

The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?

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Abstract

With a new planning system taking shape, and a new Bill of Rights embodied in a transformative Constitution having been introduced in South Africa in 1994, this article grapples with the dual questions as to whether the new spatial planning system fits within the spirit of the Bill of Rights, and the Bill of Rights assists the new spatial planning system in the realisation of its objectives. As a prequel to the engagement with these questions, a brief overview of the events leading to institution of the Bill of Rights and its contents is provided. This is followed by a brief historical overview of the creation of the South African spatial planning system and a summary of its key features. These features can be reduced to the following basic components: (1) meaningful participation in all aspects of spatial planning; (2) an open, inclusive and just decision-making process where information is readily available; (3) recognition of religion and culture and equal treatment in application and decision-making; (4) an awareness of environmental issues; and (5) the significance of property and housing. The way in which these components are addressed in the Bill of Rights and other parts of the Constitution provides the starting point to determine the extent to which there is a meaningful and mutually beneficial fit between the planning system and the Bill of Rights.

Keywords

Bill of Rights, decision-making, public participation, South Africa, spatial planning

Introduction

The peaceful transition to democracy of South Africa in April 1994 not only brought an end to a universally condemned draconian system of government, but also spurred the prospect of achieving something truly remarkable in the 'new' country in the years to come. In the immediate afterglow of the miracle, the country not only adopted a much envied progressive Constitution with an equally admired Bill of Rights but also embarked on a process of remaking its colonially inspired and tainted spatial planning system.

In the two decades that have elapsed since then, the interpretation and implementation of the rights in the Bill of Rights have made significant strides away from a system which was characterised by an unequal, discriminatory division of land with attendant homelessness and in which the state ignored and trampled upon, among others, the equality, dignity, property, housing and cultural rights of its citizens. Equally so, the unfolding spatial planning system, which both aspires to undo the damages of colonial and apartheid rule, and in some ways emulates modern Anglophone planning's early utopian roots and latter-day progressive strains, includes strong objective-statements about large-scale spatial transformation and redevelopment.

While the new planning system had to be prepared within the context of the Bill of Rights, it is not clear whether it was developed with the spirit of the Bill of Rights and the realisation of its key objectives in mind. If not, a valuable opportunity to advance the cause and objectives of the Bill of Rights through the spatial planning system may have been lost. Equally so, there may be a gap between that which the spatial planning system seeks to achieve and the actual assistance the Bill of Rights provides in getting there. In this article, these issues are explored through an engagement with two interrelated questions:

- Does the new spatial planning system fit within the spirit of the Bill of Rights?
- Does the Bill of Rights assist the new spatial planning system in the realisation of its objectives?

Before addressing these two questions, an overview of the events leading to the acceptance of the Bill of Rights and its contents is provided. The provisions in the Bill of Rights that are highlighted are those that relate to land and spatial planning, however tenuous and under-researched that link may be. Then a sketch of the evolution of the South African spatial planning system and a summary of its key features is presented. These sections are followed by the engagement with the questions, a discussion of the implications and a conclusion.

South Africa's Bill of Rights

Origins

The inauguration of the Union of South Africa on 31 May 1910 marked both the beginning of modern South Africa and the development of an interesting dichotomy of ideas on human rights. After its formation in January 1912, the main resistance movement, the

African National Congress (ANC), vigorously campaigned to recognise, protect and defend fundamental human rights and freedoms, passing a resolution on a Bill of Rights at its 1923 annual conference. It demanded access to land, as well as a right to equality before the law. Clause 2 of its Bill of Rights stated that

... all Africans have, as the sons of this soil, the God-given right to unrestricted ownership of the land in this, the land of their birth. (Nthai, 1998: 142)

Some two decades later, the ANC's African Claims (Bill of Rights) insisted on freedom of residence, freedom of movement, the security of a home as a right to every family, and the right to movable and immovable property.

The stance on human rights of the National Party government, which came to power on an apartheid/segregationist ticket on 28 May 1948, was worlds apart from the views of the resistance movements. When the United Nations General Assembly adopted the Universal Declaration on Human Rights (UDHR) in the same year, South Africa was one of only eight countries that abstained from voting, in part because the government was already planning to implement an apartheid programme that would systematically violate the rights recognised in the *UDHR*. The apartheid government's view was severely challenged on 26 June 1955, when a number of resistance organisations that had formed the Congress of the People met in Kliptown, Soweto, and adopted the Freedom Charter. This manifesto sought to reflect the people's aspirations for a future non-racial, democratic South Africa (Liebenberg, 2010: 6).

Although the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Political Rights (ICESCR) were signed by South Africa, they were only ratified in 1996 by then President Nelson Mandela (Amien and Farlam, 1998: 3; Devenish, 1999: 43). While much of the rest of the world was developing other human rights instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the American Convention for Human Rights of 1969 and the African Charter of Human and People's Rights of 1981, South Africa 'remained tragically aloof and antagonistic' (Devenish, 1999: 44). This aloofness was still apparent in 1983, when the apartheid government refused to debate the inclusion of a Bill of Rights in its 'new', but still discriminatory, 1983 Constitution.

