Vanderbilt Law Review

Volume 8
Issue 4 *Issue 4 - A Symposium on Local Government Law--Foreword--Local Government in the Larger Scheme of Things*

Article 5

6-1955

# Some Perspectives on Written Law Processes in Local Government

C. Dallas Sands

# SOME PERSPECTIVES ON WRITTEN LAW PROCESSES IN LOCAL GOVERNMENT

C. DALLAS SANDS*

There is a wide assortment of local governing bodies which exercise some measure, more or less, of legislative authority. Municipal governments generally have separate legislative bodies in the form of a council or a commission. Legislative powers may reside in county, township, parish, or borough organizations. And some law-making power, though usually more narrowly confined, may be exercised by special purpose units of local government such as school districts, drainage districts, irrigation districts, and the like.[1] In both volume and effect, the importance of the legislative output of all of these agencies should not be underestimated. Their impact is felt in many ways in modern urban society. Consider, for example, the extent to which the common law governing land tenure and transactions affecting land is being modified or displaced by locally enacted zoning legislation.

As a strict matter of the formal hierarchy of component parts in our legal system, the position of locally enacted law is a subordinate one. According to conventional doctrine, local governments possess no inherent legislative powers in their own right but only those which are delegated by state government. Thus, although locally enacted legislation draws upon the sustaining power of state sovereignty to establish its quality as law, it stands a step below enactments of the state legislative body in order of precedence. In any case of conflict between the two, provisions of the state enactment would override those that were enacted locally. In cities which exercise a measure of "home rule" under provisions of state constitutions which reserve certain matters for local determination, the only significant difference in this respect is that the devolution of legislative power proceeds through one less step than usual. Thus in a "home rule" state the local legislative body is on a par with the state legislature, each drawing its law-making authority direct from the constitution, with cases of conflict between state and local enactments resolvable in terms of

* Professor of Law, Rutgers University.

1. "The board [of directors of a school district] shall have power to make all needful rules and regulations for the organization, grading and government of schools in the district . . . ." MO. REV. STAT. § 165.393 (1949).

"The board of commissioners may divide the lands in the . . . Drainage District into classes or sub-drainage districts, and tax, locally assess, and impose forced contributions and acreage taxes on the lands . . . in proportion to the benefits derived by the land from the drainage." LA. REV. STAT. 38:1999 (1950).

constitutional construction to determine which agency had jurisdiction over the matter involved.[2]

In spite of their subordinate position in the legal system, however, the duly adopted ordinances, regulations, by-laws, or resolutions of the most inconspicuous agency of local government are just as obligatory and dispositive if they undertake to regulate conduct or affect legal relationships or status as the most formal and the most heralded edicts of a state or national legislature or constitutional convention.

Yet the law-making function and process in local government generally receives considerably less critical attention in the literature of the law than do most other phases of local or municipal government law. Bibliographical listings under such conventional headings as "municipal corporations" or "local government" disclose only scattered references to materials dealing with this phase of those subjects. Among current law school course books covering the area, two of them dignify the law-making process by recognition in a separate chapter, another gives it a part of a chapter, and the fourth fails to treat it at all as a separate subdivision of the subject. Although a substantial amount of space is taken up in digests and treatises in reporting the large output of judicial decisions relating to various aspects of the local law-making process, it is apparent from the narrow and repetitive nature of the issues which tend to arise in this field of litigation that judicial treatment of the subject does not often find the occasion to engage in constructive analysis of functions and processes. Nor does the term "legislation" as an index heading or the name given to a law school course generally signal any systematic attention devoted to local law-making. For example, occasional sparse footnote references or remarks are the best that can be found touching local law-making in any of the current law school course books on legislation.

