DER ÖFFENTLICHE SEKTOR
THE PUBLIC SECTOR

Planning, land, and property: Framing spatial politics in another age of austerity.

Guest editor: Benjamin Davy

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"Der öffentliche Sektor – The Public Sector", als Printzeitschrift im Jahr 1975 gegründet, erscheint seit 2015 als elektronische Open-Access-Zeitschrift des Fachbereichs Finanzwissenschaft und Infrastrukturpolitik im Department für Raumplanung der Technischen Universität Wien.

Das zweisprachige Journal lädt zum Diskurs über die Bedeutung und Herausforderungen staatlicher Aufgabenerfüllung, mit besonderem Augenmerk auf die Wechselwirkung zwischen gesellschaftlichem und wirtschaftlichem Wandel, politischer Steuerung und räumlicher Entwicklung auf unterschiedlichen Ebenen (z.B. Stadtteil, Gemeinde, Region, Nationalstaat, intra- und internationale Ebene). Gleichzeitig sollen verschiedene Rollenmodelle in der Aufgabenverteilung zwischen öffentlichem, privatem und zivilgesellschaftlichem Sektor hinterfragt und diskutiert werden.

In einem multidisziplinärem Ansatz werden Fachleute verschiedener Disziplinen angesprochen: Finanzwissenschaft und Fiskalpolitik, Raumplanung, Infrastrukturplanung und -politik, Bodenmanagement und -politik, Ressourcenökonomie, Planungsrecht, Immobilienwirtschaft und Wohnungswesen, Politikwissenschaft, Volkswirtschaftslehre, Stadtsoziologie sowie andere verwandte Gebiete.

"Der öffentliche Sektor – The Public Sector" versteht sich als Wissensspeicher und Kommunikationsplattform zwischen Wissenschaft und Praxis einerseits und zwischen Jungakademiker/innen und erfahrenen Expert/innen andererseits.

Jede Ausgabe ist einem Schwerpunktthema gewidmet, zu dem ein spezifischer "Call for papers" eingerichtet wird. Darüber hinaus werden auch andere geeignete Beiträge aus den oben genannten Themenkreisen veröffentlicht. Die Herausgeber ermutigen insbesondere junge Wissenschafter/innen, Artikel zur Veröffentlichung einzureichen. Nach Prüfung und Akzeptanz des Abstracts werden alle eingereichten Artikel einer Review durch ein oder mehrere Mitglieder des Editorial Board unterzogen, fallweise werden auch externe Reviewer beigezogen. Es werden keine Autorengebühren eingehoben. Publikationssprachen sind Deutsch oder Englisch.

Founded in 1975 and published until recently as a print journal, **"Der öffentliche Sektor – The Public Sector"** is now presented as an open-access e-journal edited by the Chair of Public Finance and Infrastructure Policy in the Department of Spatial Planning at TU Wien.

The aim of the bilingual journal is to advance the discussion on public intervention in a socio-economic and spatial context, studying the interrelations between economic and social change, policy design and policy impact on different spatial levels. At the same time, it encourages the discussion on role models and co-operation between the public, private and non-commercial sectors.

It follows a multi-disciplinary approach, addressing experts from disciplines and fields such as public economics, urban and regional planning, infrastructure policy, fiscal policy, environmental economics, land use policy and planning, planning law, real estate management and housing economics, political science, urban sociology and other related fields.

"Der öffentliche Sektor – The Public Sector" considers itself as a platform for exchange between science and practice, as well as between young academics and senior experts.

The journal adopts a focused thematic format with specific calls for papers. Each issue is devoted to a particular theme selected by the editorial board. However, papers that fall into the broad research fields mentioned above will also be published. The journal especially encourages young researchers to submit papers. After acceptation of the abstract, all papers will be reviewed by one or more members of the advisory board and eventually also by external reviewers. No open-access or paper submission fees will be charged. Publication languages are English and German.

Front page image: The sign announcing the property line in front of the MetLife Building on Park Avenue in Midtown Manhattan makes us wonder about the relationship between planning, land, and property. (c) 2016 Benjamin Davy

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Editorial

Special Issue: »Planning, land, and property: Framing spatial politics in another age of austerity«

Guest editor: Benjamin Davy

Preface

by Benjamin Davy and Gerlinde Gutheil-Knopp-Kirchwald

The first special issue published by *Der öffentliche Sektor / The Public Sector* establishes a new format for special issues. Each article has been reviewed by two anonymous reviewers, selected by the guest editor. This had a disadvantage for authors because several articles submitted had to be rejected. This has an advantage, however, for authors because they have passed a double-blind quality control previously not applied by *Der öffentliche Sektor / The Public Sector*. The anonymous peer review will be an essential element also of future special issues – the next one, scheduled for June 2017, already has opened its call for papers: 'Commons Reloaded. Potentials and Challenges in Urban and Regional Development', with the guest editors Alexander Hamedinger and Lukas Franta (see oes.tuwien.ac.at for further information).

But let us come back to the present special issue »Planning, land, and property: Framing spatial politics in another age of austerity«. All articles are written and published in English. This underlines the international aspiration of the collection whose authors are from China, Germany, Greece, India, Italy, the Slovak Republic, Sweden, the United Kingdom, and the United States. Writing in English is challenging for anybody whose first language is not English. Yet, if planning and property scholars wish to share their ideas with like-minded peers around the world, a common language is inevitable. Let's call this language 'audacity English.' With this special issue, *Der öffentliche Sektor / The Public Sector* takes the risk of engaging fully with international conversations on land policy, some written in audacity English.

All articles deal with the political economy of owning—or not owning—a piece of land. Planning, land, and property contribute to this political economy in a variety of ways, and often under conditions that seem to justify another age of austerity. Between the articles, readers will find posters from the 'Faces of Planning and Land Policy' series by Ben Davy. The posters are not illustrations of the chapters, but merely food for thought for readers who enjoy eye candy. Everybody, who likes the posters, can download high-resolution versions from www.bodenpolitik.de for free.

- Paasch and Paulsson discuss standardization and cutting-edge technology in land administration. Still, the software for land surveys and land registration can rely on theories that have been developed quite a while ago (such as Hohfeld's theory of fundamental legal conceptions).
- Dimelli contemplates the limits of the public sector and the private sector in Greek cities. In the face of the financial crisis, land use planning and land policy have to find a new balance between state intervention and private investments.
- Thiel investigates the impact of the Transatlantic Trade and Investment Partnership (TTIP) on domestic land policies. He confirms the fear of many commentators that TTIP might push land policies in European countries »over the edge.«
- Using empirical methods, Leschinski-Stechow verifies the degree of implementation of environmental standards through regulatory land-use planning. Although many environmental aspirations are, in fact, achieved by German planning authorities, there seems to be an invisible edge that inhibits full compliance.
- Lo Piccolo and Giampino explore formal property rights and the use value of rights with respect to housing rights of homeless people. Using the capabilities approach (Sen, Nussbaum), they assert that use rules for public spaces often are exclusionary and unjust to poor and homeless persons. Property rights frequently are an instrument of repression and marginalization.
- Henry, Lloyd, and Farnan illustrate the impact of walls in a town in Northern Ireland that became infamous during 'the troubles.' They assert that the quality of cities be considered as the result of tensions between 'privatism' and 'publicness.' This, of course, calls into question the prudence of town planning by establishing separation, where '[t]he past is a shadow, darkening our public

places to generate and maintain some segregated homogenised spaces.'

- Husar and Finka engage in understanding the impact of oil industries on local communities in the global South. The exploitation of natural resources exposes local communities to unnatural conditions of everyday life and raises serious questions about environmental justice.
- Yerramilli addresses land acquisition in India, politically an inflammatory issue. Based upon a careful examination of centuries of property theory and eminent domain doctrine, she finds that property rights in India are so unclear, indistinct and contentious that the taking of property might involve non-existent rights and is not a reliable instrument of land use control by the government.
- Huang asserts that land policy and land ownership constantly has been most relevant to the economic and social development in the People's Republic of China. Land rights and socialist welfare, in particular, have been instrumental in the co-production of political goals. Recent land reforms, however, have resulted in a complete loss of the socialist welfare nature of urban land and housing.
- The 'Bengaluru 8' (Pellissery et al.) present an exciting picture of the political economy of land markets and planning in India's third most populous city. Calling the driving force behind economic and housing development 'crony capitalism,' the authors create a frightening view of how corrupt planning can be combined with greedy market forces. Politicians, realtors, and planners serving the need not of the community, but of capital!
- Krueger and Jacobs examine the virtues and vices of localism (defined as neighborly concern over land use) with regard to environmental sustainability. Comparing land use control in Kenya and the United States, the authors find a blurred boundary between reactionary and sustainable localism. Since neighborly concern would have its merits, the authors suggest a bigger institutional space for localist sentiment be created.
- B. Davy juxtaposes plural land values with a variety of social constructions of scarcity. Robust and credible property regimes would be those that respond to different rationalities, different voices. Spatial planners, who understand the complex relationship between land values and scarcity, will be more successful than monorational planners.

As managing editor and guest editor, we wish all articles in this special issue much attention, some controversy, and many citations. Austerity and budget cuts, limited supply and collective rationality often are used as justifications for taking from the poor and giving to the rich. Surely, not all planners are like Robin Hood (taking from the rich and giving to the poor). But understanding the spatial politics in another age of austerity will help planners and other policymakers understand better the disequilibrium of (in)justice.

Benjamin Davy Gerlinde Gutheil-Knopp-Kirchwald

**No question is more central
to power relations within society or
to issues of equality and income distribution
than land.**

Danilo Türk (1990)

Standards for land use and planning - Only for specialists?

Jesper M. Paasch, Jenny Paulsson

Abstract

Standards have become vital instruments for describing and structuring e.g. real property rights and planning information, such as the international Land Administration Domain Model and the national Swedish standard for detailed development plans. However, the publication of a standard does not automatically ensure that it is used or understood. Standards are primarily technical documents and not easily accessible by non-specialists. This article discusses the problems of using standards; such as the use of terminology and to access specific target group(s) when implementing standards in the geoformation sector in general and standards on property rights and planning in the public sector in particular. Conclusions are that a standard in itself may be of rather little value if not assisted by additional, non-expert documents for a broader group(s) of decision makers and other non-experts within the organization, aiming at different organizational levels.

1. Introduction

Standards can be introduced within many different areas in order to for example agree on a specific way to do something or to specify terminology within a specific domain such as land administration. The generic nature of most standards should make them universally applicable to a wide range of organizations, authorities, etc. The purpose of standards is to further the exchange of information and to achieve a standardized terminology for a domain, e.g., real property rights or public planning regulations. However, the publication of a standard does not automatically ensure that it is used or understood. Standards are primarily technical documents and tend not to be easily accessible by non-specialists.[1] The implementation of standards in an organization must therefore be done at different levels, such as technical descriptions for development of IT systems descriptions of possible organisational or workflow changes and practical application in e.g. public planning.

Standards are part of a nation's *invisible infrastructure*, a term used in a Swedish government ordinance (SOU 2007), stating that standards are unnoticeable when they are in place and function properly. It is only in their absence the lack of them is noticed and problems arise. There is a need for acceptance and understanding of the standards throughout the organizational hierarchy in order to achieve a successful implementation and the benefits have to be analysed.

Standards are used within a wide range of sectors and are even used to describe real property rights and planning information. Examples are the Land Administration Domain Model, LADM, published by the International Organization for Standardization, ISO, in 2012 (ISO 2012)[2] and the national Swedish standard for detailed development plans published by the Swedish Standards Institute, SIS, in 2010 (SIS 2010).

1.1 Problem description and aim

In 2011, a Swedish governmental ordinance stressed the importance of using standards for furthering information interchange in the private and public sectors with the motto "make it as easy as possible for as many as possible" (SOU 2011). However, studies have shown that standards often are inaccessible and difficult to understand for non-specialists (SOU 2007). Moreover, standards often refer to other standards. Substantial knowledge is therefore often needed in order to clarify and decide what is the most important in the standard, what to prioritize and how to apply it.

1 Author's personal opinion after working with geographical information standards for two decades.

2 The standard has been accepted as Swedish standard (SIS 2012b).

Much research has been conducted on the Land Administration Domain Model[3], but a recent study showed that related research has focused on technical and registration issues, whereas legal, and especially organizational issues, have been given less attention (Paulsson and Paasch 2015).

This article is based on Swedish examples on how to further the use of standards. The aim is to discuss problems regarding an organizational issue, namely the implementation of standards; such as the use of terminology and how to address specific target group(s) when implementing standards in the geoformation sector in general and standards on property rights and planning in the public sector in particular.

1.2 Structure of the article

This article starts by presenting standards in general and how they are and have been used. It continues with a section on terminology which is closely related to standardization. Then two examples of standards within the public sector follow. The following section describes the implementation of standards. A discussion of the findings and a final conclusion end the article.

2. Standards

The International Organization for Standardization has described a standard as being "a document that provides requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose".[4] The use of standards to further manufacture and exchange of goods and services are found in most areas of society today, such as the international system of Units, SI, and the series of standards for quality management (ISO 9000), and the series of standards providing practical tools for companies and organizations to manage their environmental responsibilities (ISO 14000).[5] The examples are chosen to illustrate the huge impact standards have on our daily lives. Many more exist; the International Organization for Standardization has for example published in excess of 20,500 standards.[6]

The concepts of standardisation go back in history. For example, the Indian Sanskrit legal text "Manusmriti" dating from about 400 BC, contains a table of 13 units of weights and their inter-relationships. The text also states that "the king should inspect weights and measures and have them stamped every six months and punish offenders and cheats" (Verman 1973).

However, the concepts of standardisation are not confined to measurements and how to conduct and verify services. The legal domain has even been subject to standardization efforts. Examples are the attempts of the conceptualist movement in the 18th and 19th centuries to describe legal relations in a "scientific" way, influenced by emerging "measurable" disciplines such as physics. A more recent attempt to describe the legal domain is the classification of jural correlatives such as "rights" and "duty" and opposites such as "privilege" and "duty" by Hohfeld, who in the first decades of the 20th century created a conceptual system for classification of human relations independent of any legal system (Hohfeld 1913; 1917).

Standards are vital for trade and consumer safety. They have increased in interest since the Second World War to ensure that products and services are safe, reliable and of good quality and can help companies to access new markets and facilitate fair and free global trade.[7] Different attempts have during the last decades also been made to describe the legal domain in standardized terms.[8] One reason for applying standardized thinking on land administration is to provide frameworks for classification of land use, relation between people and objects (e.g. a right) and land valuation (ISO 2012). Furthermore, computerised systems require standardization of objects and relations to be registered, processed and analysed.

Standards are also used in many areas within the public sector, for example within land administration, service and quality control. It is an important tool to assist authorities and citizens and make sure that all are treated equally, for example when the authorities make decisions that affect the public, both private persons and companies.

For example, the Swedish National Board of Housing, Building and Planning published in 2008 a report stressing the importance of establishing the basis for a harmonised, digital planning process by establishing cooperation with the Swedish Standards Institute, SIS, to start working on standardizing information described in detailed municipal development plans and more general types of development plans (Boverket 2008). The information on the content and extension of development plans are of vital interest for everyone involved in building and planning development; ranging from the construction of motorways down to the construction of a single garage (SIS 2010: 3).

Standards on geographical information are produced by national standardisation organisations (e.g. the Swedish Standards Institute), the International Organization for Standardization and in Europe the European standardization organization, CEN. Standards developed by the industry also exist.[9] Formal international and European standards in the geographic information sector automatically gain status as national standards in e.g. Sweden. This is even the principle in other European countries. However, the standards are normally not translated into national languages due to lack of resources. The only change made is by adding a national

3 See http://wiki.tudelft.nl/bin/view/Research/ISO19152/LadmPublications for examples. Accessed 10 November 2015.
4 www.iso.org/iso/home/standards.htm Accessed December 15th 2015.
5 See e.g. Taylor and Thompson (2008) and www.iso.org.
6 www.iso.org/iso/home/standards.htm Accessed December 15th 2015.
7 For example, ISO was founded in 1947. See www.iso.org. Accessed December 21 2015.
8 See Johnson et al. (2015) for further references concerning standardisation within the legal domain.
9 Industry standards are e.g. published by the Open GeoSpatial-Consortium (OGC). See www.opengeospatial.org/ Accessed December 15th 2015.

language front page. The content itself is in English.[10] This can be seen as a hindrance for understanding the content in non-English speaking countries.