Despite intransigence on human rights by the apartheid government, the idea of a justiciable bill of rights increased in momentum within the liberation movements (Liebenberg, 2010: 6). This led to the concretisation of the idea of individual and group rights in *Constitutional Guidelines for a Democratic South Africa* (African National Congress), which was largely based on the *Freedom Charter* (American University International Law Review, 2013). In turn, the *Guidelines* formed the basis of the 1990 *Bill of Rights for a New South Africa* and its 1992 revision. These documents formed the building blocks for future constitutional development, because they were used during the negotiation process that led to the adoption of both the interim and the final Bill of Rights (Nthai, 1998: 147). With the political situation fast becoming untenable, the late 1980s saw many discussions taking place within and outside South Africa, formal and informal, between 'internal' South Africans and 'external' members of the banned ANC. These

centred on what had by then become inevitable – a new constitutional order, a justiciable Bill of Rights and an independent judiciary (Van Wyk, 1994: 136).

The year 1990 was a watershed for South Africa. Liberation movements and political parties such as the ANC and the South African Communist Party were unbanned, Nelson Mandela walked free, political prisoners and detainees were released, the first ANC leaders returned from exile, and between 2 and 4 May, the Groote Schuur Minute was signed, sealing a commitment by the ANC and the National Party government to pursue peace and a negotiated settlement to their differences (Van Wyk, 1994: 137).

The National Peace Accord of 14 September 1991 was a further critical step toward formal negotiations. Signed by representatives of 27 political organisations and national and homeland governments, it prepared the way for the Convention for a Democratic South Africa (CODESA, 1991) negotiations, convened in December 1991. There, representatives of various political, civil, religious and community organisations agreed to support the Declaration of Intent, which indicated that a process of drawing up a constitution would be set in motion.

However, CODESA 2 – the second plenary of CODESA – failed to deliver on its promise because of an inability to reach consensus on the shape and form of the interim government and the core principles of the constitution. Not long after CODESA 2's failure, the National Party government and the ANC signed a Record of Understanding on 26 September 1992. This led to the establishment of the Multi-party Negotiating Process (MPNP), which negotiated the contents of an interim Constitution. Much debate centred on the fundamental rights chapter, a process described as 'a tug of war between *minimalists* and *optimalists*, which, in the end, resulted in a compromise' (Du Plessis and Corder, 1994: 40; Liebenberg, 2010: 14–15). The liberation movements favoured the minimalist approach that would constrain the scope of the final constitutional dispensation as little as possible, while the South African government supported the opposite optimalist approach. The result was Chapter 3 of the interim Constitution that included the traditional civil and political, socio-economic and property rights. In the context of South Africa's history, it is pertinent that the first right mentioned is the right to equality. As in most equality clauses, unfair discrimination is outlawed. Simultaneously though, corrective or affirmative action is permissible. The equality clause is pivotal and influences all other rights, most notably the property clause. The content of the right to property was the cause of serious conflict between the ANC and the National Party, mainly because of fears that a constitutional right to property would impede land restitution to assist victims of forced removals (Chaskalson, 1995: 224). Throughout South Africa's history, land and property have been at the core of war and dissension, leading to dispossession, discrimination and a totally separate spatial planning system based on race. It is no surprise, therefore, that the National Party was so obsessed with this issue that it fought to have land restoration excluded from the property clause. Instead, the recognition of land restoration was incorporated under the equality clause, while its substantive treatment was dealt with outside the Bill of Rights. This compromise led to the National Party having to make concessions on most other property issues, such as compensation for expropriation. The interim Constitution, ratified on 18 November 1993, was passed by the old Parliament as the Constitution of the Republic of South Africa Act 200 of 1993. It provided that an elected Constitutional Assembly (CA) had to, within 2 years and after wide

consultation, draft a final Constitution and Bill of Rights within the guidelines set out in the 34 Constitutional Principles agreed upon during the multi-party negotiations. During this process, both the equality and property clauses, the most significant from a spatial planning perspective, were streamlined so that all the land reform provisions were incorporated into the property clause to reflect its dual nature of both property protection and land reform.

The process of drafting the Constitution involved many South Africans in the largest public participation programme ever carried out in South Africa ('*South African History Online*', n.d.). It represents an integration of ideas from ordinary citizens, civil society, political parties represented in and outside of the CA, as well as international human rights instruments such as the UDHR, the Canadian Charter of Human Rights, the German *Grundgesetz* and the Constitution of Namibia (Cachalia, 1994: Part III; Liebenberg, 2010: 19). The resulting Constitution therefore represents a project of 'transformative constitutionalism', connoting 'an enterprise of inducing large-scale social change through nonviolent political processes grounded in law' (Klare, 1998: 150).

Content

The South African Bill of Rights is not an isolated principle statement. It must be seen in the context of the Constitution as a whole, where all the components interact with one another. Moreover, legislation mandated by specific provisions in the Bill of Rights gives meaning and body to the rights.

The Constitution is a transformative document, demanding the conversion of South African society into a more equal, open and democratic society based on human rights, dignity and freedom. The Preamble emphasises that South Africans have suffered through the injustices of the past, and states unequivocally that the Constitution was adopted to heal these historic scars and divisions and build a future based on democratic values, social justice and observance of fundamental human rights. The Founding Provisions stress the ideals of the Preamble and emphasise the values of human dignity, equality, non-racism, non-sexism, accountability, responsiveness and openness. Coming from a system where parliamentary sovereignty was responsible for many human rights abuses (Hoexter, 2012: 14–15), and where millions of people were dispossessed of their land as part of the apartheid ideology, the Constitution emphasises that it is the supreme law of the Republic. Consequently, law or conduct inconsistent with it is invalid and may be declared as such by the courts.

