



# HUMAN RIGHTS, RULE OF LAW AND THE NEW URBAN AGENDA

URBAN LEGAL CASE STUDIES

VOLUME 11, 2020

**UN HABITAT**  
FOR A BETTER URBAN FUTURE





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Indigenous people during a UN Conference ©UN Photo/Eskinder Debebe



# INTRODUCTION

A distinctive feature of the New Urban Agenda (the Agenda) is its emphasis on inclusivity and Human Rights in urban development. Inclusivity- including 'inclusion' and 'inclusive'- appears 46 times in the document while 'rights' is repeated 22 times. These themes run throughout and, even where they are not mentioned, their values are reflected in words such as 'non-discrimination', 'equality', 'universal access', 'public participation', 'social function of cities' and 'people-centred approaches'. From the outset, the Agenda makes it clear that inclusivity and Human Rights are at the centre of its objectives as evidenced by the first paragraph under the 'Our Vision' section. It calls for:

*"cities for all, referring to the equal use and enjoyment of cities and human settlements, seeking to promote inclusivity and ensure that all inhabitants, of present and future generations, without discrimination of any kind, are able to inhabit and produce just, safe, healthy, accessible, affordable, resilient and sustainable cities and human settlements to foster prosperity and quality of life for all."*<sup>1</sup>

The next paragraph articulates the centrality of Human Rights in urban development through the aspiration for cities and human settlements where all persons are able to enjoy equal rights and opportunities, and their fundamental freedoms. It further adds that the Agenda is grounded in the Universal Declaration of Human Rights (UDHR), as well as other international Human Rights related treaties and instruments such as the Declaration on the Right to Development.<sup>2</sup>

The Agenda recognizes the importance of Human Rights in setting minimum standards required for people to live in freedom, equality, and dignity. Human Rights are universal legal guarantees of a civil, cultural, economic, political and social nature, protecting individuals and groups, against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.<sup>3</sup> A human right may be understood as a relationship between an individual who has a right (right-holder) and another individual who has a correlative duty or obligation (duty-bearer). Under international law, states assume obligations and duties to respect, protect and fulfil

1 Para 11, Draft outcome document of the United Nations Conference on Housing and Sustainable Urban Development ("The Agenda").

2 Para 12.

3 *Frequently Asked Questions on a Human Rights- based Approach to Development Cooperation* (United Nations publication, Sales No. E.06.XIV.10), p.1.

Human Rights. The obligation to respect requires the state not to infringe the rights of individuals while the obligation to protect obligates states to ensure that other (non-state) parties do not violate the rights of persons. The nature of the obligation to fulfil requires that states must take positive action to facilitate the enjoyment of basic Human Rights.<sup>4</sup>

Human Rights protect individuals and communities from the exercise of arbitrary power by the government and private entities. They are universal, inalienable, indivisible, interdependent and interrelated. Human Rights grant freedoms, social protections and provide for non-discrimination in the access to goods and services. Duty bearers are therefore required to ensure that the relevant rights are realized, promoted and protected, equally, for all persons within their jurisdiction. Human Rights are anchored both in national law and in the international Human Rights framework. These include international treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the Convention on the Rights of Persons with Disabilities (CRPD) and the Universal Declaration of Human Rights, among others. For states

that have ratified these instruments, the rights granted therein are binding.

In the urban context, Human Rights serve four main functions. First, they lay out the rights of urban dwellers, which states are required to progressively meet, such as housing (as part of the right to an adequate standard of living),<sup>5</sup> the highest attainable standard of health,<sup>6</sup> and the right to safe and clean drinking water and sanitation.<sup>7</sup> Second, they establish the values that must guide the treatment of individuals in urban environments. Human Rights emphasize respect for human dignity, freedom of expression, equality, non-discrimination, participation in public affairs and freedom from violence. Third, they empower urban dwellers to participate in the governance and management of urban areas in addition to enabling them to seek accountability. For example, the right to vote enables urban dwellers to choose their leaders, while freedom of expression allows them to communicate and voice their concerns. Fourth, they guide the process of resolving competing interests for urban goods and services. These include the right to be heard, to be accorded a fair hearing, to equality before the law and the right to an effective remedy whenever rights are violated. Therefore, obligations of duty bearers in the urban context are both positive and negative. The negative obligation prohibits governments from breaching the Human Rights of the persons in their jurisdiction, while positive obligation requires decision-makers to take active steps towards ensuring that

4 Human Rights Guidance Note, UN-Habitat, September 2014

5 Article 25, UDHR and Article 11, ICESCR.

6 Article 12, ICESCR.

7 UNGA Resolution 70/169 on the Human Rights to safe drinking water and sanitation Resolution adopted on 17 December 2015.

Human Rights are realized, promoted, and protected from infringement by third parties.

The Human Rights-centric character of the Agenda inevitably requires enabling conditions for successful implementation. Key among these is the Rule of Law. As noted in the preamble of the UDHR within which the Agenda is grounded, "Human Rights should be protected by the rule of law".<sup>8</sup> The Rule of Law has evolved into an idea that is defined by four inter-related principles. First, the law is supreme and independent. Second, governmental authority must not be arbitrarily exercised. Third, the law needs to apply to all persons and offer equal protection to all without discrimination. Fourth, the substance of the law needs to be consistent with minimum Human Rights norms and standards as defined by international Human Rights instruments accepted by the international community.<sup>9</sup>

The effect of these principles is that the Rule of Law requires laws to be prospective, clear and accessible to the general public. They need to be of general application and easy to comply with. The repudiation of arbitrariness also calls for separation of powers and the existence of an independent institution, such as a judiciary, to act as a bulwark against tyranny both from the government and from other (natural and juridical) persons. These elements are recognized in the United Nations' definition of the Rule of Law. It is described as:

*"[A] principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency".<sup>10</sup>*

Human Rights protection not only relies on the Rule of Law, but they have evolved to become one of its constituting elements. The enjoyment of Human Rights in a society denotes the presence of the Rule of Law and at the same time, the Rule of Law is expected to enhance these rights. The cyclical relationship between the Rule of Law and Human Rights implies that legal frameworks should always put rights at the centre. They should facilitate equal enjoyment of rights, fundamental freedoms and opportunities; foster prosperity and quality of life for all; and create conducive conditions for decent, dignified and rewarding lives and the achievement of full human potential.

The relationship between the Rule of Law and Human Rights thus requires legal

8 Preamble paragraph 3, UDHR.

9 Ricardo Gosalbo-Bono, "The Significance of the Rule of Law and its Implications for the European Union and the United States," *University of Pittsburgh Law Review* (2010).

10 *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN SC, UN Doc. S/2004/616.

frameworks to be consistently examined both for their ability to enhance as well as undermine the enjoyment of Human Rights. This examination is in line with the requirement for members states to ensure that domestic legislation comply with their international legal obligations. The assessment of legal frameworks appreciates that the law can be used to promote inclusivity, equality and non-discrimination on the one hand, and on the other, be used as a tool of oppression, exclusion and marginalization. The urban space represents one area in which the paradoxical nature of legal frameworks is exhibited. On the positive aspect, urban law can provide a framework through which various public and private interests are mediated especially in relation to land use and development; offers a stable and predictable framework for public and private sector action; gives an avenue for the inclusion of the interests of vulnerable groups; and acts as a catalyst for local and national discourse on urban-related issues. Nonetheless, urban law can also, deliberately or inadvertently, undermine the enjoyment of Human Rights by promoting exclusion, marginalization and poverty.

Urban planning laws, for example, promote positive Human Rights outcomes by establishing minimum health, sanitation, safety, and environmental protection standards. They can also foster inclusive and vibrant communities and create adequate spaces for social activities that are instrumental for the enjoyment of rights. These laws, however, can also contribute to the growth of informal settlements as

well as delegitimize and even criminalize the way of life of most poor urban residents (by establishing locally inappropriate standards for example) and as such foster inequality and exclusion. Similarly, land laws may grant property rights and protect the right of residents to live and work in urban areas. At the same time, these laws may deny residents security of tenure by, for example, recognizing a form of land tenure that is inaccessible to the majority.

These examples highlight that legal frameworks may lead to positive or negative Human Rights outcomes and as such, it is imperative that they are frequently assessed. Indeed, as the urban population is projected to reach 68 per cent of the world's population by 2050, it is estimated that 15 per cent of the 6.25 billion people will be persons with disabilities and one third will be living below the poverty line.<sup>11</sup> If the inclusivity ambitions within the Agenda are thus to be achieved, the role of urban law must be assessed, and efforts be made to reform it. This paper seeks to undertake such an assessment. It focuses on six key development areas that UN-Habitat focuses on which are also where the potency of the law on Human Rights is greatest. These areas are Land, Urban Planning, Urban Governance, Urban Economy, Housing, and Basic Services. The intention is to identify the exact points within urban legal frameworks where the enjoyment of Human Rights is undermined either through the substance of the law or through the overall manner in which the legal regime is structured. Proposals

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11 United Nations Department of Economic and Social Affairs, *Realization of The Sustainable Development Goals by, for and with Persons with Disabilities: UN Flagship Report on Disability and Development* (UNDESA 2018).

for reform are also suggested in advancement of the Agenda's commitment to "leave no one behind".<sup>12</sup>

It is important to note that most of the rights discussed in this paper are economic and social in nature and hence the obligation is for states to take steps "with a view to achieving progressively the full realization of the rights recognized"<sup>13</sup> and not an immediate obligation "to respect and to ensure" them as is required by the International Covenant on Civil and Political Rights (ICCPR).<sup>14</sup> Nonetheless, the paper is inspired by the Committee on Economic Social and Cultural Rights' interpretation of the nature of states' obligations in calling for emphasis on the achievement of these rights. The Committee has clarified that "progressive realization" should not be misinterpreted as depriving the obligation of all meaningful content. While it is a necessary flexibility device reflecting the realities of ensuring full realization of economic, social and cultural rights due to factors such as resource constraints, rights in the ICESCR still establish minimum core obligations that states must satisfy.<sup>15</sup> Through this interpretation, for example, the Committee has noted that although the right to adequate housing as a component of the right to an adequate standard of living is to be progressively realized, a state in which any significant number of individuals is deprived of basic shelter and housing is, *prima facie*, failing to discharge its obligations under the ICESCR.<sup>16</sup>

Furthermore, the Committee has provided that in fulfilling their Human Rights obligations, there are four essential elements that states must take into consideration. These include Availability, Accessibility, Affordability and Quality (AAAQ framework). **Availability** means that facilities, goods and services need to be available in sufficient quantities and equipped with the necessities required to function. **Accessibility** means that facilities, goods and services need to be accessible for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous peoples, women, children, adolescents, older persons or persons with disabilities. There are three dimensions to this-facilities should be non-discriminatory in their usage; the facilities should be physically accessible- vulnerable communities should be able to use the facilities, goods and services; and they should be convenient and flexible in their usage so that all the sections of the society are able to enjoy them. **Affordability** of goods and services means that expenses must not disproportionately burden poorer households. This also requires the removal of administrative barriers that can prevent the poor from accessing facilities, goods and services. The fourth element is **Quality** and refers to facilities, goods and services being relevant, culturally appropriate and of acceptable quality. This paper should thus be understood within this framework.

12 Paragraphs 14 (a) and 27.

13 Article 2.1 ICESCR.

14 Article 2.1 ICCPR

15 CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant).

16 *Ibid*, para 10.



# SECTION 1: LAND

## INTRODUCTION

The importance of land cannot be overstated. It acts as the anchor of social and economic activities in most societies and is also a source of cultural identity. It is the basis of shelter, food production, livelihoods, and environmental health. Its relevance is appreciated in the Agenda which envisages cities and human settlements that “fulfill their social function, including the social and ecological function of land”.<sup>17</sup> It also recognizes the promotion of secure land tenure as one of the elements of sustainable and inclusive urban development.<sup>18</sup> Tenure security is further emphasized in paragraph 35 which represents the most comprehensive statement on land. It advocates for “increased security of tenure for all, recognizing the plurality of tenure types, and to develop fit-for-purpose, and age-, gender-, and environment-responsive solutions within the continuum of land and property rights, with particular attention to security of land tenure for women as key to their empowerment, including through effective administrative systems.” These commitments are consistent

with development research and practice which has shown that land tenure security is key for development and is directly relevant to the achievement of several SDGs including SDG1, SDG 2, SDG 5 and SDG 15. Security of tenure is also an integral part of the right to adequate housing and a necessary ingredient for the enjoyment of many other civil, cultural, economic, political and social rights.<sup>19</sup>

The Agenda, in addition to recognizing the importance of land to sustainable and inclusive urban development also calls for the establishment of a supportive framework for implementation.<sup>20</sup> This includes, among other elements, institutional and regulatory frameworks. Indeed, without sound legal and policy frameworks, access to land and tenure security would be difficult to achieve. Laws identify available forms of tenure, protect property rights, lay out land registration procedures and provide for dispute resolution mechanisms. In the urban context, these functions of the law should enhance the ability of urban residents to have access to land and to secure tenure.

17 Para 13 (a)

18 Para 14 (b)

19 Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, 2013: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/191/86/PDF/G1319186.pdf?OpenElement>

20 Para 86.

However, in some cases, the law leads to the opposite effect. The right to secure tenure is undermined where the law recognizes forms of tenure that are inaccessible to most people or are inappropriate to local realities. Cumbersome and costly land registration procedures are also a hindrance to secure tenure. Furthermore, the law may inhibit full enjoyment of land rights by creating inadequate protections against evictions and involuntary relocations and by limiting the range of accepted dispute resolution mechanisms.

Accordingly, this section highlights the ways in which legal frameworks can undermine the right to secure tenure and proposes strengthening measures. These include a recognition of flexible tenure systems that reflect realities on the ground; prohibition of forced evictions and involuntary relocations; simplification of land administration procedures; and the availability of land dispute resolution mechanisms that are affordable, speedy, flexible, locally appropriate and accessible to the most vulnerable groups.<sup>21</sup> These four aspects will be briefly highlighted in the next sections with a focus on how the legal framework interacts with Human Rights in the land context.

## FLEXIBLE TENURE SYSTEMS AND LAND REGULARIZATION

Land tenure refers to the various relationships between people and land. It involves rules, practices and beliefs that define

conditions of access to, use of, control over and disposal of land. Land tenure has often been seen as existing in binary forms: formal/informal, legal/extra-legal, or *de facto/de jure*. This view ignores the wide and complex spectrum of appropriate, legitimate tenure arrangements that exist between these extremities. These range from various and sometimes overlapping rights of use to conditional or full rights to dispose of the land.<sup>22</sup>

The binary approach to land tenure has been reflected in legal systems through a preference of registered freehold and formalised individual land rights as the ultimate form of land rights rather than being seen as one among many forms of tenure.<sup>23</sup> Consequently, land laws in many parts of the world give recognition to freehold tenure and formalised individual land rights at the exclusion of the other forms. In others, leasehold tenure is recognized but occupancy rights, customary and other group tenure rights are ignored. As such, many people lack security of tenure and are at increased risk of evictions and displacements.

Two groups are noted to be the most affected in urban contexts. First, informal settlements are often built on land upon which dwellers have no legal protection over. Lack of legal recognition of at least some form of 'occupancy rights' has led to evictions of slum dwellers in many parts of the world. They have also been displaced and their structures brought down without compensation due to their perceived lack of rights over such land.

21 The most notable ones in the urban context include women, children, persons with disabilities, slum dwellers, migrants, refugees and internally displaced persons (IDPs).

22 UN-Habitat, *Secure Land Rights for All* (UN-Habitat 2008).

23 UN-Habitat, *Handling Land: Innovative Tools for Land Governance and Secure Tenure* (UN-Habitat 2012).



Second, the rights to land of women, children and other vulnerable groups have been ignored due to systematic cultural and economic barriers in many societies.

UN-Habitat advocates for the 'continuum of land rights' concept as one of the ways to improve security of tenure by recognizing several forms of land tenure. These range from informal rights on one end of the spectrum to formal rights on the other.<sup>24</sup> In between, there are occupancy rights, customary, leasehold, and group tenure among others and include both individual and collective rights. According to this model, registered freehold is not a special form of tenure but only one among many. The applicable tenure should thus be the one that suits the social, cultural and economic needs of local communities and the needs of responsible land administration authorities. The advantage of the continuum of land rights concept is that informal rights are also recognized and legally protected albeit to varying degrees. Indeed, this concept allows the possibility of movement across the spectrum resulting in increased security of tenure.<sup>25</sup>

Legal frameworks should, therefore, reflect the 'continuum of land rights' and recognise multiple forms of tenure for increased protection and inclusion of the most vulnerable in the enjoyment of land rights. An example of this is Namibia's **Flexible Land Tenure Act**, which provides for the creation of a simple land tenure form that is registerable in a public registry. This law recognizes a 'starter title'

which may then be upgraded to a 'land hold title' and later to full ownership.

Another way in which the law can promote security of tenure is through recognition of *land regularisation*. This is a deliberate process by which informal tenure and unauthorized settlements are integrated into the official, legal and administrative systems of land management. The regularisation process is two-fold: juridical/administrative (tenure regularisation) and the physical (material regularisation). In tenure regularisation, the process often starts with the delivery of an administrative permit to occupy that can be conditionally upgraded to a leasehold and, at a later stage, to a long-term registered freehold.