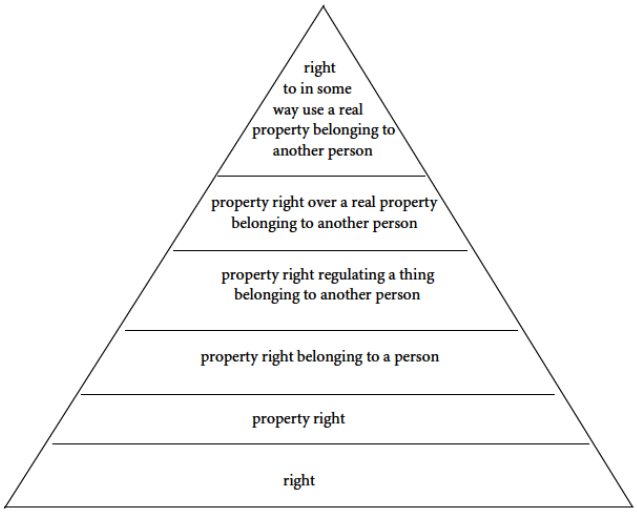
3. Terminology

Terminology is fundamental in standardisation. Without a common understanding of the meaning of a term it is impossible to achieve any effective communication. The use of words may be domain specific where the domain has developed a specialized vocabulary of terms. This is even the case in the land use domain. However, the land use domain is not homogenous and consists of a number of legal traditions which may have their use of terms. An example is when concepts in different legal systems describe the same feature, but are named differently, or even worse, when different terms are used to describe more or less the same legal concept. An example is given in Hoecke (2004: 174) who states that a specific type of right/restriction regulating the (partial) use of real property, 'easement', is rather similar to another right/restriction, 'servitude', but is not exactly the same. However, the United Nations guidelines on real property units describe servitude as an easement or right of one real property over another (UNECE 2004: 61).

The wish to describe and structure the land use domain is not new. An example is the ´conceptual pyramid' showing the logical components of a servitude (i.e. a property owner's right to use another property, e.g. for right of way), developed by the German legal scholar Puchta, 1798-1846. A servitude is a real property right. The property right belongs to a person and regulates a 'thing' which belongs to another person. It is a right to in some way use a real property belonging to another person.[11] Puchta's hierarchy is illustrated in Figure 1.

10 Standards may also be published in other languages, e.g. French, depending on the policies of the standard organization.

11 Referenced in Peczenik (1974: 145).



Source: Paasch 2008: 113.

Fig. 1. Puchta's conceptual pyramid of rights

4. Examples of standards

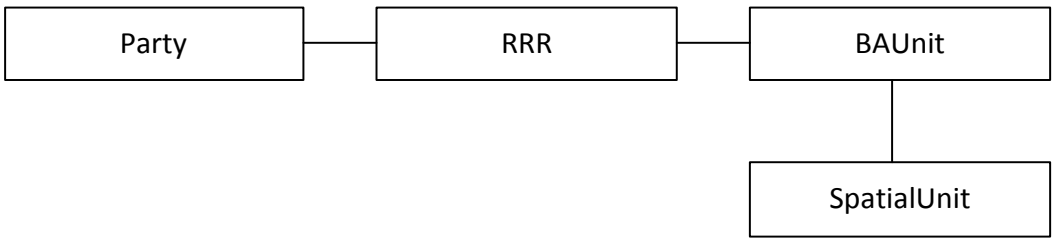
For the purpose of illustrating the implementation of standards and the lack of non-expert documents, two examples are presented below, one concerning the Land Administration Domain Model, and the other is the Swedish standard for detailed development plans.

4.1. Land Administration Domain Model

The standard is a conceptual model and provides a formal language for describing systems of land information, so that their similarities and differences can be better understood (ISO 2012: vi). The standard makes it possible to classify interests in land by providing a formal language for describing them, independent of any legal system.

The core of this standard is the four central components (in the standard called "packages"): "Party", "RRR", "BAUnit" and "SpatialUnit" (ISO 2012: clause 5.2). The packages are illustrated in Figure 2.

A "Party" describes the person, company or other legal entity holding an interest affecting the use of land (incl. water and air). These interests are classified as "RRR"s, which is synonymous with rights, restrictions and responsibilities affecting the use of land. Examples are the right to use a road located on another property, the responsibility to obtain a building permission prior to erecting a building, or a restriction for



Source: ISO 2012: clause 5.2, adaption by the authors.

Fig. 2. Core components of the Land Administration Domain Model Based on the International Organization for Standardization

the land owner and visitors to perform certain activities, such as collecting firewood, inside nature conservation areas (ISO 2012).

A "basic administrative unit" (BAUnit) is an administrative entity, which is subject to registration or recordation, on which one or more unique right, restriction or responsibility can be attached (ISO 2012: 2-3). An example is a municipal development plan, regulating to use of an area for specific purposes. Another example is a real property, being an administrative unit in which a party (i.e. the owner) executes the right of ownership. A basic administrative unit normally has a spatial extension on land, water or air. This is in the standard referred to as having a relation to a "SpatialUnit" (ISO 2012: 6).

The Land Administration Domain Model is part of ISO's family of standards describing geographical information. It may be argued that the standard has a mostly legal content, describing (legal) relations between (legal) spatial objects and therefore should not belong to that group of standards, but the initiative to produce the standard came from the geo-spatial research community (Lemmen 2012).

The Land Administration Domain Model was in 2012 accepted as a European standard, automatically making it an official national, e.g. Swedish, standard. However, the standard is not in much use in Sweden yet[12], but Lantmäteriet, the Swedish mapping, cadastral and land registration authority, has planned to decide on a strategy on how to implement the standard (Lantmäteriet 2015). An investigation concerning the implementation of the standard will be made during 2016.[13]

4.2. Swedish standard for detailed development plans

In 2010 the Swedish Standards Institute published a national standard for detailed development plans. The main purpose of the standard is to further information exchange of regulations contained in detailed development plans in regard to planning, examination, analysis, and information search (SIS 2010). The standard is a step towards achieving a full digital handling of planning information, which is part of the government's e-policy, developing means for self-services and other types of interaction between public organisations and the public. The standard is an expert document and uses for example the Unified Modelling Language, UML, to describe relations between different types of regulations. See Figure 3.

The standard consists of requirements concerning the division into areas, formulation of planning regulations and their data representation. It is based on a handbook on planning published by the National Board of Housing, Building and Planning (Boverket 2002) and intended to be used for producing new development plans. There is a demand for digitalisation of existing plans, which however has not been taken into consideration during the making of the standard.

The standard is currently under revision[14] by the Swedish Standards Institute. The revised version will only be partly in accordance with the Land Administration Domain Model standard.[15] The content of the Land Administration Domain Model and how it relates to the Swedish standard is however described in an annex (SIS forthcoming: annex E). The current standard does not describe boundaries, but only areas. This will be changed in the revised version which uses the principle from the Land Administration Domain Model of describing areas in relation to its boundaries.[16]

The description of future land use is a complex process. Huge amounts of information has to be collected, combined and presented. To ensure effective and digital procedures there is a need for structured information, among others. The standard is intended to provide support and structure for exchanging digital information within and among organisations, act as a basis for the development of e-services and reduce costs when changing data systems due to standardized information structures.[17]

12 According to a survey conducted by the Swedish Standards Institute (SIS 2015).

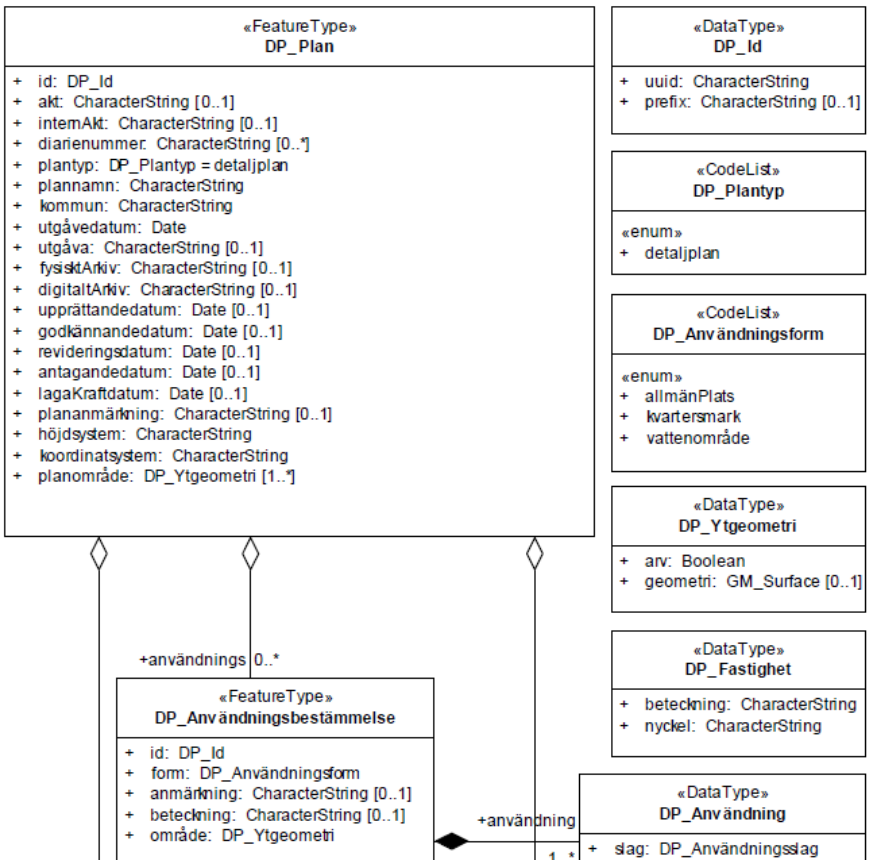
13 Personal communication on December 15th 2015 with Anna Eriksson, Director of development at Lantmäteriet.

14 Formal standards undergo scheduled revisions to ensure that they are up to date.

15 Estimation based on the draft of the revised standard (SIS, forthcoming).

16 Email communication with Mr. Anders Skog, the Swedish Standards Institute, SIS, 7 December 2015.

17 www.sis.se.



Source: SIS 2010: 12.

Fig. 3. Part of the standard's graphical description of planning regulations

The standard presents demands on digital representation of planning provisions in detailed development plans. The standard also includes clarifications and formalisation of how the planning provisions should be formulated, how they relate to each other and to geographical areas within the plan area.

5. Implementation of standards

International standards are mostly (very) technical documents presupposing a high level of expertise in e.g. information modelling, such as the Unified Modelling Language, to illustrate the content and relations between information described in the standard, as shown in Figure 3 in the previous section.[18] These technical documents may be difficult to access by non-specialists. There is thus a need for additional information about the content of a standard. This communication problem concerning the use of standards has been noticed by the Swedish Standards Institute, who commissioned a survey among its members active in the field of geographic information, mostly consisting of governmental agencies and other organisations. The survey identified, among other things, the need for publication of non-technical information concerning standards (Nicolausson et al. 2011).

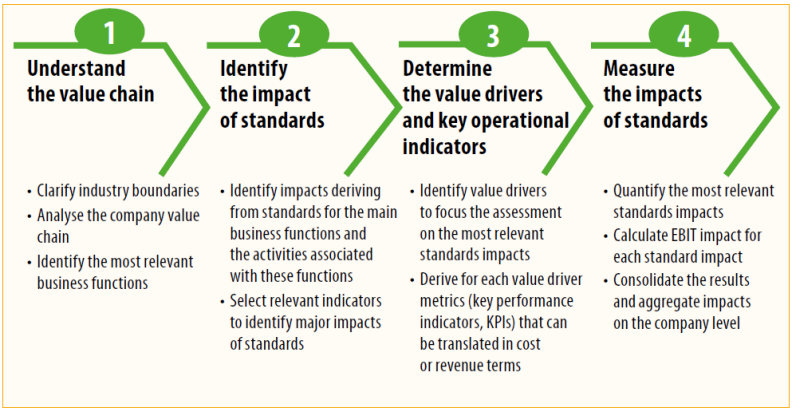
5.1. Guidelines from the International Organization for Standardization

In order to function properly there is a need for acceptance and understanding of the content of standards and how they can be implemented, e.g., in public-sector organizations.

The International Organization for Standardization has published a methodology for implementing standards (ISO 2013). The primary scope of the methodology is to assess the economic benefits of standards for a company, but it even mentions that the methodology also can be used to describe the non-economic benefits of standards independent of the type for-profit or non-profit organization in the private or public sector (ISO 2013: 8-9). The value chain is illustrated in Figure 4.

18 See www.uml.org.

To understand the value chain and to discuss how a standard can be used to gain profit for the company or to improve public services it is important to first gain knowledge of standardisation in general and how the use of specific standards affects the organisation implementing it. The standard itself may be of rather limited value for making management decisions. The use of geographic information standards is rather new and organisations may not have become confident using them yet. Education in the principles of standardisation and non-technical guidelines are needed for employees and management alike.



Source: ISO 2013: 19.

Fig. 4. The value chain of the International Organization for Standardization

5.2. An introduction to standardization

An example of an introductory text on standardisation is a report published by Lantmäteriet in 2014 describing the basics and history of standardisation (Paasch and Rydén 2014). The report is in addition to being used inside the organisation even used as course material in Swedish university courses. The purpose is to familiarise employees and students with the basic principles of standardisation in general and to provide an introduction to standards in the geographic information sector.

5.3. Guidelines on how to describe geographical information

Another example is the guideline on metadata for geographical information published by the Swedish Standards Institute (SIS 2012c). Metadata is the general term for information used to describe datasets and services, such as the title, date of creation, date of revision, description of content, restrictions in access and use, etc. The content of the metadata guidelines is an extract of the International Organization for

Tabell 19 – Resurskontakt – Organisation

Elementnummer	11.1
Elementnamn	Resurskontakt – Organisation
Förklaring	namn på för resursen ansvarig organisation
ISO 19115	376: *.identificationInfo.MD_DataIdentification.pointOfContact. CI_ResponsibleParty.organisationName.CharacterString*
Krav	0..1 ; Obligatoriskt om ansvarig organisation kan identifieras.
Värdedomän	Fri text. Ange organisationens fullständiga officiella namn. Förkortning kan anges inom parantes efter det fullständiga namnet.
Exempel	Sveriges geologiska undersökning (SGU)
Inspire	9.1 Ansvarig part

Source: SIS 2012c: 25

Fig. 5. Example of informative text in the national Swedish metadata guidelines

Standardization (and European/Swedish) standard for metadata (ISO 2005).[19]

Figure 5 shows the Swedish description of how to describe the point of contact for the data provider. *Elementnummer* [Element number], e.g. 11.1, is the id-number of the metadata in the Swedish profile; *Elementnamn* [Element name] is the name of the data provider; *Förklaring* [Explanation] is a short explanation of the metadata; *ISO 19115* shows where to find the element in the standard itself; *Krav* [Conditions] describes whether the metadata is mandatory or voluntary to provide; *Värdedomän* [Value domaine] describes if the text is free text or to be taken from fixed lists. In this case it is a free, narrative text. *Exempel* [Example] is an example of an organisation, e.g. The Swedish Geological Survey (SGU); Inspire is a reference to the European Commission's regulation for providing metadata for spatial information in Europe (EC 2008). In the example the metadata is named *Ansvarig part* [Responsible party] and is described in section 9.1 in the regulation.

5.4. Standard for development plans

A cluster of Swedish municipalities has implemented the standard as part of the development of public e-services (Jadelius 2014).[20] The aim of a part of the project was to make municipal planning information accessible for the public as a source of information for electronic building permission services called (translated from Swedish): "What am I allowed do on my property?".

During the implementation it was noticed that a number of textual formulations based on the handbook on planning published by Boverket (2002) were not sufficient for describing the regulations. The standard has room for individual texts, which was seen as a hindrance for the municipalities' collective effort due to existing, different terminology. A library of terms was therefore created to be used during the digitalisation process. The use of terms was then further limited in order to achieve a more consistent terminology. It was during the registration phase possible to leave comments in a comment field if the standardised formulation was not sufficient in order to avoid misunderstandings (Riges n.d.: 13). Already during the implementation phase of the Swedish standard for development plans the need for a consistent terminology and sometimes additional explanations of terms emerged.

19 Note: ISO 19115 has been revised and is now named ISO 19115-1. The Swedish profile has not yet been updated.

20 See www.harnosand.se/kommunen/framtidochutveckling/riges.4.54bb023f13599f076a8298d.html Accessed December 16th 2015.

6. Discussion

The studies revealed a number of problems and challenges related to the implementation of standards for land use and planning within the public sector.

The survey made by the Swedish Standards Institute (Nicolausson et al. 2011) illustrates the need for auxiliary and easy to access documents describing the contents of standards. For example, land use experts and managers in the public sector may not be familiar with descriptive languages such as the Unified Modelling Language or rather comprehensive texts in standards.

It might also be the case that the officials of an organization or authority can understand and implement the standard, but the question is if the general public who are affected by implications of these documents also do that. Should there even be two versions of every standard; one for professionals and one for laymen? This should be further investigated.

