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LAW AND LAWYERS IN URBAN DEVELOPMENT:
SOME REFLECTIONS FROM PRACTICE

by

J.P.W.B. McAuslan

INTRODUCTION

This paper reflects and comments on the skills and role of law and lawyers engaged in urban and environment management and development. It draws on my working experience over the last four years in Nigeria, Tanzania and Uganda, and makes some reference to other experiences of which I have some personal knowledge. My purpose is to consider the possible roles of law in alternative development.

In a workshop devoted to the rural sector, it may seem incongruous to offer a paper concerned with urban development. But as I shall seek to show, many of the issues I have had to deal with in an urban environment, and many of the skills needed by lawyers in urban development, are likely to be replicated in respect of rural development, and many of the possible alternatives to the present urban legal and administrative processes could equally well apply to rural legal and administrative processes. Indeed, given the urban bias of so much law and administration in countries of the Third World, it is arguable that alternative development in urban processes must accompany--perhaps even precede--change in rural processes.

THE CASE FOR LAW

An issue which must be considered first is whether there is a case for using law to structure urban or rural development at all. The arguments against can be put at two levels. The cynical level was put to me by a planning consultant in Dodoma, Tanzania. "Why bother," he said. "Does it really matter whether the agency (in the instant case the Capital Development Authority) obeys the law or not? Wouldn't everything go on as 'normal' if they didn't bother and your recommendations were ignored?" It would be hypocritical to pretend that this sort of attitude is unique; it is widespread amongst officials and consultants not least because it is grounded in reality. In Dodoma itself the C.D.A. in response

to recommendations from its Master Plan, consultants had "banned" all development in certain parts of the town from early in 1974 pending the completion of the Master Plan. There was no legal authority for such a ban, yet it was observed and enforced by many potential developers of houses who left them half finished, roofless and decaying as a result. No legal challenge was mounted to the ban. Similarly in Kano; a Master Plan was published in 1966 and successive urban development authorities had attempted to implement it, yet none of the legal steps necessary to publicise the plan, consider objections to it, and approve it, thus giving it a legal status and legal backing to enforcement action, had been taken by the time I began my consultancy there in mid 1979, nor, despite my explanations and recommendations to that effect, have these steps yet been taken [in December 1980]. No legal challenge has been mounted to any enforcement action. As it was put to me by the Chairman of the Kano Urban Development Board, authority and power rather than law was what counted in Kano. The Board had the power and the apparent authority to get its way on development issues vis-à-vis the average person, and, where it had to give way (e.g., to the State Government or a local notable) this was because the adversary had more power, though not necessarily more law on its side.

The other level of argument is in a sense an alternative development argument. A recent example of it is contained in an article by Jorge Harday and David Slatterwaite.¹ This argument says in general terms that law impedes the efforts of ordinary people to house themselves, to obtain an income, to get access to potable water, electricity and other urban services and so to survive and better themselves in an urban environment. Law turns homesteaders into squatters, self-built houses into "slums" and "nuisances" which must be demolished; petty traders into criminals and job seekers into vagrants. The less the law and lawyers have to do with uncontrolled urban settlement and the informal urban economy the more chance persons in those sectors have of survival and development. Again my own personal experience bears this analysis out. The rapidly growing squatter settlements in Dodoma--housing 1000 low-income residents conveniently located for work--were not acknowledged in official plans other than as areas to be cleared for urban development. Another Kenya development plan for a "new" residential area declared, in effect, that the existing houses were not of a suitable standard, and most would have to be demolished to make way for the new model community, and the existing people would likewise have to be moved elsewhere as they would not be able to afford to live in the new community.² In Kano great concern was generated inside the Board over hawkers and the "illegal" booths they put up on main roads, which were clearly meeting a need. The concern was how to get rid of them, not how to adopt planning strategies and policies so as to accommodate them.

What answers then can be made to these powerful criticisms of the role of law in urban development--criticisms which apply with equal if not greater force to the role of law in rural development where statutory land reform and rural credit programmes often appear to result in the poorer sections of the rural community losing their land and their means of livelihood to the richer sections; often urban-based absentee landlords? Hopefully, some answers will emerge in the course of this paper but a few general points may be made now.

A general, albeit Western liberal-democratic orientated answer is that government under and in accordance with law is likely to be fairer, more respected, more effective in the long run than government in defiance or in disregard for the law. The target example of Uganda is there for all to see. But less dramatic examples can be given. If the Kano U.D.B. need not obey the Town and Country Planning Law, why should the Kano State Government? The result: government intervention and directives to the Board to ignore the Master Plan which the Board had no way or grounds to resist. Some of the difficulties of implementing the Master Plan in Dodoma stem directly from the C.D.A.; lacking legal authority for its proposals--it becomes a question of who gets to which Minister's ear first and which Minister has more clout in Government and Party circles, a rather unsure way to proceed with developing a new capital. I am far from saying that the presence of law will obviate the need for inter- and intra-bureaucratic haggling, but it can provide a reference point for the arguments, limit the areas for argument, provide a mechanism for resolving the arguments, and provide a measure of certainty and support for particular policies and programmes and the institutions created to execute them.