The reasons for this neglect are not especially obscure. The gross of judicial expression in opinions dealing with matters in this area is in such a state as perhaps to warrant the rhetorical speculation as to whether there is any other area of law which is encumbered with as many decisions while yet illuminated with as little normative guidance as is this one. It is a characteristic of the field that on many kinds of questions the decisions purport to rest upon faded and threadbare cliches which express perfectly sound and acceptable principles, but ones that are extremely general and therefore not dispositive of real issues. Thus on a question regarding the effect of noncompliance with certain procedural requirements which are prescribed for use in the process of enacting a municipal ordinance, the opinion of a court announcing the decision is almost certain to speak in terms of a classi-

2. Van Gilden v. City of Madison, 222 Wis. 58, 267 N.W. 25 (1936). See McQUILLIN, MUNICIPAL CORPORATIONS §§ 4.85-4.88 (3d ed. 1949).

fication of such requirements according to whether they are mandatory or directory, or of whether anything has been done which might constitute substantial compliance, whereas very few of them will provide any real normative guidance to facilitate prediction as to what kinds of requirements will in the future be regarded as mandatory or directory, or identify factors of analysis by which the substantiality of incomplete compliance with other requirements can be determined.[3] This is a branch of law which does not lend itself to such ready and extensive reduction to general principles as do most others. The mechanics of the local enacting process are determined by statutes which vary more extensively from state to state than do the constitutional provisions which cover the same matters for higher levels of government. This dependence upon positive fiat combined with the absence of uniformity among pertinent provisions in different states renders the traditional logical processes of induction and generalization by which "common" or "general" principles of law are identified rather less meaningful than in some other areas of law. There is not very much predictive value, for example, in a decision which holds that in a particular state, under the pertinent statutory or charter provisions controlling the process of legislation in the affected city, a certain consequence attaches to the failure to publish the exact text of a proposed ordinance in a given manner for a given period of time before adoption.[4] The only kind of generalization that can validly be drawn from such a decision is one whose pertinence is defined in terms of judicial attitudes regarding the operative effect of similar patterns of noncompliance. The variable factors tend to overshadow the constant ones in such a generalization.

As a product of the continuing trend in the direction of comparatively greater reliance on legislative enactments to develop the substantive content of our system of law the operational significance of functional characteristics of the legislative process are coming to be better understood. This paper undertakes to explore the utility of a comparative analysis, based upon contrast and comparison of written-law processes in local government with those at other levels of government, as a source of insights applicable to the solution of problems which arise in connection with those processes. Its aim is to discover, if possible, additional sources of guidance for the decision of problems arising out of the local law-making function than results from merely identifying patternable types of problems and judicial attitudes with respect to them.

3. See *Id.*, §§ 16.76, 16.78.

4. See Stirling v. Plainfield, 136 N.J.L. 38, 53 A.2d 713 (1947). MCQUILLIN, *op. cit. supra* note 2, §§ 16.76-16.85, 16.88.

*The characteristics of local law making.*

There are characteristic differences which distinguish local legislative processes from those at other levels of government. Those pertaining to the composition and organization of the legislative body are perhaps the most noticeable. For example, the number of persons comprising the legislative branch is characteristically less in local government units than in Congress or in the state legislatures.[5] Fifty members, which is the number of aldermen in the City of Chicago, is an unusually large number. New York City's erstwhile Board of Aldermen, which numbered 72 members, probably came close to setting a record, although one which may yet be surpassed in municipalities which still retain some form of town meeting. The size of most municipal councils, on the other hand, ranges from five to fifteen members, with median sizes of nine to thirteen members, varying somewhat according to different municipal population ranges. The number is generally even less in cities having a commission form of government, with anywhere from three to seven commissioners. By way of contrast the size of state legislatures varies from the unusual low of forty-three members in Nebraska's unicameral legislature to a high of four hundred and twenty-four in New Hampshire, with most of them ranging upward from 100.

Another distinguishing factor is to be seen in the conventional pattern of organization for the two types of legislative bodies. Bicameral organization is used in the federal legislature and in all but one of the state legislatures. Although bicameral organization formulas for municipal legislative bodies had a bid for popularity in the past, and although such organization still can be found in a few cities, it is now extremely rare.

