



PAPER V: THE STRANGULATION OF LOCAL GOVERNMENT

Local Government Project
Community Law Centre
University of the Western Cape
April 2008

Research and Roundtable conference made possible by:

Austrian
Development Cooperation



CWCI
CONFERENCE • WORKSHOP
CULTURAL INITIATIVE FUND
An EU-SA Partnership Programme



Ford Foundation

THE STRANGULATION OF LOCAL GOVERNMENT¹

EXECUTIVE SUMMARY

Over the past decade, local government has experienced a deluge of laws from the national government. The question posed is whether the sheer volume, style, nature and scope of the legislative framework is facilitating or impeding the achievement of local government's developmental mandate. Is the legal regime impeding two key values of decentralization, namely that municipalities are best placed to gauge community needs and secondly, that they should be sites of innovation and creativity in formulating localised responses to meeting those needs. It is argued that the current plethora of laws may be guilty of strangulating local government, preventing it from executing its developmental mandate.

Forms of strangulation

Strangulation or overregulation takes a number of forms. A direct command that effectively eliminates discretion is certainly the clearest form. The more invidious form is when it is indirect, where the sheer complexity or cost of regulation stifles initiative. This often is linked to the uniformity of the legal regime; for the more capable municipalities it is a bearable burden but for the lesser endowed ones, it becomes an obstacle in the way of governance. Furthermore, the overuse of the command language of "must" may result in hollow commands without bite. Once an elaborate legal edifice is built, the focus shifts to the enforcement mechanisms for compliance. The use of the criminal sanction to enforce good governance raises the question about the suitability of this mechanism in some contexts. Finally, the lack of co-ordination between national departments sponsoring different pieces of legislation that are meant to "hang together", is an obvious cause for confusion and conflict.

¹ The author acknowledges the research support from the Conference Workshop Cultural Initiative (CWCI), a project of the European Union under the European Programme for Reconstruction and Development, and the Ford Foundation.

Consequences of strangulation

Overregulation have consequences that are inimical to developmental local government, including the following:

- Complying with an elaborate legal framework carries a considerable price tag not affordable by all municipalities.
- Where the legal framework requires highly skilled personnel for the implementation of particular process, the need to outsource such processes, may lead to the disempowerment of the council and the community it serves.
- Overregulation stifles innovation, experimentation and local responsiveness, the very life blood of local self-government.
- Compliance with the legal rules can become more important than achieving the object of the rules.
- Overregulation becomes a mode of thinking; the received wisdom becomes that “more is better” rather than the old adage that “less is often more”.
- Possibly the worst consequences of overregulation is when municipalities opt out of the lawful way of governing where compliance is too difficult or costly.

Loosening the grip of strangulation

The negative consequences of strangulation suggest a fundamental rethink of how local government should be regulated. Regulation should be guided the following principles:

- There must be an appreciation of the limits of law to direct and influence human and organisational behaviour. More law does not necessary solve social or organisational problems; it may be irrelevant or even exacerbate the problems.
- Law should be used in a restrained manner in order to allow the appropriate scope for local discretion.
- A more asymmetrical system should be evolved in the interest of development.
- Less reliance should be placed on the criminal sanction for compliance, placing the emphasis on sanctions that lie within the system itself.

- The goal of a seamless web of legislation that is consistent across sectors should be pursued by first developing a set of guideline definitions that will guide national departments in the exercise of their regulatory powers. The second step is to establish a monitoring mechanism that would track compliance with the guidelines.

1. INTRODUCTION

Over the past decade, local government has experienced a deluge of laws from the national government. While the provinces have been modest in their contribution to the regulation of local government during this period, the old provincial ordinances cling tenaciously to the statute book. The aim of the new legislation was to give practical effect to the vision of developmental local government envisaged in Chapter 7 of the Constitution. Of paramount importance was legislation that sought to structure the institutions and process of local government, including the Municipal Structures Act,² the Municipal Electoral Act,³ the Municipal Systems Act,⁴ the Municipal Finance Management Act (MFMA),⁵ the Municipal Rates Act,⁶ and most recently, the Municipal Fiscal Powers and Functions Act.⁷ Following in the wake of these Acts was regulations which further sought to regulate the matters covered in the principal Acts. In addition to these institutional arrangements which form the back-bone of municipal governance, regulation also flowed from sector departments directed at managing the functional areas of Schedules 4B and 5B.

Local government, has therefore, due to the inherent nature of its diverse functioning, become the point of convergence for a barrage of legislation and regulations. The legislation is ostensibly geared towards ensuring that local government indeed fulfils its constitutional mandate of development. All the legislation and regulations viewed in isolation are arguably necessary and important to regulate its composite functions and achieve intended outcomes. The question posed is whether the sheer volume, style, nature and scope of the legislative framework that has emerged, is facilitating or impeding the achievement of this mandate. Is the legislative framework undermining the fundamental constitutional principle that “a municipality has the right to govern, on its own initiative,

² Act 117 of 1998.

³ Act 27 of 2000.

⁴ Act 32 of 2000.

⁵ Act 56 of 2003.

⁶ Act 6 of 2004.

⁷ Act 12 of 2007.

the affairs of the local community, subject to national and provincial legislation”.⁸ In other words, is the collective impact of the national and provincial legislation hampering local government’s right to government on its own initiative? Is the legal regime impeding two key values of decentralization, namely that municipalities are best placed to gauge community needs and secondly, that they should be sites of innovation and creativity in formulating localised responses to meeting those needs.⁹

It is argued that the current plethora of laws may be guilty of strangulating local government, thus preventing it from executing its constitutional developmental mandate. This is a fundamental constitutional question, which is of particular currency as the White Paper on Local Government is being revised by the Department of Provincial and Local Government.¹⁰

Strangulate is not a new word. While it may sound as if it was coined by some exasperated municipal manager to describe how the deluge of regulations strangles the life out of local initiatives, it is a medical term. An old edition of the Concise Oxford Dictionary explains¹¹ that to strangulate means to “prevent circulation through a vein or intestine by compression”. Similar in sound and in meaning, but derived from a different Greek root, is the word ‘strangury’, which means a disease “in which urine is passed painfully & in drops”. A less graphic example of strangury is the disease produced in plants as a result of bondage. The message is clear, the outcome of strangulation is the condition of strangury; the harm that flows when life’s vital functions are constricted.