In Kenya, for example, regularisation is allowed by the **Land Act 2012** and the **Land Registration Act 2012** and has mostly taken place in the context of slum upgrading. Public land may be converted to private land for the benefit of occupiers with lack of title. Where the land is big enough to accommodate all the individuals, the conversion results in individual titles. In cases where it is not feasible to give out individual titles, the land may be converted and registered as community land with the slum dwellers getting some form of documentation to show entitlement to occupy their respective parts. Regularisation has also been done in Colombia through the Public Policy for the Integral Improvement of Neighborhoods (CONPES 3604/2009) which has been utilized by the Ministry of

24 Formal land rights can be considered as rights which are officially recognised by the state and explicitly protected by the law. Informal land rights can take various forms, such as individual and collective as well as custom-based rights which lack official and statutory recognition.

25 UN- Habitat, *Handling Land: Innovative Tools for Land Governance and Secure Tenure* (UN-Habitat 2012).

Housing to improve the living conditions of the urban poor.

The legal framework needs to ensure that there is adequate consultation and involvement of affected community members in the regularisation process and proper identification of beneficiaries.

## FORCED EVICTIONS

Forced evictions are gross violations of Human Rights due to their wide-ranging negative effects. They are *“permanent or temporary removal against their will of individuals, families and / or communities from the homes and / or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”*.<sup>26</sup> They not only violate the right to housing but also threaten other rights such as health, education, food, livelihood, and even the right to life especially when evictions are carried out through violence. Such evictions not only affect proprietary interests of the targeted individuals but also destroy their social networks, personal identities and access to employment. Furthermore, they have a disproportionate impact on the most vulnerable and already marginalized groups. Women, girls, children, disabled persons, refugees, migrants and the poor face the brunt of such actions.

The United Nations Human Rights Council has noted that forced evictions have continued to take place in many parts of the world. It urges governments

to as far as possible prevent instances of forced evictions through security of tenure to all. In cases where people must be evicted, the process should involve certain safeguards. These include preparation of an eviction impact assessment, be non-discriminatory in law and in practice, be defined in law and be foreseeable, and be subject to consultation and participation of the affected people.<sup>27</sup> Furthermore, there should be effective recourse mechanisms for those who are adversely affected by the eviction decision. Compensation or resettlement must be done before the eviction and most importantly, forced evictions should never result in homelessness.<sup>28</sup>

A responsible law should, therefore, reflect these principles. It should have a general prohibition on evictions and involuntary relocation. Where they are necessary, they should be lawful (not arbitrary), be for a public purpose or in the public interest; and provide just and adequate compensation or avail alternative housing. If these are missing from the law, public authorities may take advantage of such gaps to displace the most vulnerable in the society.

South Africa offers an example of strong protection against evictions. The Constitution explicitly states that an eviction can only be carried out pursuant to a court order.<sup>29</sup> This provision is elaborated through the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 (PIE)** which lays out procedural

26 Committee on Economic, Social and Cultural Rights, general comment No. 7 (1997) on the right to adequate housing: forced evictions

27 Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2)

28 Basic principles and guidelines on development-based evictions and displacement (A/HRC/4/18, annex I).

29 Section 26(3)

and substantive guidelines. In addition to all evictions being court-ordered, the court has the obligation to consider all relevant circumstances and be ordered only if they are just and equitable. As such, eviction matters cannot be heard *ex parte* and summarily determined. All the relevant circumstances must be presented before the court with the most important one being whether occupiers, including unlawful ones, have alternative accommodation.<sup>30</sup> Considering that the Constitution places the responsibility of providing accommodation on the state, proceedings for eviction normally enjoin the government in order for it to report on its ability to provide alternative accommodation to the unlawful occupiers.

Accordingly, the courts have been reluctant to order evictions where the land in question is public land.<sup>31</sup> They have been more willing to order eviction of unlawful occupants on private land— because of the registered owner’s right to private property. Nonetheless, even in these cases, the court still orders the government to provide alternative accommodation to the occupiers.<sup>32</sup> Indeed, in some cases, it has declined to order evictions but directed the government to compensate the private landowner.<sup>33</sup>

Procedural safeguards are just as important as substantial legal protections in the context of evictions. A law with strong substantive provisions but weak procedural guidelines may create ‘empty rights’ with no means of enforcement.

The most common recommended procedural safeguards include:

The evictions must be preceded by the proper identification of those taking part in the eviction or demolitions and the presentation of the formal authorisations for the action;

- The eviction should be carried out in a manner that respects the dignity, right to life and security of those affected; and
- Special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;
- Evictions need to respect the principles of necessity and proportionality in the use of force;
- Persons subjected to forced evictions must have effective access to their right to a remedy.

## SIMPLIFICATION OF ADMINISTRATIVE PROCEDURES

Protection of land rights heavily relies on their inclusion in the land administration framework. This is particularly relevant in developing countries where land rights tend to take multiple forms due to customary/traditional land rights existing side by side with statutory rights. Some

30 Sarah Fick and Michel Vols, (2016) “Best Protection Against Eviction? A Comparative Analysis of Protection Against Evictions in the European Convention on Human Rights and the South African Constitution” 3 *EJCL*

31 *President of the Republic of South Africa and another v. Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC)

32 *The City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC)

33 *President of the Republic of South Africa and another v. Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC)

countries have also made a transition from state or public ownership of land to private holdings without proper documentation leading to considerable uncertainty over land rights.<sup>34</sup>

Registration of land rights in public records is a crucial component of secure tenure. It gives the beneficiaries a degree of certainty and security. It also gives them a legitimate expectation of legal protection. It has also been argued that registered property increases investments on land and promotes access to credit.<sup>35</sup> While the applicability of this argument in rural areas has been contested,<sup>36</sup> research in several countries shows that millions of the urban poor have been denied credit for lack of proof of legal entitlement which is normally conferred by registration.<sup>37</sup> In addition to promoting security of tenure and access to credit (particularly in urban areas), land registration can facilitate the establishment of land markets and related transactions, reduces litigation over land and offers a good basis for property taxation.<sup>38</sup>

Unfortunately, the benefits of land registration have not been realized in most countries due to complex, lengthy and costly land administrative procedures. Laws that create unclear processes, contradictory provisions, and multiple institutions with overlapping mandates

discourage people from seeking land services. For instance, the registration of land use rights in Mozambique is characterized by a double registration process that involves two different institutions: the Deeds Registry under the Ministry of Justice and the Cadastral Services office which is under the Ministry of Agriculture and Rural Development. The effect of this cumbersome procedure is that most land transactions are undertaken informally.

A good legal framework should have a land administration system that is simple, affordable, expeditious and accessible even to the most vulnerable groups. It needs to involve only a few procedural steps and where appropriate, to comprise a unified system with consolidated processes, often referred to as 'one stop shops.' An example is Burundi, which in 2013, opened a one-stop shop for property registration. The 'shop' combined the services of the municipality of Bujumbura, the Burundi Revenue Authority and the land registry. Consequently, it takes 23 days to register land compared to a sub-Saharan average of 54 days. The process is also more affordable: 3.1 per cent of property value while the average cost in sub-Saharan Africa is 7.6 per cent.<sup>39</sup>

34 Tim Hanstad, "Designing Land Registration Systems for Developing Countries," (1998), 13 *American University International Law Review* 3.

35 Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000).

36 Celestine Nyamu-Musembi, "Breathing Life into Dead Theories about Property Rights: de Soto and Land Relations in Rural Africa," (2007) 28 *Third World Quarterly* 8.

37 Klaus Deninger, *Land Policies for Growth and Poverty Reduction* (World Bank 2003).

38 Tim Hanstad, "Designing Land Registration Systems for Developing Countries," (1998), 13 *American University International Law Review* 3.

39 World Bank, *Doing Business 2019: Burundi*, (World Bank Group 2018).

## ACCESS TO LAND DISPUTE RESOLUTION MECHANISMS

The centrality of land to the social and economic well-being as well as sense of identity to many individuals and communities means that disputes and conflicts are inevitable. These take a variety of forms. They include: boundary disputes; disputes caused by legal pluralism; those arising from lack of land registration; limited access to land due to discrimination by law, custom or practice; illegal allocations; intra-family disputes; and competing uses; unauthorized disposal of communal land and disputes between returnees and settlers in post-conflict zones, among others.<sup>40</sup> Such disputes and conflicts often lead to loss of land rights of some members at the expense of others. As such, it is vital that dispute resolution mechanisms are not only *available*, but also that they are *accessible* to all.

In addition to the formal justice system, the legal framework should recognize and encourage alternative dispute resolution (ADR). This refers to a group of processes through which disputes and conflicts are resolved outside of formal litigation procedures.<sup>41</sup> The most common forms include negotiation, consultation, conciliation, inquiry, mediation and arbitration. ADR is particularly relevant in light of the limitations of the formal court system, which may involve lengthy and

costly processes laced with complex procedures that limit access for the poor, women and other vulnerable groups. It is technical in nature and obliges litigants to be represented by lawyers thus making it more expensive. The formal justice system, especially in common law jurisdictions, is adversarial in nature and results in a win-lose outcome for the disputants. These factors hinder access to justice for many, women, children and the poor being particularly affected. They are unable to assert and defend their rights due to inherent societal power imbalances that come into play in the formal court system.<sup>42</sup>

In contrast, ADR has several advantages. It is relatively speedy, less costly, flexible and has less technicalities. It gives the parties the choice of selecting arbiters, involves them in the dispute resolution process and has the potential to result in a win-win situation thus preserving the parties' relationships post-dispute.<sup>43</sup> As opposed to the public nature of court cases, it also offers privacy to the parties. These benefits make ADR an attractive option for the vindication of rights. Indeed, most victims of land rights loss often belong to the most marginalised and discriminated groups, such as the urban and rural poor, racial or ethnic minorities, indigenous peoples, irregular migrants, IDPs and women.<sup>44</sup> ADR ensures that the affected have access to remedies in the context of land disputes.

40 Babette Wehrmann, *Land Conflicts: A Practical Guide to Dealing with Land Disputes*, (GTZ 2008).

41 Albert Fiadjo, *Alternative Dispute Resolution: A Developing World Perspective*, (Cavendish Publishing Limited 2004).

42 Marc Galanter, "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change," (1974), 9 *Law & Society Review* 1

43 Albert Fiadjo, *Alternative Dispute Resolution: A Developing World Perspective*, (Cavendish Publishing Limited 2004).

44 UN-Habitat, *Secure Land Rights for All* (UN-Habitat 2008).

It is also important for the legal framework to recognize the role of traditional/customary dispute resolution mechanisms. These are particularly useful in communities which view land as more than an economic asset, but as a source of cultural identity. It binds the past, present, and future generations and promotes community cohesion.<sup>45</sup> As such, land disputes must be resolved in a respectful, comprehensive and culturally appropriate manner. Customary dispute resolution mechanisms place a premium on harmony and cohesiveness within the community. They are aimed at not only resolving the dispute at hand but also preserving the parties' relationship post-resolution. This advantage is complemented by two others. First, they are often inclusive and participatory in that all the disputing parties are involved in dispute resolution. Second, they are credited with legitimacy by the community which makes their outcomes readily acceptable.<sup>46</sup>

Nonetheless, it should be noted that because customary dispute resolution mechanisms are based on specific cultures which vary from place to place, they could be incompatible with international Human Rights standards. Some cultures discriminate between individuals based on sex, marital status, ethnic or social origin, colour, age, disability and religion, among other grounds. Accordingly, the law should strike a reasonable balance between recognising traditional systems on the one hand and ensuring that basic principles of equality, equity and non-discrimination are upheld on the other.

## CONCLUSION

Access to land and secure tenure have positive Human Rights implications for billions of urban dwellers. In addition to being a right in itself in the context of the right to adequate housing, access to land and secure tenure are prerequisites for the enjoyment of other rights. These include, the right to food, right to a livelihood, the right to protection of the family and the right to the highest attainable standard of health, among others. Therefore, legal frameworks must protect the rights of the most marginalised and discriminated groups by recognising flexible tenure systems; limiting evictions and involuntary relocations; simplifying administrative procedures; and facilitating access to justice by promoting ADR mechanisms. Only then can governments meaningfully fulfill their obligations in the international Human Rights framework.

<sup>45</sup> Babette Wehrmann, *Land Conflicts: A Practical Guide to Dealing with Land Disputes*, (GTZ 2008).

<sup>46</sup> *Ibid.*



Community members receive certificate of customary ownership in Uganda ©UN-Habitat/GLTN



Streets as public spaces Nairobi ©UN-Habitat/Julius Mwelu



## SECTION 2: URBAN PLANNING

### INTRODUCTION

Urban plans create a path for urban growth that seeks to maximize the positive and minimize the negative effects of urbanization. They help revitalise physical facilities in urban areas as well as develop and conserve areas of natural environmental significance. All too often, however, the basic elements of urban planning are not clearly defined in the regulatory framework governing the planning system nor reflected in the plans, making planning ineffective in shaping cities and achieving sustainable and inclusive results. Therefore, in order to achieve sustainable and inclusive urban development where Human Rights are at the forefront, the Agenda recognises the role of spatial planning calling for a paradigm shift in the way urban areas are planned and designed.<sup>47</sup> It further notes that spatial organization, accessibility and the design of urban space and the provision of infrastructure and basic services can promote or hinder social cohesion, equality and inclusion.<sup>48</sup> Indeed, urban planning and its regulatory aspects have been a major contributor to urban exclusion and Human Rights violations

on numerous occasions. The modernist origins which sought to ‘civilize’ and ‘modernize’ countries in the Global South led to the transplantation of foreign models to developing countries without due regard to their cultural, social, political and economic contexts. These models established technical standards and processes in areas such as land markets, land use and zoning regulations and building codes that could not be met by most of the population because they imposed time consuming and high compliance costs on individuals. After political independence, these countries had the opportunity to establish more inclusive regimes but most of them did not.<sup>49</sup> Instead, many exclusionary aspects of the locally inappropriate planning systems were retained for various reasons ranging from inadequate capacity to lack of political will.

Consequently, urban dwellers, particularly the poor, are often forced into informality in urban areas. This is evidenced by the prevalence of informal settlements in most developing countries. Informality, however, means that while millions of poor people are, to some extent, able to

47 Para 5.

48 Para 25.

49 See for instance UN-Habitat, *Effectiveness of Planning Law in Sub-Saharan Africa - Urban Legal Case Studies, Volume 8* (2019) available at <https://unhabitat.org/node/142957>

enjoy the benefits of urbanization and have access to the opportunities, especially for young people to work and get an education, they constantly live in a precarious situation because the areas they occupy operate outside the legal, planned, and regulated channels of city making, and are usually accompanied by ambiguities of spatial ownership. Thus, they are vulnerable to evictions and harassment from government authorities, often coupled with violence and destruction of property. Their economic inclusion is curtailed due to lack of legal protection and access to public spaces, and sometimes due to the increases in capital and revenue streams enjoyed by landowners. They are also vulnerable to extortion and exploitation through arbitrary enforcement of the law and are excluded from urban governance processes. Moreover, they live under difficult conditions with inadequate access to services such as water, sanitation, health facilities, electricity, security and housing, among others. It can thus be argued that urban planning in developing countries has not only failed to accommodate the way of life of a significant proportion of urban residents but has also contributed to social and economic injustices.

## THE ROOTS OF URBAN EXCLUSION

Modern spatial planning was a response to the rapid and chaotic growth of cities in Western Europe in the aftermath of the Industrial Revolution. At this early stage, planning was a tool to address the

negative externalities of industrialization and urbanization with a particular focus on improved sanitation and control of diseases and epidemics. Planning was a technical activity to be carried out by trained experts. In the decades that followed, modern planning was transferred to developing countries through colonization, international development agencies, foreign consultants and educational institutions. Colonialism was particularly influential in the transfer of planning models and laws. Britain for example, introduced British urban forms and standards to its colonies in Asia and Africa. In fact, in 2018, a study “Colonial legacies: Shaping African cities” that includes 318 cities in 15 former British and 13 former French colonies in Sub-Saharan Africa, excluding South Africa, indicates that the spatial structures of a large set of cities in Sub-Saharan Africa are strongly influenced by the colonial rule.<sup>50</sup>

The transplantation was based on several assumptions: that it was only a matter of time before developing countries ‘modernized’ (and so it was imperative that ‘modern’ standards were put in place); that local governments had the technical capacity and resources to implement such plans; that western-style property rights system – characterized by individual, freehold land ownership - were inevitable; that urban development could be anchored by controlling the use of land; and the belief that a future ideal state of a city could be planned and achieved and that once this happened, no further changes would occur.<sup>51</sup>

50 Baruah N, Henderson JV, Peng C, ‘Colonial Legacies: Shaping African Cities’ (2018) *American Economic Review*  
51 Vanessa Watson, “Changing Planning Law in Africa: An Introduction to the Issue,” (2012) 22 *Urban Forum*.

The assumptions on which the transfer of planning models was based did not hold in developing countries. Colonial urban fantasies were met with the reality of weak and under-resourced local governments, different land tenure forms, rapid urban population growth and expanding informal settlements. The consequence was the implementation of planning models and legal frameworks that were inappropriate to the contexts in which they were applied which has forced people to operate outside the law.<sup>52</sup>

The importation of the planning models was not always in the interest of good planning. In colonial Sub-Saharan Africa for example, towns were usually zoned into different segments with Europeans and the indigenous population living separately. The European zones were characterized by large, privately owned and well serviced plots which were subject to European-style layouts and building codes while most of the indigenous population resided in crowded, high density areas with limited public infrastructure and services, and few or no building controls. As such, planning was used as a tool of social segregation and exclusion in many colonized territories.

