

A “rule of law” for cities

GERALD FRUG

ABSTRACT

This essay focuses on one aspect of the relationship between law and space: the idea that cities be governed by the rule of law. The core value of the rule of law, it is suggested, is the need to restrain the exercise of arbitrary power—to protect the weak from the strong. Two different kinds of neighborhoods are analyzed to expose the current difficulties in establishing the rule of law in this sense: neighborhoods dominated by informal housing, and neighborhoods dominated by economic development aimed at the goal of becoming a global city. To address the current difficulties facing the establishment of the rule of law in these neighborhoods, the essay proposes institutional reforms designed to enable a reinvigorated local democracy that strengthens the current legal system.

Introduction

The importance of law to both the built and the natural environment should be obvious to everyone. Law is overtly involved in the design of built environment when it regulates the size and location of housing and commercial life. But it is equally involved when it fails to regulate them. By choosing whether or not to regulate these kinds of land uses (and by deciding how to regulate them), legal rules encourage or inhibit the building of malls, high-rise office buildings and apartment houses. In some places, legal rules permit only single-family homes; in others, they allow the building of a giant shopping center; in still others, they authorize a mix of residential and commercial uses that would be illegal in either of the first two locations. In this way, legal rules produce the stark differences between jurisdictions that exist even within a single metropolitan area. Law is equally central to the look and feel of non-urban areas. The protection or the failure to protect open space is a familiar example of law's effect on the natural environment, as is the creation and refusal to create national parks. But the point is more general: it is impossible to

separate the growth of cities and the development of the natural environment beyond their borders. “The nineteenth century,” William Cronon writes,

saw the creation of an integrated economy in the United States, an economy that bound city and country in a powerful national and international market that forever altered human relationships to the American land (Cronon, 1991:xvi).

The same can be said about the twentieth century and about land outside the United States. When the acute observer travels through space, he or she can catalogue law’s impact along the path: the nature of the buildings (zoning law), the placement of roads (land use law), the protection of forests (environmental law) and the exclusion of poor people (local government law).

In this essay, I concentrate on only one aspect of this relationship between law and space: the ways in which law organizes city life. The vast majority of people in the developed world now live in urban areas, and the urban population in the developing world is now increasing at an astonishing rate (World Urbanization Prospects, 2007). Cities have to deal with the problem that this urbanization has engendered. But they have power to do so only to the extent they are given it by statutes and constitutional provisions adopted either by national or subnational governments (see Frug and Barron, 2008). As a result, law defines the extent to which cities can and cannot deal with the critical problems they face: housing shortages, crime, lack of water and sanitation, inadequate schools, crumbling infrastructure, traffic congestion, inadequate mass transportation, global warming, to name but a few. Law also defines the authority of other entities—state-created public authorities, national government agencies, non-governmental institutions, private corporations—that play a role in dealing with the same kinds of issues. Law thus creates the bureaucratic inefficiencies, dysfunctional agencies, regional fragmentation and democratic deficits that make governance one of the major problems facing the world’s cities today. Indeed, by helping to specify the physical, governmental and social context in which more than half of the human race lives, law is a principal way in which we define who we are (Frug, 1999). How to empower cities to better serve their population is, therefore, a critical component of the relationship between law and space.

Dealing with urban problems requires an elaborate legal structure. I concentrate here on only one ingredient of this structure—one that is immensely important, but usually overlooked in the discussion of the relationship between law and space. This is the basic notion that cities be governed by the rule of law. The core value I seek to invoke by using the term “rule of law” is the need to restrain the exercise of arbitrary power, the need to protect the weak from the strong. Many people most easily recognize the importance of this task when they think about the arbitrariness that derives from the power wielded by governments—not only by authoritarian governments, but by democracies, too. But government is not the only problem.

There are also dangers posed by the private sector. To protect against the power of employers and financial institutions, we rely on the government to prohibit employment discrimination, regulate financial markets and penalize fraud, to mention only a few examples. To protect against the arbitrary power wielded by other private individuals, we seek government action to restrain violence and intimidation. The ways in which these restraints on arbitrary power are designed affect how cities develop, and city development, in turn, affects the environment both inside and outside city borders.

Protection from these sources of arbitrary power is always incomplete and imperfect. But more worrisome than this incompleteness is that the two roles for the rule of law that I've mentioned—the need to restrain governmental power and the need to restrain private power—contradict each other. We rely on the government to regulate the market and to punish anti-social activity, and, at the same time, we seek to limit governmental power. We seek both to empower government and to disempower it. We seek both to empower private discretion and to regulate it. This contradictory structure is a fundamental building block of the formal legal system. The formal system makes a major contribution to the protection against arbitrary power when it establishes rules that seek to resolve the difficulties and ambiguities produced by this contradictory structure.

