

An international perspective on the constitutional recognition of local government

Comments on the Public Discussion Paper of the Expert Panel on Constitutional Recognition of Local Government

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The Forum of Federations welcomes this opportunity to offer an international perspective on the issues raised by the Expert Panel in its Public Discussion Paper. This perspective is presented in two parts. The first gives a broad overview of the practice in federal systems of the constitutional recognition of local government. The second provides specific comments on the ideas on local government recognition in the Australian Constitution put forward by the Expert Panel for discussion.

1. The recognition of local government in federal constitutions²

1.1 The emergence of local government in federal constitutions

Federal constitutions that do not recognize local government as an order of government are the exception rather than the rule. It is only the older federal constitutions which, as a rule, did not given any recognition to local government, establishing a strict dyadic federal system, comprising the federal and state orders of government. This has made local government invariably a creature of state legislation, falling under state control and direction.

The first federal constitutions of the modern era did not include local government as an order of government. The Constitution of the United States of 1786 was silent on local government, rendering local government a residual matter under the states' jurisdiction. This was also the case with the Swiss Constitution of 1848. In the Canadian Constitution of 1867 local government was mentioned, but only to designate it as a field of provincial competence. The Brazilian Constitution of 1891 was silent on the matter, as was the Australian federal

¹ The views represented in this paper are the author's personal opinions and do not reflect an official position of the Forum of Federations. The Forum of Federations is an international non-governmental organization based in Ottawa, Canada. It is concerned with the contribution federalism and multi-level governance can make to democracy. The Forum of Federations runs programs in about 20 countries in the world and is supported by nine partner countries: Australia, Brazil, Canada, Ethiopia, Germany, India, Mexico, Nigeria and Switzerland.

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constitution of 1901. Exceptions to this practice before World War Two were the Weimar Republic of 1919 and the Austrian republican constitution of 1920, where the right of local self-government was recognised³.

In the second half of the 20th century, multi-level government was established in most federal constitutions adopted or amended during this period, explicitly recognizing local government as an order of government. This definitive trend of constitutional recognition emerged after the Second World War, prompted by three main concerns: building democratic governance from the bottom up; facilitating development through local accountability; and regularising the political reality of local government's significant role in the governance of federations.

(a) Building democratic governance

In the major federal constitutions of this period, local government was recognised as an essential part of a democratization enterprise - building democracy from the bottom up - in countries that emerged from authoritarian, military or minority rule. Democracy was thus directly linked to decentralization by positing local governments as building blocks of democracy. In the German Basic Law of 1949, the principle of local self-government was recognized in the federal architecture. Indeed, subnational elections were held before the first national election after the Nazi-era. After the fall of the authoritarian Franco regime, the Spanish Constitution of 1978 recognized not only the principle of autonomous communities, but also local self-government.

In Latin America a similar process unfolded. After the demise of the military regime, the Brazilian Constitution of 1988 defined the federation as comprising the federation, the states and municipalities. Again, local elections lead the way before national elections inaugurated civil rule. The return to civilian rule in Argentina also led to the constitutional recognition of local government in the 1994 revision of the Constitution. The Mexican Constitutional

³ It should be noted that that in countries where no recognition is accorded in the federal constitution, local government's status as self-governing units may be secured in subnational constitutions. (The federal protection of local government may also be augmented in state constitutions, as is done Germany, Switzerland, Austria, Brazil, and Spain.) In the USA, the principle of local self-government is articulated in a number of state constitutions through "home rule" provisions. Also, to avoid the strictures of a narrow *ultra vires* doctrine, local governments have been given expansive powers to local governments to tax, legislate, and provide services. The Australian state constitutions are at the other end of the scale; they provide little more than recognition of local government's existence, placing few if any limitations on the state's sovereignty. No powers are directly conferred, and the recognition that is available can, in most states, be changed by ordinary legislation. Unlike the US and Australia, there are no provincial constitutions in Canada that could bolster the position of local autonomy. Canada represents the extreme case of provincial dominance over local government. It provides an example where constitutional reform is not on the agenda

Amendment of 1999 that redemocratized that country after one-party authoritarian rule, also made provision for the recognition of local government.

