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WHY IT'S DIFFICULT TO CHANGE PLANNING LAWS IN AFRICAN COUNTRIES?

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INTRODUCTION

Since most Africanⁱ countries became independent there has been a concern amongst officials, professionals and international development agencies that better planning laws are needed. In this context the term planning laws refers to the body of laws (national statutes, ministerial proclamations, state/provincial laws and local by-laws or regulations) that govern both the making of spatial plans – at a city, town, village or district level – as well as the regulation of land use and land development. This concern has very seldom translated into new law that has been implemented successfully or, where there has been implementation it has not been for the purposes originally envisaged for that law. In many cases the planning law inherited from the earlier colonial power remains on the statute books, largely unchanged. In both the cases where new law has been enacted and where the old law remains in force there have been increasingly publicised cases of governments using those laws to justify large-scale eviction and demolition campaigns. The legislation has also been unable to check excessive developments driven by the private sector. Planning law thus has tended to have the effect of being no more than an irritant to developers but an oppressive force for the poor, without yielding any significant societal benefits.

Currently efforts continue to revise the planning legislation in African countries, generally funded by international agencies and donors. This document asks the question why it is so difficult to effect change. It then concludes with ideas for improving these endeavours in the future. At the heart of the conundrum is the principle that planning law is meant to reflect and assert the public interest in order to moderate and direct the impacts of private interests, especially in relation to land development. Under the various colonial regimes in place in different African countries planning law was unabashedly used to assert the interests of a small minority against the interests of the majority. Since independence all indications are that this situation has endured, albeit with a different minority elite reaping the benefits.

It goes without saying that African countries are diverse and varied. From the perspectives both of law-making and the practice of planning there are widely different traditions, histories and experiences, not to forget very different economic, social and political contexts. Nevertheless the range of experiences with planning law reform is remarkably similar. The success rate is poor across the board.

The hypothesis that this paper sets out to examine is that the drafting processes in most cases fail on two counts:

- Firstly, they fail to identify the key stakeholders in the drafting and implementation of a new planning law and to identify each set of stakeholders' economic and political interests accurately and openly; and
- Secondly, they fail to follow the basic rules of 'good regulation' that most developed countries at least try to followⁱⁱ.

The paper does not argue that either of these failures is the result of bad intentions on any person or organization's part. Nor does it pretend that similar mistakes are not made in many developed countries and other parts of the world on a regular basis. It does however contend that the ongoing failure to address these shortcomings means that future attempts to reform, update or even completely transform planning laws in African countries are unlikely to succeed. Systems of planning law are necessary to provide a framework of rules to mediate and regulate competing pressures and interests. A proper understanding of these pressures and interests is thus a prerequisite for making progress in planning law reform. A proper understanding entails looking beneath the surface. While a particular stakeholder or type of stakeholder may well profess, or even

believe, that they pursue regulatory change for a particular reason there may well be other less obvious, or less palatable, motivations as well. Understanding these at the outset is important to avoid the issues emerging at final stages of a process to ambush the final passage of a bill into legislation.

Planning law reform is difficult in any context, any country, anywhere in the world. By its nature planning law is complex, it has to balance the competing interests of the public and those of individual households and businesses, each of which seeks to maximise its own economic, social and environmental opportunities. It has the potential either to be redistributive or to consolidate existing privilege. Within a rapidly changing economic scene, one in which many countries are grappling with far-reaching and deep shifts in the fundamentals of their economies, this role of planning law in shaping equitable economic outcomes is centrally important. Planners cannot anticipate the future any better than a layperson, yet planning law provides the profession with legal instruments to restrict household and firm activities in order to achieve objectives that lie in the future. Crucially in African contexts planning law determines which buildings are legal and which are not. When this final characteristic of planning law is seen in juxtaposition with insecure and unpredictable land rights then planning law represents an important fault line running through society.

A quick glance through the numerous planning law reform reviews appointed by the government of the United Kingdom, most of which have recommended far-reaching changes to the law in that country, is all that is needed to appreciate that planning law reform is neither easy nor straightforward. It is the inherent complexity of the underlying task that makes it so difficult. In African countries it is no less complex. Just as nobody in the UK would think that a foreign expert – even a truly brilliant foreign expert or even, for that matter, a truly brilliant British expert - could be expected to design a one-off, definitive solution to the question of how best to plan for and regulate land development so it is hard to imagine that such a person, however gifted, could do the same for Malawi, Uganda or Burkina Faso.

One might ask does it matter that efforts to reform planning laws in Africa have failed so dismally? Inadequate, ineffective planning law is hardly the greatest of the problems facing the African continent. One could also argue that there is so little capacity – technical or political - to implement planning law in most countries that the quality of the law is neither here nor there? In the language of the ‘good regulation’ movement this would effectively be advocating a ‘do nothing’ approach: leave things as they are and wait until there is capacity to implement the laws. Without detracting at all from the overall need for a lighter regulatory touch this work argues that better planning law is essential for sustainable urban development in Africa, itself a prerequisite for economic growth. Better does not mean more. To be better though, law reform has to be built on a sound understanding of the social, economic and environmental dynamics that need better management and regulation. It also has to be grounded in an understanding of what will drive change in the actions of the personnel responsible for its implementation. The great risk involved in the drafting of a planning law as opposed to, for example, a planning policy or even a plan, is that one’s outputs can easily and quickly assume the force of law. In most contexts that would be a great relief to a legal draftsman but this context caution is called for as the resulting law can be used both to significantly worsen the living conditions of large numbers of people and can effectively tie up what limited planning resources there are in a country in the impossible task of implementing an unworkable system.

