Urban Forum (2011) 22:247–263
DOI 10.1007/s12132-011-9119-8

Unravelling Apartheid Spatial Planning Legislation in South Africa

A Case Study

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Published online: 14 June 2011

Abstract The reform of spatial planning and land use legislation in South Africa has been difficult to achieve. The laws designed to implement the urban plans of apartheid remain stubbornly in place. This case study shows that despite there having been three windows of opportunity during which far-reaching law reform seemed likely there has been little change. The only post-apartheid national land development law, the Development Facilitation Act, has been found to transgress the Constitutional powers of local government. With its demise the country falls back entirely on pre-democratic planning legislation. Fundamental to effective planning law reform is a constitutional framework that clearly delineates the legislative powers to regulate planning and land use. A clear and shared understanding of what planning can and cannot achieve is also important, as is an effective alignment of planning law reforms with those of other sectoral laws such as local government and environment. Planning law, especially in a country of great inequality, inevitably gives rise to litigation. Drafters of new planning legislation cannot afford not to pay attention to the minutiae of how the planning system operates. Such a failure opens new planning initiatives to legal attack.

Keywords Urban planning · Law reform · South Africa · Planning law

Introduction

This case study describes the process undertaken in South Africa, and still being undertaken, to change the planning laws inherited from the country's apartheid and colonial history. South Africa is often seen by other countries in Africa as a model to

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be emulated, particularly in relation to the Integrated Development Plan required of all South African municipalities.[1] In the case of planning law reform the South African case rather shows how difficult it is to realize an idealistic and progressive vision of planning in practice. This case study illustrates that South Africa's experience of planning law reform has some elements that are attributable to the unusual context of South Africa in relation to many other African countries, while others will resonate with anyone working with planning law reform on the continent. Unusual though South Africa's history and context are, it is important to remember that every country on the continent has its own unusual or different experiences. When drawing on South Africa's experiences it is unhelpful to see the country as being in a category of its own with the other countries grouped together in a homogenous bundle. As with looking at the experiences of any country in relation to its regional neighbours it is important to understand the context in which experiences have evolved.

This case study shows how despite a widely acknowledged causation between old planning laws and the spatial legacy of apartheid as well as a high-level drive to change those laws South Africa has been unable to effect any major changes to the legal frameworks governing land use and land development. Indeed the same laws that were used to implement apartheid's grand plan of segregation and inequality remain the tools used by planners across the country to determine whether or not—and on what conditions—land development projects should proceed. In South Africa's case, moreover, there are abundant examples in almost all other sectors of governance, such as water, environment and mining, of precisely the type of far-reaching law reforms that the planning system needs. The problem in South Africa is not an inability to change laws but rather an inability to change *planning* laws. What has it been about planning that has made it so difficult to change the laws?

Historical Background

The historical background set out below is a very brief description of a lengthy process of urban law-making beginning as early as the late seventeenth century. For the purposes of this case study a complex history is summarised here. More detailed studies can be found elsewhere.[2]

Apartheid Laws

The role of planning laws in reinforcing the segregationist vision of successive colonial and apartheid governments is widely documented (Parnell 1993; Berrisford 1998). On the one hand, a battery of detailed, comprehensive, provincial laws in force in the four provinces of the Union, and then Republic of South Africa, were developed, from the late nineteenth century onwards, to regulate tightly the development of land in urban

[1] For more on the Integrated Development Plan, its origins and impacts, see Harrison in Van Donk et al. (2008).

[2] Chapter 1 of Harrison et al. (2008) as well as Mabin and Smit (1997) are both useful sources here.

areas reserved for 'White' ownership.[3] This had the effect of preserving property values, promoting a high level of amenity and a high standard of infrastructure, which, until this became redundant after restrictions on land ownership were extended under the Group Areas Act in 1950, obstructed all but a very few well-off black people owning land in these areas. On the other hand, the planning laws that applied in areas reserved for black people were rudimentary in their protection of amenity, generally prohibited the use or development of land in those areas for commercial or industrial purposes and were coupled with laws that drastically restricted black people's ability to own land in urban areas.

Planning laws thus formed part of the legislative arsenal used both to maintain racial segregation within towns and cities and to prevent and restrict urbanization, especially by black African South Africans.

Spatial Legacy

The legacy of apartheid's spatial planning is also well documented (e.g., Turok 1994). To varying degrees, each town or city in South Africa reflects not only an unequal distribution of infrastructure, amenities and accessibility, but the distances between the places in which the poor and the well off live exacerbate that inequality. They also make for an inefficient spatial pattern with the costs of installing and maintaining infrastructure unusually high and public transport difficult to provide. The roots to this legacy are complex and varied, but the regulatory frameworks governing land tenure, development and use has played a very prominent role in creating the problems now faced by South African towns and cities.