It is important to note that these models, and their legacy, have far outlived the colonial era. For example, many Commonwealth countries trace the origins of their current planning laws to the 1947 Town and Country Planning Act of England and Wales and have not fundamentally questioned the systems the law established. Furthermore, the advent of

political independence led to the emergence of a new elite that stood to benefit from the existing planning regime. An easily manipulated system coupled with weak democratic systems and inadequate financial and human resources entrenched the already exclusionary nature of planning. The cumulative effect of these factors was an urban population that was marginalised by decades of colonial and post-colonial self-interested administrations that were out of touch with the needs of its people.

## HOW URBAN PLANNING LAW CAN UNDERMINE HUMAN RIGHTS AND INCLUSIVITY

Modern planning laws, at the national, regional and most commonly, at the local level (city by-laws) in developing, and some developed, countries have frequently inherited several defects from their historical legacy. They are not responsive to 21st Century urban challenges such as climate change, informality and food insecurity. Furthermore, by seeing planning as a predominantly technical activity to be left to the professional judgement of planners, urban planning law in many developing countries lacks transparency and excludes communities and other stakeholders from participating in the planning and management of urban areas.<sup>53</sup>

Urban planning law in developing countries, including land use zoning and building regulations usually requires compliance with particular forms of land

52 Matthew Glasser, "Land Use Law and the City: Toward Inclusive Planning," (2013) *The World Bank Legal Review*.  
53 United Nations Human Settlements Programme, *Planning Sustainable Cities*, (UN-Habitat 2009).

tenure, building forms and construction materials. These often embody foreign standards, building technologies and imported materials. Coupled with requirements for setbacks, minimum plot sizes, coverage, on-site parking, etc. make it impossible for the urban poor to reside within urban areas formally due to the costs and complexity of regulatory compliance and the burden of the process. In Kenya, for example, the Physical Planning (Building and Development) (Control) Rules 1998 and the Building Code 1968 prohibit the construction of buildings with second hand materials<sup>54</sup> and provide that domestic buildings should leave an open space of “at least 6 metres (20 ft.) extending throughout the whole width of the front of the building”.<sup>55</sup> The latter is clearly inconsistent with the reality of space constraints in slums while the former fails to consider the economic situation of slum dwellers in that second hand materials may be the only affordable option for them.

A study conducted in nine cities in Africa, Asia and Latin America shows that the unsuitability of planning and building standards to the poor is prevalent.<sup>56</sup> Minimum plot sizes in many developing countries are considerably higher than the size of plots regularly occupied in informal settlements and cost more than what many households can afford.<sup>57</sup>

Indeed, the lack of appropriate standards has been one of the leading causes of informality in Sub-Saharan Africa, together with land distribution and markets. The situation can be summed up as follows:

*“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 in their efforts to solve their own shelter needs.”*<sup>58</sup>

In Asia and Latin America, the ineffectiveness of planning systems is manifested through locally inappropriate standards and cumbersome regulatory regimes. In Lahore, Pakistan, for example, developers are required to retain 50 per cent of all new urban developments for public open space and main road reserves should be 46 metres wide.<sup>59</sup> These requirements, while having some benefits, impose excessive costs for poor urban dwellers effectively locking them out of formal processes. In Peru, urban development processes can take up to 83 months due to the complexity of the processes with the planning legislation being characterized as “confusing, fragmented and incoherent” thus constituting a ‘black box’ for both practitioners and laymen”.<sup>60</sup>

54 Section 33 of Building Code.

55 Section 18 of the Physical Planning (Building and Development) (Control) Rules; and Section 26 of Building Code.

56 Devas, N. (2001) ‘Does city governance matter for the urban poor?’ *International Planning Studies* 6(4): 393–408

57 Erminia Maricato, *Searching for the Just City: Debates in Urban Theory and Practice* 10 (Routledge 2009).

58 Akin L. Mabogunje, “The Development Process: A Spatial Perspective,” (1982), 16 *The Journal of Developing Areas*.

59 Barbara Lipman and Robin Rajack, “Improving Access to Urban Land for All Residents: Fulfilling the Promise” in *Urban Development Series*, (The World Bank 2011).

60 Ana María Fernández-Maldonado, “Unboxing the Black Box of Peruvian Planning” (2019), 34 *Planning, Planning Practice & Research*.

While developing states are the ones in which inclusive planning law has been predominantly absent, developed ones have also manipulated it for exclusionary purposes. This fact has been noted as:

*"The problem the planners tackled was not how to undo poverty but how to hide the poor. Urban renewal was designed to segment the city so that barriers of highways and monumental buildings protected the rich from the sight of the poor, and enclosed the wealthy centre from the poor margin. New York is the American city that best exemplifies this transformation."<sup>61</sup>*

The regulatory burden<sup>62</sup> also exhibits the exclusionary nature of urban planning law. These laws are often characterized by ambiguous processes with overlapping or contradicting procedures which lead to higher discretion of public authorities, limited accountability and corruption, which can discourage an otherwise law-abiding citizen from adhering to the law.<sup>63</sup> Unfortunately, non-compliance usually means that the affected persons are operating outside the law and hence cannot claim its protection if they face eviction or demolition of their structures.<sup>64</sup>

Ultimately, the unsuitability of planning law in developing countries to the contexts in which they operate and its

catapulting effect on informality results in two probable outcomes, both of which have serious Human Rights implications. The first is that such standards are strictly enforced with the aim of rooting out all informality. The effect of this is widespread evictions in and demolitions of informal settlements – which are often seen as “blight spots” on the city. An obvious example of strict enforcement without regard to local circumstances was Zimbabwe’s “Operation Murambatsvina” (literally “Operation Drive out Rubbish”) where the Town and Country Planning Act allowed the government to evict more than 700,000 people.<sup>65</sup> The second outcome is that the law is not consistently enforced but those operating outside it live under the constant threat of arbitrary moves, extortion, and harassment. Indeed, it is under these circumstances that dubious land deals and corrupt arrangements have the space to flourish as political elites, private developers and commercial investors take advantage of grey legal spaces at the expense of the urban poor who continue to face poverty, marginalization and tenure insecurity.<sup>66</sup>

61 Fullilove, M.T. 2005 *Root Shock*. How tearing up city neighbourhoods hurts America, and what we can do about it. One World books, New York.  
62 This refers to the administrative cost of a regulation in terms of money, time and complexity.  
63 Mousmouti, Maria and Crispi, Gianluca (2015): Good Legislation as a Means of Ensuring Voice, Accountability, and the Delivery of Results in Urban Development, *The World Bank Legal Review: Improving Delivery in Development - The Role of Voice, Social Contract and Accountability*, Vol 6, Washington D.C., (World Bank Group).  
64 Matthew Glasser, “Land Use Law and the City: Toward Inclusive Planning,” (2013) *The World Bank Legal Review*  
65 Stephen Berrisford, and Kihato, M., “The role of planning law in evictions in sub-Saharan Africa,” (2006), 37 *South African Review of Sociology*.  
66 Stephen Berrisford, “Unravelling Apartheid Spatial Planning Legislation in South Africa: A Case Study,” (2012) 22 *Urban Forum*

# REFORMING URBAN PLANNING LAW FOR HUMAN RIGHTS AND INCLUSIVITY

## INNOVATIVE APPROACHES TO PLANNING

Many if not all problems in cities can be avoided or mitigated through foresight and planning; the securing of road grids in advance of development, the preparation of adequate urban lands for future urban populations using growth estimates and mechanisms that allow for progressive regularization, affordable housing or for the improvement of informal housing are all imperative. The current planning models in developing countries require a paradigm shift in the way urban space is allocated and utilized. Planning models that exclude the urban poor and criminalize important aspects of the way of life of the majority of the urban population are clearly inappropriate.

A Human Rights based requirement for plans would be for them to be designed with consideration of the needs of all social groups and that their drafts and outcomes should be assessed and monitored accordingly. Several innovative approaches have been developed including strategic spatial planning, integrated development planning and land regularization and slum upgrading. These approaches are responsive to current challenges and opportunities within developing countries. They are also supported by the Agenda, which calls for flexibility in plans “to adjust to changing

*social and economic conditions over time*”.<sup>67</sup> It also identifies slum upgrading and regularization as one of the ways of promoting access to sustainable and affordable housing and urges increased financial and human resources towards such programmes.<sup>68</sup>

Innovative planning approaches appreciate that a substantial number of people live in and work informally. It legitimises their urban status and works with them to improve their standard of living. They do not seek the preparation of ‘perfect’ master plans and the enactment of ambitious laws that have little hope of ever being implemented or to create an ‘ideal’ city. Instead, their main focus is supporting the majority of the urban population to lead a decent and productive life, notwithstanding their frequent need to rely on informal strategies. This approach can be found within the Agenda, which states that urban policies, in addition to being inclusive and participatory, must also be *implementable*.<sup>69</sup>

The most common moves include lowering planning standards to levels which the majority can comply with – but without compromising basic health and safety standards. Innovative planning approaches may involve lower minimum plot sizes, setbacks and street widths and higher densities. For example, smaller plots are desirable as they engender access and affordability to land and housing facilities to the poor and generate compact building forms which enhance higher densities and increase walkability. Similarly, smaller setbacks are more conducive for

67 Para 94.

68 Paras 107 and 109.

69 Para 86.

creating friendlier public spaces and environments for pedestrians as opposed to larger ones which encourage automobile transit at the expense of compact walkable cities. Large setbacks also reduce the amount of land available for building and in land-poor contexts, may contribute to high housing costs.

Local authorities should also enact legislation that recognises innovative planning tools such as development rights. In such cases, the role of law is separating ownership from the right to build with the latter being vested in public authorities. The vesting of development rights in public authorities allows them to leverage it for various social benefits. For example, a city may issue additional development rights as a “density bonus” to developers who include affordable housing in their projects. In cases where the developers are not themselves interested in providing affordable housing, the public authority may use the revenue generated from the sale of development rights to construct affordable units in other areas of the city. This mechanism has been used in São Paulo where between 1987 and 1998, it approved 857,424 m<sup>2</sup> of building area, raising US \$122.5 million that was in turn used to fund the construction of 13,000 social housing units.<sup>70</sup> In addition to sale of development rights, planning systems would also promote inclusivity by equitable sharing of urbanisation benefits through appropriate taxation including land-based finance mechanisms such as betterment levies, special assessments and developer exactions.

These systems would ensure that urban planning goes hand in hand with social and economic development.

UN-Habitat advocates for most of these elements through the Five Principles of Sustainable Neighbourhood Planning which encourage planning practices that promote adequate public spaces and streets, high density, mixed land-use, social mix, and limited land use specialisation. Moreover, as the Agenda is undoubtedly human-rights centric, urban planning law should be influenced by a Human Rights-based approach. It should seek to facilitate the enjoyment of Human Rights rather than hindering it. Human Rights should be at the centre of every planning decision. The decision should be evaluated by considering how it might impact international Human Rights standards. Such an approach would, for instance, refer to the Guiding Principles on Internal Displacement<sup>71</sup> when a planning decision has the potential to result in evictions and displacement of people.<sup>72</sup> Similarly, right holders that are likely to be affected by, and duty bearers with an obligation related to, a given planning decision should be identified and the nature and extent of likely impacts and obligations should be reasonably disaggregated by relevant major groups.

## ENHANCING PUBLIC PARTICIPATION

The most effective way of achieving urban inclusion is ensuring that all segments of the population are involved

70 Sandroni (2011): Urban value capture in São Paulo using a two-part approach: Created land and sale of building rights.

71 Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2)

72 Basic principles and guidelines on development-based evictions and displacement (A/HRC/4/18, annex I).

in the management of urban areas. Meaningful participation promotes the interests of all, including the most vulnerable and is ultimately helpful in facilitating the enjoyment of Human Rights. Human Rights standards influence the conditions for participation. For processes to be truly participatory, they should reflect the requirement for “active, free and meaningful” participation under the United Nations Declaration on the Right to Development. Participation is also emphasized in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC).<sup>73</sup>

The Agenda acknowledges public participation both as a right in itself as well as an enabler to the fulfilment of other rights. Para 41 highlights the commitment to “*promote institutional, political, legal and financial mechanisms in urban areas to broaden inclusive platforms that allow meaningful participation in decision-making, planning and follow-up processes for all, as well as enhanced civil engagement and co-provision and co-production.*” The Agenda also encourages “*effective participation and collaboration among all relevant stakeholders, including local governments, the private sector and civil society, women, organizations representing youth, as well as those representing persons with disabilities, indigenous peoples, professionals, academic institutions, trade unions, employers’ organizations, migrant associations and cultural associations, in order to identify opportunities*

*for urban economic development and identify and address existing and emerging challenges*”. More specific to planning, the Agenda requires participatory approaches at all stages of the urban and territorial policy and planning processes (including, conceptualisation, design, budgeting, implementation, evaluation and review). It also supports capacity building measures that are aimed at improving public participation in urban and territorial development.<sup>74</sup>

Accordingly, urban laws must include mechanisms to ensure that the urban poor are not only heard, but that their views are taken into consideration during decision making. Involving them in the formulation of laws improves the quality of the legislation by incorporating multiple perspectives as well as increasing the likelihood of compliance. When people feel included, they tend to take more ownership of the law, and more actively seek its enforcement, as it was made with their contribution. In the same vein, consultations among different stakeholders are critical in improving legislative content and enhancing legitimacy.<sup>75</sup>

Decisions and processes in cities - such as those affecting the right to adequate housing and the right to an adequate standard of living - need to be transparent, subject to public scrutiny, and must include free and fair dispute and complaint mechanisms. Transparency requires that individuals affected by administrative decisions related to planning, are allowed and encouraged to know not only the basic facts and figures,

73 Article 14 CEDAW and Article 12 CRC.

74 Paras 48, 92, 148 and 155.

75 OECD, *Citizens as Partner: Information, Consultation, and Public Participation in Policy-Making 22* (OECD 2001).



but also the mechanisms and processes behind such administrative transactions. It is the duty of civil servants, managers and trustees to act visibly, predictably and understandably. The right to information is a condition for meaningful participation in the different functions of society.

One of the ways in which countries can entrench public participation in urban governance is to incorporate it in the constitution. Kenya offers a good example of this practice. Article 10 of the 2010 Constitution lists public participation as one of the 'national values and principles of governance.' This is reiterated in the Urban Areas and Cities Act 2011 where "institutionalised active participation by residents in the management of its affairs" is one of the principles of governance and management of urban areas.<sup>76</sup> Indeed, the Second Schedule of the Act is titled "Rights of, and Participation by Residents in Affairs of their City or Urban Area" and provides for "*the right to of residents to contribute to the decision-making processes of the city or urban area.*" Similarly, strong provisions on public participation are found in the County Governments Act 2012.<sup>77</sup> Consequently, Kenyan courts have declared legislation enacted without adequate public participation to be unconstitutional as follows:

*" . . . public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates . . . it behoves the County Assemblies in enacting*

*legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. . . the County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and . . . to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action".<sup>78</sup>*

However, despite the existence of laudable legal provisions, the absence of a framework for the achievement of public participation in governance presents a loophole whereby it merely becomes a formality, preventing the attainment of genuine and meaningful public participation.<sup>79</sup> The Constitution is fairly recent, and institutionalisation of public participation is yet to occur. Legal recognition should thus be seen as only the first step in the inculcation of meaningful and inclusive participation in urban governance processes.

## HIERARCHY AND EFFECTIVE COORDINATION

The effectiveness of urban planning depends on the coordination of the

<sup>76</sup> Section 11.

<sup>77</sup> Sections 87, 88, 89 and 105.

<sup>78</sup> *Robert N Gakuru & another v Governor of Kiambu County and 3 others* (Petition 532 of 2013).

<sup>79</sup> Office of the Attorney General & the Department of Justice, *Kenya Draft Policy on Public Participation*, (2018).

planning system hierarchy in place. A clear planning hierarchy can ensure accountability and transparency of the system. It often provides for mechanisms of appeal if actions and decisions taken by public officials are not meeting their stated objectives and responding to the needs of the community they are meant to be benefiting. This in turn contributes to better governance. A planning hierarchy implies consistency of land-use planning policy objectives from the national to the local and neighborhood scale in a system that enables more detailed plans to remain in line with the upper level plans. The coherence of planning instruments, and the way they respond to one another will determine the effectiveness of the planning system, and the enforcement and implementation of strategies.

In some countries, laws and processes that support planning laws and land administration are ineffective and no clear mechanisms to relate one plan to one another are put in place. If a clear hierarchy is missing, coordination between institutional roles may not always be clarified, especially on the coordination between technical urban services and approving authority. This is likely to leave coordination of processes at the discretion of authorities without the mechanisms necessary for accountability in decision-making. If hierarchy between plans is characterised by ambiguities, it may be difficult for the population and other stakeholders to know and understand properly what the law is and how it affects their rights.

Establishing a clear planning hierarchy enables movement from a technocratic to a rights-based model. Decisions and processes in cities - such as those affecting the right to adequate housing and the right to an adequate standard of living - need to be transparent, subject to public scrutiny, and must include free and fair dispute and complaint mechanisms. Transparency requires that individuals affected by administrative decisions related to planning, are allowed and encouraged to know not only the basic facts and figures, but also the mechanisms and processes behind such administrative transactions. It is the duty of civil servants, managers and trustees to act visibly, predictably and understandably. The right to information is a condition for meaningful participation in the different functions of society.