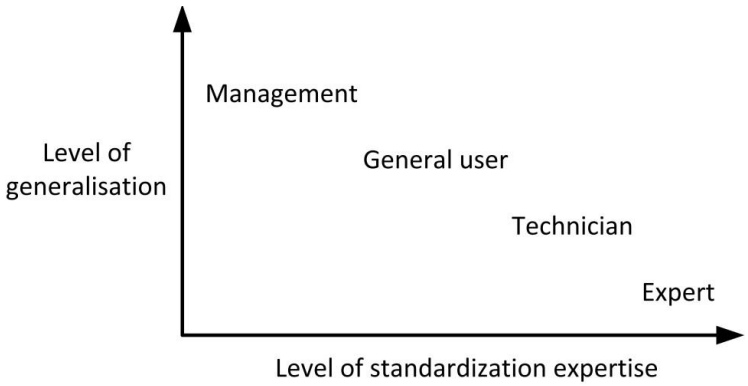


Fig. 6. Example of level of generalisation when implementing a standard

Another issue is how to supply documentation on different levels within a domain. There is a need for descriptions of standards on different levels, such as the standard itself (expert level), how to implement the standard (technical level), how to use a standard in general (general user level) and overview of the content of the standard (management level). Those levels are not fixed, but have to be defined for each organisation implementing a standard. See Figure 6.

The authors were not able to identify any examples of in-

formative documents for implementing the Land Administration Domain Model and Swedish standard for detailed development plans in Sweden. The reason may be that the standards are not yet in widespread use in Sweden according to a recent survey by the Swedish Standards Institute (SIS 2015). The survey showed that the national metadata profile on geographical information (SIS 2012b) is the most implemented standard document of that group of standards in Sweden.

This may indicate that one of the keys to implementation is easy-to-access documents on the subject. However, more research is needed on the factors making standards accessible to confirm that. Other solutions to that could be to add sections of informative text to the standard itself or to increase focus on the publication of informative auxiliary texts in the standard's publication process.

It is often a long process to develop a standard, involving the use of personnel resources thus resulting in extensive costs. For example, the Land Administration Domain Model took five years to develop, even though, already before this, initial theoretical research on which the standard is based was published in e.g. 2003, 2005 and 2006 (Lemmen 2012). The Swedish standard for detailed development plans took four years to develop. Developing standards may be time consuming and it is therefore of importance to investigate what factors that are important to secure their future use. Those issues are however not dealt with in this article, but may be subject for future research.

7. Conclusions

A standard is of rather little value in itself if not assisted by additional, non-expert documents for a broader group(s) of decision makers and other non-experts within the organization, as well as for the public. These auxiliary documents describe the benefits and content of a standard, aiming at different organizational levels, being part of the organization's strategy for implementing a particular standard or a group of standards to be used in the organization's daily administration. It can be used, for example, for providing a standardized classification of land use and planning regulations as a basis for the development of digital solutions for e.g. on-line application for building permits and other types of public communication and participation.

If such standards are not implemented at all, or implemented but the people working within the field cannot use it, or the citizens will not understand it or the consequences of it, it seems like a waste of time and money to develop them.

Acknowledgements

The authors are indebted to Karl-Gustav Johansson and Anders Skog for providing information on the coming draft of the revised Swedish standard for detailed development plans, to Anna Eriksson for input on the implementation of the LADM, and to Agneta Engberg and Fredrik Mattsson for permission to use the results from the standardization survey commissioned by the Swedish Standards Institute.

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A society is, however, not a better society just because it specifies that certain people are entitled to certain things.

Ronald M. Dworkin

The effect of public and private sectors on Greek cities

Despina Dimelli

Abstract

Greek cities have been facing in the past two centuries the influences of two World Wars and a Civilian War, a dictatorship, Olympic Games and today an economic crisis. The role of the private and the public sector during these years was extremely important on every level. It configured the urbanization process on the regional level, the density of inhabitation on the urban level and the quality of the built environment on the architectural level.

The paper focuses on the role of the public and the private sector in urban planning since the declaration of the Greek state and its effect on the Greek urban environment. It investigates the way the public sector tried to manage facts that changed the physiognomy of the Greek cities, as the lack of a strict legislative framework combined with the insufficiency of controlling mechanisms and the creation of new infrastructures led to cities that had intense environmental and social problems. Finally, the paper focuses on the economic crisis and the role of the public sector in spatial planning of Greece today.

1. Introduction

Greece has a very long history which has shaped its today's appearance. The Greek state, as we know it today, has a short history of almost two centuries. Through these years the economic, social and political conditions shaped among others the urban tissue. The Greek public sector began to confront the problems during this period in two ways; by funding infrastructures and by legislating regulations which gradually shaped the form of Greek cities. The form of the public sector intervention changed through time, according to the particularities of each period. Today, through the economic crisis the role of the public sector has changed. The private sector seems to be the only way to finance the revitalization of cities, a fact that is not followed by the required policies. This can lead to urban areas that focus on private profit maximization instead of areas that ensure sustainability and social justice. The paper examines the role of the public sector in the configuration of Greek cities until today and its cooperation with the private sector during the current period of economic crisis.

2. The beginnings of the Greek state

After the Greek revolution of 1821 the War with the Turks and the proclamation of the Greek state in 1834, Greek cities had to correspond to their new role. By this period the majority of the Greek citizens lived in the countryside, while cities were abandoned. The initial efforts for city revitalization were decrees which defined that every Greek citizen had the right to own a piece of land in the existing ravaged cities, in which he could construct his own house. The State could initially choose the areas where the public buildings and infrastructures were to be constructed; the other parts of the city could be built according to regulations that tried to ensure good health conditions in the new cities. Kapodistrias, the first Greek governor tried to formulate rules according to Western European urban standards. His efforts showed the attempt to expunge the traces of the Ottoman past and to become the base for the new Greek cities that would have similarities with the rest of European cities. The field for all these attempts was Greece's capital, the city of Athens.

The initial plan for Athens which was the final capital of the Greek state was based on classical principles. It was characte-

rized by boulevards, parks and public buildings in the standards of the Bavarian urban planning. This plan was never applied and it was modified many times as the Greek state could not afford the required expropriations (Biris, 1966).

As public buildings preceded the urban tissue in Athens, it was inevitable that, instead of the urban plan defining their location, the opposite happened. The accomplished public constructions of the Greek capital were finally built in places totally different from those foreseen by the urban plans. That way, in almost every case, especially when it was a question of a public building of special interest, the approved urban plan had to be modified.

In the period between 1828 and 1923 major changes took place in the Greek state. New regions were annexed in the country and simultaneously many Greeks returned to their country from other countries of the Balkans (table 1). These facts caused new conditions, so policies of spatial development had to be adjusted in the country's new needs. By 1897 the Greek population was 2,451,185 people. Until 1922 the Greek population was doubled (GSSG, 1931: 41).

The period between 1828 and 1923 was characterized by the creation of plans without legislative efforts. It is estimated that from 1828 until 1899 152 plans were created for the development of Greek cities. These plans only showed the areas where public buildings would be constructed and the limits of the building blocks which would be constructed with restrictions regarding issues as building heights, distances etc.

These restrictions were not detailed so their implementation included a lot of differences according to the social dynamics and the circumstances of each period. The organized construction of a 565 buildings area was a significant case of the role of the Greek public sector as in 1831 these buildings were constructed in order to cover the housing needs of Cretan militants which participated in the 1821 revolution against the Turks. It was the first time the public sector tried to cover the housing needs of a group of Greek citizens in an organized way. On the other hand the private sector that was headed by rich Greeks terminated its activities in the construction of public buildings that were functioning as public institutions (schools, orphanages, churches, hospitals).

Tab. 10. The changes of the surface and population of Greece from 1897 until 1922

Date	Area (sq. kilometers)	Population
1897	63.2111	2.451.185
1913	121.794	4.819.793
1920	150.833	5.531.474
1922	130.199	5.913.000

Source: GSSG, 1931

In the beginnings of the 20th century the political power moved from the upper to the middle class, a fact that was reinforced by the economic structural change (decline of agriculture and traditional manufacture). This new development model led to changes in the Greek social stratification. The basic factor that created the Greek built environment this period was the establishment of a central mechanism which prioritized the restrictions for the Greek cities regulation (Vergopoulos, 1978). The above procedure was followed in Greece by the Ministry of Transport and the simultaneous legislation of rules regarding cities that obtained healthy living conditions.

A characteristic example of the public sector's role was the city of Thessaloniki. A major part of the city was destroyed because of a big fire that broke out in the Mevlane district the afternoon of August 5, 1917. The fire which subsequently expanded to the rest of the urban fabric destroyed 9,500 houses leaving 70,000 of the 170,000 city's residents homeless. The Greek state immediately started with the procedure for the city's revitalization through the establishment of a council which designed a new plan for the destroyed area. The innovation of the implemented policies was the land's redistribution system. This was achieved with the establishment of a Public entity which gathered all the existing properties in its jurisdiction. For the certain case the Greek state voted the 1394 Law in 1918 which was an intervention tool that included the process of the old properties valuation, the establishment of a single real-estate owners group, the evaluation of the burned and the new real estate development in accordance with the proposed plan, the allocation and distribution of new plots and various other modalities (Karadimou-Yerolimpos, 1985: 172). The above organizational structure did not only formally introduce the mechanism of „comprehensive planning" in the country but also adjusted the international urban planning practice to Greek reality. This was characterized in economic terms by the lack of financial resources which would guarantee the property rights in particular plots (Karadimou-Yerolimpos, 1985: 349).

3. The interwar period

The arrival of 1.3 million refugees in 1922 led to two basic Decrees: the 1923 decree which tried to manage the intense urbanization with restrictions regarding urban and peri-urban areas and the 1929 Decree which dictated building rules, as the new building methods and materials encouraged the construction of high buildings. The public sector faced difficulties to house all refugeesas the political situation, the economic conditions and the lack of mechanisms made the Greek Government unable to face this intense problem. The League of Nations established the Commission for Refugees Rehabilitation which tried to solve the new housing needs. Initially the newcomers were settled in theatres, churches and other public buildings, in tents, in hovels and in abandoned settlements. The Greek state tried to strengthen its borders, so 2,000 (1,381 in the Macedonia region and 236 in the Thrace region) new agricultural settlements were constructed with the use of standard urban plans. The state also provided family allotments of 35 acres that differed according to each family's size and the type of crop. As for the urban settlements the Ministry of Welfare constructed 12 main and 34 secondary settlements near the existing urban areas (Polyzos, 1984: 29).

Due to the lack of financing tools the new urban areas for the refugees had no public infrastructures, a fact that caused degraded urban environments. These areas were addressed only to some of the newcomers so the rest of them had to be settled in hovels creating entire slums within cities or around refugee settlements. The country's planning system had to adjust to these new conditions and the continuously increasing housing needs.

So, in 1934 a new Decree for the construction of multi-storey buildings was legislated in order to allow the construction of high buildings. The same period the Greek government promoted the system of compensation-exchange, a process that brought in the private sector in the intense building process. The majority of Greece's urban residents had the right to grant their plots to private contractors in order to build multi-storey apartment buildings and give them some of the new apartments in return (Marmaras, 1989). The aim of this Decree was the control of the intense urban sprawl, the facilitation of construction and the settlement of the intense housing needs due to the rapid urbanization process of this period. As the public sector could not confront the Greek cities' expansion and finance the newly required infrastructures, it encouraged the construction of higher buildings. Nevertheless, as during this period the Greek economy was supported by capital mobility caused by the construction sector the aim of urban legislation was to facilitate private construction activity.

In the following years the Greek State adopted a number of laws which would make construction more profitable. Gradually, social housing guided by public sector withered away and the private sector took over the formulation of the Greek urban environment focusing on its profit's maximization. It is characteristic that although in 1940 43% of the Greek families were homeless or lived in inappropriate conditions, the public sector could not do anything in order to solve this problem. On the contrary 76% of the multi-storey buildings of this period had been financed by the final owners of the buildings, a fact that shows that construction was a main way of investment.

4. The Civilian war, the dictatorship and their influence on the Greek cities

Between 1947 and 1949, the Western European countries used the Marshall plan for the development of their industries, with the use of technologies that were discovered during the Second World War. In Greece the Marshall funds were used by the government forces for the civil war and the survival of the Greek population. The public sector only was responsible for 2% of the total buildings that were constructed during the 1948-1950 period. It is estimated that from the 3,000,000 buildings that were constructed after the Second World War only 50,000 were financed by the public sector.

In this period the Greek cities' development was based on the reconstruction of the Greek productive base. The employment conditions were extremely difficult, so many Greeks preferred to migrate to other countries where it was easier for them to find a job. Although the Greeks continued to move from the countryside towards the existing cities, as the activities in the countryside were declining, the country's industrial development had not yet been achieved. It was this period when the construction of houses was linked with the development of the Greek economy.

The 1952 Varvaresos proposal asserted that the construction sector would create new jobs and reduce the demand for imports as building materials would be produced in the country. All the above would simultaneously lead to an increase of purchasing power which would ensure the consumption of Greek agricultural and industrial products.

The public sector during this period was focusing on the formulation of plans for the Greek cities development. Academics of this period, referring to the principles of modern urban planning, formulated proposals for the development of the Greek cities. It was the first time the proposed regional and urban plans tried to decongest the center of Greece's capital, Athens, based on the principles of Brasilia planning. The proposed plans that were formulated were based on the definition of new urban zones and green belts that would prevent urban sprawl and on the creation of boulevards that would ensure best traffic. In this period the political conditions and the lack of financing led the Greek government to a desperate attempt to start the reconstruction with private funds in the existing plots without the necessary infrastructures and other planning principles for the city's future development. All the policies of this period focused on the creation of a status which would attract private funds. So, decrees as the one which allowed the construction of higher buildings were accepted by the private sector while other decrees that proposed changes in the cities central areas were never applied as many land owners would have been affected. All the above led to cities with high densities in their central zones.

During the 1967-1974 dictatorship all policies tried to increase the existing building ratio in all Greek cities in order to placate the Greek society. In the same direction, the entire legislative framework during this period focused on rules which would encourage the construction activity and promote successive integration of arbitrary areas into the city plans.

Through these regulations the construction sector financed by private funds was intensively promoted, a fact that expanded the group of small property owners and blunted social division.

After the dictatorship new rules were put in place in order to improve the degraded Greek urban environments. But at the same time the policies that promoted tourism development degraded small settlements and rural areas as all infrastructure was constructed in order to serve the new tourism development model. So areas as Rhodes, Corfu, and Mykonos were the field of new mass construction works without restrictions which resulted in the downgrading of areas with particular environmental and cultural characteristics (Sarigiannis, 2014).

In the beginning of the 1980's, although the experience showed that intense construction by the private sector with few restrictions caused downgraded urban environments, the new regulations that were legislated again focused on the promotion of the construction activity. Policies promoted construction by owners of small properties leading again to a new "construction miracle". So the public sector that could not finance any project for the upgrade of Greek cities, legislated the rules that would encourage the private sector to play this role. But as the private sector mainly acted for profit maximization the results of this effort had bad effects on the Greek cities, which were constantly sprawling and downgrading without restrictions.

5. The Olympic Games and their effect in the Greek cities

In the beginning of the 21st century, the globalized economic conditions, the new technologies and the new ways of consumption and production had changed the economic base of the Greek urban areas. The development of these new trends resulted in the attraction of competitive economic activities. The new liberalization policy combined with the attraction of private funds had diachronically defined a new framework in the function of Greek urban planning. The main policies regarding urban development mainly focused on the cooperation of the public with the private sector, assisted by city marketing for the promotion of more competitive cities. This way the Greek cities were during this period managed with a new piecemeal approach that focused on certain projects in certain areas. The comprehensive model of planning was gradually abandoned and new programs, which ignored the holistic approach and focused on certain degraded city areas, were adopted.

In Greece the decade of the 2000's was the period of the production of new urban infrastructures dictated by the cooperation of the private with the public sector. This fact was mainly caused by the privatization of urban infrastructures (transport, energy, communications etc.) that was supported by the emergence of utility operators and the simultaneous limitation of public expenses. The intense development of this cooperation was mainly caused by the Olympic Games when the new needs, combined with the public-private partnership supported by the European Union's guidelines led to new conditions. In Greece, a country that had developed a complicated legislative framework, the cooperation of the public and the private sector can take many different forms, according to the degree of the private sector's involvement. So in the case of a concession contract, the private sector was responsible for the planning, construction, the maintenance and development of a project and it received its revenues from the operation of the project as long as the concession lasted.

