





NORTH-WEST UNIVERSITY  
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# The Sources and Potential of Municipal By-law Making in South Africa

4 June 2015

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# OUTLINE

- Post-1996 'developmental local government' and the new face of municipal power, generally
- Municipal by-laws as 'a' key local government instrument
- Sources of local government by-law making authority in South Africa
- Potential of of municipal by-laws for improved local governance across South Africa
- What we know and what we don't

# Post-1996

- The 1996 Constitution saw the birth of a local government sphere for SA never known before
- Introduction of ‘developmental local government’ introduced break with historical perceptions eg ‘municipalities as service delivery arm of government’
- Conceptually and in practice: a new face for local government ito
  - Systems
  - Structures
  - Financial arrangements
  - Demarcation
- Concomitant change ito municipal **DUTIES** and **POWERS**
- No longer direct provincial or national ‘checks’ especially as far as it concerns legislative power – ie authority to make and pass by-laws

“The constitutional status of local government today is radically different from what it was prior to the transition to democracy in 1994. Prior to 1994, municipalities were at the bottom of a hierarchy of law-making powers. This is because they derived their existence and their powers from provincial ordinances which, in turn, derived their existence and powers from Acts of Parliament. An important consequence of this fact is that municipalities were not recognised or protected by the pre-1994 Constitution. Instead, they were classified as mere administrative agencies exercising delegated or subordinate powers. The institution of elected local government could, therefore, have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. Today, however, as the Constitutional Court pointed out in *City of Cape Town and Other v Robertson and Other*, the Constitution has moved away from this hierarchical division of governmental power. It has ushered in a new vision of government in which the sphere of local government is interdependent, ‘inviolable and possesses the constitutional latitude within which to define and express its unique character’ subject to constraints permissible under our Constitution.”

# Much has changed since the 1980's

....



# Post-1996

Today, local government's role in democratic change, transformative constitutionalism and the pursuit of social justice hinges on a combination of municipalities' duties and powers.

In combination with the *trias politica* – separation of powers

The new 'check' on local government's execution of its legislative and executive functions

All of these powers and duties must however be understood against the background of Chapter 2 of the Constitution (Bill of Rights); the Chapter 3 call for cooperative government and the values underpinning the 1996 Constitution

# By-laws in a suite of local governance instrumentation

- The 'legislative' authority of local government translates into the power of municipalities to make by-laws and to adopt other regulatory instruments such as planning instruments with legal force
- By-laws are critical for municipalities' execution of their function as 'governor' – ie responsible for governance in local communities
- Process for the passing of by-laws legally prescribed in LG: Municipal Systems Act (s 12)
- However, by-laws but one kind of instrument in the governance arsenal of local government as implied by s 11 of the LG: Municipal Systems Act



# By-laws in a suite of local governance instrumentation

- Other governance instruments include:
  - **Structural instruments** eg formal forums, committees and internal structures of the municipality
  - **Procedural instruments** eg community participation, consultation, accessible council meetings, issuing of notices etc
  - **Rights-based instruments** eg access to information (official websites etc)
  - **Agreement-based instruments** eg MOUs, PPPs and EMCAs
  - **Planning instruments** eg IDPs and SDFs
- Understanding of the role of by-laws in good municipal governance requires understanding of the interplay between the different local governance instruments – development, adoption and actual use

# Sources of by-law making authority

- Municipalities derive their law by-law making authority from a mix of sources:
  - **1996 Constitution** – original law-making powers (s 156) (Sch 4B and 5B)
  - **National and provincial legislation** which assigns by-law-making powers to local government - assigned law-making powers (s 156) (Sch 4A and 5A)
- The Constitution furthermore gives significant scope for municipal by-law-making power with its slightly ‘understated’ provision for the principle of subsidiarity in s 156(5):

Apart from those powers that are derived directly from the Constitution or that are assigned to it in terms of national or provincial legislation, section 156(5) also provides that a **municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.**

# Sources of by-law making authority

- Constitution confers authority on municipalities to pass laws in respect of matters listed in Schedules 4B and 5B YET, this authority has ALSO been conferred on national and provincial governments albeit within limits
- In *Gauteng Development*-case the Constitutional Court made clear that neither national nor provincial spheres of government can, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs
- NB: While national and provincial spheres of government are entitled to pass laws regulating local government matters set out in Sch 4B and 5B, they are not entitled to pass laws giving themselves the power to administer or implement those laws. Municipalities themselves must exercise the power to **administer** or **implement** those laws.

# Subject matter of municipal by-laws

Matters over which a municipality has legislative and executive authority may be divided into three categories:

Those set out in Schedules 4B and 5B of the Const.