On the African continent a similar trend is apparent. The South African Constitutions of 1994 and 1996, which ended minority rule, entrenched local government alongside the national and provincial governments, according municipalities the right to govern their own affairs. The Nigerian Federal Constitution of 1999, returning the country to civilian rule, reasserted the role of local government in the federal structure. Again, local elections were a precursor to national elections.

(b) Facilitating development

In polities not emerging from conflict but mired in underdevelopment, the constitutional entrenchment of local government formed part of an emerging international approach to development, one which saw decentralisation as an essential instrument of development. Local government was seen as a key instrument of unlocking local potential and ensuring greater efficiency in development through local accountability measures.

At a time when the World Bank was promoting development through decentralisation, the political initiative for the constitutional recognition of local government was also emerging in India. The 1992 constitutional amendments established a system of *panchayats* – defined as “institutions of self-government” (s 243(d)). The 73rd Amendment dealt with rural local government, while the 74th Amendment was concerned with urban municipalities. The Amendments provided a broad outline of the structure and election of local authorities and left the substance of their powers and functions to state legislation.

(c) Regularising practice

Neither emerging from an undemocratic past nor in search of development, the highly democratic and developed Switzerland amended its constitution in 1999 by adding a new Article 50 which reads as follows:

- (1) The autonomy of the Municipalities is guaranteed within the limits fixed by cantonal law.
- (2) In its activity, the Confederation shall take into account the possible consequences for the Municipalities.
- (3) In particular, it shall take into account the special situation of cities, agglomerations, and mountainous regions.

Local government in Switzerland has had a long history of relative autonomy even though it fell under the jurisdiction of the cantons. Municipalities were largely self-sustaining, showing a large measure of autonomous decision-making.

Why, then, the need to reflect this reality in the Constitution? The organisations representing municipalities and cities, the driving forces behind the amendment, considered that recognition would provide them with a sound basis on which to engage directly with federal authorities. Given the traditionally strong, autonomous position of the municipalities within the cantons, the new Article has not changed the practice much. It has rather recorded and regulated the traditionally secure status the municipalities enjoyed. In practice municipalities were already able to express their views to the federal government, especially through the association of Swiss municipalities, on any draft federal legislation affecting them. Nevertheless, in some policy fields, such as the integration of foreigners and asylum seekers, where regulation is within the competence of the Confederation and execution within that of the cities, the Article provides a firm basis for the consultative relationship between these two orders of government.

(d) Unifying themes

Although the constitutional recognition came from diverse drivers, the product has been much the same – the recognition of local self-government. At the heart of local self-government lies democracy – recognising the legitimacy of the popular will on matters of local concern. After authoritarian regimes, the democratic will, at its most basic local unit of government, was fostered for a larger, national democratic enterprise. Local democracy, however, never became subsumed in and subordinate to that national enterprise. The search for effective development was also premised on the notion of local self-government – the right of the locality to determine its development preferences and hold the local state accountable for effecting them. Where both democracy and development are entrenched in practice, it would appear that the sovereignty of the local voice must still be respected.

In Germany local self-government is seen not as a relic of the past, but as an essential component of democratic government, bringing also greater efficiency in government in its wake. It also shapes citizen participation. In the words of the Federal Constitutional Court: “the very nature and intention of local self-government is to activate people to get involved in their affairs.”⁴

1.2 The manner and form of constitutional recognition of local government

The manner and form of constitutional recognition vary considerably from country to country, shaping the meaning and consequences of such recognition. The following broad forms of recognition are highlighted:

(a) Symbolic recognition

The symbolic recognition of local government is obviously the most innocuous form of recognition as it has few or no legal consequences. Local government could be mentioned in a preamble or in a “statement of values”. The latter was a route taken in the Indian independence constitution. Democracy from the bottom up through local government structures, called *panchayats*, was an article of faith of the independence movement. The independence constitution of 1949 reflected this in the “Directive Principles of State Policy”, a set of aspirational goals which the Constitution itself proclaimed had no binding legal effect. Section 40 included the following principle:

The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

As a directive principle of state policy, this provision imposed no binding, legally enforceable obligations on either the Union or state governments to implement a system of local government. Not surprisingly, then, local self-government did not come to fruition and state attempts with the *Panchayati Raj* institution have been described as half-hearted. This prompted the constitutional initiative that resulted in the 73rd and 74th Amendments in 1992.

⁴BVerfGE 11, 266 (270).