Since the first concrete movement towards a democratic state began in the early 1990s there have been three significant windows of opportunity within which the planning laws of South Africa could have undergone far-reaching change. Each of these windows is examined below, with an evaluation of why success was difficult to attain.

Window of Opportunity 1: Around 1994

The first window of opportunity that arose to reshape the legislative framework governing urban planning and development was in the build-up to the transition to democracy, marked by the first democratic elections in 1994.[4] In the years between

[3] From 1910 and the establishment of the Union of South Africa four provinces were created from the pre-existing two republics (the Orange Free State and the Transvaal) and the two British colonies (the Cape of Good Hope and Natal). These four provinces continued as the four provinces of the Republic of South Africa established in 1961. In 1910 the planning laws of the old republics and colonies became the laws of the new provinces and remained in force until amended or repealed by the respective provincial governments. After the transition to democracy in 1994 the four provinces were replaced by nine new provinces, resulting in widespread redrawing of provincial boundaries. The laws in place in a particular territory before 1994 however remained in place in that territory afterward, irrespective of the new provincial boundary. Thus, for example, the North West Province established in 1994 has parts of both the old Cape and old Transvaal laws applicable in it (as well as those of the nominally independent pre-1994 Republic of Bophutatswana).

[4] Annexure 1 provides a brief timeline of initiatives from 1993 to the present.

1990 and 1993, there was considerable activity among a wide range of stakeholders interested in the urban future of the country.[5] In terms of interest in planning law reform there were two main thrusts of effort. The first was based in the National Housing Forum and supported primarily by technical experts aligned with or working for the Urban Foundation, a business-funded think-tank that had for many years focused on alternative urban policy and practice. The second was aligned broadly with the African National Congress and was based at the Institute for Local Governance and Development at the University of the Western Cape.[6] Its contributions to the African National Congress were managed through the Congress of SA Trade Unions (COSATU). These two groupings cooperated closely and were responsible for the emergence of an approach to law reform that had far-reaching impacts, developed through a series of meetings and workshops. These gatherings were eventually formalised into a body known as the Forum for Effective Planning and Development (FEPD). Representation on this body was increasingly widened to include academics, government officials and NGOs. The process was very much a creature of its time, characterised by optimism, a willingness to negotiate and compromise and a commitment by almost all parties to work hard and meet deadlines, often without financial reward. It was thus in many ways unique: a grouping of diverse and representative stakeholders; willing to work together; willing to work hard; and enjoying a high level of political legitimacy from all quarters. This is precisely the sort of model that most law reform initiatives in the urban (or any other sector) need, but it is one that is hard to replicate.

This grouping was united in its support for a new law that would operate on an interim basis while the long term vision for urban and planning regulatory reform was worked out. The first element of this proposed new law was that it would provide an alternative route for the approval of land development projects envisaged by the new government as part of its Reconstruction and Development Programme (RDP). This new law was intended to address the concern that many local government councils remained, and would remain for a few years after the first national elections, under the effective control of the 'old guard'. The thinking was that these forces, both in the political and technical arms of the councils, would try to block big new, transformative projects. In this their efforts would be reinforced by the resistance of established, mainly white, communities to such projects. The new law would thus provide a way around this set of obstacles, taking the decision out of the hands of local councils and giving that power to an appointed tribunal and then giving that tribunal extraordinary power to override not-in-my-backyard resistance. The second object of this new law would be to provide a relatively quick and easy way for new councils to put in place new spatial plans for the future, which would be binding on the decisions of the council as well as other decision-making bodies, including the proposed 'development tribunals'.

In order to ensure that the decisions taken by the tribunals and indeed the contents of the new local planning instrument were consistent with a new vision for development in South Africa it was proposed that the new law include a set of

[5] See Harrison et al. (2008), Chapter 2, for more on this process.

[6] Both the Urban Foundation and the Institute for Local Governance and Development ceased to exist shortly after they made these contributions.

substantive principles to guide all decisions made in relation to the use and development of land.

Finally, it was proposed that the new law should create a high level body charged with researching alternatives to the inherited legal frameworks for urban (and rural) development and planning and advising the new government on law and policy reform in this area of governance.

