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5 – URBAN RULES AND LEGISLATION

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ISSUE PAPER ON URBAN RULES AND LEGISLATION

KEY WORDS

Urban Law, Legislation, Rules, Informality, Equity, Accountability, Quality, Effectiveness, Rights, Policy, Implementation.

MAIN CONCEPTS

1. Urban Law

Urban law is the collection of policies, laws, decisions and practices that govern the management and development of the urban environment. It is a broad and diverse field but one that justifies being considered collectively because of the interaction of its various elements within the single, inclusive but diverse, space that is the urban environment. Urban law has several important characteristics:

- It governs the key functions of towns and cities and reflects the rights and responsibilities of the residents and users of these urban areas. The functions are diverse, including urban planning, municipal finance, urban land administration and management, infrastructure provision, mobility and local economic development among others.
- It exists at various levels from internationally recognised rights, such as the right to housing, to national legislation and on to municipal rules or by-laws that often govern local issues such as the provision of services or the management of public space.
- Terminology may vary among countries, but law may be expressed through a variety of instruments that primarily fall within the three categories of: i) primary legislation; ii) subsidiary or delegated regulations (law made by powers conferred in primary legislation and usually including many forms of rules, codes, orders etc), and iii) also 'softer' instruments such as policies and administrative instructions of governments at all levels.
- It often has a dual character with an apparently neutral technical nature accompanied by a complex social aspect including the potential for differential impact on different groups within the urban environment. Impacts on vulnerable groups, such as the poor and the socially marginalised, being of particular concern.
- It must be considered in the context of the institutions and processes that are established by it or that are expected to implement it.

2. Informality

Informality is, by definition, a question of the relationship of individuals and communities with the law: informal being in some way not in compliance with recognised law. Informality is frequently the result of inadequate, inappropriate or ineffective policies or legal frameworks that regulate activities based on assumptions regarding the socio-economic environment that do not reflect realities on the ground. This results in a situation in many cities where the laws, institutions, and policies governing economic, social, and political affairs deny a large part of society the chance to participate on equal terms. It is important to note that informality does not mean that there is no system, merely that what does exist is not formally



recognised. Informal local norms and institutions, including those of a traditional or customary nature, govern lives and livelihoods.

3. Good quality law

The aim of all lawmakers, irrespective of their origin, is ultimately the production of legislation and rules that are capable of producing the desired regulatory results, as the policy makers of the government dictate these regulatory results. The universality of this approach can be applied to produce a practical definition of quality of legislation that cuts across legal traditions: quality of law signifies ability to produce the regulatory reforms required by policy makers. Effectiveness is the ultimate pursuit and the ultimate criterion of quality: quality is effectiveness.ⁱ

In summary, good quality law requires three foundational elements:

- i) Clear and locally relevant policy
- ii) Well constructed legal instruments that are effective in the function of translating policy into practice, that are integrated with national standards and reflect international commitments
- iii) Clear processes for the assessment and, as needed, review of rules and legislation, particularly to avoid disproportionate impact on vulnerable groups

4. Essential law

A major challenge in urban law frameworks is complexity, where both the volume of rules and their technical nature are not reflective of the capacity and resources that are locally available. In many cases, complex urban law frameworks are also not reflective of policy priorities. For all urban areas, but particularly those facing immediate growth and development challenges with only limited institutional capacity and financial resources, it is beneficial to focus on the minimum set of legal instruments and tools that are:

- i) necessary to deliver the most important elements of urban development policy; and,
- ii) adaptable to reasonable expectations of available resources and capacity for implementation.

Once an urban area has a functioning system based on a core set of tools, it can then consider the need for expansion into more detailed or demanding approaches.

5. Rule of law

The Universal Declaration of Human Rights, the historic international recognition that all human beings have fundamental rights and freedoms, recognizes that "... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...".ⁱⁱ

Interpretations of the 'rule of law' vary significantly in academic literature but the United Nations consistently applies a definition that includes the formal procedural elements of equal treatment and the recognition of human rights as a necessary outcome:

For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international



human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.ⁱⁱⁱ

FIGURES AND KEY FACTS

- The fastest-growing urban agglomerations are small and medium-sized cities (less than 1 million and 1 million to 5 million inhabitants respectively) located in Asia and Africa that are expected to grow by up to 40% by 2030. Some 80% of the world's urban dwellers currently reside in these settlements.^{iv}
- Urban development unfolds over decades and frequently outlives its architects, both literal and metaphorical. Good quality urban law provides predictability and order in urban development from a wide range of perspectives, including spatial, societal, economic and environmental, and, through this, contributes to investment, strong economic performance and wealth creation.
- Legal systems govern the relationships among, and describe the collective objectives of, people, making urban law particularly significant in a world where 60 per cent of the population is expected to be urban by 2030.
- Good quality law has the power to promote the inclusion of vulnerable groups in the benefits of urbanisation, thereby increasing the value of these benefits for all, contributing to poverty alleviation and promoting social cohesion.
- Most poor people do not live under the shelter of the law and the opportunities it affords. Because the poor lack recognised rights, they are vulnerable to abuse. More than 4bn people around the world are estimated to be excluded from the rule of law,^v many because their homes and livelihoods are informal.
- Law, understood as including the institutional and financial structures it creates, is the principal means for policy implementation.
- Law, and in particular in the context of the rule of law, is the means by which rights are entrenched. It is also the framework by which institutions adopt the standards they will be governed by and, therefore, be held accountable to.

