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**Keywords:** Central government, democracy, local autonomy, local government, policy directives, powers, service delivery, supervision, Urban Councils Act, Zimbabwe

**Declaration**

I, Varaidzo Violet Muchapondwa, do hereby declare that ‘Examining the parameters of the powers of the Minister of Local Government to issue policy directives to urban local authorities in Zimbabwe in terms of section 313 of the Urban Councils Act’ 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 other degree or to any other institution of higher learning.

Signed .....

Date .....

Supervisor: Professor Jaap De Visser



Signed .....

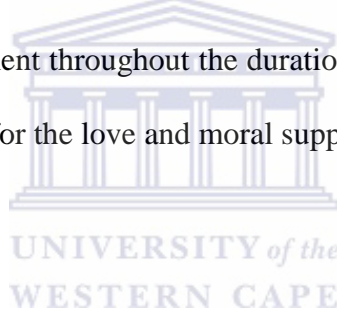
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## **Dedication**

This research paper is dedicated to my mum for being my pillar of strength. I love you.



## Abbreviations and acronyms

<b>AG</b>	Auditor-General
<b>BSACo</b>	British South Africa Company
<b>GPA</b>	Global Political Agreement
<b>LGB</b>	Local Government Board
<b>MLRUD</b>	Ministry of Local Government, Rural and Urban Development
<b>MDC</b>	Movement for Democratic Change
<b>MDC-N</b>	Movement for Democratic Change-Ncube
<b>MDC-T</b>	Movement for Democratic Change-Tsvangirai
<b>PPCLG</b>	Parliamentary Portfolio Committee on Local Government
<b>UCs</b>	Urban Councils
<b>UCA</b>	Urban Councils Act
<b>ZANU-PF</b>	Zimbabwe African National Union-Patriotic Front
<b>ZAPU</b>	Zimbabwe African Peoples Union

## List of Tables

Table 1: Classes of the Urban Councils in Zimbabwe	36
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## List of Ministerial Directives

Figure 1: Ministerial directive on elimination of costs on unnecessary trips and meetings	53
Figure 2: Ministerial directive on employment	57
Figure 3: Implementation of the Ministerial directive for all local authorities to write of debts	61



## Table of Contents

CHAPTER 1: INTRODUCTION .....	4
1.1 Problem Statement .....	4
1.2 Significance of the problem .....	6
1.3 Research question .....	6
1.4 Research methodology .....	7
1.5 Literature survey .....	8
1.6 Chapter outline .....	10
CHAPTER 2: THE MEANING OF SUPERVISION: AN INTERNATIONAL PERSPECTIVE.....	11
2.1 Introduction.....	11
2.2 Defining supervision .....	12
2.3 Which level of government should supervise local government?.....	13
2.4 Decentralisation .....	15
2.4.1 Benefits of decentralisation.....	16
2.4.1.1 Decentralisation improves democracy .....	16
2.4.1.2 Decentralisation promotes development .....	17
2.4.1.3 Decentralisation accommodates diversity.....	18
2.4.2 Pitfalls of decentralisation.....	19
2.4.2.1 Disparities .....	19
2.4.2.2 Lack of capacity .....	20
2.4.2.3 Corruption .....	21
2.5 Forms of supervision.....	22
2.5.1 Regulation .....	23
2.5.1.1 National framework .....	24
2.5.1.2 Regulatory framework must be predictable .....	24
2.5.1.3 Regulatory framework must accommodate differences of local government.....	25
2.5.1.4 Participation by local government in determination of the rules .....	25
2.5.1.5 Cost of complying with the regulatory framework .....	26
2.5.2 Monitoring .....	26
2.5.3 Support.....	27
2.5.4 Intervention .....	28

2.6	Conclusion .....	29
CHAPTER 3: LOCAL GOVERNMENT SYSTEM IN ZIMBABWE .....		31
3.1	Introduction.....	31
3.2	General overview of Zimbabwe.....	31
3.3	System of government .....	33
3.3.1	National government.....	33
3.3.2	Provincial government .....	34
3.3.3	Local government .....	35
3.4	Urban local government system.....	35
3.4.1	Colonial system of local government.....	35
3.4.2	Post-Independence local government .....	36
3.4.2.1	Categories of urban councils.....	37
3.4.2.2	Powers and functions of urban councils.....	38
3.5	Institutions charged with supervision of Urban Local Government .....	40
3.5.1	Ministry of Local Government, Rural and Urban Development .....	40
3.5.2	Local Government Board.....	42
3.5.3	Parliament .....	42
3.5.4	Auditor-General .....	43
3.6	Conclusion .....	44
CHAPTER FOUR: EXAMINING SECTION 313 OF THE URBAN COUNCILS ACT .....		45
4.1	Introduction.....	45
4.2	Power to issue policy directives.....	46
4.2.1	What is a council?.....	47
4.2.2	Policy directives of a general nature .....	48
4.2.3	The meaning of national interest.....	48
4.2.4	The discretion given to the Minister to issue policy directives.....	49
4.2.5	The duty to inform an urban authority before issuing policy directives .....	50
4.3	Assessment of policy directives.....	52
4.3.1	Figure1: Ministerial directive on elimination of costs on unnecessary trips and meetings ....	54
4.3.1.1	Was the directive limited to the standard setting?.....	55
4.3.1.2	Was the directive predictable? .....	56
4.3.1.3	Did the directive accommodate differences at local level?.....	56



4.3.1.4	Were local councils involved in the determination of the directive? .....	57
4.3.1.5	Did the directive consider the compliance costs? .....	57
4.3.2	Figure 2: Ministerial directive on employment.....	59
4.3.2.1	Was the directive limited to standard setting? .....	60
4.3.2.2	Was the directive predictable? .....	61
4.3.2.3	Did the directive accommodate differences in local government? .....	61
4.3.2.4	Were the local councils involved in the determination of the directive? .....	62
4.3.2.5	Did the directive consider the compliance costs? .....	62
4.3.3	Ministerial directive to write off debts.....	63
4.3.3.1	Was the directive limited to standard setting? .....	64
4.3.3.2	Was the directive predictable? .....	65
4.3.3.3	Did the directive accommodate differences in local government? .....	66
4.3.3.4	Were the local councils involved in the determination of the directive? .....	66
4.3.3.5	Did the directive consider the compliance costs? .....	67
4.4	Consistency of the power to issue policy directives with the Constitution.....	69
4.4.1	Lancaster House Constitution .....	69
4.4.2	Constitution of Zimbabwe Amendment Act 20 of 2013.....	70
4.5	Conclusion .....	73
<b>CHAPTER 5 : CONCLUSION AND RECOMMENDATIONS .....</b>		<b>74</b>
5.1	Conclusion .....	74
5.1.1	Supervisory powers under section 313 of the UCA go beyond framework setting .....	75
5.1.2	Minister is exercising powers beyond powers provided for under section 313 of the UCA... ..	76
5.2	Recommendations.....	76
5.2.1	Remove wide discretion given to the Minister .....	76
5.2.2	Policy directives must be predictable.....	77
5.2.3	The law should require consultation of urban local authorities before the Minister may issue policy directives .....	77
5.2.4	Consider compliance/implementation costs before issuing policy directives.....	78
5.2.5	Limit supervisory powers.....	79
<b>BIBLIOGRAPHY .....</b>		<b>80</b>

## CHAPTER 1: INTRODUCTION

### 1.1 Problem Statement

Zimbabwe adopted a new Constitution<sup>1</sup> in 2013 which among other matters provides for a multi-level system of government. The multi-level system of government consists of the national, provincial and local tiers of government, as provided for in section 5 of the Constitution.<sup>2</sup> This new Constitution transformed local government from being a mere creature of central (national) government into a tier of government. It guarantees the ‘right’ of a local authority to govern, on its own initiative, the local affairs of the people within the area for which it has been established.<sup>3</sup> The Constitution also provides that a local authority has ‘all’ the powers necessary to govern, subject to the Constitution and national legislation.<sup>4</sup>

Under a multilevel system of government, the national government has the responsibility to supervise both provincial and local governments to ensure effective governance.<sup>5</sup> The new Constitution is silent about the role of the national government to supervise local government. However, the hierarchical nature of the relationship between governments in the Constitution seems to suggest that the national government has a responsibility to supervise local government to protect and promote the realisation of certain national and local goals such as equity.<sup>6</sup>

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<sup>1</sup> Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>2</sup> Constitution of Zimbabwe, s5.

<sup>3</sup> Constitution of Zimbabwe, s276.

<sup>4</sup> Constitution of Zimbabwe, s276.

<sup>5</sup> See De Visser J *Developmental Local Government: A case study of South Africa* (2005) 82.

<sup>6</sup> Machingauta N ‘Supervision of Local Government’ in De Visser J, Steytler and Machingauta (eds.) *Local government reform in Zimbabwe: A policy dialogue* (2010) 140.

Supervision of local government can be exercised in various forms.<sup>7</sup> It can be through the establishment of local government institutions and regulating their institutional framework or, whereby the national governments exercise a regulatory role in streamlining local government functions through the laws that establish local government.<sup>8</sup> It can also be exercised through monitoring, supporting and intervening into local affairs. Regulation is the form of supervision relevant to this study.

The Urban Councils Act (UCA)<sup>9</sup> regulates the activities of urban local authorities in Zimbabwe.<sup>10</sup> The Act provides for the supervisory role of national government through the Minister responsible for local government over urban local authorities. Some of the objectives of the supervisory role of the national government are to ensure efficient service delivery, curb and prevent corruption and ensure that local authorities deliver on their development mandate.<sup>11</sup> The supervisory powers take various forms including the powers to give directives on matters of policy, approve budgets, oversee appointment of senior administration staff of local authorities, supervision of procurement, appointment of caretakers to administer local authorities, suspension or dismissal of councillors for transgressions.<sup>12</sup>

While the exercise of all supervisory powers has significant consequences on local autonomy, this study is limited to the power to issue policy directives. The 2013 Constitution has vested local authorities with some measure of local autonomy to enable them to be responsive and

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<sup>7</sup> Machingauta N (2010) 140.

<sup>8</sup> Machingauta N (2010) 140.

<sup>9</sup> Urban Councils Act [Chapter 29:15].

<sup>10</sup> Mutema EP 'Debating the implications of the Urban Councils Act Chapter 29.15 (1996) on the practice of good corporate governance in Zimbabwe's urban local authorities 2012 *International Journal of Asian Social Science* 2085.

<sup>11</sup> Zhou G 'Legal and Institutional Framework: The "Achilles Heel" of local authorities and Raison D'être of Ministerial intervention in Zimbabwe' 2012 *Journal of Public Administration and Governance* 23.

<sup>12</sup> Urban Councils Act, s314.

accountable to citizens.<sup>13</sup> The question is whether the exercise of power to issue policy directives in terms of section 313 is consistent with the normative framework that will be proposed in chapter two and whether it is constituent with the 2013 Constitution?

## 1.2 Significance of the problem

As mentioned above, supervision of local authorities by the central government is important for a number of reasons including to promote the realisation of national and local goals such as efficient and effective delivery of public services to the people. The UCA gives the national government various supervisory powers for that purpose. Policy directives are one of the major tools used by the national government to ensure that the activities of local authorities are in line with national policies and objectives. When exercising the power to issue policy directives it is important that the national government does not undermine the minimum level of local autonomy. Local autonomy is vital if urban local authorities are to deliver on their developmental mandates. If a certain measure of local autonomy is not guaranteed, then urban local authorities are unlikely to respond to the needs and preferences of their communities. Instead, urban local authorities are likely to be more accountable to the national government at the expense of the local people. Thus, it is important that supervisory powers, such as the power to issue policy directives, are exercised in such a way which does not undermine the necessary minimum level of local autonomy and local accountability.

## 1.3 Research question

The importance of local autonomy for service delivery and development at the local level has been stressed above. The 2013 Constitution has recognised the importance of local autonomy by

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<sup>13</sup> Constitution of Zimbabwe, s276.

giving local authorities ‘right to govern’ their communities and with ‘all’ the powers to do so. The question is whether section 313 of the UCA which gives the Minister responsible for local government the power to issue policy directives is in line with the normative framework which will be proposed in chapter two and whether it is consistent with the new constitutional framework? In seeking to answer this main question the study will provide answers to the following sub-questions:

What does the concept of supervision entail?

Why is the adequate use of the instrument of policy directives important?

What are the boundaries of section 313 as set out in the UCA?

What is the impact of the incorrect use of powers to issue policy directives on local autonomy, local accountability and service delivery?

#### 1.4 Research methodology

This is a desktop based study which will analyse relevant books and chapters in books relating to supervision of local governments by national and other higher level governments. It will also examine legislation, journal articles, newspaper articles and press statements in the field of multi-level government. The study will examine three Ministerial directives in chapter four. Due to challenges in accessing government policies the study will assess two directives that the author has on file. The study will rely on secondary sources such as newspaper articles for the third directive.

## 1.5 Literature survey

It is often argued that local government (local authorities) is the level of government physically closest to the people.<sup>14</sup> It is the tier of government created to bring government to the grassroots and to give the grassroots population a sense of involvement in the processes that affect their daily lives.<sup>15</sup> Local government all over the world provides basic services that contribute to the well-being of individuals and communities.<sup>16</sup> In Zimbabwe, urban local authorities have not been able to deliver basic services effectively and deliver on their overall development mandate due to a number of challenges.

Some scholars attribute this lack of effectiveness to the unlimited supervisory powers which the Minister responsible for local government enjoys under various local government Acts.<sup>17</sup> Zhou, for example, argues that the problem is the wording of local government laws which allows wide interpretation and therefore giving the Minister wide powers.<sup>18</sup> Referring to the old constitutional order, Chirisa & Jonga remarked that the Constitution is not explicit on the definition of the powers of the Minister.<sup>19</sup> They further argue that the powers of the Minister are not clearly defined in the Constitution and had they been clearly defined there could not be a lot of tampering with the systems, structures and operations of local government.<sup>20</sup> This view is supported by Machingauta who is of the view that the current legislation on local government

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<sup>14</sup> Council of Europe European Charter of local self-government (1995).

<sup>15</sup> See Chirisa I & Jonga W 'Urban Local Governance in the Crucible: Empirical Overtones of Central Government Meddling in Local Urban Councils Affairs in Zimbabwe' 2009 *Theoretical and Empirical Researchers in Urban Management* 169.

<sup>16</sup> European charter (1995).

<sup>17</sup> Constitution Watch 'Giving Effect to the New Constitution: Local Government: Ministers, Mayors and Money' *Zimbabwe Situation* available at 2 October 2013.

<sup>18</sup> Zhou G (2012) 20.

<sup>19</sup> Chirisa I & Jonga W (2009) 178.

<sup>20</sup> Chirisa I & Jonga W (2009) 178.

grants unfettered powers to the Minister of Local Government.<sup>21</sup> More so, Jonga argues that some of the problems that are faced in the local government can be related to unfettered interference in local authorities by central government.<sup>22</sup> In contrast, Chakaipa is of the view that the legal framework regulating urban local authorities is adequate.<sup>23</sup> He claims that the national government has put in place the necessary legal framework and institutional arrangements to operationalise a local government system.<sup>24</sup>

Nonetheless, scholars generally agree that an effective regulatory framework is necessary to provide local government with sufficient powers, protect its autonomy, and enhance its capacities and administration.<sup>25</sup> Madzivanyika argues that a well regulated environment protects the powers and independence of local government from interference by higher levels of government.<sup>26</sup> De Visser argues that: ‘if local government does not have sufficient and real powers, it cannot enlarge people’s choice by being responsive to their needs (and thereby improve their well-being). Instead, it is constrained in having to work within a limited mandate without room for initiative’.<sup>27</sup> Thus, local government autonomy is vital for local accountability and responsive local governance at large.

It is acknowledged that a lot has been written about the disagreements pertaining to the adequacy or inadequacy of the legal framework that governs local government in Zimbabwe. They are still

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<sup>21</sup> Machingauta N (2010) 150.

<sup>22</sup> Jonga W (20 14) 75.

<sup>23</sup> Chakaipa S ‘Local government institutions and elections’ in De Visser J, Steytler N and Machingauta N (eds.) *Local government reform in Zimbabwe: A policy dialogue* (2010) 32.

<sup>24</sup> Chakaipa S 2010(32).

<sup>25</sup> Chatiza K ‘Can local government steer socio-economic transformation in Zimbabwe? Analysing historical trends and gazing into the future’ in De Visser J et al (eds.) *Local government reform in Zimbabwe: A policy dialogue* (2010) 22.

<sup>26</sup> Madzivanyika L *The impact of weaknesses in Urban Councils Act on efficient and effective service delivery in urban councils in Zimbabwe* (unpublished LLM thesis, University of the Western Cape, 2011) 9.

<sup>27</sup> De Visser J (2005) 127.

unresolved debates on whether the legislative framework vests unlimited powers on the Minister responsible for local government. It is also acknowledged that a lot has been written about other forms of supervision of local authorities in Zimbabwe, but not much has been written on the power of the Minister to issue policy directives. This study seeks to fill this gap by examining the power of the Minister to issue policy directives.