(b) Local government as an order of government

The next level of recognition is a descriptive statement that the federated state constitutes three orders of government – federal, state and local government. Such statements are then a prelude to further clauses that give full expression to the position of local government, as is the case in Spain, Brazil, and South Africa.

In the Spanish Constitution of 1978, although the central question was the political accommodation of the nationalities driven by the Basque Country and Catalonia, local government (comprising municipalities and provinces) was recognized alongside autonomous communities. Article 137 describes the territorial organization of Spain as follows: “The state is organized territorially into municipalities, provinces and any Autonomous Communities that may be constituted.”

In the Brazilian Constitution the opening article proclaims that the Federal Republic of Brazil is “formed by the indissoluble union of States, Municipalities (*municípios*), as well as the Federal District” (art 1). The elevation of municipalities as a constituent element of the political and administrative state structure is reiterated in article 18: “The political and administrative organization of the Federal Republic of Brazil includes the Federal Government (*União*), States, Federal District and Municipalities, all autonomous, in terms of this Constitution.” The role of each order of government is then fully detailed in the Constitution.

The South African Constitution of 1996 also contains such a descriptive provision: “In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated” (s 40(1)). The word “sphere” was a deliberate deviation from the term “tier” used in the 1993 Constitution, which placed local government firmly as a competence of the provinces. The elevated position of local government as a “sphere of government” is then detailed in a chapter devoted to local government.

Another form of recognition is to be found in the Nigerian Constitution of 1999; while local government is not listed as a component of the federated state, it is recognized nevertheless as an order of government. Nigeria is described in article 2(1) as “one indivisible and indissoluble Sovereign State” that “shall be a Federation consisting of States and a Federal

Capital Territory.” Article 2 also provides in subsection (6) that there shall be 768 “local government areas” and six “area councils” in the capital territory.

(c) Recognition of local self-government and democracy

The crux of recognition is not so much that local government should be mentioned in a constitution, but the acceptance that the local community, organised in a local government, can make binding decisions about its own well-being. It recognises the legitimacy of the democratic core of local state formations. This principle is expressed either as “local self-government” or the “autonomy of local government”. Such a recognition does not create a “little republic” that functions insulated from the other orders of government; local self-government in all cases is exercised within a framework provided and supervised by state and, in some cases, federal governments.

In the German Basic Law the right to local self-governance is articulated in article 28(2) as follows:

The Municipality shall be guaranteed the right to manage all the affairs of the local community of their own responsibility within the limits set by law. Within the framework of their statutory functions the association of municipalities likewise have the right of self-government in accordance with the law. The right of self-government shall include responsibility for financial matters. The municipalities have the power to levy trade taxes according to the rates for assessment determined by them.

While there are no substantive provisions defining the meaning of “affairs of the local community”, the right includes at least autonomous financial decision-making. Critically, the Federal Constitutional Court also views financial autonomy as part of municipal self-government.⁵ It is important to note that the right to self-government is exercised “within the limits of the law”, as provided in both *Land* and federal law.

As noted above, the Spanish Constitution of 1978 included local government in the description of decentralized state structures. While the main concern was with autonomous communities, local government was nevertheless accorded in the same breath a measure of autonomy in article 137:

⁵71BVerfGE 25 (1985).

The state is organized territorially into municipalities, provinces and any Autonomous Communities that may be constituted. All these bodies shall enjoy self-government for the management of their respective interests.

In three articles the status and institutions of local administration are spelled out. Article 140 provides that “the Constitution guarantees the autonomy of the municipalities, which shall enjoy full legal personality.” Such autonomy is subject to central state and regional government’s regulation and supervision.

In Brazil, the autonomy of local government, along with that of the states, is captured in article 18, quoted above. While states play an important regulatory role, local autonomy may not in the process be compromised. One of the grounds on which the Federal Government may intervene in a state is to ensure compliance with the “constitutional principle” of “municipal autonomy” (art 34.VII(c)). That this ground stands next to the “constitutional principles” of “republican form, representative system and democratic regime” and individual rights, gives some indication of the importance of local self-government in the Brazilian Constitution.