Also, there is generally a somewhat less distinct separation of governmental powers at the local level than is found at higher levels of government. Although the logic by which the same constitution is found to require varying degrees of separation of functions at different levels of government all of which are subject to its terms may be somewhat difficult to explain, the difference in constitutional application appears to be a well settled one. Statutes governing the organization and operation of municipal governing bodies have accordingly allowed a considerable amount of intermingling of legislative, judicial and executive functions.[6] This is perhaps most obviously true with respect to the commission form of government, in which the commis-

5. See MACDONALD, STATE AND LOCAL GOVERNMENT IN THE UNITED STATES 124, 199 (1955).

6. See ALA. CODE tit. 7, § 971 (1940), giving mayors of cities and corporate towns jurisdiction to hear and decide cases of forcible entry and detainer. And see Tumey v. Ohio, 273 U.S. 510 (1927).

sioners act separately as heads of the executive departments and collectively as the legislative branch of the city government.[7]

Another difference is that there is generally greater opportunity for members of the public to participate in the law-making process than is generally true at higher levels of government. Where used, devices such as the initiative and referendum and the town meeting afford avenues for direct participation. And the process of influencing legislative action is generally more direct and efficient for the simple reason that the population is smaller and there is easier access to the persons wielding legislative power and to the places where it is wielded.

One of the most distinctive characteristics of the local legislative process is its comparatively greater continuity. Ten states have annual sessions of the state legislature, and in the other thirty-eight sessions occur only every two years. Furthermore, over half of the state constitutions limit the length of the session to a stated number of days.[8] At the local level, by way of contrast, meetings of the town council or other legislative body are generally scheduled by law to be held at comparatively frequent intervals, often at least one day each month, accompanied not infrequently with authority for other meetings to be held when the occasion requires.[9] Although state constitutions provide for additional or "special" sessions of state legislatures generally when the governor determines such action to be necessary, extra sessions have not been frequent. There usually are political deterrents operating to prevent governors from calling such sessions. And the prevalent attitude seems to be that special sessions should not be called except when absolutely necessary in order to deal with extreme emergencies. Perhaps because there is generally less widespread publicity focused upon the operations of a town council or other local legislative body, on the other hand, there is less inhibition against calling it into session at other than times when regularly scheduled meetings are required by law.

Characteristic differences in the operating legislative processes of the sort that have been noted might be expected to constitute relevant factors conditioning the application of legal concepts which relate to written-law processes. What follows is a brief exploration of their relevance in each of the sequential phases of formulation, validation, and application of locally enacted law.

---

7. See ZINK, GOVERNMENT OF CITIES IN THE UNITED STATES c. XVII (1948).

8. THE BOOK OF THE STATES (1954-55) 106-07.

9. "[The council] . . . shall hold regular stated meetings for the transaction of business, at such times and places within the city as it shall prescribe, not less than 2 of which shall be held in each month. The mayor or any 3 members of the council may call special meetings thereof, notice of which, in writing, shall be given to each alderman, or be left at his place of residence at least 6 hours before the meeting. MICH. COMP. LAWS § 88.6 (1948).

*Formulation.*

The locus of the final power of decision is an important problem in the area of formulation of legislative policy. An important determinant for that purpose is the traditional constitutional conception inhibiting the delegation of legislative powers. Yet it is clear that restrictions upon the delegation of legislative powers are neither absolute nor automatic in their operation. The necessity for delegating legislative power has been often recognized as a factor to consider in determining when a delegation is constitutionally permissible.[10] The comparative ease or difficulty with which a given legislative body may change, amend, and adjust the existing laws to deal with rapidly changing situations is thus a factor to consider in order to determine whether there is justification for delegating legislative power to a subordinate agency. Accordingly, a city operating under a commission form of government might not present the constitutional necessity for the Commission to delegate power to the Police Commissioner to promulgate traffic regulations pursuant to general standards provided by ordinance.[11] This would be true if the commissioners, because they are also executive officials, are more or less continuously available to convene and function legislatively when the need arises, and in the absence of procedural restrictions imposed by law to impede rapid legislative action. Considerations of this kind might warrant the use of a graduated scale of strictness in the application of constitutional restrictions upon the delegation of legislative power, related to the degree of continuity in the legislative processes of the governmental unit in question.

