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Exclusion, Contradiction and Ambiguity in Planning Laws and the Proliferation of Urban Informality in Kenya

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Abstract

The Town planning practice, which began in Europe and North America towards the end of the 19th century, was also exported to Kenya during colonial rule. Due to racial discrimination, the said laws facilitated planning in European and Asian settlements but excluded the African areas. Paradoxically, the component of exclusion was retained by post-colonial governments, implying that the planning laws continued to facilitate a duality of spatial patterns. Exclusionary planning during colonial and post-colonial regimes, therefore, created formal and informal space realms both in the urban and rural areas of Kenya. The review of literature shows that there was no effort in the early years of post-colonial era to either reverse informal development in areas where it occurred or accelerate planning in colonial era-formal zones. However, there was systematic effort to exclude some areas hitherto viewed as well-planned from the planning bracket. Further, laws that facilitated effective development control during colonial era were later weakened or expunged from the statutes during post-colonial era. Post-colonial policy approaches have, thus, led to ineffective development control in areas hitherto considered well-planned. The result is that Informality increased in magnitude in former African areas, while the same informality also crept back to the formerly well-planned European and Asian settlements. The result is that both former informal-African and formal-European settlements appeared to coalesce towards one huge informal settlement.

Keywords: Exclusion, and contradiction, in planning laws, proliferation, informality.

INTRODUCTION

In the recent times, there has been accelerated urbanization in the countries in transition, Kenya included. Although urbanization is a positive phenomenon, the trend of urbanization in Kenya is, however, worrying because it is characterized by high levels of informal settlements, currently constituting 71% of the urban fabric (UN-Habitat, 2009). What drives informality in the Kenyan urban and rural spaces? Most countries in less developed countries (LDCS), including Kenya, use planning theories and instruments borrowed from the west and studies show that this could be the cause of the proliferating informality in the urban spaces. The question one would then ask is: why would theories and instruments that are fairly effective in regulating planning and development control in the west become ineffective in LDCs? Some studies have found a strong correlation between effective urban planning and the nature of planning laws (Mwangi, 1994; Cullingworth, 1998; Ayonga, 2012; Home, 2012).

This paper posits that ineffective planning in Kenya and, the reason for high levels of urban informality could be found within the context of inadequacy of planning law. For example, planning laws during the era of colonial rule in Kenya mainly served European and Asian interests. Since the laws were not modified, planning still serves the former whites and Asians zones. The exclusive Asian and European zones were, however, infiltrated by a few African elites who could afford since there was no racial discrimination any more during post-colonial era. The implication is that the whites and Asian enclave changed to posh or rich-only enclave. The former African enclave changed to the poor only exclave but again remained excluded from planning during post-colonial era. The question which remains understudied is: how has such exclusion influenced urban and rural spatial patterns over time, including post-colonial era? This investigation is the subject of this paper.

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RESEARCH METHODS

Literature review was carried out through desk research covering the era of colonial rule in Kenya spanning the periods between 1896 and 1962 and the period of post-colonial rule covering the years 1963 to 1998. The review interrogates the set of laws used to undertake planning during the colonial era and these laws include the Crown Lands ordinance (Kenya, 1902, 1915), the Town Planning ordinance (Kenya, CAP 134) and the Town Planning rules Ordinance (Kenya, CAP 133). During post-colonial era, the laws were changed to read Government Lands Act (Kenya, CAP 280) instead of Crown Lands Ordinance, and Town Planning Act (Kenya, CAP 134) instead of Town Planning Ordinance. This means that the Town Planning rules ordinance (Kenya, CAP 133) was dismantled while retaining the Town Planning Act (Kenya, CAP 134) and the Government Lands Act (Kenya, CAP 280). How then did the dismantling of the Town Planning rules Ordinance affect the management of the urban and rural spaces in Kenya?

It is clear that the removal of the Town Planning Rules Ordinance from the statutes had created disarray in the unity of the laws that facilitated effective planning and development control. This paper tries to investigate how the resulting disunity within the planning laws had impacted on the planning and development control processes in the urban and rural areas. Later in 1968, post-colonial government introduced the Land Planning Act (Kenya, LPA, CAP 303) which appeared in its letter and spirit to replace the Town Planning Act (Kenya, CAP 134), the Government Lands Act (Kenya, CAP 280) and the Local Government Act (Kenya, CAP 265).

The Government Lands Act, the Town Planning Act and the Local Government Act were, however, not repealed as anticipated and, therefore, the presence of the Land Planning Act (Kenya, CAP 303) appeared to contradict, overlap and even created ambiguity within the already existing planning framework. The third review, therefore, tries to find out how the resulting overlaps, contradictions and ambiguities created by the advent of the Land Planning Act affected urban and rural planning in Kenya. Data used to answer the hypothesis advanced in this paper were available from secondary sources and particularly from the planning statutes covering colonial and post-colonial era. The literature review approach adopted in this methodology can then be justified on the basis that most data could only be available from secondary sources.