The more common but less evocative word for the corresponding legal condition is that of overregulation. An examination of whether the symptoms of this malady exist, requires a qualitative assessment of both the extent and style of regulation and whether it defeats the larger objective that is sought to be regulated. For example, if the aim is to promote developmental local government through integrated development planning

⁸ S 151(3) Constitution.

⁹ See De Visser *Developmental Local Government: A Case Study of South Africa* (2005) 19-26.

¹⁰ Dplg *Policy Process on the System of Provincial & Local Government: Background: Policy Questions, Process & Participation* (2007).

¹¹ Fourth Edition (1951).

responsive to local needs, overregulation of this process may defeat the very object if it stifles local initiative.

1. EXTENT OF STRANGULATION

Is there support for the claim that strangulation or overregulation has manifested itself in local government? Any definitive answer to this question is open for debate as the diagnosis of overregulation depends on judgment calls on the range, extent and quality of regulation, all issues that are difficult to quantify. Judged merely by the number of Acts in the new suite of legislation, there are hardly too many. It is only the Structures Act, the Systems Act, the MFMA and the Property Rates Act, that form the bedrock of the legal framework. However, these Acts are lengthy pieces of legislation. While the Systems Act contains only 120 sections and another 30 items in schedules, they, when divided into their individual provisions, amount to more than a thousand. The MFMA tops this with 180 sections comprising over one thousand provisions. This count excludes the various regulations issued in terms of these Acts.

In addition to the institutional legislation there have also been numerous sectoral pieces of law in the past ten years, such as the Water Services Act¹² and the National Health Act.¹³

The outpouring of laws has first and foremost been driven by the need to construct a new legal edifice for local government which was consonant with its new constitutional status. It was also necessary to merge the disparate local government systems inherited from the apartheid era and to secure equity in the delivery of services.

However, the depth of regulation reveals a deeper project. Local government has been viewed as the delivery arm of government, which had to be steered from the centre in order to achieve defined outcomes. The underlying premise was that there was little trust

¹² 108 of 1997.

¹³ 61 of 2003.

in the incumbents in the municipal councils and offices to realise the constitutional promise of the developmental state. Procedures and processes were prescribed in minute detail on matters where common sense could, or rather should, have been the guiding rod. This premise was based, no doubt, on the reality that an entire new cadre of councillors and officials came on board with little or no experience in local government. Moreover, the new cadres were expected to perform better than the experienced administrators of the apartheid era; their tasks were greater, the goals more challenging.

The extent and detail of the laws were also based on the belief that law can solve governance problems. The answer to mismanagement was often more law. Rather than seeking to solve the problem by other means, such as support and supervision, law was deemed to be the best solution to the problem. When councils routinely appoint political cronies to the key position of municipal manager or chief financial officer, the reaction is yet further regulation pertaining to qualifications, placing faith in the external and neutral criteria of qualifications rather than the mature judgment of the council. The response to delivery failure has been, David Schmidt argues, a stronger more hierarchical state.¹⁴

Schmidt attributes the tendency of overregulation to the ambivalent acceptance by national government of the concept of “spheres of government”, while in reality still clinging to the notion of “tiers of government”.¹⁵ He argues that the 1996 Constitution, establishing spheres of government, is an expression of the so-called “network governance” model, a model in competition with the earlier models of the traditional public administration approach and the “new” public management. The traditional public management paradigm with its emphasis on hierarchy, rules and procedures, was complemented by the “new” public management emerging in the 1970s which sought to introduce private sector management practice and private involvement in the provision of services. Interest in new public management waned in the face of complex and diverse governance challenges. Network governance, emerging in the early 1990s during the

¹⁴ Schmidt “From spheres to tiers: Conceptions of Local Government in South Africa in the Period 1994-2006”. in Van Donk et al (eds.) *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008) 117.

¹⁵ Schmidt (n 14).

information era, sought to address the limitations of the state and the market to tackle complex challenges facing society, utilising partnership with civil society, co-innovation and civic leadership. The three paradigms did not replace one another over time. Rather they built on each other and consequently exist simultaneously today. Accordingly, modern network governance requires a foundation of sound administrative practice. In reviewing the way the national government has regulated local government, Schmidt thus argues that the traditional public administration approach still prevails. While the Systems Act may have reflected the new public management ethos with an emphasis on public private partnerships, the MFMA was pure old-style bureaucracy.

FORMS OF STRANGULATION

Overregulation takes a number of forms. A direct command that effectively eliminates discretion is certainly the clearest form. The more invidious form is when it is indirect, where the sheer complexity or cost of regulation stifles initiative. This often is linked to the uniformity of the legal regime; for the more capable municipalities it is a bearable burden but for the lesser endowed ones, it becomes an obstacle in the way of governance.

Direct command effectively eliminating discretion

Overregulation takes place where a rule commands a municipality or a municipal manager to behave in a prescribed manner in an area that arguably could have been left to the latter's discretion. The command is short and sweet, leaving no doubt (most of the time¹⁶) about the binding nature of the obligation. Other forms of regulation are more subtle but have the same effect. There may be pretence of preserving the discretion of a municipality while the context within which it is to be exercised, leaves little or no meaningful room for maneuver. The most recent example is the draft regulations published by the Department of Provincial and Local Government (dplg), inviting comments by 31 January 2008 on the proposal that the rate levied on state buildings may

¹⁶ See para 3.4 below on when a "must" is a maybe.

not exceed 25 percent of that imposed on residential property.¹⁷ Municipalities quickly pointed out that the 25 percent ceiling in fact gave them no discretion at all and that it compromised local financial sustainability.

