REFORMING URBAN LAWS IN AFRICA

A PRACTICAL GUIDE

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Foreword and acknowledgements

The idea for this guide emerged at a workshop held at The Rockefeller Foundation's Bellagio Center, in Italy, in July 2012. The workshop was convened by the African Centre for Cities with the goal of establishing a platform for urban legal reform in Sub-Saharan countries.

Discussions at the workshop ranged widely. A fundamental concern emerged: even though there is widespread acknowledgement that the urban laws used for governing, planning, managing and financing African cities are deeply flawed, this realisation alone is not enough to help improve the situation. We also need to improve the processes of conceiving, drafting and implementing new legislation.

With more than 40 years of experience in conceiving, drafting and implementing urban legislation in Africa and elsewhere, the late Professor Patrick McAuslan argued in Bellagio that there is no benefit to developing laws that introduce new legal tools and instruments to address urban challenges if the processes of law-making are so weak that the new laws stand little, if any, chance of being implemented. And so the decision was made to produce a guide focusing on the processes by which laws are developed, drafted and processed. The problems facing African cities are enormous, and the need to urgently address them is extreme. But without a solid, workable legal framework that is capable of introducing fundamental change to current patterns of governance, management and planning, these problems cannot be addressed. Better urban law is a necessary (but not the only) requirement if African cities are to successfully pursue sustainable, inclusive and fair economic growth.

Developing this guide has been a challenge, primarily because of the death, in January 2014, of Patrick McAuslan, an irreplaceable source of insight into African urban legal reform. Fortunately, Patrick was a prolific writer, publishing his views widely in a range of books and articles. Indeed, he saw his contribution to this guide as an expression of his belief that those of us working at the coalface of urban legal change have a moral obligation to record and share our experiences and views. The aim of this guide is to allow a wider pool of people to draw on the ideas of Patrick and myself – and to adapt and challenge them as needed – rather than feel that they need to start from scratch. Nevertheless, it has been hard to co-write without a co-writer, and I have missed his wisdom, his

Patrick McAuslan and Stephen Berrisford at
The Rockefeller Foundation's Bellagio Center in July 2012.

humour and, of course, his vast experience over the last two years of drafting this guide.

The Urban Legal Guide for Sub-Saharan Africa owes its existence to the support of many institutions and people. Dr Mark Napier of Urban LandMark provided the seed funding to kick off the project, thanks to that organisation's funding from UKaid. This was more than matched by Cities Alliance and UN-Habitat. Of course, The Rockefeller Foundation's support for the inception workshop in Bellagio was also invaluable.

The guide has benefited from the wise counsel of a reference group consisting of Julian Baskin (Cities Alliance), Matt Glasser (formerly with the World Bank, now with the Centre for Urban Law and Finance in Africa), Robert Lewis-Lettington (UN-Habitat), Professor Ambreena Manji (Cardiff University), Dr Mark Napier (formerly with Urban LandMark, now with the Council for Scientific and Industrial Research in Pretoria), Professor Peter Ngau (University of Nairobi) and Professor Vanessa Watson (University of Cape Town). Thank you for your time and ideas.

As you read this guide, please remember that there is no instant cure for urban legal problems. Cities and legal systems are too complex for that to be possible. However, this guide can help practitioners both within and outside governments to design and lead urban law-making processes that, at the very least, avoid the mistakes of the past, and that, in an ideal situation, set new benchmarks for effective and responsive urban laws.

**Stephen Berrisford,
Cape Town**
April 2017

Introduction

The extraordinary projected rate and scale of urban growth in Africa between now and 2030 underscores the need to urgently develop urban laws and regulations that will create and shape cities that work more efficiently and treat people more fairly. New urban infrastructure has to be provided, new areas for urban growth developed, and new systems of governing and managing cities put in place. All this has to be done in accordance with laws that provide clarity, give everyone a fair hearing, prepare cities for a climate-change-resilient future and create efficient systems of decision-making and administration. And it has to be done quickly.

The rate at which African cities are growing and the scale of problems in urban governance and management demand immediate action to reverse entrenched, ineffective governance practices. To be effective, urban laws need to:

◼ **Be pragmatic.** Urban laws need to set standards of behaviour that people, organisations and governments are realistically able to meet. They also need to be cognisant of the resources available to enforce these laws. This does not mean that new laws should not set standards for human behaviour that are higher than

current practices, just that they cannot be too high. If standards are set so high that no one can attain them, then they serve no useful purpose and may even make a situation worse by making criminals out of otherwise law-abiding citizens and companies.

◼ **Give effect and strength to the right of all citizens to live and work in a city.** Many colonial and post-colonial governments have tried to limit the number of people living in cities and the working opportunities available to urban residents. Where these laws are still in place, they effectively exclude certain groups of people – especially the poor – from the benefits of living in a city.

◼ **Be responsive and scalable.** It is important to provide an implementable legal framework to manage both the growth of cities and the ongoing planning and management of cities. Urban laws must thus both respond to actual needs of each city in a country while also being easily implemented across the range of different types of city.

The term "African city" is limited in its usefulness, as is the term "African country". Each term describes where a city or country may be found – in Africa – but neither does justice to the economic, political, cultural and physical diversity of the continent's cities and countries. Nevertheless, there are common challenges and conditions that pertain to most cities in the region. Most African countries are dominated by one major city, normally the capital. Getting these cities to work better, include people better and generate jobs more efficiently is crucial for national economies and the growing urban population. This is also true of secondary cities and towns, which are also growing quickly.

URBAN LAWS NEED TO BE PRACTICAL, RESPONSIVE AND SCALABLE WHILE PROTECTING THE RIGHT OF ALL CITIZENS TO LIVE AND WORK IN A CITY

PURPOSE OF THIS GUIDE

THIS GUIDE FOCUSES ON STRENGTHENING EFFORTS TO IMPROVE THE LEGAL FRAMEWORK WITHIN WHICH URBAN AREAS ARE MANAGED, PLANNED, GOVERNED AND FINANCED TO CREATE CITIES THAT ARE MORE SUSTAINABLE, INCLUSIVE AND EFFICIENT

The most effective urban laws are those that are developed where they are to be applied, by the people that will abide by and enforce them. They need to be shaped by what is needed and possible there. Difficulties arise when laws are developed – often by outside advisers – without properly considering the relevant context. This guide helps urban legal reform initiatives within African countries and enables government officials, local experts and members of civil society and the private sector take part in developing effective urban laws. It is also a resource to help international advisers think about different ways of supporting urban legal reform to create cities that include all citizens – established and new – in a more just and more sustainable urban future.

This guide aims to create and strengthen law-making processes that build and secure the legal rights of all people living in all urban areas to be governed fairly, live safely, earn a living and participate fully in the economic and cultural offerings of cities. It does not aim to address all the problems of African cities. Rather, it focuses on strengthening efforts to improve the legal framework within which urban areas are managed, planned, governed and financed to create cities that are more sustainable, inclusive and efficient.

Legal systems differ across the region, with a particular divide between the Anglophone countries' legal traditions and those of the Lusophone and Francophone countries. This guide is written to support urban legal reform in both contexts, while acknowledging that distinct legal issues will inevitably arise in different places.

INTERNATIONAL AGREEMENTS SUPPORTING URBAN REFORM

2030 Agenda for Sustainable Development

In 2015, the United Nations General Assembly adopted the 2030 Agenda for Sustainable Development, which committed all member states to achieving 17 Sustainable Development Goals by 2030. Of these goals, three underpin the need for urban legal reform:

- **Goal 10** commits the world's governments to "reduce inequality within and among countries".

- **Goal 11** aims to "make cities and human settlements inclusive, safe, resilient and sustainable". It is reinforced by 10 targets, of which the following two need urban legal reforms of the type considered in this guide:

  - Ensure access for all to adequate, safe and affordable housing and basic services, and upgrade slums.

  - Enhance inclusive, sustainable urbanisation and the capacity for participatory, integrated and sustainable human-settlement planning and management in all countries.

- **Goal 16** commits countries to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". Among other things, Goal 16's targets address participation in decision-making, access to information and promotion of the rule of law.

The New Urban Agenda

The New Urban Agenda, unanimously agreed to at the Habitat III Conference in Quito in 2016, is unequivocal in its call for urban legal change. In terms of the New Urban Agenda, all African countries have committed to "promote institutional, legal and financial mechanisms in cities and human settlements to broaden inclusive platforms, in line with national policies that allow meaningful participation in decision-making, planning and follow-up processes for all" (paragraph 41). The countries have also committed to taking measures to "establish legal and policy frameworks, based on principles of equality and non-discrimination, to better enable prevailing governments to effectively implement national urban policies as appropriate, and to empower them as policy and decision-makers, ensuring appropriate fiscal, political and administrative decentralisation based on the principle of subsidiarity" (paragraph 89).

CHARACTERISTICS OF URBAN SUB-SAHARAN AFRICA

Despite urbanising later than most other continents, more people live in African cities than in the cities of Europe, Australasia, North America or South America. Only Asia has more urban-based people than Africa.

> **FORTY PERCENT OF AFRICANS ALREADY LIVE IN URBAN CENTRES, A FIGURE THAT WILL GROW TO 50 PERCENT BY 2030**

Forty percent of Africans already live in urban centres, a figure that will grow to 50 percent by 2030. Unfortunately, the rapid pace of urban expansion is not being matched by economic growth. In most countries, there is one key city that is up to four times larger than the second-largest city. This city is politically prominent and often regarded as a political threat to national interests.

Although cities are highly diverse, they tend to share the following characteristics:

- They are **home to migrant workers** who regularly move between urban and rural areas to seek economic opportunities in both places.

- They are **surrounded by an area that is neither urban nor rural** where new populations tend to settle.

- Large areas of the cities are "illegally" **occupied by the urban poor,** who are under constant threat of being evicted and having their homes demolished.

- **Informal systems of economic production and social organisation prevail,** resulting in competing systems of power.

- **Urban areas tend to be segregated** along income, and sometimes ethnic, lines.

- **Extractive economic and political institutions are maintained and strengthened** by local political elites to bolster their economic and political power.

- **The formal land market and land use rights are tightly constrained,** resulting in high land prices in well-located enclaves.

- **They are growing** in ways that ignore the objectives set out in official plans and policies.

Case study — The colonial influence on building regulations

BUILDING LAWS IN SOME former Portuguese colonies used to contain stringent measures to minimise earthquake damage, even though the earthquake risk in those countries was – and is – minimal.

In a similar vein, a colonial administrator in the Kenyan capital, Nairobi, once decided the city needed a set of bylaws for building regulations.

However, instead of drafting new bylaws, he merely copied the bylaws from his hometown in England, Blackburn, swopping any mention of "Blackburn" with "Nairobi". As a result, Nairobi's building regulations required roofs that are able to withstand six inches of snow.

Although the snow-load requirements were scrapped in the 1970s, building regulations in Nairobi continue to ignore the construction requirements of the urban poor. This is because standards in developing countries tend to "serve more as a means of social satisfaction than as a means of reconciling the shelter needs of the population with the maintenance of a reasonable level of environmental quality. They are so unrealistic that they are deservedly ignored by the majority of people".

- **Local governance is weak.** The state is unable to deliver basic services or provide security for citizens. This, combined with the prevalence of poverty and inequality, leads to "slum" conditions for most citizens, who voice their grievances through increased urban violence, placing a further burden on the city and country.

Many of these characteristics have their roots in the laws of the continent's colonial past. In the decades since independence, few African states have been able to develop and implement laws governing urban development to effectively improve these characteristics of their cities.

> ## AFRICA'S CITIES TEND TO BE SHACKLED TO INAPPROPRIATE, INEFFECTIVE AND REDUNDANT LAWS AND POLICIES FOR MANAGING THEM

## URBAN LAW IN SUB-SAHARAN AFRICA

Africa's cities tend to be shackled to inappropriate, ineffective and redundant laws and policies for managing them. These laws run deeply through each country's social, economic and political systems, and are often based on the assumption that there is a strong national government that is able to implement them. For example, many urban land laws assume that the state has the capacity to manage long-term land leases or land transfers through land registration systems. This is often not the case, resulting in legal uncertainty and vulnerability.

Over the past two decades especially, African countries have been urged to reform their urban policies, practices and laws in order to turn cities into more effective engines of economic growth and shift from an extractive to a more developmental and inclusive system of urban governance. Despite making global commitments to better urban management, few countries have made significant changes to their urban governance and land-management legislation.[1] In some cases, new laws have been written and finalised but not actually approved by relevant law-making bodies. Where new laws have been enacted, only a few have been fully implemented. This lack of productive change is partly due to the "export of regulatory rules and practices from major powers to weaker states"[2] – a practice that is common in international economic law but has spilled over into urban law because of urban law's importance in shaping property law. The view is often that if a country is to have an urban development and real-estate sector that mirrors that of more developed countries, it needs to have those countries' laws, too.

New urban laws may draw on international experience but should not be dominated by it. African lawmakers should rather focus on the context within which other countries' laws have worked: what were the political, administrative and legal factors in those countries that led to a particular type of law's success (or failure)? The answer to this question could reveal what might work in their own context. Lawmakers should also consider the substance and principles of global commitments, and turn them into practical steps for improving urban law. These commitments – evident in Agenda 2030, the New Urban Agenda and the Paris Agreement – are important, but can only be effective when translated into legal provisions that work within a country's own environment.

A new approach to
urban legal reform
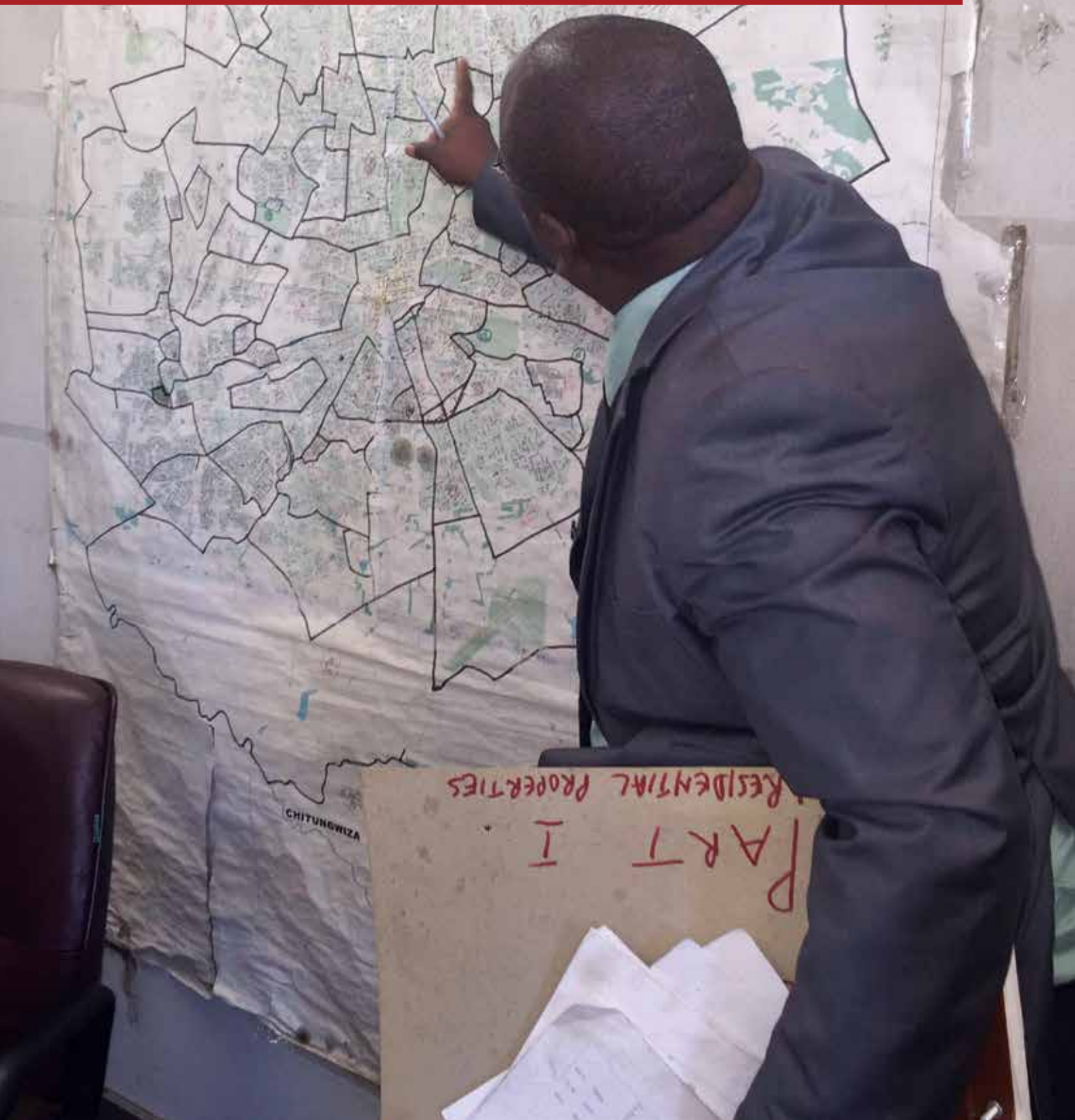
The future of African cities must be one shaped by laws that address the lived experience of households and firms. These laws must:

- Offer a reasonable trade-off between the costs and benefits of compliance.

