behind poor service

²⁹ Department of Provincial and Local Government, South Africa (2007) 41.

³⁰ De Visser J (2005) 185.

³¹ Chigwata *et al* (2017) 44.

³² Litvack J & Seddon J (eds) (1999) 75.

³³ Mathenjwa M 'Contemporary trends in Provincial Government supervision of Local Government in South Africa' (2014) 18(1.9) *Journal of Law, Democracy and Development* 183.

³⁴ Litvack J & Seddon J (eds) (1999) 75.

³⁵ De Visser J (2005) 44.

³⁶ Chigwata *et al* (2017) 44.

³⁷ Chigwata *et al* (2017) 44.

³⁸ Smith B C *Good Governance and Development* (2007) 156.

delivery by local authorities under the previous constitutional order.³⁹ He further observed that the nature of the system of local government in Zambia has created an environment where local authorities are continuously dependent on the centre for policy direction and decision-making, hence, becoming less autonomous.⁴⁰ Chikulo also argues that, in Zambia, the local governance system is characterized by central dominance that undermines local autonomy and legitimacy.⁴¹ He further claims that the Local Government Act vests excessive powers in the Minister of Local Government and Housing (MoLGH) at the expense of democratically-elected local leaders.⁴² He also attributes poor service delivery by local governments partially to these excessive supervisory powers.⁴³

Whilst there is vast comprehensive literature on supervision of local authorities in other countries, there is no comprehensive literature on local government in Zambia, besides Lolojih and Chikulo. The latter only examines the supervision of local governments before the adoption of the 2016 Constitution. Therefore this research aims to fill the gap in literature by providing a comprehensive analysis of supervision of local government in Zambia both under the 1996 and 2016 constitutions. The study will go further by not only examining the relationship between supervision and local autonomy; it will also proffer proposals that strive to establish equilibrium between these two aspects of a decentralised system of government. The objective is to recommend institutional designs that improve the potential of local authorities in Zambia to deliver on their service delivery obligation and development mandate.

1.6 Chapter outline

The study is divided into the five chapters. Chapter One introduces the study by background of the study, significance of the problem, the research question and the methodology. Chapter Two discusses the concepts of supervision based on international literature, best practice and instruments on decentralisation. It will focus on the four components of supervision, namely; regulation, monitoring, support, and intervention as well as ways of limiting the supervisory powers. Chapter Three discusses the legal framework and practice of local government supervision in Zambia. Chapter Four analyses the 2016 Constitution against the background

³⁹ 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* (unpublished PhD Thesis, University of Zambia, 2008) 263.

⁴⁰ Lolojih P K (2008) 264.

⁴¹ Chikulo B C (2014) 102.

⁴² Chikulo B C (2014) 102.

⁴³ Chikulo B C (2014) 102.

of the theoretical framework discussed in Chapter Two. Lessons will also be borrowed from other countries with similar systems of government to guide the interpretation of this Constitution. Chapter Five provides major conclusions and recommendations of the research paper.

1.7 Research methodology

This is a desktop based study that will use both primary and secondary sources. The primary sources of data include: constitutions, various pieces of legislation, government policy documents and case law. The study will also make use of international instruments on decentralisation and the role of local government. The sources of secondary data will comprise of different scholarly materials such as books, chapters in books, and journal articles on decentralisation and the role of local government. The study will also make use of informal sources such as newspaper articles, opinion pieces and websites to augment the sources above.



CHAPTER 2: BALANCING THE REQUIREMENT FOR SUPERVISION AND THE NEED FOR LOCAL AUTONOMY: A THEORETICAL FRAMEWORK

2.1 Introduction

Local governments have the potential to go beyond the traditional public service delivery role to being drivers of development, democracy, and peace. International literature on decentralisation and best practices on local government suggest that, if local governments are to reach their full potential they require a certain measure of local autonomy. It equally stresses the importance of supervision of local government by higher level governments to protect and promote both local and national goals. Thus, the requirement for the higher level governments to supervise local governments should be balanced with the need for local autonomy.⁴⁴ The purpose of this chapter is to explore ways in which such a balance can be established. The chapter proposes a set of design features based on international literature, best practices and international instruments on decentralisation and local government. The proposed framework will provide the yardstick for measuring the supervision of local government in Zambia both under the new and old constitutional orders. The chapter defines local autonomy and the concept of supervision. The chapter then discusses the importance of supervision in a decentralised system of government, followed by an analysis of which level of government should supervise local governments. A discussion of the general forms of supervision, namely: regulation, monitoring, support and intervention then follows looking at how the requirement for supervision and the need for local autonomy can be balanced. Finally, the chapter gives conclusive remarks.

2.2 Defining local autonomy

Generally, local autonomy refers to the extent to which local governments have discretionary powers to govern their jurisdictions.⁴⁵ According to Adeyemo local government autonomy is the degree of freedom given to local government in terms of political, economic and administrative decision making.⁴⁶ Local autonomy therefore entails that local governments are given discretionary powers to make by-laws, adopt policies, take decisions and spend revenue within a framework of national or regional laws.⁴⁷ Local autonomy means local government is able to govern without having to seek the approval of centre on the day-to-day

⁴⁴ Chigwata T C *et al* (2017) 41-56.

⁴⁵ Chigwata T C & De Visser J 'Local government in the 2013 Constitution of Zimbabwe: Defining the boundaries of local autonomy' (2017) *Hague Journal Rule of Law* DOI 10.1007 1-21.

⁴⁶ Adeyemo D O 'Local Government Autonomy in Nigeria: A historical perspective' (2005) *Journal of social Science* 10(2) 80.

⁴⁷ Adeyemo D O (2005) 80.

management of their respective areas. Unless local authorities are given the aforementioned discretionary powers, they are unlikely to respond adequately to the needs and preferences of people in their respective communities.⁴⁸ Chigwata *et al* identifies a varied range of features that constitute local autonomy and argues that the features can be grouped into five broad identical features.⁴⁹

Firstly, the level of local autonomy is reflected by the extent to which the existence of local government is guaranteed.⁵⁰ Constitutional recognition of local governments offers perhaps the best safeguard to the existence of local government.⁵¹ Secondly, another basic feature of local autonomy is local democracy where citizens are able to elect local leaders and directly participate in local governance processes.⁵² Thirdly, the decentralisation of original, relevant and final decision making powers and functions is at the centre of local autonomy.⁵³ Fourthly, local autonomy entails that local governments should have the power to raise and spend their own revenue.⁵⁴ Finally, administrative power, that is the powers over human resources establishment and the determination of internal administrative structures and procedures, also forms an important component of local autonomy.⁵⁵

2.3 Supervision of local government

Supervision in a decentralised system of government can be generally defined as a task of overseeing the activities of subnational units by higher governments in order to make sure that these activities comply with the constitution, legislation and any set national standards.⁵⁶ Furthermore, supervision can either be legal, meaning its concern is to supervise the legality of a municipality's original competence, or it can be functional, meaning it is meant to address matters that local governments have with regards to discretionary powers on matters that are transferred by the state to them.⁵⁷

Although local governments often have some measure of autonomy, it should be the duty of higher governments to supervise them so as to monitor their compliance with the set rules,

⁴⁸ De Visser J (2005) 35.

⁴⁹ Chigwata T C & De Visser J (2017) 1-21.

⁵⁰ Chigwata T C & De Visser J (2017) 1-21.

⁵¹ The Aberdeen Agenda: Commonwealth principles on good practice for local democracy and good governance art 1, European Charter on Local Self-Governance (1985) art 2.

⁵² The Aberdeen Agenda art 5.

⁵³ African Charter on Decentralisation (2014) art 6(1).

⁵⁴ European Charter on Local Self-Governance (1985) art 9(1).

⁵⁵ European Charter on Local Self-Governance (1985) art 6(1).

⁵⁶ De Visser J (2005) 170.

⁵⁷ Harbich J 'State supervision of local government authorities' (2009) VII (4) *JEL* 55.

regulations, policies and institutional instruments put in place which they are supposed to comply with.⁵⁸ Supervision is important because unchecked local autonomy may undermine the realisation of benefits that are usually associated with decentralisation. In South Africa, supervision is constitutionally provided for as an integral part of the system of cooperative government that is meant to ensure subnational units are compliant to laid down constitutional and legislative requirements.⁵⁹ Supervision of local governments is also important to ensure that local governments perform according to their set policy targets.⁶⁰ The targets could relate to the national norms and standards which require local governments to meet certain service delivery standards, for example in terms of the quality of water to be delivered to communities.

2.4 Which level of government should supervise local government?

One of the key questions usually raised in countries which have decentralised systems of government is the question of which level of government should supervise local government. In most federal states, supervision of local governments is solemnly carried out by regional or state governments.⁶¹ Examples of such federal states where local governments are solemnly supervised by the regions or states are the United States of America and Australia. In a quasi-federal state, for example South Africa, the national and provincial governments are both responsible for the supervision of local governments.⁶² In most unitary states, supervision of local governments is undertaken by the national government.⁶³ In Zimbabwe, which is a unitary state, the national government is charged with the responsibility of supervising local governments.⁶⁴ Although law and practice differ among various countries on which level of government should be charged with the supervision of local governments, the trend is that in most if not all countries, higher levels of government are charged with the responsibility to supervise local governments.⁶⁵

⁵⁸ Department of Provincial and Local Government, South Africa (2007) 33.

⁵⁹ Department of Provincial and Local Government, South Africa (2007) 34.

⁶⁰ Chigwata et al (2017) 41-56.

⁶¹ Steytler N 'Comparative conclusions' in Steytler N (ed) *A global dialogue on federalism* (2009) 425.

⁶² Constitution of South Africa 1996 s 40 & s 155(6)(7).

⁶³ Steytler N (ed) (2009) 426.

⁶⁴ Machingauta N (2010) 140.

⁶⁵ Steytler N (2005) 7.

2.5 Forms of supervision

Generally supervision is comprised of interrelated activities of regulation, monitoring, support and intervention.⁶⁶ This section discusses these four forms of supervision that higher governments can exercise over local governments. However the interest of the section is not only to discussing the four forms of supervision but also to show how the need for local autonomy and the requirement for supervision can be balanced. The reason being that supervisory powers have proved to be crucial determinants of the level of local government autonomy.⁶⁷

2.5.1 Regulation

In the context of intergovernmental supervision, regulation refers to the setting up of a framework that streamlines local government functions by higher levels of governments so as to allow local autonomy to be exercised responsibly.⁶⁸ A framework is a structure which basically underlines a set of regulations.⁶⁹ In order to maximise the value of local discretion; a regulatory framework should take into account various factors. To start with, a regulatory framework should only set minimum norms and standards that are not so detailed or intrusive in nature so as to usurp local government powers.⁷⁰ If it is so intrusive or too detailed, a regulatory framework impedes or compromises the ability of local governments to perform their functions effectively.⁷¹ Thus, a regulatory framework must only set the essential national standards such as the objectives of the regulatory authority and the functions of the subnational units.⁷² For example, a set regulatory framework should establish governance structures and procedures and minimum qualifications for appointment to key administrative positions.⁷³ A regulatory framework must also be reasonably predictable in its practical use.⁷⁴ De Visser argues that the regulatory framework should be predictable such that local governments must be legally aware of what the regulatory framework allows them to do, and what it prohibits them thus informing them of the likely consequences if they go against the

⁶⁶ Steytler N & De Visser J *Local Government Law of South Africa* (2016) 15-5. See Steytler N (2005) 7, See Machingauta N (2010) 141. See also De Visser J (2007) 43.

⁶⁷ Steytler N 'Introduction' in Steytler N (ed.) *The place and role of local government in federal systems* (2005) 7.

⁶⁸ De Visser J (2005) 170.

⁶⁹ Litvack L *et al* (1999) 75.

⁷⁰ Chigwata *et al* (2017) 41-56.

