

Urban LandMark: Annual Conference

Moving from Knowledge to Change; Agreeing the Next Steps for Better Access to Urban Land

Guide to urban legal reform in sub-Saharan Africa – rationale/objectives/envisaged outcomes

The paper is based on the draft Urban Legal Guide for Sub-Saharan African countries that Stephen Berrisford and I are writing. We have not completed the first draft and it seemed to both of us that it would be more interesting for you and certainly more useful to us if I presented a summary of our draft (which extends to over 25,000 words) rather than attempting a completely different presentation. So while taking account of what you have asked me to speak on – the rationale, objectives and envisaged outcomes of the Guide – I will be basing myself on the content of the guide as it is at present.

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Objectives

1.1 What the Guide seeks to do

To summarise and explain the scope and content of urban law, how to create it and its importance in creating and implementing an efficient, effective and equitable system of urban governance and planning in Sub-Saharan Africa.

1.1.1 Reflect the needs of different legal traditions

In developing a ULG, it is important to review, comment on and assess the effectiveness of urban laws throughout Sub-Saharan Africa. One of the effects of the colonial carve-up of Africa which has been carried over into the post-colonial era is the lack of comparative knowledge of or, it must be said, interest in the different legal developments and experiences used in Africa with respect to urban governance, urban planning and urban land tenure. There is still a tendency, notwithstanding the presence and work of UN-Habitat based in Nairobi, for governments wishing to revise and reform their urban laws to look to experiences and models from their former colonial ruler¹. The Guide will refer to examples of laws from all legal traditions aiming to draw out the best examples which can be built on to develop 'African best practices'².

1.1.2 Help chart the course for different countries' urban legal reforms

We are attempting to develop a guide which will have resonance for over 50 countries. These countries vary enormously in their urban development, their urban management, their urban size and their urban policies which provide the basis for their urban laws. Zanzibar and Lagos may have urban laws which are still based on elements of the common law and English colonial statutes but the former is a state of just over one million people of whom approximately 40% live in and around the city of Zanzibar; the latter is a city of over 16 million people in a country of well over 100 million people. Cape Town is still a city of gross inequalities based on race despite efforts to ameliorate the worst excesses of apartheid but it is a functioning city with

¹McAuslan, P (2013) *Land Law Reform in East Africa: Traditional or Transformative?* London, Routledge (forthcoming, June) chap. 12, illustrating the position in Eastern Africa. Both Italy and Germany had colonies in Sub-Saharan Africa but there is no discernible legal influence from those countries on the development of urban laws in their former dependencies: Somalia, Tanzania, Cameroon.

²Myers, G (2011) *African Cities: Alternative Visions of Urban Theory and Practice*, London, Zed Books although a very good book is based on discussions for the most part of Anglophone cities.

reasonably effective urban governance and urban planning; Mogadishu is a postconflict city (a somewhat optimistic statement) with effectively no urban governance or urban planning whatsoever. Kigale is a small well organised and governed city with however some questionable urban planning policies; Kinshasa after 30 years of Mobutu has in the words of De Boeck and Plissart “bypassed, redefined or smashed the (neo)colonial logics that were stamped onto its surface”³. Neither city government owes anything to its Belgian colonial past. Clearly all these cities will, if they are ever minded to review and reform their urban laws, need very different legal frameworks to tackle their unique problems but hopefully the Guide will provide a menu of relevant options which can be drawn on to develop a more useful, workable and autochthonous law than they all have at present.

1.1.3 Suggest a benchmark for a defensible urban legal reform process

We see urban law reform consisting of two elements: the process and the substance. Both are equally important. Process focuses on ‘how’; how is an urban law or an urban code of law to be developed. The majority of states in Africa have a very closed process of law-making; the educated urban elites – politicians, civil servants, lawyers, perhaps some leaders of NGOs – will be involved but the ordinary residents of the cities are, generally, kept well away from the process. This too follows the colonial approach. There are however signs that this approach is beginning to change. South Africa has pioneered a more inclusive approach to law making generally. The process of the development of Mozambique’s Land Law is held up as a model of how the process of law making should proceed. But the reform process has to go deeper than focusing just on how the law is put together and must expand into ensuring that the promise of the law on the books is carried forward into its implementation.

This is not an easy matter to ensure. For instance, in Kenya the Njonjo Commission⁴ set out policy principles for managing the urban development process:

³De Boeck, F. and Plissart, M-F. (2004) *Kinshasa; Tales of the Invisible City*, Tervuren, Royal Museum for Central Africa, 34

⁴Njonjo, C.M. (Chairman) (2002) *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration*, Nairobi, Republic of Kenya, 67, 69.