ISSUE SUMMARY

The 'Strategies for Implementation' of the Habitat Agenda included commitments to:

1. Review restrictive, exclusionary and costly legal and regulatory processes, planning systems, standards and development regulations;
2. Adopt an enabling legal and regulatory framework based on enhanced knowledge, understanding and acceptance of existing practices and land delivery mechanisms so as to stimulate partnerships with the private business and community sectors;
3. Put into effect institutional and legal frameworks that facilitate and enable the broad based participation of all people and their community organizations in decision-making of human settlement strategies, policies and programmes.



Policy

The review of laws and rules has had mixed success, with the dominant models for the principal elements of urban law substantially the same as they were twenty, and even forty, years ago.

1. The number of innovative, locally relevant urban law frameworks in fields such as physical planning and development control remains remarkably low, particularly in the context of the needs of human settlements with limited institutional structures and financial resources.
2. Urban law remains a highly segmented and complex field driven by a dynamic where technical objectives in given fields are considered in isolation from each other as well as from the institutional, financial and social factors that will determine effectiveness.
3. In part because of the dominance of 'universal' technical considerations, the international transfer of 'best practice', including the direct copying of legal instruments, remains the prevalent approach in developing urban law, often failing to reflect local practice and culture and providing limited or no opportunities for effective review and adjustment.
4. Successful interventions in urban law are more often built from incremental adjustments to, or redirections of, existing practice on the ground than from complete transformational change.
5. The development of urban law continues to be under-resourced, particularly in terms of time. Laws with significant impact on people's lives and on the long-term fabric of urban areas should not be written and approved in days.
6. When the Habitat Agenda was adopted in 1996, the role of law in development was seen as a formalistic tool to bring about development and development meant economic growth as the principal tool to fight poverty. There was a strong emphasis on deregulation and subordination of issues of equity and social development to the overarching goal of rapid economic growth. Opinions on law and development have evolved but this is not generally reflected in the law.
7. Physical planning, development control and infrastructure investment are all closely linked to law and policy on property rights and the extent to which rights may be exercised independently and regulated in the public interest.

Knowledge and Operations

1. Law that is locally relevant and enforceable in its context has the potential to harness the transformative potential of urbanisation. Urban legal frameworks are dominated by aspirational technical considerations and must be more informed by local needs and capacity.
2. Physical planning can deliver a long-term framework for development by focusing on a limited number of binding elements, including: locally appropriate systems for land management; the regulation of public space; a clear system for the identification of blocks and plots; a simple building code; and, ideally, some means for public sharing in the profits of physical development to offset infrastructure costs. Other mechanisms, such as zoning rules, can be introduced at a later stage as the necessary capacity and resources become available.
3. Urban law should place more emphasis on institutional processes and be more reflective of the fact that public administration is the channel through which municipal and local governments interpret and pursue the objectives of sustainable development.
4. The legal relations in the civil service should be appropriately regulated for effective execution of official duties in connection with the provision of public services, including:
 - with external parties (citizens, public authorities, institutions and organizations); and,



- the internal employment relations of civil servants, defining their legal status (official rights and duties, service conditions, contractual arrangements, etc).
- In this connection, Codes of Ethics/Codes of Conducts may play important role in promoting professionalism and ethical behaviour in municipal governments.
5. In many urban areas, significant proportions (often a majority) of the population are affected by informality in their employment, housing or tenure status. These informal sectors are characterized by an absence of legal licenses, titles, and regulatory supervision. Residents in informal housing may have no recognised rights, making eviction an ever-present threat. Informal businesses operate without licenses and do not pay taxes.
 6. There is increasing recognition of the plural nature of urban legal frameworks and of the role of these pluralistic systems in promoting inclusion and opportunity for the most vulnerable. Legal and regulatory frameworks are designed for the formal economy and, too often, they fail to protect, support and recognise the contributions of informal workers, excluding them instead of including them within frameworks of rights and responsibilities.
 7. Legal instruments have largely failed to maintain and ensure access to adequate public space, leading to its proportional reduction and to increasing limits on access through privatisation.
 8. The supply mechanisms for urbanised land have not been able to keep pace with the urban growth. Regulatory constraints on land supply, such as poor land allocation practices and arbitrary or discretionary normative regulations (densities, floor-area ratios, plots sizes), have limited urban productivity and the supply of affordable housing.
 9. Urban law often focuses on property rights and owners, leaving tenants and informal occupants invisible to many areas of policy and service provision and creating structures that are not reflective of the actual social balance on the ground.
 10. Mechanisms to encourage private development and investment and lower direct dependence on public financing are vital to accelerate sustainable urban development but must be designed to ensure that the urban poor share in the benefits of development and are not excluded by it.
 11. Fairness, equity and inclusion can also be promoted by effective financial tools, which capture some of the value increase potentiated by land use decisions for the benefit of the poor, and for society in general.