In this framework the cooperation between the private and the public sector was intensified for the development of the required infrastructures for the 2004 Olympic Games. This cooperation was caused by the lack of expertise on the part of the public sector for the management of large scale infrastructure projects. Due to the lack of confidence of the Greek society in the public sector which has gradually been ineffective in the management of public projects, the private sector became the main base for the creation of public infrastructures.

The fact that construction procedures had to be implemented faster than usual due to the Games and the need for a more competitive economic environment led to major changes in the country's legislative framework. So new laws that allowed the merge of construction companies were legislated in order to encourage the private sector to implement the required new infrastructures. Sectors as energy, real estate, tourism and entertainment infrastructures were promoted during this period.

It would be a serious omission not to mention the significant changes that the involvement of the private capital caused in the development of the Greek urban tissue. There was an escalating emergence of big scale private companies which were involved in development initiatives. The private sector had extended its limits beyond the individual housing construction in more complex forms of development and in reclamation of bigger and more complex properties. These forms of private funds investments emphasized in a rapid economic performance. The benefits from these procedures were either not recorded adequately or, even more, were not positively influencing the social context within the investments took place. But how is all this shaping the Greek urban tissue? The development of these projects has introduced a new dimension in real estate prices and simultaneously it affected the sustainability of the existing local markets. The Greek case has many similarities with the corresponding European. These similarities are mostly concerning the physical planning process and the existing legislative framework of spatial planning, which in most cases has not predicted the mechanisms for this new phenomenon.

6. The public sector under today's crisis conditions

Today the existing economic conditions of Greece have dramatically changed the way the public sector is functioning. The economic crisis that began in 2009 not only unsettled the social and political conditions in Greece but also modified significantly the roles of the public and the private sector. The

Greek crisis has led to a crisis in real estate, construction and services sectors. Simultaneously it has expanded into a 'social crisis' illustrated by evictions, homelessness, informal economy, curtailing of welfare provision and new forms of urban poverty and vulnerability. All the above has influenced the Greek urban environment as the economic crisis has led to reduction in urban infrastructure provision and to further degradation of already disadvantaged urban areas. Due to the lack of funding recourses the possibilities for Greek cities' revitalization through public funding were extremely difficult. The impact of the crisis was exacerbated by local government service cuts and the cessation of previous regeneration programmes. So, due to these new conditions the private sector seems as the only one that could create new jobs in order to improve the high unemployment that Greece faces. But what is the role of the private sector in Greece today?

Some seem to have used the crisis as a catalyst to reform their economic base and the delivery of public services, including: an increase in urban entrepreneurship and business start-ups in response to growing unemployment; a focus on social innovation; and a shift towards 'smart' sectors such as energy and technology and investment into energy-efficiency in buildings, transport and urban infrastructure. On the contrary the Greek cities have struggled and are critical about the changes they are forced to make, perceiving an abdication of national government responsibility.

The new existing conditions have created a field that provides a lot of chances for the private sector as land values are low and the available manpower abundant. Greek private funds have made efforts to take advantage of this new situation. Plans for new tourism infrastructures were the most common new proposals from the private sector that focused on Greece's "heavy industry" tourism. New projects on Greek islands, environmentally sensitive coastal zones and forests were proposed with the pretext of the desired development that would combat unemployment. According to the Greek legislation all these projects should have been predicted from the spatial plans of all levels (regional and urban). But this cannot be achieved because of the obsolete spatial planning system that is functioning with plans that were legislated many years ago, when the conditions were different. So every proposal was rejected as it was not complying with the existing plans.

The Greek state tried to facilitate the private sector's projects with the legislation of decrees that allowed the construction of big scale projects in case they would provide new jobs and therefore support the country's development. According to these decrees, due to the economic crisis conditions, a project that was not foreseen by the existing urban and regional plans could be approved if it created new jobs. Under this new legislative framework projects such as the abandoned airport of Helliniko, the coastal zone of the Athenians capital and other areas could be developed. Although this new framework tried to facilitate the role of the private sector in a complicated legislative environment, still many complaints were formulated as in many cases the pretense of development could result in environmental degradation. The application of this new legislation so far has not succeeded as the Council of State that is based on the Greek constitution which defines environmental protection as a basic precondition for any development has rejected almost all of these proposals. So, what can be the role of the public and the private sector's in the development of the Greek cities?

7. Conclusions

There are significant knowledge gaps about the way the crisis is affecting cities, as they seek to manage the consequences of the recessionary downturn and austerity programmes. It is essential to redistribute the available funds into the areas and activities where they are mostly needed and take advantage of the fact that the crisis may have created new opportunities for green investment, social innovation, the social economy etc. For the achievement of the above a cooperation of the public and the private sector seems to be necessary, as the experience so far has shown that the fragmentary function of each sector has not succeeded. The basic precondition for the achievement of this goal is the adoption of policies that will create infrastructures for the common benefit and thereby producing sustainable urban areas. It is important for the public sector to guarantee that the private sector will not act mainly according to its profit maximization, but according to rules that will make cities respond to the new globalized circumstances. The target must be to form cities with new financial mechanisms based on social innovation and social economy, with smart features, with investments in greener urban infrastructure and with new institutional characteristics based on new governance mechanisms.

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What we call land is an element of nature inextricably interwoven with men's institutions. To isolate it and form a market out of it was perhaps the weirdest of all undertakings of our ancestors.

Karl Polanyi

TTIP - a frivolous claim to public land policies?

The consequences of the investment partnership for property rights, procurement, and land values in Berlin and Vienna

Fabian Thiel

Abstract

It is always hazardous to write about the future. To date (December 2015), the Transatlantic Trade and Investment Partnership (TTIP) is in *statu nascendi*. Without knowing the definite content of the EU-US investment agreement, my paper speculates about the future of TTIP and its impact on *public land policies*. These policies commonly comprise the creation and definition of property rights, of expropriation as a legitimate regulatory purpose and consequence of *bona fide* regulation, property valuation, and land use planning instruments. According to the road map of the European Commission, 2016 will be the year when TTIP sees the light of the day, supposed that the national parliaments of all Member States agree with the final text of the treaty (ratification procedure).

The (secret) negotiations started in July 2013. In 2015, TTIP will dominate the controversial debate particularly in these two states. Former Austrian chancellor Werner Faymann and the German Minister of Economy and Energy, Sigmar Gabriel, are prominent opponents of TTIP at the current stage of negotiation. The results are treated as a secret by the European Commission. Faymann and Gabriel criticize TTIP because of the supposed downsizing of environmental, health and food standards and the overemphasis of investor-to state-dispute-settlement beside the national courts. The German and Austrian debate is led by the domestic angst of investor-state dispute settlement and the establishment of "arbitral tribunals" beside the domestic legislation and cognizance.

1. Introduction: TTIP for universal property protection and promotion – a *frivolous claim*, a threat to democracy and public participation?

With widened international trade relations, globalization and new classes of institutional and private investors (Reinisch 2014; EU Commission 2015; Bungenberg et al. 2015; Krajewski 2015) – including their legal advocates and lobbyists who wait in the wings to get TTIP started – nationwide in Germany and Austria, the gap left between traditional methods of dispute settlement by domestic courts and modern requirements has led to the idea of offering investors direct access to effective international procedures such as arbitration (Bubrowski 2013). The purpose to reduce the tariff rates between the EU and the United States cannot be the argument to establish TTIP. Instead, the abolition of non-tariff trade barriers dominates the sole line of justification for an implemented TTIP. Hence, TTIP will presumably introduce the following new arenas for land policies of the TTIP Member states and the EU Commission as the driving belt of TTIP. These are the core issues of TTIP:

- *protection of legitimate investment-backed expectations* in particular for intellectual, movable and immovable property;
- disclosure of *"manifestly excessive measures"* against investors, e.g., by planning decisions, the withdrawal of building permits, the termination of land use concessions and land leases for housing and infrastructure such as public transport systems;
- *expropriation or measures having an equivalent effect to expropriation:* indirect, but also de facto (so called "creeping") expropriation or measures tantamount to indirect expropriations such as regulatory coherence by a Cooperation Council which will supervise and develop TTIP issues, and
- *new procedures and standards,* e.g., for public procurement law in the planning and construction sector and for public bidding procedures related to brownfields that are not needed to fulfill public tasks – i.e., land, property, and valuation policy tasks – anymore.

Looking at these inventions, one has to be aware that TTIP is not an ordinary treaty. TTIP is a unique investment agreement that incorporates new, modified and unprecedented international investment rules. They will directly and indirectly affect procurement standards, environmental regulations, property rights, and presumably also land use planning. A "clash of norms" and valuation standards such as the Discounted Cash Flow (DCF) as the prior method in investment arbitration to determine the value of profits (and losses) is foreseeable. The exchange value of land will dominate if TTIP comes into force, whereas the social and ecological land value may suffer.

The aim of my paper is to show that TTIP is a double-edged sword: Originally designed as an extraterritorial and extrajudicial instrument to eliminate trade restrictions, TTIP could lead to diversified land policies and a *"boom of indirect expropriation"*, as Krajewski (2014) assumes rightly. Rudolf Dolzer, a leading commentator in international investment and expropriation law, puts it: *"(T)he task of defining expropriation would dominate the foreign investment legal context in the future"* (Dolzer 2002: 66). To date, it is fair to say that Dolzer was right in his assumptions. Property protection and promotion are the leitmotifs and *Raison d'Être* of any bi- and multilateral trade agreements. They will also be the paramount cornerstones of TTIP. In all trader agreements, the line between unreasonable and un-proportional regulation without expropriation and the "unjustly enrichment" of investors by conducting business in a manner detrimental to the general welfare (example for investment cases are: *S.D. Myers v. Canada*, supra note 9, para 212 or *Noble Ventures v Romania*) is, even after all the well-known jurisdiction and litigation battles (Dolzer 2002: 41), remarkably thin and fragile. This will be shown at the example of the said capitals. Are the land politicians and spatial planners in Berlin and Vienna aware of the conceivable consequences of TTIP for the state land policies with its still remarkable high shares of public property and communal housing such as the Viennese housing fund (*Wohnbaufonds*) or the public procurement procedures for public lands in Berlin which undergo permanent discussions and modifications in both increasingly "propertied" (Blomley 2001) capitals. Will all disposable plots in Berlin and Vienna go to the highest bidder, as soon as TTIP comes into force?

2. Overview on important regulations and contents of TTIP: Investment, competition, procurement, and trade facilitation

According to the negotiation mandate, the final agreement of TTIP will comprise 24 chapters. Information is accessible on the website of the European Commission and is given by so called "fact sheets" (European Commission 2015), and is grouped in three parts:

- Part 1: Market access: "Better access to the US market";
- Part 2: Regulatory co-operation: "Cutting red tape and costs - without cutting corners" and
- Part 3: Rules: "New rules to make it easier and fairer to export, import and invest".

Especially the chapters on regulatory co-operation (part 2) and rules (part 3) are unique and have never been before parts of any international agreement. These chapters might interfere in processes such as the services for the public (*Daseinsvorsorge*) at national, regional and local level, the rule of law, domestic and EU litigation, and the function of TTIP Member State parliaments (Bubrowski 2013; Corporate Europe Observatory 2014; Fisahn and Ciftci 2015; Flessner 2015; Schneider 2015). "Rules" will invent new measures particularly in sectors such as energy and raw materials or small and medium-sized enterprises. The currently re-designed Part 3 will also provide for an arbitration of investment disputes by Investor-State Dispute Settlement (ISDS) schemes, a Government-Government Dispute Settlement system which is yet unsettled by the EU-US negotiations, and an obligatory umbrella clause.

TTIP is by far not the only instrument that aims at security of investments and standards. It is, until now, the only one that *incorporates international law rules*. TTIP also raises fundamental questions of constitutional and property law in the Member States. The partnership would create a legal order that is autonomous in relation to domestic law, its legislative production processes and their legitimacy. Hence, TTIP is unique due to its binding for the Member States, especially the obligation of decisions made by dispute settlement tribunals, together with the possibility to avoid interventions of national governments if the TTIP contracting partners agree. In consequence, domestic Constitutional Courts such as the German Federal Constitutional Court are avoided and thus the ability is given to keep negotiations and contracts as a secret (Bubrowski 2013; Corporate Europe Observatory 2014; Eberhardt 2014).

A prominent case is the *Vattenfall AB and others v Germany* dispute. The Swedish energy company Vattenfall has brought a claim against the German government based on the Energy Charter Treaty seeking €4,675,903,975.32 for the loss of profit plus four percent interest. Given the fact that a remarkable high amount of taxpayer's money is at stake, the transparency problem behind this case is obvious. The public has no access to background information or to the text of the complaint. After the Fukushima nuclear disaster in March 2011, the German government has decided to significantly speed up the phasing-out of nuclear power generation. This led to the shutdown of Vattenfall-owned nuclear power plants Brunsbüttel and Krümmel (European Commission 2013: 5; Corporate Europe Observatory 2014; Krajewski 2015). As the case *Vattenfall v Germany* indicates, the relationship between international arbitral tribunals deriving their existence from investment treaties and the role of domestic courts is the most important – and controversial – issue in investment arbitration. To date, the future of arbitration regulation within TTIP is unclear and disputed. Looking at these inventions, one has to be aware that TTIP is not an ordinary treaty.

3. Non-discrimination, protection of investment, competitiveness, de-regulation, and indirect expropriation: the gold standards of TTIP?

"(…) And let me be clear: the TTIP that the European Commission will negotiate and present for ratification will be an agreement that is good for citizens – good for growth and jobs here in Europe. It will be an agreement which strengthens Europe's influence in the world, and which would help us protect our strict standards. The European Commission would never even consider an agreement which would lower our standards or limit our governments' right to regulate. Neither would EU Member States, nor the European Parliament", said the Swedish EU Commissioner of Trade, Cecilia Malmström, according to a European Commission Press Release in 2015.

"Parallel justice in the name of money"? What sounds good, convincing and reasonable in general becomes complicated and questionable in detail. But is TTIP a "free trade lie", as the German activist Bode from the Food Watch NGO claims (Bode 2015) or a *"clandestine coup d´état"* (Prantl 2014)? Is TTIP equivalent to investment exuberance, a legal order autonomous from domestic and EU law that undermines democratic structures in the TTIP Member States and leads – through arbitration courts – to a *"parallel justice in the name of money"* (Kohlenberg et al. 2015)? In a nutshell: Does TTIP mean the privatization of public spaces in European and US-American cities as investment promotion and protection? These core issues will be raised in the following chapters.

3.1. The installment of a regulatory council beside existing institutions and parliaments in the Member States: CETA as a template for TTIP

TTIP as a global "game changer" has trade agreement forefathers on both sides of the Atlantic. Blueprints for the final text for TTIP documents that are available so far (European Commission 2015) came from diverse Bilateral Investment Treaties (BIT), the North American Free Trade Agreement, the Energy Charter Treaty, but especially from the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) as of November 2014. Although CETA has not yet entered into force and is equally disputed as TTIP, the final text can be seen as the prime and instructive template for TTIP. Studying CETA carefully, we can learn about the role and function of investment treatment, dispute resolution, and the installment of regulatory bodies. Hence, CETA and TTIP are siblings.

TTIP covers more than the well-known and widely published chloride chicken story. It seems as if the people affected by TTIP worries more about these negligibility than about issues about expropriation or transparent negotiation processes. Similar to any trade and *investment* agreement, TTIP – with emphasize on the "I" concerning land and natural resources – will bring innovations with direct linkage to planning, law and property rights in the TTIP Member States. The trade deal might bring the following inventions (to name just the relevant issues for land policies):

- investment protection, reducing of trade barriers (non-tariff trade restrictions), and regulatory coherence;
- cross approval of standards and new regulations beside and above domestic and EU legislation, execution and jurisdiction of TTIP Member States;
- protection of legitimate investment-backed expectations. The term "investment" entered international law only recently;
- disclosure of "manifestly excessive measures" against investors;
- safeguarding of fair and equitable treatment and of reasonable investment expectations;
- characterization of a State measure as indirect, *de facto* ("creeping") expropriation or measure *tantamount to indirect expropriations* such as amendments in environmental and business or taxation regulations: "The higher the purpose of a measure and the greater its practical benefit to the public welfare, the greater is the level of investment interference that must be demonstrated in order to tip the scales toward a characterization of the measure as an expropriation" (Fortier and Drymer 2004: 300), and
- the invention of "regulatory coherence" by a to-be installed Regulatory Cooperation Council with executive power. The council shall supervise and develop TTIP issues, helps to foster investments and to speed up procedures and standards, and acts independently from the national legislation of TTIP Member States.