Differences in legislative methods and conditions might also be regarded as significant in determining the impact of another phase of constitutional doctrine upon the process of formulating decisions underlying the actions of local legislative bodies. Reasonable opportunity for affected persons to make known their side of the matter in controversy is regarded as an essential safeguard of fairness in adjudicatory proceedings. This is the traditional hearing requirement of procedural due process. It is generally accepted, however, that the concept of procedural due process does not operate, for primarily historical reasons, to render *a legislative enactment* invalid because of failure to give interested and affected persons advance notice and an opportunity to be heard with regard to the proposal prior to its enactment.[12] Participation in representative government is allowed to take the place of the hearing procedure as the device for the protection of private interests in legislative proceedings. According to this way

10. See United States v. Grimaud, 220 U.S. 506 (1911); Brodbine v. Inhabitants of Revere, 182 Mass. 598, 66 N.E. 607 (1903).
11. *Cf.* City of Shreveport v. Herndon, 159 La. 113, 105 So. 244 (1925).
12. Home Telephone and Telegraph Co. v. Los Angeles, 211 U.S. 265 (1908).

of stating the difference in applicability of procedural requirements, the matter of classification to determine what action is adjudicatory and what is legislative becomes critical. With regard to the actions of Congress and state legislatures, however, tautology appears to play a large part in determining classification for this purpose. The absence of cases challenging federal or state statutes on the ground that their adoption was not preceded by notice and hearing indicates that such enactments are assumed to be legislative in nature insofar as the hearing requirements of procedural due process are concerned.[13] In other words, action is *legislative* because it is taken by the legislative branch of the government.

Yet, in spite of well recognized difficulties that are encountered in the application of any formal criteria for distinguishing between legislative and adjudicatory functions, our constitutional system of separation of powers is premised on the view that there is some identifiable difference. It is submitted that notwithstanding the numerous instances which can be cited where legislatures have enacted statutes applying to identified persons or closed classes, the difference between particularly and generality in the operational impact of a governmental fiat is the functional characteristic which serves to distinguish the two kinds of action. Whatever potentialities there might be for development of legislative self-restraint based on this conception of constitutional function, historical practice now precludes judicial veto of federal or state statutes having particular applicability because of failure to grant affected parties the opportunity for a hearing. Instead such judicial restraint as can be had is based upon various forms of constitutional guaranties of equality and uniformity in the operation of the laws or upon state constitutional restrictions against special, local, and private legislation.

The framework of the problem is not so definitely fixed, however, with respect to the actions of local agencies of government which are predominantly identified with the legislative branch. Because of a tendency toward greater intermingling of functions in local government, there is less security than perhaps might otherwise be warranted in reasoning that because action was taken by the legislative department it is therefore legislative action. The alternative is to classify actions according to a functional analysis for the purpose of determining the appropriateness of procedural methods. There might be some inclination to lay hold of the fact of greater opportunity for participation in the local law-making process, when that is the case either by virtue of more direct and broadly based political representation or

13. It has even been rare for a statute to be challenged on grounds of violating the constitutional separation of powers because its enactment constituted an exercise of other than legislative powers. See ROTTSCHAEFFER, CONSTITUTIONAL LAW 50-51 (1939).

because of greater facility for influencing official action, as a justification for greater relaxation of the hearing requirement than is found at higher levels. On the other hand, it seems proper to regard any relaxation of those requirements in connection with action having a particular impact as something that is tolerated only as a makeshift substitute for the more desirable kind of procedure, resorted to on grounds of necessity because of the inconvenience and awkwardness of a judicial type of hearing in the operation of a large centralized legislature. But such reasons for accepting the makeshift do not generally hold equal force in connection with local legislative bodies. That suggests the alternative approach, for the purpose of ascertaining applicability of the procedural due process requirement of notice and hearing, of determining whether action by the nominally legislative branch of local government is in fact legislative or not by reference to the particular or general nature of the impact of the action in question. Although action which affects interests in a particularized fashion may be classed as special legislation, it is hard to see why such action should not be informed by the hearing process where the size, continuity, and accessibility of the forum render that process a practical and expeditious one.[14]