## 1.6 Chapter outline

The study is divided into five chapters. Chapter one introduces the study. It provides an outline of basic components of the study (background of the study, research problem, research questions, significance of the study, and methodology). Chapter two discusses the components of the concept of supervision focusing particularly on the component of regulation. It provides reasons why it is vital that local governments be supervised. Furthermore, the chapter will propose a normative framework within which section 313 of the UCA will be examined. Chapter three provides a brief description of system of local government in Zimbabwe. Chapter four examines the power to issue policy directives under section 313 of the UCA in light of a proposed normative framework and the Constitution. Chapter five provides major conclusions and recommendations.



## CHAPTER 2: THE MEANING OF SUPERVISION: AN INTERNATIONAL PERSPECTIVE.

### 2.1 Introduction

In recent years, a number of countries around the world have decentralised power to lower governments for several reasons.<sup>28</sup> The major reason for decentralisation is that government is more effective when it is closer to the people.<sup>29</sup> To enable efficiency and self-governance of local governments, central governments embarked on decentralisation strategies; recognising autonomy of local authorities in their Constitutions.<sup>30</sup> The previous chapter discussed the importance of local autonomy. It was mentioned that for local government to effectively provide services that enhance the well-being of citizens, the higher governments must respect the autonomy of local governments.<sup>31</sup> Local government should be bestowed with administrative and fiscal autonomy to realise the provision of efficient services. More so, autonomy will need to be complemented with a clearly defined and legally protected framework and democratic institutions. However, all that is mentioned above is not sufficient; to realise the national objectives there is need of some degree of supervision of the local government activities by higher levels of government.<sup>32</sup> It is argued that ‘uncontrolled use of autonomy leads to fragmentation and unleashes some of the dangers to development harboured by decentralisation’.<sup>33</sup>

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<sup>28</sup> Smoke P ‘Decentralisation in Africa: Goals, dimensions, myths and challenges’ (2003) 23 *Public Administration and Development* 1.

<sup>29</sup> De Visser J (2007) 24.

<sup>30</sup> Smoke P (2003)1.

<sup>31</sup> De Visser J (2005) 43.

<sup>32</sup> See Bardhan P & Mookherjee D *Decentralization and Local Governance in Developing Countries: A Comparative Perspective* (2006) 9.

<sup>33</sup> De Visser J (2005) 3.

The purpose of this chapter is to provide a normative framework against section 313 of the Urban Councils Act will be examined. The chapter provides a brief discussion of the concept of supervision before assessing the benefits and challenges of decentralisation. It will be argued that lower governments should be supervised to curb the problems harboured by decentralisation. The chapter will also discuss the forms of supervision.

## 2.2 Defining supervision

Simply put, supervision refers to the ‘task of overseeing the activities and the conduct of another and making certain that everything is done correctly’.<sup>34</sup> Steytler and De Visser define supervision as including four distinct but interrelated activities which are regulation, monitoring, support and intervention.<sup>35</sup> In the context of local government, a distinction is made between two forms of supervision; legal supervision and functional supervision. In most European countries, legal supervision is widespread, whereas functional control is more evident in the North American systems.<sup>36</sup>

Legal supervision is restricted to supervising the performance of local authorities when performing their obligations as prescribed by law, as well as the legality of their administrative activity.<sup>37</sup> Higher governments may thus not interfere in local affairs when local governments are exercising their discretion lawfully. On the other hand functional supervision deals with matters falling within the transferred sphere. Local governments in most countries are not only vested with powers to perform functions in their own sphere of competence; they also perform functions

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<sup>34</sup> Waite M & Hawker S (eds) *Oxford Paperback Dictionary and Thesaurus* (2<sup>nd</sup>) (2007) 934.

<sup>35</sup> Steytler N and De Visser J *Local Government Law of South Africa* (2007) 15-5. See Steytler N ‘Introduction’ in *The place and role of local government in federal systems* in Steytler N(ed.) (2005) 7. See Machingauta N (2010) 141. See also De Visser J (2007) 43.

<sup>36</sup> Harbich J ‘State supervision of local government authorities’ (2009) VII (4) *JEL* 55.

<sup>37</sup> Harbich J (2009) 55.

that have been transferred to them. In matters falling within the transferred sphere, state supervision goes beyond legal supervision and extends to the exercise of municipal discretion. This means that the supervising authorities have the right under certain conditions to intervene by way of directive in the exercise of administrative discretion by the municipalities.<sup>38</sup> Supervision in the local government spectrum can be distinguished from the concept of cooperation. Supervision of local government suggests a hierarchical relationship; whereas cooperation refers to a relationship of equality where the actors in intergovernmental relations operate as equal partners.<sup>39</sup> The principle of cooperation requires a normative framework, instruments for intergovernmental relations and systems and procedures for vertical and horizontal integration of policies.<sup>40</sup>

### 2.3 Which level of government should supervise local government?

Supervision of local governments varies in different countries; depending on whether a country is a federal or unitary state. In most countries, local government is supervised by ‘superior’ levels of government.<sup>41</sup> There is a debate currently with regard to who should be charged with supervision of local government. There are three broad categories of supervisors as will be shown in this study.

In one category, which is in federal and quasi-federal states, supervision is carried out solely by the regions/states/provincial government and this includes countries such as Australia, Austria, Brazil, Canada and Germany.<sup>42</sup> In the context of South Africa, Machingauta is of the view that it

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<sup>38</sup> Harbich J (2009) 57.

<sup>39</sup> See De Visser J (2005) 5.

<sup>40</sup> De Visser J (2005) 5.

<sup>41</sup> Steytler N (2005) 7.

<sup>42</sup> Sansom G ‘Commonwealth of Australia’ in Steytler N (ed.) *A global dialogue on federalism: Local government and Metropolitan regions in federal system* (2009) 2. See also Kiefer A & Schausberger F ‘Republic of Austria’ in

is largely the responsibility of the provincial government; being closer to the local government to supervise.<sup>43</sup> In another class of countries, it is the responsibility of both the central/national and provincial governments to supervise local governments. Steytler highlighted that a key feature of the South African system of decentralisation is the extensive supervision that both the national and provincial governments exercise over municipalities.<sup>44</sup> In South Africa, the national government sets the framework and the provincial government exercises primary supervision.<sup>45</sup>

The third category comprises unitary states where local governments primarily are supervised by the central government. Japan is a good example. Despite the attempt to decentralise power to the local governments through the Decentralisation Act and the Decentralisation Reform Promotion Act, Matsui argues that many of the tasks of local government are the tasks of the central government, and the local government exercises the tasks under the supervision of the central government.<sup>46</sup> Zimbabwe is also an example, where the central government is charged with the supervision of local government.<sup>47</sup>

The following section will discuss the concept of decentralisation, focusing on its benefits and pitfalls. The section will further discuss the supervisory mechanisms that can be used by the higher governments to reduce the pitfalls associated with decentralisation.

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Steytler N (ed.) *A global dialogue on federalism: Local government and Metropolitan regions in federal system* (2009) 54. See also De Queiroz Ribeiro L & Pinto S G B 'Brazil' in Steytler N (ed.) *A global dialogue on federalism: Local government and Metropolitan regions in federal system* (2009) 93.

<sup>43</sup> See Machingauta N (2010) 140.

<sup>44</sup> See Steytler N (2005) 202.

<sup>45</sup> See Steytler N (2005) 7.

<sup>46</sup> Matsui S *The Constitution of Japan: A Contextual Analysis* (2011) 33.

<sup>47</sup> Machingauta N (2010) 140

## 2.4 Decentralisation

According to Mawhood, decentralisation ‘occurs when national government shares some of its power with other groups, particularly those that are either geographically dispersed, or are responsible for specific functions, or are given jurisdiction over specified physical locations.’<sup>48</sup>

Power can be transferred through the three main forms of decentralisation namely deconcentration, devolution and delegation.<sup>49</sup> Each form of decentralisation has different characteristics, policy implications and conditions of success.<sup>50</sup> The fundamental areas in the decentralisation process are power, authority and responsibility which start from the centre and transferred to the lower levels of government.<sup>51</sup>

Decentralisation appears to be motivated by political concerns, the need to improve service delivery to large populations, democratisation and development.<sup>52</sup> The potential benefits of decentralisation revolve around the argument that proximity not only makes it easier for local communities to hold public officials liable for their performance; but it facilitates acquisition of more accurate information of conditions which could be used for planning and provision of services.<sup>53</sup>

As has been highlighted above, decentralisation can contribute to improved service delivery in local governments through many ways. However, decentralisation is not a linear or consistent

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<sup>48</sup> Mawhood P *Local Government in the Third World: The Experience of Tropical Africa* (2nd) (1984) 4. See also Falleti T G ‘A sequential theory of decentralization and its effects on the intergovernmental balance of power: Latin American cases in comparative perspective’ 2005 *American Political Science Review* 328.

<sup>49</sup> De Visser (2005) 14-15.

<sup>50</sup> Litvack J & Seddon J (eds) ‘Decentralization Briefing Notes’ (1999) 2.

<sup>51</sup> Mawhood P (1984) 18.

<sup>52</sup> Litvack J & Seddon J (1999) 6.

<sup>53</sup> See Bardhan P & Mookherjee D (2006) 7. See also Litvack J & Seddon J (1999) 2.

process; it can have its own problems.<sup>54</sup> There are some important factors that have a negative bearing on the success of decentralisation. In this study corruption, lack of capacity and inequity will be discussed. It will be argued that for decentralisation to be successful, some measure of oversight of the performance and compliance of local authorities is crucial.

#### 2.4.1 Benefits of decentralisation

##### 2.4.1.1 Decentralisation improves democracy

The argument in favour of decentralisation of power is that citizens and their elected representatives are given more power in public decision-making.<sup>55</sup> With decentralisation, local government officials are likely to be better informed about the preferences of local citizens. Decentralisation may promote democratisation by giving citizens or their representatives more influence in formulating and implementing policies.<sup>56</sup> Turner is of the view that though the decentralisation of power to territorial units is given varying degrees of constitutional status in different countries.<sup>57</sup> It has been adopted as part of the democratisation process in all regions of the world<sup>58</sup>. It has also been adopted as a response to pressures from spatially defined minority groups from a measure of self-determination.<sup>59</sup>

Bardhan and Mookherjee argue that the most remarkable achievement of the Brazilian decentralisation pertains to patterns of popular participation in certain categories.<sup>60</sup> Baiocchi argues that the decentralisation of powers in Brazil ‘created an opportunity for local governments

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<sup>54</sup> Grindle M S *Going Local: Decentralisation, Democratisation and the Promise of Good Governance* (2007)178.

<sup>55</sup> Litvack J & Seddon J (1999) 2.

<sup>56</sup> See Bardhan P & Mookherjee D (2006) 7. See also Litvack L & Seldon J (1999) 2.

<sup>57</sup> See Turner M ‘Local Government reform and community-driven development: Asia-Pacific experiences’ 1999 *Public Administration and Development Jubilee Conference* 13.

<sup>58</sup> Turner M (1999)13.

<sup>59</sup> Turner M (1999) 13.

<sup>60</sup> Bardhan P & Mookherjee D (2006) 17.

to introduce democratic innovations such as participatory budgeting.’<sup>61</sup> The purpose of widening the scope and fairness of a democracy is to promote objectives of accountability and responsiveness of policy concerning delivery of local public goods and services to citizens.<sup>62</sup>

#### 2.4.1.2 Decentralisation promotes development

De Visser argues that development comprises three processes, namely the satisfaction of material needs, the enhancement of choice and the equitable distribution of wealth.<sup>63</sup> He further argues that the threefold definition guides the assessment of what decentralisation can contribute to development.<sup>64</sup> Every country needs development, and local government as being the level of government physically closer to the communities can contribute to local economic development in a number of ways. Decentralisation promotes development in the sense that it will improve preference-matching and enables greater participation in the state affairs by the citizens.<sup>65</sup> Decentralisation may lead to more creative, innovative and responsive programmes by allowing local experimentation which is good for development.<sup>66</sup> In addition, decentralisation of powers can have a direct impact on the distribution of resources. Most local governments have distinct needs and preferences for local public goods and services. Central governments without the help of the lower level of government may fail to provide to the different needs due to lack of information of those needs and preferences.<sup>67</sup> Thus, if resources are to be distributed to the lower level of government, there is a likelihood that the resources will reach every community. Hence,

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<sup>61</sup> See Bardhan P & Mookherjee D (2006) 17.

<sup>62</sup> Bardhan P & Mookherjee D (2006) 5.

<sup>63</sup> De Visser J (2005) 2.

<sup>64</sup> De Visser J (2005) 2.

<sup>65</sup> De Visser J (2005) 24.

<sup>66</sup> Litvack L & Jessica S (1999) 5.

<sup>67</sup> Bardhan P & Mookherjee D (2006) 7.

from the above mentioned, one can conclude that decentralisation can indeed make significant contributions to development.<sup>68</sup>

#### 2.4.1.3 Decentralisation accommodates diversity

Decentralisation is instrumental in protecting and promoting cultural diversity which in turn, enriches participatory and pluralist democracy. Singiza and De Visser argue that although vesting ethnically defined local government units with strong autonomous powers would exacerbate ethnic tensions and contribute to national disintegration; neglecting the wishes of an identifiable ethnic and/or cultural group may also lead to demoralisation and alienation.<sup>69</sup>

According to Dabo *et al*, ‘decentralisation can shift the onus from conflict to negotiations and bargaining which demilitarises volatile, conflict situations while extending state authority in contested areas, areas of weak penetration or those in the hands of local war lords.’<sup>70</sup> When minority groups are provided with some measure of autonomy, tension and conflict between the minority and majority groups will be reduced, thus contributing to safeguarding and strengthening internal peace.<sup>71</sup> Thus, decentralisation can lead to the creation of peaceful and self-governed ethnic region states and local governments.<sup>72</sup>

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<sup>68</sup> See De Visser J (2005) 3.

<sup>69</sup> Singiza D & De Visser J ‘Chewing more than one can swallow: the creation of new districts in Uganda’ (2011) 15 *Law, Democracy and Development* 5.

<sup>70</sup> Dabo A et al ‘Local Governance, peace building and state building in post-conflict settings: A UNDP discussion paper’ (2009) 5.

<sup>71</sup> Bertucci G, Nencini R & Cecchiti E ‘Decentralized Governance for Democracy, Peace, Development and Effective Service Delivery’ vi. available at [http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0CDwQFjAE&url=http%3A%2F%2Fwww.forumfed.org%2Fen%2Flibdocs%2FFederations%2FV7N1e\\_et\\_maru.pdf&ei=2rqWVKfEB63o7AbHI4H4Aq&usq=AFQjCNHcv7zkcUfmA3XOARVnxXQT39HVxg&sig2=qSaSAPBqA\\_4umoaDrkBmQ&bvm=bv.75097201,d.bGQ](http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0CDwQFjAE&url=http%3A%2F%2Fwww.forumfed.org%2Fen%2Flibdocs%2FFederations%2FV7N1e_et_maru.pdf&ei=2rqWVKfEB63o7AbHI4H4Aq&usq=AFQjCNHcv7zkcUfmA3XOARVnxXQT39HVxg&sig2=qSaSAPBqA_4umoaDrkBmQ&bvm=bv.75097201,d.bGQ) (accessed 15 September 2014).

<sup>72</sup> See Zimmerman-Steinhart P & Bekele Y ‘The implications of federalism and decentralisation on socio-economic conditions in Ethiopia’ (2012) 15(2) *PER* 90.



A number of countries experimented with different methods to respond to challenges that are associated with the ethnic, racial, religious, or other diversity of their people.<sup>73</sup> Different methods were used, depending on the particular objective they sought to achieve. Methods used to deal with the ethnic diversity included decentralisation of powers to ethnic groups. In the case of Ethiopia, the authorities selected to achieve two principal purposes through the decentralisation programme namely, to achieve development and to respond to the ethnic diversity of its people.<sup>74</sup>

## 2.4.2 Pitfalls of decentralisation

### 2.4.2.1 Disparities

De Visser argues that one of the most underestimated negative effects of decentralisation is that it ignores and, in effect, stimulates regional disparities.<sup>75</sup> He further argues that disparities between regions are present in the world over.<sup>76</sup> Decentralisation creates more opportunities for local autonomy and responsiveness to the needs of communities, but it may also lead to regional disparities. According to De Visser, disparities ‘are caused by the hubs of economic activity and by the consequences thereof, namely increasing urbanisation.’<sup>77</sup> Because of pleasant living conditions, high salaries, level of infrastructure and good services in wealthier regions, people often migrate from poor rural areas to urban areas, which is likely to increase interregional income disparities.<sup>78</sup>

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<sup>73</sup> Ayele Z *Decentralisation, development and accommodation of ethnic minorities: The case of Ethiopia* (unpublished PHD thesis, University of the Western Cape 2012)79.