- The need to empower the disadvantaged groups to access decent environmentally acceptable and affordable shelter . . .
- The need to create an enabling environment for urban development through the establishment of transparent, accountable, sustainable, comprehensive and participatory governance structures and decision making processes . . .
- Promote participatory involvement by all stakeholders in land use planning⁵.

The Urban Areas and Cities Act 2011 however more or less ignored these principles in its enactment so that it will be next to impossible to apply the principles in practice. There is generally a suspicion amongst the urban elites about involving the ordinary citizens in law making and implementation so that developing a benchmark for a defensible urban legal reform process will not be easy.

1.1.4 Support the development of just cities

There is an increasing focus on the just city. We can note Soja's approach to spatial justice⁶ and the just city in the context of Fainstein's book on the subject⁷.

In a paper written in 2008 on The City and Spatial Justice⁸, Soja sums up what he means by spatial justice:

1. In the broadest sense, spatial (in)justice refers to an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice. As a starting point, this involves the fair and equitable

⁵McAuslan (2013) op. cit., 179

⁶ Soja, E. (2010) *Seeking Spatial Justice*, Minneapolis, University of Minnesota Press.

⁷ Fainstein, S (2010) *The Just City*, Ithaca, Cornell University Press. There is considerable debate amongst South Africa urbanists on the relevance of 'Northern' theories to Southern, particularly African cities. See for a very sceptical approach, Watson, V (2002) The Usefulness of Normative Planning Theories in the Context of Sub-Saharan Africa, 1 *Planning Theory*, 27 – 52; and for an approach that argues for their relevance, Parnell, S and Pieterse, E (2010) The Right to the City; Institutional Imperatives of a Developmental State. 34 *International Journal of Urban and Regional Research*, 146 – 162. Watson takes particular exception to Fainstein's use of Amsterdam as an example of the just city as showing the irrelevance of the just city approach to cities in Africa but in her book, *The Just City*, Fainstein discusses the general principles of the just city and these general principles are as applicable to cities in Africa as elsewhere.

⁸ Soja, E. (2008) The City and Spatial Justice; paper at a conference on Spatial Justice, Nanterre, Sept, 2008

distribution in space of socially valued resources and the opportunities to use them.

2. Spatial justice as such is not a substitute or alternative to social, economic, or other forms of justice but rather a way of looking at justice from a critical spatial perspective...

Soja specifically differentiates spatial justice "from the notion of just city". It is possible to understand this difference when we turn to the notion of the just city as argued for by Susan Fainstein. She states:

My aim is to develop an urban theory of justice and to use it to evaluate existing and potential institutions and programs...My effort within the urban context is to "name" justice as encompassing equity, democracy and diversity and to argue that its influence should bear on all public decisions...

I have distilled the discussions in the philosophical literature and planning theory down to four topics that seem most relevant to my concerns: (1) the relation of democratic processes to just outcomes; (2) the criterion of equity; (3) the criterion of recognition and (4) the tensions among democracy, equity and diversity...

If there is one common theme running through these diverse approaches to land-related justice, it is distribution; a fairer distribution of the outcomes of development, whether is it in the fair and equitable distribution in space of socially valued resources and the opportunities to use them (spatial justice) or moving from the planners' obsession with economic development to a concern with social equity (the just city). There is also a secondary concern: to bring about a more open public debate on planning issues involving persons and groups who tend to be excluded from the standard approaches to public participation.

1.1.6 a practical means for countries to realize aspects of the 'right to the city'

The Right to the City is a conceptualisation of the messages of the Habitat Agenda and the Global Plan of Action as later developed and elaborated in the Global Campaigns on Urban Governance and on Secure Tenure for the Urban Poor. In national policy and legal terms, it can most clearly be seen in Brazil's City Statute of 2001 as follows:

The City Statute has four main dimensions, namely a conceptual one, providing elements for the interpretation of the constitutional principle of the social function of urban property and of the city; the regulation of new legal, urbanistic and financial instruments for the construction and financing of a different urban order by the municipalities; the indication of processes for the democratic management of cities; and the identification of legal instruments for the comprehensive regularization of informal settlements in private and public urban areas.⁹

The Right to the City goes beyond land issues. It is first and foremost a statement of the requirement of a participative approach to governance within urban areas. It involves not just devolution from the centre to a local authority; in large urban areas it involves the creation and empowerment of local area councils, so bringing governance to the people.

The Right to the City is a broad and general policy statement. It offers a new way forward for urban governance and urban land management. If the Right to the City were to form the basis of any new law to provide for a re-conceptualised approach to urban government, then at the forefront of the law would be a statement of the rights and responsibilities of the residents of the city towards each other and the wider community of the city and of the local authority towards its residents.