## EMPHASIS ON PUBLIC SPACE

Public spaces are crucial to human rights and inclusivity. The Charter of Public Space<sup>80</sup> defines them as “*all places publicly owned or of public use, accessible and enjoyable by all for free and without a profit motive.*” Public spaces can include streets, sidewalks, public toilets, entertainment venues (theatres, museums), public markets, libraries, sporting venues, squares, gardens, public hospitals, public schools, parks, and plazas. The core aspect of public space is that it is designed for all citizens regardless of economic and political status, origin or nationality. SDG Goal 11.7 aspires to provide “universal access to safe, inclusive and accessible, green and public

80 The Charter of Public Space, adopted at the II Biennial Session of Public Space in Rome in May 2013. Available at, [www.biennalespaziopubblico.it/international/outputs/the-charter-of-public-space/](http://www.biennalespaziopubblico.it/international/outputs/the-charter-of-public-space/)

spaces, in particular for women and children, older persons and persons with disabilities by the year 2030.” For this reason, public spaces have the potential to make a city more equal and inclusive and promote Human Rights of everyone including the most marginalised and vulnerable.

The Agenda places enormous value on public spaces and dedicates several paragraphs to this subject. It identifies the ideal features of public spaces as “safe, inclusive, accessible, green and of high-quality” and highlights the wide range of functions performed by public spaces. These may be categorised into social, economic and civil-political. Social benefits are derived from public spaces acting as multifunctional areas for social interaction and inclusion, human health and well-being; cultural expression and dialogue among a wide diversity of people and cultures; and spaces where “living together, connectivity and social inclusion” are promoted. Public spaces offer economic benefits through their ability to be leveraged for rise in property values in addition to a substantial number of urban residents who rely on them for livelihood including street vendors and hawkers, among other small-scale traders. This fact is captured by the Agenda through a recognition that such spaces may “facilitate business and public and private investments and livelihood opportunities for all”. Civil-political functions are served through using public spaces to “build peaceful, inclusive and participatory societies”. In addition to these three categories, it is also notable that the Agenda

recognises more cross-cutting functions of public spaces. These include important roles for disaster resilience, food security, health and well-being, conservation of natural resources, and provision of ecological services such as clean air.<sup>81</sup>

Participatory ways of creating public space and its targeted use and management can contribute to the progressive realisation of several Human Rights in cities, including access to work under just and favourable conditions, improved standard of living, education, health, equality and freedom of expression. It can be argued that by building public spaces that meet the Human Rights standards of accessibility, cultural adequacy, affordability, availability and relevant quality, the duty bearer, in this context, municipality and the local government officials, are able to realise their Human Rights obligations for all at a cost substantially lower than providing the rights through other means. In turn, the citizens, through the co-creation, use and management of public space are able to enjoy internationally recognised civil, political, social, economic and cultural rights. These rights come into play due to the close involvement of urban residents in the creation of public spaces. Co-creation is the “joint development, generation, production and creation of new proposals of contextual and unique solutions that are based on specific, local and personal knowledge and skills, potentials and opportunities as well as problems, and obstacles of the community and place.” It gives urban residents “more direct involvement in defining their needs and priorities, collaboratively

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81 Relevant paras include 37, 53, 67 and 109.

*finding solutions, influencing decisions and achieving better outcomes”.*<sup>82</sup>

In addition to co-creation, inclusive public spaces may be enhanced through participatory placemaking which comprises of actions at a hyperlocal level e.g. where citizens focus on a street, park, public square or open space in their neighbourhood. It is not simply another variant of urban design. The design and planning professions often prefer to use the term ‘place making’, but with an understanding that it is a statement of the desired outcome of their design endeavours. In ‘participatory placemaking’ however, the role of experts and professionals is to support communities and local active citizens in a process of understanding the uses and potential of existing public spaces and to acknowledge the agency of citizens to make changes and improvements.

Accordingly, to promote human rights, adhere to the Rule of Law and to provide more value to the community, urban legislation that has an impact on public space should be drafted in a way that allows to determine values such as quality and accessibility of the public space for use for demonstrations, economic activities, artistic performances, etc.

It is also noteworthy that the process of allocating land for public space might have Human Rights implications. The mechanisms to allocate and acquire land for public space such as compulsory acquisition (expropriation), subdivision exactions, land readjustment, compulsory dedications of land portions,

negotiated exactions and planning incentives can be complex and may result in conflicting claims. For example, in compulsory acquisition, authorities often use their power to acquire land when it is deemed necessary for a ‘public purpose.’ However, the definition of ‘public purpose’ varies with some jurisdictions giving it a literal meaning – public usage and ownership – while others have interpreted it more broadly and allow for the private acquisition of property to achieve a public purpose. These variances make compulsory acquisition a contentious matter and subject to numerous litigation claims.

Similarly, the manner in which public authorities utilise their power to create public space through subdivision exactions and compulsory dedications can raise discrimination concerns especially where such power is exercised inconsistently or arbitrarily. It is thus important that such rules are clear to avoid Human Rights violations. Regulatory instruments to transfer ownership or control of an existing space from the local government to a private owner should be interpreted in a manner that enables the community to access and use the public space.

## CONCLUSION

The ineffectiveness of urban planning to regulate urban development in many countries in an inclusive and context-specific manner has serious Human Rights implications. With the current rapid urbanisation of the cities in the Global

82 Ina Šuklje Erjavec, “A Spotlight of Co-creation and Inclusiveness of Public Open Spaces” in Carlos Smaniotto Costa, Ina Šuklje Erjavec, Therese Kenna, Michiel de Lange, Konstantinos Ioannidis and Gabriela Maksymiuk Martijn de Waal (Eds), *CyberParks – The Interface Between People, Places and Technology* (Springer 2019).

South, where urban growth is taking place in a disorderly and unplanned manner, reforms of the current planning laws are urgently needed. The New Urban Agenda offers fresh perspectives on how Human Rights and inclusivity can be entrenched in urban areas through urban planning law. It puts Human Rights at the centre of its objectives and affirms that all urban residents are entitled to the full spectrum of rights contained in international Human Rights treaties. To this end, it calls for measures that promote urban inclusivity and prosperity for all through among others, innovative planning approaches that are suitable to informal settlers, enhanced public participation in urban governance, clear planning hierarchies and coordination among planning authorities and creation of public spaces.



Street vendor in Kuala Lumpur, Malaysia ©Anne Amin

## SECTION 3: URBAN ECONOMY

### MUNICIPAL FINANCE

Local authorities perform a range of functions with slight variations among countries. In general, these are related to allocation of public goods like transportation services; environmental services including water, sewerage, and solid waste collection and disposal; social services such as health, housing and fire protection; planning and development; and provision of recreation and cultural services. In some countries, they are also responsible for primary and secondary education, sharing this mandate with higher government levels.<sup>83</sup> Financing these services is crucial and is a key issue in current debates especially where urbanisation is growing rapidly.<sup>84</sup> In Africa, for example, the urban growth rate is almost 11 times more rapid than that of Europe.<sup>85</sup> Africa's rapid urbanisation is driven by rural–urban migration, and spatial expansion of urban areas through land annexation. Without adequate funds, local authorities cannot deliver on their infrastructural and service responsibilities as the availability of resources is an essential determinant of the quality of life of urban residents. It is noteworthy

that the average capital expenditure per capita for local services in low-income countries is US\$ 23 while it stands at US\$ 602 in high-income countries.<sup>86</sup>

In the context of Human Rights in urban areas, municipal finance is relevant in several ways. First, as indicated above, the lack of adequate resources has a direct impact on the provision of services. In such cases, informal settlers and the poor are hit the hardest. Second, the manner in which revenue sources are determined, assessed and resources are collected has Human Rights implications. For example, the identification of a tax base and setting a tax rate inevitably places an obligation on urban residents. If this obligation is not equitably placed, it may result in a burden that is disproportionately carried by some people. Third, the budgeting process i.e. determining how, where and on what the resources are going to be spent affects people. Budgeting needs to be transparent, participatory, accountable and inclusive in both the process and the outcome if Human Rights are to be promoted.

83 UN-Habitat, *Guide to Municipal Finance* (UN-Habitat 2009).

84 UN-Habitat *Finance for City Leaders Handbook* (UN-Habitat 2016).

85 UN-Habitat, *World Cities Report 2016* (UN-Habitat 2016).

86 UN-Habitat, *Global Municipal Database* (UN-Habitat 2018).

In light of the three aspects identified, this section focuses on:

- a) Promoting participation, inclusivity, transparency, and accountability in revenue collection and budgeting decisions; and
- b) Increasing the amount of revenue options for local governments through regulatory means and promotion of land value sharing through land-based finance.

### INCLUSIVITY, TRANSPARENCY AND ACCOUNTABILITY IN MUNICIPAL FINANCE

Municipal finance in many parts of the world is heavily reliant on inter-governmental transfers and property taxes. UN-Habitat estimates that in low income and lower-middle income countries, locally collected revenue is only about 46 per cent and 58 per cent respectively of local budgets.<sup>87</sup> Furthermore, taxes and user fees remain the main own-source revenue sources.<sup>88</sup> Among these instruments, property taxation is the primary source and may have direct impacts on Human Rights depending on how they are administered. A property tax system involves several steps including the identification of properties, preparation of an assessment roll, setting of tax rates, issuance of tax bills, collection and responding to assessment appeals. Most of these steps involve an interaction with Human Rights.

The identification of taxable properties and setting the tax rate may progressively affect some individuals or parts of the city disproportionately. While there is no universally recommended taxation method with each country or municipality adopting context specific measures, it is important for urban authorities to appreciate the effect of their taxation policies. Policies that impose tax obligations on people with the least ability to carry them may result in social and economic hardships with negative Human Rights implications. Assessment of taxes and appeals also involve Human Rights such as the right to be heard and the principle of fair and transparent administrative action.

Human Rights also interact with municipal finance in the area of budgeting. Legal frameworks should call for participatory and inclusive budgeting as observed in many countries, especially those in Latin America. For maximum promotion of Human Rights, budgeting should be a continuous, open and inclusive process by which citizens and local governments widen mechanisms for promoting direct and indirect citizen participation. The process should involve identifying local needs and deciding preferences as well as the implementation, monitoring and evaluation of the budget, taking into account expenditure requirements and the available resources.<sup>89</sup>

Inclusive outcomes may be achieved through participatory budgeting. Tracing its roots to the Brazilian city of Porto Alegre which used it to give residents

87 Ibid.

88 UN-Habitat *Finance for City Leaders Handbook* (UN-Habitat 2016).

89 UN-Habitat, *Participatory Budgeting in Africa: A Training Companion* (UN-Habitat 2008).



control over some decisions such as the location of street improvements and parks,<sup>90</sup> participatory budgeting has been implemented in many cities across the world. It typically involves the involvement of residents in making proposals for public expenditure. Their input is collected, options are considered and finally the most popular proposal or idea is adopted and implemented.<sup>91</sup> In addition to giving residents a say in public expenditure, participatory budgeting gives marginalized and excluded groups the opportunity to have their voices heard and to influence public decision making vital to their interests. Furthermore, it enhances community-building, helps to break down barriers between residents and public authorities and improves mutual understanding and communication.<sup>92</sup> Participatory budgeting can also help make infrastructure and services more relevant to the communities they serve and in the long run, it has the potential to entrench transparency, accountability and responsiveness within governance frameworks.<sup>93</sup>

## ENHANCING MUNICIPAL FINANCE

Urban services require an enormous amount of resources. Local authorities need to access funds to provide adequate, quality and timely services.

However, many municipalities face challenges in raising enough revenue to fulfil their mandates. The situation is made worse through decentralisation of responsibilities from higher levels of government without the concomitant resources. This results in 'unfunded mandates' which are increased responsibilities that cannot be met through existing funds.<sup>94</sup> Consequently, the ability of local governments to provide services is compromised with the poorest suffering the most.

Local governments are often inhibited by law from raising resources locally. They may not have the power to levy taxes as the law gives this mandate to national, provincial or regional governments. Legal frameworks, particularly in developing countries, also limit municipal borrowing, restrict the ability of municipalities to reallocate funds among budget categories, and place caps on certain types of expenditures. This is also the case in the implementation of alternative financial mechanisms, like municipal bonds and green bonds where rules and regulations may limit the effectiveness of these instruments and the capacity of municipalities to access private capital to finance local needs in the long term.<sup>95</sup> These restrictions are inconsistent with the worldwide trend of decentralisation

90 Rebecca Abers, "Learning Democratic Practice: Distributing Government Resources through Popular Participation in Porto Alegre, Brazil," In Freire, M. and Stren, R. (Eds), *The Challenge of Urban Government: Policies and Practices*, (The World Bank Institute 2001)

91 Dmytro Khutky, "Participatory budgeting: An empowering democratic institution," *Eurozine* (2017)

92 Alta Fölscher, "Participatory Budgeting in Central and Eastern Europe" in Anwar Shah (ed.), *Participatory Budgeting: Public Sector Governance and Accountability Series*, (World Bank 2007).

93 Anwar Shah (ed.), *Participatory Budgeting: Public Sector Governance and Accountability Series*, (World Bank 2007)

94 UN-Habitat, *Guide to Municipal Finance* (UN-Habitat 2009).

95 World Bank and IMF, *Developing Government Bond Markets: A Handbook* (World Bank, International Monetary Fund 2001).

and the consequent devolution of functional responsibilities.<sup>96</sup>

Legal frameworks thus need to support municipal finance. They should enable local authorities to raise revenue to fulfil their functions. Examples include empowering municipalities to levy other forms of taxes in addition to the property tax. These include land-based finance mechanisms such as betterment levies, special assessments, developer exactions and through sale of development rights.<sup>97</sup> Public finance legislation may also enable municipalities to raise revenue through municipal borrowing and public-private partnerships. It must, however, be noted that such measures must be accompanied by capacity building measures to strengthen the ability of municipalities to access the funds, budget for, and utilise them in an efficient, fair and accountable manner.

## INCLUSIVE ECONOMIC PARTICIPATION

The International Labour Organization (ILO) reports that 2 billion of the world's employed population work in the informal economy. This accounts for 61.2 per cent of global employment. This percentage is higher in some regions with 85.8 per cent in Africa and 68.2 per cent in Asia and the Pacific. Excluding agriculture, the global percentage falls to 50.5 although it is still significantly higher in some regions: 71.9

per cent in Africa; 59.2 per cent in Asia and the Pacific; and 53.1 per cent in Latin America and the Caribbean.<sup>98</sup>

ILO argues that most workers enter the informal economy not by choice but due to an absence of opportunities in the formal sector. Some of the most influencing reasons are limited access to capital market, low education and training. The proliferation of workers in the informal economy has several implications. First, such workers are exposed to a higher risk of poverty. Empirical research shows that workers in the informal economy face a higher risk of poverty than those in the formal economy.<sup>99</sup> Informality thus presents a serious threat to the attainment of SDG 1 which calls for an end to poverty and SDG 10 on the reduction of inequality.

Second, informal workers are exposed to Human Rights violations due to inadequate legal protection. Informal employment is characterized by unregistered and unregulated work as well as lack of secure employment contracts, workers' benefits, social protection and workers' representation.<sup>100</sup> Furthermore, the nature of informal work is such that workers operate outside normal working hours which are often not covered by labour laws and regulations. These hours may be very short due to lack of options thus increasing the risk of poverty, or very long, which exposes them to health and safety risks. Seen this way,

96 Mona Serageldin, David Jones, François Vigier and Elda Solloso, *Municipal Financing and Urban Development* (UN-Habitat 2008).

97 Lawrence Walters, *Leveraging Land: Land Based Finance for Local Governments*, (UN-Habitat 2016).

98 International Labour Organization, *Women and Men in the Informal Economy: A Statistical Picture* (ILO 2018).

99 Ibid.

100 International Labour Organization, *Measuring Informality: A statistical manual on the informal sector and informal employment* (ILO 2013).

informality also affects the achievement of SDG 8 on decent work and economic growth including the promotion of safe and secure working environments.

Third, informal workers are often excluded from governance processes. Particularly in urban areas, the response of authorities to the informal sector ranges from regulation, relocation and even outright repression. Competing interests with the corporate private sector including property developers and formal retailers exacerbates the situation as these parties often have access to decision-makers in addition to having their interests served by commercial property development and approaches that exclude the urban poor.<sup>101</sup>

The Agenda calls for the recognition of the informal economy's contribution while supporting a sustainable transition to the formal economy.<sup>102</sup> Accordingly, the role of the law should include enabling livelihoods within the informal economy through effective and inclusive laws while promoting transition to the formal economy.

## ENABLING LIVELIHOODS WITHIN THE INFORMAL ECONOMY

Inclusive economic growth with full and productive employment and decent work is a key element of sustainable urban development. The Agenda envisages urban areas that offer equal opportunities for healthy, productive, prosperous and

fulfilling lives to all people.<sup>103</sup> However, as noted above, workers in the informal economy face serious difficulties in their struggle for sustenance. Most of them could be partly attributed to ineffective and exclusionary legal frameworks.

Laws in many countries are designed towards the formal economy. They seek to facilitate formal businesses and are primarily geared towards serving their interests. In African urban areas, for example, it has been noted that private developers and commercial investors often benefit from inefficient and outdated urban laws due to the opportunities that they offer them. In a city that is mostly unregulated, dubious land deals and corrupt arrangements have the space to flourish at the expense of its poor residents.<sup>104</sup> The effect of such laws is not only 'legal blindness' to the needs of informal workers but also deliberate repression of the informal economy when its interests compete with the formal one. This attitude has been exhibited by some local authorities using urban planning law to demolish informal structures - where a lot of informal enterprises conduct their businesses - after pressure from property developers seeking to maximize land values.<sup>105</sup> Such moves result in violations of the right to property, the right to adequate housing and the right to earn a livelihood, among other Human Rights.

Moreover, urban planning laws often do not recognise the spatial and infrastructural needs of informal workers.

101 David Harvey, *Rebel Cities: from the Right to the City to the Urban Revolution* (Verso 2012).

102 Para 13 (d).

103 Para 43.

104 Stephen Berrisford, "Unravelling Apartheid Spatial Planning Legislation in South Africa: A Case Study", (2012) 22 *Urban Forum*.