BACKGROUND TO THIS WORK

This work is being written while I am on a sabbatical from my usual occupation which is that of an independent consultant working in South, Southern and Eastern Africa on the revision of planning laws and policies. Before becoming a consultant I worked in the South African government’s Department of Land Affairs and before that in the City Council planning departments of Cape Town and Johannesburg. The thinking behind this work was

seeded by three discussions I have had with knowledgeable and enthusiastic proponents of planning law reform. I will describe each of these first.

1. In 1993 I was sent by my employer, the Cape Town City Council, to the United Kingdom to speak to experts on planning law so as to help the City's contributions to national debates in South Africa on the shape of a post-apartheid planning system. The trip was very rewarding and I established invaluable professional connections that have lasted nearly twenty years. One of the people I met, now deceased, gave me a hand-typed 'model planning law' that he said he had provided as a legal and planning expert to a number of small island developing countries and which they had all enacted. He indicated the blank spaces he had left in the text where I could simply insert 'South Africa' and he assured me that the law would work very well, subject to minor tweaks of legal language. I put the document into my bag, have kept it safely ever since but have never used it.
2. In 2004 I was working in Addis Ababa on urban land regulations. The representative of a large donor agency approached me with what seemed like a tantalising offer. Would I be prepared to draft a new Urban Planning Law for Ethiopia? Yes, I replied, please send me a draft contract. The next day a contract arrived for five days of work: one to prepare a draft law, three days of workshops on the draft law and a final day to amend the draft in the light of comments received at the workshop. When I indicated that I thought this level of effort was on the low side the surprised official replied "but you just need to take your South African law for integrated development plans and make some small changes to that for Ethiopia'. Reluctantly I turned down what had initially seemed like such a prospect of interesting work.
3. When I mentioned my conversation with the UK planning lawyer, he of the model law for small island developing countries, to an urban development expert with a large international development organization, I was immediately asked if I could please send a copy so that it could be distributed to African countries in need of new planning legislation.

I persuaded the World Bank official that I did not think that a very smart idea. As I set out the reasons why I was reluctant to be party to such an apparently helpful gesture it struck me that the time was ripe to propose an argument why the question of new planning laws for African countries is more complicated than it seems and why we need to work out a way of crafting new legislative interventions more intelligently.

In doing so I am aware that I am treading in the footsteps of Professor Patrick McAuslan who has done a great deal to illustrate just how unwise it is to simply lift a law from one context and expect it to work in another, particularly in the context of planning and land law in Africa.ⁱⁱⁱ His work also demonstrates the shortcomings of the 'one size fits all' approach to planning legislation. He reminds us also that such an approach is not new. In the late 1940s the British Colonial Office developed a 'model town and country planning law' for use across Africa and the Caribbean.^{iv} Professor McAuslan concludes that 'the diaspora of town and country planning law has been used in country after country to keep the urban masses at bay; to deny them lawful homes and livelihoods; to reinforce the powers of officials; and to weaken the institutions of civil society'.^v This gloomy assessment, which fits very neatly with my professional experience, suggests that a new model is needed. He argues that this model has to be one that is in step with efforts to 'address the democratic deficit'.^{vi} It also needs to be in line with a number of other trends that are emerging and which bring the question of appropriate planning law in Africa into sharp focus. Among these are:

1. The renewed interest in making markets – in this case (mainly urban) land development markets – work better for the poor.

2. The interest in governance, which is necessarily determined by the legal frameworks in terms of which governing takes place, and which fits with Professor McAuslan's argument that new planning laws need to 'support each state's democratic philosophy'^{vii}.
3. The pressure of the MDG dealing with improving the lives of slumdweller.
4. The sharper gaze, both internationally and domestically, on the demolition of structures that don't comply with applicable planning or building laws.
5. The importance placed on decentralisation in Africa by international organizations and major donors, with the consequent need to review and change planning laws to accommodate the decentralisation of planning powers and functions.

The need thus arises to revive the debate on what constitutes an effective planning law, why are new planning laws in most African countries ineffective and how might the process of planning law reform be undertaken in a different and better way. As the Seidmans wrote in 1996, "the complaint 'we have good laws, but bad implementation' constitutes an oxymoron"^{viii}. It is no good to draft a law that appears to address a wide range of concerns yet which is incapable of being implemented, not just because 'capacity is limited' or 'there is no political will' but rather – or also – because it fails to address the reasons why people, whether they are politicians, officials, planners or individual households or firms, behave in particular ways. Many of the efforts to write new planning law for African countries are dead in the water, a fact that is often quietly, if guiltily, acknowledged by participants in the drafting process. This work aims to make a modest start to addressing this problem and charting a new way ahead. This paper is the first step in a process of building an argument that will be completed later in the year^{ix}.

