Law and Land Policy in

SHIFTING PARADIGMS AND POSSIBILITIES FOR ACTION

Edésio Fernandes and
María Mercedes Maldonado Copello

The rapid and intense urbanization in Latin America over the last 50 years is often contrasted in the literature with an inadequate urban planning system as a way to explain many resulting social problems: high land prices and property speculation, rampant informality, extreme sociospatial segregation, inadequate urban infrastructure and services, environmental degradation, and the like. The literature is largely silent, however, on the role played by national legal systems, which have both contributed to this situation and reacted against it. The pivotal role of the legal order cannot be underestimated.

Legal systems also have contributed to informal development in two main ways—through the exclusionary land, property rights, and registration legal provisions, and through flawed planning systems adopted in many large cities. Both the lack of land regulation and the approval of elitist planning laws that fail to reflect the socioeconomic realities that limit access to land and housing by the poor have had a perverse role in aggravating, if not in determining, sociospatial segregation. Institutional disputes between local and national governments over the power to regulate urban development also have brought about renewed legal problems.

Conflicting legal perspectives have evolved from progressive jurisprudence, the demands of various social movements, and a growing legislative debate prompted by divergent stakeholder interests. As a result, legal discussions in Latin America range between anachronistic interpretations of existing legal provisions and a call for a more legitimated and socially responsive legal system. This article attempts to expose these tensions and offer some new directions for the debate.

The Search for a Consistent Legal Paradigm

In many cities the legal systems regulating urban development are significantly obsolete and inconsistent, resulting in rampant noncompliance and a growing disconnection between the legal and the real city. Important urban management advances promoted by progressive local administrations have often been undermined by obstacles created by outdated national urban-legal orders. Within the broader context of the volatile democratization processes in the region, greater emphasis has been placed on the possibilities that a renewed urban-legal order could advance urban reform. Many academics, politicians, public officials, and community organizations understand that the promotion of efficient land markets, sociospatial inclusion, and environmental sustainability will be possible only through the adoption of a clearly defined and consistent new legal paradigm.

Legal principles in general, and particularly those regulating land development rights and property relations, are politically determined and culturally assimilated. Legal systems tend to be complex, as they accommodate different, contradictory, and even conflicting provisions adopted over time as a result of evolving sociopolitical processes. The maintenance of a legal system that does not fundamentally express the realities of the socioeconomic and political-institutional processes that it proposes to regulate generates distortions of all sorts.

Making sense of the legal system is a demanding but crucial task that requires the enactment of new laws as well as a consistent effort of (re)interpretation of the principles and provisions in force. However, interpretation may vary significantly according to the legal paradigm adopted by the interpreter. Different paradigms can coexist in the same legal culture, thus bringing about legal ambiguities and potential judicial conflicts, especially in countries where the traditional divide between private law and public law is still unclear.

Three complementary yet competing legal paradigms exist in Latin American countries—Civil Law, Administrative Law, and Urban Law. Historically, the hegemonic civilist paradigm, based on a highly partial reading of the Civil

Latin America

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Realtors near the vibrant new area of USME in Bogotá, Colombia, announce many real estate "deals."

Codes and expressing values of classical liberal legalism, has been gradually reformed by the more interventionist paradigm provided by Administrative Law. A recent, still incipient movement has gone one step further and claimed that only the more progressive framework of Urban Law would fully provide a comprehensive legal paradigm for contemporary times.

The Civil Codes and *Laissez Faire* Urban Development

The dominant interpretation of the Civil Codes—as provided by doctrine and jurisprudence and as ingrained in the popular imagination throughout the twentieth century—still tends to overemphasize the rights of owners to the detriment of their responsibilities and fails to consider other social, environmental, and cultural interests that result from property ownership. This interpretation gives scarce consideration to use values, since ownership of land and property is conceived largely as a commodity whose economic value is determined mainly by the owner's interests. Longstanding principles of private law, such as the condemnation of all forms of abuse of power and the requirement of a just cause to justify legitimate enrichment, have been largely ignored in this unbalanced definition of property rights.