Relying on the formal system, even at its best, however, is an insufficient way to restrain arbitrary power. I shall attempt to explain why by addressing two very different aspects of city life. The first is the part of the city that the formal legal system currently does not adequately address—best illustrated by the informal economy and informal housing so prevalent in the developing world. The second is an aspect of city policy that the formal legal system regulates in detail: decisions about urban economic development.

Speaking of an informal neighborhood in Cairo, a *New York Times* reporter wrote that the residents see government as “an utterly unreliable source of help for the average citizen” (Blackman, 2007). This is not surprising, because the informal economy and informal housing result from the government's withdrawal from portions of the economy and the housing sector, leaving them unregulated, untaxed and unprotected. The informal housing in Mumbai and other cities is built without legal permission and is not in compliance with legal standards. The informal economy includes people engaged in unregulated activities, such as building the housing, selling food and other commodities, and providing services such as transportation by vans or rickshaws. One form of arbitrary power threatening these informal activities is exercised by the government: large-scale, mass evictions that drive people from their homes, and, equally importantly, deprive them of their economic livelihood. But the government's intervention is intermittent. Sometimes the government adopts the opposite policy, seeking instead to improve services to the informal sector rather than eliminating it. The more pervasive form of arbitrary power is exercised by landlords taking advantage of those who rent housing from them, criminal gangs seeking to skim money from local vendors, and the police and

other officials taking payoffs to look the other way when these abuses occur. The informal sector is filled with people who pay money for housing, depend for their livelihood on a particular location for their stall, and rely on access to transportation and infrastructure. If trouble arises, the formal legal system is not there to help them. Calling in the police is not an answer, because the police can often be the problem.

It is important to recognize that the informal economy and the informal housing sector, as I have just described them, are set up in accordance with law. By this, I mean that the law sets up rules of formality—licenses to operate businesses, building codes for housing, zoning laws, taxation schemes—and these rules define the limit of legality. Those outside these limits are, by definition, illegal. For that reason, they are vulnerable both to public and private power. Having been declared illegal, violators are subject at any time to the penalties of illegality. But these penalties can be, and often are, withheld. This withholding of sanctions is what enables the street peddlers to work and those living in the shacks to call them home. This system empowers the people with the authority to forgive violations—those who decide that the penalties established by the legal system will not be imposed. The problem is that these officials can change their mind at any time (Ferandes and Varley, 1998).

One response to this current structure is the idea of extending the formal legal system to everything that now is located in the informal system.¹ This would mean bringing all housing and economic transactions within legal requirements—regulating them, bringing them up to code, subjecting them to taxation and giving them the rights of property owners. In many parts of the world, this simply cannot be done. The government does not have the resources or capacity to create a totally formal world. Indeed, it is because of its inability to provide housing that informal housing has become so widespread. And it is because of its inability to create an economic system that provides enough jobs that the growth of the informal economy has been so substantial. This is a familiar point to people living in developing cities around the world, from Mumbai to Mexico City. But even in the U.K. and the United States, bringing every element into the formal system—every illegal immigrant working as a maid, every business transaction made off the books, every building not strictly in compliance with the regulatory codes—is unachievable.

We have to come up with another option. The one I would like to suggest is local democracy. The basic idea is to empower neighborhood people themselves, working collectively, to intervene against the power of corrupt police, landlords and the criminal underworld. This would require the decentralization to the neighborhood level of two kinds of authority: the ability to make rules that limit the current forms of abuse and the ability to resolve the disputes that arise under the new rules. These are familiar rule of law tasks. Instead of assigning them to lawyers, judges or other professionals, however, I see the establishment of basic rules as an example of neighborhood self-government. The analogy is to the legislature. I also see the application of the rules as an example of empowering ordinary people to make decisions about disputes in their own community. Here, the analogy is to the

jury. Both institutional forms can be vehicles for involving ordinary citizens in the experience of protecting people from the exercise of arbitrary power. More than that, they can enable ordinary people to assert some control over their own lives, control that can begin by limiting the kinds of exposure imposed by some neighborhood residents over those who are even more vulnerable. This process can then lead to another form of power: it can contribute to political organizing so that, when the danger arises from the city or state governments rather than from fellow residents, the neighborhood would be better prepared to confront it.