All of these proposals were taken up in new legislation, the 1995 Development Facilitation Act (67 of 1995) (the 'DFA') among the first batch of laws passed by the newly elected parliament and described as 'the most significant piece of land development legislation to have been enacted in recent times (Van Wyk 1999), which provided for:

- A far-reaching set of general principles for land development (the DFA Principles)
- The establishment of a Development and Planning Commission
- The establishment of one Development Tribunal for each province
- Compulsory, binding Land Development Objectives (LDOs) to be set by every municipality

The implementation of this new law began in 1997 with Development Tribunals established in most provinces. LDOs were drawn up by many municipalities but were shortly overtaken by the requirement to produce Integrated Development Plans under the Municipal Systems Act (32 of 2000, see below). As is also discussed below the Development and Planning Commission was established and commenced work. The DFA principles for land development became a significant element to be factored into all planning and land development decisions whether taken under the DFA or any other legislation.

Window of Opportunity 2: Around 2000

During the second part of the 1990s, there was a great deal of activity in the regulation of urban development and planning. A number of processes were running in parallel to each other, each characterised by a lack of integration with the others. The culmination of these activities was a regulatory scene in 2001 that looked quite different from that in 1995. Each of these is discussed below, beginning with the one that could, at least on paper, have brought some coherence to the issues.

Firstly, as required by the Development Facilitation Act a national Development and Planning Commission was appointed in 1997 jointly by the three ministers responsible for Land Affairs, Constitutional Development and Housing. The Commission completed a Green Paper on Development and Planning in 1999, which proposed a new approach to the regulation of planning and land development. That approach was essentially one in which the principle of provincially specific legislation was retained in each province, there was a strong emphasis on local government planning and the concept of the provincial Development tribunals provided by the DFA was retained. Upon completion of its mandated work the Development and Planning Commission was formally disbanded in 2000. After a consultative process the Minister of Land Affairs published a White Paper on 'Spatial Planning and Land Use Management' entitled 'Wise Land Use' in 2001.

This was approved by the national cabinet and the first of many versions of a Land Use Management Bill (LUMB) based on the White Paper's recommendations was published in the Government Gazette in 2001. The White Paper adopted a different approach in that it proposed a much stronger role for national legislation rationalising the provincial laws into one uniform set of national rules and procedures.

Secondly, the Ministry for Constitutional Development[7] submitted to parliament a bill that was approved and published in 2000: the Municipal Systems Act. This law included a far-reaching chapter that required every municipality to produce an Integrated Development Plan (IDP). It was assumed that the IDP would build on the LDOs required in the DFA, as there was no provision in the new legislation to repeal them and there was necessarily considerable overlap between the two local planning instruments.

Thirdly, the Ministry for Environmental Affairs & Tourism submitted to parliament a bill that completely overhauled the regulatory context for environmental management, which was enacted in 1998, the National Environmental Management Act (107 of 1998, 'NEMA'). This Act specifically provided for the Minister to proclaim and enforce regulations for the carrying out of environmental impact assessments, although it was not until 2006 that these regulations were actually proclaimed.[8]

Thus, as South Africa entered the first decade of the twenty-first century there was a White Paper on the rationalisation of planning laws but it was already eclipsed by developments in local government and environmental laws, developments which introduced fundamental change to the spatial planning and land use terrain.

Window of Opportunity 3: 2009–2011

Frustration with the inability to enact new planning legislation grew steadily both inside and outside government. The Department of Land Affairs (DLA)[9] worked, increasingly in isolation, on drafts of the LUMB, beginning in 2001. Each of these successive drafts was widely rejected and strongly opposed, initially by other national departments and provincial governments and then by parliament itself when the 2008 draft was sent back to the Department by the Speaker. Already by 2004 powerful interests in national government, the National Treasury and the Presidency, were expressing dissatisfaction with the inability of the DLA to make progress. They were joined around 2007 by the Minister of Housing[10] who became increasingly vocal in her frustration. Her department, she argued, could not be expected to deliver 'sustainable human settlements' when the legislative framework for planning was so inappropriate and unwieldy. In 2004 and 2008 the National Treasury commissioned comprehensive reviews of the 'planning regulatory environment' with a view to its 'modernization and rationalization'.[11] In 2009, the Presidency commenced work on

[7] This ministry was subsequently renamed the Ministry for Provincial & Local Government and then the Ministry for Cooperative Governance & Traditional Affairs.
[8] Until then the EIA regulations under the 1989 Environment Conservation Act remained in place.
[9] This Department was subsequently renamed the Department for Rural Development and Land Reform.
[10] The Ministry of Housing has been renamed the Ministry for Sustainable Settlements.
[11] These were carried out by Stephen Berrisford (2004) and Dan Smit (2008).

a 'regulatory impact assessment' of the 2008 LUMB, which was supplemented by a detailed review of the implementation of the DFA to date.