From this perspective, state action through land management and urban policy is seriously restricted, and major new urban planning initiatives have often led to judicial conflict. Large public projects usually require expensive land expropriation, with the payment of compensation calculated at full market values. Developers' obligations are few and the burden of infrastructure implementation and service provision has fallen largely on the state. While development and building rights are assumed to be intrinsic expressions of individual land ownership rights, there is no established scope for the notion

that public administrations should recapture the land value increment generated by public works and services. This legal tradition has been aggravated further by the bureaucratization of contractual and commercial transactions, as well as by excessive requirements for property registration and access to credit.

Within this individualistic legal tradition, the right to use and dispose of property is often misconstrued as the right not to use or dispose of property. More substantial legal obligations and compulsory orders are virtually nonexistent. The prevalence of this paradigm in Brazil, for example, means that while the housing deficit has been estimated as 7.9 million units and people live in some 12 million precarious constructions, another 5.5 million units are empty or underutilized. An estimated 20 to 25 percent of serviced land is vacant in some cities.

Also typical of this Civil Law paradigm is the absolutism of individual freehold to the detriment of collective or restricted forms of property rights such as leasehold or communal, surface, and possession rights. Some of these do exist in many Civil Codes, but they are largely ignored or underestimated. While prescriptive acquisition rights usually require extended periods of land occupation, there is an arsenal of available legal instruments to evict occupiers and tenants.

As a result of this *laissez faire* approach to land development, the urban-legal order in many Latin American cities cannot be considered fully democratic. The process of informal development reflects the reality that more and more people have had to step outside the law to gain access to urban land and housing.

Administrative Law and State Intervention

Urban planning in some large cities has been supported by the legal principles of Administrative Law. This public law paradigm has tried to reform the private law tradition, but it has limited the scope of the notion of the "social function of property." Since the 1930s, this concept has existed in most national constitutions as a nominal principle. This more interventionist paradigm recognizes the state's "police power" to impose external restrictions and limitations on individual property rights in the name of the public interest, thus supporting traditional forms of regulatory planning.

These have been timid attempts, however, because the imposition of legal obligations, compulsory orders, and requirements of land reservation still tend to be met with strong popular and judicial resistance. In most countries, the courts have ruled that the state can impose certain limitations on property rights, but the imposition of obligations on landowners and developers has been more difficult. This is particularly the case with local laws that have tried to determine the earmarking of land or units for social housing as a condition for the approval of the development and have been declared unconstitutional.

Many cities continue to approve new land subdivisions, even though they already have a large stock of vacant plots. The problem is that they do not have the legal instruments to determine their use according to a social function. Whereas developers have been held more responsible for the implementation of infrastructure, some enormous developments, including high-income gated communities, have been approved without reserving land or housing units for domestic and service workers. This results in new informal developments and the greater densification of older settlements to accommodate the low-income sector.

In some cities that have attempted zoning, master plans, and other complex urban laws, a tradition of bureaucratic planning has emerged that reflects little understanding of how urban and environmental regulation impacts the formation, and increase, of land prices. Urban planners still have difficulties challenging the established notion that land and property owners have automatic rights to the gains in value resulting from urban planning and development. Most public administrations have not recaptured the generous land value increment generated by public works and services, as well by the changes in urban legislation governing use and development rights.

Most planning systems have failed to recognize the state's limited capacity to act so as to guarantee the enforcement of urban legislation. As a result, plans have not been properly implemented, and many forms of disrespect for the legal order have been left unquestioned. In some cities, it takes years to license important development processes such as land subdivisions, which also affects the process of informal development.

Another recurrent problem is the parallel, sometimes antagonistic, development of distinct urban and environmental legal orders, with envi-

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A sign announcing that a property is not for sale is often used to prevent someone else from selling it, as in this case in Bogotá.

ronmental provisions frequently being used to oppose socially oriented housing policies. In sociopolitical terms, most planning laws do not involve substantial popular participation in either their formulation or implementation.