Hence, the partnership would create a new (global) *legal order* that is autonomous in relation to domestic law, to its legislative production processes, and their legitimacy. TTIP is unique due to its commitment for the signing Member States, especially the obligation of decisions made by dispute settlement tribunals, together with the possibility to avoid interventions of national governments if the TTIP contracting partners agree. Domestic Constitutional Courts such as the German Federal Constitutional Court are avoided and thus the ability is given to keep negotiations, agreements, contracts, and important declarations as a secret (Raza 2014; Corporate Europe Observatory 2014; Eberhardt 2014; Pinzler 2015; Bode 2015; Flessner 2015). National treatment (*Inländergleichbehandlung*), most-favored nation treatment (*Meistbegünstigung*), international minimum standard, fair and equitable treatment, and the full and constant protection of security are core elements of international investment law.

Intermediate result: TTIP will incorporate all of these international investment law standards and, at the same time, contradicts them on the national level due to discrimination of domestic investors.

3.2. Regulatory or expropriatory? Investment protection and promotion for land as immovable property by the right to regulate

The most important objective of TTIP is promotion of investment by the "right to regulate" (Muchlinski 2008; European Commission 2013; Krajewski 2014: 38; European Commission 2015) for a stable, transparent, equal and non-discriminatory framework. Core aims of the regulatory quality are non-discrimination, fair and equitable treatment, indirect expropriation and the guarantee of investment-backed expectations. What is "investment" under TTIP? Although the ongoing negotiations for TTIP are secret, we could learn about the outcome from the sibling CETA. There, according to the Annex, Pos. A, the scope of the substantive investment protection provisions lists under "investment" (…) *"any other moveable property, tangible or intangible, or immovable property and related rights"* (see: letter h, Annex to Investment Protection in the Proposed EU-Canada Agreement (CETA)).

Doubtlessly, "land" can be subsumed under immovable property. According to Art. 1 (6) of the Energy Treaty Charter, *"investment"* covers any kind of asset which is owned or controlled directly or indirectly by an investor, including tangible and intangible, moveable and immovable properties. Investment also encompasses any property right such as property titles leases, mortgages, guarantees, liens and pledges, mineral rights, also assets such as stocks, portfolio shares, stakeholder interests and percentages, revenue sharing, concession and leases. However, a legally-binding definition of "investment" can be given neither from literature nor from jurisprudence. The term is as ambiguous as the "fair and equitable treatment" and the "full and constant protection and security"-standard. Questions remain since the current TTIP negotiating documents published by the European Commission (2015) do not allocate a concluding definition of the term "investment", whether all types of investment – direct or indirect, enterprise-based, by contract or cross-border – will be covered by TTIP. The relation between Foreign Direct Investment in land and natural resources such as in commodities, minerals, water, and other TTIP investments in energy, infrastructure, and land is somewhat vague. To date, nearly any investment could be involved in investment disputes, in particular by gas fracking moratoria or amendments of energy policies such as the phasing-out of nuclear power.

3.3. "Fair and equitable treatment" as an ambiguous clause and mystifying term – leading to expropriation light and a neoliberal straitjacket for states?

What is "fair and equitable treatment (FET)? Fair and equitable treatment is an emerging and controversial issue in international investment law. It consists of four variations (Crawford 2012: 617):

- a self-standing standard without reference to international law standards;
- in accordance with international law;
- linked to standards of "minimum treatment of aliens" to avoid severe discrimination, achieve freedom from coercion or harassment, protect against arbitrariness and to promote good faith and
- with express reference to obligations, e.g., unreasonable or discriminatory measures.

However, arbitral tribunals such as the ICSID offer significant leeway on how to interpret the requirement of fair and equitable treatment standards. Through the looking-glass of international investment law, fair and equitable treatment is interfered by

- the non-renewal of business license and leasing rights (cases: *Wena Hotels Ltd v Egypt; Tecmed v Mexico; Saluka Investments v Czech Republic*);
- newly introduced regulatory and planning instruments and requirements by the legislative and executive organs affecting the economic basis of the enterprise (case: *Pope & Talbot v Canada*);
- the termination of investment contracts and building concessions (cases: *Siemens AG v Argentina; Duke Energy v Ecuador*) and/or
- and the abusive treatment of the investor (case: *Vivendi v Argentina*).

Generally, in the often-referenced case *"Waste Management v. United Mexican States I"* (ICSID Award, para 98), the deciding tribunal found that

"(…) fair and equitable treatment is infringed (…) if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectorial or racial prejudice (…) or a complete lack of transparency and candor in an administrative process" (ICSID Case No. ARB(AF)/98/2, Award).

Given this general definition, one might call the ambiguous clause of fair and equitable treatment comparable – in investment law terminology: tantamount – to "expropriation light". The line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin, particularly if the breach of the former standard is massive and long-lasting. This is the evidence from the interesting Sempra Energy v Argentina case (ICSID Case No. ARB/02/16, 28 September 2007, paras 300 and 301). Indicators such as the protection against discrimination, transparency and stability, legitimate expectations as "the reasonably-to-be-expected economic benefit" (case: *Metalclad Corp v Mexico*, Award, 30, para 103) or proportionality of State measures show that fair and equitable treatment is an ambiguous clause. Hence, this mystifying legal term may be interpreted differently and may change from case to case as it is sometimes not precise as would be desirable (Schreuer 2006; Yannaca-Small 2008: 129; Crawford 2012).

The linkage between land use planning and the fair and equitable treatment qualification is obvious in the case *MTD Equi-*

ty v. Chile. There, the prevention and withdraw of an urban development project due to the violation of the preparatory land use plan was interpreted as an infringement against the fair and equitable treatment. In this case, the Tribunal underlined that the fair and equitable treatment standard is also violated in cases of passive behavior of the State, e.g., by the denial of adaption of the (preparatory) land use plan according to the requirements and business expectations of the investor:

"Its terms are framed as a pro-active statement – "to promote", "to create", "to stimulate" – rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors" (*MTD Equity v Chile*, ICSID Case No ARB/01/07, Final Award from 25.5.2004, para 113).

3.4. Boom of indirect expropriation as a result of TTIP?

The question whether direct versus indirect expropriation and "creeping expropriation" occur by manifestly excessive measures as the dominating doctrine in TTIP chapter on investment protection – according to part three of the current TTIP documents – is the nub of the issue. Even after all these years of legal debate, it is an ever-evolving discussion where to draw the line between non-compensable regulation including the regulation of property rights, the compensable expropriation, and the temporary taking (Alterman 2010; Davy 2012). Which function has an indirect expropriation in that respect? According to part three of TTIP negotiating documents on "rules" (see above), the partnership follows an international "expropriation trend": from direct towards indirect, "creepy" or ad hoc-expropriation. An indirect expropriation could occur in situations in which the property of an investor has not directly affected, but was impaired by "manifestly excessive measures", as a substantial loss and economic deprivation resulting in the erosion of rights associated with ownership by state interferences.

Manifestly excessive measures are amendments of health, environmental or building regulations (European Commission 2015). Investors might file a lawsuit against investment-target states (here: Member States of TTIP) due to anticlimax. These situations are not protected and covered by international and domestic laws such as constitutions, planning laws, housing regulations or environmental laws. The undermining and even "gulliverization" (Bode 2015) of national legal, planning and awarding procedure for public land and building codes is currently being discussed in Germany (Corporate Europe Observatory 2014; Krajewski 2014). Dispute claims and claims of indirect expropriation as a result of disappointed investor's expectations are often sufficient to freeze government action. Lawmakers realize immediately that they would have to pay to regulate (Corporate Europe Observatory 2012: 15-17; Eberhardt 2014: 100-119). Instructive cases are *Philip Morris v. Australia* and *Philip Morris v Uruguay*.

Indirect expropriations appear in *"great multiplicity"* (Hoffmann 2008: 152; Schmidt 2012). They are flexible, unforeseeable and hardly defined. The unanswered questions surrounding them are manifold, especially since attempts to define the demarcation line between indirect expropriation and "simple" regulatory measures have frequently been made (Hoffmann 2008: 152), however without much persuasive power. Investor state arbitration was originally envisioned for "simple" cases of direct expropriation – "when the government took the factory" (Corporate Europe Observatory 2012). Expropriation, also described as compulsory purchase or regulatory takings (Fortier and Drymer 2004; Alterman 2010) has always been a contentious – and dynamic – issue (Reinisch 2008; Muchlinski 2008; Wälde and Sabahi 2008). Most investment dispute cases deal with the controversy whether a taking has occurred by regulatory changes of legislation regarding the content of property (Dolzer 1985; Dolzer 2002; Davy 2012; Schmidt 2012). Krajewski argues that the protection against uncompensated expropriation has always been the historic root and raison d'être of international investment protection (Krajewski 2014: 13). As it is difficult to define the legitimate investment backed expectations, it is even more delicate to distinguish an indirect expropriation from a simple regulatory (direct) measure, e.g. by land use planning or amendments of land policies. Indirect expropriation could be even broader and have severe (budgetary) consequences than the violation of fair and equitable treatment. Hence, TTIP will presumably introduce a *super basic right* concerning indirect expropriation as *the* universal ambiguous clause and *"the most dangerous assaults ever launched on democracy and the welfare state"* (see the conclusion of Prantl 2014: 13).

Indirect expropriation could result in regulatory measures that lead either to a "frustration of investment expectation" (cases: *Feldman v Mexico; Generation Ukraine v Ukraine*), a disproportionality of measures, and in a non-transparent, arbitrary and discriminating procedure (case: *Rumeli v Kazakhstan*). As Reinisch points out correctly, questions of direct expropriation seem to have become less important in recent treatises on international investment law which hardly address the issue of their legality (Reinisch 2008: 171-172; Reinisch 2008: 407-458; see also: Bubrowski 2013). Direct expropriation is seldom. Today, it is clear that a taking which lacks a public purpose and a discriminatory taking as the potential raw nerves of land use planning regulations (Alterman 2010) are illegal. The "Hull-Formula" respective the Calvo-doctrine for prompt, adequate and effective compensation seems to be implemented in all constitutions of European Union Member States, albeit with a different level of broadness of compensation rights and valuation methods (Wälde and Sabahi 2008: 1049-1124; Kantor 2008). Internationally accepted compensation methods and calculations are

- market value;
- replacement value;
- book accounting value;
- liquidation value;
- de facto-spent outside expenses.

Surprisingly and although numerous expropriation cases have been settled by tribunals, no consent on a consistently used method for compensation has been found yet (Marboe 2006; Kantor 2008). No blueprint has yet emerged. Conversely, indirect or "creepy" expropriations" have gained popularity in investment treaties as blueprints for TTIP (Muchlinski 2008: 27-29; cases: *Metalclad Corp v. Mexico*, Award, 30 August

2000; *Middle East Cement Shipping and Handling Co. S.A. v Egypt*, Award, 12 April 2002; *Waste Management Inc. v Mexico*, Award, 30 April 2004; Reinisch 2008: 407-458; Crawford 2012: 621; Schmidt 2012). In the well-reviewed *Metalclad* case, the disappointment of legitimate investor expectations created by the investment host state was causal for the admission of an indirect expropriation. However, the project for a landfill had complied with all relevant planning regulations and environmental standards.

In the case Middle East Cement v Egypt, the tribunal found that:

"When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as 'creeping' or 'indirect' expropriation" (*Middle East Cement v Egypt*, Award, 12 April 2002, para 107).

In the *Tecmed v Mexico* case, the tribunal declared the failure to renew the operating permit for a landfill as an indirect expropriation. Following these decisions, the following conclusion for the investment chapter of TTIP can be drawn: It is, from investor's perspective, easier to claim indirect expropriation than direct expropriation. Evidence for indirect expropriations is always unclear and open to the tribunal's interpretation. If the trade barrier of "excessive and arbitrary taxation", if the denial of government export permits, if the permanent transfer of the power of management and control to withdraw of licenses and their granting of which an investor could have been legitimately expected which was being held to constitute an indirect expropriation in arbitral practice (Reinisch 2008: 454), then most governmental measures would fulfill the matter of fact of indirect expropriation. In close relation to the fair and equitable treatment and aiming at the promotion and protection of investment are the "international minimum standard" with access to justice and the rule of law principle (argument: no denial of justice), the national treatment (argument: no foreign investor shall be treated less fair than a domestic investor), and the most-favored nation treatment (argument: foreign investors shall get the best treatment and conditions equivalent to investors from a third country (*Drittstaat*).

4. TTIP as a feasible contradiction to the Property and Public Procurement System in Germany?

4.1. German Constitution: Article 14 as the social model for land policy versus the reasonably-to-be-expected economic benefit of an investor

The German "social model" of property clearly requires landowners to act in a socially responsible manner, as determined by regulations authorized by the legislator. The contents and limits of property rights are aiming at a "socially just property order." The social obligation must meet the proportionality test and allows, under certain circumstances, government's interventions. These depend on the social importance of the property type which may change over time. The German Constitution distinguishes two forms of property restrictions (see figure 1 below): the determination of content and limits (Article 14 para 1 sentence 2) and direct expropriation (Article 14 para 3). Direct expropriation is the last resort for the public interest particularly in connection with legally-binding land use planning for its implementation (Dieterich et al. 1993).

Meaning of "property" according to Article 14 of the German Constitution

Property (Art. 14 para 1 sentence 1)	**Content and limit of property (Art. 14 para 1 sentence 2)**	**Expropriation of property (Art. 14 para 3)**
↓	↓	↓
Private property rights; Rights given by public law and based on owner's performance; **No** property: Possibilities, (business) expectations, chances and wealth	Government's action to determine contents and limits; **Generally**: no compensation required; Balance between private and public interests (proportionality); Protection of interest	Legal and administrative action; in the public interest; Civil court procedure for compensation; Compensation (not necessarily due to the market value) No protection of future business profits No indirect expropriation

Fig. 1. The concept of "property" within Article 14 of the German Constitution

Although case law from the German Federal Constitutional Court has extensively tried to demarcate the realms of paragraphs 1 and 3 of Article 14 of the German Constitution, the discussion and interpretation of the problems combined with Article 14 are anything else than being ultimately solved. This is true in respect of the social and natural functions of non-renewable resources and the legally justified governmental interventions to restrict and – even more essentially – to define private property rights in the public interest. The content and limits of the "expropriation" are entirely clear, at least on paper: "Expropriation means a deprivation of property in an individual case directed at a transfer of property from one person to another in order to achieve an objective of public interest", consisting of all general restrictions of property imposed by law that constitute a determination of content and limits in the sense of Article 14 para 1 sentence 2 of the German Constitution.

The German Constitution, but also the Federal Building Code, is silent about the term "indirect expropriation". However, the problem lies within the interpretation of the regulatory measures provided for by Article 14 para 1 sentence 2 (*"Inhalts- und Schrankenbestimmung"*) of the German Constitution, since it does not say anything about compensation. All general restrictions of property such as regulations of legally binding land use plans, urban restructuring and urban land readjustment imposed by law do only constitute a determination of content and limits (Article 14 para 1 sentence 2). Today, most states refer to their competency to police power. States have learned from the controversial case *Ethyl Corporation v Canada* (ICSID, Decision on Jurisdiction from 24.6.1998). Non-discriminatory, state regulations which serve a public purpose do not cause the duty of compensation even in the case of property restriction:

"A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other actions of that kind that is commonly accepted as within the police powers of states, if it is not discriminatory (...) and is not designed to cause the alien to abandon his property to the state or sell it at a distress price" (US Restatement of the Foreign Relations Law, Section 712, para 1, Comment g).

Compensation serves as a consequence of expropriation, but also as a balancing factor within the principle of proportionality. Compensation for expropriation and for damages from public planning and building law damages as well can be made below the market value. A general prescription for any compensation is not possible. The compensation surely depends on the motivation and rationalities of the involved parties, the private landowners and the government. But it is not just the task of the state to guarantee property rights and the inheritance of these rights. Another element of "regulatory quality" is that the state defines and implements underlying legal and institutional conditions. The state has to ensure that the "public good" of the ownership of land shall be used to the maximum possible value for all (Article 14 para 2 of the German Constitution).

Hence, one of the main principles of the social market economy is the guideline of "property entails obligations." This sentence is of paramount importance for the land market, investments, and a comprehensive land policy. The assumption is made that what is known as the "freedom to build" forms an essential element of the individual land ownership, although it cannot be derived from Article 14 para 1 sentence 1 of the German Constitution. But individual landowners are only entitled to make (personal) use of this theoretical "freedom to build" where it is possible to ensure that the building activity does not counteract public purposes (e.g., environmental, infrastructure or energy supply issues), and qualifies to be permitted. The "right to build" is thus formed by urban development law and construction statutes. It does not include or create a right to profit from property.