It appears that this confluence of high-level interest in and frustration with the slow pace of planning law reform might yield results, especially as it comes to a head at a time when the Constitutional Court has finally given clarity on some aspects of the question of which functional area of legislative competence includes the regulation of land development and land use, dealt with in more detail below.

Behind the (Provincial) Scenes

Four provinces,[12] battling to rationalise their planning laws, impatient with the pace of national planning law reform and, in the cases of the Western Cape (Planning and Development Act 7 of 1999) and Kwazulu-Natal (Planning and Development Act 5 of 1998), driven by a political imperative to pre-empt legislative intervention by the national government had used the period leading up to 2000 to enact new provincial laws. Of these four laws only that of the Northern Cape (Planning and Development Act 7 of 1998) was implemented and then only partially. As each province moved from the enactment of provincial legislation to the detailed work of drafting regulations to make a new system operational they began to appreciate how difficult that was. Firstly, there was uncertainty as to the scope of the different spheres[13] of government's legislative authority to enact planning laws, which is discussed below, and, secondly, there was now a new framework for local planning built around the IDPs created by the Municipal Systems Act. Moreover the two provinces that had been under opposition political control, the Western Cape and Kwazulu-Natal, saw the election of governments dominated by the national ruling party, the African National Conference. The political imperative to pursue a distinctive provincial legal framework thus fell away. Gauteng province enacted a new Planning and Development Act (3 of 2003), only to begin work shortly thereafter to revise it after wide consensus that the hastily drafted 2003 Act was unworkable.

Legal Difficulties

The years 2001 to 2010 were characterised by a sense of paralysis in the development of new frameworks for planning legislation. Some of these arose from institutional and administrative problems and others from legal difficulties. I will deal with the legal difficulties first. Of these the most intractable was the question of interpreting the 1996 Constitution's provisions that set out which sphere of government—national, provincial or local—has the power to make planning laws. The second, which has received less attention but which remains a difficulty, is the extent to which planning laws can interfere with and restrict the exercise of property rights.

[12] Gauteng, Kwazulu-Natal, Northern Cape and Western Cape.

[13] The 1996 Constitution uses the term 'sphere' to describe national, provincial and local government, in an endeavour to move away from a hierarchical sense of levels and to promote a more co-operative approach to intergovernmental relations.

Constitutional Powers and Functions

Schedules 4 and 5 of the 1996 Constitution set out the areas of legislative competence of national and provincial—and to a lesser extent, municipal—government. The most relevant functional areas of legislative competence here are the following:

Schedule 4 (areas of concurrent legislative competence)		Schedule 5 (areas of exclusive provincial legislative competence)	
Part A	Part B	Part A	Part B
Environment	Municipal planning	Provincial planning	–
Regional planning and development	–	–	–
Urban and rural development	–	–	–

Because 'land' is not specified as a functional area of legislative competence it automatically becomes an area of exclusive national legislative competence. The 2001 White Paper argued that this implies that all legislation governing the use and development of land falls within the exclusive legislative competence of national government. That argument was never widely accepted and has not been reflected in subsequent drafts of the LUMB.

If one were to adopt a different line of argument—that land development is an integral part of 'urban & rural development'—then the matter falls under the concurrent powers of national and provincial governments. This approach has been adopted in various drafts of the LUMB. Under this approach a national law such as, for example, the LUMB would prevail over provincial legislation on the basis that it 'requires uniformity across the nation' and that it provides such uniformity through the establishment of 'norms and standards, frameworks or national policies.[14]

Alternatively, provincial governments appear to have been motivated by a view that provincial planning laws are justified on the strength of the provinces' exclusive legislative competence for 'provincial planning'.[15] It can be argued that 'provincial planning' refers to planning at a provincial scale rather than to all planning (and land development) that happens to be carried out within a province's boundaries. This argument would obviously not support the idea of provincial legislation to govern land development. On the other hand, it can also be argued by provinces, as indeed they have done, that land development is not an area in which 'uniformity across the nation' is needed. In that case there is no compelling argument for section 146(2) national legislation governing land development.

Finally, local governments have argued that the term 'municipal planning' is broad enough to cover the sort of planning law that provides for spatial plans and provides for the rules of land development and land use management. This interpretation would allow both national and provincial laws to be enacted, to run

[14] Section 146(2)(b) of the Constitution.
[15] Part A of Schedule 5.

concurrently, but would ensure that those laws concentrate decision-making powers in local government.