Engagement

The broad based participation of all people and their community organizations in decision-making of human settlement strategies, policies and programmes remains a challenge.

1. Participation is increasingly recognised as an important element in the formulation, reform and review of law; both as a right and as something that may enhance the effectiveness of the result.
2. Accountability, and the rule of law more generally, is fundamental to meaningful participation in decision-making.
3. Locally relevant mechanisms for alternative dispute resolution, such as an ombudsman, should be introduced to improve access to justice and enhance accountability in the most efficient and just manner possible.
4. There is a continuing need for legal frameworks to recognise the need for access by different audiences; at least including the judiciary, legislature and the public (with the public being those who might reasonably be affected including specialists and non-specialists).



KEY DRIVERS FOR ACTION

1. The recognition that good quality law makes efficiency for both governments at all levels and citizens and realistic implementation pathways inherent in the instrument itself has the potential to significantly enhance the effectiveness of urban law.
2. The effectiveness of urban law depends upon a series of elements, chief among which are clear and coherent policy and legislative instructions, the appropriateness of the legal instrument selected with primary legislation being a last resort, the efficiency of the mechanisms proposed and the quality of the text of the instrument, but, above all local relevance and practicality.
3. Institutional and procedural structures are central to the delivery of technical standards and are mostly determined by law. When adequately considered and tested at the design stage, the effectiveness of institutional and procedural structures can be significantly enhanced.
4. Recognition that a focus on essential law will provide the most effective support to sustainable urban development. Governments should identify the minimum set of instruments and tools to deliver the most important elements of a legal framework with an emphasis on the needs of small to medium settlements with limited institutional structures and financial resources. For these resource poor small to medium settlements, priority must be placed on the principal urban design elements that can reasonably be achieved and that will have the maximum impact on social outcomes and livelihoods. Rights and the protection of vulnerable groups must be central to assessments of impact.
5. Local and regional law making and legislative interpretation powers significantly influence the implementation of policy on the ground. These are often highly discretionary and exist within relatively weak governance frameworks, so appropriate balances between accountability and discretion must be achieved.
6. National and international standards, particularly for the rule of law and human rights, should be integrated into instruments and administrative practice and this integration should be regularly reviewed for effectiveness.
7. Municipal finance is considered in a separate issue paper, but the need to explicitly recognise a range of locally empowering municipal finance tools in law and to link these with institutional structures and policy objectives is of fundamental importance.

PLATFORMS AND PROJECTS

1. UN-Habitat Urban Legislation theme. Urban Legislation is one of the priority areas in UN-Habitat's strategic plan. See: <http://unhabitat.org/urban-themes/urban-legislation/>.
2. Urban Legal Network. A UN-Habitat led initiative in partnership with the Global Land Tool Network to provide secondary information on urban law and connect those working in the field. See: <http://www.uln.gltn.net/>.
3. The United Nations Public Administration Network. The Division for Public Administration and Development Management of the Department of Economic and Social Affairs of the United Nations was mandated by the General Assembly to establish UNPAN in 1999. UNPAN is an internet-based network that links regional and national institutions devoted to public administration, thereby facilitating information exchange, experience sharing, and training in the area of public sector policy and management. See: <http://www.unpan.org/>.
4. The United Nations Rule of Law Coordination and Resource Group. RoLCRG is facilitated by the Rule of Law Unit in the Office of the Secretary General and is responsible for the overall coordination and



coherence of rule of law within the United Nations system. See:
http://www.unrol.org/article.aspx?article_id=6.

5. The Global Forum on Law, Justice and Development. Facilitated by the World Bank, the Forum seeks to provide an innovative and dynamic permanent forum of knowledge exchange. See:
<http://www.globalforumljd.org/>.
6. The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights. See:
<http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.
7. The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. See:
<http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.

ⁱ Xanthaki, H., *Quality of Legislation: an achievable universal concept or an utopian pursuit?* in Mader and Tavares de Almeida (eds), 'Quality of Legislation: Principles and Instruments. Proceedings of the Ninth Congress of the International Association of Legislation (IAL) in Lisbon, June 24th – 25th, 2010' (Nomos, 2011).

ⁱⁱ Universal Declaration of Human Rights (1948), preambular paragraph 3. See, <http://www.un.org/en/documents/udhr/>. Website last checked May 2015.

ⁱⁱⁱ UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, U.N.Doc. S/2004/616 (Aug. 23, 2004), para. 6.

^{iv} United Nations (2014), *World Urbanization Prospects: The 2014 Revision* (New York: The UN Department of Economic and Social Affairs).

^v CLEP and UNDP (2008), *Making the Law Work for Everyone: Volume 1: Report of the Commission on Legal Empowerment of the Poor (CLEP)*, http://www.unrol.org/files/Making_the_Law_Work_for_Everyone.pdf