RESULTS AND DISCUSSION

Nexus between weak laws and urban informality: The European experience

In Europe, lack of laws, and therefore, *laissez faire* in urban development created the undesirable urban patterns witnessed during medieval era. The resulting scenes of urban informality, led to the agitation for environmental determinism in the later parts of the 19th century (Gallion and Einsner, 1963; Cherry, 1974; Taylor, 1998; Hall, 2002). Urban patterns can be predetermined and in this context, Barker (2007) observes that people made, and still make great cities and there is general consensus that planning would fulfill such dream (Faludi, 1973). Why is planning necessary and what set of values would planners inculcate in a planning process in order to achieve a great city? Again, Policy makers and scholars are in consensus that planning would complement the efforts by the private sector in building the great city by integrating public interest (Cherry, 1974; Taylor, 1998).

While enacting the Town and Country Planning Act of 1947 in the UK, the importance of planning to secure public interest in a land development process was emphasized as follows: 'It is expedient to secure a proper balance between the various demands for land, having in mind that there is a third party in addition to the vendor and potential purchaser' (Clark, 1948). The third party in a development process besides the vendor and purchaser is then viewed as public interest and in this context, it is public interest which suffers during *laissez-faire* urban development. Planning and environmental laws are important because of their capacity to influence, control and chart the way our cities are shaped (Cullingworth, 1998; Barker, 2007; Ayonga, 2012; Home, 2012).

Reference is made to the famous zoning law of New York (1916) and the long-term effect such law has had in shaping one of the greatest cities in the world (Barker, 2007). Ultimately, planning laws are positive statements made by citizens

about what measures, constraints and processes they want in place to make their cities the sorts of places they want them to be (Gallion and Einsner, 1963; Barker, 2007). Plan implementation needs the use of power and this power is enshrined in the planning law (Etzion, 1968; Faludi, 1973). People must be guided by a set of standards prescribed by law-the codes and ordinances that regulate the development of urban property (Gallion and Einsner, 1963). When the forces that contribute to city building are unbalanced, inequities develop and the city declines (Gallion and Eisner, 1963).

The mandate by states to enact laws that regulate land development is called police power and such power was expressed in ancient law as follows: 'Due regulation of domestic order of the kingdom where members of the state, like a family, are bound to conform their behavior in good propriety…to be good members of and an orderly part of a community' (Gallion and Einsner, 1963). From the foregoing, one can conclude that some of the undesirable patterns witnessed in our cities today, which are often manifested in long traffic jams, poor land use connectivity, poor civic designs, slum settlements, urban sprawl, massive litters of solid waste, poor drainage systems, and land use conflicts could be attributed to either lack of planning or weak laws that guide planning. Are the challenges of urban planning in Kenya a pointer to the weak link between planning law and urban land use management? This is investigated in the sections below.

Era of exclusion (1896-1962): Planning laws in Kenya excluded African areas

The colonial government began a system of racial segregation where they resided in locations far removed from those of Africans and Asians. In particular, whites preferred to live in urban areas and in the scheduled rural areas while grouping Africans into African reserves (Okoth-Ogendo, 1991). In order to bar non-whites from European settlements completely, the law specified unequivocally that: 'If at any time it shall be proved to the satisfaction of the Commissioner of Lands that any such plot or part is used solely or partly as a place of residence of an Asiatic or native not being a domestic or caretaker in the employment of the occupier, the Commissioner of lands may declare the lease to be forfeited' (Okoth-Ogendo, 1991; Kenya, CLO, 1915). Besides the racial exclusion stated in the foregoing, both the 1915 Crown Lands Ordinance (CLO) and Town Planning Ordinance (TPO) also provided for planning in the European and Asian settlements only. This discriminatory approach to planning had various implications in the management of urban and rural land use as discussed in the sections below.

Two rural areas emerged: formal-European and informal-African rural areas

The 1902 and 1915 Crown Lands ordinance (CLO) provided several rules to be followed in the management of rural-based crown land, yet such rules were not provisioned in the African rural areas. For example, part 14 of the Crown Land ordinance (Kenya, 1915), clearly specified that: 'Except where expressly varied or excepted, there shall, by virtue of this ordinance, be implied in every lease under this ordinance covenants by the lessee:- ...to keep in reasonable repair all buildings erected before the commencement of and included in the lease and to use and develop the natural resources of the land leased with all reasonable speed, having regard to all the circumstances of the case'. Section (15) of the Crown Lands Ordinance provided that the lessee should erect the buildings specified in the lease and in a manner and within the period therein provided and such buildings should be of good and substantial material. Developers were required to provide reasonable drainage and water supply, and have regard to the health of the neighborhood. The law also required developers to deliver the buildings in good and substantial repair on the termination of the lease.

African rural areas were divided into two: the African rural reserves and African frontier districts. The African reserves were mainly the fertile areas of central province, Nyanza and western while the frontier districts included the dry areas of North Eastern Kenya, some parts of Eastern province such as Isiolo, Moyale and Marsabit, and some parts of Rift valley such as Baringo, Kajiado and Narok. The African reserves and the frontier districts can be viewed as constituting one zone of informality since planning laws did not cover the two zones and land tenure in both zones were communal. There was congestion of people and animals in the African rural areas and the laws did not require Africans to build houses of permanent nature nor were Africans required to plant trees as was the case in European zones. This then created

two rural areas-the well planned, well managed-formal white scheduled rural and the informal African rural areas.