It is important to make the point that these rights and obligations will not stand alone as an add-on to existing local government laws: they will drive the rewriting of those laws so as to give effect to them. To give just one illustration, setting the local authority budget will cease to be the preserve of officers and councillors alone with ultimate reference upwards to central government. Participatory budgeting involves local communities via their organisations working with officers of local authorities, setting goals, determining spending priorities, allocating, spending and accounting for funds. It reverses the normal budgetary process which is a top-down one. It will involve central government no less than local authorities 'letting go'. This would need to be provided for by law.

⁹E Fernandes Constructing the 'Right to the City' in Brazil, (2007) 16 *Social and Legal Studies*, 201 – 221, 212.

1.2 Nature and scope of the Guide

1.2.1 A guide, not a formula

Changing urban law is never a straightforward process. In this Guide we try to guide a person through the inevitably complex and unpredictable process of developing new urban law. We do however think that the more prepared you are, the easier it will be to complete the process with a credible outcome and the less likely you will be to achieve the wrong outcome.

So the Guide sets out the principles upon which the new urban law has to be built, it draws attention to the challenges that are likely to arise and it advises on techniques for getting around obstacles. The Guide acknowledges that no two urban legal reform processes are ever the same. There are always important contextual differences. These differences are caused by the different legal traditions in different countries, the different histories of law-making, different economic conditions and different levels and rates of urbanization.

1.2.2 Urban legal reform: urban planning, urban land, urban finance and urban governance; land development; housing and informal settlement upgrading.

Urban challenges are numerous, complex and overlapping. They can be divided into different categories and these categories themselves may vary from country to country. However, we have outlined below the seven main categories of urban law that generally need improvements and change.

Urban planning

The laws that govern the planning of towns and cities normally consist of two main features. The first is a set of rules that cover urban plans: which levels of government have the power to make these plans; how these plans relate (legally and technically) with other plans which might operate at a higher level like a regional or national plan; what procedures have to be followed in drawing up the plan; and what legal effect the plan will have once it is approved and final. The second main feature of planning laws is the set of rules that govern the way in which a change in land use is managed by the relevant authorities: what land use changes need which sort of land use approval; how land use changes are officially recorded; how the legal status

of land changes from, for example, rural land to urban land; and how a person who is unhappy with a land use decision might seek a second opinion or a review of the initial decision.

Urban land

The administration and management of any land, but especially urban land, is a very important economic role played by the government in most countries. In some countries community-based structures or institutions of customary law also play this role. Nevertheless, there is always lots of law that applies, dealing with matters such as surveying of boundaries, description of tenure arrangements, procedures for resolving disputes over competing claims to the same land parcel and the recording of land rights in official registers. Obviously urban land law is very closely connected and integrated with urban planning law.

Urban finance

At the heart of every town or city is a set of rules that describe how infrastructure is paid for, how users of infrastructure and utilities pay for their use, how local government levies taxes and charges and the corresponding duty of citizens to pay them. These laws make it possible for a local government system to work and for urban residents to benefit from services and infrastructure. Most urban finance systems include strong references to land parcels, with most taxes and charges being levied on the person or persons registered to hold or own a particular parcel. There is thus a direct integration of urban finance law with urban land law.

Urban governance

Whether the governance system for a town or city and its surrounding territories is based on modern ideas of local government or traditional notions of customary government there will be laws that define the powers of the respective authorities as well as the rights of citizens to participate in the system of governance. These laws can include the definition of the local government system as well as the overlaps and integration between modern and customary governance systems.

Urban land development

Closely linked with urban planning law, these are the rules that specify how a person or developer can take an undeveloped land parcel and repackage it for investment and development.

Housing law

Many countries – notably South Africa and Angola – have committed to mass provision of state-funded housing. Other countries have less ambitious goals, but all envisage a role for the state and the law in promoting a better quality of housing for citizens. Appropriate and effective laws are then very important in regulating that process to ensure that public policy objectives of safe and efficient housing are met through the private provision of the actual dwelling units.

Upgrading of informal settlements

Flowing from the growing appreciation of the state's limitations as a provider of housing and from the rapid growth of informal settlements in urban and peri-urban areas there is an evolving body of law that deals with the rules and procedures for upgrading – both physical and legal – of informal settlements. These range from comprehensive titling programmes to programmes of incremental recognition of use and tenure rights over time. They are closely linked to the laws governing urban planning, land and land development.

