



# Urban Law Day 2016

Submission to Habitat III Conference

Quito, October 2016

## Background

The Institute of Advanced Legal Studies and the United Nations Human Settlement Programme (UN-Habitat) have signed a memorandum of understanding to promote innovative research activities in the niche area of urban law. The main pillars of this research partnership include: a) the organisation of an Urban Law Day every year b) the generation of knowledge in urban law through PhD studentships c) the provision of technical assistance and capacity building through studies, seminars, workshops and d) joint publications and networking.

The Urban Law Day is a specialised forum aiming to bring together a multidisciplinary circle of academics and practitioners interested in urban legislation, including planners, architects, policy makers, economists, urbanists, and lawyers. The purpose of the Urban Law Day is to facilitate discussion, the exchange of views, networking, and the presentation of new research findings or emerging issues. The third Urban Law Day was held on 15 July 2016 at the Institute of Advanced Legal Studies (University of London), and addressed challenges in developing countries related to good urban legislation and practical solutions for improving them.

# Proceedings of the Urban Law Day (IALS, 15 July 2016)

## 1. Urbanisation and the new Sustainable Development Agenda

The Sustainable Development Goals (SDGs) adopted in 2015 as part of the UN 2030 Agenda for Sustainable Development provide a unique opportunity to shape the urban development agenda for the coming fifteen years. SDG 16, in particular, has a horizontal impact on poverty eradication and sustainable development and enables the delivery of the other goals of the Agenda, including SDG 11 on Sustainable Cities and Human Settlements.

SDG 16 sets out to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. These are elements of the rule of law that Goal 16 (especially under Target 16.3) is meant to promote as a general enabling environment for the realization of the Agenda. The enabling ingredients contained in Goal 16 purport that (1) all persons, institutions and entities, public and private, including governments, are accountable to just, fair and equitable laws; (2) that all are entitled without any discrimination to equal protection of the law and to timely, and just remedies; (3) that natural resources are managed sustainably for shared prosperity of the communities; (4) that secure property rights, contract enforcement and restraint of abuse of official discretion create incentives for development via investment and trade; (5) and that access to justice empowers individuals by triggering their human development through the enjoyment of economic and social rights. Monitoring and measurement of progress, however, is paramount, especially regarding the effectiveness of action at domestic level.

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## 2. Urban Rules and Legislation in the New Urban Agenda

The Habitat III Agenda provides a specific framework for the worlds’ human settlements. The experience of Habitat II suggests that the Habitat Agenda’s requirement to review laws and policies has been largely ineffectual and action has resulted only in marginal reform. Legislation has the potential to set effective frameworks for sustainable development, or instead add to inequalities and exclusion. Urban law is necessary to provide a set of rules to mediate and balance competing public and private interests, especially in relation to land use and development: it creates a stable and predictable framework for both public and private sector action, guaranteeing inclusion of the interests of vulnerable groups and providing a catalyst for local and national policy discourse.

“The success of the SDGs will be determined to a large extent in the world’s cities”. However, the fundamental prerequisite for this is responsive and accountable urban governments endowed with appropriate legal powers, adequate financial allocations and the human capacity to drive a transformation agenda.

Urban legislation must be enforced, must solve problems instead of creating more; set out clear, unambiguous, comprehensive, reliable and well-circumscribed rules, for the sake of easy, inexpensive implementation and access, and do so for the longer term. ‘Good’ urban laws need to devise well-adapted provisions that can systematically entrench a rights-based dispensation focused on public interest. Renewed emphasis is called for on two fundamental legislative principles: a) the quality of law, i.e., ability to perform the functions determined by policy; and policies, i.e., the ‘prescriptions’ for law and governance, are primarily based on realistic assessments of what a country’s urban development needs are, and what resources and capacities are available to fulfil them.

### 3. Defining effective urban legislation

The achievement of the SDGs and the goals of the Habitat III Agenda largely depend on the adoption, enactment and enforcement of good urban legislation. Good urban legislation is in fact effective legislation. Effective legislation is the one that can deliver results.

Legislation that delivers results is the result of complex mechanics in the conceptualization, design, drafting, enforcement, and implementation of the law. Effectiveness is a feature of every piece of legislation and its fundamental elements include a clear purpose, consistent and well-thought-out rules and enforcement mechanisms that realistically address the targeted problems; clear, precise, and unambiguous rules and obligations; coherence with other related laws; and clear provisions and mechanisms for systematic monitoring of implementation and evaluation to capture the results of legislation in real life.

In short, effective urban legislation is backed by a clear urban policy; has a clear purpose; has a content that responds to the regulated problem and takes into account the available evidence, existing situation, resources, capacity and views of stakeholders; has a clear and enabling structure; is presented in a clear way, understandable to the end user; is easy to comply with; incorporates sufficient mechanisms to monitor implementation and measure results and effects in real life and is compatible with other legal instruments that regulate related fields.