But what of government vis-à-vis the people? Abstract statements about law's contribution to fair and respected government are rather meaningless in most Third World countries when applied to governments' relations with the governed. This line of criticism can be taken too far, however. There are few governments where every official and every programme is set against the ordinary low-income citizen. In Uganda during Amin's regime and its aftermath, it was clear to me that there were dedicated and brave officials who had tried to keep the machinery of government going and programmes operative--primary education indeed expanded during the '70s in Uganda. In both the Kano U.D.B. and the C.D.A. of Tanzania there were, and still are, planners and administrators concerned about the juggernaut-effect of foreign-made Master Plans on the lives and conditions of the urban poor in those two towns, and I cannot believe that those agencies are unique in that respect. Furthermore, the Government of Tanzania is aware of the deleterious effect on peasant and

worker motivation of government and party officials illegally and unfeelingly pushing such people about and has provided an ombudsman and financial compensation to meet complaints and considered other ways to instil a more humane administrative culture into officials. In Nigeria, too, it was the President who in his address to the Sixth Commonwealth Law Conference referred to the need for lawyers to act as guardians of justice and not to "neglect the yawning gulf between privileged and under-privileged in the contexts of a just, legal and equitably social order." Lawyers can build on this awareness by arguing for and creating administrative systems and substantive programmes that do give promise of a measure of equity in their use and implementation. I do not want to oversell this line of argument. Most legal systems do reflect and bolster the interests of the dominant economic and social class but within that broad ideological position there is room for argument and approach on the lines of that put forward by Edward Thompson--namely that while the ruling classes have appropriated the Rule of Law for their own ends they have perceived that their own ends are served by a measure of justice and equity for the lower classes--the ruled--so that it is in the interests of the ruled, too, that the Rule of Law is defended since its absence, or replacement by the rule of naked power, will leave all worse off than they are at present.

SOME SPECIFIC USES OF LAW

To turn from general questions to more specific issues, I want to comment on some areas of administration of urban development where the use of law can play a positive role and I would stress that it is as a positive force that the law has to sell itself. These areas are the repatriation of planning and decision making; the creation of a framework for positive and equitable decision making, notably sorting out the roles of different officials and institutions; and the selling of standards of administration within specific programmes.

Repatriation of decision making. There is now a great deal of writing about the deleterious effect of foreign, usually Western orientated, consultants and planners and their plans and policies, often backed up with tempting amounts of "aid." The decision to use foreign planning consultants to produce a Master Plan for an urban area or a region has the inevitable effect of passing decision making, not just on the policies of the plan but on its detailed implementation over to those consultants and bypassing the national statutory procedures for plan making, approval and implementation. Sometimes this is open and blatant as in Dodoma where in the early years of the capital development programme the Master Planners did most of their work in Toronto, their headquarters, and provided both in the Plan

and in their consultancy contract that no changes could take place in the Plan without their involvement. Thus, when some of their more far-fetched ideas were seen to be impractical by the planners on the spot, a memorandum suggesting changes would be compiled, sent to Toronto; a pause would ensue until the reply came back defending the sanctity of the Plan to the last eight-lane highway. The reply would be addressed to the Director General of C.D.A., bypassing all normal procedures, and hinting that criticisms of the Plan were motivated by malice and ignorance. The reply was accepted, and the Plan left untouched and unimplemented.

In Nigeria the process of foreign take-over of the planning process is less blatant, but no less serious. In Kano State no less than 13 Master Plans were produced for 13 urban areas by five different nationalities of planning consultants: English, Hungarian, Yugoslavian, Danish and a mixed Indian-Egyptian-Nigerian team from the planning department of A.B.U. Zaria. None of the plans made any reference to the existing town and country planning laws of the state; the mixed Polish-Hungarian-Indian team of planners and architects occupying the higher posts in the Board knew equally little of the planning laws of the state, as did the mixed Swedish-German U.N. team of planners so that administration and implementation of the plans (such as it was) proceeded in a kind of a-legal Erewhon.

In Uganda my involvement arose out of the laudable initiative of the U.N.D.P. and Habitat to set in motion machinery, men and money to rebuild the two south-western towns of Mbarara and Masaka, destroyed in the war of liberation from Amin. U.N. agencies bedevilled by their own bureaucratic in-fighting and hassles understandably had no wish to get involved in the quagmire of post-Amin Ugandan politics. The solution decided upon was a development agency to be set up outside and apart from the regular administration, reporting directly to the President and bypassing local government, central government, boards, commissions and officials. But this, too, betrayed a woeful ignorance of the existing laws and administration in Uganda and a somewhat astonishing naiveté that it would be possible to isolate such an agency from politics and administration merely by making it a separate corporate body by law.

In each case my approach and my aim was the same: to bring the existing law to the attention of the decision makers, to explain and stress the importance of complying with it; to highlight its defects and strong points; where necessary, to propose the principles that should inform amendments and reforms and then finally draft those reforms in close association with the officials of the agency I was advising. Repatriation of decision making was in retrospect what I was doing; I cannot claim that at the time I was explicit that that was a primary aim. But it is in a very real sense inevitable.

However deficient the planning laws --and in broad outline and many details the planning ordinances and acts of Tanzania, Northern Nigeria (inherited by Kano State) and Uganda are exactly the same and derive from the standard Colonial Office package of the 1950s --they all provided for certain basic procedures to be followed in respect of plan approval: publication of draft plan by plan-maker; a period for the receipt of objections and comments; a consideration of same; submission to the relevant Minister of draft plan, proposed amendments in light of comments and comments on the comments; approval with or without amendments by the Minister; publications of approval and coming-in force of the plan. Nothing in the procedures was very complicated or very time-consuming; compared to the procedures most British or North American planners have to go through to get plans approved in the U.K., U.S.A. and Canada, they were amazingly straightforward.

A failure to follow the law, a belief that it was not necessary to follow the law, did not arise from a desire on the part of consultants for more participation and discussion than the law required--such participation could have taken place but did not. Rather, the desire was to keep control of plan-making and the implementation process and a belief that the local law was beneath bothering about. The attitude was well summed up by a member of the Canadian planning consultant's team in Dodoma who said to me: "In Toronto, we are told that its planning by the bulldozer in Dodoma and all we have to worry about is getting the approval of C.D.A." The planning team knew nothing and were told nothing of the planning laws.