- Reflect the current context.

- Be the product of consultative, inclusive processes.

- Be economically and politically inclusive while creating the basic preconditions for economic growth.

- Protect the interests of the public (with a focus on the poor) when confronted by stronger commercial and political interests.

- Promote stable and sustainable urban governance.

- Build strong social contracts between state and non-state actors.

- Be designed in such a way that even a relatively fragile state or city body can effectively implement them.

Restructuring urban legislation without an overarching set of principles as described in this guide will perpetuate the problems of ineffective laws or laws that have perverse and unintended consequences.

Opinions about how best to develop new urban laws often polarise into two camps. The one camp argues that African cities need comprehensive, Western-type laws such as those commonly found in developed countries, while the other maintains that cities should follow the local, city-block-level, community-driven, informal regulations that have evolved outside the formal legal system. The first camp's view is based on the premise that sophisticated cities need sophisticated laws; the second believes the starting point should be what has emerged in practice.

Neither one of these approaches addresses the problem satisfactorily on its own, although each has its own strengths. Western-style laws are often useful for managing the interface between urban development, governance and finance, while locally emerging models tend to ensure that community-based and household issues are addressed. Cities need to find legal solutions to their urban problems that are designed to meet the complexities of these problems. This requires taking some Western-style laws and some locally emerging ones, identifying the aspects of each that are effective, and knitting these together into a model that works.

The scale of urban problems is so immense that it is tempting to design ambitious regulatory frameworks that pack every conceivable legal instrument into every urban law. This temptation poses the risk of paralysing the administration and must be resisted. When unachievable laws are put in place, private-sector investors lose confidence, poor households lose various protections (assuming the law includes pro-poor elements), and people and businesses choose to operate outside the formal system. In the end, the entire system loses legitimacy and grows weak, with devastating effects for economic growth, social inclusion and environmental protection.

TRIGGERS FOR URBAN LEGAL REFORM

Law reform is a difficult, costly process that governments only initiate when there is a compelling reason to do so. Triggering events may come from within or beyond a country's borders. Sometimes both internal and external forces combine to drive the call for urban legal reform.

The type and nature of urban-reform triggers present play a part in determining what resources will be available to support the process. A government that determines for itself that urban legal reform is needed will be more committed to concluding the process. However, a government that agrees to change urban law at the suggestion of an international development partner (or some other external pressure) will often exhibit resistance to seeing the process through, resulting in half-hearted efforts and failed outcomes.

Internal triggers
Public outcry
Authorities often claim that they are bound by inappropriate, ineffective legislation in response to public complaints about an aspect of urban management, for example, a building that collapses or a health crisis caused by poor sanitation and drainage. Scrapping and rewriting the law is then proposed as the solution.

Public pressure alone is seldom a trigger for initiating change. At best, it may result in the formal initiation of a process. But there is often then very weak follow-up. That said, no legal reform will succeed without the public's support. Public outcry around an issue is often a useful starting point for urban legal reform. Bodies that represent the public interest, such as residents or business

organisations, then need to be vigilant to ensure sustained pressure until the new law is implemented.

Pressure from civil society and other organised groups
Civil-society organisations, especially those with a wide base of supporters, can productively lobby for urban law reform. For example, the Uganda Land Alliance – an alliance of 68 non-governmental organisations and individuals formed in 1995 – successfully lobbied for new urban legislation that recognises customary land tenure, the registration of women's interests on customary land, and the legal recognition of tenants on *mailo* (communal) land. At the peak of the campaign, alliance members attended parliament each day and regularly met with members of parliament and officials. When it saw the need to do so, it drafted clauses for contentious issues and sought out sympathetic members of parliament to convince them to champion the clause in parliament. It is easier to get legislators to agree to a Bill that comes from fellow parliamentarians than from civil society only.[3] Despite these victories, Ugandan authorities resisted change, which dampened the success of the reform.

Caution is needed when a single interest group champions an urban legal change. The law-making process needs to be protected from abuse or exploitation by any single group, which might lead to the interests of other groups being sidelined.

Political motivations
The advantage of politically driven urban legal reform is that it is more likely that the process will be completed. The disadvantages of politically driven urban legal reform are that:

- **The reforms could be supported for purely political purposes.** Promoting decentralisation of power to local governments, for example, could benefit politicians from certain regions while disadvantaging those from others. As countries urbanise, the political party make-up changes. This, too, can influence the reasons behind urban legal reform.

- **Political commitment might be vested in a single minister, political party, or faction within a party.** Then, as the country's political alignments shift, the political commitment to reform gets lost. This vulnerability underlines the need to ensure a wide pool of stakeholders to support any new law. A wider pool will also reduce the likelihood that a single interest group captures the reform and prioritises that group's interest over those of the public in the final law.

Constitutional change

Sometimes a constitutional change brings about widespread shifts in urban law. This is especially true when the powers of local government change, as in South Africa, where it took the Constitutional Court resolving a persistent constitutional problem – the determination of what constitutes "municipal planning" – in 2010[4] to initiate the drafting and enactment of the Spatial Planning and Land Use Management Act (2013), which led to far-reaching changes to the country's urban and regional planning system. Before this decision, national, provincial and local governments were effectively paralysed when it came to initiating urban law reforms. Once there was clarity on the roles of each level of government, reform could be tackled in earnest.[5]

External triggers

Donors and international finance organisations often require or encourage legislative reform as a precondition for financial or programmatic support. Generally speaking, this means funding is also available to support the law-reform process, which frequently leads to the project being dominated by external advisers and consultants.

For such an initiative to succeed, external advisers and consultants need to work closely with their local counterparts, paying special attention to local practices and the country's legal and urban context. Tensions between local and foreign participants can slow the urban legal reform process, resulting in external advisers, frustrated by what they regard as uncooperative behaviour from their counterparts, sidestepping the project processes and appealing to higher authorities within the country's government or the funding agency. This results in an irrevocable breakdown in trust that derails the reform process completely. On the other hand, local experts can become exasperated with foreign advisers' reluctance to engage with local complexities. They, too, sometimes resort to appealing to higher authorities to protect against what they see as insensitive and thoughtless interference.

> **EXTERNAL TRIGGERS FOR URBAN REFORM THAT IGNORE PEOPLE'S NEEDS AND INTERESTS CAN LEAD TO UNFAIR LEGAL OUTCOMES**

External triggers that fail to consider the needs of all stakeholders can result in skewed legislation that is unfairly stacked against one party or the other, as the case study "The effect of outside influence on mortgages in Tanzania" shows.

WHEN TANZANIA'S LAND Act (1999) came into force in 2001, the country's banks took exception to the section dealing with mortgage law, claiming that the law prevented them from repossessing the land of a defaulting debtor, although this was often not the case. A critical assessment of the situation indicated that their complaint was probably more realistically that few borrowers knew their rights under the old law, whereas the new law set them out more clearly.

The banks made representations to the World Bank. In 2002, the president of the World Bank strongly urged Tanzania to reform the law of mortgages. The Tanzanian government agreed. The attorney-general took the lead (without much consultation with the ministry responsible for land, which fully understood the scope of the law on mortgages) and, in collaboration with London-based lawyers, produced what eventually became the Land Amendment Act (2004). The London firm claimed that their draft modernised the law of mortgages in Tanzania, when in fact it was grounded in the English Law of Property Act of 1925 with additions introduced in 1970 and 1973. By contrast, the 1999 Act was based on a 1991 English Law Commission Report and a 1994 New Zealand Law Commission Report.

The Mortgage Finance (Special Provisions) Act (2008), which came four years later, shifted the balance between mortgagee (the banks) and mortgagor (the borrowers) in relation to default heavily in favour of the banks.

A lot of international effort went into creating uneven playing fields between mortgagees and mortgagors in Tanzania, and there appears to have been little effort to protect these gains in the face of powerful outside influence.

CONSIDERATIONS WHEN INITIATING REFORMS

The following legal considerations set the parameters of what can be achieved by a new law:

◘ The country's constitution

◘ The country's judicial capacity

◘ The country's legal traditions (common law, civil law, customary law and hybrids)

◘ Existing legislation and decisions.

The constitution

A country's constitution is the starting point for drafting any new urban law. Often, the battle lies in translating broad constitutional provisions into detailed common-law legislation. A country's constitutional framework affects its urban laws by determining:

◘ The powers and functions of different levels of government

THE WAYS IN WHICH A COUNTRY'S CONSTITUTION ALLOCATES URBAN GOVERNANCE AND MANAGEMENT POWERS BETWEEN VARIOUS LEVELS OF GOVERNMENT DOES AFFECT THE COUNTRY'S URBAN LEGAL FRAMEWORKS

◘ The degree of protection afforded to private property

◘ The degree to which socioeconomic rights are acknowledged.

Powers and functions of different levels of government
The ways in which a country's constitution

allocates urban governance and management powers between various levels of government can affect the country's urban legal frameworks. Some countries have two levels of government (national and local) while others have three (national, provincial/regional and local). In all countries, each level has its own powers and functions.

Centralised power is an enduring legacy of colonial administration, although it is certainly not unique to formerly colonised countries. Efforts to promote decentralisation, often as part of externally driven structural adjustment programmes, have had limited impact. The 1996 Habitat Agenda, for example, promoted decentralisation as a requirement for more effective urban management (a call that the New Urban Agenda repeats in 2016). However, many African countries retain power at the centre. Where powers are decentralised, they tend to be subject to such tight restrictions that they are effectively meaningless.

Drafters of new urban laws need to proceed with caution when caught between a national government that wants centralised powers and local authorities, businesses and citizen groups that want stronger local decision-making powers. The tension between these groups invariably mirrors broader political, economic and sometimes even cultural tensions that run through the country.

As countries urbanise and populations shift from rural to urban areas, political shifts emerge. These shifts result in political decisions to either promote urbanisation (through legislation that facilitates urban development, decentralises decision-making to cities and channels public money into urban infrastructure) or invest in rural areas (where political support is seen as more dependable). For example, when Ethiopia's political opposition won control of Addis Ababa's city administration in the 2005 election, the central government of the day effectively dissolved the city government and put in place a "caretaker" administration instead. Similarly, in 1983 Kenya's president, Daniel arap Moi, dissolved the Nairobi city council because of the political direction chosen by the city's voters. Each country's

political dynamics have to be detected and understood so that new urban laws can address these trends.

While national governments sometimes go to great lengths to subvert the decentralisation of power, in other instances it is the difficulty of implementing administrative reforms or changing entrenched practices that stalls the process. In Nigeria, for instance, the federal Urban and Regional Planning Decree (1992, updated in 1999) introduced a three-tier system of urban planning, setting out the respective powers and institutional arrangements for federal, state and local government. By 2015, however, only Lagos State had managed to put in place the required institutions to give effect to the provisions of the law.[6] In 16 years, only one out of 36 states was able to implement the new system.

In South Africa, the understanding of the constitutional distribution of planning powers between national, provincial and local government has evolved. Initially, provincial governments drafted urban and regional planning laws to regulate municipal land-development decisions. As the courts increasingly pointed out that decision-making powers lay with local government, draft provincial laws became thinner and cities' bylaws became much thicker. The way the constitution has been interpreted determines the degree of uniformity in urban legal procedures across the country. Instead of one set of procedures for each province, there is now – at least in theory – a set of unique procedures for each municipality.[7]

> ## A COMPLETELY CENTRALISED OR COMPLETELY DECENTRALISED SYSTEM IS NEVER GOING TO BE OPTIMAL. POWERS NEED TO BE DIVIDED, WITH DIFFERENT LEVELS OF GOVERNMENT CHECKING EACH OTHER

A completely centralised or completely decentralised system is never going to be optimal. Each country needs to divide powers between different levels of government, as determined by a range of political, geographical and economic forces. It is rarely helpful to allocate an individual power or function entirely to one level of government. Ideally, the different levels should check each other, ensuring accountability in decision-making.

Property rights

At the heart of most areas of urban law is the question of property rights. To what extent does the law acknowledge and protect private property rights to urban land? To what extent does it enable people or households to acquire the land they are currently using or living on? What scope does a government authority have to restrict the way in which people who hold land rights use and develop that land? Are urban

THERE IS INCREASING RECOGNITION OF A "CONTINUUM" OF LAND RIGHTS FOR DIFFERENT TYPES OF TENURE RANGING FROM FORMAL, WELL-DOCUMENTED TENURE TO THAT OF INFORMAL GROUPS OR INDIVIDUALS

landholders able to realise a market-related price if they transfer their land or buildings? Is the government allowed to establish a financial value for land and buildings to use as the basis for municipal property tax? If the government's actions lead to an increase in the value of a person's land or buildings, is there scope for the authorities to recoup some of that added value?

The answers to these questions lie in the way urban law is designed. The scope for urban law to achieve policy outcomes depends on the way the constitution protects property rights.

As policy-makers grapple with the complexity of land and property rights in and around cities, there is increasing recognition of a "continuum" of land rights. This continuum marks a shift from the assumption that the ownership of land or land rights is a straightforward, unambiguous relationship. Rather, the continuum incorporates "tenure rights that are documented as well as undocumented, formal as well as informal, for individuals as well as groups, including pastoralists and residents of slums and other settlements, which may be legal or not legal".[8]

The concept of a continuum of land rights has not yet filtered into national constitutions, although international pressure to accommodate it in urban (and other) laws is growing. This is often hampered by existing legislation governing land administration. For example, in Nigeria the Land Use Decree (1978) allocates the control of urban land to state governments and of rural land to local governments. This makes it difficult to recognise a continuum, especially in areas of rapid urban expansion, where rural land is becoming urban land and each level of government is jealously guarding its area of responsibility in an attempt to squeeze the most financial benefit out of the resulting increase in land prices.

Where new land laws are introduced to encourage the development of functioning urban land markets, it is often assumed that the new law must provide for individual land titles that can be freely bought and sold on an open market. When land is held in different ways along the continuum, a legal intervention like this causes more problems than it solves. New urban land laws have to examine the different ways land is held and develop approaches for each one, based on the circumstances in each country or city and reflecting overall policy objectives.