<sup>74</sup> Ayele Z (2012) 79.

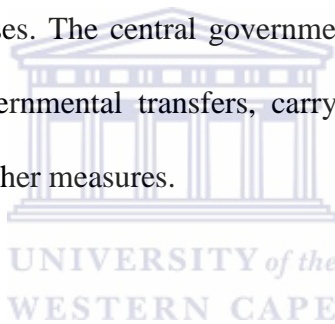
<sup>75</sup> De Visser J (2005) 27.

<sup>76</sup> De Visser J (2005) 27.

<sup>77</sup> De Visser J (2005) 27.

<sup>78</sup> Litvack L & Jessica S (1999) 40.

In the case of Brazil, despite formal mechanisms to reduce regional inequalities, inequality has persisted and even grown among municipalities of different sizes and in different regions and the situation is significantly worse in smaller municipalities.<sup>79</sup> Smaller municipalities tend to be more dependent on central government transfers and the situation is worse in the less economically developed areas. Taxes raised in the smaller municipalities are being used to privilege the developed urban areas.<sup>80</sup> Thus, for the intended results of decentralisation to materialise, there is a need for the higher governments to set regulations that levels the playing field for sub national entities. More so, higher governments can help maintain equity in spending across jurisdictions by monitoring public expenditures and supporting local government with financial resources when need arises. The central government can also help to reduce regional disparities by increasing intergovernmental transfers, carrying out several waves of national poverty alleviation program, and other measures.



#### 2.4.2.2 Lack of capacity

The intended outcomes of decentralisation are more likely to succeed where local authorities have both managerial and financial capacity to perform the task.<sup>81</sup> In most developing countries there is a mismatch between the decentralised responsibilities and human and financial capacity.<sup>82</sup> Due to the shortage of appropriately qualified personnel, decentralisation may result in the provision of lower quality goods and services at local level than may be obtained at the central level where skilled personnel are more readily available.<sup>83</sup> A decentralised local entity can

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<sup>79</sup> Baiocchi C 'Decentralization in Brazil' in Bardhan P & Mookherjee D *Decentralization and Local Governance in Developing Countries: A Comparative Perspective* (2006) 65.

<sup>80</sup> Baiocchi C (2006) 67.

<sup>81</sup> See Litvack L & Jessica S (1999) 5.

<sup>82</sup> Litvack L & Jessica S (1999) 5.

<sup>83</sup> Makumbe J *Democracy and Development in Zimbabwe: Constraints of Decentralisation* (1998) 11.

realise its mission only if there is balance between the assigned missions and the needed human and financial capacities. When powers are decentralised, local governments will have to be equipped with trained, competent people in order to carry out new responsibilities, as the success of decentralisation heavily depends on proper training for both national and local officials in decentralised administration.<sup>84</sup>

Local capacity is one of the most important and challenging factors in creating a well-functioning, decentralised government.<sup>85</sup> There is need for the higher governments to monitor the performance of local officials. Where the officials are failing to perform on their obligations, higher levels of government can have supporting mechanisms like capacity-building and secondment of staff which will help to strengthen local capacity.<sup>86</sup>

#### 2.4.2.3 Corruption

Schmidt argues that ‘decentralisation has resulted in decentralisation of corruption.’<sup>87</sup> Corruption manifests itself through tender fraud, nepotism, favouritism, lack of accountability and bribes.<sup>88</sup>

Prud’Homme argues that corruption is more likely to be widespread at decentralised levels because proximity is a fertile ground for elite capture.<sup>89</sup> Bardhan and Mookherjee refer to the vulnerability of local governments to be one of the reasons why corruption is rampant at local level.<sup>90</sup>

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<sup>84</sup> See Litvack L & Jessica S (1999) 40.

<sup>85</sup> Litvack L & Jessica S (1999) 41.

<sup>86</sup> See Litvack L & Jessica S (1999) 17.

<sup>87</sup> See De Visser J (2007) 29.

<sup>88</sup> Hope K R & Chikulo B C ‘Introduction’ in Hope K R & Chikulo B C (eds.) *Corruption and Development in Africa: Lessons from Country Case-Studies*(2003)3.

<sup>89</sup> Prud’Homme R ‘On the dangers of decentralisation’ 1 (1994) *Development Research* 10.

<sup>90</sup> See Bardhan P & Mookherjee D (2006) 9.

Local governments in most countries are agencies of the national government in the matters of collection of taxes, law enforcement, and other governmental functions. More so, they are often the cornerstone of development and are vested with some degree of autonomy. Owing to the fact that local governments often have some measure of autonomy, some central governments are reluctant to monitor local compliance with the rules, regulations, policies and institutional instruments. Where there is lack of supervision from the higher levels of government, there will be a high risk of local authorities illegally diverting funds allocated to specific public activities for personal gains. The success of decentralisation is closely related to compliance with the policies and institutional instruments that regulates the decentralised powers. Without some central supervision, there can be no assurance that functions of national importance are adequately performed once they have been decentralised. Uncontrolled use of autonomy adversely affects decentralisation. Thus, it is vital that the central government supervise the local government to ensure that they are complying with the rules and regulations and they are performing their functions.<sup>91</sup>

This section discussed the benefits and pitfalls of decentralisation. It was argued that for decentralisation to yield the desired outcomes, checks and balances must be put in place to regulate, monitor, and/or support local governments when exercising their powers and performing their functions. The following section will discuss the forms of supervision.

## 2.5 Forms of supervision

The first section of the chapter defined the concept of supervision and highlighted that supervision includes four distinct but interrelated activities which are regulation, monitoring,

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<sup>91</sup> De Visser J (2005) 3.

support and intervention.<sup>92</sup> This section will discuss these forms of supervision. Regulation is more relevant to this study.

### 2.5.1 Regulation

According to De Visser, regulation refers to setting frameworks within which local autonomy can be exercised responsibly.<sup>93</sup> Baldwin, Scott and Hood state that ‘regulation refers to the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules.’<sup>94</sup> Higher levels of governments often establish regulatory frameworks, setting the parameters within which one level of government should operate. Since regulatory frameworks may significantly influence the mandates of local governments, it is submitted that a balance needs should be struck between need for supervision and requirement for local discretion. It is against that backdrop, that the study proposes an effective regulatory framework. Such a framework does not extend to the core of how local governments must perform. It must be predictable and accommodate differences at local government level. More so, the regulators will need to ensure participation by the local government in the determination of the framework. Last, the administrative and implementation costs must be must be deliberated upon when establishing the framework. This section of the study will discuss each of the above-proposed elements of the regulatory framework.

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<sup>92</sup> Steytler N and De Visser J (2007) 15-5

<sup>93</sup> See De Visser J (2005) 170.

<sup>94</sup> Baldwin R, Scott C & Hood C (1998) ‘Introduction’ in Baldwin R, Scott C and Hood C (eds.) *A Reader on Regulation* (1998)3.

### 2.5.1.1 National framework

A framework is defined as the basic, underlying structure to a set of regulations.<sup>95</sup> The framework does not need to extend to the core of the matter, but rather deal with the structure within which local government is to exercise the powers. In other words, the regulatory framework must set the essential national standards.<sup>96</sup> The framework for example must list the objectives of the regulating authority, functions of local governments and determine the procedures and processes to be followed by the local governments when exercising their powers. The framework must not give a detailed explanation on how local governments are to perform the functions. It must only be limited to setting the structure. If the framework over regulates, there is a likelihood that it will compromise or impede a local government's ability or right to exercise its powers or perform its functions in an autonomous manner.

### 2.5.1.2 Regulatory framework must be predictable

A regulatory framework must be reasonably predictable. A continuously changing regulatory framework, just like a continuously changing environment is harmful for local government's ability to achieve optimal service delivery.<sup>97</sup> The framework will need to set the objectives. Objectives are critical for those who are acting within the parameters set by the regulations, since they represent the criteria against which they must determine the appropriate regulatory action; and against which they will be held accountable.<sup>98</sup> They also need to be clear to those being regulated and other interested parties. Legal certainty is a quality of the law connoting that legal

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<sup>95</sup> Litvack L & Jessica S (1999) 75.

<sup>96</sup> See Litvack L & Jessica S (1999) 75.

<sup>97</sup> See De Visser J (2005) 44.

<sup>98</sup> Department of Constitutional Affairs 'Draft Legal Services Bill, Explanatory Notes and Regulatory Assessment' (2006) 21.

subjects can ascertain what the law allows them to do, what it prohibits, and what is likely to happen as a result of their legal and illegal actions.<sup>99</sup>

### 2.5.1.3 Regulatory framework must accommodate differences of local government

The regulatory framework needs to be able to accommodate differences at the local level. In a number of countries, local government is divided into categories. The categorisation of local governments entails that there are different needs and preferences.<sup>100</sup> Thus, there is a need for higher governments to set standards which will enable local governments with different needs and preferences to undertake the roles and functions allocated to them. Failure to take into account the differences at local level may result in provision of low quality services by the smaller and financially unstable municipalities.

### 2.5.1.4 Participation by local government in determination of the rules

Good practice indicates that when a decision to be taken has a likelihood of adversely affecting an institution or an organisation; the interested parties must be consulted.<sup>101</sup> The process must be inclusive and facilitate appropriate and effective participation of local government. Participation by the local government in the determination of the framework is not only in line with democratic ideals; it is also the cornerstone upon which the local governments will be able to be account to the communities. One can argue that decisions that are made after consultations with local governments will be better informed and more applicable to diverse interest of local governments than those made only by the central government.<sup>102</sup>

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<sup>99</sup> Department of Constitutional Affairs (2006)21.

<sup>100</sup> See Department of Constitutional Affairs (2006) 21.

<sup>101</sup> Smith B C *Good Governance and Development* (2007) 156.

<sup>102</sup> Smith B C (2007) 156.

### 2.5.1.5 Cost of complying with the regulatory framework

The process of standard setting must consider the administration costs and impact the standards will have on the local governments. A regulatory framework that has an effect of burdening the financial standing of local government should be avoided at all costs.<sup>103</sup> The central question when making a decision to regulate must be whether the benefits that will flow from the regulation will outweigh the costs of that regulation?<sup>104</sup> If the answer will be in the affirmative, then higher governments should regulate.

The section discussed the supervision of local governments by establishing a regulatory framework. The study highlighted that the regulatory framework must be limited to setting the parameters within which the local government should perform their functions. It was also argued that an appropriate regulatory framework is predictable; enables participation of local government and takes into account the diverse needs and aspirations of local governments. In addition, it was highlighted that there is a need for a framework that does not create unnecessary financial burden on the local government.<sup>105</sup>

### 2.5.2 Monitoring

Monitoring is another form of supervision. Central governments must monitor local authorities to ensure compliance with law, regulations, policies and performance standards. Machingauta argues that monitoring relates to the establishment of mechanisms aimed at continuously looking into the general performance of local government, to see whether there is compliance with the

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<sup>103</sup> See OECD Reference Checklist for Regulatory Decision-Making. available at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=128> (accessed on 17 September 2014).

<sup>104</sup> See OECD Reference Checklist for Regulatory Decision-Making.

<sup>105</sup> See OECD Reference Checklist for Regulatory Decision-Making.



relevant legislation.<sup>106</sup> The monitoring of local government by the other levels of government is necessary in order to pick up early signals of problems that require intervention by the appropriate authority.<sup>107</sup> A monitoring framework can include certain measures or tests at intervals to see whether local governments are complying with the national legislation.<sup>108</sup> To enable monitoring, local governments should play an important role by cooperating with national and provincial governments to exercise its monitoring function within the legislative parameters.

There are several mechanisms of monitoring which include the right to access council records by the higher governments, self-reporting by the local authorities, requests for information and investigations.<sup>109</sup>

### 2.5.3 Support

Another form of supervision is support. Waite and Hawker define support as: to carry all or part of the weight; to enable to last out; give strength to and encourage.<sup>110</sup> Steytler and De Visser distinguish between two types of support, which is support in the context of supervision and support in the context of co-operation.<sup>111</sup> Support in the context of supervision is there to prevent a decline in structure of the local government.<sup>112</sup> Support of local governments in the context of co-operation is where local government will be an equal partner in the achievement of a common

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<sup>106</sup> Machingauta N (2010) 142.

<sup>107</sup> See Steytler N & De Visser J (2007) 260.

<sup>108</sup> *Certification of the Amended Text of the Constitution of the Republic of South Africa 1997 (2) SA 97.*

<sup>109</sup> See Machingauta N (2010) 142.

<sup>110</sup> Waite M & Hawker S (2007) 745.

<sup>111</sup> Steytler N & De Visser J (2007) 15-15.

<sup>112</sup> Steytler N & De Visser J (2007) 15-15.

national goal.<sup>113</sup> Other levels of government must support local government whilst respecting the autonomy of local government.

In the context of South Africa, the national and provincial government has a duty to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.<sup>114</sup> This support not only involves the delivery of actual infrastructure and support services to communities on behalf of municipalities, it also includes direct and indirect support to municipalities including technical support, capacity building and support in the area of governance.

#### 2.5.4 Intervention

Hoffman-Wanderer & Murray argue that intervention is the most intrusive form of supervision.<sup>115</sup> Where there are procedures to be followed when intervening into the affairs of the local government, if they are not followed there is likelihood that intervention will undermine the autonomy of local government.<sup>116</sup> Intervention can be exercised in various ways. In the context of South Africa, intervention can be exercised through the issuing of a directive, assumption of responsibility and dissolution of the municipal council, among others.<sup>117</sup>

In many jurisdictions the central government may intervene in local authorities' affairs in terms of the constitution of their respective country, or by constitutionally compatible legislation.<sup>118</sup>

Legislation must clearly provide when intervention is the appropriate step to take when

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<sup>113</sup> Steytler N & De Visser J (2007) 15-15.

<sup>114</sup> Constitution of the Republic of South Africa 1996, s154 (1).

<sup>115</sup> Hoffman-Wanderer Y & Murray C 'Suspension and dissolution of municipal councils under section 139 of the Constitution' 2007 TSAR 141.

<sup>116</sup> Hoffman-Wanderer Y & Murray C (2007) 141.

<sup>117</sup> Constitution of South Africa, s139 (1).

<sup>118</sup> *Certification of the Amended text of the Constitution of the Republic of South Africa* 1996 CCT 37/96.

supervising local government. When the legislation is unclear with regard to when intervention can be triggered, the disciplinary responses from the higher governments can be numerous. In the case of Uganda, the policies are not backed up with sanctions.<sup>119</sup> According to Azfar, Livingstone & Meagher, owing to the fact that the central government does not back policies with sanctions, when a local government underperforms in a key sector, the disciplinary measures are numerous.<sup>120</sup> Azfar, Livingstone & Meagher stated that the disciplinary responses range from suspension or dismissal of the responsible bureaucrat to investigation by national authorities.<sup>121</sup> Where there is no clear framework on when and how the central government can intervene, there is always a danger of undermining the autonomy of local authorities.

For local autonomy not to be undermined firstly the law should provide for a system of checks and balances before an intervention becomes a necessity. Integral to this would be mechanisms for improved monitoring, an early-warning system and strengthened means for intergovernmental oversight and support measures. Secondly, the mechanisms used to intervene into local governments must be reviewable in court. Finally, when the interests have been resolved, intervention must be terminated.<sup>122</sup>

## 2.6 Conclusion

In conclusion, the chapter highlighted that supervision has four distinct but interrelated activities which are regulation, monitoring, support and intervention. The benefits and the pitfalls of decentralisation were also discussed. It was highlighted that owing to the fact that decentralisation is not a linear process; supervision of the local government by central

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<sup>119</sup> 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.

<sup>120</sup> Azfar O, Livingston J & Meagher P (2006) 231.

<sup>121</sup> Azfar O, Livingston J & Meagher P (2006) 231.

<sup>122</sup> Steytler N & De Visser J (2007) 38.

government is significant for the success of any decentralisation strategy. Furthermore, the chapter proposed a normative framework which higher governments must adhere to when setting regulatory frameworks for local governments. It was discussed that for the autonomy of local government not to be undermined, an effective regulatory framework must be limited to the structure of how local governments must perform; the regulatory must be predictable and must accommodate differences at local government level. More so, the regulators will need to ensure participation by the local government in the determination of the framework. The administrative and implementation costs associated with complying with the framework must be deliberated upon when setting the framework.

Chapter two has provided a normative regulatory within which local government must be supervised. Chapter three will provide a case study of Zimbabwe. It is against the above-mentioned framework that the power of the Minister to issue policy directives provided for on section 313 of the Urban Councils Act will be examined in Chapter four to decide whether it exceeds the normative framework.

## CHAPTER 3: LOCAL GOVERNMENT SYSTEM IN ZIMBABWE

### 3.1 Introduction

Local government is an integral part of the 2013 Constitution of Zimbabwe.<sup>123</sup> For the first time in the history of Zimbabwe, local government is no longer a mere creature of central government but a tier of government.<sup>124</sup> As highlighted in chapter one, the Constitution guarantees the right of each local authority to govern, on its own initiative, the local affairs of the people within the area for which it has been established, subject to the Constitution and national legislation.<sup>125</sup> It further provides that a local authority has all the powers necessary to govern, subject to the Constitution and national legislation.<sup>126</sup> The Constitution which seems to guarantee autonomy of local authorities also provides for an Act of Parliament to establish powers of local authorities.