WHO THINKS THAT PLANNING LAWS SHOULD CHANGE?

The interesting point is that there is no disagreement among the main stakeholders in the international urban development and planning debates that planning laws (among many other laws as well) should change. This is not a field in which there is any disputing the need for change. As to how to effect that change there is not a great deal of dispute either. The general method adopted is one where the government of a country requests assistance with the revision of its planning laws. The donor or other organization generally responds in the affirmative, there not being much dispute that the laws need to change. A consulting firm is then appointed, a work plan drawn up and the process commences. These processes can be designed be anything between six months and a couple of years. The work plan will meticulously record that at the culmination of the consultancy a bill will be presented to the country's parliament – and passed.

UN-Habitat reports have consistently called for the reform of planning laws, particularly the regulation of land use and development. The most recent example is found in the 2009 Global Report on Human Settlements, *Planning Sustainable Cities*: "[a]n important precondition for more effective urban planning is that national legislation is up to date and is responsive to current urban issues"^x. The need for new and better planning law is summed up by UN-Habitat as follows: "The broad objective of urban development and planning regulations is to ensure the orderly development of urban areas. In particular it aims at:

- i. Providing a good living environment for all by ensuring safety, amenity, accessibility, energy conservation and environmental protection;
- ii. Providing a safe, healthy, useable, serviceable, pleasant and easily maintained environment for all commercial, industrial, civic and community land users. In addition it is aimed at preventing disturbance to neighbouring environment particularly by the industrial land users.
- iii. Ensuring that any conflicting requirements of different land uses are reconciled particularly among mixed land users; and

- iv. Providing orderly and progressive development of land in urban areas and preserve amenities on that land as well as promoting environmental control and socio-economic development.”^{xi}

The World Bank’s 2009 Urban Strategy document asks:

“How then should cities proceed? Experience suggests that only a few regulations are critical: minimum plot sizes and minimum apartment sizes, limitations on floor area ratios, zoning plans that limit the type of use and the intensity of use of urban land, and land subdivision ratios of developable and saleable land in new greenfield developments. Cities can use urban planning audits to determine which regulations should be changed to enable density and urban form to move in tandem with urbanization. The Bank is developing a global knowledge product for cities to systematically assess urban planning regulations and guidelines and their potential distortionary effects.”

All the major donors as well as bodies such as the Cities Alliance, when they mention the issue are united in their concern that regulatory reform in urban (and rural) planning is important. Many donors have funded programmes to effect law reform in the sector.

The governments of African countries are also generally consistent in their statements on the subject: better planning law is needed to bring order and control to an illegal, informal, untidy and out of control situation; it is needed to modernise the society; and to enable governments to exert a stronger influence over spatial patterns.

In practice this often means that there is a harmonious chorus, at least at the outset of any initiative to change the law. As the process unfolds and the gaps between what the government and the donor/international organization anticipate start to emerge so unease on the part of the donors and/or international organizations emerges and the positions of the government representatives start to harden. The consultant(s) – generally a foreign technical expert or a multi-national team including ‘local’ experts – are left to mediate the increasingly dysfunctional situation while constantly keeping a weather eye on the ticking clock. This is not a good recipe for international cooperation, nor for good law-making.

Increasingly, and rightly, the international urban debate is dominated by the need to secure and promote the ‘right to the city’, especially for the very poor. Much of the international effort to reshape and rewrite planning laws is founded on the belief that new planning laws – along with new land and housing laws – are essential to realize what might otherwise remain a rather abstract notion, the right to the city.

WHY IS AFRICA DIFFERENT?

Planning law has a poor record in Africa. It has provided oppressive regimes, whether colonial or independent, with a useful legal mechanism for restricting social and economic opportunities for most people and, in some cases, of strengthening those opportunities for a minority. Not infrequently it has been used even more directly to justify campaigns of demolition or eviction, as was notoriously the case with Zimbabwe’s Operation Murambatsvina in 2005. Despite this unfortunate past the call for new, revitalised, modernised planning laws grows only louder.

As one approaches the question of what planning law would be good for Africa it is important to identify the ambit of planning law. Traditionally, globally, planning law has fulfilled two main functions. Firstly, it provides the legal framework in terms of which plans are made: who makes the plans, what processes have to be followed in the plan-making, what is the content of the plan, what is its legal effect. This function is often

described as covering 'forward planning', but many other terms are also used such as physical planning, spatial planning, master planning, strategic planning, development planning and so on. Secondly, it regulates the process of approving the development or change of use of land: what land use changes or land developments require permission and in which areas; the process to be followed by a person wishing to obtain approval for a proposed land use change or land development; the factors to be taken into account by decision-makers when considering an application for permission, including the effect of any approved plan; the legal consequences of a decision to approve an application for permission such as the payment of infrastructure and services charges and the compliance with specified conditions relating to environmental protection, the need for any additional approvals or time limits within which to exercise the newly granted rights. In some cases there is also a procedure provided for appealing against the initial decision. This function is generally described as development control or development management. In general the planning laws currently in place in African countries tackle all of these functions. In practice they fail to achieve any of the outcomes that one might expect from such laws. There are very few up to date plans and those that are in place are widely regarded as highly unrealistic and wishful. The exercise of development control functions is notoriously erratic and unpredictable and it is widely acknowledged that the overwhelming majority of buildings and developments are built in contravention of planning laws.