By failing to change the dynamics of land markets, supposedly contemporary planning policies often end up reinforcing traditional processes of land and property speculation and sociospatial segregation. Urban planning has often been inefficient in promoting balanced land development, and instead has benefited land developers, property investors, and speculators. Their profits have been maximized by the significant growth in prices resulting from urban regulations that determine urban development boundaries. The areas left for the urban poor are those not regulated for the market, such as public land and environmentally sensitive areas.

It is from this tension between the interpretation of civil codes and bureaucratic planning laws that informal development and sociospatial segregation have resulted: law has been one of the main factors determining urban illegality. In cases where significant attempts have been made to promote sociospatial inclusion and environmental sustainability, the urban-legal order still fails to fully support the prevailing practice of urban management.

For example, aspects of public-private partnerships and the involvement of NGOs in the provision of public services have been questioned because of confusion between private and public values. Nominally recognized social rights, such as the right to housing, also have not been fully enforced due to the lack of necessary processes, mechanisms, and instruments.

Urban Law and the Principles of Legal Reform

Since the 1980s, an important legal reform movement has questioned this exclusionary legal order, and a new paradigm has emerged in some countries. The proponents of Urban Law have argued that it is possible, and indeed necessary, to look in the Civil Codes for principles that allow for strong legal arguments to support sound state intervention in, and social control of, the regulation of land- and property-related processes. The reinterpretation of traditional legal principles, as well as the emphasis on neglected principles (such as the notion of no legitimate enrichment without a just cause), can help to enable significant progress in the formulation of urban land policy.

This effort requires sophisticated legal expertise, as it potentially involves legal debates and judicial disputes whose results are far from certain. From the viewpoint of the urban communities and public administrations committed to promoting inclusive policies, this approach seeks to organize the overall regulatory framework, in part through the enactment of new laws that more clearly express the principles of Urban Law.

Although this process is more advanced in Brazil (mainly through the 1988 Federal Constitution and 2001 City Statute) and Colombia (mainly through the 1991 Constitution and Law no. 388/1997), a series of common principles have been incorporated

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A newly upgraded area in Medellín provides access via the Metro Cable.

into the legal orders of other Latin American countries (Fernandes 2007a; 2007b; Maldonado Copello 2003; 2007).

The most important structural principle is the notion of the social function of property, including public property and property registration. Cities result from a collective process, and the promotion of a balanced territorial order is at once a collective right and the obligation of the state. The urban order cannot be determined exclusively by the individual rights and interests of landowners, nor only by state interests. Public intervention should be promoted through administrative limitations on property rights, and through legal responsibilities and development requirements.

Related legal principles operate to determine that a just distribution of the costs and opportunities of urban development is promoted between owners, developers, the state, and society; affirm the state's central role in determining an adequate territorial order through the planning and management system; establish a clear separation between property and development/building rights; determine different criteria for the calculation of compensation in different expropriation and other contexts; reduce the required time for adverse possession to take place for the materialization of social housing; and recognize more strongly the rights of occupiers and tenants.

A whole range of collective rights guides the processes of land use and development, such as the rights to urban planning, adequate housing, and a balanced environment; the community's right and state's obligation to recapture the land value increment generated by state action and urban legislation; and the right to the regularization of consolidated informal settlements.

Some Colombian cities have amassed significant financial resources through land value capture mechanisms, making it possible (if not always feasible) to formulate a more sustainable process of legal access to serviced land by the urban poor. In Brazil, some municipalities also have been able to generate impressive financial resources as a result of "urban operations," in which development and building rights are negotiated within the framework of a master plan. Regularization programs involving both the upgrading and legalization of consolidated settlements also have been promoted in several countries.