4.2. Excursus: Procurement law and TTIP

In German as well as in European procurement law (*Vergabe- und Vertragsordnung für Bauleistungen* – VOB, parts A and B), but also the Ordinance on Procurement for Assignment concerning traffic, water supply and energy (*Sektorenverordnung* – SektVO) are based on the principles of competition and transparency and the equality principle of bidders. Any discrimination is unlawful. In sections 2 and 17 VOB, Part A, the non-discrimination-rule is embedded within the general principles of procurement law. Competition is, as a matter of course, the core element of public procurement. For the contracting authority, it follows the commandment that all entrepreneurs/investors shall be treated equally. This is also derived from Article 3 of the German Constitution. The basic rights shall bind the fiscal auxiliary business of the public administration such as construction contracts or public land sales by land funds or real estate agencies owned by the federal and/or state governments. In primarily applicable EU law, the prohibition of discrimination also applies without adaption to national law. This principle applies to all procurements in the construction and energy sector. It prohibits the participation of a limited number of undertakings or business entrepreneurs only from selected EU countries in the awarding process, by written documents only – or made exclusively available – in the local language.

The prohibition of discrimination of domestic investors should be noted. This principle obliged the contracting authorities to treat all participants in the tendering procedure equal, although similar situations are present, unless a disadvantage is due to the Law against Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* (GWB)) expressly commanded or permitted. Under the TTIP-regime (Pinzler 2015), the investments (as protected and promoted property) would be protected in special manner for investors from the European Union in the US and vice versa of US investors in the European Member States. This treatment envisaged differs significantly from the property protection of domestic investors within the EU and American Investors in the USA (discrimination of domestic investors; *"Inländerdiskriminierung"*) (Flessner 2015). The procedure is unlawful according to Article 3 of the German Constitution. It would lead to a discrimination of German domestic investors in Germany and hence a privilege of foreign investors (*"Ausländerprivilegierung"*).

5. Case Study: TTIP and the debate on the realignment of Berlin's land policy

5.1. Propertied Berlin between investment euphoria and land as a service for the public

Originally, population figures for Berlin were expected to dwindle until 2015 as far as 3.1 million inhabitants – as if the correlation of demand to population figure (with a simultaneous increase in the number of households) could make it possible to predict the exact development of the total population – including migration into EU member states. Berlin is undergoing a remarkable urban transformation. Investors from throughout the world have arrived in Berlin. Big capital from European investors and from the US moves currently in. Postmodern development fosters the inner-city revitalization. As a consequence, neighborhoods in districts such as vacant brownfields at Spree riverside, Mitte, Friedrichshain, Neukölln, Kreuzberg or Pankow are rapidly changing (Thiel 2015). The geographies of social life are getting increasingly "propertied" – a term coined by Nicholas Blomley – in Berlin (Blomley 2001: 116).

Berlin mirrors the geographies of liberalized property markets, thus the politics of property, urban land policy and the city, but also governance aspects, land policy and participatory planning for the booming capital. Numerous neighborhoods are in transition: Property values have quadrupled in recent two years even in non-prime areas of Berlin. Local initiatives such as the "rethink the city" platform try to intervene in fundamentally market and investment-driven processes (Initiative Rethink the City 2012). These activists criticize the acceptance of public tender triggered by the rent-gap which is expected by the public real estate fund. Sociological influenced movements demand a moratorium of selling public assets. Does that lead to modifications of investment decisions as unfulfilled investment expectations of investors according to chapter three of TTIP?

5.2. Case study Upstall property (former Dragoner barrack): Development potential thanks to a good location

The 47,000 m² comprehensive Upstall-terrain provides for a centralized land currently owned by the Federal Agency for Real Estate (BIMA) is in the immediate vicinity of the Halle Gate. The surface shows certain disadvantages in terms of their capacity for development and rehabilitation needs, but also significant potential due to its location. Although now a master plan was developed, the land sale will be continued. Until 2015, there was no discussion in the direction of a participatory brainstorming at the district level, for alternative procurement procedures rather than for unconditional bidding procedure or for more than a heritable building right (*Erbbaurecht*) for the investor. Existing planning instruments, although present, is not yet discussed to advance alternative proposals to the current user initiative. The Berlin Senate Department for Urban Development and Environment has discovered the problem of land policy.

While you're looking for more recent publications of the Berlin planning and land policy authority, property policy statements are in vain. Provided, however, is now, that not fiscal, but the urban overall development should take centre stage. Budgetary consolidation cannot be the target of the property policy in the opinion of the Berlin Senate Department of Urban Development. The criteria of *social diversity* and coherence versus the maximum award close out anyway. A "gentle award" of non-operating land and buildings by the fund should in future include a conceptual tender along with environmental and social criteria – instead of the previous bidding process – include. The order of heritable building rights is to be interpreted more as long-term revenues of public land leasing fees for the city's budget.

5.3. Moratorium of selling public property to a bidder as a violation of investment expectations according to TTIP regulations?

This chapter will discuss the current land policy issues in Berlin and the expected effects of TTIP for the national sovereignty in the development and application of a transparent and participatory public land policy. How are international treaties, agreements, guidelines and safeguards such as TTIP affecting Berlin's public land policy? The following set of questions mirrors the difficulties and challenges for contemporary public land policies in Berlin (Thiel 2015):

- How does a transparent public land policy with dialogue-based tender procedures work, if possible as a freely accessible online portal, and how is it violating investment protection provisions based on TTIP, part three on "rules"?
- Which forms of ownership (communal land rights, leasing, hereditary land rights) and tools are feasible and make sense to safeguard the city's assets in the long term and to set out (interim) concepts for use?
- Which stakeholders and political debates will play the central role in a potential realignment of land policy? What significance will cooperatives, construction projects by owner-occupiers or housing associations have?
- How can provision be made for the future if in a few years the spaces and land that the public sector would need for community purposes has already been sold?

Award and bidding procedures as seen as core elements of land policy and might conflict with the TTIP guideline of "fair and equitable treatment". The Berlin Senate Department for Urban Development and the Environment has also discovered the problem of the uncoordinated, if not missing public foresight land policy. While more recent publications

from the authority no longer contain any statements on land policy, it is telling that the focus should now be on overall urban development rather than on fiscal development and investment. In the opinion of the Senate Department of Urban Development and Environment, budgetary consolidation and selling of assets to the highest bidder cannot be the aim of land policy. The criteria of social diversity on the one hand and awarding to the highest bidder on the other do not need to be mutually exclusive.

A "carefully considered" awarding of land that is not necessary for operations should include a concept tender in addition to ecological (such as environmental impact assessment) and social criteria – instead of the free bidding procedure used to date. These provisions may conflict with TTIP "Competition Policy" according to the negotiating texts and factsheets (European Commission 2015), especially with the establishment of competition laws to prevent unfair und unequal competition and to protect legitimate investment backed expectations. While it would still be possible to sell public real estate, the priority given by a modified public land policy must be for residential construction: 40% concept preparation, 30% hereditary building rights, 20% taking into account urban residential construction firms and 10% for owner-occupier construction groups. The registration of hereditary building rights should be interpreted more strongly as long-term income from interest on those rights for the city. Up until now, in the event of a deadlock in Berlin's or budgetary committee, it is the Senate Department of Finance that holds the deciding vote for decisions pertaining to land policy (Thiel 2015). At the very least, the city administration and the fiscal administration should have equal rights with regard to matters involving land to strengthen local policy instead of possibly narrowing it by TTIP, leading to a discrimination of foreign investors, to a violation of a legitimated backed investment expectation or to somewhat "disturbed" free trade with the resource land.

5.4. Berlin and the investor calculation: the discourse on the real estate "potential value" – alchemy, esoteric rules or obscure prophecies like those based on Nostradamus of 16th century?

Who (and with which valuation methods?) determines the original fair value (exchange value) for land in Berlin, e.g., as basis for compensation following expropriation or to support events – besides expropriation – when there is a need to redress for the investor and the requirement to be assessed under the standard of fair and equitable treatment (Wälde and Sabahi 2008: 1049), for protection, and how differs this market value from the "potential value"? Valuation plays a key role for the determination of compensation, such as the loss of property due to (direct and indirect) expropriation. It might be the basis to undermine the argument of a violation of the "fair and equitable treatment", regardless of the vagueness of this term since the role of fair and equitable treatment changes from case to case (Yannaca-Small 2008; Hoffmann 2008).

For sure, Berlin has value potential – territorial value (Davy 2012). The Return on Investment is strongly connected with the exchange value of land; the exchange value of land regards land as commodity, as an investment opportunity protected by multilateral agreements such as TTIP, and as a good to be bought and sold like bread and meat. Most scholars – and most tribunals in investment arbitration cases such as ICSID – rely on the Discounted Cash Flow Method (DCF) as the dominant approach to estimate future cash flows and to reflect cost and capital already invested in the asset. However, there are alternate approaches to value the compensation such as replacement cost method, the liquidation value method or, as currently discussed in Berlin, the potential value method. The potential value method has yet not been integrated in the German Valuation Ordinance (Immobilienwertermittlungsverordnung – ImmoWertV). The DCF is not reliable and highly speculative. There is no reliable way of predicting market changed and influences such as growth rate, higher taxes or regulatory changes several years down the line as we are unable even to predict the stock market of tomorrow. DCF is not the received wisdom of valuation (Wälde and Sabahi 2008: 1075; Kantor 2008). It is rather alchemy or comparable to *"obscure 16th century prophecies of Nostradamus"* – to borrow a quotation from Ignaz Seidl-Hohenveldern.

Berlin's tax authorities want to capture the potential of real estate better in terms of its value. According to the Senate Department of Finance,

"The method used in the past to calculate value (…) does not reflect the actual demand and market situation and thus the recoverable purchase price in Berlin realistically. (...) The potential value calculation is based on future expectations and development opportunities for real estate" (Senate Department of Finance Berlin 2012: 2).

However, the real estate potential value, also referred to as the investor value as the net present value of future cash-flows as speculative elements (Wälde and Sabahi 2008, p. 1114), is the subject of controversy in the technical literature and legally it is extremely uncertain, even more uncertain than to calculate the present value of future cash flows as is it provided for by the Investment Method. This is because anyone who wants to calculate the market value of real estate in Germany would be well-advised to stick to the methods listed in the ImmoWertV [German Ordinance on the Valuation of Real Estate]. Otherwise, confusion ensues as a result of non-standard terminology, procedures and methods. The market value as defined by the ImmoWertV is a normed category. Anyone who diverges from the market value can easily cause misunderstandings (Marboe 2006) and has to have good reasons for diverging such as for a "potential value" based on a forward-looking financial approach that relies on speculation of future income streams (*"esoteric rules of accountancy for measuring the value of property rights"*, as Rudolf Dolzer calls them; see Dolzer 2002: 41) and might be followed by financial inventions on the real estate market.

The ImmoWertV does not provide for a potential value as it does not provide the discounted cash flow (DCF) method.

There is a valid concern that a potential value in the area of the price level obtainable in conventional bidding procedures would far exceed the fair value of a piece of land according to ImmoWertV and would thus constitute a "speculative market value". What is certain is that the approach of valuing real estate also based on its socio-economic utility value, including a defined use in the price calculation and including it in a life cycle analysis of urban development would not be served adequately by a potential value. It is also questionable whether an urban return by companies in the creative industries could be validated appropriately by such a speculative market value. The significance of a creative environment for planning and urban development is highlighted without, strangely enough, being able to substantiate this by means of the development of the real estate values or standard land values.

5.5. Berlin and the budgetary law

TTIP might also affect Berlin's Budgetary Law. The regulating factors for a sustainable budgetary policy are to set and withdraw incentives. The starting point is the budgeting based on the cost accounting. As long as a district in Berlin has real estate in its assets and uses this real estate, it has to pay the real estate fund or the State of Berlin the corresponding lease payment (fee). When the district's budget comes under pressure, there is thus often pressure to sell the real estate. There is no transparency regarding how the rent prices are calculated and set in the cost accounting. The moratorium to "Stop the sale of land" could be approached such that the flow of real estate out of the districts to the investment market is stopped immediately. The regulating factor – and thus a "manifestly excessive measure" (European Commission 2015) – with which to do this would be to stop participation of the districts in the income, thus taking away their incentive.

This strategy could be based on Sec. 63, para 2 of Berlin's State Budget Ordinance, which states that *"assets can only be sold if they are not needed in the foreseeable future to fulfill the tasks of Berlin"*. In the case of the sale of real estate classified as not needed for operations, this condition cannot be assumed to always be met. Without taking stock of the portfolio in advance (exact portfolio analysis) there is no guarantee that subsequent additions to the sales portfolio will not restrict the fulfillment of the state's tasks. Political controllability versus privatization of land properties for debt reduction: Another aspect would be to abolish or at least fundamentally revise budgeting based on cost accounting in order to restore political controllability in the districts in the area of urban and real estate development. The objective would have to be to break through the short-sighted budgetary logic that is resulting in the sale (and investment contracts with parties from e.g. the USA) for debt reduction of community spaces that could potentially be urgently needed in the near future. It may also prove useful to introduce a stockpiling system for spaces for public use that are removed from the sales process and are available for future use by the community. This is because it is problematic that matters of urban policy including measures in favor of the public welfare, utilitarian housing policies and – necessarily – also land expropriation measures are continuously changing.

6. Short Comparison: Vienna and the possible implications of TTIP for the procurement of public land plots

TTIP might influence the public land policy in Vienna – through the regulatory body, the invention of international investment standards such as fair and equitable treatment, full protection and promotion of investment, and the most-favoured treatment. Particularly, this could be the case for procurement and the modalities of developer competitions for building sites within a project area suitable for residential use. Derived from the CETA blueprint, any trade and investment treaty comprises chapters on public procurement for public construction projects, their realization, reasonably-to-be-expected investor's benefits and the existence of pro-investment land use planning. In Vienna, Developer competitions are awarded for project areas that are not owned by the housing fund (Wohnfonds), from a total of 300 residential units and will be built with funds from the Viennese housing subsidy assessment panel, with special focus on social housing and the consideration of housing cooperatives within the procurement process. Young people are particularly vulnerable to temporary tenancies and precarious work, and of above-average housing costs under the conditions of uncertain income. No doubt there are already housing policy measures specifically aimed at younger inhabitants by so-called SMART apartments, incentives for young families in the housing subsidy, special conditions for "Young Viennese", but these measures and supports do not seem to go far enough (Gutheil-Knopp-Kirchwald and Kadi 2014).

Currently, all developers competitions are carried out from the point of the "affordable housing" standard such as the SMART-housing program which aims to provide affordable housing for young families, couples, single parents, and singles. SMART-apartments are distinguished by optimum use of space, thoughtful compact floor plans, the choice of different equipment packages, low construction and user costs, financial contribution (construction cost and basic fee) of max. € 60/m² for living space. The total monthly usage fee is fixed at max. € 7,50/m² for living area. The assessment and evaluation of the contributions are made by a specialist jury consisting of experts. Eligible developers are the City of Vienna, all non-profit developers following the principle of benefit to the public (*Gemeinnützigkeit*), developers who follow the requirements of Section 117 para. 4 Austrian Industrial Code, and foreign commercial developers following the requirements of Industrial Code or by the comparable requirements in the country of origin, either reimburse the display of the service, in accordance with Section 373a Austrian Industrial Code or the equal attitude of her qualification in a EU Member State or Switzerland.

Vienna follows the remarkably active guidelines and measures of a comprehensive active land policy, consisting of land purchase (via pre-emption law), undertaken by the housing fund Vienna. The tasks of this land market regulatory body include the provision of land for social housing construc-

tion in Vienna. Within its projects, the targeted space requirements for the subsidized housing should be ensured. The housing fund acquires suitable properties and brownfields within the city boundaries of Vienna such as undeveloped land in all locations, with or without land dedication by land use planning or an urban construction contract, agricultural land, unused properties or brownfields. Under the TTIP regime in Austria (Raza et al. 2014; Raza 2014; Pinzler 2015; Fisahn and Ciftci 2015; Bode 2015), the bidding procedures and award criteria of the housing fund might come under scrutiny of the "reasonably-to-be-expected" investment expectations and benefits of US investors. Since TTIP leads to a discrimination of domestic (here: Austrian) investors and a favored-treatment of an investor from the US, the procurement principles of the housing fund and the admission of investors from the United States of America might be changed if TTIP comes into force.

7. Summary and (investment) outlook: TTIP as a "frivolous claim", an unfounded case and threat to social coherence?

Does the currently debated EU-US treaty lead to the *"fundamental right to undisturbed investments"*, as Heribert Prantl, the head of the domestic affairs department of the *Süddeutsche Zeitung*, predicts (Prantl 2014)? The answer is uncertain at the moment. The case studies Berlin and Vienna demonstrate the necessity of "marrying" investment protection procedures, fair and equitable treatment and standards with the domestic rule of law and the instruments for an effective land policy at hand. Can land policy be interpreted as a sub-category of investment planning and "business of managing public affairs, serving as a "gold standard" for investment in areas such as energy, transport, water, and housing? Dispute settlement procedures, direct and indirect expropriation and the power of the national constitutional Member States of TTIP will be the major stumbling blocks within the land policy issues of the treaty. A "clash of norms", standards and the invention of indirect expropriation (here from Austrian and German legislation) can clearly be foreseen.