105 UN-Habitat, *Enhancing Productivity in the Urban Informal Economy* (UN-Habitat 2016).

In addition to allowing the demolition of informal settlements, planning laws often fail to allocate adequate public spaces for informal workers such as street vendors. They have also been used to criminalise economic activities in such spaces as evidenced by frequent harassment of street traders and destruction or confiscation of their properties in many cities across the world. Zoning laws have also been applied arbitrarily without taking due consideration on their social and economic consequences. Single use zoning that keeps residential and commercial areas apart fails to recognize the vast majority of poor urban dwellers whose residences also act as income generating areas.<sup>106</sup>

Legal frameworks should thus enable rather than obstruct livelihoods. They should promote inclusion of workers in the informal sector by mediating competing demands on urban space. A good law is responsive to the needs of all urban dwellers, promotes access to income-earning opportunities and supports economic productivity. A good example is India's **Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014** which recognizes street vending as a legitimate and legally protected form of business. It sets out the rights and obligations of street vendors, draws up a plan for street vending, and establishes a Town Vending Committee to provide a forum through which street vendors can air their views and defend their interests. The Act has promoted the rights of vendors against discrimination,

harassment, violence and destruction of their property.<sup>107</sup>

Laws should also ensure that workers in the informal economy are protected from exploitation by setting out minimum standards of employment. These include extending occupational safety and health protection laws to the informal sector as well as access to social security, maternity protection, decent working conditions and a minimum wage that takes into account the needs of workers and considers relevant factors, including the cost of living. The law should also ensure that those in the informal economy enjoy the freedom of association and the right to collective bargaining.<sup>108</sup>

## TRANSITION TO THE FORMAL ECONOMY

As already highlighted, research shows that most people enter the informal economy not by choice but due to the absence of opportunities in the formal sector. While the importance of the informal economy to the Gross Domestic Product (GDP) of most developing countries cannot be underestimated, the challenges facing workers (including higher risk of poverty, increased inequality, poor and unsafe working conditions and inadequate social protection) call for a transition to the formal economy. This need was reflected in the Agenda where States in addition to recognising the contribution of the working poor in the informal economy, urged the progressive

106 Barbara Lipman and Robin Rajack, "Improving Access to Urban Land for All Residents: Fulfilling the Promise" in *Urban Development Series*, (The World Bank 2011).

107 UN-Habitat, *Enhancing Productivity in the Urban Informal Economy* (UN-Habitat 2016).

108 International Law Commission, "Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204)" Adoption: Geneva, 104th ILC session (12 Jun 2015).

transition of workers and economic units to the formal economy.<sup>109</sup>

Transitioning from the informal to the formal economy relies on supportive legal frameworks. Indeed, it must be appreciated that laws have been among the main contributors to the growth of the informal economy. The process of securing business licenses and other related permits in some countries is so lengthy, costly and cumbersome that most poor people are locked out. Low-income groups such as hawkers, cart-pushers, and kiosk owners find that they have to operate outside the legal process for them to eke out a living.<sup>110</sup>

Accordingly, legal frameworks should play a facilitative role in the transition process by establishing simpler, clearer, and more affordable processes. They should also extend access to social protection and support microfinance and financial inclusion programmes. Frameworks that regulate basic services should promote the integration of the informal economy through provision of water, electricity, security, and waste collection among others. This may be done through rights-based legislation which makes the provision of these services not simply a matter of good governance but also a legal requirement.

Peru's **Street Vending Ordinance 1787 of 2014** offers a good example of a law that not only recognises street vending as a legally protected economic activity but also supports incremental formalisation. It simplifies administrative procedures

for accessing licenses; grants priority to women, mothers of young children, elderly vendors, and persons with disabilities; and promotes capacity building workshops aimed at improving vendors' business skills for ultimate entry into the formal economy.

## CONCLUSION

While urban areas are the engines of economic growth and productivity, they also represent the face of increased economic inequality and Human Rights violations. These vices have been discussed in the context of municipal finance and the informal economy. Regarding the former, resources have been shown to be paramount to the provision of services and infrastructure with Human Rights implications also arising from the administration of municipal finance. The informal economy has also been highlighted as a sector rife with Human Rights violations and inadequate legal protection. As such, this section has reiterated the role of supportive legal frameworks for sustainable and inclusive urban economies.

<sup>109</sup> Para 59.

<sup>110</sup> Chris Bonner, 'Law and the informal economy: the WIEGO Law Project,' (2017) in Alison M. Brown, *Rebel Streets and the Informal Economy: Street Trade and the Law*, (Routledge 2017).



A water collection point in a slum in Nairobi ©UN-Habitat/Julius Mwelu

## SECTION 4: URBAN BASIC SERVICES

### INTRODUCTION

Basic services such as water and sanitation, electricity and energy, refuse and waste removal are critical services for a better quality of human life. One of the key features of a developmental state is to ensure that all citizens – including the poor and other vulnerable groups – have access to basic services. However, the realization of the right to basic services is fraught with challenges. The average distance that women in Africa and Asia walk to collect water is six kilometres. People living in the slums of Jakarta, Manila and Nairobi pay 5-10 times more for water than those living in high-income areas of the same cities and more than consumers in London or New York. The cost of connecting to the utility accounts for about three months' income for the poorest 20 per cent of households in Manila, rising as high as to six months' income in urban Kenya. At any one time, close to half of all people in developing countries are suffering from health problems caused by poor water and sanitation. Together, unclean water and poor

sanitation are the world's second biggest killer of children. It has been calculated that 443 million school days are lost each year to water-related illness.<sup>111</sup>

Research shows that slum dwellers in many parts of the world have inadequate access to sewer systems with most of them relying on public toilets which are often unhygienic posing both public health and environmental risks. Women and young girls are particularly affected by lack of access to water and sanitation. In Mumbai, for instance, one study showed that women went to the extent of limiting their food intake so as to minimize the need to go to unclean toilets.<sup>112</sup> Furthermore, lack of adequate sanitation facilities means that slum-dwellers have to walk up to 300 metres to the nearest toilet. This becomes a safety risk especially at night with women and young girls exposed to violence and sexual assault, including rape.<sup>113</sup>

Mitigating the challenges related to access to basic services in an urban setting is not an easy task, as the required

111 UNDP, 'Human Development Report 2006. Beyond Scarcity: Power, Poverty and the Global Water Crisis' (UNDP 2006) and Office of the United Nations High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 35, The Right to Health* (OHCHR 2010)..

112 C. McFarlane, "Sanitation in Mumbai's informal settlements: State, 'slum', and infrastructure," *Environment and Planning A*. 40/1 (2008),

113 Amnesty International, *Insecurity and Indignity: Women's Experiences in the Slums of Nairobi, Kenya* (Amnesty International Publications 2010).

infrastructure, whether new or upgraded, not only needs to be accommodated by already existing structures, such as roads or buildings, but must also be able to sustain future urban developments and expansion. It has been suggested that strong regulatory measures coupled with responsive urban governance may set up the necessary conditions for sound development in this industry.<sup>114</sup> Indeed, urban actors endorse the roles of policy makers and resources allocators and also function as regulators of service provision to guarantee universal access, quality standards, and fair pricing. This role becomes even more relevant in places where such services are externalized to the private sector. This Section will discuss the role urban legal frameworks can play in ensuring that access to basic services (water, sanitation, electricity and health care services) are enjoyed equally by all.

## WATER AND SANITATION

It is estimated that although water and sanitation are key to sustainable development and human well-being, roughly one billion people do not have access to improved water sources, and 2.6 billion people do not use improved sanitation facilities.<sup>115</sup> The right to water and the right to sanitation do not exist in isolation from other Human Rights. In other words, those who do not enjoy this right, are often also deprived of the right

to adequate housing, food, education, health etc.

The past decade has witnessed a positive development in international Human Rights law with respect to water and sanitation. The right to water and the right to sanitation had previously been deemed as components of the right to an adequate standard of living and the right to the highest attainable standard of health enshrined in Articles 11 and 12 of ICESCR, respectively. In a remarkable development, however, these rights now exist as distinct Human Rights. In 2010, the UN General Assembly adopted a Resolution recognizing 'the Human Right to water and sanitation'<sup>116</sup> which was followed up by another one on 'the Human Rights to safe drinking water and sanitation'.<sup>117</sup> These rights have since been affirmed by the Human Rights Council that also clarified their foundations and legally binding status. Furthermore, in 2015, these rights received a major boost through the adoption of a specific goal on water and sanitation within the Agenda 2030 on Sustainable Development (SDGs). Goal 6 addresses issues related to drinking water, sanitation, wastewater, integrated water resources management and ecosystems in addition to containing a specific target on participation of local communities.

In the urban context, the Agenda envisages cities and human settlements where there is "*universal access to safe and affordable drinking water and sanitation*".

114 UN-Habitat, 'Water and Sanitation' available at <https://unhabitat.org/urban-themes/water-and-sanitation-2/>.

115 WHO and UNICEF, *Progress on Sanitation and Drinking-Water – 2010 Update* (World Health Organization and UNICEF 2010), pp. 6-7.

116 UNGA Resolution 64/292 on the human right to water and sanitation adopted on 28 July 2010.

117 UNGA Resolution 70/169 on the Human Rights to safe drinking water and sanitation Resolution adopted on 17 December 2015.



It also requires States to promote “*equitable and affordable access to sustainable basic physical and social infrastructure for all, without discrimination, including affordable serviced land, housing, modern and renewable energy, safe drinking water and sanitation.*”<sup>118</sup>

While international momentum toward broad-based support for the rights to water and sanitation is essential, the actual implementation of the rights heavily depends on national legal frameworks, anchored by constitutional and statutory provisions. In turn, these laws should give voice to national policies, and be operationalised through a robust system of rules and regulations emanating from government institutions and, ideally, national water and sanitation regulators. However, inappropriate legal frameworks have been identified as major hindrances to universal access to basic services. They have promoted exclusion of some groups from access to water, sanitation and waste management services by delegitimising their urban residence.

The most notable group is informal settlers who in many states, are unable to access basic services as these are pegged on perceptions of formal occupation. As most slums are by their nature, ‘informal settlements’ in most cases, governments ignore them in the provision of services out of the fear that their recognition is implicit endorsement of their informality (especially if the slums

are on public land). For this reason, the practice in many states is to require applications for utility connections to be accompanied by formal proof of ownership or occupation (often in the form of a title deed or rental agreement). As most informal settlers do not have these documents, they are inevitably excluded from service provision. Accordingly, there is need for legislative reform in these areas to ensure that laws are geared towards the realization of Human Rights.

The strongest domestic legal frameworks exist where explicit recognition of the rights to water and sanitation is included in the national constitution. At present, many countries have **recognised the right to water in their constitutions**, including, Bolivia, the Democratic Republic of Congo, Ecuador, Kenya, the Maldives, Nicaragua, South Africa and Uruguay.<sup>119</sup> A few of these constitutions also recognise the right to sanitation. Constitutional provisions that recognise the rights to water and sanitation should be bolstered by an enabling statutory framework. They allow States to begin addressing the normative content of the rights and can serve as the basis for new policy initiatives, the creation of a new regulatory entity or simply a more comprehensive set of rules and regulations to be implemented and enforced by one or more government ministries.

Given current inequities of the rights to water and sanitation in terms

118 Paras 13(a) and 34.

119 Catarina de Albuquerque, ‘On the Right Track: Good Practices in Realizing the Rights to Water and Sanitation’ (OHCHR 2012), pg. 51.

of availability,<sup>120</sup> access<sup>121</sup> and affordability,<sup>122</sup> legal frameworks should be geared towards improving one or more of the above. For instance, a State may pass a law setting minimum water quality and quantity standards and assigning responsibility to an agency for monitoring their compliance. Likewise, a State may pass a law creating a public subsidy programme to enhance the affordability of water and sanitation services for individuals and households living in poverty. Useful policy initiatives, meanwhile, might involve efforts to harmonise the activities of different agencies, or set up a lead agency, that emphasises achieving access for vulnerable or marginalised groups, or sets realistic targets towards universal access.<sup>123</sup>

Laws and policies that permit service providers to disconnect water and sanitation users in response to the non-payment of bills must allow for due process. Such disconnection policies may not necessarily be contrary to Human Rights principles, but authorities must give the affected individuals a reasonable opportunity for rectification. Indeed, the inability to pay should not prevent poor households from accessing minimum water quantities and sanitation as these

services are essential for dignity, health as well as other Human Rights.<sup>124</sup>

Within urban areas, most slum dwellers suffer from unsafe water supply, poor sanitation and inadequate infrastructures. Countries have proposed various solutions for the issue of informal service provision. In Mozambique, for example, informal service provision is tolerated, and even encouraged in the short-term, to promote the expansion of access to services, recognising that this type of service delivery is essential to ensure that people receive these crucial services. In the longer term, it is hoped that the areas receiving informal service provision will be integrated into the formal services, whether networked supplies or more decentralised systems.<sup>125</sup> Others such as Bangladesh are exploring approaches to regulating informal service provision effectively without stamping it out altogether. However, until there is better planning for the increase in populations in urban areas, it is expected that unregulated informal service provision will continue to be the norm in informal settlements, particularly with respect to sanitation.

**Editor's note:** In most cases, individuals facing inequities of availability, access

120 The water supply for each person must be enough and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. According to the World Health Organization (WHO), between 50 and 100 litres of water per person per day are needed to ensure that most basic needs are met, and few health concerns arise.

121 Everyone has the right to a water and sanitation service that is physically accessible within, or in the immediate vicinity of the household, educational institution, workplace or health institution. According to WHO, the water source must be within 1,000 metres of the home and collection time should not exceed 30 minutes.

122 Water, and water facilities and services, must be affordable for all. The United Nations Development Programme suggests that water costs should not exceed 3 per cent of household income.

123 Catarina de Albuquerque, 'On the Right Track: Good Practices in Realizing the Rights to Water and Sanitation' (OHCHR 2012), pg. 45-46.

124 Ibid, pg. 61.

125 This means that several options for provision, such as selling on to neighbours from a yard-tap, are being legalised, even though it is hard for the State to ensure affordability, quality or accessibility, and this can lead to discriminatory practices concerning access.

and affordability to the right to water and sanitation also experience similar deprivations regarding domestic energy services such as electricity. Hence, the legal interventions discussed above can be applied *mutatis mutandis* as mitigating solutions.

## WASTE MANAGEMENT

Waste management is essential for sustainable and livable cities. UN-Habitat estimates that the total municipal solid waste generated in the world will double from 2 billion tonnes in 2016 to nearly 4 billion tonnes by 2050.<sup>126</sup> This is compounded by the fact that three billion people lack access to controlled waste disposal facilities.<sup>127</sup> The Agenda requires states to promote environmentally sound waste management and to substantially reduce waste generation. It expresses states' commitment to invest in infrastructure and service provision systems for water, sanitation and hygiene, sewage and solid waste management. The Agenda is cognisant of the socio economic impacts of waste streams and as such, calls for universal access to sustainable waste management systems and the promotion of producer-responsibility schemes.<sup>128</sup> Indeed, waste management is one of the areas with potentially disproportionate Human Rights outcomes.

Inequalities in waste management are manifested in two main ways. First, there are variations in the delivery of waste management services such as garbage collection with some areas, often where the poorest reside, receiving the worst quality of services or no services at all. Second, there is uneven exposure of some communities to hazardous waste management facilities such as dumpsites, unauthorized collection points, unsanitary landfills, incinerators and sewer treatment plants that are non-compliant with environmental and public health regulations. Research carried out in the context of environmental justice shows a link between socio-economic conditions and exposure to toxic waste and other hazardous substances. Uncontrolled waste facilities are often located in areas where the poor reside.<sup>129</sup> This phenomenon may be a result of overt discrimination or inability of the affected residents to mobilise enough political opposition to siting decisions, or both. As the presence of uncontrolled waste facilities reduces property values, most poor urban residents may also reside in these areas due to their affordability. Accordingly, they are forced to trade increased health risks for the ability to affordably reside in urban areas.<sup>130</sup>

The Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management

126 <http://unhabitat.org/waste-wise-cities-campaign/>. See also World Bank, *What a Waste 2.0: A Global Snapshot of Solid Waste Management to 2050* (World Bank Publications, 2018).

127 World Bank, *What a Waste 2.0: A Global Snapshot of Solid Waste Management to 2050* (World Bank Publications, 2018).

128 Paras 74, 119 and 122.

129 Marco Martuzzi, Francesco Mitis and Francesco Forastiere, (2001), "Inequalities, inequities, environmental justice in waste management and health" *European Journal of Public Health*, 20.

130 Manuel Pastor, Jim Saad and John Hipp, (2001), "Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice" *Journal of Urban Affairs*, 23(1).

and Disposal of Hazardous Substances and Wastes has noted that some groups are particularly affected by poor waste management practices. People in poverty are more likely to reside near toxic contamination and sources of pollution and to consume toxic products. Poorer communities are also less likely to be successful in defending their rights against businesses due to information and power asymmetries, inadequate legal representation and the difficulty of establishing a direct causal relationship between exposure and impact. Racial, religious and ethnic minorities, including migrants, are also at elevated risk as polluting industries, illegal waste disposal sites, contaminated drinking water and other sources of toxic exposure are often disproportionately located in minority communities. Such communities are also often unable to gain access to effective remedies for toxic pollution and contamination.<sup>131</sup>

The Human Rights implications of improper waste management practices are dire. The urban poor whose neighborhoods receive inadequate services or act as dumping sites have their right to health, right to clean water and sanitation (through contamination) and the right to an adequate standard of living infringed upon. Furthermore, their right to a healthy environment is also affected.<sup>132</sup>

Thus, there is the need for appropriately designed legislative, policy and institutional frameworks to promote sustainable and equitable waste management

practices. The principles of environmental justice offer an insightful starting point. Deprived communities, especially the urban poor and slum dwellers, should not bear a disproportionate burden of negative environmental impacts. Information and means of participation in decision-making must also be facilitated to all community groups where the quality of their environment is concerned.