There are a number of assumptions that underpin the generally accepted ambit of planning laws described above. They could be described as 'universal' in that they could be applied to any planning system in the world. These assumptions include:

1. That planning laws (or indeed any laws) enjoy legitimacy in the eyes of the public;
2. That there are legitimate and effective structures of government able to carry out the functions described above in an impartial and reasonable manner.
3. That planning law is needed to control development, that unrestricted development is acknowledged to be a 'public bad' that must be fought rigorously.
4. That people value the benefits of a planning system and so are willing to invest time and money to participate in the legal process in order to improve the value of their land or buildings.
5. That government authorities are able to appreciate the benefits of a planning system for, *inter alia*, budgeting for infrastructure investment or establishing the land values needed to support a property tax.

In African countries however few of these assumptions hold. In the paragraphs below I will describe the ways in which each of the five assumptions described above falters in an African context.

Legitimacy of the legislation. The oft-repeated mantra that all planning laws in Africa are inherited from colonial legislation is only partly true. Most countries have over the past fifty years amended or even replaced those laws. In some cases the changes have seemed dramatic, at least on paper. In practice however the grip of the colonial legislation over professional practice and profession mindsets, particularly within government bureaucracies, remains strong. Officials see themselves as a bastion against informality, illegality and anarchy. Their views are often complemented by those of their political principals who see the laws as serving very much the same purposes as their colonial forebears did: to protect the quality of the suburbs or enclaves in which the elite lives and to punish transgressors for failing to comply with the often arcane prescriptions of the law. This leads inexorably to a situation where there is a widespread and generally accurate perception that there are 'two laws': one for the well to do and another for the rest. Consequently there is very little respect for the law from either the well to do or the rest. There is a fundamental problem with the legitimacy of the legislation.

Legitimate and effective structures of government. There has been a significant increase in the number of democratically elected governments on the continent over the past twenty years. This has improved but not

done away with the problem of widely held views that African governments' legitimacy is compromised both by questionable electoral practices and corruption. The problem is particularly acute in relation to local government, which is frequently appointed rather than elected. Strengthening of local government and decentralisation of functions to local government is widespread across the continent, driven by donor and international organizations. A growing trend is that political parties in opposition to a government at a national level are strengthening their representation in local government, in many cases assuming power over important cities^{xii}. The inevitable political tension that then arises between national and local government has the effect of weakening the legitimacy of both, and of weakening national governments' support for decentralisation. The proposition that decentralisation is worth pursuing is considerably easier to make when there is one hegemonic political party. In a multiparty context, and especially where different parties control national and local government, the argument loses cogency.

Development control is a public good. In a context where land markets are often dysfunctional, at least when seen through a conventional market lens, where poor people battle tremendously hard to save enough money to invest in larger, more comfortable – albeit often unlawful – homes and where business investment by local and international investors is both scarce and scared off by government regulation, it is very difficult to make the case for more control over land development. While there is no doubt that control is necessary to protect public rights of way (roads, railway lines and access for emergency vehicles) as well as to minimise the risk of natural disasters such as flooding or landslides the tendency in current planning law is to try to control every aspect of land development. The impossibility of achieving this objective leads to a wholesale rejection of the concept of development control. The risk of natural disaster is then compounded by the risk of politically-driven eviction or demolition campaigns, all contributing to a highly insecure situation for most urban citizens.

There is value in participating in the planning system. Either as an applicant or objector in a planning permission process or as a participant in a plan-making process there is generally very little value in participating. The process of obtaining planning permission is widely held to be corrupt, with the outcome determined more by the payment of bribes or the exertion of political influence than by any consideration of 'planning' issues. The making of a local plan is equally widely considered to be an exercise in futility as the final output of the exercise is seldom, if ever, applied to future decision-making over land development in the area. Although some current planning laws require public participation in plan-making the cases where individuals or communities were willing or able to influence the outcome of the plan are exceptional. The model process for plan making remains unfortunately one in which the technical work is carried out by expatriate consultants, flown in for the purposes of that particular project, working with a handful of officials.

The planning system forms part of a virtuous cycle of urban management. The weak capacity of local government in particular, and government in general, coupled with the high levels of absolute and relative poverty make it almost impossible for a functional planning system to play the supportive role required by a well managed town or city. Infrastructure provision is programmed according to budget availability, which in turn is frequently determined by the availability of finance from an external source either by way of a loan or grant from a donor or international organization. A scenario in which a local council is able to align infrastructure programming with planned expansion or in which the probable future consumption of municipal services can be anticipated by monitoring the operation of the development control system is simply not realistic, even in the most well managed African town and cities. Similarly, the local property-based taxation systems are weak, revenue collection rates are low and there is seldom any formal or informal connection between the granting of development rights through the planning system and the revaluation of property via the property taxation system.