Two urban areas emerged: planned European-Asian towns and informal African town/ quarters

Africans were not permitted in towns unless they had a permit to work for the whites as domestic servants. For this reason, specific locations were set aside in class A and B towns to accommodate Africans. The Town Planning Rules Ordinance discouraged any other person other than Africans, from residing in the African quarters as witnessed in the section below: 'No person other than an African (including a Somali) shall reside in the African location unless he is in possession of a permit authorizing him so to reside, issued by the district commissioner, upon such terms and conditions as may be specified in the permit'. Any unauthorized person who is found in the African location between the hours of 7 pm and 6 am without reasonable and sufficient cause shall be guilty and shall be liable on conviction to a fine of one hundred shillings and in default of payment to imprisonment for a term not exceeding one month (Kenya, CAP 133,section 3ii (ab)). The separation of Africans from Europeans led to the evolution of African quarters within class A and B towns.

The laws permitted temporary buildings within the African quarters since the stay of Africans within class A and B towns was viewed as transient. The law specifically emphasized that: 'No hut or other erection in African location shall be deemed to be a building within the meaning of these rules' (Kenya, CAP 133, section 38). 'Notwithstanding anything contained in any other rule, it shall be lawful for the local authority to grant permits for temporary buildings on such obligations both as to removal thereof and otherwise and generally upon such terms as may be prescribed and the foregoing rules shall not apply to any building erected under such a permit unless by express stipulations' (Kenya, Cap 133, section 20). It is clear that the Town Planning rules contained in CAP 133 were not applicable to the African quarters. It was specified in the rules that African quarters would be at least 10ft away from any dwelling house, domestic building or building of the warehouse class (Kenya, CAP 133, section 19a). Such huts shall not be constructed within 5ft of any kitchen indicating of the danger posed by such dwellings to other residents.

The question then is, if African quarters were such a danger to the whites that sufficient buffer had to be created to separate them from those of the whites, why were they not worried about the safety of the Africans who occupied the dangerous huts? The setting aside of African quarters and authorization of the use of informal building materials within African zones then sired several substandard African zones in all class A and B towns. In Nairobi, there was Kariokor, Mathare and Pumwani and in Kisumu there was Nyarenda and Manyatta (Home, 2012; Laji et al., 2017).

All periodic markets which were then considered as African trading markets were not subjected to planning and were, therefore, informal. It can be concluded, therefore, that colonial era planning laws facilitated a dichotomous spatial system consisting of the well-planned Europeans-Asians in one hand and informal-African zones on the other hand. Due to the discrimination, three towns emerged; the formal European-Asian towns, the informal African quarters within class A and B towns and the informal African periodic markets.

Urban-rural delimitation and the formation of informal towns in peri-urban zones

The colonial government created towns and rural areas and specifically gazzeted the towns by demarcating their boundaries and jurisdictions. This tendency clearly separated class A and B urban areas from the African rural areas and also resulted in sharp demarcations between planned and non-planned areas. The African quarters in class A and B towns could only accommodate those Africans who worked in the European houses as domestic servants. In this context, Home (2012) reports another category of Africans who worked in railways stations but who were not housed either in town or in the informally constructed railway quarters. Such category of workers lived in poorly constructed houses outside the boundaries of class A and B (Home, 2012; Laji et al., 2017) and this resulted in yet another category of slum towns outside such cities.

Outside the city of Nairobi, informal towns occurred in Kawangware, Mathare, Kangemi and Riruta Satellite to accommodate spouses of

persons who worked in European quarters and those who worked in the railway lines. Although most of the informal towns outside the cities were incorporated to the city boundaries during post-colonial era, land tenure in such towns remained freehold and community facilities are still glaringly inadequate because of the lack of planning during colonial era.

Post-colonial rule (1963-1998): duality retained, formal and informal spatial patterns proliferate

When Kenya attained self-rule in 1963, one of the tragedies that were never resolved was the colonial laws of exclusion that sired informal urban and rural spaces, and this was perhaps done inadvertently. Worse still, the unity of purpose hitherto inherent within the planning laws was dismantled as well, making such laws ineffective in the management of urban and rural spaces.

The 'Unity in the planning laws' and the lessons we can borrow from colonial-era practice

Although colonial laws were dualistic, and had undesirable impacts on the urban and rural spaces, Kenya can borrow a lot of good practices of effective town planning from the colonial government. For example, a coherent set of planning laws were put in place which in turn created institutions that made planning processes effective in the areas where such planning was practiced. These laws were: the Crown Lands ordinance (Kenya, 1915), the Town Planning Act (Kenya, 1948, CAP 134) and the Town Planning Rules Ordinance (Kenya, 1948, CAP 133). What were the practices that made planning effective?

The first component towards effective town planning during the colonial era can be viewed as the nationalization of development rights both in the urban and rural areas as was the case in England during the era of the Town and Country Planning Act (TACPA, 1947). In this regard, developers retained the right to undertake development themselves but the right of what constituted development was decided in advance by the state in a land use plan. Secondly, developers were required to seek for development permits from an authorized authority and this requirement was to ensure that developers conform to the plan. For example, part III (29) of the Township planning rules ordinance (Kenya, CAP 133) stipulated that developers would not undertake any development activity unless they had approval from the district commissioner.

In order to avoid ambiguity in what constituted development, the concept was defined in law in order to guide the courts in identifying the offenders for punishment. In the definition, for example, developers who required permits included those who intended to, (a) erect a building, or make any addition to a building or make any alterations to a building involving the removal or re-erection of any external wall or party wall thereof; (b) or making alterations of any wall which supports the roof to an extent exceeding one half of such wall above the ground level, such half to be measured in superficial feet; (c) or remove or reconstruct any portion of a building abutting on a street which stands within the regular line of such street.