What has been particularly missing in Berlin is a platform for implementation proposals for alternative public land and urban policy strategies that may prevent investment decisions and the selling of "silverware" and land plots for debt reduction. Berlin might sell its public land portfolio only once. An important finding of the debates in Berlin in recent months is the establishment of a Space Council. The Council could accept, for example, as an urgent task of formulation of guidelines and governance standards on the future land policy – in contradiction to the guidelines of the TTIP "Regulatory Cooperation Body" (Committee) with possible special powers to trade, services or the intellectual property; additional competencies might be added. In addition, a "Joint Committee", consisting of members of the executive authority from Canada and Europe, has general responsibility, but no absolute power to decide. The tasks are fixed in an additional contract. For TTIP, the definite sphere of power in favour of the Regulatory Cooperation Bodies is unclear at the moment.

The process of ratification shows similar vagueness; it is unclear whether TTIP and CETA are "mixed treaties" that demand the approval of national parliaments and – in case of constitutional necessities for the ratification of a treaty – a public memorandum on the final text of the agreement (for Germany: Article 59 para 2 German Constitution; for Austria: Art. 10 para 1 No. 2 and Art. 50 para 1 No. 2; ratification by and through the National Assembly of Austria). There is a risk of losing social and cultural diversity in view of Berlin's form of land policy – with the former land fund and its primary aim of budgetary consolidation and with TTIP as an instrument to reduce trade obstruction and to narrow the German legislator's possibility to determine content and limits of property. Just as a reminder of the TTIP and CETA mandate with its core aim to implement new standards for services in health, environment, traffic, education, and planning – "beside and above national legislation" (European Commission 2013; European Commission 2015; Schneider 2015).

There are also differences in opinion with regard to private landownership and its restriction through regulations on content and limits following the principle of *"property entails obligations"*. It is possible that a debate has started – fuelled by the example of Berlin and the housing policy in Vienna – surrounding the ownership law arrangements for real estate. There is a need for completely new democratic participatory planning processes, methods and instruments that guarantee timely, comprehensive and relevant information to citizens and landowners with regard to the future use and structure of real estate on the one hand. On the other, it is necessary to take the ideas, needs, concerns and worries of the residential population into account in order to involve citizens, their power, time and creativity in the design of real estate and land for community use for the public good.

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To plan effectively, planners and landowners must share a common landscape vision and a common acceptance of planning.

A. Dan Tarlock

Environmental compliance in land use planning in Germany

Karsten Leschinski-Stechow

Abstract

This paper deals with the question in what way statutory environmental objectives become considered in land use plans in Germany. The inducement for such research on environmental compliance can be found in a crucial meaning of land use planning as the very basic planning area to implement any (environmental) policy and to make a difference. This evaluation makes use of a sub-dataset of a quite broader research approach, to which the author is devoted. It comprises 197 cases distributed over eleven German federal states and form a multiple proportional layered random sample. Results do indicate that the environmental objectives in most cases are fully or partly met. But it also shows that the sealing with impervious surfaces more or less is not limited by the planning bodies. An analysis of possible influential factors does on the one hand confirm some theoretical expectation, like e.g. shrinking cities do rather apply inner city development than growing ones. On the other hand factors like the location or built up area types turned out to be meaningful for the surface sealing.

1. Introduction

Although this facet of spatial planning could be understood as a little old fashioned, its first and foremost purpose is regulating the use of soil. Such 'regulatory' planning is crucial for defining the presence or the absence of 'natural' amenities like urban open space, or recreational places adjacent to settlements, but of course, regulatory planning may convey environmental problems like pollution as well. Normally this planning task is conducted using 'land use plans on a local level', but as the denomination and understanding of planning tools differs widely it is worth mentioning that this kind of plan in the English language often is titled as a 'zoning plan'. This contribution subsequently refers to the term 'land use plan' to mean a spatially precise plan that incorporates legally binding designations that allow and restrict the use of lots for building purposes. Such a land use plan normally comprises a multitude of existing properties or developments but covers an area that is significantly smaller than an urban district or even a whole municipality. As this paper deals with land use planning in Germany, the proper term translation of land use plan into German is 'Bebauungsplan.'

First of all it is worthwhile to acknowledge the reciprocity of land use planning's scope and its actual meaning. While it focuses on the local development, land use planning may appear to be small and rather meaningless in comparison to larger scale[1] planning instruments. But actually land use plans are the most spatially detailed ones and - what is far more important – they can claim to be quantitatively the most widespread planning instrument since literally thousands of them are set up in Germany each year (Schmidt-Eichstaedt 1998: 29, 62; Führ et al. 2008). The above considerations lead to the conclusion that land use planning from a theoretical standpoint should have an extraordinary impact for implementing overarching planning goals and policies. Necessarily, this includes those in the field of environmental precautions, which in the author's understanding, is a primary task of land use planning.

Accordingly, these main planning objectives are settled in the German Federal Building Code (Baugesetzbuch –BauGB), whose provisions can be understood as a basic legal framework. As planning issues are multidimensional (e.g. provide housing, transportation, economic development, environmental precautions along with others) so are the objectives of the Baugesetzbuch. Since their intention is to provide guidance in a particular planning context they are subject to interpretation and are not clearly directed towards a particular action in terms of a resulting designation in a land use plan.

With regard to the above rationale it easily becomes clear that land use plans' contents may differ while the underlying legal provisions remain the same. However differences among land use plans cannot be attributed to different legal environmental provisions but only to different planning settings and circumstances.

This fosters several basic questions for the 'environmental compliance' of land use plans and the environmental provisions of the BauGB:

1 Unfortunately the logically proper naming as 'small scale' often leads to misunderstandings. However, the expression does mean a large geographical area covered.

1. To what extent are environmental objectives accounted for in land use plans?
2. Can particular settings be attributed as explanatory factors for the extent of environmental objectives accounted for in land use plans?
3. How can an influential relationship among explanatory factors and environmental compliance in land use planning be explained?

A brief summary of underlying research results

Though many publications do question the relationship among legally defined goals of planning and the actual practice of planning, very few authors have analyzed planning and related compliance issues in a quantitative way. Therefore it appears to be pretty difficult if not impossible to assemble a comprehensive and recent information fundament about this topic. This may be an outcome of an attitude towards planning that does not care for data acquisition or systematic monitoring (Deutscher Bundestag 2014), though there are a lot of very considerable reasons to take planning evaluation more seriously. Since the overall information availability is scarce, the following few sources are of major importance for defining variables that may influence the land use planning output.

A very comprehensive analysis of environmental compliance in relation to zoning plans is provided by Gruehn (1998). Using a 414 case sample Gruehn's findings point out that on average a majority of legal environmental objectives are not recognized by planning bodies and not implemented into plans (Gruehn 1998: 286-288; 294-295). The analysis of influential factors is of central importance for formulating causation models based on numerical evidence. According to Gruehn (1998) such factors are (besides others): presence of a preceding environmental plan such as a landscape plan, integration of landscape plan and comprehensive plan (p. 301), city size (p. 289), federal state (p. 290), and professional origin of the planner (p. 296). With particular respect to land use planning Gruehn & Kenneweg (2001) analyze a set of such plans in the federal state Rhineland-Palatinate and find that nature conservation and landscape planning objectives are implemented at only 10-33% of the spatial extent of land use plans (p. 103). Führ et al. (2008) provide an analysis of environmental impact assessment procedures and point at differences with the concluding planning decision depending on whether environmental information were available or not to the planning body (p. 123). Further planning evaluations that point to deviations of environmental provisions can be found with Wende (2001) on the environmental impact assessment, Von Bosse (2004) on the impact mitigation regulation within land use planning in the federal states of Schleswig-Holstein and Mecklenburg-West Pomerania and with Siedentop et al. (2010) on land use plans for inner city development related to the federal state Baden-Württemberg.

Tab. 1. Model variables

Code[a]	Group	Variable clear name
X1C		Federal state / Bundesland
X1E	External	City size classification
X1F	conditions	General development outlook
X7A/B	Commitments	Land use plan that changes the zoning plan
X7C/D	in respect to content and	Land use plan tailored according to a particular investment proposal
X7E/F	procedure	Land use plan for inner city development
X8A		Land use plan set up for the first time
X8B	Reuse of	Land use plan changes one or more existing plans
X8C	planning areas	Land use plan cancels one or more existing plans
X4A		Spatial extent of the land use plan
X4B		Area dedicated as built up area
X4C	Area key	Area dedicated to transportation purposes
X4D	characteristics	Area dedicated to impact compensation
X5A		Overall impervious area
X5B	Impervious	Additional impervious area
X5C	surfaces	Additional pervious area
X6A		Built up area type (single variable)
Z1		Extent of implementation of the inner city development approach
Z2		Limitation of impervious surface to an appropriate extent
Z3	Environmental	Preservation of agricultural areas against a change of use
Z4	compliance	Preservation of forest areas against a change of use

a As the variables' numbering is taken from the land use plan main study, it might appear deranged. However, numbers do not correspond with an order within that table and simply should be recognized as a variable identifier.

2. Methodology

2.1 Model and Variables

The main methodological approach used to answer the research questions in section 1 is a factor model that tests influence and interrelations each variable has on planning outcomes. The following table 1 shows all these model variables at a glance.
As described above, the basic assumption is that the planning output in terms of environmental compliance with the respective set of legal provisions in the Federal Building Code [Z1,…,Z4] does not happen randomly, but rather is subject to determination[2]..

In the first place the model assumption will be that each factor [X1C,…,X6A] may directly influence the environmental compliance variables. Of course from a numerical standpoint this is easily possible. Therefore as an important constraint only those variables will be included in the numerical model that provide for plausibility in terms of a cause-effect relationship. Such cause-effect relationships rely on yet available research results (see above) and on logical considerations.

Since a couple of independent input variables are more or less closely interrelated, mediating effects on the dependent variables are to be expected. Considering the groups in the above scheme counting 17 independent variables and a resulting[3] number of up to 136 reverse dependencies, it becomes pretty clear that not all of them can be inspected within this work. Nevertheless, a few of these relationships among independent input variables are obviously meaningful and so need to be analyzed within the results' interpretation in section 3.

2.2 Introduction to the variables

External conditions are those related to general administrative differences that are known as meaningful for planning practice. Also economic perspectives may influence how land use planning is conducted. The German federal state ('Bundesland') [X1C] accounts for up to 16 different administrative state entities. City size classification [X1E] is a derived variable that is based on the population number. Three subdivisions that form classes of towns with less than 20,000; 20,000 up to less than 100,000 and 100,000 or more population account for different capabilities of the municipal planning administration. The general development outlook [X1F] is a complex indicator that estimates population development and economic prosperity. This indicator is published by the Federal Institute for Research on Building, Urban Affairs and Spatial Development (BBSR) and in this paper will be reclassified to comprise only three possible values rather than the original five.

Commitments in respect to content and procedure indicate ties that take effect on the land use plan's contents. Different from the 'regular' procedure with a top-down approach, some procedure types are eligible to subverse this principle according to §§ 8 (3) and 13a (2) BauGB. In these cases apparently the land use plan changes the zoning plan [X7A/B] which simply means that no higher-level (zoning) plan can ensure a strategic comprehensive planning approach. In a multitude of cases the land use plan has been tailored according to a particular investment proposal [X7C/D]. This situation is present either when an urban development contract results in a land use plan according to §§ 11 and 12 BauGB or the plan's justification documents make clear that the final users and their needs are known in advance of the whole planning process. In contrast to 'regular' land use plans the planning output must be understood as widely predetermined by private or public investors' interests rather than the result of an open-ended planning process where the sole obligation is to meet the best solution from a professional perspective. The so called 'land use plan for inner city development' [X7E/F] according to §§ 13 and 13a BauGB is a planning instrument, that puts an attractive incentive e.g. for using brownfields or increasing the density within existing settlement. Mainly this incentive is about waiving the normally mandatory strategic environmental impact assessment (SEA) for land use plans and the impact mitigation regulation. This procedure allows for a reduced involvement of the general public and stakeholders[4], but the instrument comes with the risk of a significantly diminished information basis in terms of environmental outcomes of the land use plan.

The *reuse of planning areas* accounts for differences that are related to challenges which arise from brownfield or greenfield. This becomes pretty clear if a new plan needs to integrate a yet existing brownfield or greenfield and include a preexisting built environment. If a plan starts from scratch, it will be coded as a 'land use plan set up for the first time' [X8A]. This option also includes those areas that are currently considered as 'inner area' according to § 34 BauGB[5]. The remaining case is the 'land use plan [that] changes one or more existing plans' [X8B] and the 'land use plan [that] cancels one or more existing plans'[X8C]. As mixed forms[6] are often reality, no single variable logically excludes from coding another within the X8-variables group. The coding is based on the information provided through the plan's justification document and the procedure documentation of the town council. As some procedural treatments of land use planning issues significantly differ among planning bodies, this can lead to a notable uncertainty with coding of [X8A] and [X8C]. If a brand new plan is set up covering the area of a prevailing plan fully or partially, the 'old' lower-layer plans designations will expire[7]. The coding then reads [X8A] = true

2 Nevertheless this assumption acknowledges the presence of a residual that may either account for randomness or for as yet unknown influential factors.

3 $C_{17,2} = \binom{17}{2}$

4 But it is worth to amend that a lot of local planning bodies use to maintain the 'regular' involvement procedure as they are aware of the results of a lacking involvement. This does mean, that there is no reliable tie among a § 13a land use plan for inner city development and a reduced participation according to § 13 BauGB.

5 This is meaningful as the 'inner area' elsewhere is eligible as built up area according to another permission scheme and therefore need to become differentiated against those areas, where a built up use anyways is subject to the existence of a land use plan (of course except of those that are subject to special planning legislation, e.g. roads a.s.o.).

6 e.g. new land use plan is set up using while the designations of an old one become changed and implemented

7 This is a common conflict resolution principle known as 'lex posterior' rule. It means that the most recent legal provision takes

and [X8C] = false despite the circumstance, that the legal effect regarding the old plan is the same as if [X8C] would be coded as 'true'.

Area key characteristics represent major numerical features of a land use plan. It is pretty easy to understand that the overall planning area can be a limiting factor towards the limitation of impervious surface[8]. But in contrast to the other groups these variables also need to be understood as dependent[9] from the planning output. Furthermore, they also can be used as control variables to better understand the relations among dependent variables. The 'spatial extent of the land use plan' [X4A] is the overall area the plan covers and comprises parts that are detached e.g. for impact compensation purposes, although it does not account for so called stand-alone land use plans for impact compensation purposes[10]. As an important portion of [X4A], the 'area dedicated as built up area' [X4B] sums up areas where buildings and attached facilities could be placed. This figure must not be mistaken with the area that results from the site occupancy index. The 'area dedicated to transportation purposes' [X4C] comprises all roads, footpaths, paths, parking lots and similar facilities that are meant to be necessary to secure access to transportation networks beyond the land use plan's limits. Finally the plan's area profile shall be completed by using the indication of the 'area dedicated to impact compensation' [X4D] according to the impact mitigation rule put in § 1a (3) BauGB. In contrast to [X4A] this number comprises those impact compensatory areas within the land use plan itself, as well as those that are shown in a detached (compensation-) part of the original land use plan, in a stand-alone compensation land use plan and areas that are drawn from a timely advanced pool of compensation areas and actions.

The *built up area type* [X6A] represents the land use zone according to the classes that are set in § 19 BauNVO (ordinance on the use of buildings – Baunutzungsverordnung). Those classes assign a profile of permissions and restrictions to each built up area type. If a development plan (§ 12 BauGB) uses its own built up area types[11] the coding accounts for this by using the 'unable to assign' code. As this variable is supposed to be notably related to both independent variables and dependent variables, it is main purpose is to be a control variable. The use of a control variable reduces a known or supposed amount of variance at the side of the independent input variables.

Finally the *environmental compliance* variables are set as the dependent ones, which mean that they need to be understood to result from the independent variables through a supposed causal relationship. As just explained above, only a few environmental provisions of § 1a BauGB are subject of this discussion. The 'extent of implementation of the inner city development approach' [Z1] accounts for land use plans that fully or partly make use of yet existing areas in the inner city areas. There's a logical relationship between such planning types and the prevention of the additional sealing of soil. Furthermore, this approach has massively been promoted through research, politics and planning professionals. Therefore, today it is an uncontested standard from a planning law and a planning practice perspective.

