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Law and the Production of Urban Illegality

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The creation of economic and institutional conditions for efficient urban environmental management, which are also committed to the consolidation of democracy, the promotion of social justice and the eradication of urban poverty, constitutes one of the major challenges for leading political and social agents in this century. This challenge to promote socio-spatial inclusion is even more significant in developing and transitional countries, given the complexity of problems resulting from intensive urbanization, environmental degradation, increasing socioeconomic inequalities and spatial segregation. The debate on the legal-political conditions of urban environmental development and management deserves special attention.

The discussion on law and illegality in the context of urban development has gathered momentum in recent years, especially since the Habitat Agenda[1] stressed the central importance of urban law. At workshops promoted by the International Research Group on Law and Urban Space (IRGLUS) over the last eight years, researchers have argued for the need to undertake a critical analysis of the role played by legal provisions and institutions in the process of urbanization. The UNCHS[2] Global Campaign for Good Urban Governance suggests that the promotion of law reform has been viewed by national and international organizations as one of the main conditions for changing the exclusionary nature of urban development in developing and transitional countries, and for the effective confrontation of growing urban illegality.

Illegal practices have taken many different forms, especially in the expanding informal economy. An increasing number of people have had to step outside the law to gain access to urban land and housing, and they have to live without proper security of tenure in very precarious conditions, usually in peripheral areas. This process has many serious implications—social, political, economic and environmental—and needs to be confronted by both governments and society. It is widely acknowledged that urban illegality has to be understood not only in terms of the dynamics of political systems and land markets, but also the nature of the legal order, particularly the definition of urban real property rights.

The promotion of urban reform depends largely on a comprehensive reform of the legal order affecting the regulation of land property rights and the overall process of urban land development, policy-making and management. Special emphasis has been placed on land tenure regularization policies aimed at promoting the socio-spatial integration of the urban poor, such as those proposed by the UNCHS Global Campaign for Secure Tenure.

Conservative versus Innovative Approaches

This complex legal-political debate has serious socioeconomic implications at the global level, and it has to be viewed against three conservative though influential and intertwined political-ideological approaches to law and legal regulation.

First, discussion of the role of law in urban development cannot be reduced to the simplistic terms proposed by those who suggest, despite historical evidence, that capitalism per se can distribute wealth widely and who defend a "hands-off" approach to state regulation aimed to control urban development. Whereas globalization is undoubtedly irreversible and in some ways independent of government action, there is no historical justification for the neoliberal ideology which assumes that by maximizing growth and wealth the free market also optimizes the distribution of that increment. (Hobsbawn 2000).

Several indicators of growing social poverty, especially those closely related to the precarious conditions of access to land and housing in urban areas, demonstrate that, even if the world has become wealthier as a result of global economic and financial

See **Urban Illegality** *page 2*

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New Publications

See pages 10–14 for information about new books and working papers.

Urban Illegality

continued from page 1

growth, the regional and social distribution of this newly acquired wealth has been far from optimal. Moreover, the successful industrial development of many countries (e.g., the U.S., Germany, or even Brazil and Mexico) was achieved by adopting regulation measures and by not accepting unreservedly the logic of the free market. Perhaps more than ever, there is a fundamental role for redefined state action and economic regulation in developing and transitional countries, especially regarding the promotion of urban development, land reform, land use control and city management. The central role of law in this process cannot be dismissed.

Second, the impact of economic and financial globalization on the development of land markets has put pressure on developing and transitional countries to reform their national land laws and homogenize their legal systems to facilitate the operation of land markets internationally. This emphasis on a globalized, market-oriented land law reform, with the resulting "'Americanization' of commercial laws and the growth of global Anglo-American law firms," is based on an approach to land "purely as an economic asset which should be made available to anyone who can use it to its highest and best economic use." This view aims to facilitate foreign investment in land rather than recognize that there is "a social role for land in society" and that land is a "part of the social patrimony of the state" (McAuslan 2000).

A third and increasingly influential approach has been largely, and sometime loosely, based on the work of the economist Hernando de Soto. He defends the notion that global poverty can be solved by linking the growing informal "extra-legal" economy to the formal economy, particularly in urban areas. In this view, small informal businesses and precarious shanty homes are essentially economic assets, "dead capital" which should be revived by the official legal system so people could have access to formal credit, invest in their homes and businesses, and thus reinvigorate the urban economy as a whole. Rather than questioning the nature of the legal system that generated urban illegality in the first place, the full (and frequently unqualified) legalization of informal businesses and the recognition of individual freehold property titles for urban dwellers in informal settlements have been proposed in several countries as the "radical" way to transform urban economies.

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Contrary to these conservative approaches, several recent studies have argued that, in the absence of a coherent, well-structured and progressive urban agenda, the approach of legal (neo)liberalism will only aggravate the already serious problem of sociospatial exclusion. However, policy makers and public agencies should become aware of the wide, and often perverse, implications of their proposals, especially those concerning the legalization of informal settlements. The long claimed recognition of the state's responsibility for the provision of social housing rights cannot be reduced to simply the recognition of property rights. The legalization of informal activities, particularly through the attribution of individual property titles, does not necessarily entail sociospatial integration.