Section 32 of part III of the rules elaborated what erecting a building means and for purposes of the subsection, it referred to: 'To erect a new building, to re-erect a building the masonry of which is pulled down to the plinth, or to convert into a dwelling-house any building originally intended for human habitation, or to convert into more than one dwelling-house a building originally constructed as one dwelling-house, and a building so erect, re-erected, converted is called a new building' (section 32).

The requirements that building plans be approved forced developers to seek advice from experts in the building industry such as architects who had the skill to prepare plans. Building plans submitted for approval had to show details of materials to be used in the construction and this forced developers to seek the advice of engineers. Further, there was a legal requirement that such plans specify the thickness of the wall and roof, the intended mode of drainage, means of water supply and means of ventilation and any other information that the commissioner would require (Kenya, CAP 133, Part III, section 33) and obviously this would require the indulgence of the trained engineer. 'No person shall begin to erect any building or to execute any such work as is described in rule 29 until he has given notice of his intention and unless the commissioner has

intimated his approval thereof within the period prescribed' (Kenya 1948, Cap 133, Part III, section 39).

The rules also specified that all buildings must follow the town plan and in particular the section reads: 'All buildings within the township shall be constructed in accordance with the general plan of the town, and on the building line approved by the district commissioner' (Kenya, CAP 133,Part III section 59). The Town Planning Act (Kenya, CAP 134) provided for the procedure of preparing a town planning scheme and the Crown Lands Ordinance also provided that no development would be permitted on crown land unless there was a town planning scheme to guide such development and such plan approved by the Commissioner of Lands.

The subdivision of land in townships was also guided by a town plan and in particular the section of the law specified: 'No land within a township shall be divided, divided and let or divided and sold, unless a plan in duplicate of the proposed division or subdivision has been submitted to the Commissioner of Lands and the approval of the Commissioner of Lands has been signed thereon in writing' (CAP 133, Part V, section 68). The erection of more than one building within the boundaries of any one plot or holding, whether such buildings are erected on account of the owner of the land or otherwise, shall constitute a division of such land for purposes of this part (section 70).

The Town Planning Rules Ordinance (TPRO) created the office of the Development Control Authority whose role was to implement plans and control development. The powers of the plan approving authority and the plan preparatory authority were specified and separated from those of the development control authority. The TPRO provided that implementation of the plans and control of development in general, including issuance of development permits and occupation certificates was the prerogative of Local Authorities. However, the functions of implementing plans and development control which were given by law to Local Authorities were actually executed by the District Commissioners. In order to remove any ambiguity as to who was in charge of development control, the TPRO specified that reference to Local Authorities would mean District Commissioners.

What norms did planning try to effectuate and how did the development control authority inculcate the norms, otherwise commonly referred to as public interest into a development process? It is noted that health and safety were integrated in the development process at the stages of construction of houses and during the subdivision of land. The statutes specifically stated that Local Authority (hereby also specified as the District Commissioner) may disapprove of any plans on any of the following grounds: (a) That the system of drainage of the plot or subplot upon which the building is to stand is not satisfactory; (b) that sufficient facilities for access of any sanitary carts are not, in the opinion of the local authority, provided; (c) in case of a building to be erected on a plot which a building stands or buildings already stand, that no scheme of subdivision has been sanctioned, or that such building is not in conformity with a scheme of subdivision which has been sanctioned; (d) that the site upon which it is proposed to build is unfit for human habitation; (e) that they do not adequately provide for the strength and stability of the building, or the sanitary requirements thereof.

In order to ensure accessibility to all land uses, section 42 of the TPRO specified that every house should have access to a road not being service lane (at least 14feet, 6in), and every room should have a clear superficial area of not less than 100 square feet and shall have a window or windows opening directly into the external air and a ventilating aperture not less than 144 square inches (Section 44). Section 46 specifies that such buildings shall be of permanent material and in particular the section states that no external wall shall, except with the written permission of the District Commissioner, consist of any temporary erection of wood, cloth, canvas, grass, leaves, mats or any other inflammable or unsightly material (Kenya, CAP 133, Part III, section 46).

To be more specific, the rules provided that every person shall erect a new building, construct the new walls and party wall and every cross wall of bricks, stones or other hard or incombustible materials properly bonded and solidly put together with motor, cement or cement mixed with sand

(Kenya, CAP 133, Part III, section 47). The roof of the building was specified in section 20; 'Every person who shall erect a new building shall cause the roof of such building and every turret, dormer or other erection placed on the flat or roof of such building to be externally covered with tiles, metal or other incombustible material, except as regards any door, window, lantern light or skylight.'

The laws provided for maximum penalty for those who violated the plans and those who did not seek for development permits. The law, for example, provided that any person who contravened the rules by constructing a new building without prior approval from the District Commissioner would be guilty of an offence and liable to a fine not exceeding 400 hundred shillings and the Commissioner shall require the person to remove or demolish such building or work within a time to be stipulated by such notice (Section 60). The construction shall also proceed as per the approved plans, otherwise, the developer shall suffer the same fate stipulated in section 60 if the plans are altered (Section 61).