GOING FORWARD: CAN PLANNING LAW REFORM BE IMPROVED

The premise behind this work is that planning law reform processes can be improved. In the sections below three broad themes are explored. The first looks at the importance of properly understanding the interests of the stakeholders in the resulting planning system while designing that system through the drafting of a new law. The second looks at five ‘principles of good regulation’ and assesses them in the light of the constraints generally experienced when trying to change planning laws in African countries. The third, using the principles discussed previously, starts to look at ways in which the law reform process can be designed differently.

IDENTIFYING THE INTERESTS OF STAKEHOLDERS EFFECTIVELY

The Seidmans make the important point that “behaviour in the face of the rule of law, like all behaviour, invariably has complex, multiple causes”^{xiii}. The behaviour to be shaped and regulated by planning law is extremely complex. African countries planning laws have to:

- Provide a sound basis for infrastructure planning;
- Secure the development rights for investors;
- Regularize informal settlements;
- Protect environmental resources; or
- Mitigate environmental risks.

In order to fulfil these many mandates the law has to be predicated on a reasonably thorough understanding of the behaviours of:

- infrastructure engineers;
- local government financial officers;
- developers and their professional service providers such as lawyers, planners and architects;
- low-income residents of informal settlements;
- property owners (both residential and commercial & industrial);
- officials in other departments responsible for sectors such as mining, agriculture, environmental management, housing and water; and, of course
- planning officials.

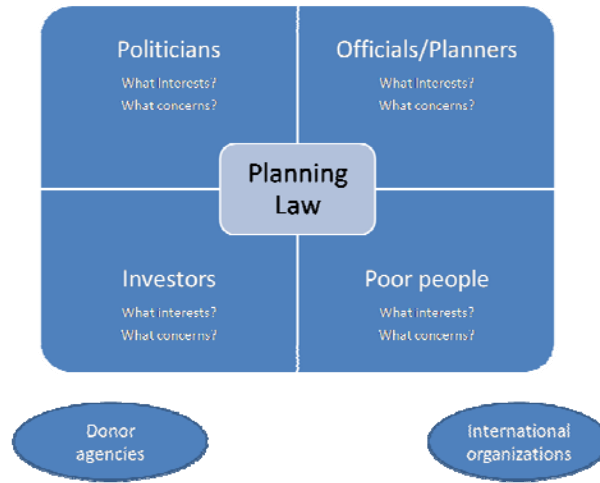
Each of these different sets of behaviours is informed by, but seldom completely described by, the legal mandates prescribed in other legislation. Stakeholders’ interests are correctly identified and stakeholders are given a route through which to direct their concerns and views. Clearly all of these interests and views cannot be accommodated but neither can they be simply ignored. Planning law in African countries is more often than not further complicated by underlying land tenure uncertainties: where a law sets out to regulate the use and development of land while rights and interests in land tenure – whether customary, formal ownership, formal lease or informal – remain unresolved the scope of issues to be addressed widens significantly.

As the recent State of World Cities report *Bridging the Urban Divide* concludes “[t]wo cross-cutting factors implicit in ... much of this Report are political will and human agency”^{xiv}. These factors are both ultimately the expression of the interests and concerns of stakeholders. If these are not understood in the making of a law then that law has little prospect of achieving its objectives. In the context of rapidly growing, weakly managed towns and cities operating in often difficult political circumstances understanding of these interests and concerns – and the conflicts between those of the different stakeholders – is difficult.

The diagram below gives a sense of the main stakeholders affected by a proposed new planning law in a typical African context. Notable by their absence in the diagram are the civil society bodies and organized interest groups that in another context might be expected to play a central role in such a law-making process. This reflects the reality that these organizations are either too weak or few to participate meaningfully or, where they exist, are too stretched by existing programmes to commit resources to participate in law reform

processes. With the emergence of new, globally and regionally linked movements such as Shack/Slum Dwellers International this situation will hopefully improve, allowing for an essential voice to be heard^{xv}.

Key stakeholders in the creation of a new planning law



PRINCIPLES OF GOOD REGULATION

Although writers such as the Seidmans, McAuslan and others mention many principles of good regulation the United Kingdom’s Better Regulation Commission has codified a set of universally applicable principles that provide a useful starting point. These principles are:

1. **Proportionality.** Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed and the costs identified and minimised.
2. **Accountability.** Regulators must be able to justify decisions and be subject to public scrutiny.
3. **Consistency.** Government rules and standards must be joined up and implemented fairly.
4. **Transparency.** Regulators should be open and keep regulations simple and user-friendly.
5. **Targeting.** Regulations should be focused on the problem and minimise side effects.

In the section below each of these principles is examined in the context of planning law reform in an African context.