⁷¹ European Charter on Local Self-Governance (1985) art 8(1), Chigwata *et al* (2017) 41-56.

⁷² Shah A & Shah S 'The New Vision of Local Governance and the Evolving Roles of Local Governments' in Shah A (ed) *Local Governance in Developing Countries* (2006) World Bank.

⁷³ Shah A & Shah S (2006) World Bank.

⁷⁴ De la Harpe S, Rijken C & Roos R 'Good Governance' (2008) 11(2) *Potcherstroom Electronic Law Journal* 3.

framework.⁷⁵ Further, given that a number of countries have different categories of local governments; these differences should be accommodated in the framework.⁷⁶ Moreover, local authorities have different capacities owing to differences in resource raising potential, among other reasons. Therefore, there is need for the regulatory framework to be established in such a way that it accommodates differences at the local level. The failure to take these differences into account may result in some weak or poor local governments failing to comply with the set regulatory framework. Hence, Chigwata *et al* argue that since local governments operate in different environments, and as such encounter different challenges, there is need for the national government to set a regulatory framework that would accommodate such differences.⁷⁷ Such a regulatory framework would enable the different categories of local governments to comply easily and effectively with its set norms and standards. When coming up with the regulatory framework, it is also important that local governments are consulted.⁷⁸ Consultations would basically involve giving adequate invitation notice to a particular party, hearing their submissions and considering them in good faith.⁷⁹ Smith argues that the process of determining any regulatory framework must be participatory enough to include on board even those it is meant to affect.⁸⁰ The following reasons are advanced as the merits of participatory approach:

*it ensures that [local governments] exercise control over their own destinies; it creates a better informed and more politically sophisticated [local government]; it enables the public to express their own views and interests; and it ensures that rule is legitimate in the sense that people are more likely to accept decisions that they themselves have made.*⁸¹

Lastly, when setting up a regulatory framework, there is need to consider the cost of compliance and implementation of the prescribed norms and standards.⁸² By all means, a regulatory framework should strike a balance between the cost of compliance and the objective outcomes of the framework.⁸³ Therefore cost of implementing the regulatory

⁷⁵ De Visser J (2005) 27.

⁷⁶ Chigwata *et al* (2017) 41-56.

⁷⁷ Chigwata *et al* (2017) 41-56.

⁷⁸ Steytler N & De Visser J (2016) 22.

⁷⁹ Steytler N & De Visser J (2016) 22.

⁸⁰ Smith B C (2007) 156.

⁸¹ Bauer C 'Public participation and the lack of service delivery before and after the 2006 local government elections in the Free State' (2006) *Politeia*, 28(1) 31.

⁸² Chigwata *et al* (2017) 41-56.

⁸³ Chigwata *et al* (2017) 41-56.

framework should not exceed the benefits that would accrue in implementing such a regulation.

2.5.2 Monitoring

Monitoring can be defined as ‘a continuing function that aims primarily to provide the management and main stakeholders of an ongoing intervention with early indications of progress, or lack thereof, in the achievement of results.’⁸⁴ In the context of intergovernmental relations, monitoring occurs when one level of government measures the compliance of another level with policy prescriptions and/or legislative directives.⁸⁵ Bahl therefore argues that in order to ensure that local governments comply to set national regulatory frameworks, it is important that they are monitored.⁸⁶ Periodic monitoring of local affairs by higher level governments enables them to detect capacity gaps that may undermine the performance of local governments and/or their compliance with the regulatory framework.⁸⁷ The general monitoring mechanism of local governments can take a general form, such as: the right of access to records and other documents, the right to request information and self-reporting.⁸⁸ Financial monitoring on the other hand, may take the form that requires a local government to submit financial statements or reports for auditing to an independent institution and any other bodies responsible for financial oversight.⁸⁹ Financial monitoring is important to curb vices such as corruption and abuse of public funds. Monitoring is hence performed so as to pick problems that require either support or intervention by appropriate authorities.⁹⁰ Machingauta argues that the ‘power to monitor the performance of local government must be coupled with the power to cause investigations into suspected acts of misconduct and non-compliance’.⁹¹ However, monitoring should not be too demanding to the extent that local governments are diverted from their main responsibilities.⁹² This means that requirements for reporting and access to documents should be rational and responsible, taking compliant costs into account.

2.5.3 Support

Support refers to measures of assistance given by one level of government, usually the national or provincial/region, to the local government level so as to enable them to adequately

⁸⁴ World Bank Group *What is Monitoring and Evaluation (M&E)?* siteresources.worldbank.org/INTBELARUS/Resources/M&E.pdf.

⁸⁵ Machingauta N (2010) 142.

⁸⁶ Bahl R *Implementation of rules for fiscal decentralisation* (1999) 9.

⁸⁷ Steytler N & De Visser J (2016) 15-5.

⁸⁸ Machingauta N (2010) 140.

⁸⁹ Litvack & Seddon (1999) 5.

⁹⁰ Steytler N & De Visser J (2016) 15-5.

⁹¹ Machingauta N (2010) 143.

⁹² De Visser J (2005) 182.

perform their functional mandate of service delivery and development to the communities they are intended to serve.⁹³ It is argued that such support to local government should be specifically tailor-made to solve a particular area of weakness of a municipality that needs support.⁹⁴ In South Africa, for example, the context of co-operative government entails that the national and provincial government must support and strengthen the capacity of municipalities to enable them to effectively exercise their powers and functions.⁹⁵ Higher governments can support local governments through the development of local capacity of councillors, administrative staff and that of other municipal governance structures so that local governments can deliver quality services and the much needed development to their communities.⁹⁶ Higher level governments can also support local governments through the transfer of grants to them. Such support is crucial in improving the financial capacity of local governments and hence enables local governments to perform their service delivery and development mandate adequately.⁹⁷

2.5.4 Intervention

Intervention is the unilateral interference by one level of government into the affairs of another level in order to remedy an unacceptable situation.⁹⁸ When a local government encounters frequent and persistent serious problems in fulfilling its objectives even after receiving support, there may be need for higher governments to intervene.⁹⁹ Some intervention measures are by nature so intrusive to an extent of making inroads that may interfere with the autonomy of local governments.¹⁰⁰ For instance, the dismissal of an entire council or the assumptions of a local government's responsibilities are an intrusive intervention measure that goes to the heart of local autonomy. Such interventions are the reason why interventions should be subjected to specific procedures and oversight mechanisms in order to protect the autonomy of local government.¹⁰¹ The procedures and oversight mechanisms are also important to reduce the chances of intervention powers being used to score political goals at the expense of local interests. Some of these procedures and safeguards for intervention are discussed in detail below.

⁹³ UN-Habitat (2007) 10.

⁹⁴ UN-Habitat (2007) 4.

⁹⁵ Constitution of the Republic of South Africa (1996) s 154 (1).

⁹⁶ Litvack & Seddon (1999) 5.

⁹⁷ Litvack J et al (1999) 31.

⁹⁸ Department of Provincial and Local Government, South Africa (2007) 41.

⁹⁹ Steytler N & De Visser J (2016) 5-15.

¹⁰⁰ Machingauta N (2010) 144.

¹⁰¹ Department of Provincial and Local Government, South Africa (2007) 34.

2.5.4.1 Explicit legal recognition for grounds of intervention

Local autonomy may be safeguarded if legislation set is as clear as possible as to when an intervention can be appropriately triggered.¹⁰² This prevents situations where higher governments would use numerous disciplinary criteria as sanctions for a similar case although committed by different local governments.¹⁰³ Azfar *et al* gives Uganda as an example of where the central government employs numerous discretionary disciplinary measures because the intervention powers are not backed by legal sanctions.¹⁰⁴ To avoid the danger of undermining the autonomy of local governments, it is important to have a clear intervention framework that clearly stipulates the reasons and the procedural requirements that higher governments should follow when triggering an intervention.¹⁰⁵

2.5.4.2. Oversight mechanisms

In order to promote local autonomy, it is argued that the exercise of supervisory powers should be subjected to oversight mechanisms.¹⁰⁶ According to Steytler, the provision of oversight involves such activities as ‘standard setting, support, routine review of decisions, monitoring of performance and intervention.’¹⁰⁷ These activities are performed as a way of strengthening intergovernmental oversight so that there are checks and balances on the exercised supervisory powers. There should be an oversight mechanism to review the supervisory powers of higher governments by independent bodies and/or by a court of law.¹⁰⁸ The role of independent institutions or the courts in such cases allow local governments to seek redress whenever they feel that the supervisory powers are inappropriately triggered or exercised for the wrong reasons.¹⁰⁹ Parliament is one of the independent bodies which can undertake oversight over intervention powers.

2.5.4.3 Resumption of duty by the local government and proportionate intervention mechanisms

Intervention in local governments by higher governments should be aimed at ensuring that local governments comply with the legislative and performance requirements.¹¹⁰ Thus, an

¹⁰² Chigwata *et al* (2017) 41-56.

¹⁰³ Azfar O, Livingston J & Meagher P ‘Decentralization in Uganda’ in Bardhan P & Mookherjee D *Decentralization and Local Governance in Developing Countries: A Comparative Perspective* (2006) 231.

¹⁰⁴ Azfar O (2006) 231.

¹⁰⁵ Azfar O (2006) 231.

¹⁰⁶ UN-Habitat (2007) 7, De Visser J (2005) 27.

¹⁰⁷ Steytler N (2005) 7.

¹⁰⁸ UN-Habitat (2007) 7.

¹⁰⁹ Chigwata *et al* (2017) 41-56.

¹¹⁰ Council of the European Charter of Local Self-Government Art 8(2).

intervention should be exercised only in such a way as to ensure that it is kept in proportion to the importance of the interests which it is intended to protect.¹¹¹ For instance, a whole council may not be dismissed if it is only one councillor who is at fault of breaching a code of conduct. When one of the appropriate intervention mechanisms has been selected, it is also crucial that legislation should determine when a local government is allowed to resume the relevant duty in the quickest possible time.¹¹² It is submitted that once local government is in a position to carry out the relevant legislative or policy obligations, the intervention should be terminated.

2.6 Conclusion

For local governments to be effective in delivering on their service delivery and development mandate they need to be autonomous. However, international literature cautions that local autonomy should be fettered in some way through supervision. The chapter further established that though supervision varies from country to country, the supervision of local governments is a common feature in all countries with a decentralised system of government. Such supervision generally takes the form of regulation, monitoring, support and interventions. The chapter argued that there is a need to balance the requirement for supervision and the need for local autonomy. A number of mechanisms of ensuring such a balance were discussed. These include the need to limit regulatory powers and the need for oversight mechanisms on the use of supervisory powers.

Having discussed the theoretical framework for balancing the requirement for supervision and the need for local autonomy of local governments, the next chapter examines whether such a balance existed in Zambia prior to the adoption of the 2016 Constitution.

¹¹¹ Council of the European Charter of Local Self-Government Art 8(3).

¹¹² UN-Habitat (2007) 7. See Steytler N & De Visser J (2016) 15-5.

CHAPTER 3: THE SUPERVISION OF LOCAL GOVERNMENT BEFORE THE ENACTMENT OF THE 2016 CONSTITUTION

3.1 Introduction

The previous chapter proposed an institutional design for balancing the requirement for supervision and the need for local autonomy in order to enhance the role of local government. The purpose of this chapter is to examine whether such a balance existed in Zambia prior to the adoption of the 2016 Constitution of Zambia. If not, how has the imbalance affected the potential of Zambia's decentralised system to realise benefits, such as improved service delivery, usually associated with decentralisation? The chapter first discusses supervision of local governments in the colonial period. It then examines the supervisory framework of local governments in the post-colonial period up to 2016 when the new Constitution of Zambia was adopted. The discussion under the independence era is divided into three legal phases: 1964 to 1980, 1981 to 1990, and 1991 to 2016. Finally, conclusive remarks are given.