Socioeconomic rights
South Africa pioneered the practice of incorporating socioeconomic rights with an urban dimension into legislation. The rights to housing, work and a safe environment, among others, were included in its 1996 constitution and given expression in

> **DRAFTERS ARE OFTEN EXPECTED TO GIVE PRACTICAL EXPRESSION TO SOCIOECONOMIC RIGHTS IN COUNTRIES WITH HIGH LEVELS OF INEQUALITY AND LOW IMPLEMENTATION CAPACITY. IN SUCH CASES, IMPROVEMENTS MAY HAVE TO BE PROGRESSIVELY REALISED**

specific legislation. This trend continued in the constitutions of other countries, for example, the 2010 Constitution of Kenya and the 2011 Transitional Constitution of the Republic of South Sudan.

The introduction of socioeconomic rights adds a new dimension to urban law. In the past, drafters of urban legislation had to ensure that new laws did not infringe on or detract from people's rights.[9] Now, in countries where the constitution guarantees these rights, laws must give positive expression to them. Substantial, specific obligations are placed on organs of the state to actively promote them. This creates a challenge for drafters, who must give practical expression to socioeconomic rights in countries with high levels of inequality and low implementation capacity, two factors that undermine the likelihood of a law delivering on socioeconomic rights.

Defining and protecting socioeconomic rights through new urban legislation is a long-term process that can only be "progressively realised", to borrow a phrase from the South African Constitution.

How constitutions promote women's rights in three countries

THE CONSTITUTIONS OF Tanzania, Rwanda and Uganda differ vastly in their approach to women's rights. This different treatment of gender discrimination creates different opportunities for specific urban laws to promote women's rights.

Tanzania's constitution is ambiguous. Section 12 states that "all human beings are … all equal". Section 13 states that all people are entitled, without discrimination, to protection and equality before the law. However, the definition of discrimination makes no specific mention of discrimination based on gender.

Rwanda's constitution is more explicit: Article 9 commits the state to ensuring that "women are granted at least 30 per cent of posts in decision making organs". Article 11 says that discrimination based on "sex … or any other form of discrimination is prohibited and punishable by law", while Article 29 provides that "every person has a right to private property". Article 185 establishes an office whose functions include "monitoring compliance with gender indicators of the programme for ensuring gender equality".

Uganda's constitution goes a step further. Section 33 not only provides that women "shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities" but goes on to entrench the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom. It ends with a prohibition on all laws and customs which are against the welfare or interests of women.

From a practical point of view, drafting laws on land tenure with specific reference to women's rights would be more difficult in Tanzania than Uganda, which moves beyond outlawing gender-based discrimination to empower the state to take affirmative action based on gender.
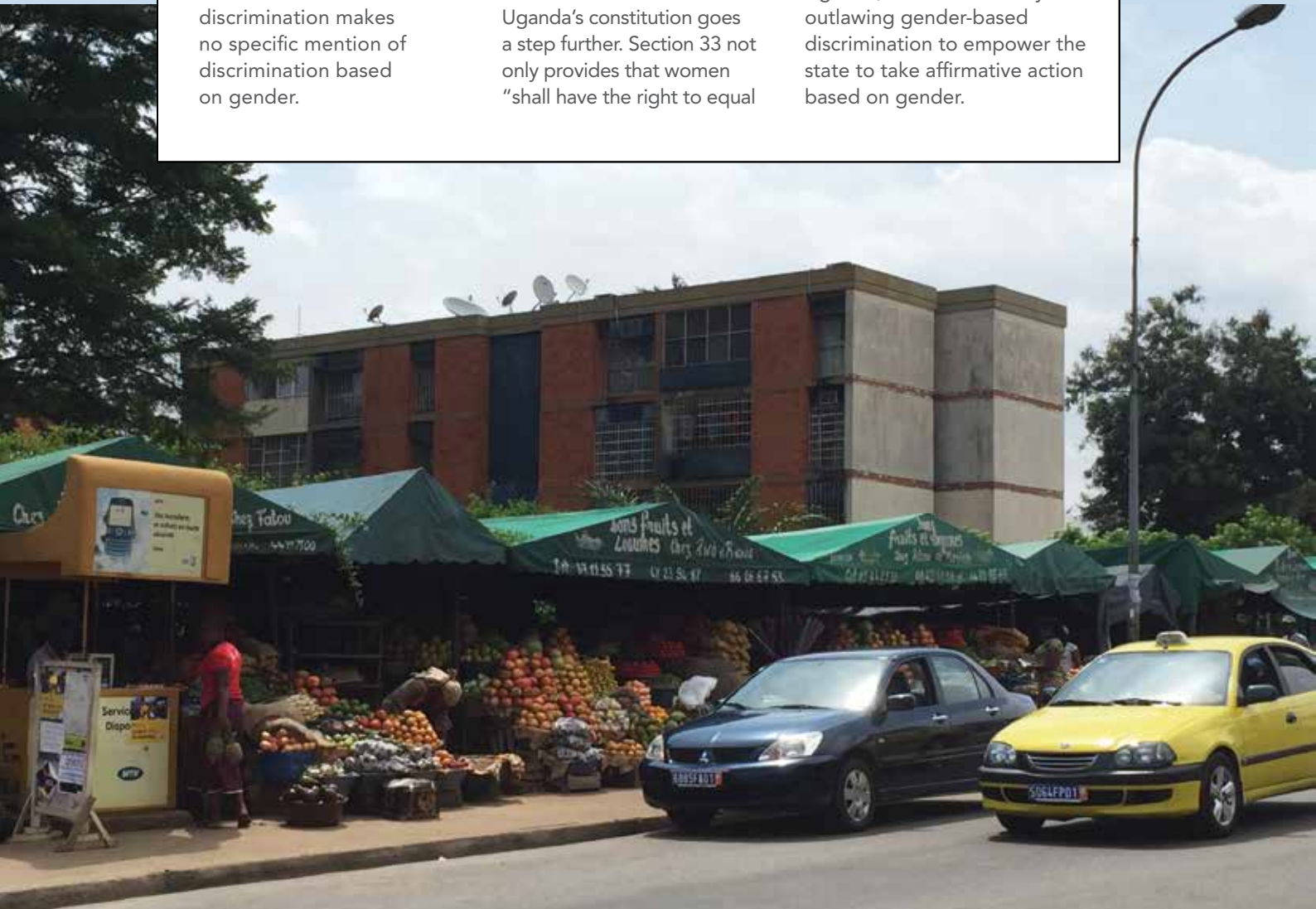
Judicial capacity and independence

The principle of the separation of powers between executive, legislative and judicial arms (where the legislative arm makes laws, the executive implements them and the judicial arm ensures that the implementation is carried out fairly and per the law) is often absent in African countries. It is more common to find a judiciary that is heavily influenced – and even intimidated – by the executive than one that is independent and able to assert its interpretation of the law. There are examples of judges who fearlessly carry out their work in the face of intimidation and threats, but they are the exception.

AVOID PLACING JUDGES IN A POSITION WHERE THEY CAN EXERCISE UNLIMITED DISCRETION, WHICH PRESENTS AN OPPORTUNITY FOR OUTSIDE INFLUENCE

This has important implications for how one drafts urban laws. Wherever possible, care needs to be taken to avoid placing judges (or magistrates or customary courts) in a position where they can exercise unlimited discretion, which presents an opportunity for outside influence. For example, open-ended phrases such as "unless the context determines otherwise" should be avoided; the drafters of the law should rather consider the context when designing that set of rules and instruments. Obviously, no one wants an inflexible and unwieldy urban legal system. The adjudicating authority needs to be able to exercise some level of discretion. The aim is to find a middle path that allows for some discretion but excludes phrasing that makes judicial officers responsible for making technical decisions, which exposes them to the risk of undue external influences and even bribery.

Judicial officers tend to be drawn from the privileged socioeconomic class. They invariably have professional training and good incomes. When adjudicating urban legal problems such as evictions or landlord-tenant disputes, the lens through which they view the issue may not always be dispassionate. Where an urban law is designed to effect substantial change in the way a city's urban land market works, judges may – consciously or unconsciously – consider their personal interest in that market before making a decision. To restrict such opportunities, the law must be explicit about its intentions.

Common law, civil law, customary law and hybrids

Some countries fall under the common-law tradition while others fall under the civil-law tradition, and there are many variations within that divide. In many countries, the distinction between civil and common law is breaking down, with shared characteristics often overshadowing differences.[10]

URBAN LEGAL DRAFTERS NEED TO FIND WAYS TO INTEGRATE FORMAL LAWS WITH TRADITIONAL, INDIGENOUS LAWS AND WITH CONTEMPORARY "UNDERGROUND" LAWS

Regardless of a country's underlying legal tradition, the difficult question increasingly confronting urban legal drafters is the coexistence of formal laws with customary, indigenous laws that are generally administered by traditional leaders, sometimes through traditional or customary courts. Many cities are expanding into areas in which customary law governs land tenure and use. Customary law also regulates aspects of family law – especially gender relations and inheritance – that directly affect urban land and property.

The interface between formal and customary law is most obvious in peri-urban areas, but also arises in informal settlements, where, in the absence of applicable legislation, inhabitants have adapted elements of customary law to form contemporary "underground" laws. These laws develop "from a variety of compromises that work in practice. There are different legal solutions that are all outside or in competition with the state order, which in most cases must abdicate in favour of those alternative systems".[11]

As urban legal reformers, we cannot simply design a new legislative provision that fits within the framework of existing legislation. Nor can we draw lines that distinguish between the application of "underground" or customary law on one side and statutory law on the other. We need to find legal solutions that work in all parts of our cities. Salvatore Mancuso, a law professor at the University of Cape Town in South Africa, asks whether "the problem of the effectiveness of law in Africa and the issue of the gap between formal and informal law can be solved through written law or if it is time to find solutions that take account of the fact that the African experience is unique and quite different from the experience in other parts of the world".[12] This is a hypothetical question because "written" law is the medium governments will always use. Nevertheless, it is a reminder that any law that fails to consider "underground" law will not achieve satisfactory urban legal outcomes.

The way a country's constitution accommodates the powers of traditional leaders and the status of customary law affects urban law, especially in peri-urban areas, where expanding cities encroach on areas that have historically been under the custodianship of traditional leaders. As a city grows outwards, so too does the footprint of statutory law. This often results in clashes between local authorities and traditional leadership. This conflict reflects a wider set of tensions within the country and should be treated with care.

As with all types of law, customary law evolves. In peri-urban or newly urbanising areas, hybridised forms of local regulation, which draw on both customary and statutory law, are emerging. This serves as a positive example to follow when revising urban legislation.

Existing legislation and decisions

New urban law must be consistent with existing legislation (in the case of civil-law countries) and both existing legislation and the decisions of apex courts (in the case of common-law countries).

Ensuring consistency with existing law is an immense challenge. Records of laws currently in force are not always available, and when they can be traced they don't always reflect amendments. Although countries are moving towards greater online access to legislation, such access to legislation remains unusual.

Case study	Customary laws dictating urban occupation in Luanda

IN LUANDA, ANGOLA'S capital, 86 percent of urban residents occupy land through unofficial property documents. Less than 10 percent of households have official documentation to prove land ownership.

Luanda – currently home to more than 7 million people –

is set to become one of the largest cities on the continent, with a projected population of more than 10 million people by 2030. While the relatively recent Land Act (2004) envisages integrating customary rules for land tenure into the formal system, the regulations to implement this have not yet been

developed and the number of households affected by uncertainty continues to grow.

Luanda provides a clear example of the importance of designing and implementing legal frameworks that bring together customary and more formal aspects of the law in workable new arrangements.

Where it exists, it is often outdated. One example of a country that has developed its own online resources is Uganda, where the Uganda Legal Information Institute's website – www.ulii.org – is useful. An added difficulty in common-law countries is that you have to establish the courts' interpretative approach to the existing legislation. Access to court judgements – "law reports" – is also difficult. Then, because so many laws are under review, you can never be sure that the version of another law that is being revised is the same version that will be in place when "your" law comes into operation.

It is important to be pragmatic when faced with such obstacles. Keeping the law you are working on in limbo while you seek clarity on the status of other legislation is not an option. Neither is inserting a provision at the end of your law stating that it will prevail over any law that is inconsistent with it. Such an approach will antagonise officials in other departments or ministries, adding to the challenge of inter-departmental and inter-sectoral cooperation within government, and could result in unintended perverse outcomes. It also creates widespread legal uncertainty, which is precisely what you are trying to resolve.

South Africa's Development Facilitation Act (1995) is a good example of this. To speed up development approvals, a planning tribunal could simply ignore other laws, including environmental management regulations. Developers fully exploited this, resulting in numerous inappropriate applications being approved. The Constitutional Court eventually repealed the law in 2010 on the grounds that it was unconstitutional, but only after many development projects had benefited from the legal uncertainty that this sort of "override provision" created.

Engaging stakeholders may help pinpoint areas where legislation could impinge on the area that is to be regulated. Beyond that, the only workable solution is to assess the range of possible intersections with other laws and see whether the proposed new law broadly fits in with existing legal frameworks.

This calls for a common-sense evaluation of:

- The implications of a possible inconsistency with an existing law.

- Whether such an inconsistency would make implementation impossible.

- Whether it would be possible to adopt a construction of the provision that allows for a consistent reading of the two (or more) provisions.

Any new urban law needs to work in harmony with other laws while giving effect to new policy proposals. Certain aspects of a new law will need to be more carefully checked than others in terms of applicability and potential conflict with existing laws. Any areas of substantive conflict will have to be identified and clearly communicated to relevant political leaders. The aim is to ensure general compliance with current law. That said, ensuring that every provision aligns with existing law is too difficult to achieve in most African countries, at least for the foreseeable future, simply because it is impossible to ascertain what the existing law says.

Resource   The Southern African Legal Information Institute

THE SOUTHERN AFRICAN LEGAL Information Institute (SAFLII) publishes an online, searchable database at www.saflii.org that includes case law, some law journals and some legislation from 16 African countries (Angola, Botswana, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe). The database is still growing, but already it provides a valuable resource for legal drafters in southern and eastern African countries.

The importance of meaningful stakeholder consultation

URBAN LEGAL INTERVENTIONS OFTEN FAIL BECAUSE OF INADEQUATE DISCUSSION WITH BOTH THE PARTIES THAT WILL BE AFFECTED BY A NEW LAW AND THE OFFICIALS AND POLITICIANS WHO WILL HAVE TO IMPLEMENT IT

The key to effective stakeholder consultation is clear, consistent communication. While the responsibility for such communication lies with the authorities responsible for reforming the law, the task can be made easier by regular, informed media coverage.

Stakeholders can only argue for their interests if they are kept informed about the drafting process. This is best done by:

◼ Issuing regular information updates across a variety of communication platforms, using plain language that stakeholders can understand.

◼ Ensuring that there are regular meetings at which stakeholders can engage with the drafting team.

◼ Having informed officials available to answer questions and provide documents when needed.

◼ Keeping a record of the concerns that stakeholders raise and how the drafting team is dealing with them.

I t is a mistake to assume that urban legal interventions are of such a technical nature that they are best designed by technical legal experts working in isolation. Nothing could be further from the truth. Urban legal interventions often fail because of inadequate discussion with both the parties that will be affected by a new law (households, businesses and the organisations representing them) and the officials and politicians who will be responsible for implementing it.

Consultation is the only way a drafting team can ascertain the context within which a proposed law will operate. Consultation provides clarity on:

◼ The social, economic and environmental pressures that the law will operate within and shape.

◼ The relative interests of different people and institutions that will be affected by the new law.

◼ The availability of information on which drafters can base recommendations.

