A practical guide to preparing, implementing and ensuring sustainability of reforms to property rights registration systems.

Real Estate Registration and Cadastre

Practical Lessons and Experiences - Chapter 6 – Legal Framework.

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Chapter 6 Legal Framework

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Introduction

This chapter focuses on major lessons learned in relation to the legal framework. They have been derived from more than 30 years of legal work, beginning at the Sydney, Australia land registry, which operated both a deeds and title registration system, and then in more than 30 countries across Europe, Africa, the Middle East, Asia and the Pacific. The lessons are remarkably consistent throughout the world, which confirms the author's conclusion that people are pretty much the same everywhere, so the issues and approaches presented below should have application elsewhere. While the chapter is aimed at lawyers, those who manage lawyers might be interested to find out what the lawyers are up to. Unlike the other chapters, it does not include many anecdotes – drafting law is (sadly) often a rather dry business.

The focus of the following pages is not on technical matters relating to drafting of property registration and cadastre laws. Such matters have been addressed by the author in the FAO technical guides numbers 9 and 10, each of which has a legal chapter and the links to which can be found in book references 17 and 18 in Annex 1. Rather, this chapter looks at the approach to be taken and some contentious issues, including the human dimension, when approaching improvements (hopefully) to the legal framework to support improved land administration.

Overview of Laws

Having done your research into the country's legal system and found as many laws, reports and background items as possible (see Chapter 2 on desk reviews generally), the first thing to do is to carry out an assessment of the existing laws (and related policies). This should be done *prior* to visiting the country because time in country will be very precious, so it is useful to get the hackwork out of the way in advance. Also, you want to be informed at your first meeting – show the officials that you have done your due diligence and you are ready to get into substantive topics immediately. You should demonstrate that you are not going to waste their time with simplistic questions that would reveal a lack of preparedness and/or seriousness. Of course, it goes without saying that you need to be an expert in the particular area of the law that you are reviewing (or you can learn very, very quickly).

The laws as they currently stand provide the foundation for the future work and the starting point for any reforms that you might want to make. If the budget stretches far enough, it is a good idea to have both a local and an international lawyer to help out. Each can have special knowledge and skills, such as the local lawyer knowing which are the relevant laws, where to find them, how to ensure that the translations are accurate on key terms,[1] whether there are any relevant customary laws, and who in the legal fraternity might be helpful. A local lawyer might also know the history of why certain laws were adopted, the social context and the existing and potential problems. A client will often appreciate a local presence. And in an ideal world, you would have the help of a local sociologist or anthropologist to complete the picture.

In some countries, it is still very difficult to get current versions of laws. If you face this problem, then you might need to approach the legal drafting department (sometimes in the Ministry of Justice) because that department should have a complete and updated set of laws. Even if there is not a consolidated

[1] While Google translate has made life much easier, not all languages translate well, particularly where legal expressions are used as terms of art and cannot therefore be literally translated. Please don't try to save money on translations – a lawyer without the text of laws is a wasted resource. Having said that, translations take time and money, so you need to be strategic about which laws are translated and allow plenty of time.

version, you should be able to obtain the original law and all the amendments, and then try to piece it all together, which is often a time-consuming and tedious task.

The document produced by the lawyer from the review should: 1) identify the name of each law; 2) provide a brief overview of its purpose, functions and effects; 3) identify the main points of relevance for the proposed project activity, whether positive or negative; 4) highlight what is missing, including which laws (and possibly policies) are missing. The review document does not need to be excessively long but, depending on the current state of the legal framework, it could easily run to 20 or 30 pages if one page is devoted to each law.

Reviewing laws: what is missing might be just as important as what is there

The challenges when reviewing laws (and policies) are twofold: Firstly, knowing what is good or best practice, or at least workable, so that there is a standard against which the existing laws can be judged. This requires a good understanding of other registration laws and systems, and also some mental flexibility because there is no one best way to set up the legal framework. For example, when one new cadastre law was being drafted, they specified that the owner was the basic unit of the system, not the parcel. This approach was quickly reversed but only because those reviewing it knew what was best practice.

Secondly, you must look for what is *not* there – what is missing or what has been incompletely addressed. Looking for something that might not be there is a much harder task and requires quite a bit more mental energy and concentration than simply reacting to what is presented to you in the text of a law.