The Bill of Rights is contained in Chapter 2 of the Constitution. Rights that play a key role in spatial planning in South Africa are varied, but generally include rights to equality, dignity, culture and religion, the environment, property, housing, information and administrative action. Three general provisions underpin the Bill of Rights: the state must respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2)); in interpreting the Bill of Rights, the values that underlie an open and democratic society must be promoted; and in interpreting any legislation the spirit, purport and objects of the Bill of Rights must be promoted (section 39). Consequently, all statutes must be interpreted through a Bill of Rights–prism.

In what can be termed a ‘mini bill of rights’, the Constitution aspires to the ideal of ‘developmental local government’ (sections 152–153) that must direct municipalities to provide democratic and accountable government for local communities, encouraging their involvement; ensure the sustainable provision of services; and promote social and economic development. These provisions are enhanced by a suite of local government legislation that aims at finding sustainable ways to meet the social, economic and material needs and improve people’s lives (see Harrison et al., 2008: 137–138).

Public administration plays a significant role in the day-to-day running of the state, especially where officials are responsible to interact with the public on a variety of planning matters. The Constitution recognises the significance of this, and in another ‘mini bill of rights’ (section 195), introduces a list of obligations, prefaced by the statement that public administration must be governed by the democratic values and principles enshrined in the Constitution.

South Africa’s new spatial planning system

A brief history

Measures to regulate the use of land in South Africa date back to the 1830s (Oranje, 1998: 34). These early measures included restrictive covenants inherited from Britain, as well as ‘official conditions’ aimed at ensuring good order, dignified conduct and enjoyment of property in villages and small towns. With the state and the Dutch Reformed Church being the only two entities that could establish towns, there was no need for any further regulation (Floyd, 1960: 20–26). This situation remained largely unchanged until the 1870s, when the then South African Republic enacted a series of 15 Gold Laws to bring order and prevent a recurrence of earlier uncontrolled and haphazard mining activities on the Witwatersrand gold fields (Oranje, 1998: 35). Simultaneously, these laws restricted the right to mine and settle in these areas to Europeans only. This effectively represented the beginning of the tie between economic exclusion and spatial separation based on race that would reach its pinnacle in the high-apartheid model of the 1960s (Harrison et al., 2008: 20–21). The beginning of the 20th century saw the introduction of a set of enactments that provided for the establishment of new properties through subdivision on land by private owners (Mabin, 1991: 10; Mabin and Smit, 1992: 2). Once again, the creation of new properties was solely for purchase and occupation by white people.

On a macro-scale, the notorious 1913 Black Land Act divided land on a racial basis at national level by setting aside ‘scheduled areas’ and ‘released areas’ for the exclusive occupation and acquisition by African people (Mabin, 1991: 8). From a planning point of view, the consequences of the 1913 Act and its successors were severe because the existing spatial planning system was ‘supplemented’ with a separate system that was specifically applicable to ‘black land’ (Mabin, 1991: 10; Parnell, 1993: 473). Later on, African people would be divided into 10 ‘national units’ or ‘Bantustans’ based on their language and ethnicity, and forming the basis of 10 homelands that became either self-governing territories or ‘independent’ states. Outside these areas, ‘locations’ were established on the peripheries of the ‘white’ towns to accommodate African people who were required

to spearhead the country's economy (Mabin, 1992: 409; Van Wyk, 2012: 43–52). This division of land and separation of people required, and resulted in, the introduction of separate spatial planning legislation for each of the different areas (Development and Planning Commission, 1999; Muller, 1983: 21; Robertson, 1990: 122–136).

During the 1920s, small, but vocal visionary, urban-based groups of town planning-zealots, strongly inspired by the introduction of town planning legislation in Europe and Britain, made it their mission to have spatial planning legislation introduced in South Africa (Oranje, 1998: 49). The system that was eventually put in place was a far cry from the modernist (i.e. comprehensive, plan-led and socially responsive) model that the visionaries had in mind (Oranje, 1998: 50). The legislation that was introduced did little more than concretise the measures to establish new settlements and extend existing settlements, and provided for the introduction of land-use zoning in the form of town planning schemes. These new regulatory functions were, in most municipalities, increasingly staffed by members of what would over time become a distinct town planning community/profession (Muller, 1983: 9). Largely, through the predominantly regulatory nature of the spatial planning system, but also through its closeness to the apartheid government, this profession would progressively become very adept at undertaking the control tasks as ordained by the legislation. Simultaneously, increasingly less of the visionary and reformist zest of the early British, European and North American town planning movements, and the modernist ideals of the small, but vocal advocacy groups who fought for the introduction of spatial planning legislation in South Africa, would be displayed (Muller, 2003; Oranje, 2003: 1998).

While the introduction of the municipal master/structure plan with its 20-/25-year planning horizon in the 1970s held the faint promise of improving the regulation-centred planning system, things remained largely unchanged (Oranje, 1998: 134). This was mainly the result of the preordained segregationist outcomes the planning system was bound by, the limited powers of municipalities in the centrally driven apartheid state, the lack of statutory backing for the 'forward plans', and the absence of a link between these plans and government financial planning and budgets (Oranje, 1998: 134, 139). Consequently, they were treated with scant respect by property developers and municipalities, being used as and when they supported proposed developments (Oranje and Berrisford, 2012: 59). If the plan did not support the development, it was dismissed as a mere non-statutory image of one of many possible futures (Oranje, 1998: 139). Over time, this further marginalised those planners who believed in this kind of 'forward planning' (Du Toit et al., 2008: 8; Oranje and Berrisford, 2013: 60).