KEY STAKEHOLDER GROUPS
Stakeholders who will be affected

There will always be a wide range of stakeholders in urban law. There will be groups who will directly or indirectly benefit from a new law, and those who will directly or indirectly bear a cost – whether financial or political – because of it. There will be law-abiding groups and groups that currently

STAKEHOLDERS CAN ONLY ARGUE FOR THEIR INTERESTS IF THEY ARE KEPT INFORMED ABOUT THE DRAFTING PROCESS

TO MAKE SURE THAT ALL POSSIBLE STAKEHOLDERS ARE CONSULTED IN DRAFTING A NEW URBAN LAW, DRAW UP A LIST WITH ALL THE DIFFERENT POSSIBLE INTERESTED PARTIES AND OUTLINE A COMMUNICATIONS APPROACH FOR EACH GROUP

operate outside the law. To make sure that all possible stakeholders are consulted in drafting a new urban law, draw up a list with all the different possible interested parties and outline a communications approach for each group.

Ideally, all interest groups should have their own legal advisers. This is more likely with developers and landowners than with community-based or non-governmental organisations. It is essential that officials are willing (and able) to provide additional support to groups that are disadvantaged, even granting extra time for comments if needed, while valuing and respecting the contributions of those groups with more resources.

There will always be stakeholders who will want to block a new urban law for a range of different reasons. Not all of these stakeholders, or their reasons, will immediately be apparent. Sometimes they will choose to keep quiet about their opposition, knowing that they can exert political or financial pressure later to achieve their objectives. It is important to consider the range of possible sources of opposition at the outset of the drafting process, and to develop strategies to manage them. This may involve eliciting support from politicians and other stakeholders, or it may involve compromising on certain aspects of the proposed law. Hoping that the law will eventually – through clever drafting perhaps – overcome obstruction from influential camps is futile, especially when these camps are politically or financially powerful. The structures responsible for implementing a new law are generally too vulnerable to resist pressure from powerful interests. It is more productive to design an urban law in such a way that its implementation is assured, even if its goals are less ambitious.

Sometimes groups that were silent start objecting to a new urban law only once its provisions firm up. For example, traditional leaders may not view an urban planning law as relevant to their interests until they see that the law aims to regulate land use in peri-urban areas that they regard as being under their jurisdiction. At that point they will make their presence felt, fully exploiting their political influence in ways that fundamentally

disrupt the law-making process. Similarly, commercial land developers may wait for an actual threat to their interests to manifest before engaging in obstructive tactics. For instance, they may wait to see how infrastructure for new developments is allowed to be financed before using their political influence to protect their interests.

Where a different approach to drafting can accommodate an opponent's concerns without fundamentally shifting the purpose and effect of the law, this should be done, openly and transparently. Where this is not possible, a strategic response backed by defensible technical arguments is the best approach. Here the practice of identifying and evaluating different legislative options (see "Outline three legal options", p40) bears fruit as it provides the basis for arguing for (or against) the different ways in which a new law can tackle an issue. Drawing on a set of known options obliges opponents to be rigorous in their arguments rather than relying on rhetoric or political muscle. However, there will be times when technical arguments are inadequate – perhaps because the opponents are exceptionally well connected in government or business – and the fight has to be taken to the political arena. In this case, it is prudent for the legal drafting team to step back and let politicians resolve the conflict, having been briefed as fully as possible beforehand by the team.

IT IS IMPORTANT TO FIND WAYS TO SPEAK TO IMPLEMENTERS WITHOUT THEIR MANAGERS, BECAUSE THE TWO GROUPS CAN EXPRESS VERY DIFFERENT VIEWS OF WHAT IS (AND IS NOT) POSSIBLE, AND OF WHAT THE LAW SHOULD TACKLE OR AVOID
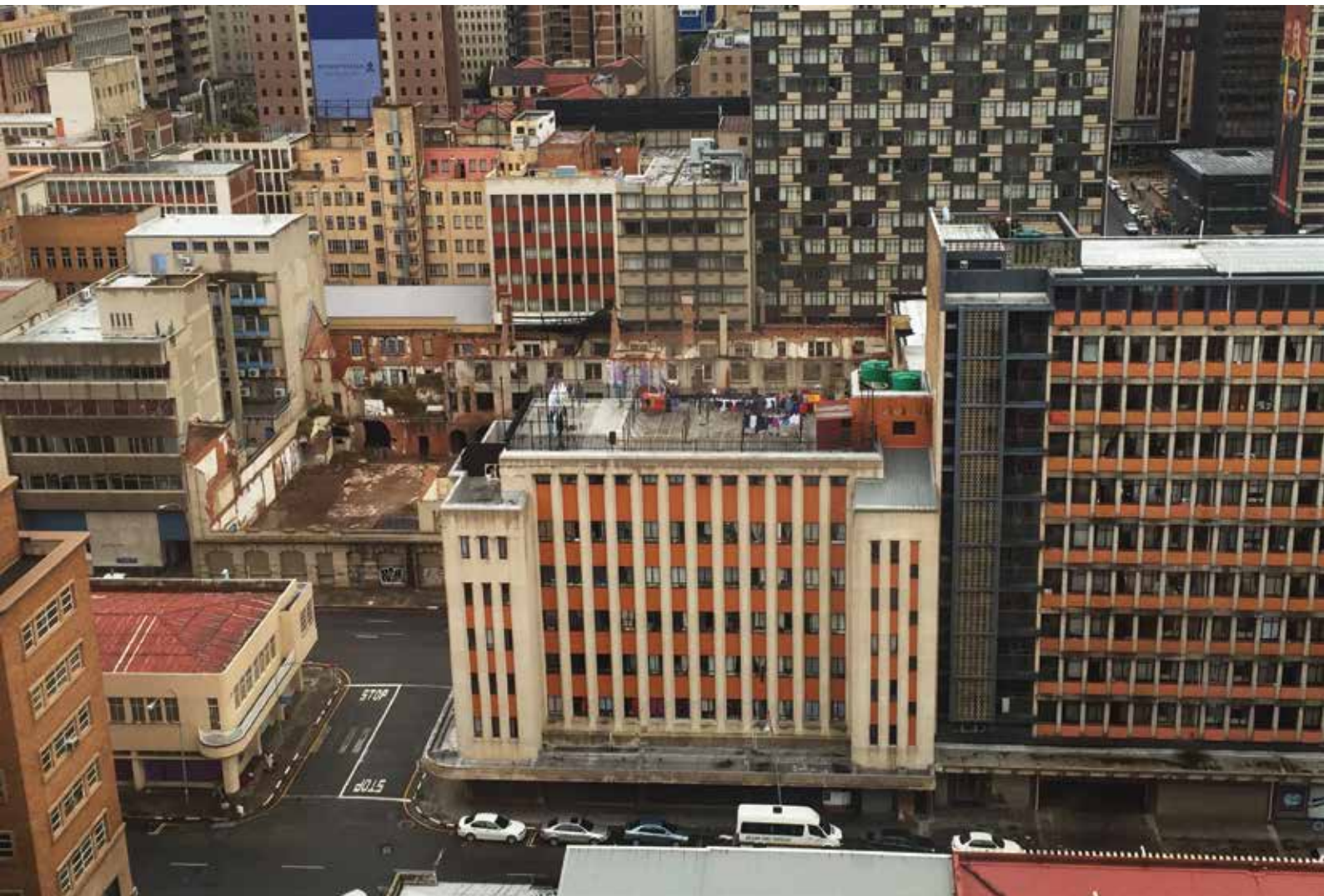
Stakeholders who will implement new legislation

Implementers are the people who work in government departments, at the interface between members of the public and politicians. They often work under pressure in understaffed offices. Even so, they are often very committed to their work and value the opportunity to express their views.

Implementers can tell you how the current system works in practice. It is important to find ways to speak to implementers without their managers, because the two groups can express very different views of what is (and is not) possible, and of what the law should tackle or avoid.

It is crucial to build a good relationship based on trust with implementers. Give them ample opportunity to express their views and share their experiences of working with current legislation. Explain to them what the urban law reform process aims to achieve and the issues at stake. Work through different legislative options with them to find out which ones they are most likely to embrace. This will help them feel invested in the outcome of the process. They need to believe that their daily experience will improve because of the new law. Implementers hold the information needed to design a system that works. For example, they know how long it takes an official to process a procedure, which allows drafters to project how many officials would be needed to process a similar procedure. This can help determine whether the civil system has the capacity to effectively implement a system introduced through new legislation. Remember that within any one agency, different groups will have quite different agendas. For example, administrators may want to portray a particular process as being very time-consuming, while their managers, within the same agency, might have an interest in depicting it as very speedy. This is why it is important to engage with different groups within a government agency or within a municipal administration.

Many locally determined, informal legal arrangements are carried out by people who are not state officials. These might be arrangements to manage refuse removal in an informal settlement or to regulate property transactions in peri-urban areas. Sometimes they operate with official sanction, sometimes not. Sometimes they are effective, sometimes not. In cases where state capacity is weak, a new law could seek out opportunities for this sort of non-state actor to implement legislation. In granting such powers, however, the law should also seek to impose performance standards and ensure that poor performance or the abuse of power is punished. This is not an approach that fits neatly with the traditional concept of legislative implementation, but is one we should embrace in the way we shape urban laws.

Politicians

In many countries, there is no sharp division between politicians and administrative workers. Civil servants can be taken from their offices and made ministers; ministers can be redeployed to head up "non-political" agencies. In a country where bureaucratic and political interests are fused, political considerations will directly affect senior officials working on drafting a new urban law. In a country with a more independent bureaucracy, technical considerations can receive more thorough consideration before they are absorbed into the political sphere.

Tensions between politicians and technocrats involved in the law-making process also need to be managed. Politicians may view a technical expert's proposal as too politically risky, not pro-poor enough or ideologically unacceptable. At the same time, technical experts may regard what politicians want as unworkable in practical terms, too expensive or too protective of party political and elite interests. Ultimately, any law must have political backing. Political considerations can therefore not be rejected out of hand.

Acknowledging and addressing these tensions head-on are crucial for producing workable laws. All parties should be given opportunities to argue their positions. They should be prepared to provide evidence for their proposals. This is the only way to ensure that the tensions between

technical and political considerations are constructively resolved.

When discussing urban legal reforms with politicians, effort should be made to ensure that:

◼ The reform process is transparent and robust enough for conflicts to be openly discussed.

◼ The discussion is based on actual available information.

◼ Political decision-makers are made aware of technical issues before they make their decision.

◼ The outcome of the reform process is administratively fair and practically implementable.

Ensuring that these objectives are realised will demand clear and open communication between the drafters of the law and relevant politicians. This requires commitment from each party to listen to the other, respect the other's views and share, rather than withhold, opinions and ideas.

CONSIDERATIONS WHEN CONSULTING STAKEHOLDERS

The accepted approach to consulting stakeholders involves drafting a proposed law, circulating the draft to stakeholders for consultation, hosting workshops or meetings at which the proposed law is verbally presented, and then taking written comments.

This approach sounds rational and manageable, but it is rarely how events unfold. During the consultation process for the Zambian Urban and Regional Planning Bill, for example, only two written submissions were received on the draft Bill over a two-year period in which numerous workshops were held across the country. And of those two submissions, one of them was from the ministry that commissioned the team that drafted the Bill, so it should not have counted as an external stakeholder's comment at all.[13] As a result, the drafting team felt that "at the end of a thorough, comprehensive process … the difficult

> **IF TRICKY AND CONTENTIOUS ISSUES ARE NOT DISCUSSED DURING THE CONSULTATION PHASE, THERE IS LITTLE CHANCE THAT THEY WILL BE SUCCESSFULLY ADDRESSED IN THE LAW**

substantive issues that we had identified at the outset were still unresolved".[14]

If tricky and contentious issues are not discussed during the consultation phase, there is little chance that they will be successfully addressed in the law. The law will then not have the desired outcome, as the law-making process did not grapple with the difficult problems. The fewer the problems that arise in the law-making process, the easier it is to agree on the contents of a new law. This gives a false sense of accomplishment. Weakness in the consultative process paves the way for a law that is too vague and weak to achieve its desired effects.

The reliability of sources

The consultative process aims to gather evidence on which the drafting team can base its final recommendations. It is not enough to simply issue a call for comments. To minimise the team's reliance on anecdotes or the views of a small selection of stakeholders, the drafting team needs to:

- Actively seek out a wide range of people who are likely to have views on legislative options in order to limit the chances of a dominant set of interests overshadowing the interests of less vocal groups.

- Engage in diverse and innovative communication techniques to increase people's familiarity with the issues so that they may truly take part in the process.

- Use local languages as necessary.

- Engage actively with interested parties, either individually or in groups.[15]

People currently living or operating outside the law require special effort to consult. In most cities, these people constitute the majority of the urban population, so it is not useful to think of consultation with them as an exception; it is the norm. If it is assumed that everyone who has to be consulted in a public consultation process lives in a formally developed area – with an address, for example – and is thus embedded in the formal systems of governing and managing the city, then this process will inevitably miss the majority of urban residents, who live outside these systems.

> **PEOPLE CURRENTLY LIVING OR OPERATING OUTSIDE THE LAW OFTEN MAKE UP THE MAJORITY OF THE URBAN POPULATION AND REQUIRE SPECIAL EFFORT TO CONSULT**

A proposed law needs to bring as many of these people within the ambit of the law as it can. In doing so, it needs to consider factors that would determine whether or not these people would choose to participate in the new legal framework. Such factors include their financial position and property rights. These are sensitive factors for any person anywhere in the world, but especially for people living in socially vulnerable and financially desperate circumstances. The real test for any urban law consultation process is whether people in this position feel reassured that participating in the consultation will not expose them to further risk and, importantly, that the proposed innovations will strengthen their financial positions, property rights and status in the community.

When starting to engage with stakeholders at the outset of the drafting process, it is important to check up on – and sometimes double-check – various assertions. Different people and groups have different reasons for wanting some parts of an

often keep working drafts out of the public eye. Sometimes the teams feel the issues are too technical for people outside the process to grasp. Sometimes they are worried that they missed an important issue. Perhaps they know the provisions will be unpopular and hope to postpone the backlash that will probably follow the draft's release.

existing law to change and for keeping other parts in place. Be alert to the risk of misrepresentation and never be afraid to ask (and re-ask) difficult questions, regardless of how powerful the voice is or how confidently the opinion is expressed. Sometimes it is the loudest, boldest views that most need careful scrutiny.

One possible area of misrepresentation involves assessments of capacity to implement proposed laws. Both when officials tell you there is adequate capacity and when you are told that capacity is too weak, there is often another agenda at play. Some people may want to use the law-reform process to motivate for the allocation of more human or financial resources to their unit. Others may want to create the impression that their unit is functioning optimally because they do not want to draw attention to their work, which might reveal that they are exploiting the current system for corrupt purposes. In each case, it is important to track down departmental budgets, organisational structures and annual reports to cross-check assertions. Sometimes all it takes is common sense to verify a stakeholder's claims. Regardless, it is always advisable to obtain official documents to support arguments in favour of, or against, a proposed way forward.

When to release a draft law

The detailed provisions of a new law indicate how the law will operate in practice. Stakeholders are usually eager to obtain drafts whenever possible, yet drafting teams

The decision of when to release a draft law for comment always involves some level of risk. For example, if the new draft law suggests that a certain type of land tenure arrangement will become stronger, it may raise expectations among people currently enjoying that type of tenure that their position will improve. This may lead them to recklessly incur debt that they would otherwise not have. Others may be motivated to speculatively acquire land in the hope of making a windfall profit once the law comes into effect. These outcomes all undermine the longer-term law-reform process and underline the importance of thinking through the possible effects of new or proposed provisions so that unwanted outcomes are not triggered before or after the law comes into effect.