In order to protect the environment, the laws also included rules related to controlling general nuisances. For example, the escape of night soil or urine outside the toilet of the plot or any person depositing unauthorized materials on the roads attracted a fine of one hundred shillings (100) (Kenya, CAP 133, sections, 71-75). Animals such as cattle, pigs, camels, goats swine, were not permitted in town except with the permission of the District Commissioner (Kenya, CAP 133, Part VIII, section 82-85). The dead could not be disposed anywhere unless such place was set aside as a cemetery (Part xxii, section 157).

Once the building was completed, the developer was required to seek for a certificate of occupation from the local authority. In particular, the law stipulated that: 'A person intending to occupy or use any new building or, being the owner thereof, to suffer the same to be occupied or used shall furnish to the local authority a certificate signed by the owner of the building or by any qualified architect or firm of architects to the effect that the building has been constructed in every respect in conformity with the plans thereof as approved, or, if not so constructed, specifying any particulars in which such plans have been departed from. When such certificate was remitted, the local authority or any officer duly authorized thereby in that behalf, if satisfied that the building is in conformity with such plans or that any deviations from the plans as approved as such may be allowed, shall issue written permit of occupation.' 'A person shall not occupy or use any new building or being the owner thereof, suffer the same to be occupied or used, unless he shall have procured a written permit of occupation under this rule' (Kenya, CAP 133, Part 56, CAP 133). Unauthorized advertisements were also prohibited unless one was permitted to do so.

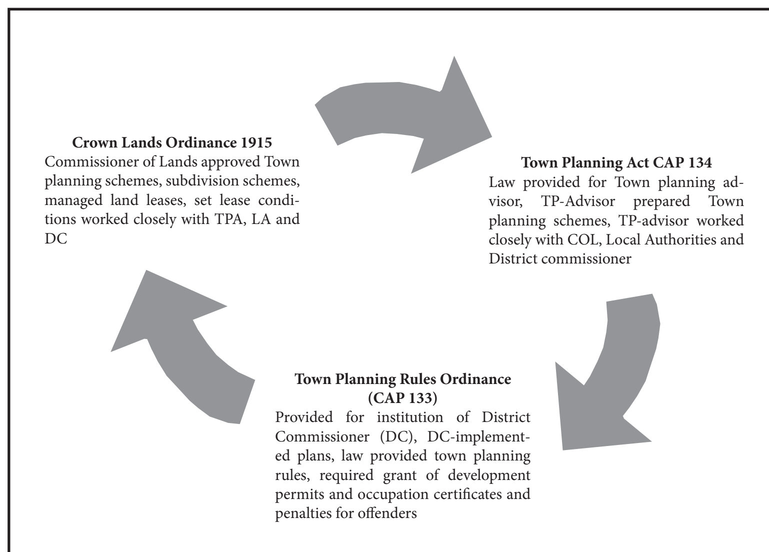

FIGURE 1
Unity in the planning laws provided for effective planning: summary
Source: Author's construct 2019

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Expunging of CAP 133 from the statutes and the contradictions in the planning laws

During post-colonial era, the Crown lands ordinance was changed to Government's Lands Act (Kenya, CAP 280) and the Town Planning Ordinance was changed to Town Planning Act (Kenya, CAP 134). Both the Government Lands Act and the Town Planning Act (Kenya, CAP 280,134) provided for planning in government land as was the case during colonial era. The Local Government ordinance was changed to Local Government Act (Kenya, CAP 265) and it facilitated Local Authorities with powers to control urban development as it were during colonial rule. However, the Town Planning Rules Ordinance (TPRO) (Kenya, CAP 133) was removed from the set of laws that provided anchorage to effective planning of towns. The Town Planning rules ordinance provided for rules that guided urban development and this law also required developers to obtain development and occupation permits. The expunging of CAP 133 from the statutes implies that development and occupation permits were no longer required and those who violated the plans could not be apprehended and punished since the development control authority was not in place.

Ineffective development control in former well-planned towns and emergence of informality

During post-colonial era, Local Authorities were in charge of development control in all towns including those formerly classified as A and B. When discharging their duty, the Local Authorities had to liaise with the Commissioner of Lands and the Town Planning advisor and this was also the practice during colonial era. However, the colonial government had enacted the Town Planning rules which created an extra institution in the name of District commissioner to execute the rules and implement plans. The absence of CAP 133 during post-colonial era created a disjoint in the planning and development control system as a whole which made Local Authorities ineffective. For example, consent to subdivide government land was granted by the Commissioner of Lands who required that such land subdivision scheme be prepared by a competent authority and in this case, most of the subdivisions were carried out by the land surveyors.

Application for consent to construct houses in the urban areas covering government land was directed to the Local Authorities. However, Local Authorities did not have the Town Planning Rules to guide them when approving building plans and they had no technical capacity to approve plans. Once the application was launched with the Local Authorities, revenue was collected from those who submitted the plans before the Local Authorities circulated the plans to various relevant authorities for comments. Finally, the plan was accorded approval by the Town Planning Committee of the council composed of councilors (Kenya, CAP 265- now repealed).