In June 2010 this impasse was finally broken by a decision of the Constitutional Court in a case between the city of Johannesburg and the DFA Development Tribunal of the province of Gauteng in which the city argued that the Chapters of the DFA providing for Development Tribunals are unconstitutional.[16] The city based its approach on the local government view outlined above, i.e. that laws dealing with the approval and consideration of land development applications are about 'municipal planning' rather than 'urban and rural development' or 'provincial planning'. The court's unanimous judgment supported the city's viewpoint and so there is finally clarity. Firstly, new planning law must be enacted as 'municipal planning legislation' which means that both National and Provincial government can do so, subject to special rules governing a possible conflict between the two and provided that the new law concentrates decision-making powers at the local level. The Court was also clear that there was a need for far-reaching law reform and effectively gave the national government 2 years within which to do this, setting a deadline of mid-2012.

Property Rights Protection

When considering the content of a new planning law it is important to understand the extent to which the law can permit an organ of state to make a planning decision that restricts a landowner's ability to develop or use his or her land as they wish. This is a vexed issue in any country. In South Africa, it has an added dimension in that landownership patterns starkly reflect the history of dispossession and segregation under colonialism and apartheid. Particularly during the mid to late twentieth century the state actively took land away from people who were not classified as white and also put in place legal restrictions on black people owning land. The implementation of comprehensive zoning-based planning laws added to this already grim picture by confirming use and development rights applicable to white-owned land, thereby enhancing its financial value. Efforts to invoke a planning law-led approach to addressing the spatial legacy of dispossession and segregation are thus met with two types of property rights based resistance. Firstly, efforts to promote investment in formerly deprived areas by curtailing the exercise of unused development rights in better resourced areas will encounter opposition from the holders of those rights who will argue that this constitutes an 'expropriation' of property under section 25 of the Constitution, thereby obliging the State to compensate them financially. Secondly, where land is developed or redeveloped for the purposes of housing low-income people the neighbours will inevitably, and many already have done so, challenge the decision on the basis that their rights to the use and enjoyment of their land will be reduced or lost entirely because of a range of possible causes such as increased crime, air pollution, water pollution and reduced property values.

[16] The case can be found on www.constitutionalcourt.org.za and the citation for the case is *City of Johannesburg v Gauteng Development Tribunal and others* 2010 ZACC 11.

Institutional Responsibility

National Departments

At the advent of democracy in 1994 the national physical planning function was transferred to the DLA. That department's main function was to drive the three pillars of the country's land reform programme: *redistribution* of land held by white farmers to black ownership; *restitution* of land that had been taken from black owners to them or their descendants either by restoration of the land itself or through compensation by cash or alternative land; and *tenure reform* in the areas under customary ownership. The officials who had operated the physical planning apparatus of the apartheid government were either transferred to provincial governments or were assigned to work on land reform projects. A small unit was retained within the DLA as a Directorate responsible for the implementation of the DFA. By 2010 that unit had grown considerably to a 'chief directorate' dedicated to 'spatial planning and information'. The Department however focused explicitly on rural development and rural land issues. Indeed in 2009 the Department's name was changed to the Department of Rural Development and Land Reform. It has never been easy for the planning agenda, especially insofar as it concerns urban planning issues, to receive the attention it requires in that Department. While nominally the Department for Rural Development and Land Reform remains responsible for planning law reform, in practice, as indicated above, many of the key steps being taken to affect the planning regulatory framework are taken by other Departments.

So, for example the national department responsible for local government matters, now known as the Department of Cooperative Governance and Traditional Affairs (CoGTA)[17] has dominated the policy and legislative debates and interventions around local level development planning through its responsibility for the Municipal Systems Act and its Integrated Development Plan. Similarly, the Department of Environment Affairs has led on the regulation of land development in terms of NEMA.

The National Treasury as well as the Presidency have also shown a keen interest in 'rationalising the planning regulatory environment' with the intention, for the Treasury, of creating a more cost effective and efficient system of regulating and managing development and, for the Presidency, of promoting a more efficient system of planning and coordinating government's interventions, particularly from a spatial perspective.

Spheres of Government

Since 1994 there has been a low intensity friction between national government and the provinces as to who is entitled to drive planning law reform. While this has increased and decreased at times it was ultimately moderated by the shared sense of frustration at the difficulty of interpreting the applicability of Schedules 4 and 5 of the Constitution. Nevertheless, while national government struggled to make

[17] Formerly Department for Constitutional Development and then Department for Provincial and Local Government.

progress on this front, a number of provincial governments persisted with new law-making initiatives in their provinces.

The Western Cape enacted new legislation in 1998 to replace the Land Use Planning Ordinance (15 of 1985) that it inherited from the old Cape Province. Subsequently it embarked on a process to compile its own new legislation that would integrate planning, environmental and heritage legislation into one statute. This process ended as it too battled to address the difficulties around the respective legislative competencies of provincial and national government.