The thread that pulls all the aspects of urban law together is their impact on the rights and interests that people have in property – whether land, a house or an apartment – and on the government's power and interest in regulating that property, its use, its taxation value and its management. Urban property is the bedrock of urban legal systems and urban law draws the lines between what is in the private realm and what is in the public interest. In cities where there is a both a deep division between the formal and informal systems of managing cities and managing urban property and where many property-based relations are mediated through customary laws there are distinctive approaches to urban legal reform that must be developed and implemented.

Principles

1.3 Principles for legal reform

The ULG is aiming to set out a framework for the development of a range of urban laws designed to create well managed towns and cities. It is important

that right at the outset of any proposed framework, a set of principles is developed which can and should be used as the basis for the specific urban laws which will be drafted. Over the years, and especially since the agreement on the Habitat Agenda and the Global Plan of Action at the UN City Summit in 1996, the use of principles at both the international and the national level as a basis for the drafting of laws on urban governance and land matters has become more common than used to be the case.

A recent statement of **Principles of Implementation of the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security** put together by FAO was agreed to by over 100 countries in May 2012.

These Guidelines seek to:

- improve tenure governance by providing guidance and information on internationally accepted practices for systems that deal with the rights to use, manage and control land, fisheries and forests.
- contribute to the improvement and development of the policy, legal and organizational frameworks regulating the range of tenure rights that exist over these resources.
- enhance the transparency and improve the functioning of tenure systems.
- strengthen the capacities and operations of implementing agencies; judicial authorities; local governments...indigenous peoples and other communities; civil society; private sector; academia; and all persons concerned with tenure governance as well as to promote the cooperation between the actors mentioned.
- The guidelines commence by setting out ten principles of implementation which are stated as being essential to contribute to responsible governance of tenure of land, fisheries and forests. They are as follows:

Human Dignity:

Non-Discrimination

Equity and Justice

Gender Equality

Holistic and Sustainable Approach

Consultation and Participation

Rule of Law
Transparency
Accountability
Continuous Improvement

We suggest that these principles are as relevant to the matters to be contained in a ULG as they are to the broader categories of land, fisheries and forests and given that, although purely voluntary, they were endorsed by over 100 countries in May 2012, they can form the same function for a ULG as they do at the wider level.

1.3.1 Draw on international law

In the interests in keeping the Guide to a manageable length and concerned to focus on the essentials, we are confining our reference to international legal documents to two only; the Habitat Agenda and the Global Plan of Action, outcomes of the 1996 UN City Summit and the African Charter on Human and Peoples' Rights.

The Istanbul Declaration on Human Settlements and the Habitat Agenda adopted at the UN City Summit in Istanbul in 1996 are in the eyes of international lawyers, examples of 'soft' international law which give rise to what might be called quasi-legal obligations which cannot however be enforced by any international law enforcement agency. Nevertheless, by agreeing to these documents, all governments represented at that Summit put themselves under an obligation – part legal, part moral – to begin the process of reviewing their policies, laws and practices to bring them into line with the principles enshrined in the Declaration and the Agenda.

If one were to sum up the principal message of these provisions, it is that while a strategy of enablement is to be the preferred mechanism for providing access to land and ensuring security of tenure, the role of governments does not stop there. Governments must also direct their attention to considerations of equity in the operation of land markets and to this end, government at all levels and civil society must be involved in working with the disadvantaged and the poor, removing obstacles to their obtaining land, developing innovative mechanisms, instruments and institutions to assist such persons to obtain access to land and security of tenure via the market, and governments

must desist from actions which penalise such persons and lessen their opportunities to obtain and hold on to land.

It has already been noted in Objectives that towns and cities in Africa are very diverse as are the laws that apply to them. So it is a common sense principle that any urban law has to be tailored to the circumstances of the particular country and indeed the particular city within the country. There is a tendency for most countries to have one local government law which is designed to cover all types of local government. It may be that states should consider the possibility of different local government laws to take account of different types of local government. A capital city of three or more million people has different urban governance issues to grapple with than a small provincial town of 20 to 30,000 thousand people. Urban laws should be shaped accordingly.

That said, there are common challenges which exist in all cities throughout the continent – for instance informal settlements and the informal economy – so there is a case for the development of e.g. an urban transformation law which would provide for an integrated approach to the regeneration of informal areas. Any such law would have to take account of and fit into the framework of the existing urban laws but there would be commonalities in the content of the law as the issues to be addressed would themselves be broadly common.

1.3.2 Match law with implementation capacity

We would like to put forward what we would argue has to be seen as the overarching theme of any programme of the reform of the law, institutions and processes of urban land management and urban governance. This is that any such programme must be seen as *a major exercise in capacity building and institutional reform* and such exercises generate a whole host of problems, challenges and opposition which need to be addressed if reform is to have any chance of being successful.