It is useful, therefore, to come up with a list of items that you would want to see *before* you start reviewing the law. You can then check off each major point as you come across it, and those still left on the list can be discussed with the drafters or client to see if those items were left out purposely and why, or whether a topic is covered elsewhere or in another manner (or whether they did not know to address it). For example, almost all European laws on National Spatial Data Infrastructure (NSDI) omit the most important thing to bureaucrats: money! Rarely is there any mention of who owns the data and therefore who is entitled to the proceeds of selling the data or who must pay compensation for losses caused by errors in the data. This omission will surely cause problems in the future, as evidenced in other jurisdictions already.

Making a list of important points in advance is hardly a revolutionary concept but it is included here as a reminder to do so, and also to devote the time and mental energy to the task. It requires some big picture thinking and, in the rush of project preparation work, there is rarely time for that. A standard list should apply across all countries, such as the list of items that should be addressed in a registration law (see FAO Technical Guide Nº 9, page 57. book reference 17 in Annex 1). Likewise, items to appear in laws to promote information sharing, gender equality, digital record keeping, condominiums, etc. could be developed and used across jurisdictions.

Constitution

The **constitution** is the basic legal document in almost any system (except a few, such as the United Kingdom, which does not have a written constitution). It sets the context and parameters for all other laws, so its provisions are very important when reading other regulatory documents. There are several features to look for in a constitution, namely:

- Does it expressly or implicitly create a division of powers between the executive, legislative and judicial branches of government (the doctrine of "separation of powers"), such that one branch of government is not permitted to carry out the functions of another branch? This can be very important for land titling programs because in some countries (such as the USA), first

registration has been characterised as a judicial function and thus a judge must be involved. See World Bank publication, Systematic Registration: Risks and Remedies, pages 52-54 for a discussion of this issue (book reference 38 in Annex 1).

- Does the constitution permit private property rights or provide protection for private property rights? In some countries, the constitution makes it clear that property belongs to the nation and people can only have land use rights.
- What does the constitution say about the taking of private land for public or other purposes? In most places, the constitution declares real property rights to be protected and the government can only take the land (usually, but not always, for a public purpose) if it follows a legal process and pays compensation. This is a clue to look for a law on compulsory acquisition.
- Does the constitution establish equality between men and women, such that both are entitled to own land, use government services, obtain information, etc.?
- Are there any provisions on access to information or any privacy provisions?

It would be extremely rare that you could expect to change the constitution of a country, so the review is more about understanding the current situation and how you need to work within the parameters of the constitution.

Land Administration Laws

The next stage of the legal review is to focus on the land and land administration laws (also known as "real estate" or "immovable property" in some jurisdictions, which should capture the buildings that are constructed on and attached to the land). Depending on the country, these could be named the land code, land law or real property law, and there are also the civil code and mortgage law to look at. They will normally include provisions on what is land, what are land rights, what can be done with them, and how and whether transactions need to be registered. These laws might also deal with the interface between customary and written laws. The laws on indigenous people's rights (if such laws exist) should be considered to see what limits might exist and also how land rights can be held, such as communally or individually. There is likely to be a law on surveying and surveyors, or at least regulations that set standards.

Tied to the land laws are the laws on condominiums, NSDI and e-signatures and e-documents, which permit people to transact electronically and for registry staff to register transactions using e-signatures. Will they support what you are planning to do? If not, what needs to be changed? The law on compulsory acquisition by the state (also known as expropriation or resumption) should be considered to see how the state goes about acquiring land for its needs and the extent to which it accords with the requirements of a donor or lender, such as those in the policy of the World Bank or the Asian Development Bank. As anyone who has attempted to insist that the standards in such policies must be applied to the local context will know, the local officials will be amazed that people with no formal legal rights should receive compensation when the public land that they are occupying is used by its rightful owner, the government (and that by providing compensation, you are creating a moral hazard that will encourage others to occupy state or other land). So, good luck in convincing them.

Most importantly, the law setting up the registration system (if any), such as the deeds registration or title registration law, needs to be very closely reviewed. More on this below.