3.2. Supervision of local government under the colonial period (1905 to 1964)

There has always been a system of local government in Zambia before colonialization in 1905. The system of governance was based on the institutions of traditional leadership of chiefs and headmen. Chiefs and headmen exercised powers within their respective tribal jurisdictions. Their authority depended largely on factors of personality and military strength. The more powerful a traditional leader was, the larger the area they governed.¹¹³ However, between 1905 and 1924 with the coming of the colonial age, significant changes were made in the system of local government.¹¹⁴ The administration of local governments under the colonial period can be divided into two legal phases. Phase one being the period from 1905 to 1924 and the second phase being the period from 1925 to 1964. In both phases the distinction between urban and rural local governments was evident.

3.2.1 Local government supervision under company rule (1905 to 1924)

The advent of local government during the colonial period was as a result of the springing up of small urban areas in Livingstone town that was as a result of the railway line that was being built by the British South African Company (BSAC).¹¹⁵ The aim of the railway line was to connect Cape Town to the copperbelt areas of Northern Rhodesia, the country now called Zambia. From 1905 onwards, there were some proclamations made by the BSAC that

¹¹³ Davidson J W *The Northern Rhodesia Legislative Council* (1948) 17.

¹¹⁴ Davidson J W (1948) 17.

¹¹⁵ Tordoff W 'Local Government In Zambia' in Vosloo W B, Kotze D A & Jeppe W J O *Local Government in Southern Africa* (1974) 271.

provided for the administration of the small urban communities that had sprung along the railway line.¹¹⁶ Under this period of colonial rule, a proclamation No. 11 of 1913 was enacted that introduced village management boards which were composed of two or three local residents appointed by the BSAC. The village management boards were responsible for administering village management regulations such as environmental health, roads, and other matters of basic community concern in the small urban communities.¹¹⁷ Members of the board were accountable to the BSAC since it was the one which appointed them. Further, the BSAC supervised these boards.

3.2.2 Local government supervision under the colonial rule (1925 to 1964)

In 1924, the British government took over the administration of Northern Rhodesia territory from the BSAC.¹¹⁸ A new policy of administration was introduced based on the conventional British colonial pattern of indirect rule which allowed the appointment of a governor to oversee the administration of Northern Rhodesia.¹¹⁹ After assuming responsibility of administering Northern Rhodesia, the British Government introduced some ordinances meant to regulate local government matters. These ordinances created two separate local government systems; one for the urban areas and the other for the rural areas.¹²⁰

3.2.2.1 Urban local government

In 1927 and 1928, the British government made important changes by introducing the Municipal Corporations Ordinance in 1927 and the Township Ordinance in 1928 which created and assigned responsibilities to municipal corporation and township boards respectively.¹²¹ These boards had a wide range of both general and specific powers such as, the power to make by-laws and levy rates.¹²² With the rapid development of copper industry in the 1930s, another ordinance known as the Mine Township Ordinance was introduced in 1933 to specifically administer the mine townships through management boards.¹²³ The mine townships were administered differently from the other urban areas as they were operated from funds provided for by the mining corporation. The ministry responsible for local

¹¹⁶ Tordoff W (1974) 271.

¹¹⁷ Tordoff W (1974) 272.

¹¹⁸ Padmore G *How Britain Rules Africa* (1969) 318.

¹¹⁹ Tordoff W (1974) 272.

¹²⁰ Mukwena R M 'Decentralisation, Democracy and development: The case of Zambia' in Chitembo A (ed) *50 years of Local Government in Zambia. Treasuring the past, reflecting the present, and shaping the future.* (2014) 38.

¹²¹ Tordoff W (1974) 272.

¹²² Tordoff W (1974) 272.

¹²³ Tordoff W (1974) 273.

government had considerable supervisory powers over these councils. They included, the power to approve annual budgets, power to appoint an auditor to audit a council, power to make rules governing elections, power to approve by-laws, power to approve council loans, power to approve annual levies and rates and powers to hear council appeals resulting from the powers of the council to grant and renew various licences.¹²⁴ The nature of the system of local government during this period created an environment where local authorities were continuously dependent on the centre for policy direction and decision-making, hence, becoming less autonomous. This meant that the powers vested in the ministry responsible for local government were thus excessive and the system was more of a centralised rather than a decentralised one.

3.2.2.2 Rural local government

In 1930, a proclamation was enacted which gave legal recognition to the traditional institutions by creating native authorities in all Northern Rhodesia tribal areas which were governed by chiefs. In the early 1950s, with the recommendations from the Cartmel Robinson Committee that was appointed by the Governor, the administration of native authorities was reorganised.¹²⁵ The composition of the native authorities, which was purely traditional, changed. The native authority proclamation also made regulations that provided for the appointment and dismissal of recognized chiefs as well as defining their duties.¹²⁶ These changes went further than how the native authorities functioned. Provisions were made for provincial commissioners and district commissioners, appointed by the colonial government, to superintend over the chiefs.¹²⁷ Supervisory powers ran from the central government through provincial commissioners then to district commissioners.¹²⁸ The chiefs and headmen were also required to periodically report to the district commissioners, who were appointees of the governor, on issues of how law and order, and any other assigned duties were being performed in their areas.¹²⁹ If the chiefs or headmen disobeyed orders from the commissioners who supervised them, they would face disciplinary action.¹³⁰ The native authorities had no discretionary powers of any sort as they were just merely created to assist

¹²⁴ Tordoff W (1974) 273.

¹²⁵ Tordoff W (1974) 273.

¹²⁶ Tordoff W (1974) 273.

¹²⁷ Padmore G (1969) 318.

¹²⁸ Padmore G (1969) 319.

¹²⁹ Hailey L *Native Administration in the British African Territories* (1950) 83.

¹³⁰ Hailey L (1950) 83.

central government in maintaining law, order and good governments in their native areas.¹³¹ Hence, the native authorities were deconcentrated structures which were simply local extensions of central government and were tools of local administration rather than local government units.

3.3 The supervision of local government under the independence era (1965- 2016)

Zambia attained independence from Britain in 1964. Since then, Zambia has had three major local government pieces of legislation in operation. The first piece of legislation is the Local Government Act of 1965 which covered the period 1965 to 1980.¹³² The Local Administration Act of 1981 covered the period 1981 to 1991.¹³³ The Local Government Act of 1991 is still operational as of November 2017.¹³⁴ In this section, the chapter examines the Acts in order to establish if there is a balance between the need for autonomy and the requirement for supervision. The practice of local government supervision is given equal attention.

3.3.1 The supervision of local government under the Local Government Act of 1965

Immediately after the dawn of independence in 1964, government enacted the Local Government Act of 1965.¹³⁵ The Act consolidated the various provisions in the Municipal Corporations Ordinance, the Mine Township Ordinance, the Township Ordinance and the Native Authority Ordinance which governed colonial local government.¹³⁶ One of the main objectives for the Act was to address the problem of high concentration of power at the centre which was one of the main causes of inequitable access to public services between the blacks and whites.¹³⁷ Under this Act, three classes of councils were established, namely; municipal councils, township councils, and rural councils.¹³⁸ The difference between the three councils was mainly the functions they performed and also the areas they administered.¹³⁹ All these local authorities were supervised by the ministry responsible for local government and for the first time local governments were supervised by a single institution. The Local Government Service Commission (LGSC) was however created to supervise personnel and administrative

¹³¹ Tordoff W 'Provincial and District Government in Zambia, Part II' (1968) *Journal of Administration Overseas* Vol. VII No. 4 538-545.

¹³² Local Government Act 69 of 1965.

¹³³ Local Administration Act 15 of 1980.

¹³⁴ Local Government Act 22 of 1991.

¹³⁵ Act 69 of 1965.

¹³⁶ Tordoff W 'Rural Administration' in Tordoff W (ed) *Administration in Zambia* (1980) 185.

¹³⁷ Tordoff W (1980) 187.

¹³⁸ Act 69 of 1965 s 65.

¹³⁹ See Act 69 of 1965 Schedules of functions.

issues of local authorities. The respective roles of these two institutions are discussed in detail below.

3.3.1.1 The role of the Ministry responsible for local government

The Local government Act stipulated that a local authority could be disciplined by central government through the minister responsible for local government if it grossly neglected or if it failed to perform the functions it was supposed to perform efficiently.¹⁴⁰ The supervision of local government under this period was a prerogative of the minister responsible for local government. The minister responsible for local government had a wide range of supervisory powers which this section seeks to discuss.

3.3.1.1.1 Power to approve budgets

Section 42 of the Local Government Act empowered the minister to approve or disapprove estimates of expenditure for all local authorities.¹⁴¹ The approval process meant that local authorities had limited budget autonomy. There was also an absence of oversight with regards to the powers to approve or disapprove a budget. It meant that the supervisory powers of the minister could be abused, for example, for political gains in an environment where parties controlling the national and local governments were different. The administration of local authorities was also politicised after the 1969 reforms by the appointment of a political cadre, the District Governor (DG).¹⁴² The appointment of the party cadre led to the high centralisation of supervisory powers into the hands of party functionaries rather than the local elected officials, thus finances were abused.¹⁴³

3.3.1.1.2 Power to appoint an auditor to investigate financial matters

The 1965 Local Government Act empowered the minister to appoint auditors to audit councils.¹⁴⁴ Section 94 of the Act also empowered the minister to act upon the auditors' report in line with whatever the audit recommendations entailed. Firstly, the provision raises good governance/oversight questions as the provision gave the minister dual powers of appointing an auditor as well as acting upon the audit recommendations. The provision thus had the potential to be abused by the minister. This is why Chapter Two argued that to guide against the abuse of supervisory powers by senior governments, such powers should be subject to an independent body, such as Parliament, that would exercise oversight over such

¹⁴⁰ Act 69 of 1965 s 93.

¹⁴¹ Act 69 of 1965 s 42.

¹⁴² Tordoff W (1980) 187.

¹⁴³ Tordoff W (1980) 187.

¹⁴⁴ Act 69 of 1965 s 94.

powers.¹⁴⁵ For instance, the minister could have been given the power to initiate the auditing process with Parliament given the role to consider and act on the audit report.

3.3.1.1.3 Power to amend, revoke or make by-laws

Section 94 of the 1965 Act provided that the minister may refuse to confirm, amend or revoke council by-laws if he or she considers it necessary in the interest of good governance. The implication of the provision was that the supervisory powers allowed the minister to assume law-making power of a local authority which should have been the primary prerogative of a local authority. The other challenge with the provision is the words ‘consider it necessary’ and ‘in the interest’ which are highly ambiguous and subjective as they have no common standard application. The challenge was that due to the ambiguity of the phrases used, the minister may have abused such supervisory power and arbitrarily amended or revoked even well-intended by-laws.

3.3.1.1.4 Role of the Local Government Service Commission

The 1965 Local Government Act also established the Local Government Service Commission (LGSC) which was empowered to regulate the administrative establishment of the local authorities.¹⁴⁶ The Commission could, with the approval from the minister responsible for local government, determine conditions of service of senior employees of local authorities. For instance, the Commission could determine the procedures to be followed when appointing and dismissing senior local authority officers.¹⁴⁷ The Commission could also determine the salary scales for local authorities.¹⁴⁸ This move should have enhanced local discretion because the powers of the minister to supervise personnel matters were limited to only setting a regulatory framework in which local authorities were to exercise their powers responsibly.

3.3.2 The supervision of local government under the Local Administration Act of 1980

The Local Government Act of 1965 was replaced in 1980 by another piece of legislation, the Local Administration Act of 1980 that came into operation in 1981. The 1980 Local Administration Act abolished the city, municipal and rural councils and replaced them with district councils.¹⁴⁹ At district level, local government administration structure and those of

¹⁴⁵ UN-Habitat (2007) 7, De Visser J (2005) 27.