No purpose would be served by describing in detail my daily work as a planning law consultant in carrying out the programme outlined above. But it is worth highlighting one or two points. In both Dodoma and Kano State, the realization on the part of officials in the agencies I was advising that there were planning laws in existence which had to be, but were not being followed, transformed, albeit temporarily, their attitude towards laws and procedures. Whereas they had viewed my mission as being designed to give them increased power to implement their plans, they suddenly found that technically they had no power at all, and indeed were highly vulnerable to legal or, more likely, political attacks from their opponents for their failure to observe existing laws. Law became a matter that was given a high priority and the importance of "sorting out the mess" was appreciated right up to the top of the administrative hierarchy. I don't know what this did for the status of and regard for the planning consultants but it certainly raised my status and increased the regard paid to my proposals.

Inevitably this carried its own dangers. As I was the expert on "the law;" as "the law" was at the root of all the planning and administration going on in the agency, I was assumed to be able to offer policy advice on

a range of issues outside the strict terms of my reference, but within the ambit of law, that is, on any matter that might require legislative action or legal advice. Perhaps this experience suggests two laws about experts: (i) the expert who knows something is assumed to know everything; and (ii) the expert who claims to know everything probably knows nothing. The test of an expert is the success with which he or she negotiates the rapids between the Scylla and Charibdis of these two laws. In my own case, while I have been willing to extend the boundaries of my presumed expertise to embrace housing and building regulations, sewerage laws, local government reorganisation in addition to planning and environmental laws, I have drawn the line at building contracts, international loan agreements and commercial transactions and, except in dire circumstances, consultants' contracts.

A second phenomenon that I have noticed is that a subtle shift of power, influence or no more than confidence taken place within the agency between nationals and foreign planning and other consultants. Too often, the latter have called all the shots; they come from abroad--almost by definition a more knowledgeable and sophisticated place--they come armed with the latest jargon and concepts; they come with superior equipment and whatever the notional partnership that follows, it is perfectly clear that the local staff are in a subordinate position. But the arrival, as it is seen, of law changes this. The law is a local matter; like it or not foreign planners have to comply with it, have to follow certain steps and consult certain national agencies and people, both under the existing law and in order to propose changes to the existing law. A counter-expertise, a counter set of "givens" can be put up against foreign expertise and the balance being more evenly weighted, a better decision or plan may result.

My work in Uganda may be instanced as an illustration of this. When I arrived, progress on the establishment of an urban development agency was slowing down. Ugandan officials were wary of U.N. proposals because they seemed to bypass normal administrative procedures which the officials were trying to reestablish and because they appeared to strengthen the powers of the President which ran counter to the then prevailing political concern. U.N. officials tended to see Ugandan officials as tied to British ways of doing things, procrastinating and failing to understand the urgency of action. But no one in the U.N. team had actually investigated the law and administration governing planning, building, land use and land tenure, local government and sewerage, that would have to be addressed before any agency could be established. I wrote a memorandum summarizing the relevant laws; stating that any new agency would have to fit into an existing legal framework, drawing attention to the essential attributes that such an agency would have to have and setting out possible heads of legislation that

could be drafted to implement the proposals. This memorandum was effective. The U.N. officials understood for the first time the complexity and interlocking nature of Uganda's land use, land tenure and local government system, the political reasons for it and thus the need to respect it. The Ugandan officials were able to point to, rely on, propose amendments to a document about their system which was concrete proof that a system did exist which had to be respected and amended rather than ignored and bypassed. Thereafter, it was not too difficult to reach agreement on the type of legislation needed to establish the agency, its functions and modus operandi. Knowledge and appreciation of the law was the key to realistic negotiations and a Ugandan solution to a Ugandan problem, albeit with U.N. assistance.

Frameworks for decision making. The above Ugandan example leads naturally on to the second specific use of law --to provide frameworks for positive and equitable decision making. In some respects this may seem rather obvious, but the circumstances in which urban planning so often takes place, outlined in some aspects above, make this use of law both necessary and difficult. A failure to observe the law, a bypassing of normal administrative procedures, the existence of conflicting agencies with overlapping jurisdictions, a lack of clarity on the geographical extent of agencies' powers were present in both Dodoma and Kano and existed in embryo Uganda. All were symptomatic of an absence of clear frameworks for decision making. A caveat must be entered here. I am not suggesting that a law will on its own solve the problem of frameworks or decision making; from both academic study and practice as a local councillor and international consultant I am only too well aware that there is no such thing as a perfectly rational system of decision making or indeed a perfectly rational decision; politics and prejudice are at least as important as facts and figures. But one objective which can be pursued by means of law is the creation of a framework which eases conflicts and channels them into harmless or productive areas; which increases the opportunities for elucidation of facts, figures and a wide range of opinion and correspondingly decreases the opportunity for ignorance, prejudice or covert pressure to determine policy; which clarifies simple technical issues such as boundary questions (note: not solves such questions for that often involves political negotiations and planning considerations, but in effect ratifies and confirms such decisions as are reached); and which takes account of current political and administrative realities. A few examples will illustrate problems and solutions.

In 1977 when I arrived in Dodoma the boundaries of C.D.A.'s jurisdiction had not been determined by any law. Its de facto boundary was determined by a planning map reference that had no legal status; this

planning boundary was different than the boundaries of the Dodoma District Council (Urban) and the Dodoma District Council (Rural), the two local administrative organs that had replaced local government units. The C.D.A. Master Plan boundary was also different to the boundary of the only legal town plan for the area, the Dodoma Town Plan of 1966. The Master Plan itself had at least two boundaries: one for a Capital City District (Urban) which embraced all the D.D.C. (U) area and some of the D.D.C. (R) area, and one for the Impact Region which embraced all of Dodoma Region and all districts outside the Region whose centres were within 260 kilometres of Dodoma. C.D.A. was to control all development in the Capital City District (Urban) and be involved in planning in the Impact Region.