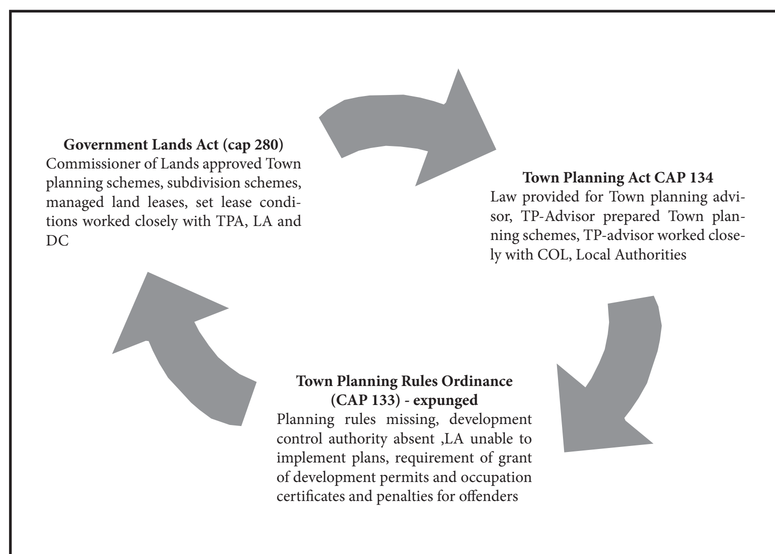

FIGURE 2
Unity in the planning laws destabilized by removal of Town Planning Rules
Source: Author's construct 2019

By expunging the town planning rules, the implication is that the requirement for development permits was no longer mandatory. The elaborate rules guiding town planning such as specific use of building materials in the roofs, walls and floors of the houses was no longer a legal requirement. The requirement for setbacks, minimum size of roads and minimum size of rooms and the need for occupation certificates once the building construction was completed were no longer required in law. For this reason, there was no one apprehended for violating the plans and there was no specification regarding the penalties for offenders. The approval of development was variously carried out by two institutions where the Commissioner of Lands approved land subdivisions while Local Authorities approved building plans in urban areas and both processes lacked coordination since two authorities were involved at various levels.

In the absence of effective urban planning and development control, what then did the office of the Commissioner of Lands and that of the Town Planning advisor engage in doing during post-colonial era? The Commissioner of Lands notoriously used the services of the Town Planning advisor to alienate land for allocation to various government elites and friends in the earlier days of post-colonial rule. For example, section (9) of part III of the Government Lands Act (Kenya, CAP 280-now repealed) provided that: 'The Commissioner may cause any portion of a township land which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner' (Kenya, Cap 280). When land set aside for future urban development was finally depleted, interest was directed towards public utility land and this became the era of land grabbing in the urban areas as documented by others (Ndung'u Commision, 2004; Njonjo Commission, 2002; Klopp, 2000).

Continued exclusion of planning in former African markets and quarters and escalation of informality

Since planning laws were not reorganized to take care of the realities of the post-colonial era, former African markets and African quarters in class A and B towns were still excluded from planning as it were during colonial era. More towns of this category were added when former communal rural land were adjudicated and registered as freehold land. Part of the adjudicated lands were set aside for urban development but such land was later subdivided by cartographers in charge of council land records and allocated to individuals without planning (Ayonga, 2012). This resulted in the evolution of towns in the rural areas that have poor road layouts and skewed land use allocation. For example, it is common in such towns to have the dominance of commercial and residential land use while other land uses such as industrial, hospitals, playgrounds, cemetery, sewerage and recreational are not provisioned because such users did not advance the profit motive.

Exclusion of planning in former African rural areas and the escalation of informality

Former communal African rural reserves were adjudicated during post-colonial era to facilitate issuance of individual title deeds in order to promote security of tenure and in turn promote capital investment in land (Lawrence Committee, 1965/66). However, the conversion of land from communal to individual tenure did not involve planning. The Lawrence Committee (1965/66), for example, lamented the failure to plan such areas noting that the opportunity to plan them were less when enclosures had taken place. The committee also noted that no provision was made for the proper planning of village centers serving the former African areas as was done in the settlement schemes in the former scheduled areas (Kenya, 1965/66). In Part III section 6(1(a)) of the Land Control Act (CAP 302-now repealed), the role of Land Control Boards was specified as follows: 'To regulate the sale, transfer, lease, mortgage, exchange, partition or the disposal of land and have regard to the effect which the grant or refusal of consent is likely to have on the economic development of the land concerned' (Kenya, CAP 302). It is clear that none of the conditions for approval included land use planning.

Developers in rural areas were provided with freehold titles and therefore nationalization of development rights which was facilitated in government land did not happen in the African areas. The lack of development control powers by the state in the former African rural areas means that developers had the freedom to subdivide

land and construct homesteads without being constrained by a development plan. In this context, it can also be argued that, for lack of planning, rural areas were insufficiently provided with social and physical infrastructure. The implication is that rural areas that are occupied by Africans suffer from informality of development which has tended to increase in magnitude because it had begun in 1896 lasting up-to 1998 (102 years).

Period 1968-1998: Entry of Land Planning Act (LPA CAP 303) resulted in overlaps and contradictions

The Land Planning Act (LPA) (CAP 303) was enacted in 1968 and created the Interim Planning Area (IPA) and the Interim Planning Authority (INPA) as alternative planning authorities. However, the Government Lands Act, Local Government Act and Town Planning Act were not repealed and, therefore, the entry of the Land Planning Act (LPA) simply joined another set of planning laws. How were the laws supposed to be effective in guiding land use planning and development control? It is demonstrated below that that the laws were then running concurrently, thus, creating overlaps and ambiguities in decision making. LPA halted development control, thus, informality crept back to scheduled rural areas.