Proportionality. In order to identify the regulatory target the legal drafting process has to be built upon an incisive examination of what needs to be regulated, why it needs to be regulated and who is motivating for that regulation. The biggest risk here is that the voice of government officials drowns out such others as might be expressed, but which often remain silent. The consequence of this is a tendency towards grandiosity. Government officials naturally want to increase their role, especially in a process as important as regulating land use and development. As the regulatory approach is devised so the instinctive response to the exposure of possible gaps or loopholes is the addition of further layers of regulation, with little thought to the number or skill level of the personnel needed to realize the draft law’s increasingly unrealistic intentions. As Professor McAuslan has observed, the default position for most officials working in planning departments or ministries is to push for greater development control functions^{xvi}: this is the aspect of work that they can carry out relatively easily and in which they can exert immediate and direct power and influence. When there is little or no costing of implementation options this creates a heady mix leading sometimes to absurd consequences. Professor McAuslan cites an example of a draft planning law in Uganda that was nearing completion when the late Professor Hastings Okoth-Ogendo pointed out that its implementation would require at least 30 000 new planning officers to implement it^{xvii}.

Accountability. In Professor McAuslan’s account of the ‘diaspora of town and country planning law in Africa and Asia’,^{xviii} he compares the way in which legislation rooted in the United Kingdom’s 1947 Town & Country Planning Act has evolved on the one hand in the UK and on the other in countries of the developing world. A key finding is the way in which subsequent changes to the law in the UK have led to a much more open system, one in which reasons for all decisions have to be given and in which they can be challenged in courts. Significantly also the law in the UK has changed to provide for greater public participation in the making of planning decisions. As he points out this is not unconnected with the growing acknowledgement in the UK that the planning process is a political one and so requires the highest levels of accountability. In African (and Asian) countries on the other hand he points out that the trend has been to exclude or minimise opportunities for public participation, to shift planning decisions to unelected and unaccountable Boards, Commissions and Authorities and to outsource plan-making responsibilities to ‘consultancy firms from abroad working to the orders of the Ministry’s chief planner’^{xix}.

Consistency. While it is a challenge in any country to ensure consistency between planning laws and a host of other closely related types of law – environmental, heritage, taxation, local government and so on – in Africa all of these challenges certainly prevail but are aggravated by the inconsistencies and mismatches between planning and land laws. Where informal, extra-legal land occupation and use is the norm the inconsistencies between these two bodies of law conspire to create an endless cycle of uncertainty, allowing the different government bodies responsible for each one’s implementation to operate in isolation from each other, mutually negating each one’s effectiveness and doubling the difficulties of people who might want to operate according to the law.

Transparency. While many parts of the developed world have been swept by a trend to make laws in ‘plain language’ that people other than lawyers can understand there is in Africa, at least in the former British colonies, a marked tendency to retain archaic legal language and even often a discernible pride in the fact that the style of, in this case, English is so impenetrable. This is a formidable obstacle to innovative legislation. Firstly, it makes the law very difficult for non-lawyers to use and, secondly, it disadvantages the poor – or indeed anyone outside of the system – who wishes to contest a particular interpretation of a provision in the law.

Targeting. It is not only in African countries that legislators battle to identify precisely what should be the target of planning law. In African countries, where the way in which planning law can be used is potentially so dangerous for so many people, it is even harder to do. As ‘planning’ in the broad sense has become a source of debate as to its nature and purpose so it has become less straightforward to establish where the responsibility for planning law should sit in government structures and what the scope of that law should be. In Zambia for instance the Ministry of Local Government & Housing is responsible for ‘physical planning’ while the Ministry of Finance & Economic Development is responsible for ‘economic planning’. Each believes itself to be the ‘proper home for proper planning’ and at least until recently each was engaged in the process of preparing different pieces of planning legislation, with obvious overlaps. In South Africa the nuts and bolts procedures of development control are regulated by provincial ‘town & regional planning’ provincial laws while the forward-looking Integrated Development Plan is governed by ‘development planning’ provisions in national legislation for local government affairs.

DESIGNING THE LAW REFORM PROCESS

From the above it is clear that planning law reform is important in Africa. It is also very hard to do. Crafting a planning law is effectively the act of designing a planning system through the back door. This is not a straightforward task. It is particularly difficult where government officials see planning law as a source of direct power and influence, wealthy individuals and investors see it merely as red-tape to be evaded by fair means or foul and the poor see absolutely no benefit in any compliance with it while fearing its enforcement.

Deep attitudinal shifts are required if a new model is to emerge. These shifts cannot be prescribed. They have to emerge, they have to be grounded in the different logics and interests of the different stakeholders and they will not all happen simultaneously. It is salutary to look at the example of the Brazilian City Statute which emerged after more than thirty years of different efforts by different stakeholders with widely divergent interests, interrupted by dramatic political events such as the military regime, was made possible by a particular political moment and where the final product is still regarded as being inadequate in certain respects^{xx}. From the experience of Brazil we can see that the outcome generally preferred in Africa – a wholesale re-writing of complex legislation and its re-codification into something new and better – is not realistic. Perhaps it is not desirable either. The enormity of the challenge does not necessarily call for bigger budgets for legal consultants or more in-house government lawyers (although both would be helpful in most cases) but it does call for a more measured approach, where the different interests of stakeholders are weighed up appropriately and where the implementation opportunities and costs are carefully assessed.