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**Overall, its implementation has proved to be effective in identifying strengths and major gaps related to the existing legal framework (and policies).**

### 4. Tools to improve the quality and applicability of urban legislation

Diagnostic tools are useful in order to identify in a structured, objective and systematic way the strengths and weaknesses of legislation. Two specific tools include:

The Legal Assessment framework developed by UN-Habitat. This has been tested/used in Colombia (2012), Philippines (2013), Rwanda (2014), Mozambique (2014), Egypt (2015) and Saudi Arabia (2016). Overall, its implementation has proved to be effective in identifying strengths and major gaps related to the existing legal framework (and policies). It is a useful tool to guide the process to agree on actions that are needed to address the identified gaps. The legal assessment framework uses two sets of indicators, the first is related to the functional effectiveness of law, which includes indicators related to the clarity of the objective of the regulation, its mechanisms and processes, institutional/organizational responsibilities and roles, ambiguity and standard of drafting, and capacity to implement the legislation. The second set of indicators are technical in nature and they are related to land, financing, public space, plots and blocks, buildability-development rights, and building codes.

The assessment needs to be undertaken through an inclusive and participatory process that ensures active engagement of key stakeholders. The methodology adopted could include focus groups, interviews and expert group meetings.



Ningo Pram Pram Planning Office, Ghana

The main recommendations and lessons learned for countries aiming at applying the legal assessment framework in their jurisdictions are: the importance of considering the legal assessment tool as a starting point (not a comprehensive framework) when aiming at understanding the complexity of the legal framework; the need for engaging multiple stakeholders from different backgrounds to ensure complementary of views and suggestions; and guarantee the linkage of this exercise with existing reform initiatives.

The 'effectiveness test' is a logical exercise that examines whether the purpose, the structure, the content, and the expected or real results of an Act are aligned and consistent. Its advantage lies in the fact that it views legislation as a continuum and in that is a neutral tool that looks at the content and the consistency of legislation.

A case study of the assessment of the effectiveness of a Land Use Act (of 1978) highlighted a number of weaknesses in the design, drafting and implementation of the Act: a) the purpose of the Act does not reflect a clear policy and sets no clear and meaningful framework for interpretation and operation; b) there is discordance between the structure and content of the law and the problems to be addressed; the solutions provided are overambitious and enforcement mechanisms are inadequate c) the Act is complicated, long, and uses of convoluted language and is difficult to access and understand d) the rights related to the ownership of land are not clear e) the Act does not resolve the tension between rights to land recognised by the law and rights to land that exist through customary law f) the procedures for acquiring land are not clearly stipulated g) the power to adopt regulations and land use plans are not time-bound and hence regulations have not been adopted h) no institutions are created to implement the Act and no procedures and reporting channels are in place to ensure accountability and transparency i) the Act lacks accountability and introduces provisions which are in breach of the rule of law (eg Section 47 of the Act) j) no provisions are in place establishing obligations for data collection and reporting and no report has been in place on its implementation. The assessment of the effectiveness of the Land Use Act proves that it is a controversial, confusing and contradictory Act that has failed to bring forward substantive change. After about 37 years of existence, the Land Use Act is largely ignored and people act on the basis of customary rules.

## 5. Challenges to good urban legislation in resource-poor settings

Case studies highlight a number of common challenges for the effectiveness of urban and planning laws: a) lack of credibility of urban laws. Laws often lack credibility which is a critical ingredient of successful reform. Credibility is enhanced when laws are culturally resonant and enforceable and when the population enjoys a higher sense of 'ownership'; b) limited relevance and practicality of urban laws. A legal system that does not express the realities of the socioeconomic and political-institutional processes that it proposes to regulate can generate distortions of all sorts. This phenomenon is frequently reflected in laws governing physical planning and land development: these include procedures for important elements (such as identification and maintenance of public space, plot design and allocation, the control and economic role of built space and building codes) that consistently fail to produce the physical outcomes that were expected to match economic and social



policies. Inefficient or impracticable legislative reforms reflect the dominance of 'universal' technical concerns and replication of foreign 'best practice' that disregard both local circumstances and opportunities for effective review and adjustment; c) lack of land rights structure and tensions with customary law. Several challenges start from the fact that the issues restraining development delivery are broader than planning law and policy and are directly related to land ownership, registration and control. The development of any meaningful and effective planning system is reliant upon the establishment of a clear, reliable and robust land rights structure, which is often not in place. A planning system that ignores land rights is far more likely to fail because of the absence of certainty as to ownership and control. Pre-colonial systems of ownership were based upon the concept of community rather than individual ownership and thus differed significantly in the foundations of land ownership compared to western countries. Communal systems are founded upon a religious and ancestral view of land that

brings with it concepts such as allodial title, usufruct interests (or customary law freehold interests) and lesser interests; d) poor implementation structures. Additional challenges include the lack of staff, capacity and resources of competent institutions.

The challenge therefore lies in the identification of responses which recognise that: the administration, funding and structure to deliver a land registration system does not exist; land registration is essential to economic growth, tenure security and planned delivery; customary rights to land are resilient to change, will persist and are fluid in their operation and function; the delivery of an enforceable and effective planning system is reliant upon the establishment of some form of land registration system; land use planning will only be meaningfully delivered and enforced with some degree of communal control; land use planning at its most effective secures measures that can allow for the provision of essential infrastructure; and corruption and non-compliance is a constant response to any structural change.



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# UN HABITAT

UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME  
P.O. Box 30030, Nairobi 00100, Kenya  
Tel: +254 20 7623120  
[infohabitat@unhabitat.org](mailto:infohabitat@unhabitat.org)