Within all these conflicting boundaries, C.D.A. found itself sharing or rather trying to avoid sharing power over planning and land development with a Ministry of Capital Development, regional and district authorities (later to become a town council and district authorities, a special committee dealing with development control consisting of representatives of C.D.A., M.C.D. regional and town authorities), Ardhi (formalities connected with plot allocation) and a plethora of Ministers and public corporations having jurisdiction over water, sewerage, road building, housing and electricity supply. During the four years of my involvement with C.D.A. I was constantly concerned to try and get boundary and jurisdictional issues settled, both by urging others to give the issues high priority and by making specific proposals myself. But here is where the politics of the bureaucracy and the bureaucratization of politics took over.

First, there were constant shifts of policy at the national level on the Dodoma question. In early 1977 a decision, approved by the President, was taken that C.D.A. should be the sole authority with jurisdiction in Dodoma taking over local government functions to be so. In early 1978 another Presidential level decision was taken to reestablish urban local government in Tanzania including Dodoma. In 1980, in the wake of the general election, the Ministry of Capital Development was abolished.

Second, there was not surprisingly constant tension at both an institutional and personal level between C.D.A. and M.C.D. Following the English model of public administration all public corporations in Tanzania have a sponsoring supervisory Ministry. This does not work particularly well in England where one Ministry might be responsible for several public corporations; it worked even less well in Dodoma where one Ministry was responsible for one corporation; where the Minister of State in the Ministry (the President was the Minister) chaired the Board of Directors of the corporation to whom the Director-General of the corporation was responsible but where the law specifically required the Director-General to make

a twice yearly report on the progress of the corporation to the President qua President, thus enabling him to bypass the Ministry officials and where any laws needed by C.D.A. for its work had to be steered through the bureaucracy and by the Ministry. No system could have been more calculated to lead to non action and the defects were compounded when Habitat, which was supplying technical assistance to C.D.A., agreed to supply an equivalent technical assistance team to M.C.D. In the areas I was working in, the results were predictable.

If law is to be used to create a framework for effective and equitable decision making, it has a better chance of making a positive contribution if it is used at the outset to provide backing for political decisions about frameworks rather than being used as a substitute for political decisions.

My Ugandan experience supports this conclusion. Again, imposing array of authorities had to be taken account of in the establishment of an urban development authority: a Ministry of Local Administration; a Commissioner of Town Planning and a Town Planning Board; a Uganda Land Commission; two urban local authorities, Masaka and Mbarara and regional administrators. A separate Ministry dealt with questions of water supply and sewerage and the National Housing Corporation had powers of house building in the area. To have established an urban development corporation without taking account of these organisations would have been to condemn it to perpetual bureaucratic battles most of which it would have lost. By taking account of these organisations, however, it was possible to draft legislation which in fact received the approval of the Cabinet on the recommendation of the Ministry of Local Administration and of the U.N. officials, which fitted a potential urban development corporation into the existing governmental structures, clothed it with ample power to get on with the job of reconstruction and redevelopment, yet ensured that other relevant agencies were involved via consultative approval, appointive and directive powers in the work of the corporation. No one knows whether it would have worked in practice but at least it might not have been seen, as C.D.A. was and still is by some, as a brash bullying intruder into the area.

The illustrations so far concern orderly administration. Law can also be used to provide frameworks for equitable administration. The lawyer rather than anybody else is most often aware of the desirability of procedures which give a chance--whether taken or not is too often outside the control of the lawyer--for different points of view to be considered before decisions are taken, or for persons likely to be inconvenienced by a decision to make representations. The old-fashioned concept of natural justice, as traditionally understood, is not universally appreciated by administrators,

planners, engineers, politicians and others involved in urban (or rural) planning, and some aspects of natural justice built into decision frameworks are essential to create a climate for equitable decision making. Of course principles of natural justice enshrined in procedures do not automatically lead to social justice in substantive decisions. Nor am I arguing for undue concentration on procedure. I do claim that procedural fairness increases the chances of substantive fairness, both because more information gets through to the decision maker and because acceptance of procedural fairness by administrators and planners is itself a victory for the cause of substantive fairness; it betokens a marginally changed attitude towards the use of power.

Illustrations from both Kano and Dodoma may be given. In Kano there were no procedural rules at all governing the obtaining of planning consent from the Board. Practice was therefore exceedingly haphazard. "Big men" could get planning permission fairly quickly; lesser mortals were waiting up to two years for all the necessary consents. Since there were no procedural rules there was no protection for officials of the Board from undue pressure and no peg on which lesser mortals could hang complaints (in an era of military rule political opposition to voice grievances was not a realistic alternative). The introduction of the rules I drafted would not have changed things overnight but would have created opportunities which more liberal planners could exploit.

In Dodoma, a more specific example may be given. Under the colonial Township Rules, first introduced in 1923 and much amended, still in use in the urban areas of Tanzania, a Township Authority may serve a notice on the owner or occupier of any temporary structure used for human habitation which in the opinion of the Authority is dangerous or likely to be dangerous to health requiring the structure to be removed or destroyed. If the occupier does not carry out the work the Authority may enter and do the work itself. No time limits exist in the relevant rule or in any other part of the rules. The C.D.A. planners were using this rule as their authority to demolish squatter settlements which were being built. Notices would be served one day; demolition would take place the next without any hearing or assistance with relocation or consideration of whether the action taken was legal. (In fact there was no legal authority for officers of C.D.A. to exercise powers under the Township Rules.) The planning rules I proposed, which have now been enacted, provide for notices to be served, and action to follow only after an interval of time--30 days or longer if there is an appeal. The planners objected to this rule--after it had been passed for enactment, I think they had not taken the planning law reform exercise seriously until it was over--on the grounds that it would make their task impossible as squatter houses could be completed and occupied within 30

days. Quite so, and if the result of a new procedural rule is to increase the pressure on the planners of C.D.A. to address themselves in a more positive fashion to the question of self-built low-cost housing for the urban majority in Dodoma, then the rule may have substantive benefits.