1.3.3 Base law on policy

This might seem a fairly obvious proposition but it is by no means the case that even fundamental law reform is preceded by a statement of policy. For instance, we may contrast the development and drafting of the Tanzanian Land Act 1999 and the Uganda Land Act 1998. In Tanzania, the National Land

Policy 1995 was approved by Parliament and that was there as my reference point in developing the Bills for a Land Act and a Village Land Act in 1996 but in Uganda, the Land Act 1998 was based on the relevant chapter of the Constitution of 1996; there is still no national land policy though one has been worked on now for over 10 years.

2.1.5 Develop different options and identify potential impacts

This is the next step after the development of a national policy; indeed it may even be part of a national policy document. When invited to become involved in a project to draft a new law on e.g. some aspect of urban management or planning, a good starting point is to develop an Issues and Options Paper setting out and discussing the various issues of urban development and governance and the various options that need to be assessed before determining the most appropriate law to meet the identified needs.

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Such a paper is usually the basis for a workshop which allows a representative group of persons from the public, private and community sectors to discuss the issues and ensure that a rounded view is arrived at before the drafting of a law commences. What is important to emphasise is that any Issues and Options paper is just that: it raises issues and suggests options; it is not meant to be definitive.

1.3.4 Involve citizens in law-making process

An excellent summary of the importance of involving citizens in law-making and the various techniques for doing so is provided by Yash Ghai in a paper on **The Constitution Reform Process: Comparative Perspectives: Learning from other experiences in the process of post-conflict constitution-building**¹⁰. Although it focuses on participation in the making of a constitution, the principles enunciated are relevant to the development of urban laws.

Participatory Process

Importance of participation

Participation in law making is considered nowadays as fundamental. International human rights instruments require, as a manifestation of self-determination, that all the people and communities should participate in deciding on the governmental and political system.

Division of Labour

Most law making processes are divided into different phases; each phase may be marked by the dominant participation of different groups, balancing their contribution and skills, and recognising the division of labour, e.g., the role of the people in defining and elaborating an agenda of reform, that of experts in translating recommendations into legal text, and representatives who make the final decisions. Participation thus takes different forms.

Securing participation

Participation can be secured, for example, through

- Representation on the law making institutions
 - o The range of interests and groups represented (e.g., social, gender, regional, disadvantaged, religions, professional, political, business and trade union, other civic society groups/organisations)

¹⁰Tom Ginsburg, Zachary Elkins, and Justin Blount (2009): Does the Process of Constitution-Making Matter? *Annu. Rev. Law Soc. Sci.* 5:201–23 for a more sceptical approach to participation.

- o The mode of choosing representatives (e.g., by umbrella bodies of women, disabled, youth, etc.)
- o The method of decision making and voting (consensus)
 - The ability of groups to engage in the process
- o Civic education to enhance general understanding of the process and reform issues
- o Facilities for individuals, groups and communities to debate issues (using local languages where possible for materials and debates, organising meetings of groups/communities to discuss issues; encouraging submissions through oral or written presentations at local meeting of the body set up for this purpose; submissions through various media)
 - Procedure for consultation and other inputs into the process
- o Convening of specialist national conventions (e.g., of the disabled, women, minorities, professions, religious groups)
- o Dissemination of option papers and questionnaires
- o An independent and reliable method of analysis of public views and recommendations
 - The forum/s for decision making
 - Adequacy of resources (financial and human; a highly participatory process is likely to be expensive; independence of resources)

1.3.5 Don't introduce new law unless there is a reasonable prospect it will work better than what already exists

However out-of-date or deficient an existing law is, it is a known quantity; both the citizenry and officials have got used to it, know their way around it, or how to avoid it. The concept of path dependency as an explanation of why existing systems persist despite their deficiencies is highly relevant here.

There will always be pressure to maintain the legal status quo. At the same time, those persons who have made their careers out of applying laws now to be replaced must be given an incentive to adapt to change. Failure to provide for this will encourage deliberate efforts to undermine new laws.

1.3.6 Laws should be written in a style that non-lawyers can understand

It is possible to set out some important general principles to which attention should be paid when drafting laws. Laws will be used for the most part by

laypersons, in local government, officers, councillors, the citizen wanting to know what he/she has to do to obtain something from the local authority, so they have to be set out in a way which facilitates their use.

A. Principles of drafting

There are four criteria of drafting which should be used. Laws should be:

- *clear:*
- *coherent:*
- *comprehensive:*
- *certain:*

B. Principles of Substance

The principles suggested as relevant are as follows: any legal input into a land market should aim to encourage, strengthen or introduce a system of management, planning and regulation of that process which is equitable and socially responsive, flexible, environmentally conscious, participative, efficient and administratively fair.