However, the dispute among legal paradigms continues, and all new principles and rights are still the subject of fierce debate. Colombia's Constitutional Court has consistently adopted a progressive interpretation sustaining the notions of the social function of property and the social right to housing, A recent study of judicial decisions by high courts from several Brazilian states showed that the new legal paradigm has been assimilated in some 50 percent of those decisions, with the conservative Civil Code paradigm still orienting the other decisions (Mattos 2006).

In many countries progressive jurisprudence has been restricted by the strong tradition of positivism and formal legalism, which still views the law merely as a technical tool to resolve conflicts, as if it were totally independent from sociopolitical and economic processes. Most judges observe the civilist paradigm, which is taught in anachronistic law school syllabuses. Progressive decisions by local judges often are revoked by more traditional higher courts.

The second important structural principle of this emerging urban-legal order is the integration of law and management within the framework of three intertwined legal-political changes:

- Restoration of local democracy, especially in Brazil, through the recognition of several forms of popular participation in law-making (as a condition for the legitimacy of new urban laws and their legal validity) and in urban management (as in the participatory budgeting process);
- Decentralization of decision-making processes by strengthening local administrations, addressing the need for a metropolitan level of policy

making and action, and articulating intergovernmental systems to overcome accumulated urban, social, and environmental problems; and
- Creation of a new set of legal references to give more support to the new relations being established between state and society, particularly through public-private partnerships and other forms of relationships of between the state and the private, community, and voluntary sectors.

Whatever the shortcomings of the process are, the enormous challenge put to countries and cities promoting urban law reform is to guarantee the full enforcement of the newly approved laws.

The Right to the City

Besides reinterpreting and reforming their national legal systems, jurists, policy makers, and social activists from Latin America have promoted international discussions of a Charter on the Right to the City that fully recognizes collective rights. At the same time, these progressive concepts regarding property rights and the nature of state action in land use and development control have been seriously challenged by those still favoring an unqualified approach to property rights and the homogenization of land and property regimes.

It is in this context of conceptual uncertainties that the regulatory framework governing urban land development and management has to be pursued. Spatial planning is a powerful process; if urban laws have long benefited certain economic groups and thus have contributed to the process of sociospatial segregation, then the promotion of urban law reform should contribute to creating the conditions for more inclusive and fairer cities.

The continued participation of jurists and policy makers, as well as national and international agencies, universities, and research organizations, is crucial, and it can take many forms:

- providing a framework to enable the reinterpretation of legal principles and provisions;
- disseminating information on new laws;
- supporting the discussion of new territorial organization and planning laws;
- giving incentives for interdisciplinary research and critical analyses in which the legal dimensions are considered;
- supporting publications and contributing consistent legal doctrine and jurisprudence;
- systematically assessing policies and projects based on the new laws;
- raising awareness of legal professionals such as judges, prosecutors for the government, and lawyers;
- legal training and capacity building of professionals from other fields; and
- supporting institutions committed to the promotion of legal reform.

The construction of a new urban-legal order in Latin America and other regions is an evolving debate full of contradictions and challenges, and none of the recent developments can be taken for granted. If the greater politicization of urban lawmaking has created a widened scope for popular participation in the process to defend collective rights and social interests, for the same reason the new laws have generated increasing resistance on the part of conservative stakeholders.

The full implementation of the possibilities introduced by the new urban-legal order in Brazil, Colombia, and elsewhere will depend on several factors, but above all on the renovation of the processes of sociopolitical mobilization, institutional change, and legal reform.

ABOUT THE AUTHORS

EDÉSIO FERNANDES *is a lawyer, urban planner, and professor associated with the Development Planning Unit of University College, London, the Institute of Housing and Urban Development Studies in Rotterdam, and several Brazilian universities. He is a visiting fellow of the Lincoln Institute in 2008–2009. Contact: edesiofernandes@compuserve.com*

MARÍA MERCEDES MALDONADO COPELLO, *attorney and urban planner, is professor at the National University of Colombia, Bogotá, and researcher at the university's Institute of Urban Studies. Her areas of interest include the legal significance of urban rights, property rights, and value capture. Contact: mmmaldonadoc@unal.edu.co*

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