Land Sector Laws

Looking further afield, laws on land reform, land consolidation, land administration and land management can be considered if time permits. Public land administration is also important, but a topic in itself and beyond the scope of this chapter. See Section 8 of the VGGT (book reference 9 in Annex 1) for key elements that should be present in a public land law. If valuation or regularisation of unauthorised constructions is part of the proposed project, then laws on those topics should be considered.

Laws of General Application

In all cases, laws on family and divorce, gender equality and inheritance should be considered to see how women are treated (equally, hopefully) in the economic and social spheres. Are they able to own land, including independently of a male relative? Laws that are relevant to the property rights of ethnic and linguistic minority groups might similarly be considered. And can children own land? If so, can they sell or otherwise transact with it (without special procedures)? Further, the law(s) on alternate disputes resolution, review of administrative decisions and appeals should be considered.

Dual or Multiple Legal Systems

Extra care needs to be taken in countries where, for historical or religious reasons, there are two or more legal systems operating in parallel or if there are laws left over from previous legal systems that are still in force. The overlay of communist law (mostly derived from the Soviet Union's work on legal theory of the 1930s) provides a further complicating factor. For example, in parts of Africa and the Middle East, you could find indigenous/customary laws, Ottoman era laws (in the Middle East), European colonial laws and post-independence laws. Western style laws and Islamic law will co-exist, but how they do so and which takes precedence are relevant questions. The distinction between civil and common law jurisdictions is not as great as it used to be because common law jurisdictions have increasingly come to resemble those of civil law countries, with parliaments enacting laws on many topics and doing so in great detail, leaving common law judges with less room to develop new law.

The review of so many laws might seem like **a lot of work**, and it is. But it is a wise investment. If your work progresses without a thorough due diligence effort, there will be surprises along the way that could distract you and even derail the entire activity. People are often looking for reasons to resist change and citing the requirements of an obscure law is an easy way to frustrate the purpose of a meeting or activity. Responding confidently in an informed manner will usually shut them up, until they think of another reason why your proposals are wrong. I have found that, as agents of change, we are rarely welcomed with open arms by everyone.

Drafting a New Law or Amendments to the Existing Law(s)

Once you have established your starting point, you can begin working out what needs to be changed and what needs to be introduced to the legal framework to achieve your ends. You might, for example, need to introduce a new registration law or dramatically amend the existing one. Alternatively, the existing law(s) might be quite adequate and require only small changes. If you are lucky, many of the policy and strategic decisions will have been made, so it should be just simply a matter of lining up the existing situation against what is required, and then drafting a few new provisions or laws.

However, things are rarely so simple. Often, the policy decisions have not been made or they are expressed in such a general way that they cannot be implemented without much discussion and consideration. What policy-makers regard as "detail" can encompass major issues for lawyers and administrators, so much work can be required. Commonly, key decision-makers do not understand that it is their job to make the policy decisions and then instruct the lawyers in how to move ahead. Lawyers are not trained in policy development but I have found that the responsibility so often falls on the lawyers that it is easier to draft something and then wait for people to object – the draft text prompts them to turn their minds to the issue and say what they do not want.

Let the lawyers decide: Abrogation of responsibility to make decisions by non-lawyers

Laws are written by lawyers, so let's ask the lawyers to come up with the new law. This is a common approach. However, it is fundamentally flawed. Lawyers are drafters, and they come up with the right words to express ideas, policy positions, operational matters, new and better ways of doing things. They do not necessarily know *what* to write. This must come from policy-makers, operational specialists, topic specialists (such as IT, NSDI or gender specialists). This requires a team, with the lawyers acting as midwife to ensure that the new law emerges properly formed and as intended.

Unfortunately, it is not unknown to send the lawyers off by themselves to do all the work. The same thing sometimes occurs with new IT systems, where the IT people are left to re-engineer the processes without input from the operational and technical specialists. In both cases, major omissions and missteps can occur. What is perfectly logical to someone trained in law might be crazy in an operational context. I have seen this again and again. Worse still, the lawyers who make up a large number of parliamentarians might not realise the errors, and thus a flawed draft law gets adopted and must then be implemented!