On the other hand, keeping new draft laws secret will breed suspicion and feed conspiracy theories. For example, municipal councillors who suspect that a new urban law will reduce their powers may put pressure on the drafting team to access the draft law prematurely or find ways to influence or end the drafting process. Regardless of what the law finally says, hostility towards it will endure and undermine implementation efforts. It is always tempting to restrict stakeholder input in the hope that this will keep the drafting team focused. Identifying and resolving internal tensions is often enough of a challenge, and it may seem wise to keep

debates internal. This is not a productive approach. The more inward-focused a team is, the more likely it is that details will be missed and the less likely it is that stakeholders will recognise the resulting law as legitimate.

Methods of communication
Meetings
The most traditional forms of communication are often the most effective. Meetings and workshops at which the ideas underpinning a new urban law are presented clearly, to facilitate thorough discussion and open analysis of what the practical implications of the new law might be, will always be at the heart of a communication strategy.

These meetings need to be carefully planned. It does not help to host massive public meetings where anyone can attend. If the meeting is too big, it becomes impossible to properly discuss any of the detailed, complex issues underpinning new urban legal arrangements. Meetings should rather be scheduled with particular interest groups, with agendas tailored to meet that group's interests and capacity.

Local government is an important stakeholder category for meetings. Within that category, though, there will be various different interests. For example, the interests of the local administration governing a large – and sometimes very large – city will differ from those governing smaller, secondary cities. Coastal cities will also have different concerns to inland cities, and fast-growing economic regions will differ from those in depressed regions. Sometimes even different cultural or religious identities affect stakeholder concerns.

Property developers are a similarly diverse category of stakeholders. It is important to consult this group through meetings rather than written correspondence, but getting all developers into one room for a discussion is seldom fruitful. They have little interest in sharing their insights with competitors, so a general meeting is not likely to yield useful findings or perspectives. The approach with developers needs to be more selective. The approach used will depend on how the real-estate development industry operates

in a country. In some cases, there will be a handful of very powerful developers and a meeting with each of those will suffice. In cases where there is a range of smaller-scale developers, it could be useful to group firms that do not work in the same city or same part of a city in a meeting to promote a freer exchange of views.

> ### ONE-ON-ONE MEETINGS WITH KEY INDIVIDUALS – USUALLY EXPERTS FROM RELEVANT PROFESSIONS OR ACADEMIA – ARE IMPORTANT

One-on-one meetings with key individuals – usually experts from relevant professions or academia – are also important. When given the chance to speak freely and off the record, these people often provide perspectives that would not be available from any other source. Retired experts or officials can provide historical insight into why a law is causing problems, or why a particular type of legal intervention did – or did not – work in the past. Informal networks of local members of the drafting team are valuable in identifying these people and setting up these meetings. This sort of one-on-one meeting is difficult to set up when the drafting team is mainly made up of foreign experts without local networks.

Newspapers and other print media
Newspapers that are read by the educated elite may well not be read by most urban citizens. Draft laws, notices of meetings and related documents need to be published where the people who will be affected by them are likely to find them. In countries that still have low levels of internet access, the popular daily newspapers are important tools for communicating news and ideas to the people.

When publishing draft laws or regulations in print media, it is advisable to include a clear, concise explanation. This could be the same memorandum that was prepared for the

legislature or it can be a shorter description of what the law seeks to achieve, presented in a straightforward way that is accessible to people without a formal education in urban legal issues.

MANY JOURNALISTS WOULD BE WILLING TO COVER THE TOPIC BUT LACK THE CONFIDENCE OR ABILITY TO WRITE ABOUT A TECHNICAL ISSUE SUCH AS URBAN LEGAL REFORM

Publishing in the print media is often prescribed by law or through a country's parliamentary practices. This sort of publication is important for transparency purposes, but it is not very effective in getting ordinary people, the private sector or civil society to engage with a process.

Achieving this requires short, concise articles. Many journalists would be willing to cover the topic but lack the confidence or ability to write about a technical issue such as urban legal reform. In such instances, journalists are often relieved to receive material that they can develop, adapt and edit for publication.

COMBINING A WEBSITE WITH THE REGULAR USE OF A SOCIAL MEDIA PLATFORM THAT IS POPULAR WITH STAKEHOLDERS IS A CHEAP, EFFECTIVE METHOD FOR INCREASING STAKEHOLDER AWARENESS

The internet and social media
Publishing draft Bills in government gazettes or similar publications will always be necessary, but it will never be enough for the purposes of engaging stakeholders. Despite low levels of internet access in many African countries, the internet is an invaluable and fast-growing communications tool for:

- Disseminating new drafts and policy papers for comment

- Providing the public with background information and documents

- Issuing notices of public meetings

- Providing contact details should people want to make a submission.

Combining a website with the regular use of a social media platform that is popular with stakeholders is a cheap, effective method for increasing stakeholder awareness of the drafting process.

HOW TO ENSURE EFFECTIVE MEDIA COVERAGE

URBAN LEGAL REFORM IS NOT, IN ITSELF, newsworthy. However, proposals to change laws that will affect urban legal problems – such as the demolition of illegal buildings, floods resulting from illegal development of low-lying areas, the corrupt approval of inappropriate land-development projects and traffic congestion – are.

A deliberate plan for managing the media is a useful tool for ensuring that there is widespread interest in, and engagement with, a new law both during the drafting process and once the law has been passed. This should include strategies to:

◼ **Develop newsworthy material.** Drafting teams need to know how to generate material that examines newsworthy issues as they relate to a proposed or recently passed law. Different types of material are needed for different types of media.

◼ **Disseminate it to the media.** Drafting teams need to be media-savvy. They need to know how to engage with the media in such a way that the issue is reported accurately and without sensationalism. This might involve, for example, inviting members of the media to occasions such as the first hearing of a newly established decision-making body, ensuring that you brief journalists properly beforehand and provide necessary supporting documents so that their coverage of the event can be reasonably accurate.

◼ **Remain open and accessible to members of the media.** Encouraging positive media coverage is a specialist activity that is foreign to most people working in urban legal reform. In the absence of specialists, much can be done by simply being open and accessible to reporters. Often the commitment of political leaders to support urban legal reform depends on the public mood. It is imperative to ensure that there are always knowledgeable people available to respond to media questions.

◼ **Respond to media coverage of urban legal issues.** Media coverage that distorts the public view of either a current urban legal problem or the proposed intervention needs to be corrected. Where there is sensationalism there has to be a measured response. This can be delivered in several ways. If the issue is high profile or controversial, the relevant minister may need to intervene. In other situations, directly communicating with journalists will suffice. Where the distortion is substantial but does not warrant high-level intervention, a letter to the editor (in the case of a newspaper) will be effective. In countries where social media is widely used, an intervention on the most popular social media platforms can be an easy way to clarify misrepresentation or error.

◼ **Monitor the media's coverage of urban legal issues over time.** As cities grow and news issues relating to urban development become more prominent, the appetite of reporters to monitor the implementation of urban laws will increase. Making provision for mandatory monitoring and reporting will make it easier for the media and civil society to alert the authorities and the public to looming crises, increasing the chance that these crises will be averted or addressed.

Few journalists specialise in urban legal – or even urban – issues. It is important for people working on urban legal reforms to develop strong relationships with reporters and take the time to help them expand their knowledge in the field.

Practical preparations for
drafting new urban laws

1 | ESTABLISH THE TERMS OF REFERENCE

Clarifying the terms of reference is the first step in the urban legal reform process. Despite the costs involved in developing new laws, the terms of reference given to drafters are often shallow, consisting of little more than a list of problems to be addressed. A vague and confusing brief creates expectations that cannot be met and, more seriously, can send the drafting team in pursuit of issues that are not relevant. Once clarity is reached, it must be confirmed in writing to set realistic expectations and avoid ambiguity.

> **THE TERMS OF REFERENCE SHOULD IDEALLY BE DRAFTED BY URBAN LEGAL EXPERTS WHO ENGAGE WITH STAKEHOLDERS, ANALYSE THE PROBLEM AND SET OUT A WORK PLAN FOR THE PROCESS**

Ideally, the terms of reference should be drafted by urban legal experts – possibly external consultants, if the government does not have internal capacity – who engage with stakeholders, analyse the problem and set out a work plan for the process. The terms of reference need to include the scope, the outcome of the process, and the various roles of the teams and team members working on the process. Although contracting professional help in drafting the terms of reference presents an added short-term cost, it is an investment that results in a more efficient and cost-effective legal reform process in the longer term.

Scope
A brief for sprawling legislation to correct multiple urban problems creates an impossible task for drafters and will probably result in none of the issues being effectively tackled. The South African government's approach to reforming urban planning law is an example of this. The need to address the

spatial legacy of urban apartheid led to the Spatial Planning and Land Use Management Act (2013), which is so broad and all-encompassing that it is unable to effect change in urban land use and development patterns on its own. Conversely, a brief that is too tightly framed, limited to one or two priority issues, runs the risk of achieving only partial reform.

Expected output
The terms of reference need to specify whether the outcome of the project should be an overarching, all-encompassing law that tackles multiple urban challenges, or a series of separate, more focused laws that incrementally contribute to a body of legislation that will eventually cover the whole field to be regulated.

This decision is never easy to make. There are advantages and disadvantages to each approach, and each creates its own risk of surprising, unexpected outcomes. It is important to consider the political and technical appetite for reform. Is there the stamina required to see through an all-at-once approach, or would it be easier to focus on one or two dimensions at first? The latter approach presents the risk that the one prioritised dimension does not work properly in isolation. In Tanzania, for example, the government developed legislation to implement a new method of property valuation without considering the need to also address the legal and practical sides of actually collecting the new revenue, effectively undermining the benefit of improving the valuation system.[16]

On the other hand, new legislation that tries to cover every aspect of a field may be too overwhelming to engage with, resulting in a draft law that does not benefit from effective stakeholder critique. Zambia's Urban and Regional Planning Bill, for example, tried to overhaul the entire planning system as well as the regulatory framework for low-income housing, resulting in a law – the Urban and Regional Planning Act (2015) – that is long on detail and difficult to implement.[17]

Roles and lines of accountability
Drafting a new law is a complex, time-consuming and stressful process for all

CLEARLY SPECIFIED TERMS OF REFERENCE FOR EACH PARTY AND EACH TEAM/COMMITTEE MEMBER ARE ESSENTIAL BUILDING BLOCKS IN AN URBAN LEGAL DRAFTING PROCESS

involved. To avoid conflict, clarify who will be responsible for different aspects of the work. In most cases, a team of experts will be responsible for generating documentation under the guidance of a wider committee of government officials. The members of each group need to know what is expected of them, and what they can expect from others. Clearly specified terms of reference for each party and each team/committee member are essential building blocks in an urban legal drafting process. Making decisions regarding people's roles and responsibilities on an ad hoc basis slows down the reform process and creates opportunities for certain parties to inappropriately influence the process.

Drafting an urban law inevitably raises issues of power and prestige. Members of the drafting team and various stakeholders all want to protect their own interests and status by influencing the new law. Drafters may have personal ambitions to be regarded as the principal author of the new law, or to

be the point of contact for political leaders. Acknowledging and managing these different agendas is a prerequisite for a successful urban legal reform process. It is important to understand when and how political considerations are likely to emerge and who will be responsible for addressing them.

Lines of accountability need to be specified:

◘ Between the drafting team and the drafting team leader

◘ Between the government steering committee and the committee leader

◘ Between the drafting team leader and the committee leader

◘ Between the committee and team leaders and the politicians responsible for the project.

In most cases, the government steering committee will report to the relevant politicians. In some cases, politicians prefer to deal directly with the drafting team. There are good arguments in favour of both approaches. Whichever is adopted, the issue should be clearly set out and understood by all parties.

WHO SHOULD BE ON THE DRAFTING TEAM?

URBAN-REFORM LAWS ARE USUALLY drafted by a team of experts. However, it is not unknown for the task to be handed to a single legal expert, or even a non-legal expert with practical experience of legal issues. It is incredibly difficult for one person to think through all the possible impacts a legal formulation could have, or to think through all the possible ways of addressing a specific legal problem. In these cases, the lone drafter needs to rely on a small network of people who can help him or her, either formally or informally, to develop and test ideas. This is both to ensure a better draft law, but also to protect the drafter from being accused of failing to draw on available expertise.

Where a team has been commissioned to draft a new urban law, the make-up of the team can significantly influence the draft law's acceptance and successful implementation. Ideally, such a team should include local drafters, experts from a wide range of disciplines, and representatives from various levels of government.

Local drafters

All countries have their own legal traditions. Drafting teams need to include local drafters to ensure that local legal practices are reflected in the new law and that the new law will fit into the country's existing legislative framework. This will also help develop the country's ability to undertake its own drafting projects in the future. This local drafter should ideally be the principal draftsperson, supported by other team members if necessary.

In the drafting of the Zambian Urban and Regional Planning Act (2015), the international drafting team chose a Zambian lawyer to be the principal author of the first draft of the legislation. Although her background was in gender and social development law and she had had little, if any, exposure to urban planning law, she was familiar with the country's drafting styles and rules. As her drafts developed, so did her understanding of urban development issues. Afterwards, because of her experience in the drafting process, the University of Zambia asked her to teach a course on planning law. This demonstrates how using a local drafter not only ensured that the draft legislation was written in a way that fitted with the Zambian context, but also contributed to the development of new skills, knowledge and experience across generations.

Diverse disciplines

A drafting team that includes a wide range of experience in the technical, legal and practical dimensions of urban planning is more likely to produce a law capable of mitigating the risk of perverse consequences and achieving its goals once implemented. In addition to lawyers, there may be urban planners, economists, environmentalists, building experts, transportation engineers, land surveyors, political scientists and social development experts on the drafting team. Each discipline brings a different understanding of what legal reform can achieve. It is the role of the team leader to maximise these strengths.

It is useful to have people with experience in rolling out urban law on both the drafting team and the steering committee. This helps produce practical, implementable laws. Developers are especially useful to have on the drafting team as their activities directly affect urban development and will need to be regulated by the new law.

Government representatives

The drafting team should include people who work within the government system, ideally in the ministry responsible for implementing the new legislation. Including a municipal government representative will also allow the team to draw on the experience of officials working to implement urban legislation.

2 | IDENTIFY THE PROBLEM

Urban law reform often gives priority to an initial contextual study that only examines the problems to be addressed. However, context is seldom static. Between identifying the need for new urban law and approval of that law, the context in which the new law will operate may shift. The law-making process needs to consider these shifts in context and how they might affect the proposed law.

Analysing the context within which a new law will operate has two main benefits:

◻ **It gives drafters a better understanding of the problem.** Examining the context can help drafters determine whether they have identified the problem itself, or if they are only looking at symptoms arising from the problem. A team may be asked to draft new building regulations to address the problem of unsafe informal houses. However, it is possible that the real reason people build unsafe houses is because they do not have disposable income to spend on construction. It is equally possible that they are wary of investing too much in homes built on land where they have insecure tenure rights. If either of these alternative explanations is correct, the effort put into updating building regulations will be wasted.

◻ **It creates an opportunity for officials working in the system to see how parts of the system work together,** increasing the likelihood that they will implement the urban legal reforms.[18]

New urban laws can have far-reaching consequences. Any intervention in urban land supply or management, for example, will affect the urban land market and thus the land values of households and businesses. Different governance models, on the other hand, will affect the ways political parties are represented on the municipal council, meaning that some will benefit and others will lose out as a result of the new system. These are two examples of issues that drive parties to take extreme steps to maximise their own benefits.