In the Northern Cape, which inherited the same Land Use Planning Ordinance as the Western Cape, a new Planning and Development Act was enacted in 1998 and was partially implemented, although most of the previous law's rules for rezoning and subdivision were retained in practice.

In Gauteng, a new Planning and Development Act was passed in 2003. It was never implemented, and a process to develop an alternative to it has been followed since 2007.

In Kwazulu-Natal a new Planning and Development Act was also passed in 1998 and also never implemented. That province, however, has made more progress in addressing the issue and a newer Planning and Development Act was enacted 10 years later and has been in force since May 2010.

Planning Difficulties

What is Planning?

At the time that the search for a new post-apartheid planning framework emerged around 1994 there was, legally speaking, a clear understanding of what 'planning' was for the purposes of making new planning laws. 'Town Planning' as an area of legislative competence was accepted to cover the following legal elements:

- Provisions empowering particular arms of the state to make 'town plans' and 'regional plans'
- Rules to be followed by anyone wishing to establish a new township, i.e. a set of conjoined plots of land with the intention to develop them as a whole
- Rules to be followed for the subdivision of land, particularly land that falls within an established township
- Rules to be followed in the changing of a permitted land use either to change the underlying zoning of the land or to amend the zoning conditions

This broad description was supported by legislation from 1976[18] that defined precisely what fell under the legislative competence of the then provinces when dealing with 'town planning'. That term included the following:

(a) The subdivision, lay-out or development of areas or groups of areas for building purposes or urban settlement, or deemed by the executive committee of the province concerned to be destined for such purposes of settlement

[18] The Financial Relations Act, 67 of 1976, Schedule 2, section 14. This definition fell away with the advent of the new constitutional dispensation in 1996.

(b) The regulation and limitation of building upon sites
(c) The variation, subject to compensation in cases of prejudice, of any existing sub-division or lay-out of land used for building purposes or urban settlement, or deemed by the executive committee of the province concerned to be destined for such purposes of settlement, and the authorization of the consequential amendment of any general plan or any diagram of any sub-division or lay-out so varied and of the consequential alteration of endorsement of any document of title or any entry in a deeds registry
(d) The reservation of land for local government or other public purposes in any approved or varied scheme of town planning
(e) The prohibition of the transfer of land included in any approved or varied scheme of town planning where any lawful requirement has not been fulfilled
(f) The planning or re-planning subject to the provisions of subparagraph (c) of any areas, whether developed as an urban area or not, including the prohibition of the use of any land within such area in conflict with the terms of any town-planning scheme in operation or in the course of the preparation in respect of the area within which such land is situated
(g) Without prejudice to or limitation by the foregoing provisions, the reservation of land for agricultural purposes in any town-planning scheme and the consequential prohibition, restriction or regulation of the sub-division, lay-out or development of any land so reserved for any purpose which is not an agricultural purpose
(h) The demolition of, or the imposition of a special charge in respect of buildings or other structures erected or altered contrary to any provisions made by virtue of powers conferred in pursuance of this paragraph
(i) The payment of an amount or the transfer of land:

    i. to an institution, council or body contemplated in section 84(1)(f) of the 1961 Constitution, by the owner of his successor in title, of land the value of which has been increased and
    ii. by an institution, council or body referred to in item (i), to the owner, or his successor in title, of land the value of which has been decreased

(j) By any town planning scheme, or the alteration or substitution of any town-planning scheme, irrespective of whether such town-planning scheme is in the course of preparation, is awaiting approval or is in operation.

While one can with hindsight quibble over the appropriateness of some items on this list, it is clear about what does and what does not fall under this legislative mandate.

The complicity of the planning profession in the implementation of apartheid and the use of the planning laws to promote a segregated and unequal landscape gravely undermined the legitimacy of both planning as a discipline as well as planners as a profession.[19] Consequently there was a concerted effort to move away from the tainted term ‘planning’ and move towards the more progressive-sounding ‘development planning’. Over and above the moral and ethical shortcomings of apartheid-era planning law, there was also a concern that it had been unduly focussed on

[19] See Chapter 10 in Harrison et al. (2008).

controlling development. In the new South Africa, planning laws should be changed to *facilitate* development. The Forum for Effective Planning and Development proposed a definition of *development planning* that was widely embraced. It defined development planning as:

> a participatory approach to integrate economic, sectoral, social, institutional, environmental and fiscal strategies in order to support the optimal allocation of scarce resources between sectors and geographical areas and across the population in a manner that provides sustainable growth, equity and the empowerment of the poor and the marginalised. (Harrison et al. 2008)

Clearly, a much wider scope was now envisaged for planning and the planning profession. It is sobering to compare this description with that used in the 1976 legislation and to consider which provides the greater clarity to the legal draftsperson. The omission of the term 'town and regional planning' in the schedules of functional areas of legislative competence in the 1996 Constitution reflected a rejection of a type of planning with which nobody wanted to be associated. However, leaving that term out from the Constitution meant that there was now no clear mandate to any sphere of government to repeal that very legislation that had prompted the rejection of the outdated, albeit more legally precise, terminology in the first place.