I am not proposing a form of community empowerment disconnected from the legal system. I am proposing a new kind of institution that would fit within and that would strengthen the legal system. Like the rest of the legal system, any neighborhood process needs to be subject to institutional checks and balances. No rule of law regime enables a group of people to exercise unchecked power. The issue here—very similar to the one that confronts the formal legal system—is how to give the decision makers enough authority so that they can be empowered while, at the same time, limiting the dangers of abuse that they themselves impose. This is the problem involved when the legal system subjects city decision making to state or national oversight, subjects jury judgments to judicial and appellate review, and subjects legislative judgments to declarations of their unconstitutionality. Moreover, the role of outsiders is not just to limit power in the name of checking abuse. It is also to reinforce neighborhood power by providing assistance in cases that the neighborhood cannot handle. Sometimes, neighborhood residents may be too vulnerable to retribution by powerful actors in the community to be able to make a decision. Still, the structure I am proposing is not just an addition to the traditional formal legal system. It is also a modification of it. As I have stressed, the decision makers would be ordinary people, not lawyers or judges or experts.

To understand the system I have in mind better, I turn now to the second situation I mentioned earlier, one far from the neighborhoods in my first example. I am talking about the places where the government and developers are concentrating their efforts to further the economic growth of cities (see, e.g., Fainstein, 2001; Marcuse and van Kempen, 2000). I mean places like Canary Wharf in London, the Santa Fe neighborhood in Mexico City and the mill area in Mumbai. These are not places, like the sites for the informal sector, designed to be marginal. They are to be the heart of the city economy, and, as a result, they are the places where the formal legal system is most in evidence. The way that the current legal system structures these developments is not the same everywhere, so to discuss the process requires engaging in generalization, indeed, over-generalization. But it usually takes the form of three legally-constituted negotiations: one between the city and the developer, another between the two of them and the surrounding neighborhood, and the third involving efforts by all interested parties to get approvals from other regulatory government bodies, often at the state or national level. These three negotiations create an enormously complex process. Legal rules affect every part of it. Yet, it

seems to me, the most important issue that these developments raise is not addressed by the legal system at all.

The focus of the negotiation between the developer and the government is the devising of a formula that allows the developer to make enough money to be willing to sign the deal and enables the government to accomplish enough of its objectives to be willing to go along. The government's focus might be on the accommodation of affordable housing, the size of the buildings, the need for improvements to the infrastructure or other similar matters; the developer is likely to be focused principally on the bottom line. The deal with the neighborhood is different. The neighbors have to be persuaded not to try to block the project, so enough has to be offered to them to buy their compliance (even if, ultimately, they will be forced to move out of the neighborhood). The regulatory authorities will have still other objectives—very often environmental concerns, but they can involve almost any aspect of regulatory power. These additional regulatory requirements are often used strategically by opponents of the development to attack a deal they are against on other grounds. If these three negotiations are concluded successfully, the deal is blessed as consistent with governing law.

Does this process allow the exercise of arbitrary power? I think it does. The source of arbitrariness can vary. Sometimes it can come from the government, when it interprets the legal rules to allow the developer exemptions from standard practice, or when it interprets the law to prohibit the developer from doing something it might just as easily have allowed. Sometimes it is the neighborhood, operating under the legitimating cloak of the word "community," that can hold up a project by demands that outsiders would consider unreasonable. Sometimes it can come from the architects, when they seek to defend the unchallengeable creativity of their design. Sometimes it can be based on a disputable invocation of environmental or other rules. Since the background legal framework does not determine the result of any of the negotiations, there is a considerable amount of individual discretion exercised in all of them. The formal rules are often crafted precisely to allow this discretion, thereby circumventing the popular protest that another process might have produced.

The overarching question left out of this process is whether the current economic development strategy embraced by these projects will improve the lives of the majority of people affected by them. This is not a question to be negotiated with developers. It is also not likely to be addressed by the detailed technical objections lodged with regulatory agencies. And it is not a question appropriately answered by the neighborhood where the development is located. The current assumption in planning circles about popular involvement is that the relevant "community" to evaluate development decisions is the neighborhood, and not the larger population. One can understand why people think this. After all, a development is likely to have a very significant impact on people living nearby. But that is also the reason the neighborhood might be the wrong focus group. The way neighborhoods evaluate their future is likely to be different than a city-wide evaluation. Change has to take

place somewhere, and if every neighborhood parochially resists it, it will be prevented from happening.