The notion of local self-government is differently expressed in the South African Constitution of 1996, while the same idea of confined or regulated autonomy is reflected. A municipality “has the right to govern, on its own initiative, the local government affairs of its community, as provided for in the Constitution” (s 151(3)). The corollary to this right is that “[t]he national and provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its duties” (s 151(4)). Again, it should be noted that the right to local self-government is exercised “as provided for in the Constitution”, which allows for significant national and provincial regulatory powers and powers of intervention.

(d) Entrenching local democracy

The recognition of local self-government is inextricably linked to the democratic governance of the local space. Autonomous decision-making at local level is only legitimate if it is based on the popular will as expressed in free and fair elections. In most constitutions local self-government is thus explicitly tied to democratic governance.

In article 28(1) the German Basic Law establishes the general democratic principle: “In each of the Lander, counties and municipalities the people shall be represented by a body elected

by general, direct, free, equal and secret ballot."Spain has a similar provision, linking autonomy to democracy: municipalities are to be governed by town councils that are to be elected by "universal, equal, free and secret suffrage" (art 140). In South Africa the elections of local councils are required and regulated in the constitution. The Nigerian Constitution also entrenches the democratic nature of local government: "The system of local government by democratically elected local government councils is under this Constitution guaranteed" (art7(1)).

Since local self-government is exercised under the supervision of state governments, the elected local governments are not immune from state intervention. Where the power to dismiss local councils is recognized in some constitutions, such a power is usually accompanied by checks and balances. While the power of dismissal is usually regulated in state law (for example, in Switzerland and Germany), it is done explicitly in the South African Constitution. A provincial executive has the power to dismiss a council only in "exceptional circumstances". In such an event there are checks and balance within the political system (the National Council of Provinces or the national minister may veto such an intervention). The dissolution of councils is also possible in cases of serious financial difficulties, but such circumstances are detailed in the Constitution.

(e) Demarcating the powers and functions of local government

In a number of federal constitutions, local government's recognition is limited to the basic statement that the right to local self-government is confined to matters of local interest, without such matters being listed in concrete functional areas. Examples here are Germany and Switzerland. The scope of such self-government and its relationship to state and federal law are then, ultimately, a matter of judicial interpretation.

In some countries the recognition of local government includes the listing of functions and powers, but it is left to state legislatures to select from this "shopping list" functions that are transferred to local governments. India and Nigeria are examples of this approach.

The 73rd and 74th Amendments to the Indian Constitution listed the powers of local government, but left their assignment to local governments to the discretion of the state legislatures. Such legislation may "endow the *panchayats* with such powers and authority as may be necessary to enable them to function as institutions of self-government" (s 243G). While the Constitution indicates the scope of *panchayats*' functions and powers with

reference to “the preparation of plans for economic development and social justice” and “implementation of schemes for economic development and social justice” relating to a long list of matters listed in the 11th Schedule, state legislation determines which of the listed powers and responsibilities are devolved upon the *panchayats* at each level. The critique has then been that in many states local governments were starved of any meaningful functions, as state legislatures proved to be unwilling to assign such functions to them.

The Nigerian Constitution follows a similar approach: a set of activities, listed in a schedule to the Constitution, must also be operationalized by state legislation before a local council may act in these listed functional areas.

A more certain demarcation of local government powers is to be found in the Brazilian and South African constitutions. The Brazilian Constitution provides perhaps the most comprehensive exposition of local competencies. The powers of municipalities fall into three categories. First, the Constitution lists a number of general areas where the Union, States, Federal District and municipalities have joint powers. The second category comprises powers specifically reserved for municipalities. The third source is a smattering of provisions in the Constitution that deals with specific issues. For example, the chapter dealing with security authorizes municipalities to “organise municipal guards in order to protect municipal property, services and facilities” (art 144(8)). The effect, overall, is that in addition to concurrent functions, local government has some exclusive powers.

In the case of South Africa, the Constitution lists a number of functional areas in which local government is paramount. While both national and provincial legislation may intrude on this area, they may do so in a regulatory fashion only.

(f) Financial powers of local government

It is widely accepted that local self-government or autonomy can only flourish in practice where local governments have access to their own financial resources to make and implement policy choices. The financial powers of local government have thus featured prominently in a number of federal constitutions. The strongest protection of local autonomy is to guarantee, in some measure, fiscal self-reliance. Exclusive access to a specific tax source is often provided for, while sharing in centrally raised revenue is also common.