'Planning' and 'Environment'

A further flaw identified in pre-democracy planning was that it was seen to have paid little attention to environmental concerns. As a body of new environmental management legislation was built up from 1998, so the schism widened between a body of law and a profession responsible for planning and those which were growing rapidly around environmental management. Increasingly planning was associated with an illegitimate past, an inability to embrace the new challenge of sustainable development and too close a relationship with developers. On the other hand the environmental sector was characterised by new, far-reaching laws, bolstered by South Africa's preparations for and hosting of the World Summit on Sustainable Development in 2002 as well as a new profession on the ascendant. At a practical level this created an inefficient and often unworkable system for planning as well as the management of development. Two parallel sets of laws were applied, implemented by different professions and adjudicated by different officials in different departments and, generally, different spheres of government as well.

What are the Lessons from South Africa's Experience?

Firstly, the experience here shows that a country needs a high level of agreement on some key issues before commencing a revision of planning laws. These issues pertain especially to the expectation of what planning is, both as an activity of government and as a profession carried out by practitioners in both the public and private sectors. In South Africa the vision of development planning that emerged in the early to mid-1990s was ambitious and broad. There was however not enough

thinking about how it would translate into legal provisions and how these in turn would relate to existing, inherited laws. The capacity of a vision, no matter how widely shared, to shift a regulatory framework that protects so many diverse and often lucrative interests was underestimated. In retrospect it's easy to be critical but there was an inadequate assessment of which aspects of a new planning vision should be translated in legislation, and how that should be done. Some aspects of the planning vision, indeed of any planning vision, do not lend themselves to becoming law. There are limits to what the law can do and these need to be understood too. While the debate in South Africa was often over-simplified to relatively crude combat between 'facilitation' on one hand and 'control' on the other it did not engage with a more complex debate around what activities need to be changed through a planning process and what are the legal steps that will either generate those activities or promote changes in existing ways of acting. Only some changes in the way land is developed and used are influenced by legislation, let alone specifically 'planning' or 'land use' legislation. Most changes result from the ways in which land markets operate, the availability of capital in a society, land tenure trends and technology.

Secondly, the experience of the Development Facilitation Act shows that an ambitious legislative intervention needs to be backed up both by consistent and well-resourced institutional capacity but also by regular monitoring. When the Act was first enacted it depended on a small team based in the DLA to support its implementation. Provincial governments had to establish and operate their Development Tribunals with minimal support from the centre. As concerns arose with the way in which the Tribunals operated and with the Constitutionality of some aspects of the law in light of the 1996 Constitution there was not the sort of robust support and confident leadership that is needed either to support or change an approach. The DFA was intended to be an interim measure. It has indeed proved to be interim, with its most significant chapters declared constitutionally invalid by the Constitutional Court in 2010, but this was not the envisaged way in which it would come to an end. The DFA was carefully designed to provide for a process, driven by the Development and Planning Commission that would put in place both a long term alternative to the DFA but also the transitional arrangements for taking the existing planning laws, including the DFA, into the new era. Instead the work of the DPC was largely ignored and the 'planning law' process was overtaken by local government and environmental legislation.

Thirdly, the underlying legal and constitutional basis on which a new planning system is to be built has to be clear at the outset. However planning is conceptualised it ultimately boils down to regulations over what households and businesses can do with their land and rules determining which government authorities have the power to authorise new land development. These are inherently contestable issues. All parties, in both public and private sectors, will strive to carve out the most generous space for themselves and their interests. The wider and looser the constitutional parameters are the more such space they are able to carve and the less there is for the law to impact directly on human behaviour. Any legislative intervention that will inevitably be systematically and consistently challenged on grounds of constitutional and legal validity needs to be very carefully analysed before it is enacted. Not to do that risks the entire enterprise collapsing, as has been the case with the DFA (although in that case the legislature could

not have completely anticipated the wording of the 1996 Constitution that was enacted a year later).