A framework for decision making may exist but the roles of officials and institutions within the framework may not be clear so confusion results. In Uganda, it was not enough to try and create a cooperative framework for the activities of the urban development corporation; it was essential also to spell out the duties and powers of the different authorities within the framework so that confusion and suspicion would be minimised, as it would be possible to refer to a public document to determine who should do what.

A more difficult question to determine is the role of law in respect of clarifying roles of officials within institutions. To what extent should one run the risk of preventing administrative flexibility by using legal rules to govern powers and duties of officials within institutions? Administrative flexibility can be overdone; if every new senior official in an organisation, immediately insists on reorganising his department and reallocating duties within it, no person either within the department or outside it is going to be able to know who does what. This was one of the problems of C.D.A.; not merely did senior officials come and go annually by administrative systems as well; committees would rise and fall; charts explaining duties of and linkages between officials would be produced, discussed, agreed and as soon superseded by other charts. A reverse situation pertained in Kano. There it appeared that there were no committees, no planned allocation of duties and no charts. The key decisions were taken by the chief planner in association with the chief executive (until the chief executive resigned under a cloud and the services of the chief planner (an expatriate) were dispensed with by reason of the same cloud).

In a large organisation, dealing with a multitude of tasks, one finds both rules to make a good deal of administration routine combined with at least lip service paid to the principle of allowing administration to adjust to new tasks. On the basis of my experience I would say that the latter principle of administration is much less important than the former and that rules encouraging the routinization of administration are more helpful to administrators and the public than principles of flexibility. Where there is a fast turnover of staff; where the staff, both national and expatriate, have been trained in different methods, theories and ideologies of administration; where pressure of all sorts are likely to be placed on administrators and where outside the institution, there is constant "reform" of, disappearance of or additions to governmental institutions, the case for a set of clear legal guidelines and directives on who does what, how and in what order is

very strong. Properly constructed such a set would reinforce the equitable frameworks of decision making and lead to more efficient execution of tasks and contribute to the repatriation of decision making.

The setting of standards. This is probably the most difficult issue. The topic refers to the whole question of planning and housing design and standards, matters often covered by building regulations, zoning regulations, design and material specifications in building contracts. It is an area where there is law, where the law is widely disregarded, and a powerful case can be made for saying that the law is a major hindrance to the evolution of appropriate housing standards for the urban majority. The case I want to argue is that, given the existence of inappropriate laws which provide the legal backing for the (sporadic and often unfair) enforcement of unrealistic standards on the urban poor, the only way of overcoming them, while maintaining the principle of administration under and in accordance with law, is to replace the inappropriate law and standards with more appropriate law and standards. Many planners have an almost schizophrenic attitude towards law; it is at one and the same time resented and regarded as of little account, yet as a justification for continuing to apply inappropriate standards and to resist any reforms.

The explanation, I believe, is that the existing law is regarded as having a magical quality of certainty and order, and, faced with the actual reality of immigration from rural areas, lack of infrastructure or finance to provide for same, unplanned residential settlements on the one hand and the Utopia promised by consultants' Master Plans on the other hand, there is an understandable, if mistaken, belief that the use of a law requiring "high standards" with no exceptions is the key to getting on top of the problems of the real world so as to advance the implementation of the planned Utopia. This lies at the back of the desire for the rigid plan with its strict zoning regulations; for the power to demolish "temporary structures" without a hearing; and for the massive highways thrusting their way through or over areas classified as "slums." It explains too the belief, ingrained in so many planners and administrators despite numerous U.N. and other publications, conferences, recommendations, models and visitations, that if the law sanctions housing of "low standards" it would be sanctioning the creation or continuation of "slums." Proposals for reform of the law add one more element of uncertainty to the planners' already uncertain world and when these proposals appear to lower standards, allow for the possibility of exceptions to zones and use categories, downgrade the Master Plan from holy writ to mere guide, then opposition is likely to be intensified; not merely is the planner's world being turned upside down but his status as an unchallengeable expert is being questioned.

In these circumstances the lawyer has to pit his expertise and the law against that of the planner. The lawyer has to point out that the law has other values besides certainty and order, that rigid and inflexible plans have not stemmed unplanned urban growth in the past nor have laws requiring high standards of residential building prevented the growth of "low" standard owner-built houses; in fact if anything rigid laws imposing unrealistically high standards have contributed to "illegal" development by making impossible or very difficult the rezoning of land or the application of funds and administrative effort to upgrade unplanned urban development. In this area then, even more than in the other areas discussed, the lawyer has an educative role to play, weaning the planner and administrator away from the old style colonial authoritarian urban law, which was based on the proposition that the indigenous population did not really have a place or home in the urban area and helping them to understand that current thinking and policies about urban development for the urban poor are more likely to be successfully translated into practice via laws which reflect these same currents.

A good illustration of the debate in action occurred in Kano. There was in existence in the city a building code dating from 1940; requiring too high a standard of construction when it was imposed, by 1979 rising living standards and increased skills amongst the urban population had brought the standards within reach of many more of the citizens. But the Board and the State Government wanted a new building code requiring higher "modern" standards. The view of the expatriate officials on the Board was that these new regulations should apply to the whole of Kano and other urban areas within the State otherwise building control would be impossible to carry out and a detailed set of regulations were prepared on that basis. Owing in part to the somewhat undiplomatic way in which the Board presented its regulations and arguments to the State Government, a committee was established by the government to review the draft regulations. The committee considered that the regulations both "did not take into full account the psychological and sociological aspects of the lives of the indigenes living in the ancient cities of the State which albeit are within the urban centres of the State," and "overlooked in the main modern standards in architectural and structural designs of buildings and failed to incorporate up-to-date town planning measures and requirements." The Committee therefore prepared new regulations (which were not wholly dissimilar from the Board's draft) and ruled that they should not apply to the already developed areas within the ancient cities of Kano State as this would cause unnecessary social disruption.