Chapter two provided a normative framework within which section 313 of the UCA will be examined. The chapter provided a brief discussion of the concept of supervision. It was argued that for decentralisation to be successful, it is necessary that lower governments be supervised. In particular, chapter three will focus on the history, the status, powers and functions of urban local authorities and the institutions responsible for supervising urban local authorities.

### 3.2 General overview of Zimbabwe

The 2013 Constitution of Zimbabwe replaced the 1979 Lancaster House Constitution. The Lancaster House Constitution is a product of the negotiations between the British government, the Patriotic Front (led by Robert Mugabe's Zimbabwe African National Union [ZANU]), Joshua

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<sup>123</sup> Constitution of Zimbabwe.

<sup>124</sup> See Constitution of Zimbabwe, s5.

<sup>125</sup> Constitution of Zimbabwe, s276.

<sup>126</sup> Constitution of Zimbabwe, s276.

Nkomo's Zimbabwe African Peoples Union [ZAPU]), and the Zimbabwe-Rhodesia government (represented by Abel Muzorewa and Ian Smith).<sup>127</sup> Lancaster House Constitution was deficient in many respects 'because of its compromised, undemocratic origins and because of the governmental imbalance that had resulted from frequent amendments'.<sup>128</sup> The adoption of a 2013 Constitution was a key requirement of the Global Political Agreement (GPA) signed in September 2008 by the three political parties in Zimbabwe, Zimbabwe African National Union-Patriotic Front (ZANU-PF), and the two formations of the Movement for Democratic Change (MDC), namely, the MDC-T led by Morgan Tsvangirai, and the MDC-N led by Welshman Ncube.<sup>129</sup> The Constitution officially came into force on 22 May 2013 after an overwhelming approval at a constitutional referendum held on 16 and 17 March 2013. The Constitution seeks to address the irregularities that had been observed during the tenure of the Lancaster House Constitution.<sup>130</sup> For this thesis, it is particularly relevant that the 2013 constitution seeks to democratise the political landscape through decentralisation.<sup>131</sup> The previous constitutional order was characterised by over-centralisation of power, including the unlimited supervisory powers of the Minister.<sup>132</sup> The Constitution is one of the few constitutions that expressly provides for the judicial enforcement of socio-economic rights.<sup>133</sup> The Constitution also establishes a new

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<sup>127</sup> Zimbabwe Lawyers for Human Rights (2011) *Zimbabwe's Constitutional Drafts: Comparison and Recommendation* (2011) 2.

<sup>128</sup> Zimbabwe Lawyers for Human Rights (2011) 2.

<sup>129</sup> Dzinesa G A 'Zimbabwe's Constitutional Reform Process: Challenges and Prospects' 2012 1.

<sup>130</sup> Mapuva J & Muyengwa-Mapuva L 'Devolution and the new Constitutional Dispensation in Zimbabwe' (05 March 2014) available at [http://www.monitor.upeace.org/innerpq.cfm?id\\_article=1035](http://www.monitor.upeace.org/innerpq.cfm?id_article=1035) (accessed on 01 October 2014).

<sup>131</sup> See Constitution of Zimbabwe, s264.

<sup>132</sup> Mapuva J & Muyengwa-Mapuva L (2014).

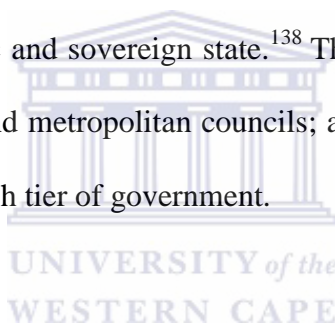
<sup>133</sup> See Moyo K 'Zimbabwe adopts a new Constitution' 2013 Socio-economic rights and administrative justice research project available on <http://blogs.sun.ac.za/seraj/2013/05/28/zimbabwe-adopts-a-new-constitution/> (accessed on 09 October 2014).

Constitutional Court which is the highest court in all constitutional matters and has the powers to declare any act or legislation unconstitutional.<sup>134</sup>

Furthermore, the Constitution provides for a Parliament which is tasked with protecting the Constitution and promoting democratic governance.<sup>135</sup> Parliament has powers to ensure that the provisions of the Constitution are upheld and that the State and all institutions and agencies of government at every level act constitutionally and in the national interest.<sup>136</sup> All institutions and agencies of the state and government at every level are accountable to the Parliament.<sup>137</sup>

### 3.3 System of government

Zimbabwe is a unitary, democratic and sovereign state.<sup>138</sup> The government is constituted by the national government; provincial and metropolitan councils; and local authorities.<sup>139</sup> This section of the study will briefly discuss each tier of government.



#### 3.3.1 National government

The national government is divided into three branches; the legislature, executive and the judiciary. The legislature consists of Parliament and the President.<sup>140</sup> The legislative authority is derived from the people and is vested in the legislature which it must exercise in accordance with the Constitution.<sup>141</sup> The legislature is bestowed with the powers to amend the Constitution, to make laws for the peace, order and good governance of Zimbabwe. It may confer subordinate

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<sup>134</sup> Constitution of Zimbabwe, s167.

<sup>135</sup> Constitution of Zimbabwe, s119 (1).

<sup>136</sup> Constitution of Zimbabwe, s119 (2).

<sup>137</sup> Constitution of Zimbabwe, s119 (3).

<sup>138</sup> Constitution of Zimbabwe, s1.

<sup>139</sup> Constitution of Zimbabwe, s5.

<sup>140</sup> Constitution of Zimbabwe, s116.

<sup>141</sup> Constitution of Zimbabwe, s117 (1).

legislative powers upon another body or authority in accordance with section 134 of the Constitution.<sup>142</sup> The judiciary authority is derived from the people and is vested in the courts.<sup>143</sup> The Constitution vests the President with executive authority, who exercises it in accordance with the Constitution. The President delegates executive authority to Cabinet Ministers who are responsible for overseeing various sectoral areas.<sup>144</sup> One of the Ministers relevant to this discussion is the Minister of Local Government, Rural and Urban Development (MLRUB) who is responsible for supervising local government in Zimbabwe.

### 3.3.2 Provincial government

Zimbabwe is divided into eight non-metropolitan provinces and two provinces with a metropolitan status.<sup>145</sup> Each non-metropolitan province is under the political leadership of the chairperson (previously known as the provincial governor), elected by the provincial council.<sup>146</sup> Harare metropolitan province is under the leadership of the Mayor of Harare and Bulawayo metropolitan province is led by the Mayor of Bulawayo.<sup>147</sup> Both non-metropolitan and metropolitan provinces are responsible for social and economic development of their respective province including; planning and implementing social and economic development activities, promotion of tourism, management of natural resources, coordination and implementation of governmental programmes and monitoring and evaluation of the use of resources.<sup>148</sup>

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<sup>142</sup> Constitution of Zimbabwe, s117 (2).

<sup>143</sup> Constitution of Zimbabwe, s162.

<sup>144</sup> Constitution of Zimbabwe, s88.

<sup>145</sup> See Constitution of Zimbabwe, s267.

<sup>146</sup> Constitution of Zimbabwe, s268.

<sup>147</sup> Constitution of Zimbabwe, s269.

<sup>148</sup> Constitution of Zimbabwe, s270.



### 3.3.3 Local government

Local government is divided into rural and urban local authorities.<sup>149</sup> Urban local authorities represent and manage the affairs of people in urban areas and rural local authorities are tasked with representing and managing the affairs of people in the rural areas.<sup>150</sup> Local authority areas are divided into wards, which are further divided into village assemblies in rural areas. The paper will focus particularly on urban local authorities.

## 3.4 Urban local government system

### 3.4.1 Colonial system of local government

The history of formal urban local government in Zimbabwe dates back to 1890, when Zimbabwe, (the then Rhodesia) was run by a private company, the British South Africa Company (BSACo).<sup>151</sup> The first formal urban local authority to be set up was the Salisbury Sanitation Board in 1891.<sup>152</sup> The Salisbury Sanitation Board was set up in response to pressure from residents of the emerging town who were worried about sanitary conditions and the Board was only responsible for refuse removal and management.<sup>153</sup> The need for similar boards was evident in other fast-emerging towns. Building on the experience of Salisbury (now known as Harare), other sanitary boards were set up in 1894 in the urban centres of Bulawayo, Mutare and Gweru.<sup>154</sup> These were upgraded to urban councils.

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<sup>149</sup> Constitution of Zimbabwe, s5.

<sup>150</sup> Constitution of Zimbabwe, s5.

<sup>151</sup> Chatiza K (2010) 3.

<sup>152</sup> See Chatiza K (2010) 3.

<sup>153</sup> Marumahoko S and Fesha Y 'Fiscal autonomy of urban councils in Zimbabwe: A critical analysis' (2011) 15 *Law, Democracy and Development* 39.

<sup>154</sup> Marumahoko S and Fesha Y (2011) 39.

Colonial local government legislation was used as a tool to further racial division and the exploitation and marginalisation of the majority of Africans for the benefit of the white minority.<sup>155</sup> The system was primarily racist, exploitative and subservient in character.<sup>156</sup> More so, it was based on the principle of ‘separate development’ of races, notably whites and blacks, with the former benefiting more from the system than the latter.<sup>157</sup> Urban councils had wide resource-raising powers and were relatively autonomous.<sup>158</sup>

### 3.4.2 Post-Independence local government

The ZANU PF-led government, immediately after independence sought to introduce wide-ranging reforms aimed at removing some of the racial considerations of the colonial regime from the local government system.<sup>159</sup> It introduced a set of policies aimed at enabling Africans to own immovable property in urban areas.<sup>160</sup> A number of pieces of colonial legislation were either amended or repealed, and new directives and statutes were issued.<sup>161</sup> The government declared its intention to promote decentralisation and participation in 1980. The dawn of independence saw the creation of a single Local Government Ministry.<sup>162</sup> More so, the beginning of independence saw the amendment of the Urban Councils Act which governs the urban councils.<sup>163</sup> The Urban Councils Act has been changed constantly since independence from the UCA (Chapter 214), UCA (Chapter 29:15) and finally to the Local Government Laws

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<sup>155</sup> Chigwata T C ‘A critical analysis of decentralisation in Zimbabwe: focus on the position and role of a Provincial Governor’ (unpublished LLM thesis, University of the Western Cape, 2010) 24.

<sup>156</sup> Chigwata T C (2010) 24.

<sup>157</sup> Makumbe J M (1998) 20.

<sup>158</sup> Paradza G ‘Reflections on Zimbabwe’s Past as Building Blocks for its Future’ (2010) 23(1) *Policy: Issues and Actors* 3.

<sup>159</sup> Makumbe J M (1998) 24.

<sup>160</sup> Paradza G (2010)2.

<sup>161</sup> Makumbe J M (1998) 24.

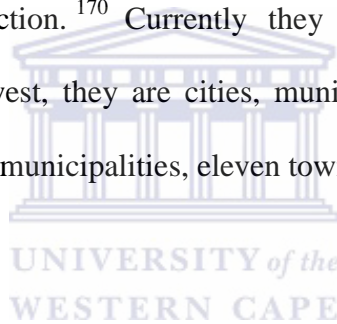
<sup>162</sup> See Chatiza K (2010) 5.

<sup>163</sup> Chatiza K (2010) 5.

Amendment Act, 2008.<sup>164</sup> Currently, there is an effort to amend the UCA to align it with other local government laws and the 2013 Constitution.<sup>165</sup> There is currently a Local Authorities Draft Bill.<sup>166</sup> The proposed Bill is intended to unify local government legislation and systematise local government.<sup>167</sup> According to Davies, the ‘proposed Bill appears to be a largely cut-and-paste amalgamation of its predecessors.’<sup>168</sup>

#### 3.4.2.1 Categories of urban councils

In spite of the 2013 Constitution, the organisation of urban local government is still primarily provided for in the Urban Councils Act.<sup>169</sup> Urban councils are hierarchically organised into classes, based on size and function.<sup>170</sup> Currently they are thirty-one urban councils in Zimbabwe.<sup>171</sup> From highest to lowest, they are cities, municipalities, town councils and local boards. They are seven cities, nine municipalities, eleven town councils and four local boards.<sup>172</sup>



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<sup>164</sup> Jonga W (2012)117.

<sup>165</sup> Jonga W (2012)117.

<sup>166</sup> See Davies M J ‘An analysis of the proposed Local Authorities Bill: Prepared by Kubatana’ August 2014 (2014) available at [http://kubatana.kubatananet.netdna-cdn.com/wp-content/uploads/2014/08/davies\\_analysis\\_proposed\\_local\\_authorities\\_bill\\_140820.pdf](http://kubatana.kubatananet.netdna-cdn.com/wp-content/uploads/2014/08/davies_analysis_proposed_local_authorities_bill_140820.pdf) accessed on 28 October 2014.

<sup>167</sup> Davies M J (2014) 3.

<sup>168</sup> Davies M J (2014) 3. See also Local Authorities Bill August 2014. (section 253 of the Local Authorities Bill is a cut and paste of section 313 of the Urban Councils Act)

<sup>169</sup> Urban Councils Act.

<sup>170</sup> Chakaipa S (2010) 36.

<sup>171</sup> Moyo S (2014)14.

<sup>172</sup> Moyo S ‘The Green Paper on Zimbabwe’s Local Government’ (2014)14. Combined Harare Residents Association August 2014.

Table 1: Classes of the Urban Councils in Zimbabwe

Cities	Municipalities	Town Councils	Local Boards
Harare	Bindura	Beitbridge	Chirundu
Bulawayo	Chegutu	Chipinge	Epworth
Gweru	Chinhoyi	Chiredzi	Hwange
Kadoma	Chitungwiza	Gokwe	Ruwa
Kwekwe	Gwanda	Karoi	
Masvingo	Marondera	Norton	
Mutare	Redcliff	Rusape	
	Kariba	Shurugwi	
	Victoria Falls	Zvishavane	
		Plum Tree	
		Lupane	

Source: Moyo S (2014) 15.

The Urban Councils Act, (sections 4 to 14) empowers the President to establish municipal and town councils as well as dividing council areas into wards.<sup>173</sup> The Act also empowers the President to upgrade urban councils from one category to the other i.e. local boards to be upgraded to town councils, town councils to municipalities and municipalities to city councils.<sup>174</sup>

### 3.4.2.2 Powers and functions of urban councils

The 2013 Constitution does not explicitly provide for the specific powers and functions of local authorities. Section 276 of the Constitution provides that local authority powers shall include:

<sup>173</sup> Urban Councils Act, s4-14.

<sup>174</sup> Urban Councils Act, s6.

*‘... the right to govern on its own initiative, the local affairs of the people within the area for which it has been established, and shall have all the powers necessary for it to do so.’<sup>175</sup>*

The Constitution further provides that local authorities’ powers may include powers to make by-laws and other regulations or rules which are necessary for the effective administration of local authorities.<sup>176</sup> With regard to executive powers, an Act of Parliament may confer executive powers on a directly elected mayor or chairperson of an urban local authority.<sup>177</sup> While the Constitution guarantees local authorities the right to govern on its own initiative the affairs of its own people, the powers and functions are to be determined by the national government.<sup>178</sup>

Furthermore, the Constitution envisages national government allocating revenue-raising powers to local authorities.<sup>179</sup> Section 276(2) of the Constitution gives Parliament the discretion to enact a law conferring powers on local authorities including ‘a power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objectives and responsibilities’.<sup>180</sup>

The Constitution makes reference to an Act of Parliament to confer functions on local authorities.<sup>181</sup> The existing Act of Parliament that regulates urban local government is the Urban Councils Act. The Act provides the powers and functions of urban local authorities. The powers range from the core business of the council, which is service provision, to issues to do with

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<sup>175</sup> Constitution of Zimbabwe, s276 (1).

<sup>176</sup> Constitution of Zimbabwe, s276 (2).

<sup>177</sup> Constitution of Zimbabwe, s275.

<sup>178</sup> Constitution of Zimbabwe, s276 (2).

<sup>179</sup> See Machingauta N, Chigwata T C & De Visser J ‘Unpacking devolution in the Constitution of Zimbabwe: Draft Paper’

<sup>180</sup> Constitution of Zimbabwe, s276 (2).