The only sensible, efficient approach is to create a multi-disciplinary team to prepare laws. Where I have seen this happen, the results are usually very good. Involving outsiders, possibly economists or IT people, can introduce new ways of thinking too. To leave it to the lawyers alone is an abrogation of responsibility by those who are in charge of for the system's design and it should be avoided as much as possible.

Where can you find **inspiration** for the law or the amendments that need to be drafted? Fortunately, there is no shortage of internationally agreed or accepted guidelines; numerous diagnostic tools have emerged over recent years; there is advice on what is international best practice; there are likely to be policy statements of the host country; and there are probably one or more reports of previous consultants that contain useful ideas. Similarly, workshops with officials and external stakeholders can highlight problems and possible solutions. Technical assistance specialists are, of course, a good source of advice and inspiration.

Try to work with what you have, at least at first

Generally, the laws of a country will be in a reasonable state and capable of being used without major change, at least at first. If you don't use what is already there then you could face long periods of preparation, discussions and enactment of a new law. It can take years to have a major piece of legislation adopted by a parliament. You can add on another year to prepare and adopt the regulations. So, there can easily be a delay of two or three years before a reformed or new law comes into operation. In the meantime, work should continue under the existing law as much as possible. If necessary, the transitional provisions at the end of a new law can deal with work already done, such as by validating the outcomes under the existing law. Although retrospective provisions in a law are, as a rule, not recommended, they can usually be drafted without risk when they confer a benefit on the public.

One of the most basic decisions to make in a land registration project is whether the system should be **declaratory** (as in a deed system) or **constitutive** (as in a title system)? Much time is spent on this question in the academic texts because it is possibly the most fundamental issue and it used to affect the entire system (in the days before computerisation), although now it is not such a critical decision in terms of administration. It is also the main thing that lawyers learn about at university, so they will want to talk about it. There are also multiple versions of constitutive systems, starting with the distinction between deferred and immediate indefeasibility. The basic issues relating to these questions have been well explored by David Palmer in the FAO Technical Guide no 9 pages 49 to 52 (book reference 17 in Annex 1) so will not be repeated here, but his assessment should be carefully considered.

No matter whether you chose declaratory or constitutive, **all systems can work well**, particularly with suitable IT support that allows quick and easy searching.

When either amending the existing registration law or drafting a new one – whether it is declaratory or constitutive – make sure that it covers all the **basic elements** to permit the system to operate in practice. A checklist has been prepared (see FAO Technical Guide no 9 page 57 book reference 17 in Annex 1) on what the law should include. The legal review and (if necessary) amendment or drafting process need to ensure that each of these items is addressed adequately, such as "creation of the registration system", "appointment of person responsible", "nature and effect of registration", "public access to information in the system (subject to privacy concerns)", etc. In this context, "adequate" does not mean detail – the details can be left to regulations.

It is often a good idea to include only a **minimum in the law** and provide most of the detail in the regulations, particularly in the early stages of developing a new system. This is because many aspects will evolve with time and experience, so flexibility is needed. If the law is too detailed and prescriptive, then it will constrain innovation and best practice. Ultimately, the details can be transferred to the law if necessary.

The enemies of innovation: Professors of Law and others

Registration projects often seek to introduce new ways of doing things – more efficient approaches, better information sharing, more protections and greater access for users. In a small number of cases, completely new concepts are introduced to land laws, such as private ownership of land, and then reflected in the registration law. Thus, open, creative and user-focused ways of thinking are commonly required.

In practice, where a major new law is to be drafted, the task will often be given to lawyers who are well experienced and know what they are doing. This makes sense. However, sometimes, these lawyers do not have these necessary qualities or perspective to embrace the necessary reforms. Rather, they can often be defenders of the existing system and resistant to any substantive change because the existing system is what they know and what they have built their careers on. All proposed changes are met with arguments as to why this or that is impossible and why it goes against the fundamentals of the legal framework or society. For such people, all change is a threat and they see that their task is to minimise these dangerous reforms. The lawyers are not doing this for any improper motive but rather to avoid problems. And it is not just lawyers who can be an impediment to reform. People who have known only one way of doing things can be a roadblock to change.

Experienced and knowledgeable lawyers and specialists have an important role to play, but they should not lead the process. That task belongs to the people who are charged with achieving the overall goal of the reforms. Thus, the multi-disciplinary team that includes lawyers and specialists should be chaired by someone with the overall vision and supported by others who can help realise the reforms.

