THE Strangulation of local government

In the past decade, local government has experienced a mass of legislation regulating its functioning. The question is whether the sheer volume, style, nature and scope of this legislative framework is facilitating or obstructing the achievement of local government's mandate of development. Are the many laws not impeding two key values of local government, namely that municipalities are best placed to gauge community needs and can become sites of innovation and creativity? This article argues that the overload of laws may be strangulating local government's execution of its mandate. The revision of the White Paper on Local Government should therefore also look at the extent and manner of regulation.

Strangulation

'Strangulation' is not a new word, coined by some frustrated municipal manager seeing the many rules and regulations choke the life out of local initiatives. It is an old physiological term, meaning 'preventing circulation through a vein or intestine by compression'. In legal terms, the more usual word for this condition would be 'overregulation'. It happens when the extent and style of regulation defeat the larger object being regulated. For example, if the aim of integrated development planning is to promote developmental local government, the overregulation of the process may defeat that very object by stifling local initiative.

Extent of strangulation

The torrent of laws has been driven by the need to construct a legal framework for local government which conforms to its new constitutional status. However, the depth of regulation reveals a deeper concern. Local government was seen as the delivery arm of government, which had to be steered from the centre to achieve

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defined outcomes. The underlying premise showed little trust in the new incumbents of municipal councils and offices. Procedures and processes were prescribed in detail on matters where common sense could have sufficed. The premise was based, no doubt, on the reality that an entirely new cadre of councillors and officials, who had little or no experience in local government, were expected to perform better than the administrators of the past. 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 problems. The response to mismanagement was often more law. Rather than seeking to solve the problem by means such as support and supervision, law was thrown at the problem.

Forms of strangulation

Overregulation takes a number of forms.

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. Other forms of overregulation are more subtle but have the same effect. For example, while there may be a pretence of preserving the discretion of a municipality, the context may leave little or no meaningful room for manoeuvre. The most recent example is the draft regulations prescribing that the municipal rates levied on state buildings may not exceed 25% of those imposed on residential property. (See page 10 on the draft regulations.)

Weight, complexity and costs of regulation

The overregulation of certain processes may render them simply too difficult and / or costly to undertake. The prime example is the outsourcing of municipal services. There has thus been a significant decline in public-private partnerships over the years.

Uniformity of regulation

The same set of rules applies to all municipalities, however large or small and however huge the gaps in human and financial resources. The various interventions in municipalities and the very existence of Project Consolidate speak to the difficulties municipalities have in complying with the law in its many facets. The first actual legal acknowledgement of the problem came from the National Treasury when it implemented the Municipal Finance Management Act in a staggered manner, depending on the capacity of municipalities to implement particular provisions.

Too many 'musts'

Reading the various local government laws, an administrator is immediately struck by the number of 'musts' – do this, do that. The overuse of the word 'must' could lead to the problem that it is not regarded as imposing a binding obligation every time. The courts have said this depends on the intention of the legislature, determined by the context in which 'must' is used. When doubt arises around a 'must', legal certainty is not advanced and a larger scepticism about the binding nature of all 'musts' can flow. Overregulation then leads to greater lawlessness rather than securing the desired outcomes through regulation.

A legislative framework that is not fully integrated

With thousands of pages of law governing all aspects of local government coming from a number of sectors and departments, one cannot expect a harmonious and conflict-free legal regime. However, many of the contradictions, overlaps and inconsistencies could have been prevented. Two major factors contributing to the lack of integration are the insufficiency of coordination among departments and the absence of a common understanding and approach to local government.

Consequences of strangulation

The large body of law is new and the administrators are often inexperienced. Is it, then, only a matter of time before the system matures and the administrators become skilled enough to cope with the demands of the legal framework? It is argued that overregulation has consequences that work against developmental local government.

Cost of compliance

Complying with an elaborate legal framework carries a considerable price tag. Costs come in various forms. At a primary level, municipalities need legal practitioners to guide them every step of the way. The metros and bigger local municipalities have large legal departments devoted to the legal niceties of the framework. It goes without saying that such in-house legal services come at a price, albeit a smaller one than that of lawyers in private practice. The fact that compliance entails considerable financial costs and assumes ready access to legal advice necessarily implies that there are two classes of municipalities: those that rely on their own resources (in-house or contracted) and others that do not. The second form of cost is the transaction cost of implementing complex procedures. The cost of a simple section 78 process for outsourcing municipal services has made all but large-scale projects too costly to be justified.