THE CHALLENGE IS TO FIND INNOVATIVE WAYS TO GAUGE THE SCALE OF THE PROBLEM TO BE CORRECTED THROUGH NEW URBAN LEGISLATION

It is difficult to assess context in the absence of reliable data. Drafters need data to test the outcome of a provision, but that data is often not available. When this happens, the challenge is to find innovative ways to gauge the scale of the problem to help design an intervention. It is rarely easy to establish, for example, how many applications have been received for a type of land use, or how many buildings there are in a city. Data relating to the availability of infrastructure and tax collection is equally difficult to obtain.

NO NEW LAW CAN OPERATE INDEPENDENTLY OF OTHER LAWS, ESPECIALLY IN AN URBAN LEGAL CONTEXT

Legal context

Legal context refers to the way in which the legal system operates at a given point in time. It includes the laws that are in force as well as the ways in which a country respects or follows the rule of law. No new law can operate independently of other laws, especially in an urban legal context, where different authorities use different laws to achieve different policy objectives in one place – the city.

Key elements relating to the legal context that need to be considered are:

◻ **The legal and administrative system's capacity to implement new legal**

processes. Will the current system be able to cope with an increased load if your new law introduces new categories of administrative process? Where urban decision-making affects people's rights and interests, is there currently a mechanism for people to appeal a decision? If there is, does the appeal go through the legal or the administrative system? Is the current system able to deliver timely decisions of reasonably good quality? Will your new law add to the number of appeals, or detract from it?

▣ **The way courts are likely to interpret new legislation**. Different countries have different legal traditions with different principles of statutory interpretation that need to be reflected in the way a new law is written. Countries that use civil law, for example, have a more prominent role for statutory interpretation and less regard for earlier court decisions. The way drafters approach statutory interpretation will have implications for the language and terminology used in drafting a law, and how stakeholders are engaged. This issue

demands careful attention where drafters come from a country with a different legal tradition to the country for which the new law is intended.

▣ **Competing informal governance structures.** Urban legislation in Africa is often not implemented because it competes with existing informal governance arrangements. Proposed urban laws often need to work in a context where operating outside the law is more common than operating within it. Most new urban legal interventions will try, in one way or another, to bring more activities under the formal legislative umbrella, yet perfect compliance is an unrealistic expectation. However, shifting the overall balance of informal to formal is a commendable goal, the achievement of which depends on a sound understanding of the way the informal and formal sectors operate, both independently and in relation to each other. Drafts of new urban legislation should be shared with individuals in the informal sector and with organisations that represent their interests.

Case study	The unintended outcomes of Zanzibar's land reform programme

ZANZIBAR'S EXPERIENCE OF the Mkurabita programme illustrates the problems that arise when new laws do not fit with existing legislation.

In 2008, the Tanzanian government initiated the Mkurabita programme to formalise property. The programme ignored legislation already in force in Zanzibar and imposed

a local land registry at neighbourhood level, where administrative capacity was the weakest.

The new law, grounded in the principle of individual property rights, was thus superimposed over an existing system dominated by socialist values, with no effective mechanism to resolve property conflicts.

In effect, the law undermined rather than strengthened the land rights of ordinary people, with wealthy outsiders able to secure the most valuable properties. An initiative ostensibly aimed at empowering the urban poor thus ended up weakening their property rights because attention was not paid to pre-existing land laws.

Economic context

The successful implementation of a proposed law relies on a clear understanding of the economic system in which it will operate. What sort of economic activity sustains people? What is the volume of economic transactions? Are most transactions carried out within a formal or informal framework? Is economic activity characterised by small-scale traders or large-scale manufacturing enterprises? Are many people involved in economic production, or a few? To what extent are local and other authorities able to raise tax revenue either from businesses or land values, taking into account both the authorities' willingness to collect and taxpayers' willingness to pay?

> UNDERSTANDING THESE DIMENSIONS OF THE ECONOMIC CONTEXT ALLOWS THE DRAFTING TEAM TO DETERMINE THE SORT OF LEGAL INSTRUMENTS AND PROCEDURES THAT WILL WORK IN THAT CONTEXT

Understanding these dimensions of the economic context allows the drafting team to determine the sort of legal instruments and procedures that will work in that context. It provides a set of data, no matter how thin, on which they can start to build an argument for tackling urban legal problems in particular ways. Without this understanding, they run the risk of proposing solutions that cannot work, even with the most skilful drafting and most enthusiastic government support.

Geographic and demographic context

Physical context has a bearing on the effectiveness of proposed laws. Is a city growing quickly, or is the population stable or declining? What sorts of land holdings underpin the city? Are they primarily formal, customary or – as is most often the case – a

combination of the two? Are the buildings primarily made of brick and cement, or temporary materials? All these lines of inquiry will help identify strengths on which to build, as well as problems and their underlying causes.

Political context

This relates to how cities are governed. To what extent are they governed by local municipal administrations as opposed to national or regional government? What are relations like between local levels of government and central government authorities? These are crucial questions to answer when undertaking urban legal reform because they will determine which aspects of a new law can be effectively implemented.

A study of the ways urban land-development regulations were applied in Kampala, Uganda, and Kigali, Rwanda, over the same period demonstrates the role of political context when contemplating new urban laws. Despite having similar institutional, legal and economic features, land-use regulations and building codes were generally applied in Kigali, but not in Kampala. The study ascribed this difference to the way political resources and incentives were arranged in the two cities (and countries): in Rwanda, officials were compelled to implement plans and regulations, and they did so, while in Uganda the economic and political gains to be had by ignoring or overriding the regulatory framework dominated, which resulted in many developments being approved in places that were unsuitable. Achieving desired legal outcomes requires a more nuanced approach than elegant legal drafting and ensuring that there are enough officials to implement the law. It needs to rest on a realistic analysis of what does and does not work in the country's political system.[19]

Social context

The way society is structured in a country has a big impact on how effective different urban legal interventions will be. The drafting team needs to consider gender issues, ethnic and cultural differences and social inequality at all times during the drafting process.

Gender

To what extent are women able to participate

> **THE DRAFTING TEAM NEEDS TO CONSIDER GENDER ISSUES, ETHNIC AND CULTURAL DIFFERENCES AND SOCIAL INEQUALITY AT ALL TIMES DURING THE DRAFTING PROCESS**

in civic affairs and property ownership? If women's participation is weak, is there a commitment on the part of the government to strengthen it? Will the law need to make special provisions to protect the interests of women in the governance and management of cities?

Most countries exhibit significant gender inequality. New urban laws need to tackle that, but the techniques and strategies for doing so will depend on the willingness of the state to engage on the matter. Where an urban law takes an entirely gender-neutral approach, it runs the risk of perpetuating or worsening existing gender inequality, especially when property rights are affected. This can pose a real challenge for the drafting team (which itself is generally made up of men) in countries where gender inequality is persistent and the government officials and politicians running the urban legal reform process are mainly men.

Ethnic and cultural groupings
Does one ethnic or cultural group dominate politics, the urban economy or land ownership? Is there a willingness on the part of the state to change this pattern of domination? Ethnic or cultural domination is a complex issue to address, especially where this domination is reflected in the government officials working with the drafting team. But, like gender inequality, it is one of the benchmarks that will determine whether or not an urban legal reform is successful in practical terms. Addressing all forms of urban social exclusion is a central part of each country's international obligations. It is useful for the drafting team to be familiar with the relevant provisions of applicable United Nations agreements and conventions.

Inequality
The question of inequality is central to understanding social context. In his 1894 book, The Red Lily, French writer Anatole France writes that "in its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread". This highlights the need to understand how urban laws differently affect the rich and the poor. Where the majority of citizens are poor, it is especially important to appreciate how a proposed legal intervention will work in terms of people's ability to afford both the costs of compliance and of asserting their rights when challenged by more powerful parties.

> **A NEW LAW WILL FAIL IF ITS DRAFTERS DO NOT UNDERSTAND WHY EARLIER INTERVENTIONS FAILED**

Historical context
There is a tendency for history to repeat itself, for laws to be drafted in the hope that the same objective that was pursued in earlier years will be achieved by reworking or strengthening the text of a new statute. Certainly, countries change over time. But it is equally certain that a new law will fail if its drafters do not understand why earlier interventions failed.

It is important to look back more than a few years. Sometimes the drafting team will need to look at the experiences of post-independence governments in power more than 50 years ago to see what worked and what did not work then. Consulting historical records, which can require some difficult archival research, is thus an important part of understanding the historical context. In countries where archival records are thin and there are few libraries, these records may ironically be more easily accessed from other countries, particularly in academic writing. Tracking down the historical context provides invaluable benefit to the urban legal reform process and boosts the probability of the law being effective.

IDENTIFYING OPTIONS FOR TACKLING THE PROBLEM IS USEFUL FOR GIVING DRAFTERS A SENSE OF THE RANGE OF POSSIBLE APPROACHES AND FOR SHOWING STAKEHOLDERS HOW A NEW LAW MIGHT AFFECT THEM

3 | OUTLINE THREE LEGAL OPTIONS

Once the problem has been identified, it may seem that there is no practical way to tackle it – or that there are so many ways that it is difficult to decide where to start. Identifying options for tackling the problem is useful for giving drafters a sense of the range of possible approaches and for showing stakeholders how a new law might affect them.

Options should be identified based on the drafting team's understanding of the current context in the country, complemented by other countries' approaches to similar concerns. It is best to outline no more than three options. One of them can be the "do nothing" option, which explores the effect of not introducing new legislation but rather strengthening existing legislation, either by better communicating its requirements or by strengthening the capacity to implement it. In most cases, the do-nothing option is not one to seriously consider, as the decision to proceed with new legislation is often difficult to reverse. However, it does serve as a reality check and forms a useful benchmark for comparison with other scenarios. It enables the drafters to evaluate whether the proposed way forward will actually achieve positive change. If a proposal is only likely to work if it is accompanied by significant increases in financial and human capacity, then the question must always be: would that increase in capacity make the current system work well enough to make it unnecessary to develop a new law at all?

The three legal options can reflect different approaches to various aspects of law-making,

for example, regulation (encouraging self-regulation within a particular sector versus comprehensive regulation of a wide range of activities versus regulation focused on one or two types of activities or transactions) or legislation (national legislation versus municipal regulation versus a combination of the two).

The options identified need to be viable. For example, the principle of subsidiarity – that a problem should be addressed at the level that is closest to the citizens involved and to the problem itself – appeals to many urban legal drafting experts. However, it might not be a viable option in certain legal and constitutional contexts, such as where decision-making powers are concentrated in central government.

Once you have described three options and obtained support for them from political stakeholders, you have a basis from which to compare their various financial, economic, social or environmental consequences. Based on this analysis, you may decide not to choose any one of these options, but rather to take a hybrid approach.

Identifying various options for new urban legal frameworks gives drafters insight into what might work and what will probably not. It also allows them to present various options to the public, the private sector and non-governmental organisations during the consultation process, allowing these groups to see how an idea might unfold in practice. This empowers them to contribute meaningfully to the development of the legislation by bringing new perspectives, and maybe even new information that will shift the direction of drafting, to the process.

In fleshing out the three options, draft legislation should clarify relevant concepts and set realistic expectations in terms of compliance. This enables people engaging with the options to assess them in a useful way. It is pointless describing a set of detailed options in such technical language that only highly skilled professionals can understand the implications of the different approaches. Workable options are a requirement for implementing regulatory impact assessment techniques (discussed on p43).

Clarify concepts

Cities are complex and dynamic. Different aspects of the city mean different things to different people and institutions, especially when viewed through a legal lens. Yet the law aims to provide certainty and predictability, a yardstick by which to ensure minimum standards of acceptable behaviour. Such certainty is not possible without first clearly defining concepts to ensure shared meanings for as many terms as possible and prevent future conflict arising from terminological confusion. Ambiguity is the enemy of good law.

Sometimes, drafters may choose to retain a degree of ambiguity to allow for a different interpretation of the law in future. This is often inevitable, especially when the target of law-making is something as complicated as a city. But it is also a high-risk strategy, especially where capacity to exercise discretion wisely and carefully is limited, both in the administration of the urban legal system and in the judiciary.

Many current urban laws in Sub-Saharan Africa are old and use archaic legal language with assumed meanings that can be difficult to resolve. One of the aims of the urban law reform process is to identify, define and modernise these terms and phrases. (There will, however, be some instances where a term is widely understood and devising a new word might make people more, not less, confused. In this case, it is pragmatic to keep the old wording.)

ONE OF THE AIMS OF URBAN LAW REFORM IS TO IDENTIFY, DEFINE AND MODERNISE ARCHAIC LEGAL TERMS AND PHRASES
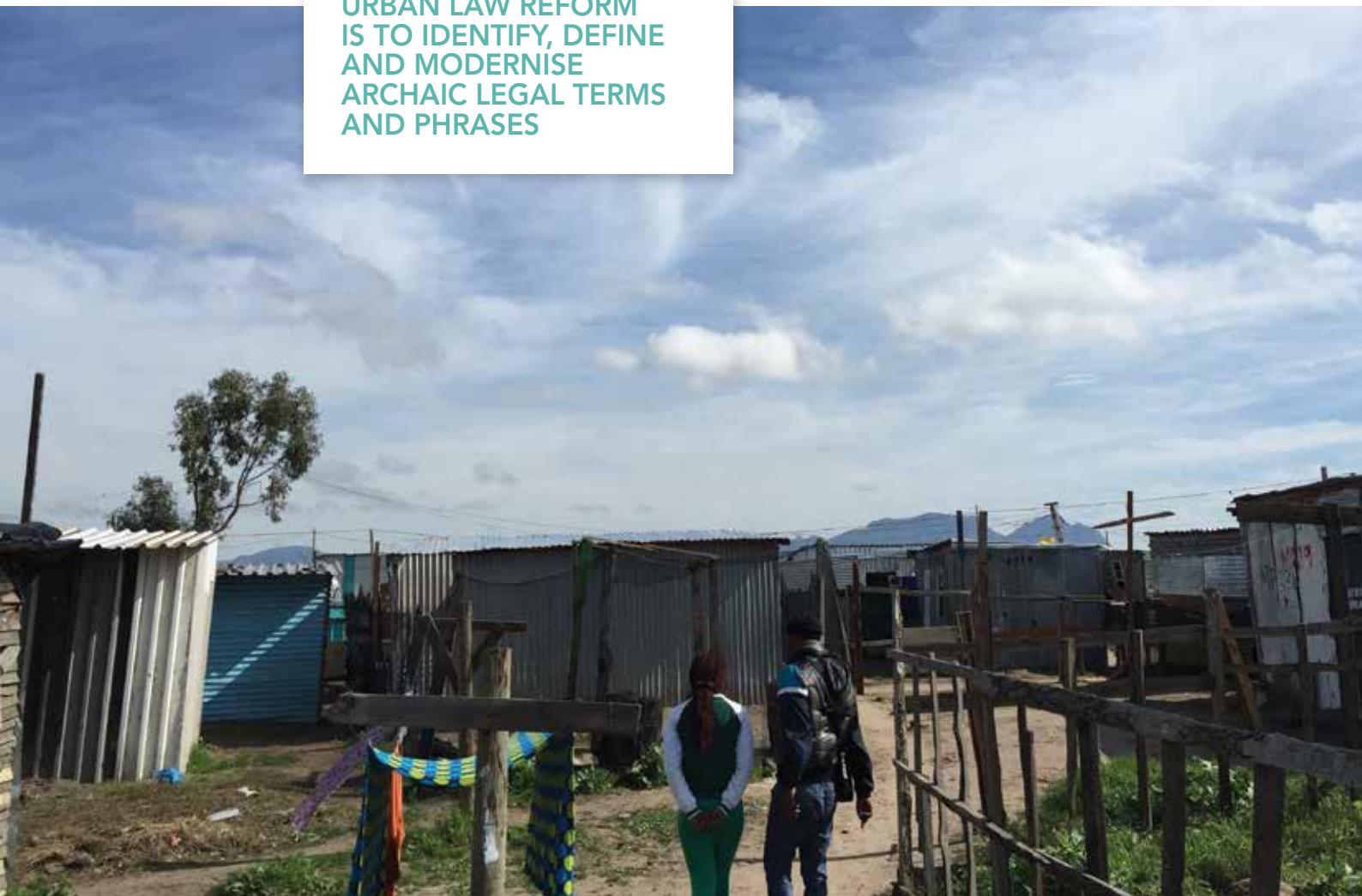
LAWS FROM OTHER COUNTRIES: TO HEED OR NOT TO HEED?