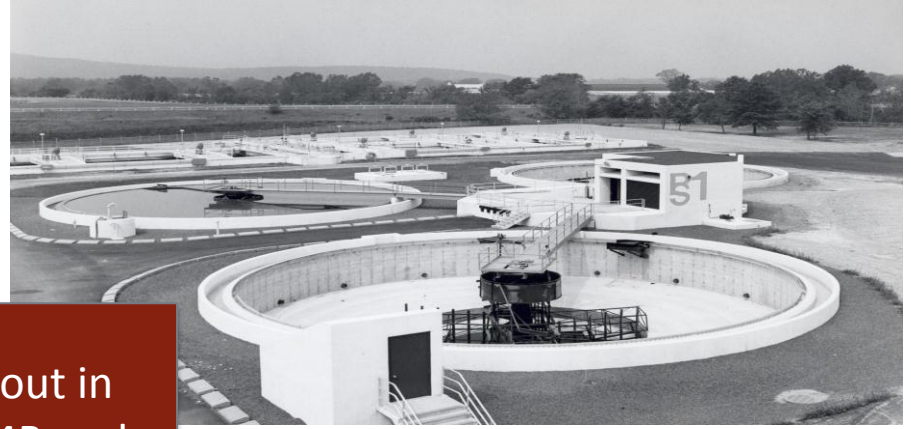
Those assigned to a municipality by national / provincial government

Those reasonably necessary for or incidental to the effective performance of its functions

*Le Sueur and Another v Ethekwini Municipality* – case shows that a municipality may base its power to pass legislation on a particular subject matter on ONE or all THREE of above categories

Court accepted that the “environment” may be classified as a matter that is reasonably necessary for or incidental to the effective performance of a municipality’s planning function and the passing of laws related to this function

# Big range of Schedule 4B and 5B matters



Those set out in Schedules 4B and 5B of the Const.



# Big range of Schedule 4B and 5B matters



Those set out in Schedules 4B and 5B of the Const.




# Powers assigned to local government by national legislation



Those assigned to a municipality by national / provincial government

# Incidental powers



Those reasonably  
necessary for or incidental  
to the effective  
performance of its  
functions

Incidental powers to be understood  
also against background of s 7(2) of  
the Constitution read with Bill of  
Rights ... “The STATE must respect,  
protect, promote and fulfil ...”



# Conflicting national, provincial and municipal laws

- Because of overlapping law-making authority with respect to Schs 4B and 5B matters, inevitable that some laws will on occasion conflict with one another
- Such conflicts resolved into s 156(3) of Constitution – ‘a bylaw in conflict with national or provincial legislation is invalid’
- Thus: municipalities must execute their legislative powers within parameters set by national or provincial legislation
- In the absence of any national or provincial matter, a municipality is however free to determine content of its legislative and executive decisions

# Common misconception

- Not true that national / provincial legislation always prevails over municipal law
- Example: S 29(1) of *National Building Regulations and Building Standards Act*
  - ‘the provisions of any law applicable to any local authority are hereby repealed in so far as they confer a power to make building regulations or by-laws regarding any matter provided for in this Act’
  - HOWEVER: Constitution grants original legislative power to local government over building regulations in Sch 4B
  - Municipal by-laws therefore prevail in this situation

# Unlocking the potential of by-laws as governance instruments

- The potential of by-laws in strengthening municipal governance should not be overlooked – it is not the only instrument in the municipal arsenal of governance instruments but it is critical *inter alia* as:
  - Enforceable steering instrument – regulation of affairs and relationships in the jurisdiction of the municipality
  - Legislative laboratory for government in its entirety – foreign example: “Merton Rule” in the UK on by-laws regulating the compulsory installation of renewable energy technology in all new buildings
  - An incentive-based instrument to encourage certain community behaviour OR as a command-and-control instrument to regulate in strict sense – penalties, prosecution etc

# What we know and what we don't

- More or less clear what the minimum scope of municipalities' legislative authority is
- The maximum scope must increasingly be explored – municipalities may have to rely on principle of subsidiarity and intergovernmental litigation and / or seeking of judicial clarification to test extent of its law-making authority
- Process for the development and adoption of by-laws is more or less clear BUT we are still finding our way with the implementation of, compliance with and enforcement of municipal bylaws

# What we know and what we don't

- The following seems in need of further research and experimentation:
  - Municipal courts – rationale, resources, jurisdiction etc
  - Cooperation between municipalities and other law enforcement agencies such as the national / provincial Green Scorpions / Environmental Management Inspectorate
  - The development of local 'standards' eg local standards for compacting and storage of hazardous waste and local standards for ambient air emissions into NEM: WA and NEM: AQA – significant scientific inputs necessary

# What we know and what we don't

- How best to:
  - approach the shared / overlapping law-making authority of district and local municipalities
  - ensure that all municipal by-laws:
    - Are well-written and carefully drafted
    - Are recent and up to date
    - Are in line with the Constitution and all applicable national and provincial legislation
    - Are enforceable (matters of drafting and as a resource-related matter)
    - Contain duties and concomitant penalties for non-compliance with such duties
  - devise measures to assist community members with by-law compliance
  - employ 'municipal police officers' as provided for in the SAPS Act

# Conclusion

South African society's perception of the **strength and success of the entire government is largely dependent on its experience of the 'rule of law' in the local sphere ....**

**Everyone in this room** has the duty to know and see to the responsible execution and unlocking of the potential of local government's by-law making authority.

This is part of the great **vision** for developmental local government in a democracy that **we can only together make work; and work well.**



**THANK YOU**