3.1 Weight, complexity and cost-implications of regulation

The overregulation of certain processes may render such processes simply too difficult and/or costly to undertake. The prime example is the outsourcing of municipal services.¹⁸ The complex set of rules of the Municipal Systems Act,¹⁹ compounded by the MFMA²⁰ and the Public Private Partnership regulations issued in terms of the latter,²¹ has meant that only the most ardent and wealthiest municipalities are willing and able to undertake the onerous journey.²² Not only has the complexity of the outsourcing process stymied private sector involvement, it has denied community organisations from providing services themselves.²³

There has thus been a significant decline in PPPs over the past years. The much vaunted partnership with the private sector in the provision of services, as envisaged in the White Paper on Local Government,²⁴ has failed to materialise. The result has been an extreme case of the disease of strangury: passing PPPs painfully and in drops, with the drops few and far between.

¹⁷ GN 1172, *Government Gazette* No. 30584 of 19 December 2007, *Draft Regulations: Municipal Property Rates Regulations on a Rate Ratio between Residential and Non-residential Properties*.

¹⁸ See Johnson “Outsourcing of basic services: contract analysis” in De Visser & Mbazira (eds.) *Water Delivery: Public or Private* (2006) 54.

¹⁹ See sections 76 to 84 Systems Act. See further Steytler & de Visser *Local Government Law of South Africa* (2007) 9-22ff.

²⁰ S 120 MFMA.

²¹ Municipal Public-Private Partnership Regulations (PPP Regulations) No R 309 *Government Gazette* no 27431 of 1 April 2005, taking effect on 1 April 2005 (reg 12 PPP Regulations).

²² On the dual application and harmonisation of the two sets of rules, see Reynolds 2005 and Steytler & De Visser (n 19) 9-42.

²³ See Baatjies “Communalisation of municipal services” unpublished paper, Community Law Centre, UWC (2005).

²⁴ White Paper on Local Government (1998) 97.

3.2 Uniformity of regulation

The underlying premise of local government legislation has been that there is a single institution called the municipality. There are small variations pertaining to types and size of councils, but on the whole, the same set of rules regarding institutional structures, administrative and financial duties and processes apply to all municipalities. All municipalities must develop an integrated development plan in the mould cast by the Systems Act. There is thus no distinct set of rules for the giant metro's commensurate with their status, role and functioning in the South African society and economy. The same set of laws which apply to Johannesburg Metropolitan Municipality with councillors in excess of 200 and a budget running into several billion rands, apply to Jozini Local Municipality in the northeast of KwaZulu-Natal, or Mier in the northwest of Northern Cape with budgets amounting to no more than a few million rands. In terms of the law, there is only one institution - the municipality - irrespective of size, budget, capacity and location.

Huge gaps exist in respect of the human and financial resources found in municipalities in the deep rural area of the former homelands as compared to those in urban areas. The various interventions in municipalities and the very existence of Project Consolidate, the national assistance programme for municipalities, speak to the difficulties which these municipalities face in trying to comply with the law in its myriad facets. It is often not a question of funds to buy the necessary skills; many rural municipalities governing areas with no social and economic infrastructure find it very difficult to attract appropriately skilled personnel, resulting in a permanent skills deficit. These manifest disparities in skills and resources have elicited different responses from the national and provincial governments.

Provinces have sought to provide support but with uneven results. The failure to support municipalities resulted in a number of interventions in municipalities in terms of section 139 of the Constitution. Provincial efforts have been eclipsed by the launching of the

national support programme Project Consolidate, which has had the effect of reducing drastically the number of provincial interventions.²⁵

The first recognition of the problem came from the National Treasury when it implemented the MFMA in a staggered manner, determined by the capacity of the municipalities to implement particular provisions. Before then, the System Act also made provision that asymmetrical regulations could be issued to accommodate different kinds of municipalities. Finally, the Property Rates Act makes provision for the *ad hoc* exemption of municipalities from the application of certain provisions.

3.3.1 Asymmetry in the implementation dates

The National Treasury, on the basis of municipal budgets, classified all municipalities into three groups - high capacity, medium capacity and low capacity.²⁶ The coming into operation of certain provisions was implemented in three phases. Fifty municipalities, including all the metros, were classified as high capacity municipalities. The 107 municipalities that were classified as medium capacity municipalities, were given an additional year to comply with the exempted provisions of the Act. The remaining municipalities, classified as having low capacity, were given yet another year's grace, until 30 June 2008, to implement all the provisions of the MFMA. There was thus temporal asymmetry rather than substantive asymmetry. The end result should be uniform compliance rather than a systematic differentiation between municipalities. The temporal asymmetry merely exists to cope with temporary capacity problems.

3.3.2 Regulatory asymmetry - differentiating regulations

While the laws remain uniformly applicable, the differences between municipalities could be recognised in the regulations implementing the laws. In the Systems Act, for example, the minister for local government in issuing regulations or guidelines may

²⁵ See Murray "The NCOP and Intervention" 18 (2007) *Stellenbosch Law Review* 1.

²⁶ GN 773 *Government Gazette* 26511 of 1 July 2004, *Delays and Exemptions*, issued in terms of s 177 MFMA.

differentiate between “different kinds of municipalities which may, for the purpose of the regulations, be defined in the regulation either in relation to categories or types or municipalities or *in any other way*.”²⁷ This provision, while leaving the principal legal framework in tact, may accommodate the diversity of capacity found in municipalities by issuing asymmetrical regulations. It would appear, however, that the Minister has not yet made use of this power.

3.3.3 *Ad hoc* exemptions from specific municipalities

An individualistic approach to capacity problems has been to exempt specific municipalities which, due to any number of reasons, may experience the uniform approach to regulation unduly harsh. It is not an asymmetrical system but an *ad hoc* approach to ameliorate the inequitable application of a uniform rule. The Property Rates Act provides, for example, that a municipality may apply in writing to the Minister for local government to be exempted from the exclusion of nature conservancies from being rated.²⁸ The municipality must, however, demonstrate that the exclusion is compromising or impeding its ability or right to exercise its powers or to perform its functions within the meaning of section 151(4) of the Constitution. Any exemption granted by the Minister must be in writing and is subject to limitations and conditions that the Minister may determine.²⁹

This *ad hoc* power of the minister may be more apparent than real. If the municipality has in fact made out a case that the application of the exclusion is in conflict with section 151(4), the Minister is obliged to grant the exemption from the reduction. Although any national law trumps a by-law, the former is still subject to the demands of section 151(4).³⁰ Should a municipality pass a by-law levying a rate on nature conservancies, it could trump the provision in the Property Rates Act if the requirements of section 151(4) are met.