Legal frameworks need to be aligned with the needs and capacities of the people concerned. They should facilitate rather than curtail the realisation of Human Rights. Domestic frameworks that create cumbersome and costly processes before access to waste management services should be repealed. Governments should also facilitate the right to public participation and the right to information as these are critical for communities to determine and have control over the quality of their environments. Recycling should also be included as part of integrated solid waste management and supported through legislative and institutional measures. Such measures need to particularly recognize the role of waste-collectors, who in most cases, are constituted by the urban poor and inhabitants of marginal neighborhoods. Legislative frameworks ought to ensure that these workers enjoy the right to just and favourable work conditions which must be safe, healthy, and not demeaning to human dignity.

131 Report of the Special Rapporteur on the implications for Human Rights of the environmentally sound management and disposal of hazardous substances and wastes, A/HRC/36/41 (2017).

132 Although the ICESCR does not recognize an independent right to a healthy environment (considers it part of the right to health), regional conventions including the African Charter on Human and Peoples' Rights as well as the San Salvador Protocol include it.

Crucially, it is important for governmental agencies to recognise the inter-relatedness and interdependency of Human Rights. This would, for example, show that physical health and environmental cleanliness are intricately connected to the right to life. As such, even in states where the right to a healthy environment is not recognised as a distinct right, its impact on the right to life should be enough to argue for proper waste management.

## HEALTH CARE SERVICES

The right to health is a human right that is well-established in international law.<sup>133</sup> It is recognised in the UDHR, the ICESCR and in several other international and regional Human Rights treaties such as the CRC and the African Charter on Human and Peoples' Rights.<sup>134</sup> It means that everyone has the right to the highest attainable standard of physical and mental health, which includes access to all medical services, sanitation, adequate food, decent housing, healthy working conditions, and a clean environment.<sup>135</sup> This definition provides an overarching standard to guide the actions of governments as they strengthen their health

systems by reforming their public health laws.

The principles of availability, accessibility, acceptability and quality are essential elements of the right to health. They provide guidance to governments as they make decisions about the goals, resources, focus and scale of public health law reform activities. Although the precise form that the law takes will vary significantly between countries, law has a flexible and enabling role in creating a framework for the discharge of core public health functions and reducing health inequalities.

In some countries, the right to health has been recognised in the national constitution. For example, in **Article 6 of the Constitution of the Federal Republic of Brazil**, health is designated as a social right. The right to health is further reinforced by **Article 196**, which states:

*"Health is the right of all persons and the duty of the State and is guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at universal and equal access to all actions and services for the promotion, protection and recovery of health."*

133 The substantive obligations embodied within the right to health were clarified by the United Nations Committee on Economic, Social and Cultural Rights in General Comment 14. This General Comment explains that the right to health is an inclusive right that extends beyond health care to the underlying determinants of health, including access to safe and potable water, adequate sanitation, an adequate supply of safe food and nutrition, housing, healthy occupational and environmental conditions, access to health-related education and information, including on sexual and reproductive health, and freedom from discrimination.

134 Article 25, 12, 24 and 16 respectively.

135 World Health Organization, 'Advancing the Right to Health: The Vital Role of Law' (WHO 2017). The right to health, as explained in the United Nations Committee on Economic, Social and Cultural Rights General Comment 14, does not create an entitlement to be healthy. Nor does it hold States responsible for all the potential causes of poor health, including genetic susceptibility or an individual's choice to adopt an unhealthy lifestyle. On the other hand, the obligation to respect, protect, and fulfil the right to health places health on the agenda of every government, and provides a mandate for the legislative and administrative actions that are necessary, across all the relevant sectors of government, to create the conditions in which members of the population can realize the highest attainable standard of health.

The **Constitution of South Africa (1999)** guarantees access to health services, including reproductive health and emergency services, basic health care for children, and medical services for detained persons and prisoners.<sup>136</sup> Similarly, the **Constitution of Mongolia (1992)** declares that citizens shall enjoy the right to a healthy and safe environment, and the right to the protection of health and medical care.<sup>137</sup> Some groups or individuals, such as children, women, persons with disabilities, migrants or persons living with HIV/AIDS, face specific hurdles in relation to the right to health. These can result from biological or socio-economic factors, discrimination and stigma, or a combination of these.<sup>138</sup> Laws need to adopt positive measures to ensure that these individuals are not discriminated against.<sup>139</sup> For instance, **the Constitution of the Islamic Republic of Iran (1979)** recognises the right to the enjoyment of social insurance and social security benefits covering retirement, unemployment, old age, workers' compensation, lack of guardianship, and destitution. The government is obliged, in accordance with existing laws, to use the proceeds from the national income and public contributions to provide health care services and financial support to all citizens.<sup>140</sup>

From an urban perspective, it is important to apply a "health lens" to urban interventions to create settlements that positively influence health and wellbeing. For instance, the legal framework could require that new homes built for growing urban populations to be constructed with a more clearly defined specification that supports better health outcomes (insulation and heating, safer stairs, more appropriate spatial layout - better access to natural light and community amenities). It could also require equitable access to parks and green spaces since they are conducive to good mental and physical health for urban residents, and integral to the achievement of health equity in cities.<sup>141</sup>

## CONCLUSION

Ensuring access to basic services for all members of the population, without discrimination, is an obligation for all governments. It means that everybody, whether rich or poor, men, women and children, people living in urban and rural areas, having a suitable accommodation or not, people with physical disabilities or people living in institutions like prisons or hospitals, have the right to access these services. Legal and institutional frameworks can support the sustainability of interventions by not only creating

136 Sections 27(1)(a), (b) and (c), 28(1)(c) and 35(2)(e).

137 Article 16.

138 For more information, see Office of the United Nations High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 31, The Right to Health* (OHCHR 2008).

139 Most of these groups of people mentioned have their rights enshrined in specific international instruments which have progressive provisions on the right to health. For instance, see; Art 14 of the Convention on the Elimination of All Forms of Discrimination Against Women, Art 39 of the Convention on the Rights of the Child, Art 25 of the Convention on the Rights of Persons with Disabilities, Art 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

140 Article 29.

141 For more information, see WHO, *Health as the Pulse of the New Urban Agenda: United Nations Conference on Housing and Sustainable Urban Development, Quito, October 2016* (WHO 2016).

a legitimate reference point for actors seeking to hold States accountable but also mitigating the inequities of availability, access and affordability.



*A homeless man sleeping on the streets ©Ahmad Kavousian*



# SECTION 5: HOUSING AND SLUM UPGRADING

## INTRODUCTION

One of the most consequential outcomes of rapid urbanization has been the rise of housing shortages. Many cities have struggled to provide adequate housing for their urban populations. Statistics indicate that 980 million urban households lack decent housing and that another 600 million will be in such a position between 2010 and 2030.<sup>142</sup> Furthermore, a quarter of the urban population live in slums with more than 881 million in developing states alone. As the urban population is expected to double by 2050, the housing challenges will only get worse. By 2030, UN-Habitat estimates that an additional 3 billion people (or about 40 per cent of the world's population) will need access to adequate and affordable housing.

The shortage of adequate and affordable housing means that most poor urban dwellers have to rely on informal strategies for their housing. The consequence of such moves is the expansion of informal settlements. In 2016, there were around a billion people living in slum conditions without access to safe water, adequate sanitation, sufficient living space,

or durable housing of a permanent nature that protects against extreme climate conditions.<sup>143</sup> This figure does not include the number of households that lack security of tenure. In Sub-Saharan Africa, 59 per cent of the urban population lives in slums. In Asia and the Pacific, the proportion of slum dwellers stands at 28 per cent of the urban population while it is 21 per cent in Latin America and the Caribbean region.

The shortage of housing coupled with the growth of informal settlements has Human Rights implications. It represents a violation of the right of adequate housing for billions of urban dwellers. The right to adequate housing is recognised in international Human Rights law as part of the right to an adequate standard of living.<sup>144</sup> This right has been interpreted to be more than merely having a roof over one's head. Instead, it means the right to live somewhere in security, peace and dignity. In particular, the idea of 'adequacy' denotes certain elements including security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; appropriate location (with access to

142 UN-Habitat, *World Cities Report 2016* (UN-Habitat 2016).

143 UN-Habitat, *Slum Almanac: Tracking Improvement in the Lives of Slum Dwellers* (UN-Habitat 2015).

144 Article 25, Universal Declaration of Human Rights and Article 11, International Covenant on Economic Social and Cultural Rights.

employment options, health-care services, schools, childcare centres and other social facilities); and cultural adequacy.<sup>145</sup> Furthermore, as Human Rights are interdependent, indivisible and interrelated, the right to adequate housing affects various other Human Rights. Access to adequate housing can be a precondition for the enjoyment of the right to work, the right to health, the right to education, the right to social security, the right to property, the right to personal security and the right to human dignity, among others. The freedom from discrimination as a human right also appears prominently within the context of housing.<sup>146</sup>

Legal frameworks have contributed to violations of the right to housing by both governmental actors and private entities. Discriminative practices have been facilitated through exclusionary zoning, denial of security of tenure, inappropriate construction standards, limited participation in decision-making and the criminalisation of homelessness. As the Agenda calls for sustainable urban development programmes with housing and people's needs at the centre of the strategy, this chapter highlights the role of law in promoting the right to adequate housing through four entry points: affordability, slum upgrading, the construction industry and homelessness.

## AFFORDABLE HOUSING

Affordable housing is prioritised by the Agenda as expressed by the commitment to stimulate the supply of a variety of adequate housing options that are safe, affordable and accessible for members of different income groups of society, taking into consideration the socio-economic and cultural integration of marginalised communities, homeless persons and those in vulnerable situations, and preventing segregation.<sup>147</sup> This commitment was motivated by the recognition that affordability of housing is a challenge for most poor urban households. The 'enabling approach' which took hold from the 1980s and called for decreased role of governments and a reliance on the private sector for housing supply has not worked for the poorest. Under this approach, government intervention is restricted to providing an enabling environment while the private sector focuses on supply. While this approach has led to increased housing supply, these have been targeted to the middle class rather than low income households.

Consequently, most poor people are locked out of formal housing due to prohibitive costs.<sup>148</sup> In South Africa, for instance, the cheapest formal housing is unaffordable for 64 per cent of households<sup>149</sup> while in Tunisia, almost half the households cannot afford the

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145 Committee on Economic Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) (1991).

146 Office of the United Nations High Commissioner for Human Rights and UN-Habitat, *The Right to Adequate Housing*, Fact Sheet No. 21/Rev.1.

147 Para 33.

148 UN-Habitat, *World Cities Report 2016*, (Nairobi: UN-Habitat 2016).

149 Landman, K. and M. Napier "Waiting for a house or building your own? Reconsidering state provision, aided and unaided self-help in South Africa", *Habitat International*, 34 (2010).

cheapest mortgage.<sup>150</sup> As the private sector is driven by profit, there has been an over-supply of housing for the middle-class while the poor are underhoused. In Ireland, for example, there are 14,000 empty dwellings while in the situation is more critical in Japan with 8.2 million vacant dwellings in 2013. Lack of affordable housing for the poor means they must turn to the informal sector. The informal sector provides 60-70 per cent of urban housing in Zambia,<sup>151</sup> up to 90 per cent in Ghana<sup>152</sup> and over 70 per cent in Latin American cities such as Lima and Caracas.<sup>153</sup> Although informal sector enables a substantial proportion of the urban poor to reside in urban areas, such housing is often characterised by features that fit in to the definition of 'slums.' These include poor physical infrastructure; inadequate access to water and sanitation; overcrowding; lack of security of tenure; and poor access to city functions and employment opportunities.

Legal frameworks ought to support the supply of affordable housing for all income groups. These may take a variety of forms which include incentives or disincentives for the developers. Incentives may be cross-subsidies (such as density bonuses for developers to fund affordable housing) and outright subsidies (such as housing vouchers or developer tax incentives). They also include measures that create and promote higher-density urban land or set quota requirement for developers. The density bonus (or Floor

Area Ratio bonuses) is the most common form of incentive used by States. A density bonus provides an increase in allowed dwelling units per acre, Floor Area Ratio (FAR) or height which generally means that more housing units can be built on any given site.

States can also facilitate the production of affordable housing by providing state-owned land for free or at low cost; develop or subsidize bulk infrastructure for identified sites that will be part of the affordable housing programme; coordinate and expedite statutory approvals from authorities and utility providers; establish legal obligations for developers mandating them to provide a proportion of affordable housing in development permit approvals; create an environment that mobilises private sector resources by de-risking projects and encouraging private sector investment and participation in the affordable housing programme.

Another relevant role of legal frameworks is to identify deserving beneficiaries of affordable housing programmes. A social housing programme that primarily benefits middle-income group cannot be qualified as an inclusive housing programme. Instead, social housing should target those in greatest need, with a focus on the lowest income groups. To ensure deserving groups benefit, urban legislation can set up mechanisms on the selection of beneficiaries for affordable housing. Such mechanisms include a transparent identification and verification

150 Salheen, M. (ed) "Regional Housing Review Report Of the Global Strategy for Shelter to the Year 2000: Middle East & North Africa" (2012).

151 UN-Habitat, *Zambia Urban Housing Sector Profile*, (UN-Habitat 2012).

152 UN-Habitat, *Ghana Urban Housing Sector Profile*, (UN-Habitat, 2012).

153 Hernandez, F. and P. Kellett, *Rethinking the Informal City: A Radical Perspective from Latin America*, (Berghahn 2008).

system, eligibility criterion that are context-related and are made for the most needed groups while taking into account beneficiaries' income and needs. Moreover, the selection criterion (eligibility criteria) and allocation process should be generally accepted through close collaboration with communities and their leaders, if not exclusively led by them.

Legal frameworks also perform a crucial role in the housing context by regulating the rental market. Urban legislation should foster a well-regulated rental market and promote the production of adequate and affordable rental housing. Tenants are particularly in need of legal protection from arbitrary action by property owners. Under Human Rights principles, states have a responsibility to respect, protect and fulfil the rights. Even though States are not a party under a rental contract, they have the responsibility to take measures to prevent third parties from interfering with people's enjoyment of their rights. When housing provision is transferred to third parties (the private rental market), the State should regulate the market in order to protect people from Human Rights abuses and to create an enabling environment for the realisation of the right to adequate housing. Indeed, the Committee on Economic, Social and Cultural Rights has noted that tenants should be protected by appropriate means against unreasonable rent levels or rent increases, unlawful evictions and negligence. A good starting point for protection of tenant rights might be through contract law where implied terms favorable to tenants may be emphasised.

## SLUM UPGRADING

UN-Habitat defines a slum household as a group of people living under the same roof in an urban area who lack one or more of the following conditions: durable housing, sufficient living space, access to clean water, access to adequate sanitation and secure tenure. The scope and severity of the living conditions in slums make them one of the most pervasive violations of the Human Rights of dignity, security, health and life worldwide. They contribute to the persistence of poverty and the full and progressive realisation of everyone's economic, social and cultural rights, and in particular, the right to adequate housing.

Effective slum upgrading policies and preventive housing policies are thus needed to fulfil affordable housing needs, reduce social inequalities and ensure the right of urban poor to an adequate standard of living, and to the continuous improvement of living conditions and opportunities to work and education. Historically, there have been different approaches of dealing with slums. One of them is demolition of informal settlements which is a common practice in many states. Even with international recognition that forced evictions should be outlawed, many governments continue to sporadically or systematically forcibly evict urban poor households from their homes. This may eliminate slums that no one would like to see, but it does not resolve housing problems of the city and leaves people homeless. Forced evictions and demolition without compensation also violate a wide range of internationally recognised Human Rights, including the rights to

adequate housing, food, water, health, education, work, security of the person, due process, freedom from cruel, inhuman and degrading treatment, and freedom of movement.

The majority of (forced) evictions are avoidable. Many alternatives to evictions have proven to be successful depending on the situation, such as agreed resettlement and in-situ upgrading. Agreed resettlement is an approach that respects people's right to participate and fulfils their right to adequate housing. However, because resettlement in most cases destroys social networks, breaks up communities, reduces job opportunities and increases transportation costs, national legislation should promote in-situ upgrading as a first option as it entails improving the physical, social and economic environment of an existing informal settlement and enhancing security of tenure without displacing current occupants.

Slum upgrading is the least expensive, most humane way of enhancing a city's much-needed stock of affordable housing, as it works to improve housing conditions rather than destroying them. In fact, the UN Special Rapporteur on the right to adequate housing has stated that a Human Rights-based approach to informal settlement upgrading is an essential component of a broader commitment to bringing Human Rights to cities, and to sustainable inclusive development as laid out in the Agenda.

Accordingly, legal frameworks may perform an instrumental role in slum

upgrading and the inculcation of Human Rights in the process. They may explicitly prohibit forced evictions and provide safeguards against them in accordance with international Human Rights law. They may require that alternatives to eviction -such as slum upgrading - are first considered before any action that might have adverse Human Rights impacts is undertaken. Specific mechanisms such as land regularisation and provision of basic services can also be prescribed and detailed in a Slum Upgrading legislation. Furthermore, where eviction is unavoidable, urban legislation should guarantee an appropriate location for resettlements to ensure communities' meaningful participation and safeguard their rights during and after the resettlement process.