¹⁴⁶ Act 69 of 1965 s 15.

¹⁴⁷ Act 69 of 1965 s 169.

¹⁴⁸ Act 69 of 1965 s 169.

¹⁴⁹ Tordoff W (1980) 191.

the ruling party– the United Independence Party (UNIP) were merged.¹⁵⁰ The merger was part of several measures that were implemented to create a one party state in Zambia. The Act provided for the integrated local administration system at district level where the officials of the UNIP were merged with officials of the district councils.¹⁵¹ The officials of UNIP became supreme in terms of administering the day-to-day operations of the district councils. For each district council, central government appointed a UNIP political party cadre as a district governor.¹⁵² The supremacy of the party led to the high centralisation of power into the hands of party functionaries at various levels of government.¹⁵³ At the national level, the ministry responsible for decentralisation was established with the primary responsibility of supervising the newly created district councils.¹⁵⁴ Local governments during this era were merely tools of local administration as was the case in the colonial era. The district councils were composed of mainly party appointees rather than elected representatives. The councils essentially failed to deliver on their service delivery and development mandate due to the absence of local democracy and the high level of political interference from party cadres.¹⁵⁵

3.3.3 The supervision of local government under the Local Government Act of 1991

In 1991, Zambia enacted another piece of local government legislation, the Local Government Act of 1991. The 1991 Act replaced the 1980 Local Administration Act. The 1991 Act was enacted so as to de-link local administration from the central government and convert it into a fully-fledged autonomous local government system.¹⁵⁶ It sort to separate the party from the government. This entailed a clear institutional divorce of party structures from local government structures. Section Three of the Act empowers the minister responsible for local government to establish a three tier local government system.¹⁵⁷ The Act also empowers the minister to establish in any given district- a city, municipal, township, district council, or a management board.¹⁵⁸ The 1991 Act provides various provisions that empower local governments with the right to govern their respective areas. For instance, sections 76(1) and 61 state that a council may make by-laws for the control of activities within its area and that a council may perform all or any of the functions set out in the Act, respectively.

¹⁵⁰ Tordoff W (1980) 191.

¹⁵¹ Tordoff W (1980) 191.

¹⁵² Act 15 of 1980 s 10.

¹⁵³ Tordoff W (1980) 191.

¹⁵⁴ Tordoff W (1980) 198.

¹⁵⁵ Mukwena R M (2014) 40.

¹⁵⁶ Mukwena R M 'Situating Decentralisation in Zambia in a Political Context' (2001) *African Administrative Studies* No. 57 35-50.

¹⁵⁷ Act 22 of 1991 s 3.

¹⁵⁸ Act 22 of 1991 s 3.

The 1991 Act empowers the minister responsible for local government with supervisory powers over local governments. The objective of these powers was to ensure that local governments perform their mandatory functions within the provisions of the law. The supervisory powers of the minister include: the power to cause councils to submit periodic reports; power to approve, amend, revoke or make by-laws; power to access reports and other documents; power to approve budgets; power to appoint an auditor to investigate financial matters and power to amend or revoke council resolutions and decisions. The minister also has the power to give policy directives; the power to suspend or dismiss councillors and supervisory powers over some components of personnel issues. The LGSC was assigned oversight powers over personnel issues of local government. The key question this section strives to answer is whether the 1991 Act balances the requirement of supervision with the need for local autonomy. The practice of local government supervision during this period is also examined.

3.3.3.1 Regulation

It was argued in Chapter Two that in order to maximise the value of local discretion there is need to establish a regulatory framework that sets parameters within which local autonomy is exercised responsibly.¹⁵⁹ It was also argued that when formulating such a regulatory framework, it must not be too intrusive as to endanger local autonomy. Therefore the framework should only set essential national minimum norms and standards that are to be followed when local authorities perform their functions. There are some provisions in the 1991 Act that require that local authorities should be regulated.

3.3.3.1.1 Regulatory role of the minister responsible for local government

Section 84(1) of the 1991 Act stipulates that the minister responsible for local government may make regulations governing local government. The provision allows the minister to regulate the many activities of local government among others by making by-laws and standing orders that guide the service delivery and internal operations of local authorities respectively. However, the making of by-laws and standing orders by the national government has a negative impact on local autonomy of a democratically-elected council. The challenge is how a centrally located minister could be in a better position to know the needs and preferences of various communities than the elected representatives who are physically closer to the people? That is why in Chapter Two, it was argued that higher

¹⁵⁹ Litvack L *et al* (1999) 75.

governments must set regulatory frameworks that only set minimum norms and standards within which powers such as law-making can be exercised. The powers to make by-laws and standing orders go to the heart of local autonomy, and that affects the effectiveness of a local government.

3.3.3.1.2 Regulatory role of the Local Government Service Commission (LGSC)

Prior to the establishment of the LGSC in 2010, councils had the powers to appoint, fire and discipline both officers and employees of the council.¹⁶⁰ In exercising these powers, it was a requirement that councils should conform to the provisions of the Local Government Service Regulations.¹⁶¹ This system operated with a measure of success as the role of the minister was merely to monitor, support and control the exercise of council powers with regards to the service officers and employees rendered to the council.¹⁶² However, some elected officials abused the powers vested in them to the dissatisfaction of most local [authority] officers.¹⁶³ The national government, after a careful analysis of the complaints of abuse exhibited by councillors on matters of personnel, established the LGSC in 2010 which took over the powers to appoint, dismiss, and discipline employees of councils.¹⁶⁴ The powers of the commission were intrusive as they were neither limited to setting minimum standards nor subject to oversight. The LGSC disciplined, promoted or transferred staff of local authorities arbitrarily- a situation that saw senior staff of local governments being more loyal to the commissioners than the councillors.¹⁶⁵ Accountability tends to follow appointment channels. The system also exhibited some delays, corruption and appointment of officials without adequate consideration of the needs of various localities or councils.¹⁶⁶ The system also exhibited challenges as regards to disciplinary actions. If a member of staff is disciplined by the Commission, it would be the same Commission that also heard appeals of such disciplinary cases. This raised serious questions of checks and balances. The Commission therefore usurped power over personnel from the councils and significantly limited its administrative autonomy.

¹⁶⁰ Act 22 of 1991 s 90.

¹⁶¹ Statutory Instrument No. 115 of 1996.

¹⁶² Loloji P K 'Challenges facing service delivery by local councils' in Chitembo A (ed) *50 years of Local Government in Zambia. Treasuring the past, reflecting the present, and shaping the future* (2014) 174.

¹⁶³ Loloji P K (2014)174.

¹⁶⁴ Loloji P K (2014)174.

¹⁶⁵ Mwasile F B 'Human Resource Development and Management in Local Government in Zambia' in Chitembo A (ed) *50 years of Local Government in Zambia* (2014) 124. Ministry of Local Government Councillors' - Officers' Orientation workshop evaluation report (September, 2016).

¹⁶⁶ Mwasile F B (2014) 124. Ministry of Local Government (September, 2016).

3.3.3.1.3 The regulation of finances

Section 46 of the 1991 Local Government Act empowers the minister responsible for finance to make regulations for the control and management of the finances of councils. The Act should be commended for providing for a financial regulatory framework that sets minimum standards for fiscal reporting, financial management and financial accountability of council revenue.

3.3.3.2 Monitoring

It was submitted in Chapter Two that once the regulatory framework has been established, monitoring local government's compliance with this framework becomes vital.¹⁶⁷ It was further argued that monitoring should not be too demanding but rather rational and responsible by taking into account the costs of compliance on the part of local governments.¹⁶⁸ This section examines the various monitoring mechanisms the Act had put in place.

3.3.3.2.1 Submission of reports to the minister and the minister's access to documentation

It is argued in Chapter Two that when a monitoring framework is set, such a framework should be considerate of the administrative burden local governments will bear due to the frequency of furnishing information to higher governments.¹⁶⁹ Section 30(3) of the 1991 Act requires local authorities to submit to the minister responsible for local government such number of confirmed and signed copies of minutes of any proceedings of a council as may be determined by him or her within a month.¹⁷⁰ The provision empowers the minister responsible for local government with access to minutes of council meetings and financial reports, among reports and forms of information. This monitoring mechanism is important because it helps the minister gauge whether local authorities' meetings are deliberate and resolutions made are in line with the national policy and strategic framework. However, the challenge with the provision is that it does not specify how often the minister can request such information. There is a danger that frequent requests of such information may impose administrative burdens on local authorities.

¹⁶⁷ Bahl R (1999) 9.

¹⁶⁸ De Visser J (2005) 182.

¹⁶⁹ De Visser J (2005) 182.

¹⁷⁰ Act 22 of 1991 s 30(3).

3.3.3.2.2 Approval of budgets

Section 39(1) of the 1991 Local Government Act empowers councils to prepare and adopt their own annual estimates of revenues and expenditure (budget). These estimates must however be submitted to the minister for approval at least 60 days before the commencement of another financial year.¹⁷¹ This requirement enables the minister to establish whether a local authority's budget is in line with the set national budget framework. It is however not automatic that the minister may approve all local authorities' budgets. The Act does not give enough guidance on what happens when the minister does not approve the budget of a council. The other challenge is that in an event that the council budget has not been approved by the minister; the council may only continue to incur expenditure on charges which become due in respect of inescapable commitments determined by the minister responsible for local government.¹⁷² However, the term inescapable in section 39(4) is problematic as the Act does not clearly stipulate or give grounds of what would constitute an inescapable expenditure. This provision may be abused by the national government by not approving council budgets and thus dictating how councils should spend their finances.

3.3.3.2.3 Power to appoint an auditor to investigate financial matters

It was argued in Chapter Two that the reason behind monitoring is to pick problems and take action through either support or intervention so as to solve them.¹⁷³ Section 60(1) of the Local Government Act states that, apart from the routine yearly audits, the minister responsible for local government may appoint at any time a public officer to be an auditor who would undertake an extraordinary audit of all or any of the accounts of a council.

Section 60(3) further states that the appointed auditor is required to submit a copy of the audit report to the minister who has an obligation to consider the report within 60 days of its receipt. After considering the report, the minister is empowered under Section 60(4) to take action as he or she considers appropriate. The difficulty with the provision was to come up with a common understanding of what is claimed as an 'appropriate action' the minister can take. The term appropriate is a relative concept whose application can be easily misinterpreted and hence abused for political reasons.

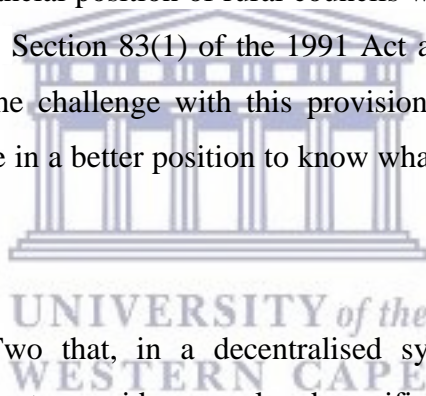
¹⁷¹ Act 22 of 1991 s 39(1).

¹⁷² Act 22 of 1991 s 39(4).

¹⁷³ Bahl R (1999) 9.

3.3.3.2.4 Power to approve, amend, revoke or make by-laws

Section 76(1) of the 1991 Local Government Act empowers a council to make by-laws for the effective governance of its area. The Act should be commended for providing local authorities with much needed autonomy. However, section 82(1) of the Act requires that any by-law made by a local authority must be approved by the minister responsible for local government before it becomes operational. The powers of the minister to approve or disapprove by-laws may undermine local autonomy. The Act does not stipulate on what grounds the minister may disapprove a by-law. Further the powers of the minister to disapprove a by-law are not subject to oversight, so there is a risk that the minister may abuse them. For example, in 2009, President Rupiah Banda made a pronouncement to abolish crop levy at a public rally he held in Chipata District.¹⁷⁴ The pronouncement was seen by many people as a way for him to gain political popularity. The move was done in bad faith as it disregarded the autonomy of local authorities on matters of making by-laws. The abolishment of crop levy worsened the financial position of rural councils who were already struggling to broaden their revenue base.¹⁷⁵ Section 83(1) of the 1991 Act also empowers the minister to amend or revoke by-laws. The challenge with this provision is that the minister, who is centrally located, would not be in a better position to know what by-laws are best situated for the communities.