What is of interest in the saga, however, is the perception of the Committee that new "modern" regulations would be socially disruptive on

old existing urban communities --even assuming that they could be enforced which is gravely open to doubt --yet a shared view between Committee and senior Board officials that up-to-date regulations incorporating modern (= developed countries) standards were an essential part of any new urban development. No consideration was given to the possibility of simplified building regulations for low-cost, self-built housing or for any positive provisions to be included in the draft regulations requiring officials to assist or help small builders to meet the new standards or for any transitional period for builders to adjust to new standards. Equally, clearly no attempt at costing had been undertaken so that the effect on construction costs was unknown.

It was to become clear when I began to draw up a memorandum on principles for building regulations, that not merely were the standards and proposed designs and measurements for houses set out in the various Master Plans, drawn up for the urban centres of the State, all different to each other, but both sets of regulations had paid no attention to the proposals of the Master Plans so that approval of the plans on the existing legal basis would have made it impossible to comply with the regulations and vice versa. This last matter pointed up the necessity for a clearer legal framework for planning and building in Kano State as well as the difficulties of being locked into a planning system which was based on giving plans the force of law. What was needed and what I suggested was a set of planning regulations which used the Master Plans as guides (existing proposals based on Indian practice were for rigid zoning regulations) along with a whole lot of other considerations in determining whether to grant planning permission and an approach to building regulations which saw them as a facilitative mechanism to assist the urban poor to upgrade their houses and aim for higher standards rather than a control mechanism that provided the legal justification for demolition of poor quality building. If need be more than one set of regulations should be drafted to cater for the widely differing classes of construction.

This approach to planning and building regulations is slowly being adopted in Tanzania, both for Dodoma and elsewhere. A new approach to building regulations is clearly an important part of any changed attitude towards the urban poor. Work has been going on for some time in Tanzania on new building codes and guides with the specific aim of creating a simple code for the construction of single-story houses and other buildings which could be relatively easily complied with by small contractors and those who wish to build their own houses. There was for some considerable time resistance in C.D.A. to the application of such a code to Dodoma on the inevitable grounds that this would mean lowering standards for the new capital which should be a showpiece for the nation. But the reality was that

while work was progressing on the new building code at the national level, no architect, planner or engineer was working on any code of building regulations for Dodoma and it was not easy to discover to what existing code, if any, the architects of C.D.A. were working. Thus, faut de mieux, C.D.A. was brought to acknowledge the usefulness of the national work.

By early 1980, a layperson's draft of a code of building regulations for single-story houses had been in existence for two years, based as far as possible on observed practices. I turned it into a legal draft, providing a relatively straightforward system of administration, inspection and assistance for its implementation and at all times following the specifications and requirements of the architect's draft. I also recommended that for a period of up to two years the code once approved by government should be operated only as a set of guidelines for builders which officials would use to help educate and assist builders to adjust to the new requirements, and even after the rules had full statutory force, it should not be every infringement that incurred a penalty. Rather every local authority should "administer and interpret these rules in a broad and reasonable manner, calculated to facilitate and advance the construction of houses to which they apply." This draft was then discussed at a meeting of local government officials, planners, architects and others where once again there was a difference of emphasis between those who believed that the rules would lower standards and those who thought that on balance the rules might help improve the quality of building self-built houses.

Kenya too is at the moment engaged in an exercise to review its building regulations with a view to creating a better code for low-cost housing than the present Grade II Housing Bylaws which, although much simpler than the Grade I bylaws, are still too detailed and complex for most urban dwellers to follow. One matter the Tanzanian and Kenyan exercises have in common, which if finally adopted would represent a definite advance in the creation of law for the urban poor, is the provision of a manual complete with diagrams, drawings and explanations of what is required by that code and how it can be achieved. Together with off-the-peg plans for low-cost houses --a service available in C.D.A. --such a manual could make a much more effective contribution towards raising housing standards than any code enforced with criminal penalties. Together with the initial use of the code as a non-binding guide as opposed to a binding code, this manual could help change the emphasis of the work of the building inspectors from enforcement to assistance and their image from foe to friend. As with planning law so here; there is a great need to create a positive law of assistance to replace the colonial-authoritarian negative law of control.

SOME IMPLICATIONS FOR ALTERNATIVE DEVELOPMENT

This paper has been mainly about bureaucracy and its internal problems, but a knowledge of how law is perceived and can be used inside a bureaucracy may be useful when it comes to try and construct administrative systems for alternative development, for one first has to overcome bureaucratic inertia, suspicion or hostility to new approaches. In this last section of this paper, however, I want to try and shift the focus and consider some of the implications for alternative development of my experiences. I would single out three major themes to stress--the educative role of lawyers, the positive uses of law and the complexity of law.

The educative role of lawyers. In this respect I very much doubt whether urban development is unique. There is a widespread ignorance of, often accompanied by hostility towards, lawyers and law in development administration. Time and again I find myself explaining the existence and usefulness of law, the case for law as opposed to a-legal power, the various legal techniques available to achieve desires' ends, and the safeguards that should be built into administrative systems. I stress that much of the time it is ignorance--both of the details of the law and, probably more important, certain values which lawyers tend to be concerned with and administrators and planners are not. What this role amounts to is not taking the case for law for granted and equally being ready to disabuse laypersons of some of their assumptions about law, the most prevalent of which in development administration is that the law is both the big stick to get development moving--this is a perennial problem in Tanzania in respect of agricultural development--and the big stick to prevent "illegal" development, both essentially negative uses of law.

Part of this educative role is to get the message across that legal frameworks for alternative development should be devised as an integral part of the programme at its inception rather than being wheeled in as a kind of deus ex machina half way through the programme when things have begun to go wrong. It follows from this point that the lawyer should cease to be regarded either by him-or-herself (and this implies altering the nature of legal education to some extent) or by development agencies as just an expert at technicalities, who is brought in for specific legal jobs--drafting a contract or bylaw, completing a conveyance, advising on the prosecution of or prosecuting an alleged offender for breach of a regulation--but rather the lawyer has to be seen as concerned with policy and its implementation, as being part of the management team, in at the beginning of the programme.