In stark contrast to the appeals for the introduction of a planning system focused on the creation of a better future by the group of visionaries, the regulation of planning would have a deep and lasting impact on the spatial development and creation and distribution of wealth in the country. Developed as it was for exclusive use in those parts of towns and cities inhabited by the European settlers, and strongly based on town planning laws passed in primarily Britain, but also the United States and Western Europe, the planning system enabled the carefully planned, functionally separated and tightly controlled development and accompanying protection of property wealth in these areas (Muller, 1983; Oranje, 1998: 230). In areas set aside for African occupation, a rudimentary form of functional division of land took place. The most basic of structures were erected for

the inhabitants of these iniquitous settlements who were regarded as temporary residents in essentially ‘labour camps’ serving farms, businesses and homes in ‘white South Africa’ (Oranje, 2003: 12).

With the advent of democracy in 1994, and the subsequent meshing of formerly separated spaces into new provinces and municipalities, the first democratic government was confronted with a complicated legal framework (Berrisford, 2011; Oranje, 2002). In some cases, authorities were tasked with administering up to 17 pieces of spatial planning legislation, each with different application procedures, terminologies and submission and approval mechanisms (Oranje, 2002: 92). While the resolution of this legal complexity and the introduction of ‘a single system for all’ was a key driver for the new government, there were other aspects it deemed necessary for a novel planning system (Development and Planning Commission, 1999). These new components were to a large degree a response to, and driven by, the *absences* (notably relating to fairness, equity and inclusivity) and the *silences* (notably relating to the segregation, exclusion, disempowerment and marginalisation) of the colonial and apartheid spatial planning systems. In addition, they were based on government’s objectives of redress, transformation and inclusivity, coupled with the pursuit of an investor-friendly, dynamic property market and accompanying property tax base, as well as prevailing international ideas about what constitutes ‘good’ spatial planning, including sustainability, resilience, land-use transport integration and the mixing of land uses (Oranje, 2012; Oranje and Berrisford, 2012: 61).

Contents

The first legal expression of the transformative post-apartheid spatial planning system was the Development Facilitation Act 67 of 1995 (DFA). Contrary to the view that it would introduce a progressive spatial planning ethos, containing the idea of efficient, integrated and sustainable land development in the interests of all inhabitants, it was geared rather to introducing extraordinary measures to facilitate and speed up the implementation of reconstruction and development projects and programmes relating to land (Berrisford, 2011: 251; Harrison et al., 2008: 61–62; Van Wyk, 2012: 105–109). Some 5 years later, government drafted a *White Paper on Spatial Planning, Land Use Management and Land Development* (Department of Land Affairs, 2001). It sought to create a new era of spatial planning in South Africa, strongly driven by principles and norms focused on inclusivity, equity, justice and redress. For the best part of a decade, the process of enacting new spatial planning legislation proposed in the *White Paper* was bogged down by continued threats of unconstitutionality, based mainly on the division of powers and functions between the three spheres of government in South Africa (Oranje and Berrisford, 2012: 58).

While a landmark judgment of the Constitutional Court in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* (2010) put the issues into perspective, it found two chapters of the DFA to be invalid and ordered the rectification of the DFA or the introduction of new spatial planning legislation. Finally, two decades after the dawn of democracy, a new legislative dispensation for spatial planning is now a reality. The national Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) signed into law on 5 August 2013, will, once put into operation, become national ‘framework

legislation' and alongside it, nine provincial spatial planning Acts will be promulgated. The point of departure in all the envisaged legislation is to address the spatial divisions of the past and create single, integrated spatial planning systems and more coherent and inclusive approaches to land and land development in municipalities. The necessity for these measures was recently reiterated in the Cabinet-adopted *National Development Plan 2030: Our Future – Make it Work* (National Planning Commission, 2012), highlighting the fact that apartheid planning consigned the majority of South Africans to places far from work where it is difficult to access the benefits that urban living provides. Whether the new spatial planning system will be able to turn around decades of segregation, exclusion and disempowerment, and bring about the comprehensive social, spatial and economic transformation required to ensure genuine inclusivity and equity in terms of access to 'the good life' in South Africa's towns and cities as envisaged ('*President Zuma signs the Spatial Planning and Land Use Management Act into law*', n.d.), remains to be seen.

The new spatial planning system

The key features of the unfolding system – complex mix of the pursuit of 'the diametric opposite of the earlier apartheid model', progressive social and economic objectives, neo-liberal persuasions and dominant international planning wisdoms – are the following:

(a) In contrast to the earlier top-down, centralist model, integrated, cooperative long-term strategic spatial development planning by all three spheres of government in a proactive, developmentally minded state: The legally mandated long-term spatial development frameworks to be crafted in accordance with this feature, must (1) be prepared, reviewed and amended with the participation by all interested and affected parties in a cooperative manner; (2) be aligned with the long-term economic, social and spatial development objectives and budgets of all three spheres of government; (3) provide strategic direction for infrastructure investment by government and the private sector; and (4) be used to inform decision-making on land development applications. 'The future' has become a central focus of government action, and planning a key driver in initiating, ensuring and sustaining economic growth. Given the challenges of limited capacity and budgetary constraints faced by municipalities, legal provision is made for national and provincial spheres of government to support municipalities in performing their strategic spatial planning functions.