Much of the writing on the need for legislative change is premised on an assumption – primarily on the part of donors and their consultants - that new planning laws will reflect an entirely new understanding of cities, of poverty and of planning. In reality such a law would be out of step with the professional practice (in both the planning and legal professions), the personal and economic interests of most of the personnel responsible for its implementation as well as the financial and human resources available for that implementation.

Obviously there is a risk of over-generalization, given the wide range of different contexts in African countries, but nevertheless there is an inescapable and significant chance that most work on reforming planning laws is ultimately going to be irrelevant. That does not mean that the need for that change is negligible, it has never been stronger, but it does mean that methods are needed to determine what and how much of existing laws should be changed, as well as the ways in which law reform processes are designed. Some examples of what could be done differently are set out below. All of them warrant considerable further discussion and debate, indeed they are proposed with the intention of provoking that discussion and debate. I am presenting them under the headings of the five ‘principles of good regulation’ as a way of reminding ourselves that these principles are no less important in a developing country, indeed are probably more so, but that they need to be interpreted with an appreciation of the constraints and opportunities presented by the African context.

Proportionality. We need a useful method for determining which are the most pressing problems that lend themselves to regulatory intervention, what regulatory interventions are needed, what are the risks involved both in regulating some activities and not regulating others as well as the respective costs of those two options. In many ways this method will determine the way in which the entire law reform process is designed. It may well be a time- and resource-intensive part of the process as it is here that the most difficult questions will have to be asked. It is also where the generation of costable options has to be done and models developed for doing these costing exercises. The exercises cannot be designed with an expectation that a precise outcome will emerge but they must be sufficient to provide a reasonably good estimation. Important data will also have to be captured at the outset. This data will have to include at least:

- The numbers of planners working in the different arms of the state apparatus and their levels on the salary scale;
- The number of non-planners effectively carrying out the work of planners;
- The number of planners and related professionals in the private sector;
- The anticipated supply of planners, planning technicians and related professionals from the country’s tertiary education institutions;
- The salary levels and proposed budgets for planning officials and their departments;
- The numbers of planning applications received, broken down where possible by the types of application, whether or not they were successful and how long they took to be processed;

- The proportional areas of the country/province/town that are formally planned and those that are not and an assessment of the land development pressures and issues in each;
- The proportional areas of the country/province/town that fall under customary authorities and an assessment of the land development pressures and issues in each; and
- The number of planning applications that are taken on appeal, the time taken for the appeals to be decided and the outcomes of the appeals.

Once this information is assembled – or as much of it as can be gathered - it is possible to look at the bigger questions facing the planning system with a greater sense of realism: how to deal with informality, how to integrate with land administration and environmental authorities, how to introduce greater transparency and a more responsive bureaucracy, how to focus the planning system on urgent issues, how to ensure that it plans for rather than against development and how to determine whether a law should provide an overarching framework or tackle questions of more minute detail. All of these questions become easier to tackle in a sensible manner, based on an appreciation of what's feasible and possible, than where they are determined purely by the interests of the most dominant voices in the law-making process.

In addition to the determination of implementation costs the costs of compliance by all those likely to be affected by the new system have to be quantified in so far as that is practical. In many cases even the most perfunctory costing of compliance costs will show that the vast majority of citizens are unable to comply with any but the most basic planning standards. And still there will many others who will be unable to comply at all. The costing of, for example, surveying of boundaries, use of particular building materials or the relocation of business premises from a 'residential' to a 'commercial' area can be done relatively easily and provide sobering evidence as to the likelihood of compliance with proposed regulations.

Accountability. One of the biggest problems facing the drafters of planning legislation is the question of how to deal with the requirement to give reasons for planning decisions and the extent to which people aggrieved by a planning decision can challenge it through the courts or other bodies. The argument most often expressed is that one does not want to give troublesome people the right to delay or otherwise impede a proposed development. Implicit in this argument is a sense that if we are so fortunate as to have landed an investor prepared to invest in our country/province/town then we should not let other people interfere with those intentions. This argument is augmented by the view that the human resources available to operate a planning department are so thin that the additional costs of processing objections and court challenges is unaffordable. Allowing investment decisions to be delayed by planning processes is seen as worsening a country's 'cost of doing business' score card.

These arguments cannot be rejected out of hand. In a context of underdevelopment the planning system has to allow the scales to swing more in favour of development than of due process. But equally the need to hold decision makers accountable for their decisions cannot be dismissed. This is an area where careful balancing is needed in the drafting of the legal provisions to ensure that adequate protection is afforded to both the interests of the developer and the rights of potential objectors or challengers. It is also an area in which a nuanced grasp of national political and constitutional dynamics is essential. The temptation for a Minister responsible for new legislation to minimise his or her own accountability while maximising those of local government decision-makers is very real.