It is worth speculating whether, if the implementation of the villagisation programme in Tanzania in 1975-6 had been seen as, in part, having

legal aspects and therefore needing legal advice on such matters as expropriation and compensation and a legal framework for administrative action the end result might not have been more satisfactory. Implementation might have been slower but effectiveness might have been greater. A small parallel is provided in Dodoma. A decision was taken to move some "squatters" so that the land could be prepared for "development" -- a road. A decision was taken to pay compensation ex gratia. But no procedures were followed in this; no proper efforts were made to ensure that the right people were being compensated or that those who got it understood what it was for. The squatters were not in fact moved until three years after payment of compensation but there had been no adequate preparation of a site for them to move to. Thus the decision to pay compensation which was admirable was vitiated by an absence of any kind of legal or other framework for its implementation. No lawyer had been consulted on procedures and no attempt had been made to adapt what legal procedures existed to the particular circumstances of the case. A repeat performance of this was planned for another area -- the Kikuyu Model Community -- where homes were to be demolished and squatters moved, as they did not fit in with the plans, without any consideration being given in the plan to relocation, compensation or assistance for those displaced. By drawing attention to the various legal provisions governing these matters -- contained in both town and country planning and compulsory purchase legislation, it was possible to get the plan rewritten to incorporate both the necessity to pay compensation and the likely costs thereof. The educative role therefore is important, both before any particular programme begins and during the programme and should be as much concerned with stressing values as techniques or procedures.

The positive role of law. No aspect of the educative role is more important than to stress the positive role of law in development. As mentioned earlier, the law is seen as a weapon against "illegal" development which basically means against the urban majority. Any attempt to construct frameworks for alternative development entails use of law in a positive way to promote the ends and means of alternative development.

But what is this positive role? In part it is a question of using legal principles to change attitudes; in part it is a question of providing substantive rights. On the first point, one has to get across the message that basic legal principles (e.g., natural justice) are not a hindrance but actually facilitate implementation; that an alternative development approach of public or neighbourhood or village participation can only be made more effective and meaningful if it is given a legal framework, and that giving it a legal framework need not mean stifling the spontaneous growth and evolution of institutions of participation. The same point can be made about a

matter as basic and "legal" as compensation. Development, even alternative development, may involve disruption: to give people compensation of some sort --not necessarily monetary compensation--can be an important part of making a programme acceptable and thus increasing its chances of success. Compensation must therefore be presented as part of a programme of development --not a substitute for meaningful participation, the mistake often made in the U.K. --and not as a delaying tactic on the part of those who wish to oppose the programme. Fair administration must be presented as more effective administration and more consistent with development goals.

The harder part of the positive role of law is to come forward with proposals of substance that present law in a more favourable positive light. We can proceed from the less to more difficult suggestions. First, lawyers should join with those--both commentators and practitioners--who urge the decriminalisation of failure to comply with official development programmes. No single step could do more for alternative development in the city (or for the image of law) than to decriminalise informal trading and uncontrolled urban settlements. The fact that in too many recently independent countries, these activities are still subject to the sporadic enforcement of the criminal law shows that the colonial legacy has still not been eradicated from the law. In this respect African countries have much to learn from countries in South America where squatting, a more developed activity, has been virtually incorporated into urban administration.

Secondly, institutions and administrative practices have to be created which clearly and overtly assist programme implementation, whether the programme is development or alternative development. These would include the provision of legal backing for "political" institutions such as tenants associations, residents associations, village development committees, etc., which would have specific roles in planning and implementing programmes; for "economic" associations such as cooperatives in both the rural and urban areas, loan associations and other institutions of mutual self-help to which and through which would be channelled aid and assistance. Within formal official bureaucracies, posts would have to be established and duties imposed on officials, the aim of which would be to change the emphasis in official administration from "orders from above" to "assistance to development from below."

To give a small example of this point, one proposal in connection with the draft simplified building regulations in Tanzania was (it will be recalled) to have the regulations used only as a guide for a period, accompanied by diagrams, drawings, etc., with the building inspectorate used more as adult educationalists to assist builders to comply with the new

guides than as inspectors seeing out faults and requiring demolition. However apt the new rules are, heavy-handed administration would quickly destroy their acceptability.

Another example, so easily overlooked by administrators and lawyers, is the need for a hard look at the necessity for and the actual design and content of official forms. Looking back on the forms I designed to accompany the planning regulations for Dodoma, I think now that they were too complex, though there is a provision designed for the small self-build situation dispensing with the necessity for filling in a planning application.

Equally important is the need to ensure that the costs of bureaucratic divisions and departments are borne by the bureaucracy and not by an applicant for permission to do something; i. e., the applicant should be obliged only to fill in one form and take it to, and receive it back from, one office in one place; the necessity to obtain different permissions from different officials located in different departments should be met by the one form journeying round the bureaucracy. In this matter C.D.A. was making a real effort to tie up planning and building control permission in one package and the law was hindering this effort. The same problem existed in Kano; good administrative practice had to be carried on in spite of the law, which allocated planning and building control to different agencies. This example highlights another positive approach: law reform designed to survey and if necessary reorganise and up-date the multiplicity of laws that exist in so many areas of development; new post-Colonial laws superimposed on old Colonial laws; new institutions duplicating the work of existing institutions; reports proposing changes forgotten or superseded by other reports proposing other changes; the difficulty of carrying on any coherent administration in such a legal atmosphere is obvious, yet the remedy--a lawyer to help tidy up the legal framework or to press for policy decisions on which set of proposals to adopt--is not always seen, or acted upon. A positive role for law means a creative, strenuous role for lawyers who must also be able to deal with the complexity of law.