(b) In contrast to the former docile, static, reactive development control function, a dynamic, proactive, assertive land-use management system: While the new system includes a regulatory function, this is no longer a goal in itself, but rather one of a number of components of a system including proactive government land development and land-use planning and implementation, which are all geared towards the attainment of strategic long-term objectives. While a high price is placed on rapid decision-making, maximum provision is also provided for public

participation and transparency. The new system is geared to (1) ensuring the creation, protection and maintenance of an environment that is conducive to current and future generations' health and safety; (2) fostering conditions that will enable people to obtain access to land; (3) providing access to housing; and (4) safeguarding the right to sufficient food and water. As such, it must guarantee (1) the inclusion of all South Africans in urban land markets and the effective functioning of these markets in the interests of all, (2) the extension of land-use management to include previously marginalised communities and settlements; and (3) the repair of unequal administrative and regulatory treatment. Simultaneously, and in order to provide municipalities with the necessary income to pursue their economic and social objectives, land markets must also bring certainty and predictability, instil confidence in the state, and serve the creation, maintenance and protection of municipal property tax bases throughout the country.

(c) In contrast to the previous technocratic system, the introduction of a model with a normative base and a set of progressive guiding and binding principles for spatial planning: This base and the accompanying principles include statements on the need for all planning and land development actions to (1) empower the public through understandable, clear policies, laws and procedures; (2) be fair, ensuring sound administrative justice and fair treatment of everyone, including provision for decision-making and appeals to bodies that are competent and independent to take decisions; (3) pursue the public interest, maximise resilience and minimise negative impacts on the environment, sprawl and the use of natural resources and valuable agricultural land by pursuing energy-efficient settlement patterns; (4) remove the spatial inequities/injustices created by apartheid, and include previously marginalised communities and settlements and ensure social inclusion; (5) restructure and regenerate urban areas, revitalise rural areas and create viable communities; (6) insofar as possible, use evidence in considering and taking decisions that impact on future expenditure on the provision of public services and the construction and maintenance of infrastructure; and (7) pursue national consistency and uniformity in the planning systems and procedures by which decisions are taken.

(d) In contrast to the former one-size fits all system, a provision for well-considered and pragmatic differentiation: In accordance with the provisions of the system, this differentiation may take place between geographic areas, types of land use and the development needs of places. As such, it may inter alia permit differences in land-use classifications and legal provisions, facilitate the nature and speed of decision-making, and assist in the pursuit of equality, fairness and repair of historic injustices, without detriment to any affected party. The differentiation must (1) permit the gradual introduction of land-use management and regulation in traditional and rural areas, informal settlement and slum areas, as well as areas that were previously not subject to a land-use management scheme; (2) recognise traditional leadership; and (3) provide for flexibility so as to allow communities to develop and maintain ways of living that will enable greater resilience.

Rejoinder: a meaningful and mutually beneficial fit?

The evolving post-apartheid planning system, as is being rolled-out in South Africa with its history of discrimination and inequality with regard to land and property, its multi-cultural and linguistic population, homelessness and a fragile and vulnerable environment, can be summarised as follows:

- Meaningful participation in all aspects of the spatial planning system;
- An open, inclusive and just decision-making process where information is readily available;
- Recognition of religion and culture and equal treatment in application and decision-making;
- An awareness of environmental issues; and
- The significance of property and housing.

While many of these issues are generic, a number of them are particularly pertinent in a South African context (Berrisford, 2011; Harrison et al., 2008). The way/s in which these issues are addressed in the Bill of Rights and other parts of the Constitution provide the starting point to determine the extent to which there is a meaningful and mutually beneficial fit between the two systems.

Participation

In pre-democratic South Africa, public participation received lip-service only (Harrison et al., 2009: 208; Van Wyk, 2012: 230). The democratisation of a society presupposes that citizens are actively involved in decisions and actions that affect their lives. In the new planning system, meaningful participation by the public is legally prescribed. This includes the right of people to participate in all spatial development plan preparation, review and implementation processes that affect them (Van Wyk, 2012: 231–232). This in turn requires that everyone who wishes to participate is equipped with the necessary competence to do so in an equal, effective and meaningful way. In addition, involvement in decision-making on courses of action and accompanying public investments must be guaranteed. Particularly in South Africa with its mix of languages and cultures, such participation and involvement will be enhanced where spatial development planning documents and land-use management systems are written in an accessible and user-friendly way.

From a legal perspective, ‘public participation’ is an ambiguous concept that can be interpreted to mean any of the following: information-gathering, consultation, collaboration, engagement and meaningful engagement. Few directly enforceable provisions regarding participation can be found in the Constitution. Those that do exist are statements of principle that must be interpreted and translated into enforceable legal provisions. Key among these are the values espoused throughout the Constitution and the provision that an object of local government is ‘to encourage the involvement of communities and community organizations in matters of local government’ (section 152(1) (e)). This objective is supported by the Local Government: Municipal Systems Act 32 of

2000. Chapter 4, entitled ‘Community participation’, directs municipalities to put appropriate mechanisms, processes and procedures in place to enable communities to participate in the planning, budgeting and implementation programmes and actions of the municipality.

Another set of constitutional values and principles enjoins public administration to be accountable and transparent by providing the public with timely, accessible and accurate information to promote efficient, economic and effective use of resources and encourage the public to participate in policy-making (section 195(1)). However, these principles remain principles until translated into enforceable legislative provisions. Although the Constitution (section 195(3)) demands the enactment of national legislation to give expression to and advance the values and principles listed, the legislature is tardy in complying. Draft legislation in the form of the Public Administration Management Draft Bill has been on the drawing board since 2008, leaving a serious lacuna. Consequently, support for these principles must be found elsewhere. In this regard, the SPLUMA’s principles of efficiency and good administration (section 7(d) and (e)) could assist. In addition, clause 5 of the Regulations on Fair Administrative Procedures, drafted in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), provides for special assistance in circumstances where people cannot read or write or who need support.