COUNTRIES IN SUB-SAHARAN AFRICA have a history of uncritically adopting urban legislation from other places. (Under colonial rule, legislation was uncritically imposed.) This is one of the main reasons current legislation is ineffective and inappropriate.

New legislation needs to be effective in the given country's context. This does not mean drafters should ignore the lessons learnt in other countries; almost all laws borrow from other places. The trick is to cautiously adapt legislation, especially where laws are being imported from more developed contexts to less developed ones, or where there are different underlying legal cultures.

When borrowing from international urban law, drafters should look to countries with similar contexts, such as those in Latin America and other parts of Africa. But they should do so critically. A legal instrument that works well in another context may have certain preconditions for successful implementation. If similar preconditions do not exist in the country drafting new legislation, look for a different legal instrument. To pursue that instrument simply because it worked elsewhere would be irresponsible.

The official version of how well a law works is also often different from the reality. Double-check any law recommended by official sources as being suitable for your context against academic writing. Consult the private sector and local urban development non-governmental organisations. This will help improve understanding of how the legal instrument or provision actually works.

Where an urban legal intervention has worked in another country and that country has similar contextual factors, it is important to adapt the intervention to suit local conditions. Perhaps the legal provisions need to refer to different institutional requirements. Or perhaps the country has different rules for public participation in the law-making process. As a starting point, the following factors need to be considered:

- **Institutional capacity.** What were the institutional requirements for making the intervention work? Did its success depend on allocating decision-making powers between different levels of government? Did it require a set of skills to implement? Did it require special institutions to be set up?

- **The burden placed on the population.** What did the law demand from the people affected by its decisions? Did those hoping to improve their situation or air their interests in the decision-making process need to pay professional service providers?

- **The country's legal traditions.** Is the borrowed urban legal idea consistent with the overall legal culture of the target country? Does it rely on the same principles of rationality, the same burden of proof and the same legal terminology that the country's legal system uses? If there are inconsistencies, can these be remedied by carefully wording the new law, or do they reflect a deeper inconsistency that no amount of clever drafting can remedy?

The UrbanLex urban law database (http://urbanlex.unhabitat.org) is a useful online tool from the United Nations Human Settlements Programme, UN-Habitat. UrbanLex contains urban legal materials from more than 190 countries. This is a good place to look for examples of urban legislation from other parts of the world.

Assess the consequences of each option

Every provision of every new legislation will affect someone, somewhere. It is impossible to predict all the possible outcomes, especially in an environment as dynamic as urban Africa. The absence of reliable quantitative data makes such predictions problematic. However, every draft urban law should aim to identify and understand the range of possible impacts. Who will benefit, and who will pay? Whose land rights will strengthen, and whose will weaken? Which officials will lose decision-making powers, and which will get new ones?

Formally, the process of finding the answers to these and other questions is known as regulatory impact assessment. Many countries, especially more developed ones, require a regulatory impact assessment to be done as a stand-alone exercise towards the end of the drafting process. This is not always helpful. In the diverse African context, it makes more sense to integrate regulatory impact assessment principles into the drafting process. Drafting teams should be encouraged to think through the range of possible impacts of different regulatory options.

Regulatory impact assessments should also be done on existing legislation. The legal context within which new laws will work needs to be free of inconsistency and fragmentation. Countries should apply regulatory impact assessment methods to existing regulations, in line with a common format for regulatory impact assessment, to inform whether or not, or to what extent, laws needs to change. The overall thrust of this should be reducing red tape and government formalities, while still achieving a desirable benefit in the public interest.

Regulatory impact assessment techniques for Africa

In developed countries, regulatory impact assessments use calculations that are based on quantitative data that is relevant, reliable and readily available. African countries have real difficulty accessing the sorts of reliable data used elsewhere to evaluate the costs and benefits of particular regulatory options. Here, regulatory impact assessments can benefit from novel approaches to gathering data. For example, satellite images of towns and cities can be used to determine land use and the extent to which urban areas consist of certain types of development. This information can be used to extrapolate population figures, income bands, infrastructure availability and environmental conditions. These factors are indicative of households' ability to comply with various legislative requirements and can, combined with an analysis of available government implementation capacity, be used to set regulatory standards for different areas.

Satellite images of cities, including historical records of how the cities have changed over time, are increasingly available for free or at low cost from international agencies such as the World Bank and the Lincoln Institute for Land Policy. The Lincoln Institute's Atlas of Urban Expansion is an invaluable online resource, providing data on historical trends and the current extent of urban expansion – information that is often difficult to find in a country or a city itself.[20] The atlas covers a growing number of African cities, some of it providing a historical timeline back to the nineteenth century. While not 100 percent

accurate, information obtained in this way is likely to be more accurate than interviews overlaid with unreliable census information. Reliable information can prevent government officials and elite groups from manipulating data to serve their interests during the law-drafting process.

Another way to improve the quality and quantity of data on urban Africa – and therefore the ability to do regulatory impact assessments – is to draft new urban laws in ways that lend themselves to efficient monitoring. This requires that the laws are not overly complex, that their objectives are clearly stated, and that the decision-making systems they create are straightforward and easy to monitor.

Building an effective regulatory management system

Any individual legal reform is unlikely to be effective if there is not also a supportive system for regulatory governance. Building this system depends on:

◾ Adopting "a regulatory reform policy at the highest political levels".

◾ Establishing "explicit standards for regulatory quality and principles of regulatory decision-making".

◾ Introducing "effective training schemes in regulatory theory and practice".

◾ Introducing effective data-collection processes and systems to monitor regulatory implementation.

◾ Clarifying the role of regulatory impact assessment in achieving sustainability and poverty reduction.[21]

Set realistic targets for compliance

A helpful benchmark when designing urban legislation is to only include regulatory standards that 80 percent of a typical neighbourhood can realistically meet.[22] If a standard of behaviour is beyond the capacity of most households to meet,

TOWARDS MORE ROBUST REGULATORY IMPACT ASSESSMENT

BECAUSE OF THE CONTESTED NATURE of urban development and the severe consequences when new legislation leads to perverse outcomes, African countries should work to establish and strengthen their ability to apply regulatory impact assessment principles to proposed urban legal interventions. The United Kingdom codified a set of principles that can be applied in the context of a developing country. These are:

◾ **Proportionality.** Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and their costs identified and minimised.

◾ **Accountability.** Regulators should be able to justify decisions and be subject to public scrutiny.

◾ **Consistency.** Government rules and standards must align with each other and be fairly implemented.

◾ **Transparency.** Regulators should be open and keep regulations simple and user-friendly.

◾ **Targeting.** Regulations should be focused on the problem and minimise side effects.

then the new law will fail to achieve the desired outcomes. Following the "80 percent rule" will help countries develop trust in urban law; without it, drafters risk perpetuating the mistake of creating laws that cannot be implemented. This does not benefit anyone.

At the same time, laws exist to raise the standards of human behaviour and attain better outcomes than can be achieved by a free-for-all competition between different actors in the city. Some situations require a higher standard than what 80 percent of the population can attain. For example, land-use regulations should ensure that storm-water drainage is always provided when land is developed to prevent ongoing floods. Property tax regulations should also be designed to ensure that property tax is affordable to all, even households that typically have not paid them in the past. In these cases, the benefits of compliance need to outweigh the costs of compliance. This trade-off needs to be clearly communicated to stakeholders as the benefits may not be felt in the short term, which is when most costs arise. Where nearly everyone lives hand-to-mouth, the argument that an immediate cost will be offset by a medium- or long-term benefit is not likely to persuade many people.

A study on the extent of compliance with land-use regulations in Nigeria found that, when it came to maximum plot-coverage rules, the level of compliance in high-income neighbourhoods was 15 percent, in middle-income neighbourhoods it was 20 percent, but in low-income areas there was no compliance at all. This is an inversion of the 80 percent rule. As the study's authors point out, "none of the developers could afford to leave 50 percent of the plot undeveloped simply to comply with development regulations. Apart from the need to provide accommodation for large households averaging about 10 to 12 persons, a sizeable proportion of residents can only afford to buy one half or less of a standard plot of land".[23]

4 | GENERATE A POLICY PAPER

A policy paper is used to initiate debate before the legislation is drafted. The document should always be written clearly and simply, without relying too much on legal jargon or a complicated writing style. Ideally, a policy paper should:

- Identify the problems to be addressed

- Set out options for addressing those problems

- Outline the implications of each option for the economy, the environment, households and implementation agencies.

A policy paper provides a benchmark against which the draft law can be tested. Does the proposed law reflect the priorities set out in the policy paper? To what extent does the draft law deviate from the policy paper, and is that deviation significant? Ideally, the team drafting the policy should be different to the team that will draft the legislation. In practice, the same people often produce both documents. The benefit of this is that the legal drafting team has a clear idea about what the policy aims to achieve. The downside is that it is easy for the legal drafters to make changes to the policy framework, either because crafting a workable legal text to achieve the desired policy outcome is more difficult than anticipated, or because the policy objective is not actually desirable. This practice should be avoided.

In some countries, producing a policy paper (known as a White Paper in the British legal tradition) is an optional exercise. In others, it is mandatory. Regardless of whether it is a requirement or not, it is always advisable to develop a document – even if only an informal one to be used by the drafting team – that sets out policy direction. In some cases, a three-page memo will be enough. In most cases, a more comprehensive document (or series of shorter policy documents) is needed. Shorter documents may be customised to address different stakeholder groups, provided the information they contain is consistent and there is a process in place to integrate feedback on the different documents into one coherent policy proposal.

Characteristics of effective urban legislation

After collating stakeholders' submissions on the various proposed legal scenarios, the drafting team is ready to select the most viable, pragmatic option as the basis for the proposed legislation. Effective urban legislation should be implementable; administratively open, fair and impartial; clear; coherent; comprehensive; and certain.

Implementability

First and foremost, a new law must be implementable. There is no point in drafting a law that addresses a wide range of concerns on paper but cannot be implemented because capacity is limited, there is no political will or it simply fails to address why people – whether they be politicians, officials, planners or individual households or firms – behave in particular ways.

An implementation plan needs to be in place before the draft law enters the parliamentary process. This plan should consider the many actions needed to implement a new law and be pragmatic about the people and institutions available to do so.

The plan should also match the type of urban legal reform. A major overhaul of a country's urban property taxation system, for example, demands a different implementation plan to a relatively modest revision of land-use approval procedures.

An implementation plan should include strategies to:

◘ **Inform all stakeholders about the law** and the date on which it comes into effect.

◘ **Prepare all the materials needed to operationalise the new law,** including regulations, proclamations, forms and flow charts.

◘ **Deepen understanding of the new law** by, for example, writing opinion pieces for newspapers, initiating discussion on broadcast media (television, radio and, where applicable, social media), and producing posters or flyers for areas where access to formal media is limited.

◘ **Train and prepare** officials, lawyers, planners, engineers, architects, local

politicians and community-based organisations for the implementation of the law.

- ◪ **Deploy additional resources** to areas where implementation difficulties are anticipated.

- ◪ **Develop and disseminate materials** (practical manuals and guides) to support officials and users of the new law as they get used to new procedures and instruments.

- ◪ **Support local government** in assimilating the new legal context into service delivery, infrastructure investment, property-based taxes and community development.

In most countries, written materials – especially those intended for popular consumption – will need to be produced in an international language and the main local languages.

AN ADMINISTRATIVE SYSTEM THAT IGNORES THE PRINCIPLES OF ADMINISTRATIVE JUSTICE IS MORE LIKELY TO NEGATIVELY AFFECT THE POOR THAN THE WEALTHY OR POLITICALLY CONNECTED

Administrative openness, fairness and impartiality

An administrative system that ignores the principles of administrative justice is more likely to negatively affect the poor than the wealthy or politically connected because the former group is less able to assert its rights through courts and other formal processes. To ensure administrative openness, fairness and impartiality in the way a proposed law is applied, it should ensure that:

- ◪ **Due consideration is given before a decision is made** that could have adverse

consequences, especially if this involves people losing land or being forced to relocate, or significant changes to how neighbourhoods are governed.

- ◪ **Hearings are conducted in accordance with recognised principles of administrative justice** (where relevant).

- ◪ **Decisions are based on clearly specified criteria** so that those seeking benefit from the administration know the case they need to make.

- ◪ **Reasons for decisions are given promptly** if requested.

- ◪ **Compensation is paid** on time and in full (where relevant).

- ◪ **Proper internal checks are in place** to ensure that town planners and administrators properly carry out their duties.

- ◪ **Allegations of misconduct on behalf of officials is independently and thoroughly investigated.**

Clarity

As far as possible, the language used should be simple enough for laypeople to understand. Where technical legal terms and phrases are used, these should be clearly defined in the text.

Clarity also refers to the structure of the law. An urban planning law that has been amended multiple times to accommodate laws on other topics becomes impossible for the public to follow. In England, for instance, there are more than 17 000 pages of law dealing with town and country planning, scattered over about 45 Acts and thousands of pages of regulations. Only professionals specialising in that aspect of the law can find their way about.[24] This is neither efficient nor just, and is an example of international practice that Africa should not follow.

Coherence

A draft law should have a logical structure. For instance, in a law on urban planning, it makes sense to first outline what may be planned before describing how to carry

out planning. Similarly, in a law regulating the sale of city-owned land, the rules determining the circumstances under which it is possible to sell the land, and the principles that apply in making the decision, should be outlined before detailing the procedural steps to be followed.

> **A DRAFT LAW SHOULD HAVE A LOGICAL STRUCTURE AND PROVIDE PRINCIPLES TO GUIDE DECISION-MAKERS IN RESOLVING TENSIONS WITH CUSTOMARY LAWS**

Urban laws should also consider customary laws, both traditional and urban, ensuring that new laws respect and dovetail into them. This is easier said than done. In many peri-urban areas, there is fierce conflict between the legal powers awarded to the city government by legislation and those of the traditional leaders, who hold their powers through customary law. There are no quick legal solutions to this deep-seated tension. However, a law that ignores this tension and simply assumes that the new law will absorb the customary law will create great legal uncertainty, fuelling tensions that already exist rather than creating order and predictability.

Even though it is a challenge for drafters, new laws need to provide specific points of intersection between urban law and customary law that at least provide principles to guide decision-makers in resolving this tension. There is a lot of scope to innovate and test new ideas for managing this enduring characteristic of many cities, especially those expanding rapidly into rural areas.

Comprehensiveness

As far as possible, matters on a topic should be dealt with in the same law. This means that some laws might be quite lengthy. Legal issues relating to urban development and governance are often so complex and

detailed that more than one law is needed. In such cases, the separate laws should still work together as a coherent whole.

Ensuring comprehensiveness in an urban law is not always straightforward. Trying to be thorough can lead to a law that is too ambitious and tries to regulate more issues than there is capacity for. This has been one of the most common weaknesses of earlier urban laws. When developing new laws, the goal of comprehensiveness needs to be interpreted differently. It is not about ensuring that the law addresses every single possible set of circumstances, but rather that it joins up the different parts of the law in ways that make sense to the users and implementers. When the law leaves a gap without guidance as to how to get around it, this encourages non-compliance just as much as trying to over-regulate.