*Validation.*

The effect of non-compliance with procedural requirements prescribed by superior law is a prevalent problem in the legislative process at whatever level it may take place. A probable reason why courts have not exercised greater freedom to declare state statutes invalid on these grounds has been an awareness of the debilitating and unsettling effect which more extensive judicial interference might have upon the body of statute law.[15] The very ponderous and slow-moving nature of the process at the state level removes any assurance that the gap created by holding an enactment invalid on a technical ground of procedural irregularity would or could be easily or speedily repaired. Those considerations do not ordinarily have similar force in the case of municipal legislation because of the greater continuity and flexibility which has been noticed in the legislative process at that level. If an ordinance is held invalid because it was defectively enacted, proper reenactment would not ordinarily involve intolerable delays and the cause of responsibility and regularity with respect to procedural requirements would be served. Yet, the very flexibility and informality of the local legislative process supplies additional reason for scrupulous

14. See Wood v. Town of Avondale, 72 Ariz. 217, 232 P.2d 963 (1951) (zoning ordinance prescribing set-back lines which was adopted without the notice and hearing that was required by statute, held invalid because of violation of procedural due process).

15. Field v. Clark, 143 U.S. 649 (1892); Williams v. MacFeeley, 186 Ga. 145, 197 S.E. 225 (1938).

insistence upon adherence to the minimal procedural requirements, because the easier it is to make new laws, the greater is the importance of procedural safeguards to enable persons who may be affected by the laws to understand what is taking place and make their wishes known prior to the moment of decision.

*Application.*

Problems relating to the discovery and proof of written law, although the product of validation procedures and requirements, affect a necessary first step in the process of application. They comprise a much neglected area of local government law. With respect to written law generally, since it is recorded in the form of an exclusively authoritative written text, it becomes important to be able to identify precisely what text is authentic. That this is true is emphasized by the fact that problems involved in determining the applicability of written law are uniformly handled by courts as problems of *interpretation or construction of the written text.* The approach to the decisional process is that of ascertaining what [the text of] the law *means,* instead of ascertaining what the law *is* by reference to all logically persuasive data including various possible forms of textual expression which may have been offered previously by judges, juristic writers, and publicists.

Even the discovery of municipal legislation, in the form of ordinances, resolutions, by-laws, or by whatever other name they may be called, is generally beset with manifold uncertainties. Some of our larger cities have systematic collections or compilations of their ordinances, but the evidentiary standing of such collections varies widely. In many of the units of local government which have legislative authority, however, there is simply no convenient published record of enactments. The original documents are generally kept on file in the office of the city clerk or other similar official. In some of the smaller municipalities, townships, and the like, they may be kept by the presiding officer of the local legislative body. Persons having their custody frequently will have had no prior experience or training in methods of filing, so that documents of legislative enactments may become intermingled and lost in a mass of minutes and other official papers. Adding to the confusion is the fact that many of the officials who have custody of the documents hold office by popular election so that incumbents in the office change more or less frequently. Everyone knows how hard it is to achieve a working knowledge of the contents of files that have been organized and kept by someone else. For reasons of this kind it would not be surprising if ordinances have been lost, or forgotten by public officials as well as members of the public.

But the reference job has not been completed merely by discovery of

a copy of a text of an ordinance. The problem of establishing the authenticity of a given text of a legislative enactment is a more sensitive one and a more difficult one in the case of municipal legislation than in the case of state legislation. In the first place the risk of uncertainty and the possibility of disagreement and controversy is greater because of the variety of detailed requirements governing the enacting process which are to be found in statutes or charter provisions.[16] Furthermore, the looseness of record-keeping practices in many cities, especially but not exclusively among the relatively small ones, makes it probable that discrepancies among various renderings of the text of an enactment might occur. It is of course true that this must be regarded as no more than an academic problem unless serious and substantial textual irregularities may be expected to occur with some frequency. Problems regarding the effect of noncompliance with procedural requirements for enactment have in the past generally been presented as problems of validity, vel non, of the putative enactment. For that reason the digests provide little information as to the incidence of problems of textual regularity. The rate of incidence of such problems with respect to state statutes, however, has been sufficiently high in the past as to suggest that they would occur with substantial frequency at the local level, especially since conditions might be expected to create an even greater likelihood of irregularity at the local level than at the state level.[17]