3.3.3.3 Support

It was argued in Chapter Two that, in a decentralised system of government, senior governments have an obligation to provide general and specific support to local governments to enable them to perform their mandated functions effectively and efficiently.¹⁷⁶ In order to build capacity and help local authorities manage their service delivery mandate effectively, section 45(1) of the 1991 Local Government Act provides that the minister may make available Constituency Development Funds grants and loans to a council, based on terms and conditions as determined by him or her. A major observation with the financial support is that for a local authority to receive such support, it depends on the goodwill of the minister in charge of local government, as it is at his or her discretion to determine the terms and conditions when such funds may be made available. The other challenge is that apart from providing financial support, the Act does not require the minister to provide any other general support to councils.

¹⁷⁴ Lusaka Times *Abolishing of crop levy to deprive council revenue* September 21 (2009) 1.

¹⁷⁵ Lusaka Times (2009) 1.

¹⁷⁶ UN-Habitat (2007) 10.

3.3.3.4 Intervention

It was argued in Chapter Two that when a local government fails to fulfil its service delivery and development mandate even after receiving support, senior governments may intervene in its affairs.¹⁷⁷ Senior governments may intervene by suspending and/or dissolving the entire council. However, it was also argued that given that interventions are the most intrusive forms of supervision, they should be subject to specific procedures and oversight, and there is also need for the legal recognition of grounds when an intervention can be triggered.¹⁷⁸ This section discusses the various interventions the Act provides for.

3.3.3.4.1 The power to suspend or dismiss councillor(s)

The Local Government Act empowers the minister to intervene in the running of local affairs by suspending or dissolving a council. Section 88(1) of the Act provides that whenever the minister has reasons to feel that the council has refused, failed or is unable to adequately discharge all or any of its functions he/she may intervene by suspending or dissolving the council. The suspended or dissolved council is then placed under the stewardship of a Local Government Administrator.¹⁷⁹ Section 88(1)(b)(ii) further stipulates that the minister responsible for local government may suspend or dissolve a council after receiving prior approval from the president and call for elections within 90 days after the dissolution. The powers to suspend councillors or dissolve a council gives the minister wide discretionary powers that significantly undermine local autonomy. To start with, the provision does not clearly state the reasons that would warrant the suspension of councillors. For example, the South African Constitution clearly provides grounds that warrant the trigger of an intervention, for instance it provides that if a municipality does not adopt a budget, it can be suspended or dismissed.¹⁸⁰ The other problem the Act has is that it does not stipulate the procedural steps the minister must take before he or she can suspend or dismiss a council.

In practice, the exercise of the power to suspend and dismiss councillors has been controversial. One example is when the minister responsible for local government, Dr Brian Chituwo, in January 2011, announced the suspension of the Lusaka City council. The suspension was based on reports that the local authority was involved in an illegal land

¹⁷⁷ Steytler N & De Visser J (2016) 5-15.

¹⁷⁸ Azfar O (2006) 231.

¹⁷⁹ Act 22 of 1991 s 88(1)(a).

¹⁸⁰ Constitution of South Africa (1996) s 139(4).

allocation scam in Lilayi area.¹⁸¹ Investigations were done and it was found out that the councillors had followed the due process of law in allocating the said plots. When contacted, the then Lusaka Mayor Daniel Chisenga claimed that the minister just wanted to settle political scores against them as councillors by using the land issue. The Mayor justified his claim by mentioning that the suspension was meant to intimidate the councillors, as most of them were aligned to the opposition Patriotic Front (PF) party, while the incumbent minister was aligned to the ruling Movement for Multi-Party Democracy (MMD) party. This limited the powers of opposition councillors as they were threatened with suspension or dismissal. This state of affairs has remained a major thorn to local autonomy even up to the point of writing this.

3.3.3.4.2 The power to issue directives to councils

Section 84(1) of the 1991 Act stipulates that the minister responsible for local government may make regulations that guide the service delivery and internal operations of local authorities. Under this provision, it is envisaged that the minister may issue legislative or policy directives on how local governments should operate. It was argued in Chapter Two that whenever a national government issues directives to local governments, such directives are supposed to be general in nature. A directive of general nature may specify the processes and procedures a local authority may observe when exercising its functions. For example, the directive may be issued within a certain minimum standard of service provision.¹⁸² The guiding principle is that a directive of a general character does not go to the core of local government functions or activities.

However in 1996, President Fredrick Chiluba, the Republican President directed the Ministry of Local Government and Housing to issue a circular instructing all councils to sell their houses to sitting tenants without prior evaluation as required by law.¹⁸³ The circular further directed councils to complete the sale of their housing stocks by 30th June 1996 and thereafter submit a progress report to the Ministry.¹⁸⁴ The directive was not of a general character as it detailed a specific action that is to sell their housing stock by a specific date. The implication was that the President, through the minister responsible for local government, usurped powers

¹⁸¹ Lusaka Times *Lusaka City Council suspended over plots* (January 22, 2011) available <https://www.lusakatimes.com/2011/01/22/lusaka-city-council-suspended-plots/>.

¹⁸² Chigwata *at el* (2017) 41-56.

¹⁸³ Cabinet circular No. 2 of 1996.

¹⁸⁴ Sunday Mail *Sale of Council Houses* March 17 (1996) 1.

of local governments- a situation that had in turn eroded the revenue base of most rural councils.

3.3.3.4.3 Power to amend or revoke council resolutions and decisions

It was contended in Chapter Two that if local governments fail to comply with the set regulatory framework, higher governments can intervene in their affairs.¹⁸⁵ Such an intervention on local governments may however defeat the very purpose local governments were created for. Section 119(1)(b) of the 1991 Act states that the minister responsible for local government may, whenever necessary, amend or revoke any resolution or decision given or made by local authorities. The difficulty with the provision arises from the words ‘whenever necessary.’ The words entail that the minister responsible for local government has unlimited powers of amending or revoking council resolution. The provision should then explicitly lay down grounds upon which council resolutions and decisions are to be amended or revoked so as to avoid a situation whereby the minister would arbitrarily do so.

3.4 Conclusion

Since independence, Zambia has embarked on several local government reforms whose aim was to create a functional decentralised local government system, capable of delivering not just public services but also meeting other development objectives. The reforms however failed to yield the desired results, partially due to the fact that they all could not balance the requirement for supervision and the need for local autonomy. The imbalance left local government with little discretion to freely operate without undue interference from higher level government who sometimes intrusively usurped local powers and functions. The result has been poor service delivery by local government throughout most parts of the independence era. The question then is, could the adoption of the 2016 Constitution of Zambia be seen as a solution to the unfruitful imbalance between the requirement for supervision and the need for local autonomy that is echoed both in law and practice before its adoption. The question is the main focus of Chapter Four which examines the 2016 Constitution.

¹⁸⁵ Azfar O *et al* (2006) 13.

CHAPTER 4: THE SUPERVISION OF LOCAL GOVERNMENT UNDER THE 2016 CONSTITUTION

4.1 Introduction

This chapter analyses the 2016 Constitution of Zambia with an objective to establish the extent to which it balances the requirement for supervision and the need for local autonomy. This is against the background that such a balance, as argued in Chapter Two, is necessary for an enhanced role of local government.¹⁸⁶ It is argued that while guaranteeing the right of local authorities to govern and the principle of local autonomy, the 2016 Constitution of Zambia does not adequately regulate and limit supervisory powers over local government. Without stringent constitutional limits, the national government, through the minister responsible for local government, among other actors, may be overly involved in local affairs. The implication is that local democracy, initiative and innovation, which are all at the centre of effective local government, are likely to be stifled. The chapter begins by briefly discussing the place of local government in the 2016 Constitution. It then discusses the role of various institutions in the supervision of local government and does so by examining the supervisory framework enshrined in the Constitution. The examination of the 2016 constitutional supervisory framework is carried out against the institution design framework for supervision proposed in Chapter Two. The examination is divided along the four main forms of supervision, namely: regulation, monitoring, support and intervention. Finally, the chapter gives conclusive remarks.

4.2 The place of local government in the 2016 Constitution

Article 4(3) of the 2016 Constitution provides that Zambia is a ‘unitary’ state. This implies that governmental power is aggregated from central government through decentralisation to lower governments.¹⁸⁷ While Zambia remains a unitary state, it has adopted a multilevel system of government constituted by the national, provincial and local governments. Article 147(1) of the Constitution of Zambia provides for ‘a system of governance where political, social, legal, and economic affairs of the state are devolved from the national government are managed and administered at the local government level.’ This provision suggests that there is a hierarchy of governments in Zambia with local government being the ‘junior’ tier of government. This hierarchical arrangement of governments, the objectives and principles of

¹⁸⁶ Chigwata *et al* (2017) 41-56.

¹⁸⁷ Bockenforde (2011) 35.

local government,¹⁸⁸ coupled with the fact that Zambia is a unitary state, clearly indicates that the national government and/or the provincial government have the duty to supervise local governments.¹⁸⁹

The requirement for devolution in Article 147(1), on the other hand, entails that local authorities in Zambia must have clear and legally recognised geographical boundaries over which they exercise political, administrative and financial authority with a certain level of discretion.¹⁹⁰ Thus, the requirement points to a minimum level of autonomy local authorities must enjoy. This reasoning is supported by Article 147(3)(c) which requires that the different levels of government ‘observe and adhere to the principle of autonomy of sub-structures’.¹⁹¹ Article 152(2) of the 2016 Constitution buttresses the argument about local autonomy. It stipulates that, when local authorities perform their functions, the national government and/or the provincial administration are prohibited from interfering with or compromising their ability or right to do so. Local autonomy is defined as the extent to which local governments have discretion when carrying out their duties and obligations within given jurisdictions.¹⁹² Therefore the local discretion is now constitutionally protected in Zambia. Given that the Constitution recognises both the requirement for supervision and the need for local government, the key question becomes that of balancing these two contrasting principles. Chapter Two has proposed design features which strive to provide that balance. The objective of the following analysis is to show the extent to which the framework for supervision in the 2016 Constitution of Zambia strives to provide such a balance and the implication thereof.

4.3 Supervision of local government under the 2016 Constitution

The 2016 Constitution provides for the supervision of local government by different actors and institutions. The main supervisors which are recognised in the Constitution are the Provincial Minister, the Local Government Service Commission (LGSC) and the minister responsible for local government. Other supervisors include Parliament, the Auditor General (AG), and the minister responsible for finance. This however does not mean that other bodies cannot be established to exercise oversight over local government. The supervisory

¹⁸⁸ Some of the objectives and principles of local government that are relevant for supervision are: need for good governance art 147(3)(a); need for sub-structures to be autonomous art 147(3)(c); need for equitable development 147(3)(c); and need to promote national unity art 151(2)(c).

¹⁸⁹ Machingauta (2010) 140 & 144.

¹⁹⁰ Rondinelli, D.A, *Government Decentralization in Comparative Perspective: Theory and Practice in Developing Countries*, *International Review of Administrative Sciences*, Vol. XLVII, NO. 2 (198) 138.

¹⁹¹ Constitution art 147(3)(c).

¹⁹² Chigwata T C & De Visser J (2017) 1-21.

authorities exercise various supervisory powers ranging from the power to regulate local government to intervening in local affairs. As stated above, the supervisory framework proposed in Chapter Two provides the main yardstick upon which the 2016 Constitution will be measured against. Where necessary, reference to other countries with similar multilevel systems of government will also be made to guide the interpretation of the Constitution of Zambia which borrowed from other countries.