In the German Basic Law the link between the right to local self-governance and financial self-reliance is articulated in Article 28(2). After asserting the right to self-government, the article reads further:

The right of self-government shall include responsibility for financial matters. The municipalities have the power to levy trade taxes according to the rates for assessment determined by them.

The listing of specific tax sources is also found in the South African Constitution. Municipalities have the power to levy rates on property and surcharges on user fees for services provided. Although this power may be regulated by national legislation, it is not dependent on such legislation. Local government is also entitled to transfers from the national government, namely “an equitable share of revenue raised nationally” (s 227(1)).

The Brazilian Constitution is the most expansive in securing local financial viability. The Constitution guarantees local government access to considerable revenue from three resources. First, municipalities are granted specific taxing powers that they must administer themselves, including those relating to property and services. Second, the Constitution guarantees the transfer of a fixed percentage of some of the revenue raised by the states. Third, the federal government must also transfer fixed percentages of the specified taxes which it raises.

The Spanish Constitution expresses the rather elusive principle that municipalities (corporations) must have sufficient revenue to execute their mandate. Article 142 reads as follows:

Local treasuries must have sufficient funds available in order to perform the tasks assigned by law to the respective Corporations, and shall mainly be financed by their own taxation as well as by their share of State taxes and those of the Autonomous Communities.

There are, however, no detailed provisions on how specific taxes are assigned to local government or how it will share in the revenue raised by the central government and autonomous regions. This is left to the legislation of these orders of government.

Subjecting the financial powers of local government to the discretion of state law can be problematic, as the experience in India shows. The financial affairs of *panchayats* are also

placed at the discretion of state legislatures: they may be authorized to levy, collect and appropriate taxes, duties, tolls and fees, but such assignments have not always materialized in practice.

(g) Establishing a hierarchical relationship of supervision

The golden thread that runs through all the constitutional provisions, whether they deal with local self-government, the assignment of powers and functions, or the exercise of fiscal powers, is the notion of a hierarchical supervisory relationship. Constitutional recognition of local government has, in most cases, not resulted in local government becoming an equal partner to the states. The dyadic federal system remains the dominant model which subjects local government to the jurisdiction of the states. The hierarchical relationship is preserved, but constitutional recognition sets boundaries to and principles for regulation and supervision. There is a further trend in some countries where the regulation of local government is not the sole domain of the states – the federal government often plays a regulatory role as well.

In a number of countries the dyadic federal system is firmly maintained and implementing the constitutional provisions falls within the domain of the states. Mexico, India and Nigeria follow this path. The detailed provisions of their constitutions, listing powers and functions (including taxing powers), remain only a promise as the determination of the contours of local government powers, functions and funds is the prerogative of the states. In India the two Amendments of 1993 provide a broad framework in which the states must operate, but leave to the discretion of the states which of the long list of functions *panchayats* or municipalities may exercise. Likewise, the Nigerian constitutional provisions are not directly operative, but must be mediated by state law.

In a second group of countries, characteristic of more centralized federal systems, the regulation of local government is a concurrent function exercised by both the federal government and the states. In Germany, Austria, Spain and South Africa the federal government provides the legal framework and the states fill in the details. The result is that there is a fair measure of uniformity in the local government system across a country.

(h) Intergovernmental cooperation

Flowing from the recognition that local government is an order of government, and not merely a creature of statute under the control of state governments, comes the

acknowledgement of the relationship between the federal government and local governments. This relationship takes many forms – from financial transfers to regulation and the imposition of mandates. It also brings the recognition that federal actions may have a profound impact on local governments. Operating within the widely-accepted notion of cooperative government, where the interests of other governance partners cannot be ignored, consultation and cooperation become constitutional imperatives. The Swiss and South African constitutions have articulated these principles.

The 1999 amendment to the Swiss Constitution, after recognizing local self-government, expressed the relationship between municipalities and the federal government (confederation) thus:

(2) In its activity, the Confederation shall take into account the possible consequences for the Municipalities.

(3) In particular, it shall take into account the special situation of cities, agglomerations, and mountainous regions.

Taking into consideration the interests of municipalities (and even specific sectors and formations within this order of government) implies that processes need to be followed to ensure that “possible consequences” are indeed taken into account.