Commonly Contentious Issues

There are some areas of a registration law that will be contentious. For example, expect heated discussion when it comes time to draft the provisions dealing with **parcel areas**, including whether such information should even form part of the records. There are commonly discrepancies between the areas shown on legal documents and the areas measured, either larger or smaller, which give rise to arguments between lawyers and surveyors about which is correct, and potential problems with beneficiaries if they see that their area as shown on a map is smaller than what their deed says. It is important to highlight the financial consequences of the area issue to the agency or ministry, and to make it clear that in other countries, the land registry has been found liable to compensate anyone who suffers a loss because the precise area shown in the records was unavailable. Or a new law could suffer a fatal public relations blow if people see that the area of their land has been reduced. For more

discussion on this point, see the World Bank publication Systematic Property Registration: Risks and Remedies, pages 58-60 (book reference 38 in Annex 1).

Privacy and access to information in the register is another contentious and sometimes emotional issue. Each country, and people within countries, have their own views about privacy. Some are horrified that anyone could know what property they own by inspecting the register because financial affairs are regarded as confidential. Consequently, you can face serious resistance to opening up the register for public inspection. There are *numerous* responses to this issue so there is plenty of room to develop a unique solution that reflects the values of the country, while still pursuing the ambition of an informed market and associated economic efficiencies.

Customary and informal rights can be other contentious areas. They commonly present difficulties with not only identifying but also adequately recognising the rights that people understand themselves to have in a registry system that may not be (legally or otherwise) equipped to record such rights, particularly if an outside model is imported without regard to local conditions. The situation is made doubly difficult if the customary and/or informal rights exist over land held by others whose rights are derived from a parallel system, such as government leasing of public land to investors or grants of public land to developers. Custom and informal rights exist around the world and have presented particular practical difficulties in registration projects across Africa, the Pacific, the Americas and Asia. So at least there is a body of knowledge and experience in how to deal with such challenges. For lawyers used to European legal systems, the multitude of rights that can exist in other legal systems can present real conceptual challenges. As noted above, a local lawyer and sociologist can be major assets in such circumstances.

It is important for the lawyers to understand the real life impact of the law that they are drafting. While recording one person's legal rights is important, unless the process is done in a fully informed manner, doing so can deny other people their (often long-held) rights, such as issuing a title to one person when multiple people have rights over the land, trees, wells, pathways and other features. From a gender perspective, women's rights can sometimes be discounted in the face of rights claimed by men. Therefore, at the design stage and in monitoring, it is important for the lawyer to work with at least one sociologist, as well as the local lawyer, to understand the context. Working out how to create or modify the legal framework to adequately protect these rights is not only a legal challenge but a political, ideological and practical one, with numerous interest groups (one both sides) wanting their views to dominate.

Dispute resolution should be a particular focus of the law, with at least one option for people to have their dispute or grievance addressed without the need to go to court. Preferably there would be several, ascending levels of means to resolve disputes, beginning with administrative reviews, through non-judicial mediation and arbitration, and then finally the court system. The law should create the framework for an efficient system of settling the disagreements that invariably occur, primarily in relation to first registration but also for subsequent disputes, particularly boundary disputes. See Section 21 of the VGGT (book reference 9 in Annex 1). A basic understanding of the existing alternate dispute resolution laws and systems and also the court system is required before beginning work. Similarly, it would be useful to talk to those who operate and use the systems to see if they are functioning well. There is no need to create a new system for resolving disputes if an adequate one already exists.

The land sector is well known as a major area for **corruption**, as discussed in Chapter 5. The Transparency International/FAO publication Corruption in the Land Sector (book reference 36 in Annex 1) not only summarises the many ways in which corrupt behaviour can be found in the land sector but also makes suggestions on how to deal with this international phenomenon. One such action involves the improvement of the land governance framework, which is supported by the laws, to introduce greater transparency, accessibility and accountability in the administration of land. The need to promote these three aspects of land administration should be constantly kept in mind when drafting new laws or amendments.