<sup>181</sup> Constitution of Zimbabwe, s276 (2).

allowances, mementoes, and orchestras and bands.<sup>182</sup> The general powers of urban councils are provided in the second schedule of the Act.<sup>183</sup> Nonetheless, the powers vested in urban councils are matched by even more supervisory powers bestowed on the Minister responsible for local government.<sup>184</sup>

### 3.5 Institutions charged with supervision of Urban Local Government

As highlighted in Chapter two, for local government to achieve its developmental mandate, some degree of supervision by higher levels of government is crucial. In Zimbabwe, there is an array of national government institutions charged with the supervision of urban councils.<sup>185</sup> Central government supervises urban authorities through the Ministry of Local Government Rural and Urban Development, the Local Government Board, Parliament, the Auditor General and other institutions. This section will discuss the role of the Ministry of Local Government<sup>186</sup> Local Government Board<sup>187</sup>, Parliament<sup>188</sup> and Auditor-General.<sup>189</sup>

#### 3.5.1 Ministry of Local Government, Rural and Urban Development

The primary function of the Ministry of Local Government (MLGUD) is to supervise or monitor the activities of local governments and also to monitor the services offered to the public by these public institutions.<sup>190</sup> The MLGUD is responsible for the coordination of all government

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<sup>182</sup> Chakaipa S (2010) 38.

<sup>183</sup> Chakaipa S (2010) 38.

<sup>184</sup> Mushamba S (2010)113.

<sup>185</sup> Chakaipa S (2010) 54.

<sup>186</sup> Urban Councils Act, s2.

<sup>187</sup> Urban Councils Act, s116.

<sup>188</sup> Constitution of Zimbabwe, s299.

<sup>189</sup> Constitution of Zimbabwe, s309.

<sup>190</sup> Jonga W *Good Governance through Staff Development in Zimbabwe Urban Councils: Training of Councillors* (2012) 136.

programmes at sub-national level and administering all local government legislation.<sup>191</sup> It is charged with coordinating policy formulation, implementation and evaluation in the local government sector. Furthermore, the Ministry is mandated to lead the development and management of the sector, representing its interests at national and district levels in relation to other government institutions.<sup>192</sup> Chakaipa summarises the roles of the Ministry besides administering legislation on local government to include, but not limited to, facilitation, advice, monitoring, oversight, directing, promoting and capacity building.<sup>193</sup>

The Minister responsible for local government has various powers and obligations under various local government Acts. For instance, under the Urban Councils Act the Minister is empowered to ‘direct a council to reverse, suspend or rescind any of its resolutions or decisions if he considers that the resolutions or decisions are not in the interest of the inhabitants of the area, or in the national or public interest’.<sup>194</sup> More so, in terms of section 313 of the Act, the Minister may give councils directives of a general nature on policy which the Minister deems to be in the national interests.<sup>195</sup> The directives are binding and must be complied with expeditiously, notwithstanding that the councillors may have reasonable grounds for apprehension about the directives.<sup>196</sup> These powers and levels of discretion given to the Minister over local authorities have generated a lot of debate within the local government sector.<sup>197</sup> That being said; the debate with regard to the powers vested in the Minister responsible for local government will be dealt with in chapter four.

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<sup>191</sup> See Urban Councils Act, s2.

<sup>192</sup> Chatiza K (2010) 14.

<sup>193</sup> Chakaipa S (2010) 33.

<sup>194</sup> Urban Councils Act, s314.

<sup>195</sup> Urban Councils Act, s313.

<sup>196</sup> Urban Councils Act, s313.

<sup>197</sup> Moyo S (2014)16.

### 3.5.2 Local Government Board

The Local Government Board (LGB) is an important institution in urban local government management.<sup>198</sup> It is provided for under section 116 of the Urban Councils Act.<sup>199</sup> The main role of the Board is to provide guidance for the general organisation and control of employees in the service of councils.<sup>200</sup> The appointment and discharge of senior officials, defined in section 131 as a town clerk, a chamber secretary, a head or deputy, head of a department or such other employee of a council as may be prescribed, requires the approval of the LGB.<sup>201</sup>

### 3.5.3 Parliament

One of the principles of public financial management as provided in the Constitution is that there must be transparency and accountability in financial matters.<sup>202</sup> Section 299 of the Constitution vests the Parliament with the oversight powers with regards to state revenues and expenditure.<sup>203</sup>

Parliament has powers to;

*monitor and oversee expenditure by the state and all commissions and institutions and agencies of government at every level, including statutory bodies, government-controlled entities, and provincial and metropolitan councils and local authorities.*<sup>204</sup>

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<sup>198</sup> Chakaipa S (2010) 54.

<sup>199</sup> Urban Councils Act, s116.

<sup>200</sup> Zhou G & Madhekeni A (2012)28.

<sup>201</sup> Chakaipa S (2010) 42.

<sup>202</sup> Constitution of Zimbabwe, s298.

<sup>203</sup> Constitution of Zimbabwe, s299.

<sup>204</sup> Constitution of Zimbabwe, s299.



This entails that for each urban local authority to comply with the principles on financial management, it has to account for revenue earned and expenditure incurred to the Parliament. The Parliamentary Portfolio Committee on Local Government (PPCLG) plays an important role.<sup>205</sup> Members of the Committee convene public discussions on pertinent issues that emanate from areas of concern to the public and report back to Parliament.<sup>206</sup> They may discuss issues related to the performance of ministries with members of the executive, their officials and the public.<sup>207</sup> Furthermore, members of the PPCLG may demand explanation from ministries if work, for which Parliament allocated funds, is not carried out.<sup>208</sup> The role played by the Committee is significant in and at light of accountability at the local level.

#### 3.5.4 Auditor-General

The 2013 Constitution established the office of the Auditor-General.<sup>209</sup> Section 309 of the Constitution states that the Auditor-General (AG) is required to audit the accounts, financial management of all departments, institutions and agencies of government, all provincial and metropolitan councils and local authorities.<sup>210</sup> At the request of the government, the AG may carry out special audits of the accounts of any statutory body or government-controlled entity.<sup>211</sup> More so, he or she can order the taking of measures to rectify any defects in the management and

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<sup>205</sup> Mushamba S 'The powers and functions of local government authorities' in De Visser J, Steytler N and Machingauta N (eds.) *Local government reform in Zimbabwe: A policy dialogue* (2010) 116.

<sup>206</sup> Mushamba S (2010) 116.

<sup>207</sup> Chakaipa S (2010) 54.

<sup>208</sup> Chakaipa S (2010) 54.

<sup>209</sup> Constitution of Zimbabwe, s309.

<sup>210</sup> Constitution of Zimbabwe, s309 (a).

<sup>211</sup> Constitution of Zimbabwe, s309 (b).

safeguarding of public funds and public property.<sup>212</sup> The AG may exercise other functions that may be conferred to him or her by or under an Act of Parliament.<sup>213</sup>

### 3.6 Conclusion

This chapter provided a brief description of the system of urban local government in Zimbabwe. It spelt out that the Minister responsible for Local Government has supervisory powers which are provided for in the Urban Councils Act. The power to issue policy directives has been controversial for more than a decade. Some authors argue that the problem is the wording of local government laws which allows wide interpretation and therefore giving the Minister too wide powers.<sup>214</sup> Others are of the view that the Minister is exercising powers that go beyond the powers under section 313 of the UCA.<sup>215</sup> Drawing from the normative framework proposed in chapter two, chapter four will examine whether the power to issue policy directives as provided for in section 313 of the UCA complies with the framework set out in chapter two. The chapter will further examine whether section 313 of the UCA is constituent with the 2013 Constitution.

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<sup>212</sup> Constitution of Zimbabwe, s309 (c).

<sup>213</sup> Constitution of Zimbabwe, s309 (d).

<sup>214</sup> See Zhou G (2012) 20.

<sup>215</sup> See Jonga W (2014) 75.

## CHAPTER FOUR: EXAMINING SECTION 313 OF THE URBAN COUNCILS ACT.

### 4.1 Introduction

Urban local authorities in Zimbabwe are failing to deliver basic services efficiently and effectively.<sup>216</sup> This is attributed to a number of challenges including the political and economic crisis in Zimbabwe.<sup>217</sup> As highlighted in chapter one, some scholars attribute this failure to the unlimited supervisory powers which the Minister responsible for local government enjoys under local government legislations.<sup>218</sup> In the context of the Urban Councils Act, such powers include the powers of the Minister to ‘direct a council to reverse, suspend or rescind any of its resolutions or decisions if he or she considers that the resolutions or decisions are not in the interest of the inhabitants of the area, or are not in the national or public interest.’<sup>219</sup> More so, in terms of section 313 of the Act, the Minister may give councils directives of a general nature on policy which the Minister deems to be requisite in the national interests.<sup>220</sup>

In chapter two an argument was made that there is a need for a regulatory framework that establishes the parameters within which local authorities exercise their autonomy. It was further argued that the regulatory framework must not endanger the minimum level of autonomy required if local authorities are to be responsive to the needs and preferences of their communities. Such autonomy is likely to be protected if; firstly there is a regulatory framework that is predictable, as a continuously changing framework is detrimental to local authorities.

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<sup>216</sup> See Dewa D, Dziva C and Mukwashi K ‘Exploring Local Governance Challenges in Zimbabwe under the Government of National Unity era and beyond’ (2014) 2(8) *International Journal of Political Science and Development* 189.

<sup>217</sup> See Dewa D, Dziva C and Mukwashi K (2014) 189.

<sup>218</sup> Constitution Watch ‘Giving Effect to the New Constitution: Local Government: Ministers, Mayors and Money’ *Zimbabwe Situation* 2 October 2013. See also Zhou G (2012) 20 and Chakaipa S 2010(32).

<sup>219</sup> Urban Councils Act, s314.

<sup>220</sup> Urban Councils Act, s313.

Secondly, the regulatory framework must be limited to setting the parameters within which the local government should perform their functions. Thirdly, it was argued that local authorities should be involved in the development of the normative regulatory framework and there is need for a stable, yet asymmetrical framework for local government. Finally, it was highlighted that when the decision-makers are deliberating on the framework, they have to consider how the local government will comply with the framework. In chapter three the study provided an overview of the urban local government system in Zimbabwe. It is this system that will be examined in this chapter with particular focus on the power of the Minister to issue policy directives. The examination will be carried out against the normative framework set out in chapter two. The chapter will further establish whether section 313 is consistent with the 2013 Constitution.

#### 4.2 Power to issue policy directives

Section 313 of the Urban Councils Act provides that;

‘(1) Subject to subsection (2), the Minister may give a council such directions of a general character as to the policy it is to observe in the exercise of its functions, as appear to the Minister to be requisite in the national interest.

(2) Where the Minister considers that it might be desirable to give any direction in terms of subsection (1), he shall inform the council concerned, in writing, of his proposal and the council shall, within thirty days or such further period as the Minister may allow, submit to the Minister, in writing, its views on the proposal and the possible implications on the finances and other resources of the council.

(3) The council shall, with all due expedition, comply with any direction given to it in terms of subsection (1).’<sup>221</sup>

The Minister responsible for local government is vested with significant supervisory powers under section 313 of the Urban Councils Act. Section 313 of the Urban Councils Act raises a number of questions. Firstly, what is the meaning of council? Secondly, what does ‘directions of

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<sup>221</sup> Urban Councils Act, s313.

a general nature on policy' mean? Thirdly, what is the meaning of national interest? Fourthly, what kind of powers may the Minister exercise under the provision? Finally, what does the duty to inform entail? This section will attempt to provide answers to those questions.

#### 4.2.1 What is a council?

Section 313(1) of the Urban Councils Act provides that the Minister may give a *council* directives of a general nature.<sup>222</sup> The provision further states that the Minister may inform a *council*, when he/she considers it desirable to give such directive.<sup>223</sup> After the proposal, the *council*, shall submit their views on the proposal and the possible financial implications of the directive on the *council*.<sup>224</sup> Finally, a *council* must comply with any directive given in terms of section 313(1).<sup>225</sup>

Section 2 of the Urban Councils Act defines a council as a 'municipal council or town council.'<sup>226</sup> A local authority is also another term used to refer to a municipal council, town council, district council or municipal board.<sup>227</sup> It is evident from the provision that the original intention of the framers of the Act was to deal with councils independently. The Minister is obliged to inform the specific council that will be affected by the directive. This entails that the Minister may not issue a general directive to all the councils, but only to a council concerned. More so, because of the phrase council concerned, it is reasonable and practical to say that in the case that the directive will affect more than one council, the Minister may inform those councils affected.

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<sup>222</sup> Urban Councils Act, s313 (1).

<sup>223</sup> Urban Councils Act, s313 (2).

<sup>224</sup> Urban Councils Act, s313 (2).

<sup>225</sup> Urban Councils Act, s313 (3).

<sup>226</sup> Urban Councils Act, s2.

<sup>227</sup> See Urban Councils Act, s2.

#### 4.2.2 Policy directives of a general nature

An argument was made in chapter two that a regulatory framework must not be prescriptive about how local governments are to perform the functions. It must be limited to setting the framework within which local authorities operate. Under section 313 of the Urban Councils Act, the Minister may give a council '*such directions of a general character as to the policy it is to observe in the exercise of its functions*'.<sup>228</sup>

A directive of a general nature may specify the processes or procedures to be followed by urban councils. It may relate merely to a policy that the urban councils are to observe when exercising their functions. For example, a directive of a general nature may establish the minimum standards required for service delivery or for public participation. It does not for example specify how urban councils must provide communities with a certain amount of water or electricity per day, but it may only provide that urban councils have a duty to provide the services on a sustainable basis.

#### 4.2.3 The meaning of national interest

It was highlighted in chapter two that the regulatory framework governing local government must be predictable; as a continuously changing framework is detrimental to the local government's ability to achieve optimal service delivery.<sup>229</sup> Section 313 provides that the Minister may give directions of a general nature on policy which the Minister deems to be requisite in the national interest.<sup>230</sup> There is no accepted common standard or definition of the

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<sup>228</sup> Urban Councils Act, s313 (1). (words in italics-emphasis added)

<sup>229</sup> See De Visser J (2005) 44.

<sup>230</sup> Urban Councils Act, s313.

concept of national interest.<sup>231</sup> Xue-tong is of the view that the understanding of the role or meaning of national interest is totally different from one user of the term to another.<sup>232</sup> According to Chigora, ‘national interest refers to the country's goals and ambitions, whether economic, military, or cultural’.<sup>233</sup> What then is national interest in the context of section 313 of the UCA? The UCA does not define the term national interest. The implication of not having a precise meaning of national interest is that when central and local governments have different views on what is in the national interest; the central government may make decisions that may undermine or compromise the autonomy of urban councils in the name of national interest.<sup>234</sup>

#### 4.2.4 The discretion given to the Minister to issue policy directives

The provision vests the Minister with unlimited supervisory powers. According to section 313, the Minister may issue directives ‘*as appear to the Minister to be requisite in the national interests*’.<sup>235</sup> The provision further states that ‘*where the Minister considers that it might be desirable to give any direction in terms of subsection he shall inform the council concerned*’.<sup>236</sup> There is an obligation placed upon the council to submit its views on the proposal within ‘thirty days or *such further period as the Minister may allow*’.<sup>237</sup> The council has a mandate to comply *with any direction* given to it in terms of subsection (1).<sup>238</sup>

When issuing a directive, there is a need to differentiate between the objective facts and the opinion of the Minister, giving rise to the directive. The Minister’s opinion with regard to the

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<sup>231</sup> Xue-tong Y ‘Analysis of China’s national interest’ (2002) 7. available at [http://cns.miis.edu/books/pdfs/china\\_national\\_interests.pdf](http://cns.miis.edu/books/pdfs/china_national_interests.pdf) (accessed on 20 October 2014).

<sup>232</sup> Xue-tong Y (2002) 7.

<sup>233</sup> Chigora P ‘Acting in the name of National interest: the survival strategy of Zimbabwe in international intervention in Mozambique and Democratic Republic of Congo (DRC)’ (2008) 632.

<sup>234</sup> See Machingauta N (2010) 114.

<sup>235</sup> Urban Councils Act, s313 (1).

<sup>236</sup> Urban Councils Act, s313 (2). (words in italics-emphasis added)

<sup>237</sup> Urban Councils Act, s313 (2). (words in italics-emphasis added)

<sup>238</sup> Urban Councils Act, s313 (3).

urban council's state of affairs might be helpful, but it not be sufficient to make an informed decision. It may be argued that for the Minister to make an objective decision with regard to local authorities' problems after he/she has received information and views from the council concerned. In as much as supervision is critical in governance, section 313 of UCA seem to imply that if the Minister is of the opinion that it is in the national interest, he/she has discretion to decide when and how to issue policy directives. More so, notwithstanding the fact that the councils may have objections on the directives issued; the provision further states that any of the directives from the Minister are binding on the councils and must be complied with expeditiously.<sup>239</sup> It is apparent from section 313 of the UCA that the Act bestows unlimited powers on the Minister responsible for local government, thus this impacts negatively on the autonomy of urban councils. Lack of autonomy is one of the most critical constraints on urban councils to deliver services to their communities.