²⁷ S 120(2)(a) Systems Act, emphasis added.

²⁸ S 18(1) Property Rates Act.

²⁹ S 18(2) Property Rates Act.

³⁰ S 156(3) Constitution.

The wide-spread use of this executive power in determining the application of specific rules, will result in an *ad hoc* asymmetrical system. Such a system is not, however, systematic and leaves much to ministerial discretion, raising questions of legal certainty.

The examples given above clearly demonstrate how the basic assumption of uniformity conflicts with the reality on the ground. Although in theory they are the same institution, the municipalities are very different kinds of animals. If this is indeed the acknowledged case, the question must be asked whether there should not be asymmetry in design and purpose rather than seeking to accommodate difference through executive action. Moreover, the need for variation after promulgation of legislation, questions the claim that South Africa has of the world's best local government laws. Can they be considered to be the best if they are unsuited for their purpose? Ironically, then, the laws that may be theoretically the best, become the worst in practice.

3.3 Hollow commands

The creation of the elaborate legal edifice is aimed at influencing and directing the conduct of councils, councillors and administrators. The legal technique used is to impose legal duties on these role players to do certain things or abstain from others. In the past a legal duty was signaled by the word "shall". Today the term "must" is more popular as the plain language indicator of a binding duty. There is little doubt about the binding nature of the obligation that a council "must pass a budget";³¹ if there is no compliance the errant councils must be dissolved.³² However, the meaning of the term "must" may be devalued by its inappropriate use, when a "must" is no longer a command but the shorthand for "a good idea to do" such and such.

Reading the various local government laws, an administrator will be intimidated by the number of "musts". There are literally hundreds of them scattered across the legislation.

³¹ S 24 MFMA.

³² S 139(5) Constitution.

If there is an overload of legal rules, it is inevitable that “musts” will be in abundance. The question then follows whether some of them are not what they should signify but merely hollow commands without bite. The meaning of the word “shall” or “must” is not a new question, but with the deluge of laws, the question has become more pronounced.

Take the following example: The Systems Act provides that all documents that must be made public (the first “must”), must (the second “must”) be conveyed to the public by “displaying the documents at the municipality’s head and satellite offices and libraries”.³³ Apart from the intriguing question of the authority of a municipality to place a notice in libraries, institutions that fall outside its competence,³⁴ the main question is whether there would be any consequences for the municipality if one, some or all libraries are skipped in its communication strategy? The courts have grappled over the years with the problem which arises when the failure to comply with a “must” attracts no sanction, and they have given no clearer answer than saying that “the object and importance of the provision must be considered, having due regard to the law as a whole”.³⁵ On the question of whether due notice was given to the community about a property rates increase, the proper approach, the Supreme Court Appeal held, was a common sense one, asking whether the steps taken by the council were effective to bring about the enforcement of the rates assessment. This question was to be “measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular.”³⁶ This approach, the Court said, reflects the trend away from the strict legalistic to the substantive approach to interpretation.

It is unlikely that a court would invalidate a municipality’s communication effort if one, some or even all the libraries in a municipality did not contain a specified document. First, there would a lack of clarity about which libraries should be featured? In Cape Town, does the duty include the three university libraries, the South African National Library, and so on? Second, would a court invalidate the communication strategy if other,

³³ S 21A Systems Act.

³⁴ Libraries is a Schedule 5A function, falling in a province’s exclusive competence.

³⁵ *Weenen Transitional Council v Van Dyk* 2000 4 BCLR 445 (N) 454H.

³⁶ *Weenen Transitional Council v Van Dyk* 2002 4 SA 653 (SCA) para 13.

more effective measures to communicate with the public were used? A common sense approach would suggest not.

The question is, then, whether the common sense approach should not have been the one adopted by the law maker in the first instance: the rule should simply be that the municipality should communicate the specified documentation by means appropriate for a municipality. The counter-argument could be that without including libraries in the communication duty, the municipalities may have sufficed with only displaying the documentation or notice at the municipal offices. To the contrary, if the statutory instruction was that the documents should be placed in places appropriate for the municipality, a more locally attuned result may have followed.

The overuse of “must” could lead to larger problems than simply one of interpretation. If the binding nature of a must is dependent on the context of the law and intention of the legislature, legal certainty is not advanced. When question marks appear after some “musts”, a larger skepticism about the binding nature of other “musts” could result. Overregulation then leads to greater lawlessness rather than securing the desired outcomes through regulation.

3.4 Criminalising poor administration

Once an elaborate legal edifice is built, the focus shifts to the enforcement mechanisms for compliance. Why, after all, construct the legal framework if it does not bite? The principal mechanisms employed in local government legislation have been (a) giving oversight to the provinces (to be enforced through section 139 of the Constitution) and (b) criminalising poor administration. A further mechanism is court action that any aggrieved party may resort to. The focus of this section is on the use of the criminal sanction, raising the question about the suitability of this mechanism in some of the contexts to which it has been applied.

The criminal sanction is used liberally in the MFMA to ensure good financial administration.³⁷ The Act criminalises a municipal manager who fails to disclose to the council and mayor all material facts available to or reasonably discoverable by the municipal manager, and which may in any way influence their decisions or actions.³⁸ Although there could be an element of fraud involved, it essentially criminalises a breakdown in relations between the two parties. A more far-reaching offence is the municipal manager's failure, when executing his or her financial administration duties, to take all reasonable steps to ensure, among others things, “that the resources of the municipality are used effectively, efficiently and economically.”³⁹ Not only is the criminal conduct, which may attract a five-year jail sentence, premised on the vague standard of “failing to take all reasonable steps”, but the “effective, efficient and economic” elements are even more obtuse. Equally vague are the offences punishing poor administration, namely the failure to establish a system for asset and liability management,⁴⁰ revenue management,⁴¹ expenditure control,⁴² and supply chain management.⁴³

It would seem that the very fact that the aim of these provisions are too ambitious – good administration - renders the formulation of the offences problematic and their application questionable. In terms of the foundational constitutional value of the rule of law, the indeterminate nature of this offence certainly raises constitutional questions.