Gender issues will also be contentious if only because almost every official will tell you that there is *no gender inequality* in the country, so stop wasting our time with it! The constitution, they will tell you, declares men and women to be equal, so that is the end of the story! And all laws are drafted in a gender neutral way, so stop trying to mention women! The only way to counter such beliefs is, in the author's experience, with hard data that show women are under-represented as property owners. Key areas of law that are relevant are: the right to own property independently (so that women can own property by themselves); inheritance provisions (to ensure all inherit equally); family law (often noting that both spouses are deemed to own the matrimonial property); divorce laws (to understand how property should be split); and the nexus between civil and family laws and the registration laws (to ensure that women can be recorded as co-owners and that both owners must agree to a sale). If you fail to address gender issues adequately in the law, there are many other avenues, including the regulations, directives and publicity materials, plus operational and educative activities that can be sued to re-right the imbalance. It is unrealistic to expect that displacing beliefs that have existed for millennia can be accomplished in a short time, so prepare yourself for an extended challenge, and remember that the challenge is well worth it. Similarly, observations can be made about linguistic, religious or other minorities and also other vulnerable people, including children. There are numerous useful resources available to you, including the FAO Technical Guide N° 1: Governing Land for Women and Men[2] and the Gender in Agriculture Sourcebook.[3]

Transitional provisions, which cover the move from the old system (or law) to the new system (or law), are rarely understood, including by lawyers in many countries. However, in terms of affecting existing rights, the transitional provisions (and consequential provisions) can be the most important. Discussion on how existing rights and obligations are to be carried forward to the new system (or law) should not be left to the last minute when everyone is exhausted. Likewise, you might struggle to convince local lawyers and officials in some countries that you need to specify which old laws are overridden by the new law. Often, they simply say "any law inconsistent with this law is void". This is lazy and creates the confusion down the track that we should always try to avoid.

Listen to the people on the ground and reality check everything

Either from arrogance or insecurity, lawyers can sometimes think that they know it all and that the opinions of others can be ignored because they really don't understand. Maybe all specialists are the same but in the case of lawyers, it can be made worse if lawyers only talk to lawyers and they thus confirm their supposed superiority to everyone else. Using specialist legal terms and Latin expressions only serves to exclude non-lawyers. Finally, lawyers are often under pressure to deliver the law, and do not have the time for broad consultation.

However, no one knows it all, and lawyers would be well served to actively pursue input from those with other types of knowledge. The consultation process should be introduced at a very early stage of drafting so that basic concepts and relationships can be reality tested. Rather than leaving this to the initiative of the lawyers, the consultation should be established in the work plan, and it should be supported by the inclusion of a range of people on a drafting committee. This approach will also improve efficiency as wrong approaches can be quickly and easily dispensed with before the law is finalised. Taking the draft law outside the land registry headquarters to local offices, user groups, bar associations, civil society groups and others is another mechanism for reality checking. Although somewhat time consuming, it can be a more efficient approach than adopting a poorly drafted law and then going through the process of amending it.

The **benefits** of clear, well drafted laws are not just for the public who are subject to the laws. Staff also benefit greatly by having a law that clearly sets out their powers, responsibilities and limits. Even if the

[2] (http://www.fao.org/docrep/017/i3114e/i3114e.pdf
[3] https://openknowledge.worldbankorg/handle/10986/6603

substance of the law does not change the rules to any degree, a clearer, better expressed law gives staff greater confidence, makes it easier to train them, and provides them with an authoritative reference point when giving advice or information to the public (who often do not believe the officials – sometimes with good cause).

Focus on the common cases, not the exceptions, and try to keep it simple

It is easy for lawyers (and other professionals) to make things complicated. The complications are often the interesting bits and what we study in law school. The exceptions are more challenging than the general principle, and lawyers learn where the dividing line exists. If the law were perfectly clear, the role of lawyers would be much diminished. So, there is a bias to make things complicated, which also shows how accomplished the lawyers are. Further, there can be a desire to cover every situation so that no problems will arise. Similarly, it is easy to make the structure and language of the law complicated if the exceptions occupy the primary focus of the drafters, resulting in laws that are difficult (or even impossible) to read and understand.