Consistency. Planning laws are not the only laws to be implemented erratically or unpredictably. In each of other related sectors – environment, land, housing, local government and municipal finance – there are idiosyncratic ways in which they are implemented. A standard feature of all planning law reform exercises is a 'scan' of relevant legislation. Only if this scan evaluates each of the different laws in terms of whether or not is actually implemented and, if so, how that is done and by whom is it likely to be useful. Skilful

legal drafting is needed to avoid on the one hand writing a planning law that is integrated in detailed ways to each and every other related law, regardless of whether or not it is implemented, and on the other slipping into the too easy trap of simply inserting provisions that everything in the new planning law automatically overrides any contradictory provisions in any other law. The first of these approaches creates a law that can never be implemented as decision-makers will always be delayed by requirements that steps are taken under other laws that are, in practice seldom, if ever, taken. The second approach runs the risk of alienating the officials and professionals responsible for those laws' implementation as well as creating an enabling environment for sloppy drafting.

Transparency. On the question of drafting in plain language again a careful balance has to be struck. An approach that abandons a legal system's preferred language, no matter how archaic it may be or how deeply rooted it is in colonial history, risks being treated contemptuously by legal professionals and even the judiciary. Yet one that fails to write a law that can be understood by ordinary people will surely fail to address the widely acknowledged need to get people to understand their rights and obligations. Where the law is both written in an impenetrable language *and* it does not hold decision makers accountable for their actions then there can be very little chance of the law gaining popular acceptance.

Targeting. Because planning is increasingly described in broad terms, often prefixed with 'integrated' or 'coordinated', the temptation to stretch a planning to cover all aspects of physical development and spatial planning has to be resisted. The international discourse tends to be dismissive of 'old fashioned' planning that looks 'only at the physical'. Rather, we are told, planning has to embrace the economic, the social, the environmental. When a planning law attempts to do this, alongside a host of other laws dealing with precisely those issues and all of which are similarly compromised in implementation this creates a recipe for confusion and creates a blanket of uncertainty under which corruption and other abuses of power are able to flourish. A planning law that focuses on the 'old fashioned' content of planning laws is also one that is likely to be able to deal more imaginatively and sensitively to questions of regularization and upgrading. It allows for basic standards for health and safety in the construction of informal structures and the layout of informal settlements to be set and so encourages officials to focus on these issues rather than more grandiose efforts to achieve impossible outcomes.

CONCLUSION

Despite the widely accepted view that 'planning is not just a technical exercise' the drafting of new planning laws, which in effect amounts to the design of a new planning system, is treated as primarily a technical exercise. The Nirvana of one good model law that can solve all the vexed issues is still sought. This paper sets out simply to highlight this point and to identify some of the questions that have to be asked both in the design of the law-making process and in the actual crafting of the new law. These questions relate to practical issues such as the affordability of different options as well as the capacity of people to comply with the law. They also highlight the need for certainty and clarity, without which more powerful forces in a society in both the public and private sectors are able to manipulate the system to their own advantage. The work reflected in this paper is the first step towards a more comprehensive piece on how, in practical terms, planning laws in Africa can be changed and updated in a way that promotes and encourages economic development, enables better living environments and nurtures the efforts of low-income people to establish their homes and businesses with security and confidence.

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Key words

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Summary

The paper argues that the current approach to planning law reform in Africa is both unsuccessful and unlikely to improve unless the way in which the task is tackled is improved. This requires a better understanding of the interests of the key stakeholders in the law's eventual implementation during the drafting process. It also requires the drafting team to be alert to the risk that their output can have unanticipated consequences which are difficult to reverse. The paper proposes that the 'five principles of good regulation', adapted to accommodate the particular needs of African countries is a good starting point.

ⁱ While this paper uses the term African broadly in fact it refers primarily to the regions of the continent where I have done most of my work, Southern and Eastern Africa, and primarily the Anglophone countries in that region.

ⁱⁱ These rules vary from country to country but there are many similarities. The example of the UK's Five Principles of Good Regulation is the one used in this paper and will be discussed further. Page | 16

ⁱⁱⁱ McAuslan (2003).

^{iv} McAuslan (2003) at 92.

^v At 103.

^{vi} At 104.

^{vii} At 105.

^{viii} Seidman and Seidman, (1996) at 27.

^{ix} This work is funded by the Rockefeller Foundation. Other components to be completed over the next few months are case studies of planning law reform processes in South Africa and Zambia as well as the compilation of curriculum materials for the teaching of planning law at African universities.

^x At 215.

^{xi} UN Habitat (1999): 6.

^{xii} Examples include Addis Ababa, Harare, Lusaka, and Cape Town.

^{xiii} Seidman and Seidman (1996) at 26.

^{xiv} UN-Habitat (2010) at 165

^{xv} McGranaham, Mitlin et al (2009) at 31 provides an indication of how these organizations are increasingly able to play a constructive role in policy development.

^{xvi} McAuslan (2003) at 96:

^{xvii} Pers comm. 26 February 2010.

^{xviii} McAuslan (2003) at 84

^{xix} McAuslan (2003) at 103.

^{xx} Cities Alliance (2010).