The complexity of law. Basically what both administrators and proponents of alternative development are looking for, is simple law; a few well-chosen sections which any person can understand and comply with is the ideal; anything more is evidence of the lawyer's practice of obfuscation for his own financial benefit--runs the standard criticism and it is idle to pretend that there is no truth in it. But the issues are not as simple as they are made out to be in that kind of criticism. A short "simple" law establishing a new programme or a new institution only too often is a law which gives great power with few safeguards to administrators and/or fails to cater for all the problems to be encountered in implementation.

The creation of C.D.A. by presidential order in 1973, already referred to, is a case in point; the establishment of the Kano U.D.B. by military decree in 1972 is another example: in each case quick decisive action on the basis of a short "simple" law was taken; in each case legal and administrative problems multiplied as it became apparent that insufficient attention had been paid to existing laws, institutions and administrative structures at the time of enactment.

A final question--how to secure more participation and a more equitable administrative system--poses the greatest challenge and gives rise to the maximum amount of schizophrenia on the part of a concerned lawyer. How can one draft a statute creating new institutions and duties of participation, imposing new checks on administrative action, providing new opportunities for informal developments of all kinds and not finish up with a longer, more complex law than the old Colonial-type legislation which is being replaced and which basically gave planners and administrators carte-blanche to "get on with things" with a minimum of checks on their activities?

My experiences in drafting a new planning law for Kano State may be used as an illustration for this dilemma. It was designed to replace a 1962 Town Planning Law and a 1972 K.U.B.D. Edict, the combined lengths of which were 114 sections and 3 schedules. My proposed draft was 96 sections and 2 schedules, one of them long and complex, but before assuming that this represented a significant simplification, I should add that many of the sections were long and the total number of words used in the replacement legislation may well exceed that in the replaced legislation. Length and complexity came about from two causes: first increasing the types of plans that could be made, thus increasing the flexibility of the planning system (there being no requirement that one type of plan had to be made before another), and stating what the purpose of the plans were--a necessary provision as each planning consultant or expatriate planning officer had his own idea as to what he hoped to achieve by preparing a plan of some kind and these ideas rarely dovetailed. Secondly, a great many words were used to set up and provide the outline procedures for consultation and publicity in connection with the making and approval of plans. These procedures are unquestionably open to criticism from an alternative development "bottom-up" perspective as being too heavily weighted towards "official" participation about officially made plans but equally unquestionably they went far further than any planning legislation in Nigeria or indeed in Anglophonic Africa generally, in the direction of open participative plan making. All the time I was drafting I was conscious that every additional provision I put in to sharpen up participation and reduce the possibility of the provisions being ignored both made the legislation longer and more complex and so paradoxically possibly increased the likelihood of

administrators, planners, consultants being tempted to ignore it. It is easy to make the usual lawyer's trite remark about "striking the balance," much more difficult actually to do that in practice. The draft law has not been enacted so I cannot tell whether in practice I erred on the side of complexity in this matter; I think I did but I also think that less legal provisions would inevitably mean more reliance on the goodwill of officials, and in programmes of alternative development where bureaucracies are having to act against their own best interests, relying on bureaucratic goodwill might not be too sensible.

I mentioned that one schedule in the draft legislation was long and complex. This dealt with permitted development--i.e., development permitted by the law and which did not need specific planning permission. The aim was to free as much small-scale development and economic activity from the requirements of planning permission as possible without at the same time negating the principle of development control. The draft law therefore contained the principle of development control where there was in existence a development plan (that alone freed most of the State from development control on unimpeachable grounds); the schedule contained the exceptions to development control in those areas where there was a plan and therefore development control. It is not, however, very easy to draft provisions exempting small-scale development from control in such a way that the informal sector is left alone but developments which might cause a nuisance or pollution are caught, or exempting residential developments of a traditional kind or a certain size but catching other residential development. The only way to do it is to spell out in some detail what is permitted and what is not. In this way developers and more important officials know what they may and may not do or control. But spelling details out adds to the length and complexity of law. The alternative--to give a wide measure of discretion to officials runs the risk of providing a spurious legal backing to harassment of informal urban development and economic activity.

The demands for more participation, for more decentralisation of power, for more institutions for informal economic activity, for more controls over official power are (however necessary to alternative development) demands for a more complex administrative structure and in turn for a more complex legal superstructure. This is the price that has to be paid for a democratic and equitable administrative system (and even then one might not achieve that to the extent that it is desired by some proponents of participation--see for instance the English saga of public participation in town planning and housing, the lengthy laws to provide for it and the mouse that resulted³), and not the least of the tasks of a lawyer in the design and administration of alternative development is both to get that point across to his or her colleagues in administration while at the same time striving for simplicity and conciseness.

CONCLUSION

This paper has been fairly down-to-earth and has eschewed overt philosophising though it obviously has an ideology at the back of it. In brief, it is that my practical experiences allied to my general academic work in planning law do lead me to believe that there is a role for law for law and lawyers in development and that role is a much more overtly policy-orientated role than is traditionally accorded the lawyer either by him/herself or the world of administration at large. It is only by displaying a capacity to understand the aims of alternative development and the possible methods of implementation that the lawyer is likely to be taken seriously and thus his/her specifically legal concerns taken seriously. The way forward for lawyers then is not to try and become even more expert in one's own technical patch--narrowing one's horizons in other words by excessive concentration on legal knowledge--but to recognize that understanding is more important than expertise, though it will lead to it, and understanding will come from a broadening of intellectual horizons. At the same time there must be a recognition that the case for law is not self-evident to most people--administrators and otherwise--and that it has to be argued for and in a sense earned by demonstration.

FOOTNOTES

1. The Guardian, November 12, 1980: Searching for more than shelter.
2. Kikuyu Development Plan, PPAL/CDA 1978.
3. Patrick McAuslan: The Ideologies of Planning Law (1980), Chapters 1 and 2.