This approach reverses how most people would deal with a situation. Normally, we come up with a general rule, and then we deal with problems as they arise. So too with laws. The focus should be on the common cases, which are what 99 per cent of the population will experience, and not the one per cent. This is not a radical proposition but it is one that is easy to forget when deep in the process of drafting a law. It should be kept in mind throughout the drafting process.

Regulations and Technical Directives

Drafting of the **regulations** should take place in parallel with the preparation of the law or amendments. This is to ensure that nothing is missed. Often, in discussions about what should appear in the law, some items are considered too minor or technical, but unless they are recorded in a draft regulation they can be lost. Leaving the drafting of regulations until later is also inefficient – it means that the work must be done again, sometimes by a different team. At a minimum, a list of matters that were identified, discussed and (possibly) decided during the drafting of the law should be created. That list can then be used as a guide to the content of the regulations.

It is also a good idea to draft the regulations in parallel with the law because in some legal systems, you will need to specify the topics on which regulations will be drafted. Unless there is a "hook" in the law on which to hand the regulations, it might not be possible to adopt the regulations you need.

If possible, the law should make allowance for the head of the registration agency to issue **technical directives**. These would be binding on those using the system and provide the details of procedures, formats, document and plan requirements, and other operational or technical matters. The main advantage of such directives is that they can be quickly and easily updated as the procedure or technology changes.

Manual, Publicity, Training

The lawyers, particularly those who prepared the law or amendments, should be involved in the preparation of the **operational manual** and procedures. They should have a good understanding of the law and how some of its provisions interact with other provisions and with other laws. At a minimum, they should review the material produced by others to ensure that it is consistent with the law. They can also review the **publicity material** that is to be issued to update internal and external stakeholders of the changes. Often, the lawyers will be called on to deliver some **training** on the law.

Budgets

The project budget for on-going policy and legal input does not have to be large. Costs include the wages of the lawyers and others who are to be engaged (assuming that registration agency's employee lawyers are not available). The main costs can be associated with consultation and publicity, such as workshops and events, although even here there are many ways to save money, such as taking a slot at a local bar association meeting or using local news coverage instead of advertising.

In drafting legislation, the lawyers should also have an eye on the registration agency's budget and other resources. There is no use developing a law that is way beyond the scope of the agency to implement, either due to financial constraints or human resources limitations. This point is tied to the reality checking the law, as discussed above.

Continual Reform Process

Lawyers should also be involved in the on-going operations of the registration system because the law needs to be subject to continual improvement. They will often be aware of the difficult or newly developing issues because the operations people should be referring such matters for a legal opinion. Where necessary, appropriate amendments to the law can then be drafted.

Major legal reforms take time

Substantial legal reforms, such as a new system of registration, can involve major changes, introducing new concepts and new ways of doing things. Often, it establishes a whole new approach and no one in the jurisdiction really knows what will happen.

The expectation, particularly from management and politicians, is that the new system and law will emerge fully formed and perfect. The leadership wants to promote an image of competence and confidence, so a thoroughly suitable legal basis is essential to them. Technical people will therefore come under pressure to get it right from the start.

Experience has shown that it is very rare for the first version of a new law to be perfect. It is almost impossible for anyone to imagine every combination and permutation of events, how things will operate in practice, and what new demands or changes will arise. Well experienced specialists will have trouble, let alone the novice lawyers who are sometimes assigned the task of drafting the law. So, it should be expected that the first version of the law will need to be changed after one or two years of experience. And another round of changes could be expected in a few more years. In fact, major reforms commonly take three iterations of the law before things settle down to a satisfactory, workable system. This is normal, so don't be surprised, and let the client know that you are comfortable with it. This will ease what will be inevitable and ensure that the final outcome is an improved and more workable law. Going forward, ensuring that there is a policy and legal component in a project will give cover for the development of the needed reforms.

Of course, in reality, a law is never finished because needs and demands are constantly changing. When I worked as a lawyer at the Sydney Land Titles Office, we changed the Real Property Act 1900 almost every year, as new policies or needs emerged or as technology changed. Ensuring the capacity within the registration agency to manage this process can be an important long-term benefit from a project, making the results more sustainable and bringing flexibility and nimbleness to the legal framework so that it better serves the community into the future.