1.4 Principles for urban legal reform

1.4.1 Equitably manage the allocation and use of the scarce resource of developable land

A key principle of urban legal reform must be the need to reduce that scarcity, to increase the supply of opportunities for people to acquire and use developable land and to share the benefits held by those who already hold and use it.

1.4.2 Respect both women and men's right to live securely and safely in the city

It is a central principle of urban legal reform that new law must strengthen, and not weaken, people's rights to live and work in town and cities. In some cases this will involve not merely strengthening rights but actually creating new rights.

An important dimension to this is that these are rights that must be held and enjoyed by both men and women. Today we know that urban households take many forms and even where there is a man and a woman running a

household there must be equal treatment of the two of them in the allocation and strengthening of rights.

1.4.3 Ensure coherence between new law and customary legal practices

The principle guiding the developers of new urban law is that they must understand which aspects of customary law are in effect, how they are implemented or enforced and where possible conflicts with new legislation might arise. Then it is important to use that knowledge and understanding to design the new statutory framework, consciously taking into account the limits that the customary law might impose as well as identifying those areas where the new law might need to change customary law and practice.

1.4.4 Provide for public involvement in city and local decision-making.

Where appropriate the law should make possible the delegation of some decision-making from local government authorities to community-based institutions, subject to legal protections against abuse of positions by powerful individuals or groups.

1.4.5 Respect the respective powers of different tiers of government

Each country has its own constitutional arrangement of the different powers exercised by different tiers or levels of government. In the urban law context this is most important when delineating the powers of the local level of government from those of the next level up, which might be a provincial, state or district level.

1.4.6 Allow for incremental improvement of physical infrastructure and buildings

Urban law should acknowledge the investments already made by the state and by individuals into infrastructure and buildings. Introducing a new law is an opportunity to draw a line under historic transgressions and problems and start afresh with a new approach that respects the investments made in the past and builds a new more appropriate system for planning and approving future investment in infrastructure and buildings. The principle to be pursued is thus one of prioritising actual investments made over compliance or non-compliance with the relevant rules and regulations.

1.4.7 Provide a supportive environment for financially sustainable local government

The principle that has to be pursued here is that the law must, wherever possible, avoid imposing costs on local government without ensuring that a corresponding revenue source is also provided. For all levels of government, but especially local government, what works in financial terms is often what will work in legal terms and urban laws must reflect that.

1.4.8 Promote consistent rules across different sectors

In a context where administrative and professional capacity is scarce and where the government is generally committed to reducing the burden of excessive regulatory compliance on the private sector it is very important to promote the principle that new laws should be integrated with existing systems and structures wherever possible rather than creating new ones.

2 Beginning an urban legal reform

2.1 How to develop a policy basis on which to begin legal drafting

Sometimes it seems so obvious that we forget the point that we should not start thinking about how to draft new legislation until we have a clear understanding of what the problem is that we wish to solve through the new law. That includes understanding the various dimensions of the problem as well as an appreciation that each dimension will probably require a very different response from the government. And that response need not necessarily be a new law or even the amendment of an old law.

In practice the legal drafting team will find themselves having to solve the problem of policy gaps in different and innovative ways. Two possible ways:

1. Initiate or facilitate a process, tailor-made to suit the particular situation and particular issue, that will uncover the important policy issues and give a sufficiently clear policy mandate from the relevant political authorities; or
2. Make it clear that a legal drafting process alone cannot resolve that issue and thus argue for a reduced scope of the legislation, effectively parking the difficult issue to be tackled once more policy clarity is possible.

The important point to understand here is that the law cannot on its own automatically resolve difficult policy questions.

2.2 How to draw on international experience

'borrowing' legal ideas and even the structure and content of laws from countries with broadly similar social, economic and/or legal systems to one's own is a perfectly respectable and even sensible way to approach law reform in one's own country.

What one must not do however, and this is worth emphasising very strongly indeed, is to, *adopt uncritically* as opposed to *adapt with caution* and this applies particularly to using legal models from developed countries or models from legal systems based on a different legal culture. A different legal culture does not just mean common law as opposed to civil law as opposed to Islamic law as opposed to customary law. It includes laws from the same legal family but developed in such a different socio-economic system that they are completely alien to those to whom they are offered as models.

2.3 How to develop legislative options and evaluate impacts

If nothing else is achieved in the process of developing a new approach to urban law-making it should be the idea that different options need to be considered before settling on a particular approach to regulating an issue. Too often a single-minded approach is adopted towards an urban legal reform rather than stepping back, considering the problem to be addressed and then ascertaining which of a number of possible interventions will be appropriate.