#### 4.2.5 The duty to inform an urban authority before issuing policy directives

In chapter two, it was highlighted that local authorities must be consulted when the regulatory framework is being developed. Local authorities are to be consulted because they will be required to exercise their powers within that framework.<sup>240</sup> Section 313(2) of the Urban Councils Act provides procedural requirements that will need to be followed by the Minister when he/she considers issuing a directive.<sup>241</sup> The Minister is mandated to 'inform' the council concerned of his proposal, in writing. Following the proposal, the council must, within a specified period, submit its views and the possible implications on the finances and other resources.<sup>242</sup>

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<sup>239</sup> Urban Councils Act, s313.

<sup>240</sup> Smith B C (2007) 156.

<sup>241</sup> Urban Councils Act, s313(2)

<sup>242</sup> Urban Councils Act, s313(2)



The provision raises a number of questions. Firstly, what does the duty to inform mean? Secondly, what happens when the Minister does not inform the councils? Thirdly, is the duty to inform consistent with the normative framework set out in chapter two and the 2013 Constitution?

The duty to inform entails that the Minister will provide urban councils with facts or information concerning the proposal to issue a directive, without taking into account the urban councils views in the decision-making.<sup>243</sup> Consultation differs from informing as it requires the national government to seek the views or information from urban councils to inform its own decision-making.<sup>244</sup> Steytler and De Visser argue that intergovernmental consultation has three basic elements. These elements are that; there must be an invitation to hear the views of a particular party, an adequate opportunity to submit considered views on a specified matter and the party inviting views must consider those views in good faith.<sup>245</sup> It is important that local councils be informed before a decision is made so that they will be aware of the risks and drawbacks of the decision to be made. Regardless of the provision providing for the council to respond to the proposal, the requirement of the provision is for a council only to be informed. The provision deviates from the normative framework which highlighted that the local governments must be consulted not just informed. More so, the provision falls short of the requirement of the Constitution which requires that local government must be informed and consulted.

The Constitution provides for co-operative government. Section 194(1) (g) of the Constitution provides that institutions and agencies of government at all levels must co-operate with each

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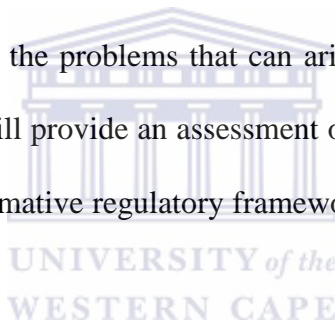
<sup>243</sup> See Steytler N & De Visser *Constitutional Law of South Africa* (2ed) (2011) 22-134.

<sup>244</sup> See Steytler N & De Visser (2011) 22-134.

<sup>245</sup> Steytler N & De Visser (2011) 22-134.

other.<sup>246</sup> Furthermore, provincial and metropolitan and local authorities must within their spheres co-operate with one another, in particular by informing one another of and consulting one another on matters of common interest; harmonising and coordinating their activities.<sup>247</sup> The Constitution does not technically require central government to consult with local government. However, based on the rule of purposive interpretation and drawing from section 194 of the Constitution, one can argue that, it was the intention of the framers of the Constitution that the central government must co-operate with local government. Thus, failure of the national government to inform and consult the councils on matters that also affect them undermines autonomy of urban councils.

This section of the study provided the problems that can arise from interpreting section 313 of the UCA. The following section will provide an assessment of the exercise of the power to issue policy directives in light of the normative regulatory framework proposed in chapter two and the Constitution.



#### 4.3 Assessment of policy directives

This section of the work will assess three directives that were issued by the Minister at different intervals. It was submitted in chapter one that it is a challenge in Zimbabwe to access government policies. Thus, the study will assess two directives that the author has on file. The study will rely on secondary sources such as newspaper articles for the third directive. When assessing the third directive from newspaper articles, a fourth directive which the author has on file will be introduced as an aid to the assessment. First, the study will assess whether the three selected directives were limited to standard setting. Secondly, an assessment will be done

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<sup>246</sup> Constitution of Zimbabwe, s194 (1) (g).

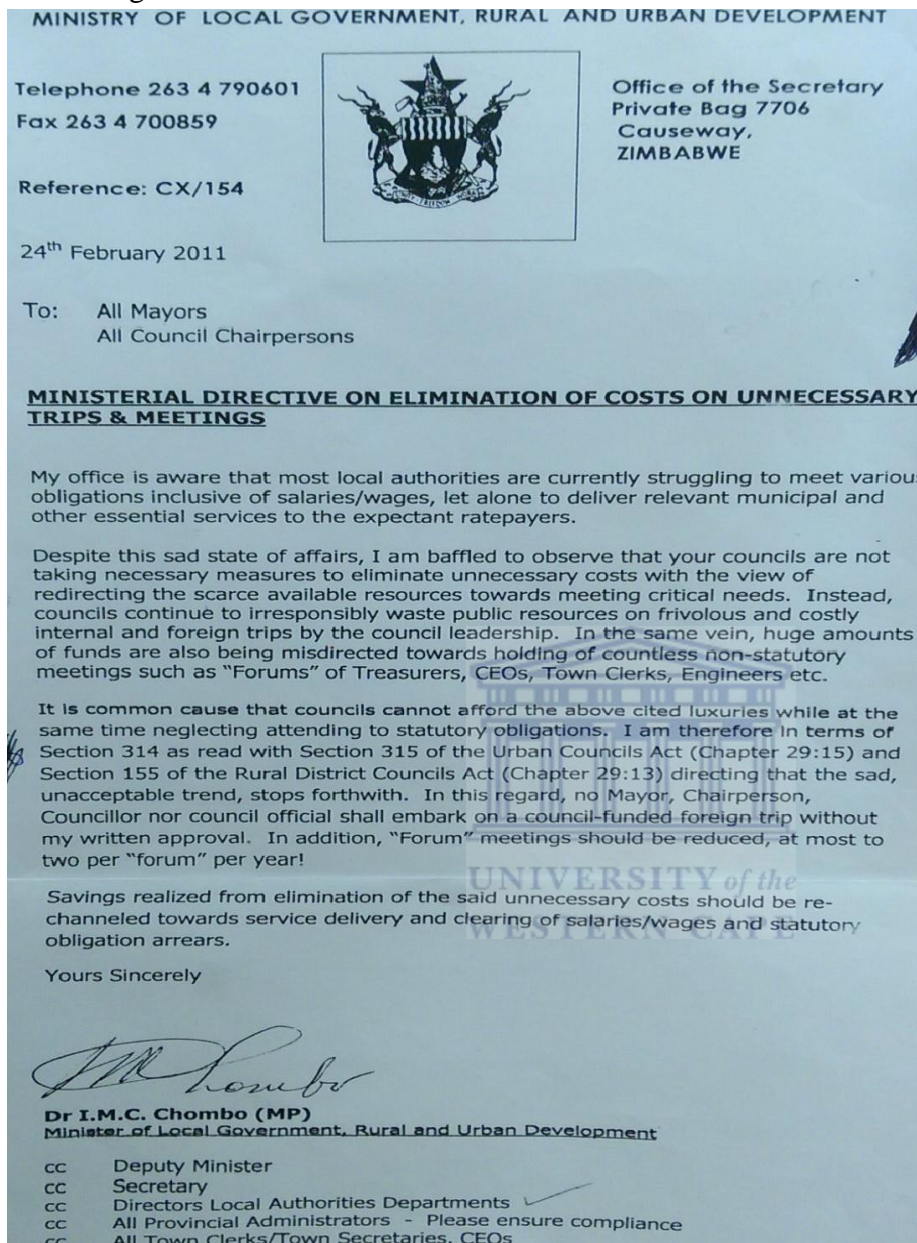
<sup>247</sup> Constitution of Zimbabwe, s265 (1) (d)).

whether the directives issued were predictable, that is could the local councils have foreseen the directives coming. Thirdly, the study will assess whether the directives accommodated the differences in local authorities. Fourthly, it will be assessed whether the central government involved local councils likely to be affected by the directive in the determination of the directives. Finally, the study will assess whether the national government took into consideration the compliance costs by the local authorities when preparing the directives.

The following section will assess the exercise of the power to issue directives with the aid of the Ministerial directive to eliminate costs of unnecessary trips and meetings. The study will provide a background to the directive. It will also provide the facts, purpose and the consequences that are likely to result from issuing directives of such a nature.



#### 4.3.1 Figure1: Ministerial directive on elimination of costs on unnecessary trips and meetings



Prior to 2011, local authorities were struggling to pay salaries and deliver relevant municipal and other essential service.<sup>248</sup> The Minister attributed the failure by the local authorities to meet various statutory obligations to mismanagement of funds. According to the Minister, local authorities were irresponsibly wasting public resources on frivolous and costly internal and

<sup>248</sup> Ministry of Local Government, Rural and Development 'Ministerial Directive on Elimination of costs on unnecessary trips and meetings' 24 February 2011.

foreign trips and were irresponsibly wasting public funds towards holding countless non-statutory meetings.<sup>249</sup> Thus, on the 24<sup>th</sup> of February 2011, the Minister issued a directive on elimination of costs. The directive stated that the unnecessary trips and meetings should be eliminated and the savings realised from the elimination of the said unnecessary costs should be re-channelled towards service delivery and clearing of salaries/wages and statutory obligation arrears.<sup>250</sup> The purpose of the directive was to assist local councils in complying with their statutory obligations.

#### 4.3.1.1 Was the directive limited to the standard setting?

The first question to be answered is whether the directive was limited to standard setting? Chapter two pointed out that national government needs to set certain standards regulating the activities of local authorities to ensure their developmental objectives are achieved. The chapter further highlighted that a framework must be limited to standard setting. It is suggested that the directive to eliminate costs was not limited to setting standards within which local councils where to perform their functions towards the realisation of their service delivery mandate. The directive was too specific. It prohibited local officials from travelling and conducting meetings without approval and re-channel the savings towards service delivery. The Minister used the directive as a way to intervene into the affairs of local authorities. With standard setting, the Minister could have had issued a directive that was limited to setting a range within which local authorities could spend on their budgets on trips and meetings. It is the argument of this study that the directive to eliminate costs issued by the Minister was not limited to standard setting.

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<sup>249</sup> Ministry of Local Government, Rural and Development 'Ministerial Directive on Elimination of costs on unnecessary trips and meetings' 24 February 2011.

<sup>250</sup> Ministry of Local Government, Rural and Development 'Ministerial Directive on Elimination of costs on unnecessary trips and meetings' 24 February 2011.

#### 4.3.1.2 Was the directive predictable?

The main question is whether local authorities could have foreseen the directive to eliminate costs of trips and meetings. It was highlighted above that local authorities were struggling to meet their statutory obligations and the purpose of the directive was to assist local authorities in complying with their statutory obligations. It is reasonable to say that, in such instances a directive to assist local authorities in realising their service delivery mandate was predictable. However, the nature of the directive is problematic. Local authorities could have foreseen a general directive reminding them to comply with their statutory obligations and upon failure, a specific directive to eliminate costs could have been issued. The issuing of a specific directive to stop meetings and trips limited the discretion of local authorities to address local authorities' compliance challenges through local solutions. Therefore, the directive to eliminate costs was not predictable.

#### 4.3.1.3 Did the directive accommodate differences at local level?

It was argued in chapter two that the differences between local authorities must be considered when the national government is exercising their supervisory powers. The section above submitted that section 313 of the UCA refers to a council concerned, thus the national government must take a differentiated approach when dealing with local councils. When issuing the directive to eliminate costs, there seems to be no evidence pointing to the fact that the Minister considered the differences in local authorities'. The directive refers to most local authorities. The Minister could have set indicators showing that the directive was to be implemented by local councils in a certain category. Because of the phrase 'most local authorities' the directive one can argue that the directive does not differentiate between councils. With regard to local authorities in dire financial stress, such a directive would frustrate the

emergence of local solutions, which is likely to hamper service delivery in urban councils. More so, the nature of the directive compromises the autonomy of local authorities to budget for their own communities.

#### 4.3.1.4 Were local councils involved in the determination of the directive?

Fourthly, it was highlighted in chapter two that the process of determining the directives must be inclusive and facilitate appropriate and effective participation of affected local authorities. Chapter two discussed that participation by the local authorities in the regulation process is not only in line with democratic ideals; it is also the cornerstone upon which the local authorities will be able to be account to their communities. The question is whether the affected local authorities were involved in the determination of the directive. Section 313 of the UCA provides that the council concerned must be informed by the Minister before a directive is issued. There seems to be no evidence in the text to suggest that the council(s) were informed or consulted before the directive was issued.<sup>251</sup> More so, the scope of the study did not allow for interviews to be conducted, thus it is not clear whether they consulted. There are direct and indirect consequences of failing to comply with regulations. In this instance, in the case that central government failed to consult with the local authorities, the functionality of the local authorities will be compromised.

#### 4.3.1.5 Did the directive consider the compliance costs?

It was proposed in chapter two that the normative regulatory framework must consider the costs of compliance by the local authorities. The manner in which local authorities are to comply with

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<sup>251</sup> See Ministry of Local Government, Rural and Development 'Ministerial Directive on Elimination of costs on unnecessary trips and meetings' 24 February 2011.

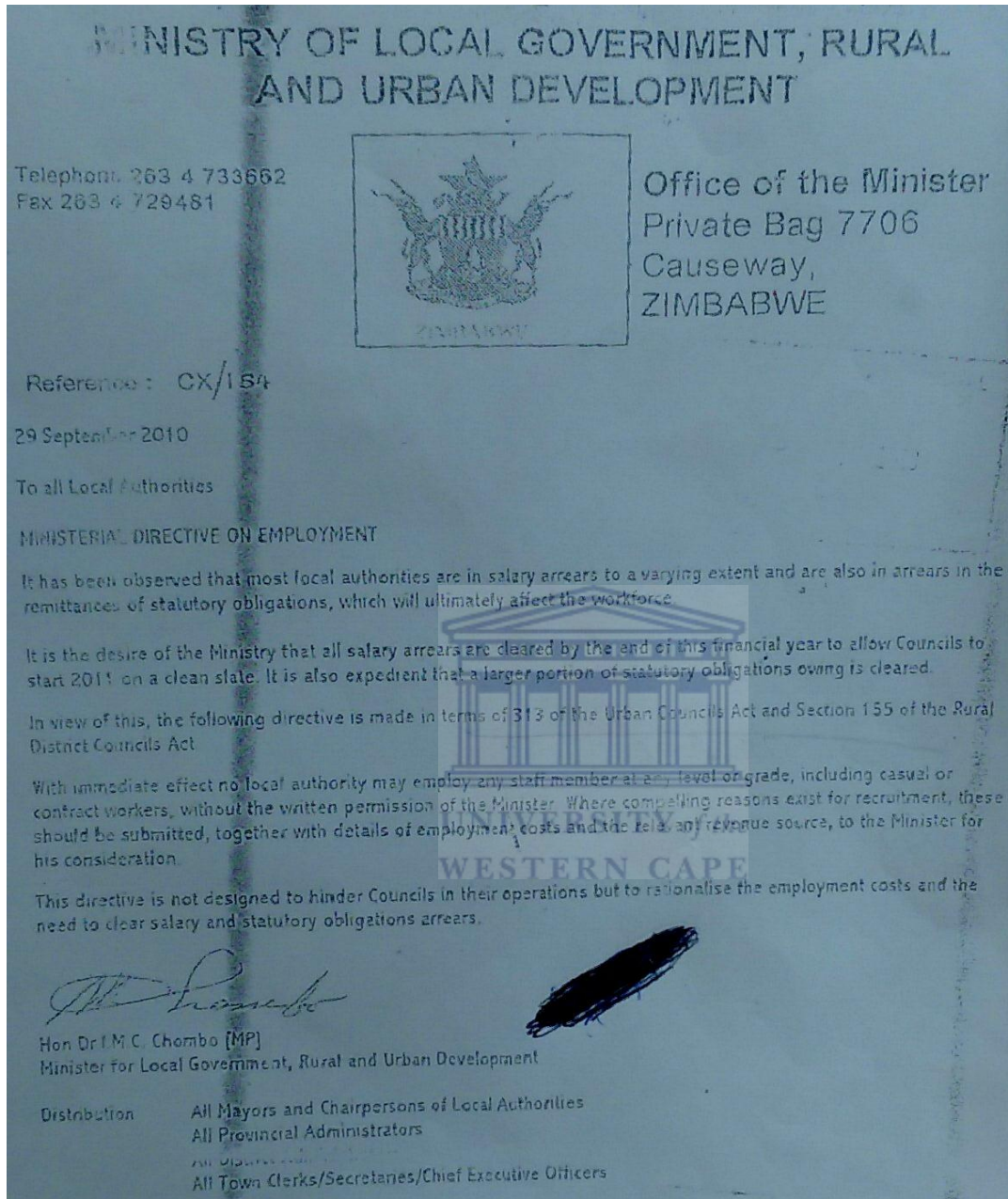
the directives is of paramount importance. The final question on the direction is whether the Minister took into consideration the local authorities' compliance costs when he/she was preparing to issue the directive to eliminate costs. Although the effects of the directive are far-fetched, there is no evidence to suggest that the Minister considered the costs of compliance when issuing the directive.