## THE CONSTRUCTION SECTOR

Building standards are important for structural integrity and habitability of buildings. They regulate the siting of buildings, materials to be used and provide for matters such as ventilation, drainage, fire resistance, and waste disposal. These standards, however, can undermine the right to adequate housing if they are inappropriately developed and applied. In most developing states, building standards have had a prejudicial effect on the urban poor as they are outdated, obsolete and largely unresponsive to their shelter needs.<sup>154</sup> Local by-laws which require construction with modern materials and techniques such as steel,

154 Elijah Agevi, "Building Standards and Planning Regulations - The Kenyan Experience, (1995), 3 *Journal of the Network of African Countries on Local Building Materials and Technologies*.

mortar, cement, electrical and mechanical installations make housing expensive for the majority of the urban population. The effect is a rapid growth of informal settlements as most people opt to operate outside the law as compliance is impossible. For instance, up to the 1970s, the building regulations in Nairobi required that roofs be strong enough to sustain six inches of snow. These regulations were put in place by a British colonial administrator who exported his hometown's laws and only replaced 'Blackburn' with 'Nairobi.' Residents of Nairobi, which enjoys a tropical climate with little history of snow were forced to comply with these regulations or else their buildings were considered informal.<sup>155</sup> Consequently, the poor were disadvantaged as most of them could not afford to build their roofs with materials that could withstand six inches of snow. Their houses were, therefore, considered illegal and vulnerable to demolition.

Furthermore, the cost of housing can be high and not affordable for the urban poor if the regulatory framework does not promote locally available construction materials. Housing in slums is mostly built with low-cost materials that are often not recognised in regulatory frameworks. In many cases, these materials are affordable and durable alternatives for the urban poor and deserve to be recognised. Construction standards that seek to promote Human Rights should thus not only ensure safety of dwellings but also be sufficiently flexible, performance-based and appropriate to local conditions. This requires the review of building and planning regulations as well as norms and

standards for the use of land, building materials and infrastructure in order to lower housing costs and enable delivery at scale.

Housing has also to be flexible and responsive to various and changing needs of residents, including those associated with indigenous peoples. Today for example, most social housing programmes and building codes do not factor in customs and traditions from indigenous peoples and exclude them from such sectors. It is also important to allow flexibility in designing houses and neighbourhoods. Different housing types such as detached, semidetached, single family and multifamily, and different housing sizes should be available to accommodate the varying needs of households at different stages of their life cycle. These would also accommodate both present and future needs of urban residents including indigenous groups.

Additionally, indigenous peoples have to be meaningfully engaged with urban and rural planning processes, as traditional way of life can be compatible with the provision of adequate infrastructure and basic services but should not be forced to change. Therefore, master plans and housing provision to indigenous peoples need to allow for a degree of ambiguity and openness to change, recognising that a new community will develop best if it is allowed to be dynamic and to evolve in ways that the planners cannot entirely predict. Urban legislation that promotes the vernacular designs and building techniques for dwellings can help achieve

155 Ibid.

better flexibility for the urban poor and indigenous groups, as well as improved environmental performance, tap into local building materials, and promote the use and transmission of vernacular construction techniques.

## HOMELESSNESS

Homelessness has been defined through a three-dimensional approach that is anchored in Human Rights. The first dimension involves “the absence of material aspect of minimally adequate housing and of the social aspect of a secure place to establish a family or social relationships and participate in community life”.<sup>156</sup> The second dimension considers homelessness as a form of systemic discrimination and social exclusion while the third dimension recognises those who are homeless as “rights holders who are resilient in the struggle for survival and dignity”.<sup>157</sup> Homelessness represents individual experiences of some of the most vulnerable members of society, characterised by abandonment, despair, erosion of self-esteem, denial of dignity, serious health consequences and loss of life. Moreover, those who are homeless are subject to stigmatisation, social exclusion and criminalisation.

Homelessness is an extreme violation of the rights to adequate housing and non-discrimination and often also a violation of the rights to life, to security of person, to health, to protection of the home and family and to freedom from cruel and

inhuman treatment. The Committee on Economic, Social and Cultural Rights has stated that a state party to the ICESCR in which any significant number of individuals are deprived of basic shelter and housing is, *prima facie*, failing to discharge its obligations under the Covenant. States are thus required to demonstrate that every effort has been made to use all resources that are at their disposition in an effort to satisfy, as a matter of priority, to fulfill the minimum obligations.

It is notable that the law has been as exacerbating factor in Human Rights violations occurring within the context of homelessness. Public nuisance laws and those that criminalise homelessness contribute to the stigma and discrimination of homeless persons. Inadequate recognition of different tenure forms in legal frameworks is also a cause of homelessness as many individuals find themselves vulnerable to arbitrary evictions. Accordingly, the Agenda calls on states to combat homelessness and eliminate “its criminalisation through dedicated policies and targeted active inclusion strategies, such as comprehensive, inclusive and sustainable housing-first programmes”.<sup>158</sup> In line with this commitment, legal interventions can thus take a variety of forms including prohibiting forced evictions, especially where they will lead to homelessness; prohibiting discrimination, stigma and negative stereotyping of homeless people; ensuring access to legal remedies for violations of rights; and regulating third-party actors

156 OHCHR, “Homelessness and Human Rights: Summary Of The Report Of The Special Rapporteur On The Right To Adequate Housing” (A/HRC/31/54) available at [https://www.ohchr.org/Documents/Issues/Housing/HomelessSummary\\_en.pdf](https://www.ohchr.org/Documents/Issues/Housing/HomelessSummary_en.pdf)

157 *Ibid.*

158 Para 108.

(such as the rental market) to ensure that their actions are consistent with the elimination of homelessness.

## CONCLUSION

The Agenda has put housing at the centre of its commitment to sustainable and inclusive urban development. The implementation of this shared vision requires appropriate legal frameworks that are supportive to the living needs of all urban inhabitants. They should enable rather than obstruct the right to adequate housing. As this chapter has highlighted, law can play a useful role in promoting housing affordability as well as in Human Rights-focused slum upgrading programmes and elimination of homelessness. The building and construction industry is also another sector where law can facilitate Human Rights rather than exclusion.





*Women repair their house using mud in Haveli, Pakistan ©UN-Habitat*



## SECTION 6: URBAN GOVERNANCE

### INTRODUCTION

Governance has been defined in various ways. It refers to the process of decision-making and the process by which decisions are implemented.<sup>159</sup> It has also been defined as “*the exercise of political and administrative authority and comprises the mechanisms, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences*”.<sup>160</sup> Governance encompasses a diverse range of actors in decision-making as well as the formal and informal structures that have been set in place to arrive at and implement decisions. This broad understanding is made more explicitly in the World Bank’s definition of governance which is “*the process through which state and nonstate actors interact to design and implement policies within a given set of formal and informal rules that shape and are shaped by power*”.<sup>161</sup>

‘Urban Governance’ is thus the process by which governments and stakeholders collectively decide how to plan, finance

and manage urban areas.<sup>162</sup> It is “*the sum of the many ways individuals and institutions, public and private, plan and manage the common affairs of the city. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action can be taken*”.<sup>163</sup> In addition to the recognition that governance includes formal institutions as well as informal arrangements, several other aspects are important in the urban context. First, urban governance involves a diverse range of stakeholders including governments (national, regional and local), civil societies, the private sector, community groups, and individuals (operating both formally and informally). Second, different stakeholders have differing interests which often come into conflict and thus need to be reconciled through the governance system. Third, power and its exercise are at the centre of urban governance. The extent to which urban areas recognise and respond to the interests of its residents heavily depends on power asymmetries. They determine how costs and distribution of resources among different

159 United Nations Economic and Social Commission for Asia and the Pacific, *What is Good Governance?*

160 United Nations Development Programme, *Governance for Sustainable Human Development* (New York: UNDP 1991).

161 World Bank, *Governance and the Law*, (World Bank 2017).

162 William Robert Avis, *Urban Governance* (Birmingham, GSDRC, University of Birmingham 2016).

163 UN-Habitat, *Global Campaign on Urban Governance: Concept Paper* (Nairobi: UN-Habitat 2002).

groups are shared, which groups have access to decision making structures and influence government accountability and responsiveness.<sup>164</sup>

Urban governance, Human Rights and the Rule of Law are intricately linked. At its best, urban governance ensures that all urban residents reap the benefits of urbanization. It is outcome-oriented and promotes the civil and political as well as social, economic and cultural rights of all urban residents. A good urban governance system is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive. It assures that corruption is minimized, the views of minorities are considered and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.<sup>165</sup> Furthermore, 'good urban governance' guarantees all inhabitants access to the necessities of urban life, including adequate shelter, security of tenure, safe water, sanitation, a clean environment, health, education and nutrition, employment, public safety and mobility.<sup>166</sup> Indeed, it is noteworthy that the Agenda recognizes, in para 5, that to end poverty and hunger; reduce inequalities; promote sustained, inclusive and sustainable economic growth; achieve gender equality; improve human health and well-being; foster resilience; and protect the environment, the way in which cities are governed needs to be readdressed.

Numerous civil and political rights come into play in urban governance. The right to hold opinions and freedom of expression, the freedom of movement, the right to participate in political affairs and the right to peaceful assembly and association<sup>167</sup> facilitate the engagement of urban residents in the management of urban areas and empower them to seek accountability. They enable inhabitants of urban areas to organize and mobilize, voice their demands and participate in and decide their governance systems. Non-discrimination and equality before the law as well as the right to an effective remedy<sup>168</sup> are important for the protection, promotion and fulfilment of the rights of all urban dwellers and more crucially, for the disadvantaged and marginalized groups. Additionally, social, economic and cultural rights are relevant as good urban governance ought to facilitate the right to an adequate standard of living (including adequate food, clothing and housing); the right to the highest attainable standard of health; the right to education; the right to just and safe working conditions; and the right of everyone to take part in cultural life,<sup>169</sup> among other rights.

As urban governance involves exercise of authority and decision-making within a context of diverse interests, the law is an important tool for ordering behaviour, mediation of interests and building of legitimacy. More importantly, it manages and constrains the effect of

164 William Robert Avis, *Urban Governance* (Birmingham, GSDRC, University of Birmingham 2016).

165 United Nations Economic and Social Commission for Asia and the Pacific, *What is Good Governance?*

166 UN-Habitat, *Global Campaign on Urban Governance: Concept Paper* (Nairobi: UN-Habitat 2002).

167 Articles 19, 12, 25, 21 and 22 ICCPR, respectively.

168 Articles 2, 3 and 26 ICCPR.

169 Articles 11, 12, 13, 7 and 15 ICESCR, respectively.

power asymmetries that exist among urban actors. Power asymmetries undermine the core functions of institutions in three ways: exclusion, capture and clientelism.<sup>170</sup> Exclusion happens where some individuals or groups are “systematically side-lined from policy decisions that affect their interests”.<sup>171</sup> In the urban context, the most affected groups include women children and youth, persons with disabilities, older persons, indigenous peoples, slum dwellers, homeless people, workers, refugees, returnees, migrants and IDPs.

Influential groups often have the ability to ‘capture’ policies and make them serve their narrow interests. For example, despite operating in the least productive sector of the economy, powerful firms may advocate for policies that protect their economic power, obtain preferential treatment and block competition. ‘Capture’ in the urban context is prevalent as powerful actors often influence decision making to get favourable outcomes even when these result in net societal loss. Large landowners, may, for instance, use their political connections to resist taxes on idle land even when these are needed to stimulate land supply and result in overall positive benefits such as lower housing costs. Similarly, ‘slum lords’ and cartels that control supply of water and electricity in informal settlements may use their influence to frustrate formalisation efforts.

Clientelism occurs where benefits are exchanged in return for political support. Examples include public officials

soliciting for votes in exchange for short-term benefits such as transfers and subsidies or where politicians become responsive to groups that wield greater influence.<sup>172</sup> In the urban setting, a good example is a situation when public authorities side with property developers and wealthy land owners for political donations. Such donations may be acquired in exchange for better infrastructure and facilities in wealthy areas including roads, schools, hospitals, police stations, and public spaces. In some countries, the private sector acquires public concessions on provision of infrastructure and basic services through political patronage. Clientelism may also be manifested where national governments leverage their control over financial resources and favour inter-governmental transfers to local authorities where they enjoy the most political support.

Considering the serious Human Rights impacts of poor urban governance and the role of law in managing and correcting power asymmetries, several points need to be highlighted. First, for optimum delivery of urban services, the national government-local government interface must be strong with proper inter-institutional hierarchy and coordination. Second, the recognition that local governments are the most-optimal level for provision of several services requires a focus on decentralisation in accordance with the principle of subsidiarity and accompanied by capacity building and equitable allocation and distribution of financial resources as well as the ability

170 World Bank, *Governance and the Law*, (World Bank 2017).

171 Ibid.

172 Ibid.

to raise local revenue. Third, a discussion of urban governance needs to appreciate the role of the private sector as a complementing partner of public authorities in service provision and its ability to spur economic growth and generate employment. Such a discussion must, however, also recognise that inadequate regulation of the private sector may reinforce social and economic inequities and promote exclusion and exploitation. Lastly, urban governance in the 21st century needs to appreciate the role of technology and the 'internet of things' in the collection of data and its use in service delivery as embodied in the concept of 'smart cities.' The way data is collected, used, stored and shared also has Human Rights implications.

This chapter will focus on three areas based on the issues discussed above. These are Multi-level Governance (MLG); Decentralisation and Capacity Building; and Smart City Governance.

## MULTI-LEVEL GOVERNANCE (MLG) AND INSTITUTIONAL COORDINATION

The complexity of urban governance requires multi-level cooperation built around broad consultative processes and mechanisms for vertical and horizontal integration. The recognition that urban governance involves a diverse range of stakeholders both in the formal and the informal sectors calls for a paradigm shift in governmental and public management approaches. Multi-level governance implies vertical coordination among

different government levels such as municipalities, metropolitan authorities, regional, state/provincial and national governments. It also requires horizontal coordination among sectoral departments, authorities and governments, as well as non-governmental actors at the same governance level. Multi-level governance ought to incorporate collaborations between public authorities and other urban stakeholders including civil societies, the private sector, community groups, and residents. Importantly, the governance system requires coherent legal frameworks to avoid overlapping, gaps and the inefficient use of resources.<sup>173</sup> MLG can thus be seen as a concept that incorporates a range of linked but distinct conceptual and empirical developments including collaboration, networks and polycentrism. The law is also crucial in stimulating rights and responsibilities of various stakeholders and mediating conflicting interests.

The Agenda appreciates the role of multi-level urban governance in sustainable and inclusive cities. It calls for stronger coordination and cooperation among national, subnational and local governments, including through multi-level consultation mechanisms and by clear definition of mandates (para 87); coherence between goals and measures of sectoral policies at different levels of administration (para 88); and strong metropolitan governance based on functional territories rather than administrative borders (para 90). The Agenda also emphasises on participation of all urban residents in urban governance by encouraging collaborations among local governments,

173 UN-Habitat, *Policy Paper 4: Urban Governance, Capacity and Institutional Development*, (UN-Habitat 2016).

communities, civil societies and the private sector in infrastructure and basic services provision (para 91) as well as urban and territorial policy and planning processes (para 92).

MLG is invaluable to positive Human Rights outcomes. Urban residents are often the victims of dysfunctional governance systems as it has been highlighted through examples in all the sections of this paper. The Land section shows that security of tenure is seriously undermined where land administration procedures are complex, lengthy and costly or where they are characterized by unclear processes and multiple institutions with overlapping mandates. In the Planning section, locally inappropriate planning systems create regulatory burdens and expectations that ultimately result in negative Human Rights outcomes. These systems represent governance systems that are out of touch with reality. The Urban Economy section illustrates how improper coordination and allocation of mandates between local and national governments hinders the former from raising local revenue which is needed for provision of essential services such as transportation, water, health, housing and fire protection. Fragmentation of institutions and lack of policy coordination are credited with Human Rights violations in the Basic Services section. For instance, slum dwellers are unable to access basic services, even from private utility companies, as these are pegged on formal recognition of their tenure status by public authorities. The Housing section also shows that inadequate linkages between

the public and private sectors contributes to unaffordability of housing costs.

## METROPOLITAN GOVERNANCE

As mentioned before, multi-level governance implies supra-municipal cooperation. Metropolitan governance is a supra-municipal cooperation approach recently emerging from continuous transformations of urban and territorial dynamics, and especially, from urban land expansion processes in cities in both developing and developed countries. These conurbations are also known as 'urban agglomerations,' 'metropolises,' 'functional cities,' among other names. While their definitions depend on legal, administrative or political local contexts, they share a common characteristic in that they are connected territories which do not operate in isolation and have strong territorial interdependencies varying from economic, social, and environmental aspects.<sup>174</sup> Managing these interdependencies in an integrated way enables citizens to access urban goods and services without jurisdictional constraints. For instance, integrated transport systems are crucial for millions of urban dwellers around the world who have to commute every day between several municipalities for work or access to education and other social services. Furthermore, the most pressing urban challenges such as climate change, mass migration and health pandemics do not recognise municipal boundaries thus underscoring the need for integrated management frameworks.

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174 UN-Habitat. *Metropolitan and Regional Governance Assessment Framework*. Forthcoming publication.