Perhaps, however, the overall question of economic policy is handled by the public sector in the negotiations. After all, the public sector itself, and not just the neighborhood, is always one of the negotiating parties. Often, however, it is not the city that represents the public. Instead, it is a public authority, public corporation or quango that has been carefully organized to be less responsive to democratic decision making than the city itself (Fainstein, 2001). Even when the city is involved, the desire for attracting investment can overwhelm executive officials. They often feel that the city is so threatened by competition with other cities, so desperate to get the deal done, that an examination and debate about the conception of the city's future that the deal is fostering would seem a distraction.

Another basic problem with the current negotiation structure is that the focus is on land use. But much more is at stake in development decisions than how land is to be used. Even more important is the idea of the city that the proposed development will foster—the kind of population the city is trying to attract, retain and exclude by adopting this particular definition of economic growth. Most of the major projects I'm thinking about are focused on pursuing the image of being a global city. This means attracting finance, high-tech and international investment and therefore providing the office buildings, high-end shopping and secluded housing complexes that these target audiences are thought to demand (Sassen, 2001). Those who are pursuing this agenda rarely have to defend it before representatives of the city as a whole. They rarely have to articulate how this strategy will improve the lives of most city residents.

That's why I think that we need to open up the contestability of economic development policy—like the organization of informal neighborhoods—to a democratically organized institution. Unlike my proposal for the informal sector, I think that the institution should represent people city-wide, rather than be neighborhood-focused. In some cities, this can be done by giving greater authority over development to the city's legislative body—its city council or assembly. If the local legislature is not now adequate, another organization will have to be established. The role of the democratic process should not be to offer advice and criticism to experts. The participants should be empowered to establish the city's strategy for economic growth, with the experts advising the decision makers rather than being the decision makers. The goal is to include the very people left out in the reigning economic development strategy in the decision making about what that strategy should be. These are the people who most need to be protected by the rule of law. As was the case for the neighborhood process for the informal sector, I see the new institution as an integral part of the existing legal structure, not independent of it. It adds new voices to the legal structure. It, too, needs to be subject to a system of checks and balances. To give unrestrained decision making power to any particular group would enable arbitrary power, rather than limit it. The goal of the

new institution is to empower the people not now in the process to be able to make decisions not now adequately addressed.

In my view, my proposal dealing with economic development and my earlier proposal about informal neighborhoods constitute one agenda, not two. The most vulnerable residents of major cities around the world are threatened by events in two very different parts of town. Some of their vulnerability derives from the neighborhoods where they live; some comes from the effect on their lives produced by the pursuit of development elsewhere in the city. The changes I propose to the way we now organize the rule of law in our cities are designed to protect these people from decisions made regarding either kind of neighborhood. This is not just a necessity for the developing world. Although London and New York are justly proud of the immigrants who have become a major part of their population, their views are rarely represented in debates about the city's future. The rules that govern both the informal and formal ingredients of city life are a vehicle for city making. Indeed, these rules affect not just what the built environment looks like, but also the relationship between cities and rural life. Defining who has a voice in these issues is thus a critical aspect of defining the relationship between law and space. It is for that reason that I propose a more democratic form of the rule of law.

NOTE

¹ For an analysis of the formalization of the real property sector, see DeSoto (2000).

REFERENCES

- Blackman, Michael. (2007). "Cairo journal: In Arab hub, poor are left to their fate." *New York Times*, March 1.
- Cronon, William. (1991). *Nature's Metropolis: Chicago and the Great West*. London: Norton.
- DeSoto, Fernando. (2000). *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. New York: Basic Books.
- Fainstein, Susan. (2001). *The City Builders: Property Development in New York and London, 1980–2000* (2nd ed.) Lawrence, KS: University Press of Kansas.
- Ferandes, Edésio, and Varley, Ann. (1998). *Illegal Cities: Law and Urban Change in Developing Countries*. London: Zed Books.
- Frug, Gerald. (1999). *City Making: Building Communities without Building Walls*. Princeton: Princeton University Press.

- Frug, Gerald, and Barron, David. (2008). *City Bound: How States Stifle Urban Innovation*. Ithaca, NY : Cornell University Press.
- Marcuse, Peter, and van Kempen, Ronald (Eds.). (2000). *Globalizing Cities: A New Spatial Order*. London and Cambridge: Blackwell.
- Sassen, Saskia. (2001). *The Global City: New York, London, Tokyo* (2nd ed.). Princeton: Princeton University Press.
- World Urbanization Prospects. (2007). "The 2007 revision population data base," <http://esa.un.org/unup/index.asp?panel=2>.