The statutes of many of the states are fairly exacting in the methods which they prescribe to be followed in the enactment of local ordinances. Besides various procedural requirements, they often specify in some detail what records shall be kept, and what must be done by way of promulgation or publication. Sometimes they explicitly define the evidentuary value of certain sources in which the ordinances are to be found. By way of illustration, the relevant section of the Alabama statutes is as follows:

> "All ordinances shall, as soon as practicable after their passage, be recorded in a book kept for that purpose and be authenticated by the signature of the clerk, and all ordinances or regulations except as hereinafter provided, of a general or permanent nature shall be published in some newspaper of general circulation in the city or town, but if no such newspaper is published within the limits of the corporation, such ordinances or resolutions may be published by posting copies thereof in three public places within the limits of the city or town, one of which places shall be at the post office or the mayor's office in such city or town. When the ordinance is published in the newspaper, it shall take effect from and after the time it shall first appear in said

16. See McQUILLIN, *op. cit. supra* note 2, c. 16.
17. Cases involving problems as to the textual regularity of statutes are digested in the American Digest System under *Statutes*, key numbers 283-286.

> publication, and when published by posting it shall take effect five days thereafter, except as herein otherwise provided. Immediately following the record of any ordinance the clerk shall append a certificate stating therein the time and manner of publication thereof, which certificate shall be presumptive of the facts stated therein. . . ."[18]

Most of the litigation which has occurred under that section has had to do with the sufficiency of the publication, in its character as a condition precedent to the validity of an ordinance. The section would seem to be laden with other problems of authenticity, although such questions have not often been raised in litigation. The full scope of those problems cannot be appreciated without some knowledge of the actual functioning of a city government. Although methods are never entirely uniform even for different cities operating under the same statutory authority, the following practices have been observed. The texts of all ordinances may be set forth in the minutes of council or commission meetings. The minutes are kept by the city clerk and are signed by each councilman or commissioner. Thereafter the ordinances are published as required by the statute. Then the clerk records a copy of the ordinance in the ordinance book. In some cities the ordinance book is a loose leaf volume, containing typewritten copies made from the original documents in the minute book. Sometimes a ledger book is used, and when an ordinance is published as required in a local newspaper, it is clipped out and the clipping pasted into the ledger book. In some instances the record book is no more than a register of the ordinances that have been adopted, the clerk merely keeping a notebook in which he makes a notation of each ordinance passed, the subject to which it relates, the date it was passed, a certification that it has published in a certain manner on certain dates, and a reference to the place in the files or the books containing the minutes where it can be found. Where a copy of the ordinance is actually set out in the ordinance book, the clerk usually certifies that it was duly and legally adopted and that as so adopted it is truly and correctly set out therein, along with the facts as to compliance with the requirement of publication.

From this description of official practices it can be seen that putative texts of an ordinance can regularly be found written down in three different places: the minute book, the ordinance record book, and the required newspaper notice. It is not at all easy to determine, even as a matter of principle, which of these, if any, should prevail in any case of conflict or discrepancy among them. The copy found in the minute entry is certainly the original document and has a certain claim to authenticity and priority because of the fact that the minutes containing that copy are signed by the members of the commission or

18. ALA. CODE tit. 37, § 462 (1940).

council in their official capacity as local legislators. The text as printed in the newspaper notice can also be rationally supported. The statute requires publication as a condition precedent to validity, and it is the ordinance as published which, according to the statute, becomes effective. Thus if the wording of the original document as attested in the minutes should disagree with that which is published in the newspaper, then the copy found in the minutes would not have gone through all of the steps which are required in order for it to become effective, and the published text would never have been adopted by legislative action. A third possibility is that the copy as entered in the ordinance record book might be entitled to preference because of the official certification by the clerk that it is true and correctly set out and was duly and legally adopted. This position would most nearly coincide with the enrolled-bill rule as applied to determine the authenticity of a state statute. The suitability of its application to municipal legislation depends upon a judgment as to the reliability of the clerk's records. Misgivings on that score might well tip the scales in favor of one of the other two texts in case of a discrepancy among them. Thus the court might hold that the recording requirement was only directory and not a condition precedent to establishing a legally effective text. But if there were a conflict between the minutes and the published text, the court might well hold that neither could be legally binding because the former had not undergone a required condition precedent to validity and the latter had never been enacted in that form. Or as a practical matter, a court might feel justified in simply comparing the different texts for the purpose of arriving at a composite interpretation which it would give effect to as the law.