Despite these overarching provisions on the need for participation, little guidance is available on the precise ambit of ‘participation’ and serious differences of opinion exist between decision-makers and objectors on exactly where participation starts and ends. In *SAPOA v The Council of the Metropolitan Municipality of Johannesburg* (2012) ‘adequate public participation’ was described as a prescribed process to be followed, properly advising, consulting and considering the views of the local community, the entitlement to be notified timeously and to be provided with all relevant information, as well as a reasonable opportunity to respond. ‘Meaningful engagement’, as described by the Constitutional Court in two eviction cases, namely, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (2008) and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* (2010), was held to entail a two-way, structured, consistent and careful process of face-to-face interaction between all stakeholders at an early stage of the process (McLean, 2010).

Participation also envisages cooperation within and between different spheres and sectors of government. This is particularly true of South Africa where the government is not only constitutionally defined as consisting of ‘national, provincial and local spheres of government that are distinctive, interdependent and interrelated’ (section 40), but also where integrated spatial development planning is the domain of a number of organs of state that must cooperate. Chapter 3 of the Constitution is devoted to cooperative government, where the different spheres of government are obliged to ‘cooperate with one another in good faith by ... coordinating their actions and legislation with one another’ (section 41(1)(h)(v)). The importance of this chapter is evidenced by the fact that a general overarching Act, the Intergovernmental Relations Framework Act 13 of 2005, was enacted to provide structures and mechanisms to promote and facilitate intergovernmental relations and settle intergovernmental disputes. SPLUMA also devotes a chapter (Chapter 3) to intergovernmental support. However, despite the three spheres of government being ‘instructed’ to act in a cooperative way by the Constitution and supporting

legislation, the will to implement (appropriate and adequate) measures to ensure this has proven to be sorely lacking in practice (see also Harrison et al., 2008: 209).

Decision-making

South Africa's past with regard to planning decision-making was questionable with decisions being made at the whim and will of government alone (Hoexter, 2012: 14–15). The new spatial planning system proposes a land-use management system that is inclusive, just and consistent. A large part of this system entails decision-making, which occurs in different phases of the planning process. Different types of such 'decisions' are discernible, and include 'decisions' or proposals on the preparation, content and review of a Spatial Development Framework and 'decisions' on applications to change land-use rights. A key objective in this regard is to ensure that the state brings certainty and predictability to the property development sector by acting in accordance with its own spatial development plans when taking decisions in the land development and property domain.

Section 33 of the Constitution guarantees the right to administrative action – a decision – that is lawful, reasonable and procedurally fair. Reasonableness always features as a central aspect of a decision. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (2004), the court held that a reasonable decision is judged by its nature, the identity and expertise of the decision-maker, the range of relevant factors, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. For spatial planning, at the heart of which lies the promotion of quality of life, this decision weighs heavily.

The crux of 'administrative action' is the definition of 'decision' and the question arises whether a proposal made in terms of a Spatial Development Framework is a 'decision' (as defined in PAJA) and, therefore, constitutionally protected, or not. The answer to this question is that a proposal in a Spatial Development Framework is not a 'decision' and is therefore not 'administrative action' that is protected. Since it is important to be able to review the provisions of such a framework, it is unfortunate that proposals do not fall within the purview of PAJA. Other alternatives must, therefore, be relied on. These would include the supremacy clause in the Constitution (section 2), the provisions for public participation sketched above, flawed as they are, or to lobby that provisions for 'meaningful engagement' should be contained in legislation such as the SPLUMA.

Good administration is a prerequisite for proper decision-making in spatial planning. Once again the principles that public administration must adhere to are paramount. Besides these and other values in the Constitution, the SPLUMA, in section 7, contains principles of spatial justice, spatial sustainability, efficiency, spatial resilience and good administration. However, in the absence of legislation to enforce these principles, they are toothless.

Just as South Africa's past regarding decision-making was tainted, its approach to providing information was authoritarian and unrepresentative (Currie and De Waal, 2013: 692). The spatial development planning scenario as set out above envisages a situation where a person may need access to information regarding a development proposal. Protection of the right for all to have access to information related to applications for

land development is required. In an attempt to reverse past practice, access to information became a right and no longer a privilege. Section 32 of the Constitution provides for access to any information held by the state or by another person that is required for the exercise or protection of any rights. Enacted in consequence of the constitutional directive, the Promotion of Access to Information Act 2 of 2000 (PAIA) and its Regulations provide a statutory right of access, on request, but with necessary limitations to any record held by the state and private bodies.

Equality, dignity, religion and culture

The debates around 'equity v diversity' are not restricted to South Africa (Harrison et al., 2008: 210–211). Yet, with South Africa's tragic past looming large where inequality was rife and racial separation intrinsic to the way in which planning was done, a central theme in the new planning system is the recognition and protection of the right of all to be treated equally, fairly and with dignity in the entire spatial planning process, from participation in plan preparation to submitting a land development application. Where necessary, legal provisions must be instituted to ensure that differentiation in spatial development plans and land-use management systems is permissible and does not compromise other human rights.