Identifying and evaluating legislative options is a centrally important area in which to develop and build capacity. Also, it is an important area in which to find good practice and to share it, so developing a growing community of impact practitioners.

2.4 How to draw on the support of stakeholders

An effective urban law is going to impact on the material interests of stakeholders. Some will benefit and others may not. Urban land markets are characterised by strong vested interests, particularly those of large landowners, traditional leaders and politicians. Among the politicians there are divisions between those in local government and those in higher levels of government, as the various levels strive to extract maximum benefits from

the urban development process. And all these divisions rest on a bed of citizens who are mostly excluded from formal participation in that process. An urban law is thus unlikely to be neutral in its impact.

In each case the legal drafting team has to assess the range of stakeholders likely to have an interest in the development of the new urban law. Then it is important to understand the possible alliances that might emerge and how these will affect the drafting process. While obviously answering directly to the ministry or department that is driving the legislative project the drafters cannot afford to yield to that authority's interests at every turn. This will result in a law that is unlikely to be effective in practice, because it lacks legitimacy and 'buy in' but also because it probably does not articulate with the actual needs and interests of the groupings directly affected by it.

The best advice to a drafting team is thus to maintain the highest levels of openness in the process, making it very clear to all stakeholders that their views will be heard and respected (even if not always slavishly implemented).

3 Driving an urban legal reform

3.1 How to sustain political interest in the initiative

One has to create pressures from below to push politicians to accept the case for change. A good example comes from Laos. Despite having a very rigid and authoritarian political structure, there is a hot-line to the National Assembly which the citizen can use to complain about issues. This hot-line was used to such good effect in late 2012 over a planned new National Land Policy which paid too little attention to the land rights of the peasant farmers that the National Assembly agreed to postpone the approval of the policy for six months so as to allow for a revision of the policy with more attention paid to the land rights of the peasants.

3.2 How to manage conflicting interests of different stakeholders

Wide participation inevitably tends to broaden the agenda of reform and introduce conflicting demands. It is therefore useful to have two devices to moderate the situation.

- The first device is to have a mechanism to analysis, co-ordinate and harmonise the recommendations submitted by individuals, groups and communities. This task can be easily biased in favour of particular

positions. Therefore it should be entrusted to a competent and impartial body – something like an independent commission.

- The second is to have a deadlock-breaking mechanism. This can take several forms, including a special committee of the decision making body, or a committee of eminent nationals who are and are seen as above the fray.
- In addition to the above two devices, we come back to the use of the Issues and Options Paper: differing points of view can be aired and discussed via such a paper which might produce an agreed outcome.

The question however does assume that it is necessary to manage conflicting interests of different stakeholders. Is it? Where different stakeholders are represented by different political parties in the legislature, the usual processes of parliamentary debate and voting will operate and the outcome might well be that one side or point of view will lose and one will win. There's little to object to in that.

Where there are deep divisions between e.g. the rich and the poor over the future of informal settlements, whatever the law might say, the positions of the two sides will remain irreconcilable; the former wanting to eliminate 'slums'; the latter wanting to continue living in their homes in areas they have occupied for more than a generation. Is it realistic to suppose that in practice it is possible to 'manage' the conflicting interests of blacks and whites in the governance and land rights of Cape Town or Christians and Muslims in the urban areas of Northern Nigeria? The best one can hope for is the keeping of an uneasy peace between opponents.

3.3 How to sustain a coalition of supportive stakeholders

It is useful to have firm but realistic time limits. There is considerable value in a strict deadline, for the critical issues are easily and quickly identified and once having been identified, should be dealt with speedily. There are likely to be political or pecuniary reasons why some delegates or interest groups may want to drag out the process. Extended processes are unlikely to hold public attention for too long.

3.4 How to manage unrealistic expectations of what a new urban law can do

A degree of scepticism is in order here. Governments will tend to advance the proposition that a new reforming law is the solution to the myriad of problems which they have inherited. In Tanzania, opposition to elements of the Land Act came both from a particular NGO and from the banks which managed to get the World Bank on their side. It was, not surprisingly, the World Bank that ensured that reforms which favoured the banks were introduced into the Act via conditions on a loan. The NGO huffed and puffed but got nowhere.

The problem then is that while supporting the enactment of a reforming law and the government that has been responsible for same, it may be necessary to draw attention to the challenges ahead and even the gaps in the law. Key issues here are that of finance and capacity: without adequate finance and officials trained and committed to implement the new law, enthusiasm for the reforms will quickly turn to disillusion. One way to meet this is to ensure that alongside the enactment of a reforming law there is a programme for its progressive and planned implementation: not everything can be done at once and it would be sensible to involve the protagonists for the new law in developing with government a programme of implementation.