The effectiveness and appropriateness of this method of regulatory control must also be questioned. First, it would appear that since 2000 the mere incidence of poor administration has not yet been prosecuted. Why? Is it a case that there were no cases because there have not been unsuccessful and less than diligent municipal managers? Clearly not. Does the problem lie in the opaqueness of the offences? Or is it a case that it is simply an inappropriate sanction and other methods of sanctioning are preferable? If,

³⁷ See Steytler & De Visser (n 19) 11-43

³⁸ S 61(2)(b) MFMA.

³⁹ S 62(1)(a) MFMA referred to by s 173(1)(a)(i) MFMA.

⁴⁰ S 63(2)(a) and (c) MFMA.

⁴¹ S 64(2)(a) and (d) MFMA.

⁴² S 65(2)(a),(b)(c),(d),(f) and (i) MFMA.

⁴³ S 111 MFMA.

however, the criminal sanction is only going to be used infrequently, it is more likely to be used for the wrong reasons in settling political scores than punishing poor administration. More fundamentally, is this the appropriate and effective method of enforcing efficient administration? If a municipal manager has not, for example, established a system of procurement, he or she will clearly be in breach of their performance contract and should be fired. What value does vaguely worded and seldom used criminal sanctions then have? The argument is not that the criminal sanction is inappropriate in all circumstances; fraudulent and corrupt practices must be criminalised and prosecuted. What is questioned is the functionality and efficiency of the criminal sanction to advance good administration. It should not be the case that a municipal manager has two career options; either serving five years in a council or five years behind bars – the maximum penalties these offence attract.

3.5 Sectoral disjunctions

The thousands of pages of law governing all aspects of local government emanate from a number of national departments, with DPLG and National Treasury the main but not the only scriptwriters. One would be naïve to expect a harmonious and conflict-free legal regime. Contradictions, overlaps and inconsistencies are inevitable in an endeavour that is so ambitious. When the provinces add a few chapters to the legislation, more complexities and inevitable contradictions are bound to appear. However, some conflicts are avoidable as two major contributing factors resulting in the lack of integration are, first, a lack of co-ordination among departments and, second, a lack of a common understanding and approach to local government.

A lack of co-ordination between national departments sponsoring different pieces of legislation that are meant to “hang together”, is an obvious cause for confusion and conflict. A prime example has been the legislation supporting interventions in municipalities in terms of section 139 of the Constitution. The legislation involved three departments. The Department of Justice and Constitutional Affairs drafted the changes to section 139 of the Constitution to give constitutional backbone to the National Treasury’s

extensive intervention measures in the MFMA. Where an intervention measure entails a dissolution of a council, the institutional arrangements fall in the domain of the Department of Provincial and Local Government (DPLG). Somehow, the three departments didn't get it right; since 2003 when the constitutional amendment was effected, DPLG has not yet brought the Structures Act into line with the new section 139 as well as the MFMA with regard to the procedures in case of a dissolution of a council. The result is that the MFMA still refers to provisions in the Structures Act that are patently unconstitutional.⁴⁴

Another example is the regulation of the outsourcing of municipal services. Not only did the Municipal Systems Act, driven by DPLG, strangle the outsourcing of municipal services, the National Treasury made sure that the MFMA rules governing public-private partnerships, made the process even more difficult. The dual set of rules did not come about inadvertently, but it was the result of two departments pursued different goals.

A more fundamental problem is the perceived absence of a common approach to local government and the supporting processes that seek to minimise contradictions at national level. A good example is the Health Act of 2003 where the definition of "municipal health services" and the allocation of this function to district municipalities⁴⁵ contradict DPLG's approach to local government powers in general and district-local municipal relations in particular. In an over-inclusive definition, "municipal health services" are defined as:

- (a) Water quality monitoring
- (b) Food control;
- (c) Waste management
- (d) Control premises;
- (e) Communicable disease control;
- (f) Vector control;
- (g) Environmental pollution control;

⁴⁴ S 34 Structures Act. See further Steytler & De Visser (n 19) 15-26.

⁴⁵ See Steytler & Fesha "Defining local government powers and functions" 124 (2007) *South African Law Journal* 320.

- (h) Disposal of the dead;
 - (i) Chemical safety,
- but excludes port health, malaria control and control of hazardous substances.”⁴⁶

This definition conflicts with the allocation of functions between district and local municipalities. While the “municipal health services” function is a district function in terms of section 84 of the Municipal Structures Act, the “licensing and control of undertakings that sell food to the public” and “air pollution” are local functions.

The problem with the definition of “municipal health services” is symptomatic of a larger problem, namely the lack of integration and coordination at national level. The lack of a coherent set of guidelines on the meaning of the functional areas of local government, means that inconsistencies are likely to occur. The absence of a clearing house for local government legislation in DPLG as the department responsible for local government, will inevitably result in an uncoordinated approach to local government.

4 CONSEQUENCES OF STRANGULATION

There is an admittedly large body of law applicable to local government. The system is new and the administrators are often inexperienced. Is it, then, only a matter of time for the system to mature when the administrators become more skilled to cope with the demands of the legal framework? It is argued that the problem is much more than a lack of experience; even with the best skilled personnel the key elements of overregulation (and poor regulation) have consequences that are inimical to developmental local government. Some of these consequences are discussed in this section.