In the scheduled rural areas, the Government Lands Act (Kenya, CAP 280) in the first schedule, and part IV (32,33) in particular, specified that rural farms must have permanent farm building, fencing, water furrows, planting trees or live hedges, walls, wells, draining land or reclamation of swamps, road-making, clearing of land for agriculture, water boring, planting of long-lived crops, water tanks, irrigation works and fixed machinery reservoirs, etc. In part IV (34) the lessee was reminded not to subdivide the land or assign or sublet any portion without the written consent of the Commissioner of Lands. This means that the Government Lands Act (Kenya, CAP 280-now repealed) had provided for effective land use management in former scheduled rural areas.

The Land Planning Act (LPA) however, redefined development as, (a) the making of any material change in the use or density of any building or land or subdivision of any land which for these purposes and regulations shall be termed class A development and the; (b) erection of such buildings or works and the carrying out of such buildings operations, as the minister may, from time to time, determine, which for purposes of these rules shall be termed class B development, provided that:-

- Subdivision of agricultural land into plots of twenty acres or more where no change of use is involved
- The use of land for purposes of agriculture or forestry or the use of buildings occupied with land so used
- The carrying out of works for maintenance or improvement or other alterations of, or addition to, any building where such alteration or addition does not exceed 10 percent of the floor area of the building
- The use of any building or land within the curtilage of a dwelling for any purpose incidental to the enjoyment of the dwelling shall not constitute development for purposes of these outlined regulations.

For the first three regulations, land subdivision beyond 20 acres where change of user is not required and the use of land for agriculture, forestry or buildings occupied with agriculture land were excluded from the subject of planning. The failure to control the construction of homesteads and other forms of land subdivision in the former scheduled rural areas to the discipline of planning made it difficult to provide for community facilities and to regulate buildings. Whereas the colonial government controlled development of houses and land subdivision in the scheduled areas up-to 1962, such requirement was relaxed in post-colonial era up to the period 1998. It is also noteworthy that the expunging of the town planning rules from the statutes had reduced the tempo of development control in all government land including scheduled rural areas. This means that informal development was permitted in the former scheduled rural areas during the period 1963-1998.

LPA and GLA had provision for multiple development control authorities in former scheduled rural areas

Part IV- of the Land Planning Act provided as follow: 'Subject to these regulations, no person shall carry out development in an interim planning

area except with the consent of the authority under these regulations empowered to grant consent' (section 10(1)). Any person who carries development without consent shall be guilty of an offence against these regulations and shall be liable to a fine not exceeding five thousands shillings or imprisonment for a term not exceeding six months or to both imprisonment and fine. 'Any dealing with any subdivision shall, in the event of an offence under these regulations being committed in relation thereto, be null and void' (Kenya, CAP 303, section 10(3)). But who was in charge of development control, the Commissioner of Lands, the Local Authorities or the Interim Planning authority and which statute between the LPA and GLA was superior to the other when guiding developers?

So far the LPA had created three authorities to control development and authority in LPA refers to Local Authority, an Interim Planning Authority or the Central Authority as the context may require (Kenya, CAP 303, part V, section 26). However, where no Interim Planning Authority existed, section 11(1) clarified that such an application be directed to the Central Authority in such form and such manner as may be prescribed and shall include such plans and particulars as are necessary to indicate the intention of the applicant. The central authority while making consideration for approval must seek for comments of nearest Land Control Board if subdivision was less than 20 acres, or to the nearest Local Authority if and incase of application in respect of land within three miles of an adjacent municipality and to such other authorities as the Central Authority may think it proper (Kenya, CAP 303, section 12(1)a-d). But the questions is: who among the three authorities was responsible for development control? This ambiguity and overlap of roles created discretion in decision making, inaction and inefficiency in the development control process.

LPA and GLA created parallel authorities to plan and control former European towns

The Land Planning Act (LPA) (Kenya, CAP 303) created a planning zone referred to as Interim Planning Area (IPA) and further created a different planning authority referred to as the Interim Planning Authority (INPA) to be in charge of the Interim Planning Area. Before the advent of the Land Planning Act, the Government Lands Act (GLA) (Kenya, CAP 280) and the Town Planning Act (TPA) provided for the procedures of planning in both urban and rural government land (Kenya, CAP, 280; Kenya, 134). However, in section 4 (1) of part-II of the Land-Planning Act, a statement is made as follows: 'Where an area plan or town plan has been prepared and approved for a local authority area ... and if it appears to the minister to be expedient in the interest of securing the proper control of such area, he may with the agreement of that Local Authority by order published in the gazette constitute that Local Authority as the Interim Planning Authority for that area or part thereof' (Kenya, 1968, LPA cap 303).

The inference one makes out of the foregoing statement is that the minister under the provisions of the Land Planning Act (cap 303) would make the municipal and town councils Interim Planning Authorities and the area of jurisdiction of the municipalities shall become interim planning area. The Municipal councils would then implement a municipal or town planning scheme prepared by the town planning advisor under the provisions of the GLA and TPA. Such plan, if prepared under the provisions of the GLA and TPA (CAP 280, 134) would have been earlier approved by the Commissioner of Lands (CAP 134; 280). In the spirit of the LPA, this implies that the Government Lands Act (CAP 280), the Local Government Act and the Town Planning Act were to be replaced by the Land Planning Act. If this were to be the case, there would be no contradiction because the Local Authorities were the development control authorities even before the advent of the LPA.