4 Answering difficult questions?

4.1 What do you do with existing legislation: repeal, amend or ignore?

It depends on the scope of the reform. With land law reform in Mozambique, Tanzania, Rwanda, the old land laws covering the same subject as the new laws were repealed as the aim of the new laws was a fresh beginning.

Turning to amendment, it may often depend on the politics of reform. In Indonesia, for instance the Basic Agrarian Law is of fundamental importance in two ways: for what it is and for what it says. What is meant by the first point is that BAL has, in a sense, taken on a life of its own: it has risen above what it says – its content – and its formal legal status – a Law enacted by the national legislature – and has taken on an iconic status as a part of the fundamental basis of the nation – it helps define and cement the Unitary State of Indonesia as proclaimed in the Constitution of 1945. At best, it might be amended but is unlikely to be replaced.

Kenya's urban law reform is a bit of a mish-mash. The new Land Act includes a chapter on land acquisition which repeals the Land Acquisition Act. It includes new provisions on land transactions which run alongside the old Indian Transfer of Property Act 1882 which has applied in the country for over 100 years. New provisions on urban planning contained in the Urban Areas and Cities Act 2011 run alongside the Physical Planning Act of 1996 and the same is the case with new laws on urban governance.

Ignoring the existing law is not to be recommended. Where a new law and an existing law exist side by side, it leads inevitably to confusion and conflict. Even where an existing law and a new law cover different topics in the same subject area, there may be a case for reviewing the existing law to ensure it dovetails in with the new law.

4.2 How do you deal with other ministries where it's at odds with 'your' minister?

This is very much a political-cum-administrative issue to which there is no easy answer. Where a consultant is involved in advising on and drafting new urban laws, he or she would be well advised to steer very clear of inter-ministerial disputes. Where two ministries are at odds, in practice, it's likely to be the one that can get the ear of the President or the Prime Minister who will win, irrespective of the merits of the case.

At best, lower order civil servants or outside consultants can produce a memorandum setting out the arguments for and against a particular proposed law or parts of the content of a new law but should go no further. If a project to come forward with a new law stalls because a stand-off between two or more ministers takes place and the President or Prime Minister is disinclined to intervene, one should gracefully retire from the fray. Even if the side one is on wins, it is advisable to try and make one's peace with the loser. What comes around goes around.

4.3 What happens when a different party runs the main city to the national government and so the city government opposes the urban law or the national government restricts the city's inputs to the new law?

This is straight-forward politics and outside consultants are well advised to steer clear from becoming involved in such a situation. Ditto, middle ranking officials.

5.4 Should a new law it be comprehensive or strategic?

It is useful to articulate a general point about the drafting of a law. There are, very broadly, two styles of drafting, the detailed and specific and the broad and general. The latter concentrates on principles and consciously allows those implementing and interpreting the laws considerable latitude in developing the law. The former is concerned to set out the new law clearly and in some detail so that the citizen, officials and judges know what their rights, liabilities, powers and obligations are, what they have to do and how they have to do it to achieve certain specific ends.

In the case of a land law which is to confirm and protect private rights and interests in land; to facilitate the acquisition of certain sorts of private rights by administrative action; to regulate hitherto contentious relations between citizens in connection with land; and to establish and empower new administrative and quasi-judicial bodies to exercise powers and determine disputes in respect of privately owned and occupied land, our position is that it is absolutely essential that the new land law is clear, and in sufficient detail and precision so people know where they stand and relatively inexperienced officials have their discretions carefully structured and controlled. We would argue the same approach should be adopted to urban law generally.

6 Conclusion

What has been presented here is work in progress. We haven't yet finished and we haven't yet arrived at any firm conclusions. We would be grateful for your ideas, suggestions and criticisms.

Some issues for discussion:

- ❖ The draft ULG does not contain any draft 'arrangements of sections' – possible contents of laws – for specific laws: e.g. urban regeneration and transformation laws; land readjustment laws; participatory urban

planning and governance laws; urban taxation laws with special reference to participatory budgeting; dispute settlement. Should it? Should it contain discussions of specific examples of existing laws?

- ❖ We have not addressed land acquisition laws or public/private partnerships for land development or regulatory impact assessment. Should we?
- ❖ Consider the thesis of A.K. Onoma in his *The Politics of Property Rights Institutions in Africa* (2010) which is that the evidence is that some politicians don't want secure property rights and are uninterested in developing institutions which contribute to same. These are more than 'spoilers'; their policies are to ensure insecurity for political reasons. We have tended to assume that there is a commitment to better urban land management to be achieved via efficient, effective and equitable urban planning provided for by law. Do we need to address the out-and-out political opposition?

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