4.3.1 Regulation

In the context of intergovernmental supervision, a regulatory framework should take in various factors if it is to maximise the value of local discretion. It was contended in Chapter Two that there is need to establish a regulatory framework that sets parameters within which local autonomy is exercised responsibly so that the local governments perform their functions within the confines of set national policy standards and norms.¹⁹³ It was also argued that when formulating such a regulatory framework, it must not be intrusive as to endanger local autonomy. Rather, the framework should set essential national minimum norms and standards that, among other things, specify the processes or procedures to be followed when local authorities perform their service delivery and developmental functions.¹⁹⁴ Furthermore, it was stated that it is important that the national governments involve local governments when determining the regulatory framework since they will be required to comply with it.¹⁹⁵ There are various provisions in the 2016 Constitution that require the regulation of local authorities.

Article 164(a) of the 2016 Constitution requires the regulation of local government. This provision envisages that the Constitution or legislation must establish a national regulation framework within which local governments must operate. This provision allows the national government to regulate almost all activities of local government. Article 164(b) further requires the national government to regulate local government sub-structures and their relationships. The sub-structures to be regulated may include: the establishment of committees of the council, the establishment of Ward Development Committees and the establishment of key administrative structures. The provision suggests that these structures should be regulated in terms of how they are to be established and how they will function in terms of relating to one another and the local authority as a whole. Article 147(2) empowers local authorities to carry a variety of functions listed in part C of the Annex to the

¹⁹³ Litvack L *et al* (1999) 75.

¹⁹⁴ Chigwata *et al* (2017) 41-56.

¹⁹⁵ Smith B C (2007) 156.

Constitution. The provision further suggests that these local government functions may be regulated. It is submitted that such form of regulation should be limited to the regulation of procedures to be followed when undertaking local functions and not the substance of these functions. Thus, such regulation is about procedure and not the content of the functions. The regulation of the substance of the functions is likely to undermine local autonomy which is now constitutionally protected.

Article 151(1)(i) stipulates that the local government system ensures the accountability of local authorities. This provision envisages the need for accountability which requires some form of regulatory framework that establishes structures, procedures and processes to achieve this objective. Chigwata *et al* argue that with respect to accountability, the national government is duty-bound to determine a regulatory framework within which local governments must operate.¹⁹⁶ Apart from these generic constitutional frameworks for the regulation of local government, the Constitution imposes regulatory duties on the minister responsible for local government and the Local Government Service Commission, which are discussed in detail below.

4.3.1.1 Regulatory role of the minister responsible for local government

The Constitution empowers the president to appoint a prescribed number of ministers from among members of parliament to be in charge of line ministries.¹⁹⁷ Article 116(2) of the Constitution empowers the minister assigned the responsibility to oversee local government with the power to issue policy and strategic direction to local authorities as directed by the president. The Constitution should be commended for having empowered the responsible minister with the power to determine the policy and strategies for the local government sector. However, it is submitted that this should not be construed to mean that the minister has the power to adopt policies on behalf of each local council. Rather, the powers of the minister are limited to setting the generic policy framework for the entire local government sector. Such a policy framework should set the national norms and standards for the delivery of public services which local authorities must abide with. It can also, for instance, determine the performance standards to be complied with by each local council. It is also important that this framework is reasonably predictable such that local authorities are well-informed of the likely consequences that would happen if they go against it.

¹⁹⁶ Chigwata T C & De Visser J (2017) 1-21.

¹⁹⁷ Constitution art 116(1).

4.3.1.2 Regulatory role of the Local Government Service Commission (LGSC)

It was argued in Chapter Two that the control over personnel matters and internal administrative processes by local government is one of the important aspects of local autonomy.¹⁹⁸ Such powers given to local authorities to determine their own personnel and internal administrative structures help them to adapt them to the needs of the local environment and communities.¹⁹⁹ In order to guarantee autonomy of local authorities on personnel matters, the national government's supervisory powers should be limited to setting policies of general character. For example, the national government may set minimum requirements for appointment to key administrative positions, salary scales, and generic procedures to be followed in disciplinary issues involving employees. Local authorities will then be left with a fair amount of discretion to undertake the specific acts, determine the core of the relevant activities or to appoint staff in line with the relevant policy. The question therefore is whether the 2016 Constitution of Zambia guarantees a fair amount of local discretion when it comes to local administrative matters.

The 2016 Constitution, while progressive in other respects, leaves a lot to be desired in as far as personnel issues at the local level is concerned. Article 228(2)(a) of the Constitution empowers the Local Government Service Commission to appoint the town clerks and council secretaries among other senior officials of local authorities.²⁰⁰ Article 228(2)(c) further empowers the LGSC to 'appoint, confirm, promote, and hear appeals from officers of the Local Government Service.'²⁰¹ These two provisions literally empower the LGSC to intrude in local affairs and perform all personnel functions that in other countries, such as South Africa,²⁰² are reserved for the council. This means that local authorities in Zambia are devoid of autonomous powers over personnel issues. The above analysed provisions seem to be contrary to Article 152(2) which protects the autonomy of local authorities. The provision states that neither the national government nor the provincial administration has the right to interfere with or compromise the ability of local authority to perform its functions. It is argued that the role of the LGSC can undermine the ability of local authorities to carry out their duties effectively. History suggests that delays, corruption and appointment of officials without adequate consideration of the needs of various localities or councils, are some of the

¹⁹⁸ Fessha Y & Kirkby C 'Critical survey of subnational autonomy in African States' (2008) *Journal of Federalism* 38(2) 180.

¹⁹⁹ UN-Habitat (2007) 12.

²⁰⁰ Constitution art 228(2)(a).

²⁰¹ Constitution art 228(2)(c).

²⁰² Municipal Systems Act s 54A.

many problems that have characterised the role of the Commission in the past.²⁰³ These challenges are likely to continue under the latest constitutional era. The LGSC appoints, confirms, promotes or disciplines officers of the local authorities. If such officers are aggrieved by the decision of the Commission they are required to appeal to the same Commission. This constitutional position does not augur well for good governance.

4.3.1.3 The regulation of finances

It was argued in Chapter Two that the exercise of local financial autonomy must be supervised by the national government to ensure efficient, effective and economic use of resources.²⁰⁴ The need to regulate the financial affairs of local autonomy is recognised in the 2016 Constitution of Zambia. Article 164(c) of the Constitution stipulates that the financial control and accountability of local authority shall be provided for. Apart from the above constitutional provisions on local finances, Article 163(3) of the 2016 Constitution also states that the national government may regulate the provision for additional funds and grants to a local authority. These provisions empower the national government to enact legislation providing for fiscal reporting, financial management and financial accountability systems at local government level. It is important when enacting the relevant piece of legislation to ensure that the fiscal regulatory framework respects local autonomy, acknowledges the different capacities of local government and considers the administrative costs of complying with the framework.

4.3.2. Monitoring

Once the regulatory framework has been established, it was submitted in Chapter Two that monitoring local government's compliance with this framework becomes vital.²⁰⁵ It was further argued that monitoring should not be too demanding but rather rational and responsible, taking into account the costs of compliance on the part of local governments.²⁰⁶ When monitoring mechanisms such as requirements for supply of information becomes too demanding, there is a possibility that local governments may be diverted from their core function of service delivery. The 2016 Constitution recognises the need for the national and provincial governments to monitor the activities of local government. There are some general principles of the devolved system of local government that form the foundation of this

²⁰³ Mwasile F B 'Human Resource Development and Management in Local Government in Zambia' in Chitembo A (ed) *50 years of Local Government in Zambia* (2014) 124.

²⁰⁴ Bahl R (1999) 9.

²⁰⁵ Bahl R (1999) 9.

²⁰⁶ De Visser J (2005) 182.

monitoring role. Article 147(3)(a) stipulates that different levels of government should observe and adhere to good governance through a democratic, effective and coherent governance system and structures. In order to promote good governance, the national and provincial governments have to put monitoring mechanisms in place that detect bad governance.

Article 151(1)(h) provides that the provision of government services must be monitored. Given that local government is at the centre of the delivery of these services, it means that its activities must be monitored by the national and provincial governments. Such monitoring is important to ensure that local authorities comply with the set national regulatory and policy frameworks.²⁰⁷ Article 151(2)(b)(c) states that the local government system should exercise its powers in a democratic and accountable manner so as to foster national unity. Thus, the national government has an obligation to monitor local government to detect if there is transparency, citizen participation and accountability and if local authorities are not undertaking activities that undermine unity. The monitoring role can be divided into three categories: general, personnel and financial monitoring.

4.3.2.1 General monitoring of local government

The Constitution provides for the establishment of a provincial administration in each province, consisting of presidential appointees, namely: the Provincial Minister, the provincial permanent secretary and other staff.²⁰⁸ The provincial administration is not a 'real' government as it is not elected. Rather, it is a deconcentrated structure of the national government at the provincial level. The Constitution provides that the provincial minister is the head of government in the province.²⁰⁹ Article 117(3)(b) of the Constitution requires each provincial minister to ensure that the national policies are implemented in all districts of the province. Article 117(3)(c) mandates the provincial minister to ensure that the exclusive functions of local authorities are performed in accordance with the Constitution and other laws. These provisions imply that the provincial minister has a duty to monitor local authorities. He or she should ensure that when local authorities perform their functions, they are compliant with the set national regulatory and performance frameworks. The role of the provincial minister in exercising oversight over local government is necessary to ensure that problems which may hamper effective local government are exposed and rectified. What is

²⁰⁷ Bahl R (1999) 9.

²⁰⁸ Constitution art 150(1).

²⁰⁹ Constitution art 117(3)(a).

now left is for the enactment of legislation and policies that give effect to this monitoring role. It is important when enacting such a piece of legislation and policies to ensure that the monitoring mechanisms put in place do not endanger the minimum level of local autonomy which is now constitutionally protected.²¹⁰ It should not also impose a heavy administrative burden on local authorities when complying with the monitoring regime, otherwise the authorities may be diverted from their core business and concentrate on trying to comply with the regime, as argued above.

4.3.2.2 Monitoring of the personnel matters of local government

The Constitution empowers the LGSC to ensure that the functions of local authorities are efficiently and effectively performed.²¹¹ This constitutional provision recognises the need to monitor personnel aspects of local authorities. However, the concern with the provision is the absence of an adequate constitutional regulation of these monitoring powers of LGSC. It is therefore important that legislation provides for adequate and reasonable monitoring mechanisms that respects local autonomy. In the absence of a clear legislative monitoring regime within which local authority personnel issues can be monitored, the LGSC may over supervise or under supervise local authority personnel issues given the wide discretion the Constitution has given it. Both sides of the coin have negative implications on effective local government.

4.3.2.3 Monitoring of the finances of local government

The need to monitor the financial aspects of local government is recognised in the 2016 Constitution of Zambia. Article 250(1)(a)(i) of the 2016 Constitution provides for the auditing of financial accounts of state organs, state institutions, provincial administration as well as those of local authorities by the office of the Auditor-General (AG). An audit is generally a monitoring mechanism meant to check compliance of an institution with set national accounting standards in a spirit of promoting transparency and accountability. The Constitution empowers the AG to recommend to the Director of Public Prosecution or any law enforcement agency for prosecution any matter arising from the auditing of financial statements that in his or her opinion requires such prosecution.²¹² These are far reaching powers of the AG which are not common in most countries that will enhance financial accountability at all levels of government, including local government. These powers are

²¹⁰ Chigwata T C & De Visser J (2017) 1-21.

²¹¹ Article 228(2)(d).