The South African hybrid-federal system is specifically premised on the principles of cooperative government, and the Constitution seeks to institutionalize this approach through processes and structures. While all three spheres of government must “co-operate with one another in mutual trust and good faith by [inter alia] ... informing one another of, and consulting one another, on matters of common interest” (s 41(1)(h)), there are also specific consultation provisions pertaining to local government. Section 154(2) provides:

Draft national and provincial legislation that affects the status, institutions, powers and functions of local government must be published before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

In a further expression of co-operative government, the Constitution has included organized local government in the National Council of Provinces (NCOP), the second chamber of

Parliament where provinces are represented. It is entitled to participate “when necessary”, but without a vote. Like the South African Constitution, the Austrian Constitution also recognizes the role of organized local government as a consultation partner of the federal government.

1.3 Significance of constitutional recognition of local government

As the manner and form of constitutional recognition vary from country to country, so the legal significance of such recognition will differ in each jurisdiction. The following general observations are, however, ventured:

First, constitutional recognition puts some brake on state power. In India it was only after the 1992 Amendments that states’ exclusive jurisdiction over local government was breached. However, where the implementation of constitutional recognition still lies in the hands of state governments, reluctance or resistance on their part may effectively scupper the realisation of local self-government. Nigeria presents an example of state governments fundamentally undermining such a constitutional mandate.

Second, where constitutional provisions are directly operative (without having to be mediated by state law), the shield against federal and state intervention is that much more effective. In South Africa, not only can the Constitutional Court be called upon to protect local autonomy, but the Constitution also defines the practice of intergovernmental relations.

Third, where constitutional recognition is confined to the principle of local self-government, the lack of a clear definition of the scope of local powers limits the impact of such recognition. The recognition nevertheless remains legally significant. The experience of Germany shows that it protects local governments from excessive restrictions and preserves a “core sphere” of responsibilities (finances, local planning, and personnel matters) for local government. It also protects local governments from revocation of responsibilities to higher orders of government: this is only allowed if justified by an overriding public interest.

Fourth, recognition of local government has formalised and regulated its relationship with the federal government. Local government is no longer the sole preserve of states, but can, in the governance of a country, have direct relations with the federal government. Recognition places this relationship on a solid legal basis for the purpose of financial relations as well as consultative processes. In the case of Switzerland, recognition gave a solid foundation to the longstanding practice of intergovernmental relations between these two orders of government.

Recognition of local government may also have a broader political impact. As noted above, where democratic local self-government is entrenched, it builds the democratic system from the bottom up. Participatory democracy finds best expression in the government closest to the people. Moreover, as the world is globalising at an ever-increasing pace, the paradoxical consequence has been a renewed interest in local politics in an attempt by citizens to connect to and control their local space.

2. Comments on the Discussion Paper

The Panel's point of departure is that the scope of recognition would be limited. It explicitly rejects any notion of listing local government competencies as that would be unacceptable to state governments. The question then is how recognition can be effected in such a way that local government would be a meaningful enterprise and add value to the Australian political system. The Panel has advanced four ideas on the possible constitutional recognition of local government, all forms of recognition that have some precedents in international practice. In light of the international trends outlined above, the following comments are offered for consideration:

2.1 Symbolic recognition

The symbolic recognition of local government - having no or minimal legal consequences - questions the very purpose of seeking a constitutional amendment in the first place. If it is totally harmless, the protagonists for recognition remain dissatisfied and the electorate may show little interest in a proposal that is of no consequence. A reference to democratic local government in a "statement of values" is arguably of as little value as a reference in a preamble. The Indian experience shows that the mere recognition of the principle of local self-government in the Directive Principles of State Policy had little or no impact on practice. In the end it was augmented by the substantive provisions on local government in the 73rd and 74th Amendments. It is thus submitted that mere symbolic recognition adds so little to a constitution that it should be discounted as an option.

There are, however, other forms of recognition that go beyond mere symbolism. One such recognition is the listing of local government as one of the institutions of government, alongside the federal government and the states. This has been done, for example, in South Africa and Brazil. However, the reference to local government in a descriptive clause is a prelude to more substantive provisions dealing with local self-government, functional areas,

taxing powers and intergovernmental relations. A mere statement that government is constituted by federal, state and local governments would simply beg the question as to the consequences of such a description. As a minimum, such a descriptive clause will at least establish that in each state there must be a system of local government. Given the limited impact of such a clause, however, it is not supported.