Metropolitan governance supports the quest to leave no one and no place behind since it aims for balanced territorial development that facilitates housing, work, health, education and other fundamental socio-economic rights without the constraints caused by administrative boundaries. Achieving metropolitan governance involves actions on three fundamental fronts. First, institutional solutions (formal and informal arrangements) can offer a more efficient management of the inter-jurisdictional and inter-sectoral complexity of territorial affairs. Second, decision-making processes and avenues (governing bodies and knowledge management) to approach territorial management from non-hierarchical perspectives. Third, there is need for common agreements and collective action (administrative/legal acts and common development visions) to support integration between several public, private and social actors.<sup>175</sup> Due to the fact that the metropolitan level is not yet rooted within public management and governmental approaches, the three metropolitan governance dimensions, and specially the common agreements and collective actions need to be legally binding in order to promote effective supra-municipal cooperation.

## DECENTRALISATION AND CAPACITY BUILDING

Decentralisation is the delegation of resources, tasks and decision-making power to democratically elected lower-level authorities that are wholly independent of central government.<sup>176</sup> The rationale for instituting a decentralisation reform process is often supported, in part, through the principle of subsidiarity and proportionality<sup>177</sup> which provides that local representatives are better placed to understand and respond to local needs. From a Human Rights perspective, this could mean that local reform processes, especially of a legislative nature (bylaws), will be culturally sensitive and thus have a higher chance of success.<sup>178</sup> Decentralization is also critical to the establishment of a long-lasting form of participative democracy that respects the dignity of the person by providing direct opportunities to voice concerns.<sup>179</sup>

Decentralised urban governance has direct linkages to the holistic approach of poverty alleviation because it could increase peoples' awareness of their rights and entitlements, empower citizens to have a genuine say in matters that affect them directly and ensure that public officials operate in an efficient, transparent and accountable manner in the management of public affairs.

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175 Ibid.

176 This definition covers both administrative and financial decentralization. It should be noted however, three major forms of administrative decentralization exist; deconcentration, delegation, and devolution. For more information on this, see: [http://www.ciesin.org/decentralization/English/General/Different\\_forms.html](http://www.ciesin.org/decentralization/English/General/Different_forms.html) (accessed 23 November 2018).

177 It was introduced to the European Union in the Treaty of Maastricht, 1993 as a general principle applicable to all areas of non-exclusive competence.

178 This is one of the elements of a functional effective law. Other elements include: precise in achieving its intended result, is clear, consistent, simple to understand and implementable.

179 Paul Lundberg, (2004), 'Decentralized Governance and a Human Rights-based Approach to Development'.



Constitution, laws and regulations codify the rules by which a decentralised system functions. Structurally, the desirable architecture of these rules is as follows:<sup>180</sup> the Constitution enshrines the broad principles on which decentralisation is to operate, including the rights and responsibilities of all levels of government; the description and role of key institutions at central and local levels; and, the basis on which detailed rules may be established or changed. Just under the Constitution are statutory laws which define the specific parameters of the intergovernmental fiscal system and the institutional details of the local government structure, including key structures, procedures (including elections), accountabilities and remedies. The statutory laws are then supplemented by a series of regulations which interpret and describe in detail the practices and measures within which the related law operates.

For example, in Uganda, the purposes and mechanisms for budgetary transfers are specified in the Constitution along with a formula for determining the minimum size of the pool from which block grants are to be distributed; however, the details of the fiscal distributional formulae are the subject of regulations.<sup>181</sup>

Decentralisation needs to be accompanied by capacity building. As more urban functions get devolved, local authorities need to be equipped with the necessary financial, technical and human resources to fulfil their mandates. Inadequate

capacity has, for instance, been identified as a reason for the failure of urban planning systems in many developing states. These include a lack of up-to-date mapping; weak development control and enforcement powers; out-of-date planning processes; and limited public knowledge of or compliance with land-use regulation. As a result, cities often develop in non-inclusive ways, which marginalises the urban poor.

To strengthen planning coordination in lack-of-governance contexts, it is crucial to evaluate existing capacity and processes, noting the legal frameworks for planning and development control as well as appeals and enforcement.<sup>182</sup> It is advisable to carry out an appraisal of existing resources using a set of performance indicators – which might include total expenditure, degree of self-sufficiency (i.e., proportion of own revenues to total), budget management performance (i.e., absence of deficits), and service delivery performance (i.e., client surveys). This would allow for the legal and regulatory frameworks to have differential approaches reflecting local capacity and resources.<sup>183</sup> Additionally, the focus should be on managing developments that have significant environmental or social impact on the city as a whole or on priority areas within it.

The human and administrative capacities of most local authorities in many parts of the world, especially in developing countries, have failed to keep pace with the substantial social, economic and physical

180 World Bank, 'Political Decentralization' <http://www1.worldbank.org/publicsector/decentralization/political.htm>

181 Ibid.

182 International Society of City and Regional Planners, *International Manual of Planning Practice* (ISOCARP 2008).

183 World Bank, 'Political Decentralization' <http://www1.worldbank.org/publicsector/decentralization/political.htm>

transformation within cities.<sup>184</sup> With limited capacity, the delivery of services is constrained which disproportionately affects the urban poor forcing them to access services that are expensive, insecure or illegal. To address capacity constraints at the local level, UN-Habitat calls for a systemic approach that mobilises different types of education and training – high and middle-level education, technical courses, peer-to-peer learning and technical support. This includes local government and civil society exchanging information and knowledge. The involvement of civil society requires capacity building to improve the ability of community leaders and public institutions to engage in dialogue to support a collaborative approach.<sup>185</sup>

## SMART CITY GOVERNANCE

Information and communications technologies, data and the new digital economy are of increasing prominence in shaping cities, both in developing and developed countries leading to what are described as ‘smart cities.’ These are “technologically instrumented and networked cities, with systems that are interlinked and integrated, and vast troves of big urban data are being generated and used to manage and control urban life in real-time.”<sup>186</sup> The smart city is characterized by Big data, the internet of things (IoT) and sensor networks that offer new ways for urban managers to make informed decisions and strategic choices. These include digital

networking of infrastructure with “grids of embedded sensors, actuators, scanners, transponders, cameras, meters and GPS producing a continuous flow of data about infrastructure conditions and usage”.<sup>187</sup> A smart city also exhibits sharing of data across systems thus enabling an integrated view of city services and infrastructure.

Technology is revolutionising urban governance in many ways. Digital platforms and applications are helping to facilitate dialogue between residents and decision-makers, autonomous vehicles and drones are changing the way in which cities are planned and designed and new mapping and 3D visualisation techniques are providing new opportunities for planning cities. The sharing economy is also creating new job opportunities and ways to make business. Accordingly, a smart city is understood to be one that uses information to produce *smart governments* (through new forms of e-government, evidence-informed decision making, better service delivery, and increasing transparency, participation and accountability); *smart economies* (by fostering entrepreneurship, innovation, productivity such as the app economy and open data economy); *smart mobility* (by creating intelligent transport systems and efficient, inter-operable multi-modal public transport); *smart environments* (by promoting sustainability and resilience and the development of green energy); *smart living* (by improving quality of life, increasing safety and security,

184 UN-Habitat, *World Cities Report 2016: Urbanization and Development: Emerging Futures* (UN-Habitat 2016).

185 *Ibid*

186 Rob Kitchin, “Data-driven, Networked Urbanism”, paper prepared for Data and the City workshop, 31 Aug-1st Sept 2015, Maynooth University.

187 *Ibid*.

and reducing risk); and *smart people* (by creating a more informed citizenry and fostering creativity, inclusivity, empowerment and participation).<sup>188</sup>

The Agenda, in para 66, expresses the commitment by states to adopt “a smart-city approach that makes use of opportunities from digitalisation, clean energy and technologies, as well as innovative transport technologies, thus providing options for inhabitants to make more environmentally friendly choices and boost sustainable economic growth and enabling cities to improve their service delivery.” It further identifies several uses of technology and data for better urban governance and provision of services including better urban planning and design (para 92) sustainable urban mobility (para 116), protection of cultural heritage (para 125), sustainable energy consumption (para 121), and facilitating participation and flow of information to urban residents (para 156). The Agenda, in para 160, also calls for creation, promotion and enhancement of open, user-friendly and participatory data platforms to transfer and share knowledge among national, subnational and local governments as well as other urban stakeholders including residents.

Smart cities interact with Human Rights in several ways. First, smart cities facilitate the rights of urban residents. The rights that come into play include the right of access to information as ideally, smart cities should promote open data and transparency in governance; the right to public participation as urban residents

are equipped with the necessary information to make decisions; and freedom of speech as technology enables alternative communication channels through which feedback from urban residents can be conveyed more effectively. Furthermore, as smart cities are meant to use data to improve the quality of urban services and lead to a better quality of life, various other civil as well as social, economic and cultural rights may be promoted. These include the freedom of movement, the right to earn a livelihood, the right to an adequate standard of living and the right to a clean and healthy environment. It is crucial to include mechanisms that allow for residents’ rights to be heard and to seek redress as a significant element in any smart city strategy. For example, e-government strategies can sometimes have an exclusionary effect on particular vulnerable groups, at least in relative terms (i.e. some groups may be more readily able to take advantage of initiatives than others even if there is a net gain for all). In such a situation, vulnerable groups should have the means to insist on parallel approaches or transitional measures.

Second, smart cities raise issues of intellectual property rights and data ownership. As innovation in this field intensifies, new forms of proprietary interest may need to be recognized and protected. The law is expected to perform a crucial role taking advantage of currently available intellectual property forms such as patents, industrial designs, copyrights and trademarks while adapting them to

188 Boyd Cohen, “What Exactly Is A Smart City? *Fast Company*, Sept 19th 2012, available at <http://www.fastcoexist.com/1680538/what-exactly-is-a-smart-city>.

See also Robert Hollands, “Will the real smart city please stand up?” (2012) *City* 12:3, 303-320

fit into new innovations. Furthermore, the law is relevant in the regulation of data access, ownership and control. As most of the data generated within cities is done by commercial entities which view it as a valuable commodity to be used for competitive advantage or for sale, regulation is paramount. These commercial companies are often under no obligation to share the data with public authorities.<sup>189</sup> As such, the law may come in to stipulate the terms of data ownership and sharing, especially where such data is generated from public utilities. These legal stipulations may also obligate public institutions and departments to share data among themselves as well as be open to the general public.

Third, it is noteworthy that smart cities and associated technologies may have negative Human Rights implications. The most affected ones are the right to privacy and freedom from discrimination. As troves of data are generated by a wide array of devices and networked systems including mobile phones, personal computers, traffic sensors and cameras, there is a risk of improper use. Millions of urban residents are leaving digital footprints and data shadows without any control or even knowledge of their use. Coupled with data security concerns and the vulnerability of computing systems to hacking, crashing, and viruses, a large amount of personal information is at risk of misuse. Additionally, some data usages have already caused controversy and labelled as discriminatory. These include the use of data by both public

and private institutions to monitor and predict behavior based on personal and demographic profiles.<sup>190</sup> While it could be argued that such data use serves a useful public purpose -such as improvement in urban safety and security- valid concerns are raised when particular racial, religious or ethnic groups are disproportionately targeted. At the end, without an all-encompassing focus on the community's needs, solutions may be misguided. It is thus important that the law strikes a reasonable balance between individual rights on the one hand and public interests on the other.

189 Rob Kitchin, Op. Cit.

190 Edith Rameriz, "The privacy challenges of big data: A view from the lifeguard's chair." (2013) *Technology Policy Institute Aspen Forum*.

## CONCLUSION

Good urban governance systems are characterized by the extent to which they improve the quality of life of urban residents. They involve consultative and participatory processes that include all urban stakeholders built around vertical and horizontal coordination channels among several territorial scales such as municipal, metropolitan, regional and national. They promote Human Rights by facilitating responsive, people-centered and locally appropriate administrative, political and financial systems and empower public authorities to fulfil the needs of all urban residents. Such systems are also cognisant of transformative urbanization trends such as the growth of frontier technologies and utilise them for urban prosperity while being aware of the Human Rights risks that they present.



Disability Pride Parade in New York City ©UN Photo/Devra Berkowitz

# RECOMMENDATIONS

## BACK TO BASICS' APPROACH - ESSENTIAL LAW

The failure of urban law to accommodate the way of life of the majority of poor urban dwellers calls for a new way of doing things. UN-Habitat advocates for a 'back to basics' approach called Essential Law. This approach entails looking at the current situation, identifying necessary standards for health and safety, and developing practical and realistic responses that can be assessed against need and a realistic projection of impact.<sup>191</sup> It proposes not a comprehensive law that tries to address everything, but one that focuses on the basic needs of the urban population to lead a decent and productive life, notwithstanding their frequent need to rely on informal strategies, with the possibility of scaling up to more complex interventions as capacity and resources increase. This approach can be found within the Agenda, which states that urban policies, in addition to being inclusive and participatory, must also be *implementable*.<sup>192</sup>

The Essential Law approach is consistent with the realities of urbanisation in the Global South. It recognises that

most local governments in developing countries are weak and under-resourced, and that the informal urban population is already substantial. UN-Habitat's proposal for legal reform has four main components. First, urban laws need to be appropriate to the local contexts in which they operate. Second, the compliance processes created by urban laws should be simple, expeditious and affordable for most urban dwellers. They should not discourage otherwise law-abiding residents from compliance due to the complexity and costs of the process and they should be regularly monitored and assessed for their efficacy. Third, legal frameworks should be characterised by clear institutional and governmental structures with sufficient accountability and coordination between them. They should specify the roles of each institution to eliminate gaps and overlaps which often lead to confusion, arbitrary decision making and poor compliance. Fourth, the law-making process should include an adequate appraisal of the financial and human resources needed for its implementation. Such an assessment ensures that proposed laws set realistic targets and that it is possible to implement them.<sup>193</sup>

191 Vanessa Watson, *African Urban Fantasies: Dreams or Nightmares?* 26(1) *Env. & Urbanization* 215–31 (2014).

192 Para 86.

193 UN-Habitat, *Planning Law Assessment Framework*, (UN-Habitat 2018).

These elements are all reflected in the Agenda. Para 86 calls for implementable urban policies; para 87 provides for stronger coordination and cooperation among the various levels of governments through multilevel consultation mechanisms and by clearly defining the respective competences, tools and resources for each level; and para 88 focuses on coherence between the goals and measures of sectoral policies at different levels of administration.

## ADOPTING HUMAN RIGHTS-BASED FRAMEWORKS

Human Rights-based approaches have three distinguishing features. The first is the belief that all development policies and programmes should be formulated with the main objective being the fulfilment of Human Rights. Second, a human rights-based approach identifies rights holders and their entitlements and corresponding duty-bearers and their obligations and works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations. The third attribute of human rights-based approaches is that principles and standards derived from international Human Rights treaties should guide all development policies.

The Agenda clearly supports a human rights-based approach to urban development as manifested by its inclusion of all the three distinguishing features. Under Para 12, one of the main objectives of the Agenda is the achievement of

urban areas where *“all persons are able to enjoy equal rights and opportunities, as well as their fundamental freedoms.”* It also pledges to **“leave no one behind”** by, among other things, ending poverty in all its forms and dimensions; ensuring equal rights and opportunities, socioeconomic and cultural diversity, and integration in the urban space; enhancing liveability, education, food security and nutrition, health and well-being; promoting safety and eliminating discrimination and all forms of violence; and providing equal access for all to physical and social infrastructure and basic services, as well as adequate and affordable housing.<sup>194</sup>

The Agenda also repeatedly includes the term ‘for all’ indicating that every urban resident is a right-holder. It goes further to identify specific groups that may require greater interventions. These include women, children and youth, the elderly, persons with disabilities, indigenous peoples and local communities, people living with HIV/AIDS, slum and informal-settlement dwellers, homeless people, workers, smallholder farmers and fishers, refugees, internally displaced persons, and migrants.<sup>195</sup> In the same vein, the Agenda aims to strengthen the ability of both the right holders to make claims (by putting an emphasis on public participation) and the capacity of duty-bearers to fulfil them. The latter is reflected in various paragraphs which recognise the link between capacity building and the fulfilment of Human Rights. For example, para 120 calls for capacity building of public water and sanitation utilities to

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194 Para 14 (a).

195 See Paras 5, 13, 20, 34, 57, 113, 148, 155 and 156.



promote the right to water and sanitation.<sup>196</sup> Lastly, the Agenda explicitly states that it is grounded in the UDHR and other international Human Rights treaties.<sup>197</sup>

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<sup>196</sup> Other relevant paras are 81, 89, 90, 120, 147, 148, 151 and 159.

<sup>197</sup> Para 12.



A section of Port-Au-Prince, Haiti ©UN-Habitat/Julius Mwelu

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# ABOUT THIS PUBLICATION

The Law can be used to promote inclusivity, equality and non-discrimination, however, it can also be used as a tool of oppression, exclusion and marginalization. The urban space represents an area in which the paradoxical nature of legal frameworks is exhibited. On the positive aspect, urban law can provide a framework through which various public and private interests are mediated especially in relation to land use and development. It can offer a stable and predictable framework for public and private sector action and give an avenue for the inclusion of the interests of vulnerable groups. Nonetheless, urban law can also, deliberately or inadvertently, undermine the enjoyment of Human Rights by promoting exclusion, marginalization and poverty.

This publication seeks to assess the impact of legal frameworks within the urban context using international Human Rights standards and the New Urban Agenda as the starting point. It examines six key development areas that UN-Habitat focuses on which are also where the potency of the law on Human Rights is greatest. These areas are Land, Urban Planning, Urban Economy, Housing, Basic Services and Urban Governance. The intention is to identify the points within urban legal frameworks where the enjoyment of Human Rights is undermined either through the substance of the law or through the overall manner in which the legal regime is structured. Proposals for reform are also suggested in advancement of the New Urban Agenda's commitment to "leave no one behind".

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