4.1 Cost of compliance

Complying with an elaborate legal framework carries a considerable price tag. Costs come in various forms. At a primary level, municipalities must avail themselves of legal

⁴⁶ S 1 Act 61 of 2003.

services where the task of the legal practitioner is to guide the municipality every step of the way. The metros and large local municipalities have substantial legal sections devoted to the legal niceties of the framework. Some industrious municipalities have set up legal compliance desks with the aim of ensuring that all laws are complied with. It goes without saying that such in-house legal services come at a price, although not as pricey as lawyers in private practice. The fact that considerable financial costs are attached to compliance, which assumes ready access to legal advice, inevitably entails that there are two classes of municipalities; those who rely on their own resources (in-house or contracted) and those without.

The second form of costs is the transaction cost of implementing complex procedures. The cost of outsourcing municipal services in terms of section 78 of the Systems Act and the MFMA, including conducting elaborate feasibility studies, has made public-private partnerships for all but the large scale projects, too costly in terms of time and money. The cost effect of the outsourcing process has been recognised by the National Treasury. Because the required feasibility studies require skills, resources and time, the MFMA provides that the national government may assist municipalities in carrying out and assessing the feasibility studies.⁴⁷

4.2 Opting out of self-governing

Where the legal framework requires a sophisticated institution with skilled administrators and knowledgeable councillors who are able to marshal human and material resources to perform key functions, as prescribed by the various pieces of legislation, the outcome can be the disempowerment of the council and the community it serves. Where a council has the resources, it may outsource key processes to the private sector. Where they do not have the resources, the national government will eventually catch up with them and impose its solutions (and resources) on them. In both instances, local self-government is hollowed out.

⁴⁷ S 120(4)(b) MFMA.

In the first instance, where the complexities and demands of the legal requirements overwhelm the administrators, they inevitably haul in the consultants to ensure compliance. The outsourcing of the drafting of the first integrated development plans (IDPs) was a prime example. Consultants were employed to do the entire process including the public participation process. Seasoned provincial administrators winced at receiving from different municipalities the same IDP drafted by the same consultants (including the spelling errors!). What was intended as a community outreach process became a commercial transaction.

Where municipalities lack the funds to buy compliance through the services of consultants, they, the consultants arrive in any event, this time on the payroll of Project Consolidate. Through quick-fix strategies, problems are solved, but the larger malaise remains untouched. It is thus contended that in both instances, the weight of the legal obligations can thus have a profound disempowering effect on smaller, low resourced municipalities.

4.3 Stifling innovation, experimentation and local initiative

The most profound effect of overregulation is that it stifles innovation, experimentation and local responsiveness, the very life blood of local self-government. As argued above, regulation may directly shut down the space for self-government. If not directly, the weight and complexity of a number of provisions may make local initiative too difficult and costly to attempt. The usual example is the outsourcing of municipal services that has been regulated out of existence.

A very current example is provided by Sustainable Energy Africa (SEA), a section 21 company working in the field of sustainable energy development with a particular focus on city energy planning.⁴⁸ In exploring the use of alternate sources of energy, municipalities, they contend, will bump their heads against the MFMA.⁴⁹ The MFMA,

⁴⁸ See www.sustainable.org.

⁴⁹ See their submission to dplg with regard to the White Paper policy process on provincial and local

they argue, places the emphasis on reducing short-term financial risk. Exploring alternative forms of sustainable energy sources requires more long-term sustainability and risk. The crux of the problem is that alternative sources of renewable energy may be more costly at the outset and becomes only cost effective in the future (also given other environmental advantages of a non-carbon energy generation for climate change). SEA thus argues:

Prevailing interpretation of “wasteful expenditure” prohibits medium to longer-term efficiency within local government. Many energy efficiency measures, such as efficient lighting, efficient water pumps, etc, may require an initial upfront cost higher than other existing technologies, but are proven to be more cost effective over 5 – 20 years. It would appear that financial decision making in local government does not feel able to take this kind of “value for money” into account. Retrofitting buildings or functions for energy efficiency is typically undertaken by energy services specialist companies, ESCOs, who operate by taking on the upfront capital cost which they then offset through being paid out a percentage of the savings achieved through the energy efficiency interventions (a win-win framework). Local government bumps up against the interpretation of the MFMA that argues that private companies may not benefit from municipal assets. Many energy efficiency interventions may require fairly long-term contracts due to pay back timeframes. The MFMA makes this difficult.⁵⁰

Their plea is thus that local government should be allowed a greater degree of flexibility to be able to fulfil the sustainability aspects of their core service delivery functions.

4.4 Self-strangulation – ticking off boxes

The more insidious form of strangulation is where it is voluntarily inflicted. This occurs where compliance with the legal rules become more important than achieving the object

government (dated January 2008).

⁵⁰ SEA submission 2008, para 4.2.2.

of the rules. Through the strict adherence to the legal requirements, a council may lose the plot, replacing substance with form.

Where there is an over-prescription of procedural requirements, an obsessive-compulsive administration can be reduced to ticking off boxes for every procedural element prescribed. Achieving the objective of the rules becomes of secondary importance. The example of the prescribed methods of communicating documents to the public is again relevant. The Systems Act details that specified documents should be made available to the public by placing them at the council offices and libraries. The object of the exercise is to communicate effectively with the community and placing the documents only at the prescribed places may not be the most effective methods of communication. A rule-bound administrator may suffice with what is prescribed rather than explore other options that a more open procedure may have elicited. Compliance becomes the end in itself, and the overall purpose of the legal rules gets lost in the hurry to tick off the boxes of compliance.

Another example is the drafting of IDPs. Schmidt writes:

The IDP processes often reinforce bureaucratic rather than ‘developmental’ thinking. The fact that a council has complied with the law by preparing a plan is far more important than the content of the plan. This is inevitable, given the absence of any substantial benchmarking that allows municipal outputs and outcomes to be evaluated in some evidence-based way.⁵¹

The rule-bound approach to functions may also be promoted by the supervising provinces. Where there is a mass of detailed rules to comply with, a province may equally lapse into a legalistic approach of ticking boxes when monitoring municipalities, rather than seeking to determine whether the objectives of the law have been complied with.

⁵¹ Schmidt (n 14) 123.