²¹² Article 250(1)(e).

important in fighting corruption, abuse of powers and mismanagement of resources which are usually associated with decentralisation. If exercised in practice and with cooperation from the enforcement agencies, these powers are likely to be effective in the safeguarding of public funds and property. However, the Constitution does not provide for the requirement of the publication of audit reports by the AG. It is recommended that legislation should provide that the audited financial statements from the AG be widely publicised to allow the public and other stakeholders to hold local authorities accountable for their financial decisions. This will generally improve financial transparency at the local level.

In addition to the AG's role of monitoring the financial affairs of the local authorities, the 2016 Constitution imposes an obligation on Parliament to scrutinise local expenditure and approve local debt.²¹³ Article 63(2)(c) of the 2016 Constitution entails that Parliament is mandated to supervise the expenditure of local authorities in order to ensure that the revenue of local authorities is properly spent and any limits and conditions on appropriation are observed. This supervisory role of Parliament over local authorities' finances is commendable. However, the problem with the provision is the feasibility of the role of Parliament to monitor local authorities directly as regards to finances. For example, will Parliament be scrutinising the expenditure decisions of local authorities on a day-to-day basis? If the answer is affirmative, how possible will that be? Against this background and given that Parliament is part of the national government, it is suggested that parliament's role should be limited to the setting of a monitoring framework that would govern finances at local government level.

4.3.3. Support

It was argued in Chapter Two that under a multilevel system of government, higher level governments have an obligation to provide general and specific support to local governments to enable them to perform their mandated functions effectively and efficiently.²¹⁴ The question is whether the 2016 Constitution of Zambia obliges the national government and/or provincial administration to provide such support to local authorities. Various forms of support to local government can be identified in the 2016 Constitution. The discussion centres on four themes: general support, administrative support, financial support and other forms of support.

²¹³ Constitution art 63(2)(c)(d).

²¹⁴ Department of Provincial and Local Government, South Africa (2007) 34, UN-Habitat (2007) 10.

4.3.3.1. General support

Article 148(2) of the 2016 Constitution requires the national government to provide adequate resources to sub-structures of local governments for the performance of their functions. Resources can vary from financial, technical to administrative. Article 151(1)(d) of the 2016 Constitution further states that ‘the capacity of local authorities to initiate, plan, manage and execute policies must be enhanced by the national government’. These two provisions oblige the national government to provide general and specific support to local government.²¹⁵ The Constitution should be commended for imposing such an obligation given those local authorities in Zambia has over the years lacked the necessary support from the national government. In general, support is directed at building the administrative establishment of local authorities. It can take the financial form with an objective of providing additional resources necessary for service delivery and development at the local level. Other forms of support are necessary depending on various factors such as the local environment.

4.3.3.2 Support directed at local administrative establishments

Local authorities can be supported by the national government through capacity building programmes.²¹⁶ Such support enhances the knowledge and skills of administrative officials to enable them to carry out their respective responsibilities effectively.²¹⁷ Article 228(2)(d) of the 2016 Constitution as earlier noted stipulates that the LGSC ‘ensures efficient and effective function of local authorities’. This provision entails that, where relevant and necessary, the LGSC should build the administrative capacity of local governments to deliver. Legislation should therefore require the LGSC to undertake capacity building, among other measures, targeted at enhancing the administrative establishment of these local authorities. It may also be necessary for the national government to put measures in place to improve the capacity of local political officials, as their performance is equally important to effective local government.

4.3.3.3 Financial support

International literature suggests that in a decentralised system, there is usually an imbalance where local expenditure needs outweigh revenue generated locally.²¹⁸ It is therefore important for the national government to provide grants to local authorities to cover this

²¹⁵ Constitution art 147(3)(d).

²¹⁶ Department of Provincial and Local government (2007) 37.

²¹⁷ Litvack & Seddon (1999) 5, see Department of Provincial and Local Government, South Africa (2007) 38.

²¹⁸ Bahl (1999), UN-Habitat(2009).

financial gap.²¹⁹ The need for the national government to provide financial support to local government is now recognised in the Constitution. Article 151(1)(f) of the Constitution provides that the local government system in Zambia should establish a sound financial base for each local authority that is reliable and predictable in terms of sources of revenue. One of these financial resources the Constitution establishes is the Constituency Development Funds (CDF).²²⁰ The appropriation of monies to the CDF and the management, disbursement and accountability of the funds is provided for.²²¹ These CDF are allocated as a conditional grant to local authorities depending on the number of constituencies each local authority has.²²² The 2016 Zambian Constitution also established the Local Government Equalisation Funds (LGEF). Parliament is mandated to appropriate money to the LGEF on an annual basis which should be shared among local authorities by the ministry responsible for finance.²²³ Article 163(3) also provides that the national government may provide additional funds and grants to local authorities. The CDF, LGEF and the provision of additional grants are positive mechanisms recognised in the Constitution to ensure the financial sustainability of local authorities.

4.3.3.4 Other forms of support

Apart from financial and human resource support discussed above, the Constitution requires that local authorities should be provided with support in other various areas.²²⁴ This implies that whenever the monitoring mechanisms reveal particular need for support, such support should be rendered by the national government and/or provincial administration.²²⁵ Local authorities perform demanding functions such as land use planning and management, collection of property rates and disaster management where special support in the form of information technology, motor vehicles and administrative systems, among other things, is likely to be required. Therefore, it is important that legislation, policies and an institutional framework for providing such kind of support is developed and put in place.

4.3.4. Intervention

It was submitted in Chapter Two that intervention by higher governments may be necessary when a local government fails to fulfil its service delivery and development mandate even

²¹⁹ Chigwata T C & De Visser J (2017) 18.

²²⁰ Constitution art 162(1).

²²¹ Constitution art 162(2).

²²² Zambia Constituency Development Funds Guidelines (2006).

²²³ Constitution art 163(2).

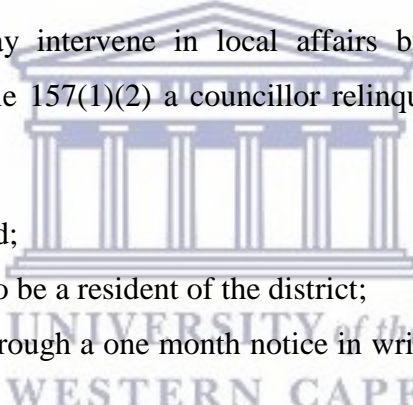
²²⁴ Constitution art 148(2).

²²⁵ UN-Habitat (2007) 4.

after receiving support.²²⁶ Higher governments may intervene for example by suspending and/or dissolving the entire council. They may also assume the relevant responsibilities from a local authority.²²⁷ It was however argued that given that interventions are the most intrusive forms of supervision, they be subjected to specific procedures and oversight mechanisms in order to protect the autonomy of local government.²²⁸ Further, to safeguard local autonomy there is also need for the legal recognition of grounds for intervention, indicating explicitly when an intervention can be appropriately triggered.²²⁹ Last, an intervention should only be exercised proportionately to the importance of the interests it intends to protect²³⁰ and a local government should be allowed to resume its duty as quickly as possible.²³¹ This section analyses three main interventions mechanisms that are provided in the 2016 Constitution of Zambia. The question is whether this Constitution provides not only intervention mechanisms but also local autonomy.

4.3.4.1 The power to suspend and/or dismiss councillors

The national government may intervene in local affairs by suspending and dismissing councillors. In terms of Article 157(1)(2) a councillor relinquishes his or her position as a councillor if:

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- a) the council is dissolved;
 - b) the councillor ceases to be a resident of the district;
 - c) a councillor resigns through a one month notice in writing addressed to the mayor or council chairperson;
 - d) the election results of a councillor are nullified;
 - e) the councillor fails to act in a manner that is consistent with a councillor's civic duties and responsibilities as provided for in Article 155;
 - f) a councillor is mentally or physically disabled as to perform his or her duties effectively; and
 - g) a councillor dies.

Constitutionally speaking these are the only grounds upon which the office of a councillor becomes vacant. The role of the national government in suspending and/or removing a

²²⁶ Steytler N & De Visser J (2016) 5-15.

²²⁷ UN-Habitat (2007) 7.

²²⁸ Department of Provincial and Local Government, South Africa (2007) 34.

²²⁹ Azfar O (2006) 231.

²³⁰ Council of the European Charter of Local Self-Government Art 8(3).

²³¹ UN-Habitat (2009) 7, Steytler N & De Visser J (2017) 15-5.

councillor from office particularly applies when a councillor fails to act in accordance with article 155. The provision states that '[a] councillor shall act in a manner that is consistent with a councillor's civic duties and responsibilities, as prescribed'. Thus, the actual grounds for suspension and/or dismissal by the national government or provincial minister are not listed in the Constitution. They have been left to the determination of legislation and policies. This therefore significantly limits the protection offered to councillors from arbitrary suspensions and/or removals from office.

The other challenge with the 2016 Constitution is that it does not have a specific provision that empowers the national government or the provincial minister to suspend or dismiss the entire council except if all councillors act contrary to Article 155. This does not mean that the national government cannot suspend and/or dissolve a council. It is empowered to do so by the Local Government Act.²³² This situation where the grounds of suspension and/or dissolution of the entire council are not constitutionally provided for may lead to the national government arbitrarily removing local elected councils and taking over their functions. Chapter Three has demonstrated that in the past there were councils which were suspended or dismissed arbitrarily.²³³ Against this background there was need to constitutionalise the rules or grounds for suspension and/or dismissal of the entire council, as is the case in South Africa. Section 139 of the South African Constitution explicitly stipulates reasons when an entire council can be suspended or dismissed. For instance, an entire council can be suspended if it fails to adopt a budget.²³⁴ These procedural requirements that the national or provincial governments in South Africa must follow when intervening are also constitutionally recognised.²³⁵ The recognition of procedural and substantive requirements relating to disciplining of local officials enables oversight from other bodies. In Zimbabwe, while the national government can suspend a councillor or council, it is an independent tribunal that exercises the role of dismissing a councillor or council.²³⁶ This therefore enhances oversight which protects local politicians from arbitrary suspensions and removals.

4.3.4.2. Power to issue directives to council

As stated above, article 117(3)(c) requires the provincial minister to ensure that local authorities carry out their functions in accordance with the Constitution and other laws. This

²³² Local Government Act s88 (1)(a)(b)(i)(ii).

²³³ Lusaka Times *Lusaka City Council suspended over plots* (January 22, 2011) available <https://www.lusakatimes.com/2011/01/22/lusaka-city-council-suspended-plots/>.

²³⁴ Constitution of South Africa 1996 s 139(4).

²³⁵ Constitution 1996 s 139(1).

²³⁶ Constitution of Zimbabwe (2013) s 272(7).

provision may signify that the provincial minister is empowered to intervene in local affairs by issuing directives, among other ways, if he or she is of the opinion that local functions are not being undertaken in accordance with the Constitution and relevant legislation. Its challenge is that it is too broad and therefore subject to wide interpretation. It can be interpreted liberally to encompass all forms of supervision discussed above. Past practice as evidenced in Chapter Three shows that such liberal interpretation had been abused to issue intrusive directives rather than general directives to councils or directives intended to achieve political objectives.²³⁷ The 2016 Constitution therefore does not solve the challenges of the abuse of the powers to issue directives to local authorities witnessed under the previous constitutional orders, as discussed in Chapter Three.²³⁸ Thus, there is a likelihood that such abuse may continue under the latest constitutional era.