Section 9 of the Constitution is the equality clause. The commitment to equality entails recognising the shifting patterns of inequality (Currie and De Waal, 2013: 212). For spatial planning, this means eradicating racial discrimination in relation to, among others, access to land and housing, markets and participation in decision-making. It precludes unfair discrimination on a range of grounds, including race, culture, language and belief. 'Fair discrimination' on the same grounds is permitted. Differentiation is sanctioned on a number of grounds, including 'persons, or categories of persons, disadvantaged by unfair discrimination', granted that it is applied in such a way that it does not lead to unfair discrimination against any person (Liebenberg, 2010: 157–163). Although the section does not specifically list spatial location or regional differences as grounds for differentiation, these could be included, because it provides for '... one or more grounds, including ...'. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was specifically enacted in consequence of section 9(4) to prohibit or prevent unfair discrimination. Lists of practices relating to discrimination are annexed to the Act and include housing, land and property. These lists emphasise practices that may be unfair and the state is called upon to address them. Included is the practice of 'red-lining', which is the refusal by financial institutions to lend money to purchase property (Currie and De Waal, 2013: 249), a practice that is anathema to proper planning.

Human dignity is a central value established by the Constitution (section 10). As espoused in the landmark decision of the Constitutional Court in *Government of the Republic of South Africa v Grootboom* (2001), the right to human dignity encompasses the recognition of, and concern and respect for, all people as human beings and members of humanity. Dignity is what gives a person his or her intrinsic worth and presupposes that dignity is only possible where there is access to food, housing and water (Chaskalson, 2000: 198). In a planning context, this ruling instructs planning authorities to perform

their duties with insight, respect and a sense of humaneness, especially with regard to the poor and vulnerable (Liebenberg, 2005: 1–31).

Culture and religion are given particular attention in the Bill of Rights. Not only does the equality clause list culture and religion as two grounds on which discrimination is prohibited, but section 15 guarantees everyone the right to freedom of religion; section 30 grants the right to everyone to participate in the cultural life of their choice; and section 31 gives persons belonging to cultural, religious or linguistic communities the right not to be denied the right to enjoy that culture or practise their religion. In *Oudekraal Estates (Pty) Ltd v City of Cape Town* (2010), the Supreme Court of Appeal, faced with competing rights of freedom of religion, property and environment, safeguarded religious rights by permitting sacred *kramats* to remain on property ‘regarded as sacred by a formerly marginalized section of society’ that was earmarked for development.

Environment

Besides emphasising religious rights, the *Oudekraal* case reiterated that humankind has not always been aware of treading softly on the planet. A concern worldwide, but for South Africa in particular, her situation at the southern tip of Africa is a precarious one. Subject to extremes in climate, drought-prone and with limited water supplies, yet rich in natural resources, including recently discovered natural gas reserves, significant threats exist. Moreover, town planning, with few exceptions, did not take environmental concerns into account. As a result, environmental issues came to be catered for by an alternative set of environmental regulations and the relationship between planning and environmental management suffered. This divide caused a weak incorporation of sustainability concerns in planning and a duplication of procedures, straining already limited capacity (Harrison et al., 2008: 160–163). Consequently, one of the key features of the new planning system must, of necessity, be not only an awareness of environmental issues but also a strong move to play a leading role in integrating spatial planning and environmental factors.

Section 24 of the Constitution grants everyone the right to an environment that is not harmful to their health or well-being, and to have it protected for the benefit of present and future generations through legislative and other measures that secure sustainable development and use of natural resources, while promoting justifiable economic and social development (Kidd, 2011: 209–265). The core of this right – sustainable development – forms the base of the framework National Environmental Management Act 107 of 1998 (NEMA) and a comprehensive suite of ‘downstream’ legislation as well as a detailed set of Environment Impact Assessment Regulations 2010. In addition to this, the Constitution directs local government to promote a safe and healthy environment (section 152(1)(d)). Despite these provisions and the view that it ‘must be accorded appropriate recognition and respect’ (*Director, Mineral Development, Gauteng Region v Save the Vaal Environment* (1999)), the divide between planning and environmental management is not disappearing fast. Moreover, the environmental right contains few ‘teeth’ (Currie and De Waal, 2013: 529), permitting planners, developers and officials to choose to ignore the intent, content and implications of the right.

Property and housing

The conflict around the inclusion of a property clause in South Africa's Constitution is evidence of the significance of land, not only in an economic sense, but in a cultural sense as well. Land is intimately connected to people's lives, properties, housing and areas in which those properties are located. Consequently, the spatial planning system must protect all these elements. Simultaneously though, the state must be enabled to actively intervene where much needed restructuring of the 'Apartheid City' is required, and where efficient and resilient urban forms and ways of living are pursued for the sake of the public good and long-term sustainability (see *inter alia* Department of Land Affairs, 2001; Development and Planning Commission, 1999; National Planning Commission, 2012). Limitations on the sizes of properties, the places where properties are developed and the density and type of housing that are provided, serve as examples of the types of interventions that are required. Legal measures must ensure that well-located land, especially public land, is used, as and where possible, to assist especially persons from previously disadvantaged groups, to access affordable housing. In addition, far more needs to be done to facilitate dignified life and living in the countless informal settlements – 'slums' – surround so many of South Africa's towns and cities (Huchzermeyer, 2011).

Against the background of South Africa's history, property and housing rights are appropriately accorded recognition in the Bill of Rights. The section 25 property clause is divided into two main parts: the purpose of the first part (sections 25(1)–(3)) is to protect existing property rights and interests against unconstitutional state interference, while the second part (sections 25(5)–(9)) aims to legitimate and promote land and related reforms. With these two components as base, the property clause provides the balance in terms of which rights to land are both secured and regulated (Van der Walt, 2011). Nevertheless, issues of arbitrary deprivation of property and the payment of 'just and equitable compensation' continue to receive the attention of the courts, especially where redress for past dispossession and redistribution of land remains uncertain and contentious.