4.5 Mode of thinking – more is better

The comprehensive detailed regulations flowing from the national government, sets the tone even when it comes to internal self regulation. In short, overregulation becomes a mode of thinking; the received wisdom becomes that “more is better” rather than the old adage that “less is often more”. Where national regulation is experienced as many words, paragraphs and pages, then that approach is often followed by councils when they exercise their law-making functions. There is a tendency to prescribe everything to death in minute detail that adds very little to the achievement of the substantive goals. An anecdotal example comes from a rural council in Limpopo which had rules and orders running into sixty pages. Most of the detail was unnecessary when compared to the 25 pages of rules and orders necessary to run the fractious council of the City of Cape Town. Reading the 60-pager carefully (no doubt a product of a consultant being paid by the word!) it was evident that it was much too detailed and restrictive, providing in the end a confusing picture of how to conduct an orderly council meeting.

4.6 Opting for lawlessness

The worst consequence of overregulation is when municipalities opt out of the lawful way of governing. It may become an attractive option for a municipality simply to avoid the legal regulations (and the costs involved) and do what it deems necessary irrespective of the law, thus achieving the very opposite that the extensive legal regulation sought.

But first, is there any evidence that suggests the lawlessness is a problem? No comprehensive study has yet been done focusing on legal compliance and the problems of implementing the legal framework. There are, however, a number of indicators that suggest something less than felicity to the law. First, on the financial side, the Auditor-General Reports on municipalities show that there are a substantial number of municipalities that get qualified audits annually. Second, regular legal audits of municipalities conducted by provinces produce mixed results. Third, the MDB’s annual capacity assessment reports indicate that in a number of instances municipalities perform

functions that fall outside their field of competence.⁵² Fourth, there are some discrete examples of how provinces and municipalities simply ignored the strictures of a law because they found them too constraining. One example is the prescription in the Intergovernmental Relations Framework Act (IRFA)⁵³ that the premier's intergovernmental forum consists of the premier and the mayors of metropolitan and district municipalities.⁵⁴ The practice that emerged was that in a number of provinces the prescription was simply ignored with mayors of local municipalities participating as full members.⁵⁵

The reasons for non-compliance are bound to be varied. The last example provides one reason why a legal provision is not followed. It made no sense to exclude strong local municipalities from the Premier's Intergovernmental Forum where the district municipalities carried little authority to be a communication channel between the premier and the local municipalities. Local conditions required something different. Other causes include lack of knowledge or access to legal services, and a proper understanding of the law. Some old hands in local government have the skill, guile and dexterity to weave a neat path through the thicket of laws. They have the necessary experience to know how to achieve the result desired by their political principals without breaking the law, how to deftly sidestep inconvenient rules and innovatively interpret old ones. These skills came from years of experience in local government, a resource that has dwindled over the past decade when they were replaced by the new cadre of administrators. Of course, the most pertinent reason is willfulness when the law is too difficult, costly or cumbersome even to attempt compliance. Only by operating outside the letter of the law is there escape from the strangle-hold of the law. While operating outside the law in pursuit of the noble objects of local government may be lauded as innovative, it is fundamentally in conflict with the foundational value of the Constitution of the rule of law. Moreover, moving

⁵² Municipal Demarcation Board, *National Report on Local Government Capacity: District and Local Municipality – Capacity Assessment Period 2007-08* (2008) 83.

⁵³ Act 13 of 2005.

⁵⁴ S 17(1) IRFA.

⁵⁵ See Fessha "Provincial Intergovernmental Forums: A preliminary assessment of institutional compliance" unpublished CAGE report, Community Law Centre, UWC (2006).

outside the law on specific issues undermines the legitimacy of the law in general. It is ironic, then, that law can then become the enemy of its own supremacy.

In conclusion, it is contended that overregulation may have the perverse consequence of increasing lawlessness rather than ensuring greater law abidingness. It is then axiomatic: the more law there is the greater the possibility of lawlessness.

5 LOOSENING THE GRIP OF STRANGULATION

Given the negative consequences of strangulation, resulting in a state of strangury, where governance is painful and inspiration and innovation reduced to a few drops, the question is, then, how to proceed. Is it simply a question of the system needing to mature or is a more fundamental shift of mindset necessary? Admittedly, the system is relatively new and new administrators must learn the rules. Over time, administrators would become more experienced and knowledgeable. Even this will be a slow process as practice suggests that there is a high turn-over of municipal managers.⁵⁶ The critique of the way legal regulation is done, suggests a more fundamental rethink of how local government should be regulated.

The critique has been that there are too many instances of rules that directly stifle local initiative or that the complexity and cost of certain regulation have exactly the same effect. It is easy but facile to say that there should be less law and that the laws in place should allow sufficient scope for municipalities to fulfil their constitutional mandate. The devil lies in the detail. Which legal provisions strangulate local government? How should they be reformulated? Do all municipalities have the maturity to cope with greater freedom? These questions could be addressed in the light of a number of principles.

⁵⁶ MDB (n 52) 41.

5.1 Appropriate use of law or the limits of law

There must be an appreciation for the limits of law to direct and influence human and organisational behaviour. More law does not necessarily solve social or organisational problems; it may be irrelevant or even exacerbate the problems. It is axiomatic to state that the law must be used to fix a problem that can be resolved by the categorical imperative of legal rules. For example, when serious problems were experienced with the functioning of district councils and relations between participating local councils and the district council showed signs of distress, a possible solution became the creation of alternative forums of communications between the locals and the district municipalities through the district intergovernmental forums (DIFs).⁵⁷ Research has shown, however, that the DIFs did not solve dysfunctional relations; they functioned optimally where sound relations existed.⁵⁸ Prescribing by law good relations between district and local municipalities has little chance of success. What was required was a much more fundamental re-look at the dysfunctional functioning of district councils themselves, rather than to patch over the problems with DIFs. Moreover, political solutions were required rather than legal ones. It is, of course, a question of judgment whether a legal response is the appropriate one, depending on a proper analysis of the problem that is being addressed.