4.3.4.3 Power to assume responsibilities of a council

Intervention may also take the form of assumption of local responsibilities. Article 117(3)(c) requires the provincial minister to ensure that local authorities carry out their functions in accordance with the Constitution and other laws. This provision may signify that the provincial minister may assume local responsibilities if they are not undertaken in accordance with the Constitution and relevant legislation. As discussed above, the major challenge of this provision is that it is too broad and therefore subject to wide interpretation. To make matters worse, there is no other provision in the Constitution which explicitly empowers the national government or provincial administration to assume local responsibilities. The 2016 Constitution neither provides for a procedural requirement of how the responsibilities of a suspended or dissolved local authority can be assumed nor does it provide for a procedure or timeline of when a local council can resume its duties after the intervention. This therefore means that the power to assume local responsibilities, among other intervention mechanisms, is going to be determined by and exercised in accordance with legislation. Legislation provides a weaker form of protecting local autonomy given that it can be easily amended to meet the needs of incumbent politicians.²³⁹ Hence, in as far as intervention powers are concerned, the Constitution presents a weak framework that is unlikely to do local government any good. Instead the culture of arbitrary assumption of local responsibilities,

²³⁷ Cabinet circular No. 2 of 1996.

²³⁸ See second paragraph 3.3.3. 4.2 of Chapter Three.

²³⁹ Tarr AG 'Symmetry and asymmetry in American federalism' in Courchene J T *et al* (eds) *The federal idea: essays in honour of Ronald Watts* (2011) 173.

discussed in Chapter Three, is likely to be perpetuated.²⁴⁰ A lot will depend on incumbent politicians at the national and provincial levels exercising restraint, otherwise local autonomy will likely be compromised from time to time.

4.4. Conclusion

For a local government to function effectively, it requires a conducive environment where the discretion to govern is guaranteed, preferably through the constitution. However, giving autonomous powers to local governments must not be construed to mean that local governments should have unfettered discretion. This is because if not supervised the dangers of decentralisation such as corruption, elite capture and an increase in disparities among local governments may increase. In order to curb the aforementioned unwanted consequences usually associated with decentralisation, higher governments should supervise local governments. Such supervision may be exercised through regulation, monitoring, support, and intervention. Nonetheless, the right to supervise local governments should be exercised with limitations so as not to constrain local autonomy which is crucial to an effective system of local government. The analysis in this chapter established that the supervisory powers in the 2016 Constitution of Zambia are not adequately regulated and limited. The majority of the constitutional provisions that empower the national government to regulate, monitor and intervene are too broad. It is difficult to determine where the supervisory powers of the national minister responsible for local government and the provincial minister start and end. The danger with this is that these constitutional provisions are open to wide interpretation and therefore can be abused to achieve interests other than that of the local communities'. Some of the supervisory powers are not explicitly recognised in the Constitution and therefore left to the determination of legislation. However, constitutional provisions on support to local government are quite progressive and therefore should be commended. The Constitution requires the national and provincial government to provide various forms of support to local government that if complied with will enhance the capacity of local authorities. On the whole, it is submitted that the 2016 Constitution fails to provide a balance between the requirement for supervision and the need for local autonomy. There is however an opportunity to establish such a balance through national legislation, given that the 2016 Constitution provides the necessary foundation upon which an effective system of local

²⁴⁰ European Charter of Local Self-Government art 8(1).

government can be built upon. Chapter Five therefore gives recommendations on how an effective system of local government can be anchored.



CHAPTER 5: CONCLUSION

5.1 Introduction

Since attaining independence in 1964, Zambia embarked on a number of reforms aimed at improving the effectiveness of its decentralised system of government. As demonstrated in Chapter Three, service delivery remained largely poor in many parts of the country despite the adoption of these policy reforms.²⁴¹ The system of local government remained largely unresponsive to the needs and preferences of local communities due to the imbalance between the requirement for supervision and the need for local autonomy, among other reasons. In 2016, Zambia adopted a new Constitution partially to address this problem relating to decentralised governance. The primary objective of this research paper was to assess the extent to which this Constitution has improved the system of local government, particularly focusing on the supervision of local government. An institutional design that strives to balance the need for local autonomy and the requirement for supervision was proposed in Chapter Two which provided the primary yardstick for assessing the Constitution in Chapter Four. This chapter provides the major findings and conclusion of the study. It begins with a discussion of the major findings, before answering the research question. Lastly, the chapter provides a set of key recommendations.

5.2 Major findings of the study

It was argued in Chapter Two that local governments require a certain level of local autonomy if they are to deliver effectively on both local and national goals. However, there was caution that unfettered local autonomy may undermine the realization of these goals.²⁴² It was therefore contended that higher levels of government should supervise local governments. Unregulated and unlimited supervisory powers, nonetheless, stifle the development potential of local government. Thus, it was argued that there is need to balance the requirement for supervision and the need for local autonomy. Chapter Two identified four main forms of supervision, namely: regulation, monitoring, support and intervention as well as the necessary safeguards to local autonomy. The major findings and recommendations of this study on these forms of supervision are presented below.

5.2.1 Regulation

It was argued in Chapter Two that in order to allow local autonomy to be exercised responsibly, the national government should supervise local governments by way of setting

²⁴¹ See paragraph 3.4 of Chapter Three.

²⁴² See Machingauta N (2010) 140.

up regulatory frameworks within which local governments perform their functions.²⁴³ It was further argued that such a regulatory framework must not be intrusive as to endanger local autonomy.²⁴⁴ The 2016 Constitution of Zambia has recognised the importance of the national government regulating local government. Although the 2016 Constitution suggests that activities of local authorities should be regulated, the challenge is that some constitutional provisions fail to define and limit the exercise of these regulatory powers. Thus there are no strict constitutional limits against the establishment of an intrusive regulatory framework. The regulatory powers of the LGSC are excessive and go beyond setting a regulatory framework comprising national norms and standards. The implication is that local autonomy which is crucial to effective local government is likely to be undermined.

5.2.2 Monitoring

Once the regulatory framework has been established, it becomes important that activities performed by local government are monitored by the national government and/or provincial government. It was however contended in Chapter Two that monitoring should not be too demanding but rather rational and responsible, taking into account the costs of administrative compliance on the part of local governments.²⁴⁵ It was observed in Chapter Four that the 2016 Constitution of Zambia has several provisions that suggest that local authorities should be monitored by the national government and/or provincial government. However, there are some concerns of the absence of adequate constitutional regulation of the national and/or provincial government's monitoring powers. For example, Chapter Four raised concerns about the absence of adequate constitutional limits to the monitoring powers of the LGSC. Thus the challenge of unlimited monitoring powers discussed in Chapter Three which characterise the legislative framework, for instance with regard to local administrative issues is concerned, has not been adequately addressed by the 2016 Constitution.

5.2.3 Support

It was argued in Chapter Two that, under a multilevel system of government, senior governments should be obliged to provide general and specific support to local governments so as to enable these lower governments to perform their mandated functions effectively and efficiently. The 2016 Constitution of Zambia obliges the national government and/or provincial administration to provide a variety of forms of support to local authorities. The constitutional provisions on support to local government are quite progressive and therefore

²⁴³ See De Visser J (2005) 170.

²⁴⁴ Chigwata *et al* (2017) 41-56.

²⁴⁵ See De Visser J (2005) 182.

should be commended. If these constitutional provisions are complied with they will enhance the capacity of local authorities especially that of the low category or poor councils, which tend to lack the necessary capacity to deliver.

5.2.4 Intervention

When a local government fails to fulfil its service delivery and development mandate even after receiving support, it may be necessary for higher governments to intervene.²⁴⁶ It was however argued in paragraph 2.5.4.2 of Chapter Two that, given that interventions are the most intrusive form of supervision, they should be subjected to specific procedures and oversight mechanisms in order to protect the autonomy of local government. Further, there is also need for the legal recognition of grounds for intervention indicating explicitly when an intervention can be appropriately triggered.²⁴⁷ Unfortunately, it was also observed in Chapter Four that the actual grounds for suspension and/or dismissal of a council by the national government or provincial minister are not provided for in the Constitution. Article 117(3)(c) of the 2016 Constitution empowers the provincial minister to ensure that local authorities perform their functions in accordance with the Constitution and legislation. The challenge with this provision is that it is too broad and therefore subject to wide interpretation. It can arguably be used to monitor, support or even intervene in local affairs. Thus, it is possible that such kind of supervisory powers can be abused to further political and individual interests at the expense of those of the local communities as was often the case under the previous constitutional orders.²⁴⁸ A further challenge with the 2016 Constitution is that it neither explicitly empowers the national or provincial governments to assume local responsibilities nor provides for a procedural requirement of how the responsibilities of a suspended or dissolved local authority can be assumed. It also does not provide for a procedure or timeline of when a local council can resume its duties after the intervention. Thus, some intervention powers are not constitutionally delimited. Such a constitutional framework for local government presents a huge risk to local autonomy.

5.3 Answering the research question

The main research question the research sought to answer is ‘Does the 2016 Constitution of Zambia sufficiently balance the need for local autonomy and the requirement for supervision?’ It should be noted that the 2016 Constitution has provided for an autonomous

²⁴⁶See Steytler N & De Visser J (2016) 5-15.

²⁴⁷ Azfar O (2006) 231.

²⁴⁸ See paragraph 3.3.3.2.4 of Chapter Three.

local government system on one hand and on the other a national supervisory framework. It is submitted, however, that the 2016 Constitution fails to provide an effective balance between the requirement for supervision and the need for local autonomy. The main reason being that the Constitution fails to adequately regulate and limit supervisory powers as well as provide oversight mechanisms over the exercises of those powers. The overall effect of this imbalance is that the supervisory powers of the national government undermine the autonomy of local authorities. However, there is an opportunity to establish such a balance through enacting a new national legislation which, while recognising the need for the supervision of local government, recognises and protects local autonomy as defined in the 2016 Constitution of Zambia.

5.4 Recommendations

One of the major reasons advanced for the enactment of the 2016 Constitution was to come up with decentralised system governance that will improve on the service delivery and development mandate of local government. However, to achieve such a milestone, among other things, there is need for an appropriate balance between the need for supervision of local government and the need for local autonomy. The 2016 Constitution of Zambia, while not perhaps in as far as enhancing the role of local government is concerned, provides the necessary foundation for establishing an effective system of local government. The purpose of this section is to propose a set of recommendations that strives to rectify the imbalance between supervisory powers and local autonomy.

5.4.1 Limiting regulatory powers

While the 2016 Constitution provides several provisions that suggest that operations of local authorities must be regulated, it leaves some gaps in far as the limitation of these regulatory powers is concerned. It is therefore recommended that a new piece of legislation be enacted that ensures that local government enjoys a certain level of autonomy required by the Constitution. The regulatory powers of the national government should be limited to setting a regulatory framework that sets parameters within which local autonomy is exercised responsibly, so that the local governments perform their functions within the confines of set national standards and norms. The set framework should avoid extending to the core of how local government activities are to be performed. This new local government legislation should be concerned about the procedures and processes rather than the substance of local

functions. It should also determine the framework within which key local government structures can be established.

5.4.2 Setting a monitoring framework

Once the regulatory framework has been established, it becomes important to develop the monitoring framework provided in the Constitution. A new piece of legislation that regulates and limit the monitoring powers of the national government and/or provincial governments should be enacted to ensure that such powers are exercised responsibly to promote genuine local interests. Among other things, the administrative burden of complying with such a monitoring framework should be considered when enacting this piece of legislation.

5.4.3 Defining and limiting intervention powers

When it comes to intervention powers there is need to legally and explicitly stipulate the grounds when an entire council can be suspended and/or dismissed. Such legislative reforms must also explicitly spell out the appropriate procedures that the national or provincial government must follow when undertaking such a kind of intervention. There is also need to provide for checks and balances on the exercise of supervisory powers. Independent bodies, such as Parliament, can be assigned the duty to oversee the use of intervention powers. Legislation should also empower the national and/or provincial governments to assume local responsibilities but it is important to provide for procedural and substantive requirements for such a form of intervention. Last, the legal recognition of the timeline of when a local authority can resume its duties after the intervention is necessary. It is particularly essential, that the local council as the democratically-elected body resume its duties as soon as possible.

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