Fourthly, there needs to be a deep understanding of the way in which strategic spatial planning is linked to the day-to-day decision making processes concerning land use and land development. In South Africa's case the former was covered in the Integrated Development Plans of municipalities in terms of the Municipal Systems Act. The latter was covered by a host of laws but primarily the provincial planning Ordinances, laws which predated the Systems Act by many years. Consequently the plans had very little impact on the decisions around development applications. The plan-making processes consumed substantial resources with notoriously little impact on patterns of actual development. Even where these two endeavours—plan-making and deciding on applications—take place in terms of the same piece of legislation there is a difficulty in getting the plan to impact on the decision-making, but where they are operating under completely different legislative umbrellas then there's really only a very weak prospect of effective integration.

Fifthly, the South African experience shows that when opportunities arise they have to be seized. There were at least three 'windows of opportunity' between the early 1990s and the late 2000s. Each one passed; none of them yielded significant positive change. Here some responsibility lies with the organized planning profession. This grouping was largely in disarray during this period; firstly as it struggled to deal with its own chequered history and then as its members battled to articulate a vision of how they thought a new planning system should operate. What would a new system look like? What did they think would work best? Were there examples from abroad that they thought should be pursued in South Africa? On all of these questions there was largely silence on the part of planners and their organizations. The weakening of 'urban sector' NGOs after 1994 diluted the contribution that could be expected from that quarter. It is hard to expect any government to come up with an acceptable framework for law reform if the interest groups most likely to be knowledgeable in the area and most likely to be involved in the framework's implementation themselves have limited views on what changes are needed.

Sixthly, the South African case shows how difficult planning is to manage politically. For government departments and their ministers planning is tantalising, because it is imbued with powers both stated and implicit to control private land development as well as the work of other departments and spheres of government. On the other hand it also comes with the risk of being linked by association at least to red tape, bureaucratic impediments to economic development and legal complexity. It is significant to realize that after 15 years of democratic government the national government has yet to resolve satisfactorily where, institutionally, the home of planning law should be. That the function has been left to be managed by a department that has rural land reform as its primary mandate suggests that the political horse-trading necessary to locate the function in a more appropriate setting still has a long way to run. As this case study shows this is not for lack of interest. The matter has consistently received intense scrutiny from the most powerful organs of State, the Presidency and the National Treasury, but all efforts to resolve the fundamental question of which Ministry should be responsible for its implementation have been in vain.

Finally, it is worth reflecting that one of the hallmarks of much colonial-era legislation was that it was heavy on procedural detail attempting to provide for any eventuality, no matter how improbable. This provides a legal minefield. Even where a provision has not been fully implemented or indeed implemented at all if it remains on the law book it can trip up subsequent efforts to, in this case, effect law reform. No matter how compelling a positive vision might be a process of law reform has to tackle the minutiae of inherited legislation, go through it in detail and determine whether it is appropriate that it remain, that it be changed or that it be repealed. In each of these cases, though, careful thought has to be given to the implications of that choice.

Annexure 1: A timeline

Set out below are the key steps or phases that have influenced the process of rationalising and revising planning law in South Africa since the demise of apartheid.

1993—Inlogov and Urban Foundation processes thinking of new approaches to planning law, feeding into ideas for new legislation and the new Interim Constitution, under the umbrella of the National Housing Forum
1994—RDP Ministry established with a strong emphasis on mainstreaming 'development planning' in all government departments
1995—Development Facilitation Act enacted
1996—Final Constitution approved, including schedules 4 and 5 that determine functional areas of legislative competence for 'urban and rural development' and 'municipal planning'
1997—First Development Tribunals established under the DFA, Development and Planning Commission established
1998—KZN Planning & Development Act; Northern Cape Planning & Development Act
1998—NEMA
1999—Planning and Development Green Paper
1999—Western Cape Planning & Development Act
2000—Municipal Systems Act requires all municipalities to prepare Integrated Development Plans
2001—White Paper on Spatial Planning and Land Use Management: Wise Land Use
2001—LUMB 1
2003—Gauteng Planning & Development Act
2006—LUMB 2
2008—Kwazulu-Natal Planning & Development Act
2008—LUMB 3
2010—Constitutional Court judgement on DFA determines that 'municipal planning' as a 'functional area of legislative competence' includes 'township establishment and rezoning', thus paving the way for law reform to proceed with greater certainty

Acknowledgments This article was made possible by funding provided by the Rockefeller Foundation, via the African Centre for Cities, for which I am very grateful. Practical support from the Department of Town & Regional Planning at the University of Sheffield where I was a Visiting Scholar from January to June 2010 was invaluable.

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