Opting out of governing

Where a council has the resources, it may outsource to the private sector key processes that are too difficult for it to carry out itself. Where it does not have the resources, the national government will eventually catch up with it and impose solutions on it. In both instances, local government is disempowered. The outsourcing of the drafting of the first IDPs was a prime example.

Stifling innovation, experimentation and local initiative

A consequence of overregulation is that it stifles innovation, experimentation and local responsiveness, the very lifeblood of decentralisation. Even if not directly, the weight and complexity of a number of provisions may make local initiative too difficult and costly to attempt. The most common example is the outsourcing of municipal services, which have been regulated almost out of existence.

Self-strangulation – ticking off boxes

One of the worst forms of strangulation is self-inflicted. This occurs when compliance with the rules becomes more important than achieving the object behind the rules. In adhering strictly to the legal requirements, a council may lose the plot, replacing substance with form. Where there is an overprescription of

KEY POINTS

- A consequence of overregulation is that it stifles innovation, experimentation and local responsiveness.
- Even if not directly, the weight and complexity of a number of provisions may make local initiative too difficult and costly to attempt.
- Law should thus be used in a restrained manner in order to allow scope for local discretion.
- The restrained use of law is not the same as a minimalist approach; a clear distinction should be made between areas requiring detailed regulations and other areas where greater flexibility would be beneficial.

procedural requirements, an administration can be reduced to ticking off a box for each requirement met. Achieving the objective of the rules becomes secondary.

Opting for lawlessness

Possibly the worst consequence of overregulation is opting out of the lawful way of governing and opting for lawlessness. It may become an option for a municipality to avoid the legal regulations and merely do what is necessary. The result is the complete opposite of what the extensive legal regulation sought to achieve. Overregulation may thus have the perverse consequence of increasing lawlessness rather than ensuring greater legal compliance.

Loosening the grip of strangulation

Given the negative consequences of strangulation, the question is how to proceed. Does the system simply need to mature, or is a more fundamental shift of mindset necessary?

It is easy 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. However, the devil lies in the detail. Which legal provisions strangulate local government? How can they be reformulated? These questions should be addressed in the light of a number of principles.

Appropriate use of law or the limits of law

There must be an appreciation of the limitations of law in directing and influencing municipal behaviour. More law does not necessarily solve social or organisational problems; it may be irrelevant or even exacerbate the problems.

Restrained use of law

Law should be used in a restrained manner in order to allow scope for local discretion. The restrained use of law is not the same as a minimalist approach: a clear distinction should be made between areas requiring detailed regulations and other areas where greater flexibility would be beneficial. Key areas where detailed rules are appropriate are those relating to the democratic processes that underpin local democracy. Likewise, accounting for the expenditure of public money needs to be precise. The scope for policy choices and partnerships with private and civil society should be maximised.

Outcomes-based regulation

At the moment the focus of the legislation is on the process that must produce desired outcomes. Could not a different approach be followed that focuses on the desired outcomes, rather than the preceding processes?

Differentiated use of law

An asymmetrical system should be allowed to evolve. There are two legs to this argument. The first is that the bigger municipalities with adequate capacity to comply with the law should be less regulated. They need greater leeway to mobilise partnerships in their quest for economic and social development. The small municipalities, with less capacity, 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. However, the set of rules should be simplified to ensure compliance.

Integrated legal regulation

To ensure better integration of sectoral legislation, it is vital to start with a proper definition of the various functions of local government listed in Schedules 4B and 5B of the Constitution. The issuing of guidelines by the Department of Provincial and Local Government would do much to ensure that all sector departments work from the same page.

Comment

There is a tension between a municipality's "right to govern, on its own initiative, the local government affairs of the community" (section 151(3) of the Constitution) and the duty of both the national and provincial governments to oversee local government through regulation and supervision. This tension is managed as long as the national and provincial governments do not, to use the constitutional expression, "compromise or impede a municipality's ability or right to exercise its powers or perform its functions" (section 151(4)).

There is thus a balance to be struck between letting the flowers of local initiative and innovation bloom, and preventing the weeds of mismanagement, incompetence and corruption from taking over the flower beds. It is now a question of correcting the balance to ensure that the creative energy of municipalities and communities is harnessed in pursuit of developmental local government.

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