2.2 Financial recognition

In very few federal systems is local government totally insulated from financial relations with the federal government. The norm is that there are fiscal relations between all three orders of government in the form of tied and untied transfers. In the case of untied federal transfers, they are usually mediated by state governments, whose role is the horizontal distribution of the funds. In most federations, except for Switzerland, there are direct specific purpose federal grants to local governments. This is the position even in Canada, where provinces guard their control over local government jealously. In the US the extent of federal grants to local government has even prompted Congress to include local government in the protective mechanisms of the Unfunded Mandate Reform Act of 1995.

Given the constitutional uncertainty of whether the Commonwealth Government can provide grant funding to local government, an enabling phrase in section 96 of the Constitution may resolve this difficulty. It is, however, a technical solution to a more profound problem – it does not deal with the status of local government as a democratic institution.

2.3 Democratic recognition

Within the modern democratic state, it has become paradigmatic that local government's democratic nature, like that of other orders of government, should also receive constitutional entrenchment. As suggested above, local democracy is not only an end in itself with regard to matters of local concern; it also strengthens the entire democratic enterprise from the bottom up.

However, once the democratic core is recognised, the question is raised as to the scope of such democratic governance. Here, the international practice firmly establishes the link between democracy and local self-government. It would make little sense if democratic governance were recognised, but without any demarcation of the field in which the local voice may authoritatively speak.

International practice shows that there can be a minimalist approach to defining the field of self-governance. There is no need to list the exact powers and functions of local government. A generic phrase – such as “matters of local concern or interest” – could be used (as in Germany or Switzerland), without defining the meaning of either “local” or “interest”. Such a phrase provides a sufficient, although limited and uncertain focal area for democratic rule. It allows the courts to develop over time the concept of local self-government and define the ambit of local autonomy within the supervisory confines of state regulation.

The constitutional recognition of elected local government is not necessarily accompanied by provisions enabling states to dismiss an elected council. Often these supervisory powers are contained in state constitutions, providing both substantive grounds and procedural checks and balances. It would, however, be advisable to provide an empowering clause for the dismissal of elected councils by state governments. The international practice further suggests that dismissal of an elected council is done by executive action in terms of enabling provisions in the constitution or statute. As the grounds for dismissal are spelt out in such instruments, judicial review would provide the necessary protection against abuse.

2.4 Recognition through federal cooperation

The introduction of constitutional provisions that would institutionalise cooperative government as a set of justiciable principles goes much further than the concern of hearing the voice of local government in federal decision-making forums. Such principles would deal with the relationship between all three orders of government. Such principles, codified in a constitution, can have real legal significance (as the South African experience shows) where both structural and procedural requirements are included.

At the heart of cooperative government is the consideration of the interests of the other orders of government. The most basic expression of this principle is recognition of the duty to consult the other orders of government on matters of common interest.

It is also possible to introduce this principle specifically with reference to local government, as was done in the Swiss Constitution. The duty to consider the interests of local government (which, by necessity, includes the duty to consult) is an option. It should, however, be stressed that the recognition of local government through a provision on cooperative government, only makes sense where there has already been a substantive recognition of

local government as an order of government which exercises a measure of autonomy. The minimalist Swiss example is instructive in this regard.

3. Concluding remarks

It would seem that in line with international trends in constitutional reform, the Australian Constitution would be enriched and strengthened by explicit reflection of the relations between the three orders of government that have evolved over the years. Local government, although a creature of statute receiving limited recognition and protection in state constitutions, has emerged as an order of government that plays an integral part in the governance of Australia. This is attested to by the practice of including local government in numerous intergovernmental fora and concluding intergovernmental agreements with it. Recognising local government can only add to the legitimacy of the Constitution as it reflects more accurately how state power is exercised by the three orders of government and the relations that have emerged between them.

Reflecting the reality of local government in the Constitution will not detract from the fundamental dyadic nature of Australian federalism. Recognition of local government is not necessarily a zero-sum game resulting in a major diminution of state jurisdiction. The international experience has been that local self-governance is usually firmly embedded in state regulatory powers, without losing the dynamic potential of local innovation and democratic accountability. In sum, constitutional recognition of local government has not, in most cases, resulted in local government becoming an equal partner to the states: the dyadic federal system remains the dominant model which subjects local government, within limits, to the jurisdiction of the states.