Similar to the above- discussed directive, through the use of the directive on employment, the study will assess the exercise of power to issue directives. The study will provide a background giving rise to the directive on employment. It will further provide the facts, purpose and the consequences that are likely to result from issuing such kind of directive.





4.3.2 Figure 2: Ministerial directive on employment



Before September 2010, most local authorities were in salary arrears and were also in arrears in the remittances of statutory obligations. This had the effect of negatively impacting on the workforce, due to the employment costs. Thus, the Ministry aspired that all salary arrears be cleared by the end of the financial year (2010) to allow councils to start the year 2011 on a clean

slate.<sup>252</sup> In a bid to rationalise the employment costs, the Minister issued a directive on employment. The directive stipulated that no local authority was to employ any staff member at any level or grade, without the Minister's written permission.<sup>253</sup> Local authorities were required to submit some documents to the Minister where compelling reasons existed for recruitment. The Minister argued that the directive was not designed to hinder councils in their operations.<sup>254</sup>

#### 4.3.2.1 Was the directive limited to standard setting?

Similar to the directive discussed above, the first question to be answered on the directive on employment is whether the directive was limited to standard setting. It can be argued that the directive issued by the Minister on employment goes beyond standard setting. It is evident from the directive that local authorities were not only failing to pay salaries; they were also failing to comply with their statutory obligations. Owing to the fact that the main aim of the directive was to enable councils to start 2011 on a clean slate, the Minister could have proposed standards that promoted sound financial management. However, the directive just directed local authorities to stop employing any staff member without the written permission of the Minister. Instead of the directive assisting in rationalising employment costs, the directive could have an effect of hindering councils' operations. Thus, the directive could have been consistent with the normative regulatory framework if it had been limited to setting standards that promotes sound financial management.

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<sup>252</sup> Ministry of Local Government, Rural and Development 'Ministerial Directive on Employment' 29 September 2010.

<sup>253</sup> Ministry of Local Government, Rural and Development 'Ministerial Directive on Employment' 29 September 2010.

<sup>254</sup> Ministry of Local Government, Rural and Development 'Ministerial Directive on Employment' 29 September 2010.

#### 4.3.2.2 Was the directive predictable?

The second question is whether the directive was predictable? One can argue that the directive on employment was not predictable. A directive must enable officials and institutions to achieve their objectives. Local authorities are mandated to deliver services. To enable local authorities to deliver services there is a need for human capacity. The Minister is responsible for supervising all local authorities in Zimbabwe. In the case that all local authorities were to submit and wait for approval to recruit from the Minister, it is practical to say that the process could take long. The waiting time could likely affect local authorities that were short-staffed. As has been highlighted above, for local authorities to deliver on their developmental mandate they need capacity. Where there is lack of capacity it is likely that service delivery will be affected. Thus, what could have been predictable to the local authorities could be the central government allowing them to temporarily employ pending written approval of the Minister to enable them to deliver services.

#### 4.3.2.3 Did the directive accommodate differences in local government?

Thirdly, does the directive accommodate the differences that might exist between local authorities? Similar to the directive discussed above, it can be argued that the directive did not consider the differences in local councils as the directive also referred to ‘most local authorities.’ The directive could have differentiated between understaffed local councils from those with enough human capacity. It is likely that such a directive could have affected the former more than the latter. Therefore, it appears that due to the phrase most local authorities, the Minister did not accommodate the differences between local authorities.

#### 4.3.2.4 Were the local councils involved in the determination of the directive?

The fourth question is whether the process of determining the directive involved the participation of the local authorities. There is no evidence in the directive that suggests that the councils were informed or consulted before the directive was issued. It is clear that the directive seems to have an effect of hindering the operations of the understaffed councils. Thus, it is reasonable to say that if councils were consulted before the directive was issued, they could have had challenged the directive. This entails that such a directive could not have been issued.

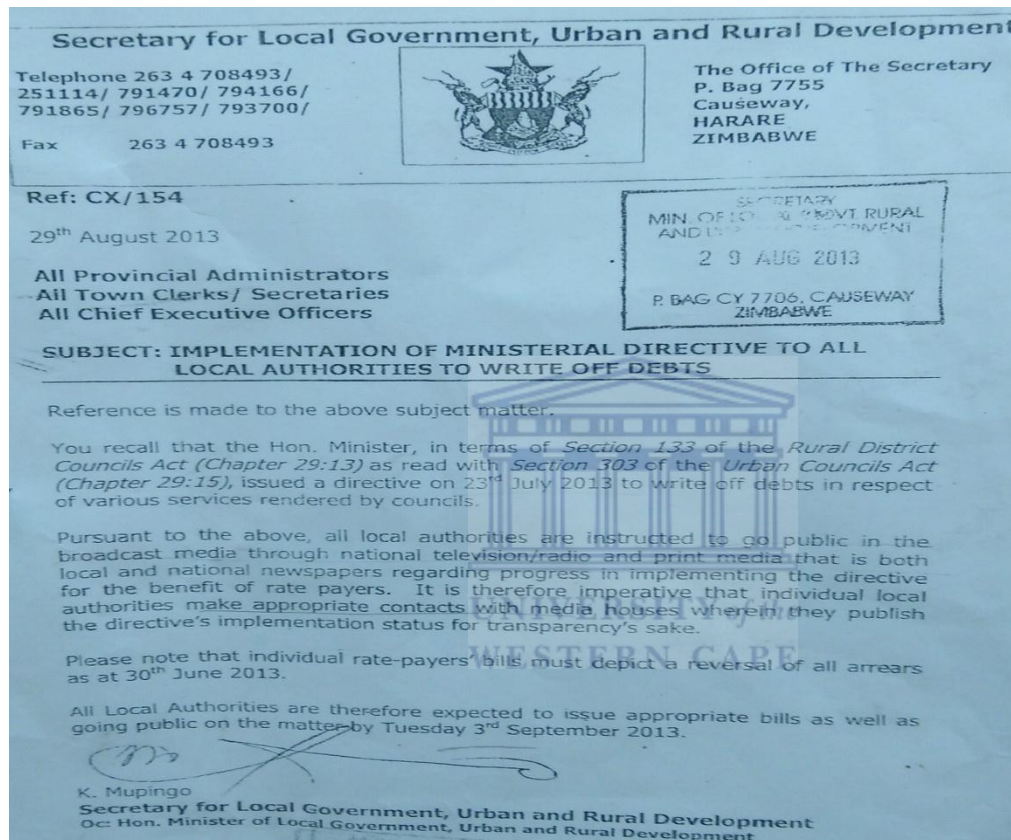
#### 4.3.2.5 Did the directive consider the compliance costs?

Finally, did the directive consider how the local authorities were going to comply with such a directive? It can be argued that the directive did not take into account bureaucratic costs. The directive stated that where compelling reasons exist for recruitment, local authorities should submit some documents to the Minister. The directive failed to consider that the process of submission of documents would be costly to councils that were already in dire financial stress. Thus, the directive seems to only have taken into account the factor of reducing salary arrears and disregarded the fact that the process of submission had financial implications.

The following section will assess the exercise of the power to issue directives with the aid of the third directive. It is a challenge to access government policies in Zimbabwe. Thus, unlike the other directives, the actual directive is not included in the study. Secondary sources were used to gather information with regard to the directive. However, the directive urging local authorities to implement the directive to write off debts is included below.

### 4.3.3 Ministerial directive to write off debts

Figure 3: Implementation of the Ministerial directive to all local authorities to write of debts



In terms of section 303 of the Urban Councils Act;

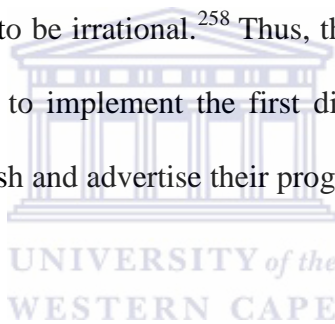
‘A council may write off amounts, excluding rates, owing to the council by any person if-

(a) the council considers that such amounts are irrecoverable; or

(b) in the opinion of the council the difficulties, disadvantages or costs of collection thereof outweigh the value thereof.’<sup>255</sup>

<sup>255</sup> Urban Councils Act, s303.

Ahead of the 2013 national elections, economic sanctions were making it difficult for the citizens to meet their obligations.<sup>256</sup> Thus, as part of the pro-poor policies of the Zanu PF party, the Minister issued a directive to the local authorities to write off debts in respect of various services rendered by councils between the period 2009 and 2013.<sup>257</sup> The directive stipulated that all local authorities had to write off debts with immediate effect as it had become clear that debts were irrecoverable and that councils were spending more resources in trying to recover them. The purpose of the directive was to lessen the effects of the hard economic environment on the residents. Thus, the Minister used his supervisory powers under section 313 to write off debts in terms of section 303. Some local authorities defied the directive, others viewed it as a political gimmick whilst others regarded it to be irrational.<sup>258</sup> Thus, the Ministry issued another directive (figure 3) urging local authorities to implement the first directive to write off debts.<sup>259</sup> Local authorities were instructed to publish and advertise their progress with regards to implementation of the first directive.<sup>260</sup>



#### 4.3.3.1 Was the directive limited to standard setting?

In terms of section 303, a council has the power to write off amounts where the council considers that such amounts are irrecoverable or in the opinion of the council the difficulties,

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<sup>256</sup> Staff Reporter 'Chombo orders debts write-off ahead of polls' *New Zimbabwe* 22 July 2013 available at <http://www.newzimbabwe.com/news-11794-Chombo+orders+urban+debts+write-off/news.aspx> (accessed on 23 November 2014).

<sup>257</sup> Maponga G 'Municipalities write off debts' *The Herald* 31 July 2013 available at <http://www.herald.co.zw/municipalities-write-off-water-bills/> (accessed on 21 October 2014).

<sup>258</sup> Movement for Democratic Change 'Chombo's directive on councils irrational' available at [http://www.mdc.co.zw/index.php?option=com\\_content&view=article&id=134:chombo-s-directive-on-councils-irrational&catid=84&Itemid=500](http://www.mdc.co.zw/index.php?option=com_content&view=article&id=134:chombo-s-directive-on-councils-irrational&catid=84&Itemid=500) (accessed on 02 November 2014).

<sup>259</sup> Ministry of Local Government, Rural and Development 'Implementation of Ministerial Directive to all local authorities to write off debts' 29 August 2013.

<sup>260</sup> Ministry of Local Government, Rural and Development 'Implementation of Ministerial Directive to all local authorities to write off debts' 29 August 2013.

disadvantages or costs of collection outweigh the value thereof.<sup>261</sup> It is clear from the provision that a council has limited powers to write off amounts. The Minister has no power in terms of section 303 of the UCA to write off debts. Notwithstanding that there was a provision providing for writing off of amounts by the local council; the Minister still issued the directive in terms of section 313 of the Act. This entails that the Minister assumed powers not provided for in the provision and issued the directive to write off debts. It can be argued that by issuing the directive to write off debts, the Minister did not set the standards; rather he/she intervened into the affairs of local authorities by assuming the local authorities' responsibilities to write off amounts.

#### 4.3.3.2 Was the directive predictable?

It is the argument of this study that the directive to write off debts was not predictable. As highlighted above, there was a provision that provided for the writing off of debts and the Minister assumed powers that were not bestowed in him/her. A council could not have foreseen such a directive when section 303 of the UCA provides for grounds upon which amounts can be written off. Owing to the fact that the directive was not predictable other local authorities as stated above defied it,<sup>262</sup> thus leading to a second directive compelling local authorities to implement the directive (figure 3). More so, it appears that the directive was not predictable as the legality of the directive is still in question.<sup>263</sup>

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<sup>261</sup> Urban Councils Act, s303.

<sup>262</sup> Sibanda N 'Bulawayo defies government order to write off all residents' debts' *Zimbabwe Situation* 30 August 2013 available at [http://www.zimbabwesituation.com/news/jb\\_bulawayo-defies-govt-order-to-write-off-all-residents-debts/](http://www.zimbabwesituation.com/news/jb_bulawayo-defies-govt-order-to-write-off-all-residents-debts/) (accessed on 23 November 2014).

<sup>263</sup> Movement for Democratic Change 'Chombo's directive on councils irrational' available at [http://www.mdc.co.zw/index.php?option=com\\_content&view=article&id=134:chombo-s-directive-on-councils-irrational&catid=84&Itemid=500](http://www.mdc.co.zw/index.php?option=com_content&view=article&id=134:chombo-s-directive-on-councils-irrational&catid=84&Itemid=500) (accessed on 02 November 2014).

#### 4.3.3.3 Did the directive accommodate differences in local government?

The third question is whether the directive accommodated the differences that might exist between local authorities? The directive referred to ‘all local authorities,’ which is also shown in the directive to implement the first directive. The phrase ‘all local authorities’ mean that the directive was targeting both urban and rural councils. It was highlighted in chapter three that urban local authorities derive most of their income from the fees they charge which can be distinguished from rural local authorities.<sup>264</sup> More so, other local authorities were in dire financial stress due to huge amounts owed by ratepayers.<sup>265</sup> There seems to be no evidence pointing to the fact that the directive did consider all those differences. Thus, one can argue that the directive did not accommodate the differences in local councils.

#### 4.3.3.4 Were the local councils involved in the determination of the directive?

It was highlighted in chapter two that local authorities must be consulted on matters that affects them. Section 313(2) of the UCA provides that after a council concerned has been informed of the proposal, it ‘shall within thirty days or such further period as the Minister may allow’ submit its views on the implications the directive will have on their finances and resources. What can be construed from the provision is that a council must be given an adequate opportunity to submit its views. However, what is clear is that the directive was issued on the 22<sup>nd</sup> of July 2013 and the elections were held on the 31<sup>st</sup> of July 2013.<sup>266</sup> Local authorities could not have had ample time

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<sup>264</sup> Coutinho B ‘Sources of local government funding’ in De Visser J, Steytler N and Machingauta N (eds.) *Local government reform in Zimbabwe: A policy dialogue*: (2010) 73.

<sup>265</sup> Sibanda T ‘Chombo debt directive pushes Kwekwe to the brink of collapse’ *SW Radio Africa* 2 February 2014 available at <http://www.swradioafrica.com/2014/02/06/chombo-debt-directive-pushes-kwekwe-to-the-brink-of-collapse/#sthash.OwtEM9pZ.dpuf> (accessed on 21 October 2014).

<sup>266</sup> Staff Reporter ‘Chombo orders debts write-off ahead of polls’ *New Zimbabwe* 22 July 2013 available at <http://www.newzimbabwe.com/news-11794-Chombo+orders+urban+debts+write-off/news.aspx> (accessed on 23 November 2014).



to address their problems during that time. It is practical that towards election time people, even councillors who are tasked with governing the affairs of local authorities tend to focus more on campaigning for votes rather than problems that might be affecting local authorities at that time. Furthermore, the fact that other local authorities defied the directive which led the Minister to issue the directive urging local authorities to implement the first directive seems to suggest that local authorities were not consulted when the directive was issued.

#### 4.3.3.5 Did the directive consider the compliance costs?

The overriding question in this regard is whether the Minister considered the financial implications the directive to write off debts was going to have on local authorities. For residents to have better service delivery it is crucial that a council has the ability to properly determine the cost of providing the services. Upon debt cancellation, it was not certain on the impact the directive was going to have on local authorities. One of the major negative impacts of the directive is that it set a wrong precedent. There were residents who were up to date with their payments who stopped paying debts at all.<sup>267</sup> On the other hand, there were also ratepayers who were in default with their payments who continued not paying for services.<sup>268</sup> Some critics viewed the directive as a punishment to those who were paying utility bills on time and was likely to encourage people to delay paying their bills.<sup>269</sup> Currently local authorities are struggling financially and the deteriorating financial situation is linked to the debt cancellation.<sup>270</sup> More so, with the implementation directive, it is evident that the central government did not take into

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<sup>267</sup> See Bepete L 'Residents owe BCC \$90m' available at <http://www.chronicle.co.zw/residents-owe-bcc-90m/> (accessed on 23 November 2014).

<sup>268</sup> Bepete L 'Residents owe BCC \$90m' available at <http://www.chronicle.co.zw/residents-owe-bcc-90m/> (accessed on 23 November 2014).

<sup>269</sup> Staff Reporter 'Chombo orders debts write-off ahead of polls' *New Zimbabwe* 22 July 2013 available at <http://www.newzimbabwe.com/news-11794-Chombo+orders+urban+debts+write-off/news.aspx> (accessed on 23 November 2014).

<sup>270</sup> Bepete L 'Residents owe BCC \$90m' available at <http://www.chronicle.co.zw/residents-owe-bcc-90m/> (accessed on 23 November 2014).

account the compliance costs. The advertising and publishing costs created a financial burden on local authorities who had already lost finances due to the first directive. Thus, it is reasonable to conclude that central government did not consider the administration and compliance costs.