> **LAWS SHOULD BE CLEAR ABOUT WHO IS BEING ADDRESSED; WHAT A PARTY MAY (OR MAY NOT) DO; HOW THEY SHOULD DO IT; AND WHAT HAPPENS IF THEY DON'T (OR DO) DO IT**

Certainty

Laws should be clear about who is being addressed; what a party may (or may not) do; how they should do it; and what happens if they don't (or do) do it. This clarity gives both officials and the public certainty as to what is permitted and what is prohibited, leaving little room for dispute.

Certainty also refers to the need to limit the discretionary powers of public authorities and officials to remove the possibility of abuse. However, certainty should not be allowed to become rigidity; some flexibility must be retained. The key is to ensure that adjustments can only be made within carefully regulated parameters.

THE ROLE OF REGULATIONS

MOST NEW URBAN LAWS USE REGULATIONS to set out the procedures to make the law work in practice. Regulations, in this context, are "secondary laws" that are set out from time to time by a designated person, often a minister or mayor. They generally address the detailed aspects of implementation; how the general framework set out in the law approved by parliament will actually work in practice.

It is difficult to assess the likely effects of a proposed law if its regulations have not yet been set out. In countries where trust in the government is low, stakeholders are likely to reject any new urban law that only covers overarching principles without also specifying the accompanying regulations, because it is impossible to determine how the law might affect them in practical ways. (Conversely, they may fail to engage in the law-making process because they do not think that the law will affect them in practice.) Lack of clarity at the regulation level is also a problem for officials who need to determine which resources they will need to implement the law and how it will affect institutional arrangements.

For these reasons, regulations should ideally be developed in tandem with the main legislation and published at the same time. If this is not possible, it is still useful to publish an outline of the set of regulations that will be needed to give effect to draft legislation. These regulations can then be developed as the legislation becomes more fixed. When faced with issues that are too complicated to resolve during the law-making process – for instance, when funding from an international donor places a limit on experts' time – drafters may choose not to deal with them in the law that they are drafting, but to leave them to be addressed in regulations. However, there is no guarantee that the issues will be resolved more satisfactorily in that way. In such cases,

and where it is unavoidable, it is important that drafters incorporate principles to guide the making of the regulations when they are eventually tackled by the relevant regulatory authority.

Conditions in towns and cities can vary tremendously, even within the same country. Regulations allow for rules to be adapted to suit different sets of local conditions. When a draft law introduces an issue that needs to be managed at the local level, it is generally better to leave the drafting of regulations to an executive officer of the national government, like a minister or a local council. Towns and cities are places of rapid change. The legal framework governing urban areas should be flexible enough to accommodate such change. Updating a regulation that has been issued by a minister or a local authority is much easier than changing a law that must be approved at the highest legislative level. In South Africa, for example, the Spatial Planning and Land Use Management Act (2013) empowers the national minister to implement a wide range of regulations concerning the way local councils manage land-use applications (although the fact that the minister issued the regulations before the main Act came into operation casts doubt on the legality of the regulations). In Zambia, the Urban and Regional Planning Act (2015) gives the national minister extensive authority to make regulations to operationalise the Act. In this case, the scope of the regulations is so broad that the Act itself cannot come into operation until they are finalised. Unfortunately, this means a long-awaited urban legal reform remains dormant.

Where regulations have been left to a minister or local council to draft, it is advisable to ensure that these regulations are updated regularly and made available either at government offices or on government websites.

Passing the responsibility on to politicians

Producing a polished and coherent draft law is, in many ways, the easy part. Getting the draft law through the subsequent political process and then gearing up the affected institutions to initiate the implementation are the real challenges. Here, the original drafters take a back seat, if they are involved in the process at all.

One risk at this point is that parliamentarians will amend the draft law in ways that disrupt its careful legal logic, or that the draft law will drop off the parliamentary agenda altogether. These risks are less likely if political stakeholders gave input on a policy paper and if the drafting team included political representatives in their deliberations, giving them regular updates on progress and issues. The determining factor now is whether the draft's champions – the government officials who have been managing the drafting process – can effectively support their political bosses in robust parliamentary and public debate. This largely depends on the extent to which the drafting team worked inclusively with government officials and politicians, both to draw on their inputs and help develop their understanding of the draft legislation.

The availability of international experts to support local officials after the draft has passed into the parliamentary sphere is also an important factor. It is useful to keep the full drafting team on hand during the parliamentary process to:

◘ Help brief the minister or head of department

◘ Help officials and politicians handle difficult questions

◘ Support the drafting of amendments that might arise in parliament.

The aim is to taper off the experts' participation while building up the ability of relevant officials and politicians to defend and promote the new law.

KEY STEPS IN THE LEGISLATIVE PROCESS

Each country has its own procedure for moving a proposed law through the legislature. Usually, this includes:

◘ Tabling the Bill

◘ Publishing the Bill for comment

◘ Committee processes

◘ Finalisation and adoption.

1. Tabling the Bill

Until the draft law (Bill) is formally tabled in the legislature, it does not normally enjoy any formal status. Up to this point it is merely an indication of how officials plan to translate their mandates into legislation. In most countries, a draft law can only be tabled in the

IT IS USEFUL TO KEEP THE FULL DRAFTING TEAM ON HAND DURING THE PARLIAMENTARY PROCESS

legislature once either the president or the cabinet has signed off on it.

> **A DRAFT LAW IS USUALLY ACCOMPANIED BY AN EXPLANATORY MEMORANDUM THAT EXPLAINS THE LAW IN CLEAR, STRAIGHTFORWARD LANGUAGE**

A draft law is usually accompanied by an explanatory memorandum. There is often a standard template for structuring this document, which should explain:

- The purpose of the law

- The problem it wants to address

- The proposed solution

- Reasons for the solution

- The method used for selecting this solution

- Steps taken to engage with stakeholders.

Clear, straightforward language is important here because not all members of the legislature will review the draft legislation in detail.

2. Publishing the Bill for comment
Once the draft law has been tabled, it is usually published in official government papers for public comment. Stakeholders who have commented on earlier drafts of the law will check to see whether their concerns have been addressed, and those that did not engage with the drafting process earlier will realise that this is their last opportunity to protect their interests or assert their powers. This is a time of heightened debate and interaction. Interested groups will lobby hard to get their views reflected, sometimes approaching politicians directly. They might use the press or social media to elevate their points of view. It is a time of hard work

for officials and advisers, and it is a time when it is especially important to manage communications and media relations.

3. Committee processes
After the deadline for public comment, the draft law is revised to incorporate relevant inputs before the minister responsible for the Bill submits it to the relevant committee of the legislature for a penultimate round of discussion. This is often a time of intense engagement with ministers and their political advisers as they try to iron out potential flashpoints before submitting the Bill. The risk here is that important elements of the draft law get lost as the minister seeks political compromise.

> **IT IS USEFUL TO PREPARE THE MINISTER TO FIELD QUESTIONS DURING THE FINAL DEBATE IN THE MAIN LEGISLATURE**

Once the committee process is concluded, there is one final chance to redraft the law before it goes to the main legislature. Powerful stakeholders often try to use this time to lobby for change behind the scenes. The drafting team can come under heavy pressure at this stage.

4. Finalisation and adoption
The final debate happens in the main legislature. It is useful to prepare the minister for fielding questions at this stage, underscoring the importance of sustaining a strong relationship with political leadership. Depending on how the draft law was received at the committee stage and the changes implemented by the minister, these debates should be predictable. Once the legislature adopts the final version of the draft law, usually after a vote, a date will be set for the law to come into effect. This is an important time within which to make final preparations for implementation, and to check that the necessary support has been put in place for the implementers.

Implementing new urban laws

The government officials that worked on drafting a law are not always the same people that will implement it. The early stages of implementation can be a time of uncertainty for the drafting team, which may worry that the law's new custodians will not embrace its values or apply themselves to rolling it out. This is one reason why consulting the implementers early on and ensuring positive media coverage are so important. If the press has covered the new law's purpose and intended impact, there is a greater chance that it will be taken up by the new custodians with the appropriate level of care.

THE EARLY STAGES OF IMPLEMENTATION CAN BE A TIME OF UNCERTAINTY FOR THE DRAFTING TEAM, WHICH MAY WORRY THAT THE LAW'S NEW CUSTODIANS WILL NOT EMBRACE ITS VALUES OR APPLY THEMSELVES TO ROLLING IT OUT

The first step towards ensuring successful implementation is designing a legal framework that considers the current context of capacity and resources. The second step is building capacity within the urban legal system. This involves providing structured, sustained training to the state officials who will implement the law and the judicial officers who will be called on to resolve disputes over the interpretation of the law. Civil-society bodies that work with or represent poor or marginalised communities and legal professionals that work in urban law will also need to attend short courses on the new law. While the legal professionals will probably self-fund such training, civil-society bodies will need direct or indirect funding from the state or donors.

Capacity-building involves providing practical support to state implementers by, for example:

◘ **Developing information booklets and training materials** on the new law, which can be tailored to address different parts of the law or the country.

◘ **Establishing help desks** and online help facilities.

◘ **Ensuring that the right forms are available** in the right places and in the correct languages.

◘ **Ensuring that staff are on hand** to help people fill out these forms.

◘ **Ensuring that poor and marginalised communities receive the same level of administration** as those who are better off.

Some aspects of the law will probably be implemented by non-state actors, for example, when community-based structures are enlisted to regulate land transactions or land use. It is important to ensure proper support for this category of implementers, whose concerns and conditions are different to those of government officials and inspectors.

Monitoring the effects of the new law and making adjustments

Many of the urban legal problems in Africa today are caused by inappropriate legislation. For decades, African countries have used laws that were inappropriate to their contexts, their development pressures, their implementation capacity and their political environments. As a result, citizens and officials became adept at sidestepping the law and introducing their own approaches, which were innovative and practical but often also unlawful.

No law is perfect. All countries need to fine-tune, amend or even scrap urban legal interventions from time to time. This has not happened in most African countries, which is one reason current urban legal frameworks are outdated and inappropriate. To prevent this from happening in future, it is necessary to establish a system to track whether a new legislation is achieving its intended outcomes. This system must:

- **Identify indicators** to measure the impact of the new law.

- **Clarify who is responsible for monitoring** and evaluating the outcomes of the law.

- **Include efficient, workable templates for reporting,** especially by local government.

The drafting team should consider imposing a mandatory review requirement under which a minister would be obliged to review the impact of a law every five or 10 years.

> **THE DRAFTING TEAM SHOULD CONSIDER IMPOSING A MANDATORY REVIEW REQUIREMENT UNDER WHICH A MINISTER WOULD BE OBLIGED TO REVIEW THE IMPACT OF A LAW EVERY FIVE OR 10 YEARS**

INDICATORS TO MEASURE IMPACT

A legal monitoring system should specify indicators for measuring the performance of a new law and acceptable parameters for performance on those indicators.

The indicators will be determined by the nature of the law and the urban situation it covers. These indicators need to be carefully chosen. Some indicators may seem suitable in the abstract but end up distorting performance assessments because people modify their behaviour to score well in terms of indicators without bringing about the desired change. For example, measuring the speed at which officials process permit applications submitted to them can lead to the officials cutting corners to meet the prescribed timeframes while ignoring the quality of the final decision, subverting the aims of the legislation.

> **WITHOUT GOOD MONITORING AND REPORTING, IT WILL BE DIFFICULT TO MOTIVATE FOR FUTURE IMPROVEMENTS TO AN URBAN LAW**

In countries with low administrative and professional capacity, resources should not be diverted from implementation to monitoring. However, without good monitoring and reporting, it will be difficult to motivate for future improvements to an urban law. Careful thought should be given to the selection of indicators to ensure that the law's objectives are balanced with the practical realities of public administration. Indicators that can only be measured by, for example, conducting six-monthly household surveys will be less likely to be implemented than those that require an evaluation of the municipality's capital budget and the extent to which revenue and expenditure changed after implementing a new law.

MONITORING AND EVALUATION ROLES

The party responsible for monitoring the effects of a new law should be agreed to, in writing, early on in the implementation process. The common assumption that the legislature – parliament – will fulfil this role is often incorrect, so it is important to pin down the particular ministry or level of government that must do this wherever possible.

The media, which in most countries is independent of the state system, can play a role in informally monitoring the outcomes of a law. Press reports highlighting how a particular urban legal reform has failed to deliver the envisaged outcomes or triggered entirely different, negative outcomes are effective in getting government authorities to refocus their implementation efforts. For this to happen, the media needs guidance. Urban law is a notoriously difficult area of

law and governance for anyone outside the system to understand. Drafters of urban law can help by ensuring that the policy documents and explanatory memorandum are clear, concise and readily available to the media. This makes it easier for observers to track the extent to which the new law is realising the policy's objectives.

> **STRAIGHTFORWARD TEMPLATES FOR REPORTING SHOULD BE INTRODUCED**

TEMPLATES FOR REPORTING

It usually falls to the implementers of the new law – mostly local government bodies – to collect indicator data and report on whether a new urban law is working effectively or not. To facilitate reporting and support overwhelmed officials, straightforward templates for reporting should be introduced. Support and capacity-building programmes will also help ensure that local government officials can fulfil their reporting mandates without compromising their overall responsibility to implement the new law.

Conclusion

There is no blueprint for urban legal reform in Sub-Saharan Africa. The countries' law-making systems are too different, their urban challenges unique and their political contexts too varied to allow for a strictly procedural manual. Nevertheless, this guide provides a direction for people working at the frontier of urban legal change.

SUCCESS IS MORE LIKELY WHEN ALL THE ACTORS APPRECIATE THE COMPLEXITY AND LIMITATIONS OF THE PROCESS BUT CAN STILL IDENTIFY AND SEIZE OPPORTUNITIES TO BRING ABOUT CHANGE

Urban legal change is a slow, complicated process. African cities do not have time on their side. The current paths of urban expansion and governance are cementing patterns that will endure for decades. Success is more likely when all the actors appreciate the complexity and limitations of the process but can still identify and seize opportunities to bring about change.

These opportunities differ from time to time and country to country. We cannot predict when they will arise. In some countries, at some times, there may not be strong opportunities at all. Armed with an approach that is grounded in what is actually happening and possible in context will allow legal drafters and champions of urban legal reform to identify and enact the changes that are needed. Without these changes, our cities will continue failing to live up to their potential.

The 2030 Agenda for Sustainable Development sets ambitious targets for improving city planning and management if its Sustainable Development Goals are to be reached, especially in African countries. The rapid growth of our cities, coupled with the additional burden of mitigating and adapting to climate change, demands that we sharpen all the tools at our disposal if we are to meet our international obligations. Improving legislation will not, on its own, address any urban problem. But if we start to make laws that work in practical terms, actually changing the ways that cities are growing and developing, then we stand a chance of rising to the challenges.

Of the various tools used to shape and govern cities, laws are the most difficult to change once they are in place. The costs of getting them wrong are high and changing them can take decades. This is why we must pay such careful attention to how we make new urban laws.

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The extraordinary projected rate and scale of urban growth in Africa between now and 2030 underscores the need to urgently develop urban laws and regulations that will shape cities that work more efficiently, treat people more fairly and are sustainable.

This guide aims to strengthen the process by which the laws and regulations that govern urban areas are drafted. It looks at the characteristics of urban legislation in Sub-Saharan Africa and the challenges faced in changing these laws to propose a practical, real-world approach to drafting urban legislation.

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urbanism from an african perspective