The statutes of some states are more explicit than the Alabama statute with respect to the evidentiary quality of certain official records of municipal legislation. In Indiana for instance, after requirements similar to those in the Alabama statute quoted above, it is provided that the record of the ordinance as kept and certified in the ordinance book, "shall be presumptive evidence of the passage and going into effect of such ordinance."[19] And the Illinois statute is to the following effect:

> "The municipal clerk shall record, in a book used exclusively for that purpose, all ordinances passed by the corporate authorities. Immediately following each ordinance the municipal clerk shall make a memorandum of the date of the passage and of the publication or posting, where required, of the ordinance. This record and memorandum, or a certified copy thereof, shall be prima facie evidence of the *contents,* passage, and of the publication or posting of ordinances. . . ."[20] (Italics supplied.)

19. IND. ANN. STAT., § 48-1406 (Burns repl. 1950)
20. ILL. ANN. STAT., § 21-1351 (rev. 1942)

These provisions would not apparently change the considerations from what they were under the Alabama statute. It might be argued that when the ordinance book is expressly made only "prima facie" or "presumptive" by inference one of the other texts would prevail, as better evidence, in the event of conflict.

Another factor affecting the discovery of an authentic text is the problem of textual currency. Much has been said but not so much done about the need for codification of municipal ordinances.[21] And the least has been done about it in the smaller cities and towns, where the need is probably greatest because legislative records are apt to be least reliably kept. Among cities having more than 100,000 population it is not unusual to have a code which has been prepared as recently perhaps as within the past quarter of a century. What passes for a "code," however, may be anything from an enacted collection to one that is designated as "authorized" or "official" for some reason short of enactment, or even a private collection having no legal sanction. As in the case of statutes at higher levels of government, a collection provides an exclusive source of a city's ordinances only when it is newly enacted in its compiled form accompanied by the repeal of all of the legislation which preceded it. Short of enactment in compiled form, a collection cannot operate as anything more than *evidence* of the laws which it contains, irrespective of what manner of governmental action may have transpired with relation to it so as to inspire references to it as being "authentic" or "official." Furthermore, except where enactment is accompanied by absolute repeal of all previously enacted ordinances, an ordinance which happened to be omitted from the collection, inadvertently or otherwise, would continue in effect in the absence of conflict between its provisions and provisions in the code. And the status of prior ordinances with relation to an enacted collection is frequently complicated by a loosely and inaccurately phrased repealing clause abrogating "all prior ordinances in conflict with" either the code or the ordinance adopting it. Although probably a higher percentage of municipal "codes" are enacted than is true of collections of state statutes, frequently very little attention is given to the matter of keeping them up to date. Under those circumstances, thorough research may require examination of a code that was enacted several years previously plus the separate ordinances that were subsequently enacted. Because of the extent of loose, irregular, and frequently uninformed practices which so often characterize the treatment of these matters at the local level, the problems that are raised thereby need to be taken seriously.

Beyond the rather specialized technical problems of discovery and

21. See CODIFICATION OF MUNICIPAL ORDINANCES, National Institute of Municipal Law Officers, Report No. 95 (1943), and Report No. 132 (1950).

proof, observed differences in the legislative process at the local level may also make a difference in the process of legislative interpretation. The comparatively greater facility with which local enactments can be amended or otherwise changed legislatively might afford a court greater freedom to maximize the factor of reliance upon expressed meaning according to conventional acceptation of the language used, at the expense of the comparatively more subjective "intent" element. If such an approach produces a result not wanted by the law makers they can easily and quickly make the change legislatively, and the cause of responsible and careful communication would be served.

These are some of the kinds of operational consequences which come to mind as logically inferable from the observable differences between the characteristics of the legislative processes at different levels of government. No doubt other consequences may be discoverable by further development of this factor in analysis. And comparative insights produced by this approach might also help in the solution of written-law problems arising at other levels of government.