Final Thoughts

How to Engage with the Lawyers

Law is one of the few, perhaps the only, profession in which everyone has an opinion and gives advice to the experts. How many times have I heard, "I am not a lawyer but …" and then been given some legal advice? I have rarely heard someone say "I am not a surveyor/brain surgeon/rocket scientist but …" Many surveyors study one or two courses of land law, which they think equips them to give legal advice (on just about any topic), so perhaps the universities are to blame.

Of course, law (unlike many other areas) regulates how we do things, so everyone should have an opinion. Law is just the vehicle and, even though it has many technical rules that non-lawyers do not know about, the basis is policy, and everyone should have an opinion on policy matters.

The challenge for non-lawyers and non-specialist lawyers is to know when to stop and let the specialist lawyers take over – to know what you do not know! There are numerous rules on drafting laws that only lawyers study and often it is only the specialist legal drafters who know about those rules. There is also usually an internal logic to laws and looking at one article in isolation is risky.

In conclusion, don't say "I am not a lawyer but …". Instead, say "This is an important policy/operational matter and I think …" You will avoid upsetting the lawyers and focus on the real issue, not the way someone has chosen to express it in a law.

Tip to External Reviewers: there is no single best way to do something

It is easy to think that the way we do something is the best and that all other countries should copy us. This is the mistake that almost all new consultants fall into and it is easy to understand why: theirs is the system they know; it (often) works well in their country, and it is all that they can offer to the conversation. And it is true that the systems in countries of consultants are usually pretty good.

However, there is no monopoly on good laws or systems or ways of doing things. There are also cultural, historical and legal factors that are unique to each country and that might justify an alternative way of doing things.

So, when reviewing a system or law, keep in mind that just because it does not look the way others do, it could still be workable and appropriate. The task is to test what the law is saying against the policy objective or process that is required, and then ask whether the law supports or authorises it adequately. This is a mentally challenging task, especially when there are hundreds of articles in a law.

You should only intervene when there is something seriously wrong, even if staying quiet makes you look like you are adding nothing (because there are no serious problems) and thus not assisting as you would like. In the same vein, I have found that a prioritised list of comments, beginning with the most serious issue, is the best way to structure a meeting to discuss a draft law. The readiness of people who have spent long hours drafting a law to listen to (and possibly accept) an outsider's comments is very limited, and it may well be that you only get to the second or third point before you have lost their attention and engagement. Thus, nit-picking is fatal to the process because it takes up time and attention on matters that really do not matter. The challenge is to know what are the really serious issues, and this takes some time and contemplation, time which is often not available due to project budgets and timetables. It would, however, be better to postpone a meeting on discussing a law until you have been through that thought process: you often get only one chance.

Summary

This chapter has looked at some challenges that lawyers will encounter when attempting to develop the legal framework for a more efficient and effective registration system, and it has (hopefully) provided some tips on how to deal with these challenges. In summary:

- Do your due diligence in advance of your first visit to a country. Find, read and assess all the relevant laws; ensure that key laws are properly translated.
- Get a local lawyer and possibly a sociologist to help.
- Consider not only what the laws say but what they don't say – what is missing.
- Start with the constitution (obviously) and see how you can work within its parameters. Then review the other land related laws and also the laws of general application, such as civil law, family, divorce and inheritance laws.
- Take extra care where multiple legal systems have existed.
- In developing the legal framework, try to work with what you have at first, while at the same time working on substantial reforms (if they are necessary) that will take time to be considered and adopted.
- Make sure a multi-disciplinary team works with the lawyers and that policy-makers understand that they have to make the policy decisions and do so in a detailed manner. Try to exclude those who cannot accept that change is a good thing.
- There are plenty of materials around on how to deal with legal issues and draft laws well. You just need to look for them.
- There will be many contentious topics, such as parcel area discrepancies, dispute resolution, corruption opportunities, gender issues, customary and/or informal rights. So, expect many arguments and discussions, which are often time-consuming.
- Don't forget the transitional and consequential provisions in a law.
- Reality check the draft with people who know how the system works or should work. And focus on the more common cases, not the unusual or unique cases.
- Try to draft the regulations in parallel with the new law or amendments so that nothing is missed, and you do not lose valuable time.
- Expect up to three iterations of the law to be adopted before it takes a final form.
- There is no single best way to do something, so have an open mind.