5.2 Restrained use of law

The second guiding principle is that law should be used in a restrained manner in order to allow the appropriate scope for local discretion. This approach depends, of course, on a broader approach to local government where the dominant discourse is that a municipality is, as the Constitution proclaims, a “sphere” of government capable of governing, “on its own initiative, the local government affairs of the community”.⁵⁹

⁵⁷ In terms IRFA.

⁵⁸ Baatjies & Steytler “District Intergovernmental Forums: A preliminary assessment of institutional compliance” CAGE report, Community Law Centre, UWC (2006).

⁵⁹ S 151(3) Constitution. See Schmidt (n 14).

The advocacy of the restrained use of law is not to be equated with a minimalist approach; clear distinction should be made between areas requiring detailed regulations and other areas where greater flexibility would be beneficial. Key areas where detailed rules would be appropriate are those relating to the democratic processes that underpin local democracy. Elections, openness in government and accountability procedures and processes should be clear and precise. Likewise, accounting for the expenditure of public money should also be precise. However, the scope for policy choices and partnerships with private and civil society sectors should be maximised.

A restrained use of law may also include a change in style. At the moment the focus of the legislation is on the process that must produce certain desired goods. In the case of the IDP the focus is on process rather than the outcome – namely a credible strategy for the next five years. Both the formal requirements of the IDP and the process of drafting it are prescribed in detail. Could a different approach be followed where the focus is on the desired outcomes, rather than the preceding processes?

Where law is used in a restrained manner, the overabundant use of the command “must” is likely to be addressed. Only when a hard rule is established, are the command term to be used. Ambiguous and doubtful obligations created by the light use of the term “must” not only create legal uncertainty but prejudices also the larger enterprise of law enforcement.

5.3 Differentiated use of law

As pointed out above, the legal regime applies equally to all municipalities (with some exceptions) irrespective of the category, size, or capacity. The question is whether a uniform system should be maintained or an asymmetrical system evolved in the interest of development. There are two legs to the asymmetry argument. The first is that the top 30 municipalities, the sites of economic development in the country and who are all capable of complying with the rigours of the current legal regime, should be less regulated. The argument is that they are capable of self-government and need greater

leeway to mobilise partnerships in their quest for development. Schmidt argues that a “spheres of government” approach to local government allows for asymmetry where more capable municipalities should be given more discretion.⁶⁰

It is ironically that poor rural municipalities, currently struggling to keep to the letter of the law, require more guidance rather than less. While cities need greater flexibility to flex their muscles smaller municipalities lacking strong administrative capacity, are sustained by a set of clear rules. In the rural areas, municipalities are likely to suffer from permanent incapacity; they are unlikely to attract skilled administrators let alone establish a legal compliance office. However, a simplified set of rules would facilitate compliance.

5.4 Enforcement of the legal rules

How can good administration, defined in a set of legal rules, best be enforced? The criminal sanction has its place but should be concerned with fraudulent or corrupt practices. Ensuring good administration, starts with the municipality itself. The first step would be support and training for administrators in the application of new laws. The second step is to increase the practice of accountability of the administration to the council. It should never be the case that the failure to implement a supply change management system should result in a prosecution. The performance contracts of the senior management should make such a sanction unnecessary. Third, the sanctions should, where possible, lie within the system itself. The failure to adopt a budget is sanctioned within the system by the automatic dissolution of the council. Fourth, the monitoring regime of provinces should be effective to pick up infractions. The use of section 139 of the Constitution where there is a failure to comply with an executive obligation, could be more frequent but also more measured. The use of directive and court orders should be fully explored before resorting to the assumption of responsibilities.

⁶⁰ Schmidt (n 14) 114.

5.5 Integrate legal regulation

The goal of a seamless web of legislation that is consistent across sectors should not be a dream deferred. Two practical suggestions in this regard are the following. The first step is to develop a set of guideline definitions of local government powers and functions that will guide national departments in the exercise of their regulatory powers.⁶¹ The Minister responsible for local government can issue such regulations in terms of section 92 of that Municipal Structures Act in order to provide a holistic approach to municipal powers and functions. The aim of the Guidelines should be, inter alia, to guide the national and provincial departments when they seek to regulate local government powers and functions concerned with a particular sector. They will also guide the provincial governments in defining the scope of their municipal monitoring and support functions. The aim of the Guidelines would be to secure a uniform and consistent approach to Schedule 4B and 5B competences. This will promote a coherent overarching view of the nature and ambit of local government powers and functions. The Guideline definitions would not, per definition, have the binding force of law, but would provide national and provincial departments with a framework in terms of which the details of a particular functional area can be determined.

The second step is to establish some kind of monitoring mechanism that would track compliance with the guidelines. It is suggested that DPLG should be charged with the task of overseeing the coherence of the national government's supervisory laws, policies and practices regarding local government. As it is a line department it can be no more than a clearing house of the legislation and practices of other departments affecting local government. Its task is to monitor other national departments' interaction with local government and channel conflicting or inconsistent policies and bills to the appropriate cabinet committee for resolution. More importantly, it must provide the overall vision of the role and place of local government in South Africa's system of decentralised government.

⁶¹ See Steytler & Fessha (n 45).

6. Conclusion

In conclusion, there is a fundamental tension in the system which is encapsulated in two opposing constitutional principles underpinning local government: The first one, articulated in section 151(3) of the Constitution, entrenches a municipality's "right to govern, on its own initiative, the local government affairs of the community". The second, competing, principle is the duty of both the national and provincial governments to oversee local government through regulation, monitoring and supervision.⁶² The power to regulate may not, however, "compromise or impede a municipality's ability or right to exercise its powers or perform its functions."⁶³ There is thus a balance to be struck between letting the thousand flowers of decentralised local initiative and innovation bloom, and preventing the weeds of mismanagement, incompetence and corruption from taking over the flower beds. It is a question of correcting the balance, where the objective must be to harness the creative energy of municipalities and communities in the elusive search of the holy grail of developmental local government.

⁶² S 155(7) Constitution.

⁶³ S 151(4) Constitution.