The Constitution requires the state to 'take reasonable legislative and other measures, within its available resources, to achieve progressive realisation' of the section 26(1) right of 'access to adequate housing'. Moreover, the Housing Act 107 of 1997 and comprehensive policies, such as the National Housing Code that includes the all-important Upgrading of Informal Settlements Programme, take the implementation of the right further. The Constitutional Court, in *Government of the Republic of South Africa v Grootboom* (2001) and *Nokotyana v Ekurhuleni Metropolitan Municipality* (2010), has provided the required interpretational guidance to give direction to municipalities tasked with implementing the right (Currie and De Waal, 2013: 563–591; Huchzermeyer, 2011: 224–242; Liebenberg, 2010: 465–466). However, in giving expression to the right, the state has been constrained by the necessity of having available resources, which has been worsened by a massive housing backlog and the multiple budgetary demands posed by a troubled global and national economy.

Findings

While it has textual references to the kind of ideals that the Bill of Rights seeks to advance, the new planning system, true to the planning ideals of the early Anglophone

planning movement of the 19th Century, the developmental mandate of the state and the fractures of the past to be healed, has put forward its own set of principles and objectives. While these are broadly concentrated within the mould of the Bill of Rights, other sections of the Constitution and supporting legislation, they in some cases go further than those included in these texts. However, in some cases the Bill of Rights provides little support. These are the following:

- For participation in spatial development plan preparation and review processes to have real meaning, and truly reverse the exclusion and silence of the apartheid years, a broader, more inclusive type of ‘meaningful engagement’ is required.
- While the Constitution lists a set of norms and principles to be observed in public administration, and hence in the preparation of spatial development plans, application procedures and decision-making processes in land-use management practice, these have as yet not been provided for in legislation.
- The Constitution facilitates a dialogical system of planning and development in Chapter 3, in terms of which the three spheres of government must assist and support one another. Moreover, because they each have different powers and functions, they actually need this to get things done. Despite this, cooperative government and intergovernmental collaboration has by and large remained a far-off ideal in South Africa. Without it, and with neither the Constitution nor the Intergovernmental Relations Framework Act 13 of 2005 providing strong guidance on it, other than ‘calling for it’ and providing legal backing for the creation of intergovernmental forums and structures, the impact of the new spatial planning system, with its high premium on collaboration, will be severely compromised.
- The key features and emanating actions of the new spatial planning system and a number of the rights these actions speak to, such as those around the environment, housing and property, are reliant on the involvement of, amongst others, highly skilled and experienced spatial planning, urban design and planning law professionals. Although a number of provisions in the Constitution do provide the appropriate value-system to support this, neither local government nor new spatial planning legislation takes the issue far enough, leaving the door open for powerful, self-serving involvement, advice and decision-making that may not be informed by technical analysis and rational consideration of the merits and demerits of spatial development plans and proposals.

Conclusion

The Bill of Rights and the unfolding new spatial planning system are connected to the past in that they are responses to the colonial and apartheid legal and planning regimes. They are also part of the present, because they are components of the new democratic South Africa. Focused on the future, they are key instruments in healing the fractured, fragmented and deeply unequal country. For the Bill of Rights to see its manifestation of principle and value in the real world, it needs instruments like the spatial planning system. Likewise the spatial planning system needs the backing and support of the Bill of Rights.

This article has attempted to understand the extent to which there is a mutual and beneficial fit between the two ‘systems’. In this process, the nature of the particular right was found to play a significant role. The rights to equality and human dignity, for example, have a normative base and their impact cannot be quantifiably determined. The right of access to adequate housing, on the other hand, is, to a large extent, quantifiable. This makes a meaningful determination of the role and place of each of the rights vis-a-vis the planning system difficult, especially where the terrain is a novel one. Nevertheless, some understanding of the nature of the relationship between them is possible, however tentatively.

Where the fit seems to be mutually strong is in the recognition and application of proper decision-making processes. Despite some uncertainties, the rights to just administrative action and access to information provide the context within which the spatial planning system can function properly. The courts have ensured that the right of access to adequate housing fits comfortably. However, this is bedevilled by the way in which many municipalities avoid their constitutional duties, as well as by problems around illegality, service provision and certainty inherent to informal settlements.

Sometimes though, the fit is not as strong and as clear as it would need to be for meaningful application and impact in practice. The rights to equality, dignity, religion and the environment are increasingly becoming part and parcel of spatial planning attitudes, practices and procedures, and a mutual fit is being achieved, however slowly and tentatively.

As a result, the past may yet obstruct the kind of future that both the authors of the Constitution and the new planning system have sought, and are still seeking to achieve. Preventing this from happening, and ensuring a closer fit and actual follow-through on the ground, may require more than just a set of legal provisions. Without the wish and will to effect the necessary changes by politicians, spatial planners and others involved in the social, economic and spatial development of the country, the belief that it is possible to ‘make a change’, and the ability, from both a capacity and a funding-perspective, to do what is required, even the most progressive Bill of Rights and spatial planning system, will not be able to undo the deep and divisive imprint of the past. While it is in most cases not too late to make the necessary (and urgently required) changes, there is a real and deep concern that the magnitude of the task, the impact of passionless, tick-box-style, administratively driven state performance management systems may lead to just (another) meaningless ‘paper-fit’ between the two systems.

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