Unless tenure legalization policies are formulated within the scope of comprehensive socioeconomic policies and are assimilated into a broader strategy of urban management, they can have negative effects (Alfonsin 2001). These consequences can include bringing unintended financial burdens to the urban poor; having little impact on alleviating urban poverty; and, most important, directly reinforcing the overall disposition of political and economic power that has traditionally caused sociospatial exclusion. New policies need to reconcile four major factors:

- adequate legal instruments creating effective rights;
- socially oriented urban planning laws;
- political-institutional agencies for democratic urban management; and
- socioeconomic policies aimed at creating job opportunities and increasing income levels.

The search for innovative legal-political approaches to tenure for the urban poor includes reconciling the promotion of individual tenure with the recognition of social housing rights; incorporating a long-neglected gender dimension; and attempting to minimize impacts on the land market so the benefits of public investment are "captured" by the poor rather than by private land subdividers. Pursuit of these goals is of utmost importance within the context of a broader, inclusionary urban reform strategy (Payne forthcoming). Several cities, such as Porto Alegre, Mexico City and Caracas, have attempted to operationalize this progressive urban agenda by reforming their traditional legal system. Significant developments to democratize access to land and property have included less exclusive urban norms and regulations, special residential zoning for the urban poor, and changes in the nature of fiscal land value capture mechanisms to make them less regressive.

Widening the Debate

In the context of this lively debate on urban law, the Lincoln Institute supported three recent international conferences:

- 7th Law and Urban Space Conference on Law in Urban Governance, promoted by IRGLUS, Cairo, Egypt, June 2000;
- UNCHS/ECLAC Latin American and Caribbean Regional Preparatory Conference in Santiago, Chile, October 2000;
- 1st Brazilian Urban Law Conference in Belo Horizonte, Brazil, December 2000.

Law in Urban Governance

Given the relatively new emphasis on reconciling urban studies and legal studies, the legal dimension of the urban development process still needs to be made more explicitly the focus of research. This requires a more consistent approach to language so key concepts, such as property rights, can be adequately discussed in both political and legal terms. Most of the papers presented at this IRGLUS conference focused on land regularization. While regularization has become the most frequent policy response to the general problem of illegal settlement, the term is used in a variety of ways, each with different meanings, by different agencies and researchers. The implementation of the physical dimension of regularization policies entails upgrading infrastructure and introducing services. It also highlights the need to be culturally sensitive. For example, regularization policies to provide security of tenure require greater attention to the gender implications of the process.

Participants also discussed the impacts of regularization policies on both formal and informal land market. Regularization was seen by some as the "marketization" of processes operating in erstwhile illegal settlements. One area of concern was the possibility of "gentrification," which in this case means not the rehabilitation and changed use of buildings but the process of middle-income groups "raiding" newly regularized settlements for residential or other purposes and displacing the original inhabitants. Clearly, a broad range of economic and political issues needs to be addressed when defining regularization policies. In particular, the residents of illegal settlements need to be included in the economic and political life of the city to avoid the dangers of increased socioeconomic segregation.

Responding successfully to the complex problems of illegal settlement is difficult, and particular solutions cannot always be replicated in other places. Ultimately successful regularization is dependent on government and requires costly programs and legal reform. However, the gap between the questions raised and actual practice in the field is significant. Because of the pressing need to "get ahead" of the process of illegal settlement, public agencies are concentrating on cure not prevention.

How do local governments halt the process of illegal settlement? By working on more effective housing and land delivery systems. Conference participants defended the legitimacy of tenure programs, pragmatically in some cases, or as a fundamental right in others. Given the "top-down" approach frequently given to this issue, the discussion on empowerment needs to be widened so the voice of the urban poor can emerge.

The UNCHS/ECLAC Conference

Latin America was the only region to draw up a plan of action for Habitat II—an indication that, despite the existence of fundamental linguistic, historical and cultural differences in the region, there is a common agenda that should mobilize collaboration. The region's urban structure is undergoing significant transformation as a result of several combined processes:

- new economic frontiers;
- growing social poverty and spatial segregation;
- environmental degradation;
- the impact of natural disasters on the precarious urban infrastructure;
- changes in family size and relations;
- generalized unemployment and growing informal employment; and
- escalating urban violence, frequently related to drug trafficking.

All such problems have worsened because of expanding economic globalization, inappropriate liberalization policies and largely unregulated privatization schemes. Despite its rapid integration into the growing global market, Latin America has seen social poverty escalate in the last decade. World Bank projections suggest that if this picture remains unchallenged 55 million Latin Americans may be living on less than US$1 a day in the next decade.