It can be observed from the discussion above that the directives do not comply with the normative framework proposed in chapter two. Firstly, all the directives issued exceeded the boundaries of a proposed normative regulatory framework. Secondly, the directives were not predictable, as is shown by the inconsistencies in the manner in which central government dealt with local authorities' challenges. Thirdly, the directives do not accommodate the differences between the local authorities as all the above discussed directives refers to 'most' or 'all local authorities.' Fourthly, it is evident that the local authorities were not involved in the determination of the directives. Finally, one can argue that the central government did not consider the compliance costs of local authorities when preparing the directives which is not only shown by the problems that the directives are causing in practice, but also the fact that if all those factors were considered, such directives could not have been issued.

It was emphasised in the discussion that the directives being issued by the Minister do not comply with the normative framework due to various reasons. However, assessing section 313 of the UCA only in light of the normative framework is not sufficient. Owing to the fact that the 2013 Constitution explicitly provided for the functionality of local authorities, it is reasonable that section 313 of the UCA also be judged against the constitutional framework. The following section of the study will assess the constitutionality of the provision. The first part of the section will assess section 313 in light of the Lancaster House Constitution which was the supreme law prior to the 2013 Constitution. The second section will assess whether section 313 is consistent with the 2013 Constitution which guarantees some measure of autonomy to local authorities.

#### 4.4 Consistency of the power to issue policy directives with the Constitution

The assessment of the constitutionality of section 313 of the UCA is also informed by the practice that was discussed above. The following section will assess the constitutionality of the exercise of the power to issue directives.

##### 4.4.1 Lancaster House Constitution

Since the Lancaster House Constitution, the Zimbabwean government had made a few attempts to decentralise power through legislation.<sup>271</sup> Decentralisation was not enshrined in the Constitution. While the Constitution provided for institutions that had a strong bearing on urban local governance, such as the provincial, district and regional governors; urban local government was established through the Urban Councils Act.<sup>272</sup> According to Chakaipa, local government was viewed as the ‘establishment of a lower sphere of governance for the purpose of executing functions that central government was too far removed to carry out effectively.’<sup>273</sup> The ability of local government to make decisions that addressed local needs was hampered as local government was managed by the central government.<sup>274</sup>

As was highlighted above, the local government system prior to the 2013 Constitution was based on a delegate and delegator relationship; with local authorities being the delegate and the central government the delegator.<sup>275</sup> Urban councils were a creature of the central government.<sup>276</sup> More so, the Lancaster House Constitution did not provide for autonomy of urban authorities. During the Lancaster House Constitution it was reasonable for central government to exercise any kind

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<sup>271</sup> Sims B M Sims B M ‘Conceptualising local government: Local perceptions on devolution and participation in Zimbabwe’ 2013 *Academia.edu* 6.

<sup>272</sup> Chakaipa S (2010) 33.

<sup>273</sup> Chakaipa S (2010) 32.

<sup>274</sup> Sims B M (2013) 6.

<sup>275</sup> See Mushamba S (2010)114.

<sup>276</sup> Sims B M (2013) 6.

of supervisory powers on urban authorities. The power to issue directives was consistent with the constitutional order even if it had consequences of undermining or compromising autonomy of urban councils.

#### 4.4.2 Constitution of Zimbabwe Amendment Act 20 of 2013

The Constitution guarantees urban local government with the right to govern on its own initiative the affairs of its communities.<sup>277</sup> The Constitution further states that an Act of Parliament may confer functions on local authorities.<sup>278</sup> As has been highlighted in the previous chapter, the Act of Parliament governing urban councils is the Urban Councils Act. Section 2 of the Constitution states that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct that is inconsistent with it is invalid to the extent of its inconsistency.<sup>279</sup> As has been highlighted above, the Constitution establishes local government as a tier of government. While the Constitution does not explicitly provide for the supervisory powers of the national government, it provides for the values and principles of how the national government must supervise local authorities. The following section will discuss some of the constitutional provisions that limit the powers of the national government with regard to the affairs of local government.

The Constitution itself elevates local government to a tier of government and gives local authorities the powers they need to govern the local affairs of their people. Section 276(1) of the Constitution vests the local authority with the right to govern, on its own initiative, the local affairs of the people within the area for which it has been established, and a local authority has

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<sup>277</sup> Constitution of Zimbabwe, s276.

<sup>278</sup> Constitution of Zimbabwe, s276 (2).

<sup>279</sup> Constitution of Zimbabwe, s2.

‘all’ the powers necessary to do so.<sup>280</sup> This provision is confirmation that the Constitution recognises the importance of the autonomy of local authorities.<sup>281</sup> Thus, while other tiers of government may supervise the functioning of local government; this must be done without encroaching on the institutional integrity of local government. Section 265(1) (c) of the Constitution provides that when different levels of government are exercising their functions, they must do it in a manner that does not encroach on the geographical, functional or institutional integrity of another tier of government.<sup>282</sup>

It is evident from the directives discussed above that in the exercise of supervisory powers under section 313 of the UCA, central government is undermining and compromising autonomy of local authorities. The directive to write off debts can attest to that fact. When the Minister issued the directive to write off debts it encroached on the autonomy of the councils. Its effect was prejudicial to the local authorities as they were removed from their positions against their will with adverse financial implications. This entails that the nature of the powers being exercised under section 313 are inconsistent with the Constitution.

The Constitution further provides for institutional integrity, co-operative governance and good governance. The principles and values of the Constitution signify that supervision of the local authorities by the central government must be exercised within limits. Section 313 of the UCA provides that the Minister may issue directives of a general nature. This entails that the Minister may not give directives which are specific, as they have the impact of limiting unjustifiably the powers of the urban councils. The above discussion provided evidence that section 313 of the

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<sup>280</sup> Constitution of Zimbabwe, s276 (1).

<sup>281</sup> Mapuva J & Muyengwa-Mapuva L ‘Devolution and the new Constitutional Dispensation in Zimbabwe’ 05 March 2014 available at [http://www.monitor.upeace.org/innerpg.cfm?id\\_article=1035](http://www.monitor.upeace.org/innerpg.cfm?id_article=1035) (accessed on 01 October 2014).

<sup>282</sup> Constitution of Zimbabwe, s265 (1) (c).

UCA is being used to issue specific directives to UCs. It can be argued that the limitation of powers required by the Constitution is not complied with when the Minister is exercising the power to issue policy directives. Therefore, because of the unlimited powers being exercised under the veil of section 313 which does not respect the principles and values of the Constitution, the provision is inconsistent with the Constitution.

A local authority has the right to govern on its own initiative. In the context of South Africa, Steytler and De Visser argue that the use of the word 'right' emphasises that a local authority is entitled to govern the affairs of its own communities and that entitlement can be claimed and defended in terms of the Constitution.<sup>283</sup> They further argue that the phrase *on its own initiative* 'marks the end to the era when municipalities were the implementers of national and provincial legislation and had no policy making authority of their own'.<sup>284</sup> The principles and values of supervision will entail that, upon failure to govern, national government will exercise their supervisory role within limits. Section 313(3) provides that councils are to comply with 'any' direction given to it in terms of section 313(1).<sup>285</sup> If councils are to comply with any direction that it is given, does that not undermine the autonomy of councils as provided for in the Constitution? One can argue that the text is in violation with the Constitution because it does not respect the institutional integrity of urban councils.

It is clear that the Constitution recognises the importance of local government to be involved in the determination of matters that affect them. The principle of co-operative governance as explained above provides that local government is to be informed 'and' consulted on matters of common interests. This entails that the Constitution places an obligation on the other tiers of

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<sup>283</sup> Steytler N & De Visser (2007) 22-44.

<sup>284</sup> Steytler N & De Visser (2007) 22-45.

<sup>285</sup> Urban Councils Act, s313 (3).

government to inform and consult the local government on matters that are of common interest. Unlike what is provided for in the Constitution, section 313 of the UCA provides that the Minister *only* has to inform the council concerned if he/she considers issuing a directive.<sup>286</sup> Under the principle of co-operative governance, informing is not sufficient; hence the provision is inconsistent with the Constitution.

#### 4.5 Conclusion

The chapter argued that the power to issue policy directives bestowed in the central government is important for a number of reasons. However, it was highlighted that the nature of the powers exercised under section 313 of the UCA undermines and compromises the autonomy of the UCs which is provided for in the Constitution. The chapter highlighted that the Minister is exercising powers that are not vested in him under section 313, as shown by the directive to write off debts. Furthermore, it was highlighted that the provision allows for a liberal interpretation which is likely to undermine the autonomy of the urban councils. The powers are also inconsistent with the normative framework set in chapter two and the principles and values of the Constitution. The final chapter will provide the conclusion and recommendations with regard to section 313 of the UCA.

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<sup>286</sup> Urban Councils Act, s313.

## CHAPTER 5 : CONCLUSION AND RECOMMENDATIONS

### 5.1 Conclusion

It was submitted in chapter one that supervision of local authorities by the national government is important to promote the realisation of national and local goals such as efficient and effective delivery of public services. In Zimbabwe, the Urban Councils Act gives the central government various supervisory powers. Ministerial directives are one of the ways used by the national government to ensure that the activities of urban local authorities are in line with national policies and objectives. It was submitted that when exercising the power to issue policy directives it is important that the national government does not undermine the minimum level of local autonomy. Local autonomy is vital if local authorities are to effectively deliver on their service delivery mandate and developmental objectives. If a certain measure of local autonomy is not guaranteed, then local authorities are unlikely to respond to the needs and preferences of their communities. Thus, it is important that supervisory powers, such as the power to issue policy directives in terms of section 313 of the UCA are exercised in such a way which does not undermine local autonomy and local accountability.

The 2013 Constitution provides for devolution of powers to local authorities.<sup>287</sup> As was highlighted in chapter four, the Constitution further provides for the principles and values such as the right of communities to govern on their own initiative, institutional integrity, cooperative governance, among others.<sup>288</sup> These principles and values signify that supervision of the local authorities by the national government must be exercised within limits.

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<sup>287</sup> Constitution of Zimbabwe, s264.

<sup>288</sup> Constitution, s194, s264 and s276.



Chapter one gave a background to the study and posed the question whether the exercise of the power to issue policy directives in terms of section 313 of the UCA is limited to framework setting. It was further posed whether section 313 of the UCA is consistent with the 2013 Constitution, which guarantees local authorities some measure of autonomy? In chapter two, the study defined the concept supervision as including four distinct but interrelated activities which are regulation, monitoring, support and intervention.<sup>289</sup> The chapter proposed a normative framework which higher governments must adhere to when setting regulatory frameworks for local governments. Chapter three provided a brief overview of urban local government in Zimbabwe. In chapter four, the study examined section 313 of the UCA in light of the normative framework that was proposed in chapter two and the Constitution. The following section of the study will provide the major findings:

#### 5.1.1 Supervisory powers under section 313 of the UCA go beyond framework setting

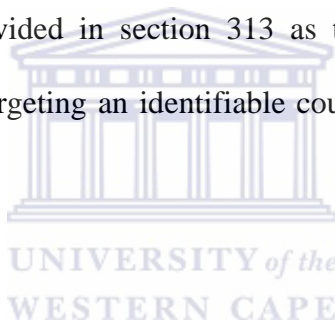
In chapter two it was pointed out that the national government needs to establish a framework comprising, for example certain standards for service delivery to enable the achievement of national and local goals at the local level. The chapter further argued that the framework should not extend to the core of the matter, but provides guidelines within which local government is to exercise the powers. It was argued in chapter four that the directives that were being issued by the Minister were exceeding the boundaries of a proposed normative framework. The directives issued were not limited to setting national standards to be complied by local authorities rather, they were being used as intervention mechanisms.

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<sup>289</sup> Steytler N and De Visser J *Local Government Law of South Africa* (2007) 15-5. See Steytler N 'Introduction' in *The place and role of local government in federal systems* in Steytler N(ed.) (2005) 7. See Machingauta N 'Supervision of Local Government' in De Visser J, Steytler N and Machingauta N (eds.) *Local government reform in Zimbabwe: A policy dialogue* (2010) 141. See De Visser J (2007) 43.

5.1.2 Minister is exercising powers beyond powers provided for under section 313 of the UCA

The study also demonstrated that in the exercise of the supervisory powers under section 313, the Minister is exceeding the powers vested in him/her to issue policy directives. It was argued that the incorrect use of powers to issue policy directives has an impact on local autonomy, local accountability and service delivery. Section 313 provides that the Minister must inform the councils before issuing the directives. From the policy directives discussed in chapter four, it is evident that the Minister issued the policy directives without informing the councils. More so, section 313 provides that the Minister must issue directives of a general nature, to a council concerned. However, the examples provided in chapter four shows otherwise. The Minister is incorrectly using the powers provided in section 313 as the directives refer to all or most councils. The directives are not targeting an identifiable council or group of councils, they are targeting all or most councils.



## 5.2 Recommendations

The challenges of the provision have been identified above. The overall effect of powers exercised under the provision is that they undermine the autonomy of urban local authorities. When exercising the power to issue directives, a balance must be struck between the need to supervise and protecting autonomy of local authorities. To strike a balance, this section will provide proposals which are discussed below.

### 5.2.1 Remove wide discretion given to the Minister

It was submitted above that in the exercise of the supervisory powers under section 313; the Minister is exceeding the powers of the provision or interpreting the provision too widely. This is because of the wording of the provision which allows the Minister to issue directives *as appear*

to him/her to be *requisite in the national interest*.<sup>290</sup> The provision further states that *where the Minister considers that it might be desirable to give any direction* in terms of subsection he shall inform the council concerned.<sup>291</sup> It is evident that from the wording of the provision, that the Minister has unlimited supervisory powers. In this regard, it is recommended that the law regulating policy directives must be amended to be in line with the 2013 Constitution which provides for local government autonomy. One can argue that the principles and values that are provided in the Constitution, especially the right of local authorities to govern their communities on their own initiative should guide the reform of section 313 of the UCA.

#### 5.2.2 Policy directives must be predictable

It is recommended that the grounds upon which the Minister may resort to a policy directive should be clearly spelt out. The grounds upon which directives may be issued may be based on the Constitution. As has been highlighted in chapter four, the Constitution provides for values and principles. The law may explicitly highlight that policy directives may be issued to promote those principles and values. Thus, when the policy directives are predictable there is likelihood that the Minister will not abuse the powers bestowed on him/her.

#### 5.2.3 The law should require consultation of urban local authorities before the Minister may issue policy directives

As was argued in the chapter four, when urban local authorities are informed and consulted in matters of common interests, it is likely that they will respond to the proposals and give their views on possible implications of the directive on the financial and other resources of the council. The responses of the urban councils will not only help the central government to make

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<sup>290</sup> Urban Councils Act, s313 (1).

<sup>291</sup> Urban Councils Act, s313.(words in italics-emphasis added)

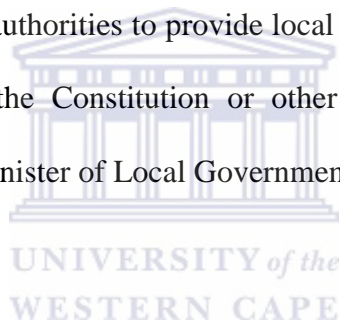
informed decisions, they will also enhance the quality of the directives to be issued. It was submitted in chapter four that the current legislation which requires urban councils to be merely informed in matters of common interest is not only inconsistent with the Constitution; it is also against the normative framework set out in chapter two. In that regard, a proposal is made that the provision be reformed to provide that the Minister must inform and consult UCs in matters of common interest before issuing directives so as to enhance the quality of the directives. Such a move will not only go a long way in preventing the unnecessary meddling into the affairs of UCs by the national government; it is also consistent with the 2013 Constitution.

#### 5.2.4 Consider compliance/implementation costs before issuing policy directives

Section 313 provides that before the Minister issues a policy directive, a council is required to respond to the directions and may give its views on the implications the directive will have on its financial status and other resources of the council. This entails that compliance costs must become part of the consultation process so that the Minister cannot escape that issue. In the case that the costs of complying with the directive are too high, the Minister may provide support to the council or choose a differently worded directive. It is recommended that the legal framework regulating the issuing of directives must make it clear that the Minister is obliged to consider compliance costs before he/she issues a policy directive. The framework must require, for example, that compliance costs be included in the agenda where policy directives will be deliberated upon. More so, consideration of compliance costs may be a criteria which the Minister will be obliged to adhere to before issuing policy directives.

### 5.2.5 Limit supervisory powers

It is evident from the discussion in chapter four that section 313 of the UCA gives the Minister wide powers. The provision is not clear with regard to the meaning of phrases like national interest, which enables the Minister to exercise any powers he/she deems to be in the national interest. The provision is not specific to what kind of powers the Minister may exercise; thus, as highlighted in chapter four, the Minister is either exercising powers that go beyond powers provided for under section 313 or he/she is exercising powers that are not even bestowed on him/her under the veil of section 313 of the UCA. Such exercise of powers has adversely affected the ability of urban local authorities to provide local solutions to local problems. In this regard, it is recommended that the Constitution or other national legislation must set the parameters of the powers of the Minister of Local Government.



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