However, the Government Lands Act, the Local Government Act and Town Planning Act were not repealed. This means that the LPA created a parallel plan preparatory authority in the name of Interim Planning Authority to compete with the Town Planning Advisor who also prepared plans in government land as provided for in the GLA and TPA. The LPA also created a parallel plan approving authority in the name of the minister besides the commissioner of lands who was provided for in the Government Lands Act and the Act further provided for another development control authority in the name of the Interim Planning Authority other than those provided for in the Local Government Act (Kenya, CAP 265-now repealed).

Part II (5) of the Land Planning Act (Kenya, CAP 303) provided further contradictory provisions as follows: 'Where a preparatory authority has been appointed under the Town Planning Act for an area for which an Interim Planning Authority has been constituted, such preparatory authority shall, in respect of the area of such Interim Planning Authority, cease to have or perform any powers and where the area of such Interim Planning Authority extends over the whole of the area of such preparatory authority, such preparatory authority shall be dissolved as from the date of appointment of such Interim Planning Authority' (Kenya, CAP 303, Section Part II(5)). Again, this clause presupposes that the minister could replace the role of the Town Planning Advisor with the Interim Planning Authority. Since the TPA and GLA were not repealed, the two sets of statutes were legitimate and tended to operate in parallel.

There was yet another contradictory provision in the LPA as follows: 'Where no town plan, area plan or subdivision and use plan has been approved, and in respect of unalienated government land, the minster may prepare such plans' (section 7(1)). Any plans approved by the Commissioner of Lands under section23 and 24 of the Town Planning Act which relates to land to which these regulations apply shall be deemed to be a plan approved by the minister for purposes of these regulations and the minister may prepare additional plans and amendments to any such plan as may be necessary having regard to the development requirements of the area (7(2)). Again, this section makes the minister an alternative plan preparatory authority, yet the Town Planning Act and Government lands Act (CAP, 134; 280) provided for the Town Planning advisor to prepare such plans. The enactment of the LPA and retention of the previous planning statutes then created overlaps, contradictions and discretions in decision making.

Less control and rent seeking due to ambiguities led to massive house extensions, change and extension of user

Post-colonial era saw cases of capitalism gone amok when it came to issues of urban development. The increased rural-urban migration brought to town many people some of whom could not get sufficient and decent housing. Developers saw an opportunity similar to what happened in Europe during the industrial revolution and constructed various categories of houses to accommodate the middle and low income population. In the formerly well-planned European and Asian zones, land owners and those who bought houses in those zones quickly applied for change of user or extension of user and constructed flats in areas of low housing, some flats as tall as twenty floors. The houses were on sale going for up-to Kshs. 7,000,000 per three bedroom in the middle of the 90s to the current price of Kshs. 15,000,000 per three bedroom. However, the road networks in such areas remained the same while community facilities were strained due to increased population in the area.

Water and sewerage systems were strained and most developers opted to dig boreholes to supplement water sources which they again sold exorbitantly to the tenants. More extensions were carried out in Buruburu, Umoja, and Komorok where prototype house designs were provided for the middle income, only for rich developers to buy the houses which they converted to skyscrapers for more profit. The mostly one bedroom prototype houses in Umoja were changed into skyscrapers and since there was no framework for development control and there was no effective development control authority, these kind of developments went unnoticed. The worrying challenge is that such areas were not provided with enough social and physical infrastructure to match with the incoming population. These places are now dens of crime, congestion and environmental degradation as solid waste threatens to choke the neighborhoods. Those who live in council and government houses carry out illegal extensions using substandard building materials such as iron sheets and timber to accommodate the surging demand for urban housing and these cases are rampant in areas of Jericho, Makongeni, Uhuru, Ngara and Kaloleni.

CONCLUSION AND RECOMMENDATIONS

This investigation has established that planning law excluded African areas from planning during colonial era. This created a duality of development that resulted in informal development within former African settlements and planned Europeans urban and rural settlements. African markets were not planned and this added to informal African quarters within class A and B towns which were not planned also while similar

settlements evolved in peri-urban zones. There was no provision for planning of former African rural and urban areas during post-colonial era just like during colonial times and therefore informality escalated in these areas. The town planning rules were suspended during post-colonial era and this created a lacuna in town planning and development control which resulted in informality creeping back to formerly well-planned areas of class A and B towns. The advent of the Land Planning Act introduced overlaps, contradictions, distortions and discretions in the planning and development control processes both in the urban and rural areas and this worsened the already fragile scenario of urban development control.

The result was the escalation of informality where it existed and evolution of new slums as urban population grew due to rural urban migration. In former classified towns, capitalists constructed massive buildings to sell and rent for profit, massive land gabbing took place and several houses were either changed user or the user was extended. Whilst the planning laws created exclusion that resulted in duality during colonial era, such laws facilitated permissiveness in urban construction due to contradictions as to who had the power to control development and ambiguities in the institutional roles. It is concluded that planning law has been used to create urban anarchy both in the era of colonial and post-colonial era albeit differently. In particular, the laws resulted in exclusion and whilst exclusion in post-colonial era tended to escalate informality where it existed, such informality also begun to creep back to formerly-well planned areas due to suspension of some laws from the statutes, and the overlaps and contradictions in some laws. To promote effective planning in Kenya, there is need to overhaul the planning laws and a paradigm shift in the management of urban and rural spaces.

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