The Santiago Declaration resulting from this conference clarified the goal of an urban environmental agenda for political-institutional dialogue and joint action. The focus is to create the conditions needed to overcome political governance obstacles that still challenge the efforts made over the last two decades to promote economic reforms and democratization in the region. To develop a more competitive and efficient urban structure, such a regional action plan should:

- require broad political reforms to facilitate the adoption of decentralization policies to favor the action of local government;
- redefine intergovernmental relations and financial cooperation at national, regional and international levels;
- modernize the institutional apparatus;
- combat endemic and widespread corruption; and
- create mechanisms for effective democratic participation in urban governance.

An urgent need is to provide better and more accessible housing conditions for the urban poor, as part of a broader urban reform strategy. Since public investment in housing in much of Latin America has decreased recently, the provision of new housing units, improvements to the existing housing stock and the regularization of informal settlements cannot be postponed any longer.

The Santiago Declaration also advanced a number of proposals, including new regulation frameworks for urban and housing policies; territorial organization policies and land use control mechanisms; and public policies for social integration and gender equity. However, it failed to confront the fact that many of the region's social, urban and environmental problems have been caused by the conservative, elitist and largely obsolete national legal systems still in force in many countries. Any proposed new balance between states, markets and citizens to support the process of urban reform requires not only economic and political-institutional changes but a comprehensive legal reform as well, especially the legal-political approach to property rights.

Brazilian Urban Law Conference

Brazil's 1988 Constitution introduced a ground-breaking chapter on urban policy by consolidating the notion of the "social function of property and of the city" as the main framework for Brazilian urban law.

See **Urban Illegality** *page 4*

Urban Illegality

continued from page 3

Although previous Brazilian constitutions since 1934 nominally stated that the recognition of individual property rights was conditioned to the fulfillment of a "social function," until 1988 this principle was not clearly defined or made operational with enforcement mechanisms. In short, the 1988 Constitution recognizes individual property rights in urban areas only if the use and development of land and property meets the socially oriented and environmentally sound provisions of urban legislation, especially master plans formulated at the local level. As a result, countless urban and environmental laws have been enacted at the municipal level to support a wide range of progressive urban policies and management strategies.

Some of the most interesting international experiences in urban management are taking place in Brazil, such as the participatory budgeting process which has been adopted in several cities (Goldsmith and Vainer 2001). The imminent approval of National Urban Development Law (the so-called "City Statute") should help consolidate the new constitutional paradigm for urban planning and management, especially by regulating constitutional enforcement mechanisms such as mandatory edification, transfer of development rights, expropriation through progressive taxation and special *usucapiao* (adverse possession) rights.

This change in the legal paradigm is of utmost importance. The incipient tradition of urban legal studies in Brazil tends to be essentially legalistic, but it reinforces traditional notions of individual property rights found in the long-standing 1916 Civil Code. This obsolete Code views land and property rights almost exclusively in terms of the economic possibilities granted to individual owners, allowing little room for socially oriented state intervention aimed at reconciling different interests over the use of land and property. Just as important as enacting new laws is the need to consolidate the conceptual framework proposed by the 1988 Constitution, and thus replace the individualistic provisions of the Civil Code, which still provide the basis for conservative judicial interpretations on land development. Much of the ideological resistance to progressive urban policies held by large conservative sectors of Brazilian society stems from the Code, which does not address the role of law and illegality in the process of urban development and management.

The papers presented at this conference explored the legal, political and institutional possibilities created by the new constitutional framework for state and social action in the process of urban development and land use control. Participants emphasized that the discussion of laws, legal institutions and judicial decisions has to be supported by an understanding of the nature of the law-making process, the conditions for law enforcement, and the dynamics of the process of social production of urban illegality.

Participants also remarked that if the legal treatment of property rights is to be taken out of the narrow context of civil law so it can be interpreted from the more progressive criteria of redefined public urban law, then the possibilities offered by administrative law in Brazil are not satisfactory either. The limited and formalistic administrative provisions now in force do not have enough flexibility and scope to deal with and provide legal security to the complex and rapidly changing political-institutional relations at various levels—inside the state, among governmental levels, between state and society, and inside society. New urban management strategies are based on ideas such as planning gains, public-private partnerships, so-called "urban" and "linkage" operations, privatization and public service subcontracting, and participatory budgeting, but they lack full support in the legal system. Furthermore, the new constitutional basis of Brazilian urban law still needs to be consolidated as the main legal framework for urban management.

Conclusion

Many important questions about law and urban illegality remain unanswered, and much more work, research and discussion needs to be undertaken before they can be properly answered. However, sometimes formulating the right questions is as important as providing the right answers. Thus, the discussion of the legal dimension of the urban development and management process will continue to explore questions and answers in the regional context of Latin America and internationally.

NOTES

1) Habitat Agenda—the global plan of action adopted by the international community at the Habitat II Conference in Istanbul, Turkey, in June 1996

2) UNCHS: United Nations Centre for Human Settlements (Habitat). See www.unchs.org/govern for information on the UNCHS Global Campaign on Good Urban Governance and www.unchs.org/tenure for information on the UNCHS Global Campaign for Secure Tenure.

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