The decision to consider [Z1] as fulfilled requires one of the following provisions

- to include the area of any existing land use plan,
- to make use of the inner area as defined by § 34 BauGB (see fn. 5 above) or
- to include an area where built up uses are present and the additional built up uses are aimed at increasing the density of the setting rather than expanding into yet open areas.

Besides the qualitative feature, the variable [Z1] also records the spatial extent related to its overall area [X4A]. These four ordinal steps represent a proportion of 0%, the intervals of 1%-49%, 50%-99% and finally 100%. Next, the 'limitation of impervious surface to an appropriate extent' [Z2] will be investigated. As an indicator of this limitation the site occupancy index will be used. The decision whether this requirement is met is made by the comparison with the maximum site occupancy indices as provided in § 17 (1) BauNVO. A limitation in terms of [Z2] requires a site occupancy index in the land use plan that is lower than the upper limits provided in § 17 (1) BauNVO. The remaining features 'preservation of agricultural', 'areas against a change of use' [Z3] and 'preservation of forest areas against a change of use' [Z4] are self-explanatory. Their requirements are not to plan on top of a present agricultural or forest designation in any other valid plan (e.g. land use plan, zoning plan), and independently from any plan, not to create plans on such land uses.

2.3 Sampling & data collection

As the research questions are not geographically limited, sampling aims at representing the practice of land use planning over Germany as a whole. Therefore, it is very important to understand that the sample is not meant to represent any equivalence between administrative entities and a quantitative estimate of the number of land use plans rather than the planning actions of planning bodies. According to this consideration the basic population would be formed through the number of planning bodies, meaning municipalities. As especially small municipalities often form overarching cooperative municipal administrations there is a considerable reason to include (just) those administrations, that actually deal with land use planning.

effect.

8 The rationale is quite simple. Even though land use plans can become downsized to one single lot or less, built up uses cannot be reduced beyond the limitations set by their purpose.

9 A good example is a land use plan that does not account for the preservation of forest areas [Z4] and therefore would need to appoint an area dedicated to impact compensation [X4D]. Ceteris paribus such a compensation area would not have been put if the plan had taken another preceding use e.g. like a brownfield.

10 Of course there are comprehensible reasons as well: First, just from a legal standpoint two single land use plans can hardly be treated as one. Second, as the Federal Building Code allows storage of compensatory measures that have been realized (long) before a land use plan is enacted, accounting for compensatory stand-alone land use plans would just mean a significant bias in the dataset.

11 The Federal building code actually does open up this opportunity to § 12 development plans, as it could mean an additional flexibility to investors and stimulate their engagement. Nevertheless, a big number of development plans uses the classic built up area types of § 19 BauNVO.

The primary distinctions between those planning bodies are to be expected in the scales of German federal state / Bundesland, city size classification and general development outlook.

The sampling procedure comprises two steps, where within each step a proportional sampling is achieved. In the first place each city size class (refer to variable [X1E]) contains 96 cases equal distributed across city size class. A short example illustrates why an equal number of city size samples were used: The share of all 77 municipalities in Germany with 100,000 inhabitants and more is 1.7% of all municipal administrations that can prepare land use plans. The share of all those 690 planning bodies who serve communities populated from 20,000 up to 100,000 is slightly higher at 15.3%. Even if the overall target sample size would number 1,000; there would only be 17 'big' cities represented. In other words, the resulting analysis would omit both groups of big and medium size cities in favor of a strict proportionality.

Because of peculiarities with the inner administrative structure of the cities Berlin, Bremen and Hamburg, the big cities' group needs to get an additional 19 cases and sums up to 96. As the first step of sampling aims at an equal distribution, the target sample size is 288.

The second step of sampling takes care of a simple proportional representation of the German federal states [X1C] as well as a representation of the economic development outlook [X1F]. Finally the resulting data set can be entitled as 'multiple proportional layered random sample'. At each respective layer, all elements (e.g. municipal administrations) had an equal probability to be drawn into the dataset once. Technically the sample was acquired using a random number generator that is able to output a sample table according to a particular presetting.

Data collection was aimed at pulling one land use plan for each municipal administration into the sample dataset. To ensure a comparable legislative framework, only land use plans that were politically enacted from September 2011 to December 2014 where considered. The first step of the land use plan selection was to figure out one or more plans which were enacted closest to 31st December 2014. Often two or more plans were enacted on the same day. The selection was once again made with the help of a random numbers generator. The information on which land use plans where set up, was gathered either using a web-based parliamentary information interface or through a written and/or telephone inquiry with the administrative body of interest.

3. Results

3.1 Feedback

As expected, not every municipal administration could provide for the requested land use plan. Since the scope of this paper is limited to only 11 of 16 German federal states, the maximum number of acquired land use plans is 241. As the feedback numbers 197, the feedback quota is 81.7%; which can be interpreted as a quite good value. As easily can be seen, the feedback quotas are pretty different among regions. It turned out especially difficult to gather data from a couple of Bavarian municipalities, as unexpectedly many of them were not willing to cooperate.

Tab. 2. Sample distribution and feedback according to federal state / Bundesland

[a]

German federal state / Bundesland	Number of cases		Quota
	Target	Feedback	
Schleswig-Holstein	10	10	100.0%
Hamburg	8	8	100.0%
Lower Saxony	25	23[1]	92.0%
Bremen	2	2	100.0%
North Rhine-Westphalia	58	57	98.3%
Hesse	21	15	71.4%
Rhineland-Palatinate	14	9	64.3%
Baden-Württemberg	37	31	83.8%
Bavaria	50	29	58.0%
Saarland	3	2	66.7%
Berlin	13	11[1]	84.6%
Overall	241	197	81,7%

a Since two district planning administrations yet promised to provide recent land use plans, the resulting quota underestimates the 'Berlin' feedback.

Since two district planning administrations yet promised to provide recent land use plans, the resulting quota underestimates the 'Berlin' feedback.

With respect to table 3 a different average city size classification is also related to different regional quotas. However as expected, the portion of feedback increases towards bigger municipalities. The data acquisition clearly showed that planning information was pretty easy to get through the municipalities' parliamentary information resources. Small communities often did not provide such interfaces and the data was more difficult to acquire. Additionally, many small municipalities appeared to have very few administrative staff and therefore could not serve inquiries for planning information.

Tab. 3. Sample distribution and feedback according to city size classed

City size classification	Number of cases		Quota
	Target	Feedback	
less than 20,000	73	46	63.0%
20,000 up to less than 100,000	81	70	86.4%
100,000 and more	87	81	93.1%
Overall	241	197	81.7%

To conclude, despite particular difficulties the data acquisition went very well. The feedback quotas are pretty good, though they do differ. Some of these deviations obviously do accumulate, as some German federal states like Rhineland-Palatinate or Bavaria are crowded with rather small municipalities. A general summary needs to recognize in the end, that the land use plan availability is pretty good in the northern half of Germany and slightly worse in the southern regions.

3.2 Extent of environmental objectives accounted for in land use plans

With regard to table 4, two basic observations need to be noted. First, the percentages of environmental objectives which were accounted for in the land use plans do obviously differ. Second, the numbers indicate that the implementation of environmental objectives either is done on the full spatial extent of the land use plan or not at all. The classes what represent the partial implementation only comprise up to about 10% of the cases. The distributions appear to be bipolar.

While table 4 shows the observed quantities and the respective percentages, table 5 provides an estimate of the 'real' share. Assuming an infinite number of observations, the upper and lower boundaries make sure the value will be in this interval at a 95%-probability.

A notable finding is that the inner city development approach [Z1] is put into practice in more than half of all cases. If the point estimator in table 4 is true, about two thirds of all land use plans do not consume additional, often unsealed, soil outside of those areas that yet were used as built up areas. It is worth to amend that the average spatial extent [X4A] of a land use plan which fully implements the inner city development approach comes without any statistical difference from those plans, who do not account for that objective at all. The descriptive differences are 4.09 ha ('not at all') compared to

Tab. 4. Achievement of environmental objectives

Environmental objective / Extent of fulfilment	Inner city development approach [Z1]		Limitation of impervious surface [Z2]		Use of agricultural areas [Z3]		Use of forest areas [Z4]	
not at all	29	17.1%	80	48.5%	124	78.5%	146	92.4%
partly*	7	4.1%	12	7.3%	6	3.8%	7	4.4%
mostly**	9	5.3%	5	3.0%	7	4.4%	0	0.0%
fully	112	65.9%	36	21.8%	16	10.1%	1	0.6%
no assignment	13	7.6%	32	19.4%	5	3.2%	4	2.5%
coded cases	170	100.0%	165	100.0%	158	100.0%	158	100.0%
missing information	27		32		39		39	

*≤ 50% of land use plan area **> 50% of land use plan area

3.75 ha ('fully'). The same conclusions apply to the remaining area characteristics [X4B] … [X5C] as well.

In contrast to [Z1], the 'limitation of the impervious surface to an appropriate extent' [Z2] seems to be applied far less. Only 21.8% of the sample cases can be attributed to the sealing with impervious surfaces, the confidence interval reaches up to a 26.8% share. The mirror image is that a pretty big value of the point estimator at 48.5% for the 'not at all'-group and at an additional 7.3% for the 'partly' implementation shows, that preserving the soil is not yet that advanced as figures like those concerning [Z1] might indicate.

Tab. 5. Estimates of the proportions to which environmental objectives are implemented

Environmental objective / Extent of fulfilment	Inner city development approach [Z1]		Limitation of impervious surface [Z2]		Use of agricultural areas [Z3]		Use of forest areas [Z4]	
Limits of 95%-Confidence interval	lower	upper	lower	upper	lower	upper	lower	upper
not at all	11.8%	22.9%	40.9%	58.4%	70.9%	84.8%	88.0%	96.2%
partly*	1.2%	7.1%	3.4%	12.1%	1.3%	7.0%	1.3%	7.6%
mostly**	2.4%	8.8%	0.7%	6.7%	1.3%	8.2%	0.0%	0.0%
fully	58.8%	72.9%	13.4%	26.8%	5.1%	14.6%	0.0%	5.1%

*≤ 50% of land use plan area **> 50% of land use plan area

Since it might appear self-evident that an inverse relationship between [Z1] and [Z2] exists, this question deserves a test for rank correlation. This leads to a very little (Spearman) ϱ of -0.014 which actually cannot be considered different from zero (p-value for this hypothesis reads 0.861). This finding is interesting, as the assumption that inner city development would be closely related to the limitation of the impervious surface is often stressed in the literature body. The descriptive differences within the present sample are shown in table 6 (below) to better understand the sample. However, the descriptive differences of the average built up area most likely are due to random, as the respective tests show[12].

12 Pairwise comparisons of [Z1] features while controlling for [Z2] features (and vice versa) using the Mann-Whitney U statistics. All p-values where ≥ 0.057 and thus unsuitable for concluding population differences.

Tab. 6. Average built up area depending to [Z1]*[Z2]

	Inner city development approach [Z1]			
Limitation of impervious surface [Z2]	not at all	partly	mostly	fully
not at all	3.7	2.0	1.2	4.1
partly	4.2	.	1.2	2.8
mostly	5.2	.	.	2.1
fully	1.5	3.1	.	2.4
Average built up area in hectares				

Finally the 'use of agricultural area' [Z3] and the 'use of forest area' [Z4] appear to be environmental objectives that all in all are met pretty well in comparison to [Z1] and [Z2]. Just 18.3% of the land use plans occupy agricultural areas and the share of such plans that fully use 'greenfields' is between 5.4% and 14.8%. Though this might be recognized as a quite 'good' estimate (e.g. with respect to earlier decades), the annotation is justified that the legal provisions aims at no additional use of agricultural areas for land use planning.

3.3 The influence of particular settings

As illustrated in section 3.2 above, the compliance with respect to the achievement of the legal environmental objectives is variable to some degree. Variations may either occur randomly or be the result of causation. If they are a result of a systematic influence of a factor, it is very important to unveil it. Since most factors are closely related to particular planning actions or external frame conditions, the understanding of their influence is the crucial prerequisite for improvements.

Table 7 (below) cross tabulates all supposed influence factors. Any factor model needs to be derived from theoretical considerations, and so this factor model follows the theoretical considerations discussed in chapter 2 (above). It is important to understand that this table does simply summarize a couple of systematic tests on the relationship between the influence factors and the environmental objectives variables. Though it superficially might appear as such, it is unlike a regression model. Each variable test was conducted independently; hence any result is valid unless the other factors become controlled. According to this explanation, no covariates (e.g. area metrics in this case) were accounted for.

Tab. 7. Single influence of model factors on environmental objectives

	Environmental objectives							
	[Z1]		[Z2]		[Z3]		[Z4]	
Factor	χ^2 (df)	p	χ^2 (df)	p	χ^2 (df)	p	χ^2 (df)	p
[X1C]	14.591 (10)	0.148	38.656 (10)	**0.000**	12.196 (10)	0.272	12.649 (10)	0.244
[X1E]	1.622 (2)	0.444	0.680 (2)	0.712	11.876 (2)	**0.003**	0.526 (2)	0.769
[X1F]	10.037 (4)	**0.040**	4.312 (4)	0.365	2.654 (4)	0.617	14.631 (4)	**0.006**
[X7A/B]	0.000 (1)	0.992	0.024 (1)	0.876	0.402 (1)	0.526	0.001 (1)	0.982
[X7C/D]	0.776 (1)	0.378	1.452 (1)	0.228	1.028 (1)	0.311	0.365 (1)	0.546
[X7E/F]	20.834 (1)	**0.000**	0.594 (1)	0.441	8.751 (1)	**0.003**	1.004 (1)	0.316
[X8A]	14.163 (1)	**0.000**	0.927 (1)	0.336	13.831 (1)	**0.000**	0.270 (1)	0.869
[X8B]	13.571 (1)	**0.000**	0.059 (1)	0.807	6.275 (1)	**0.012**	0.000 (1)	0.990
[X8C]	0.007 (1)	0.932	0.037 (1)	0.848	**0.019 (1)**	0.892	4.560 (1)	0.033
[X6A]	13.649 (8)	0.091	51.984 (8)	**0.000**	10.281 (8)	0.246	10.074 (8)	0.260

Statistical test method: Kruskal-Wallis test on rank sum differences. Significant results are shown in **bold.**

As some readers may not be accustomed to argumentations using such statistical rather than verbal considerations, the following explanation is worth to become amended. To better illustrate it, one could have a look at the first cell in table 7. This cell does represent the global test results using the Kruskal-Wallis test on rank sum differences (Kruskal & Wallis 1952), what is a wide-spread standard test method when it comes to the comparison of data distributions at ordinal data quality ('dignity') like in the present study.

As the outcome variable [Z1] comprises four features in an ordinal relation (better or worse achievement of the environmental objective), an unprejudiced assumption would argue there are no differences to be observed if that ordinal relation (= rank order) was compared using a distinction into federal states (or any other potentially explaining factor, provided its rationale can yet be put from theoretical considerations). Each distribution of [Z1]'s values over features of [X1C] (or any other factor to be examined) can be expressed through its median value or yet better a rank sum[13]. Since the present dataset contains hundreds of cases with many ties, the average rank sum values appear to be pretty high numbers. Nevertheless, the statistical test does determine the differences between the observations and the feature groups' average rank and transform and condense them to a single test value. This test value will be tested against the so called Chi-square (χ^2) distribution.

The χ^2-distribution[14] tabulates critical values for a defined

13 since considering a rank sum better allows to account for ties and unequal sample sizes among the feature groups of the analysed factor

14 Such tabulated distributions are to be found in almost every text book on statistics for applications within sciences. However, they

combination of degrees of freedom 'df' of the analysed factorial model and a particular level of statistical significance (p-value). If the observed χ^2-value exceeds the tabulated critical χ^2-value, it does indicate that the observed distribution differences are less likely than this particular level of statistical significance assuming the hypothesis is true, that no differences among distributions exist[15]. According to conventions within social sciences, this study does accept a statistically significant difference between distributions at p-values of 0.05 and less.

Finally the conclusion then is to adopt the alternative hypothesis. In the present example, the alternative hypothesis would be that [Z1] distribution differences exist among federal states [X1C]. According to the research design, the factor 'federal state' would be meaningful to explain observed differences. Since the respective p-value in this case reads 0.148, a 14.8% probability propones no such differences using the present dataset. More comprehensive explanations on the test method can be found e.g. with Sheskin 2003: 757-770.

easily can be accessed using statistics software on a computer, e.g. SPSS or R.

15 And that any differences in the observed data are subject to random deviations only.

The inner city development approach

Concerning the 'Inner city development approach' [Z1] the p-values indicate four factors that influence the degree of environmental compliance. The general development outlook [X1F] turns out to be significant. Data inspection (see table 8) shows that municipalities with a shrinking development outlook prefer to enact land use plans that implement the inner city development approach (indicated by a higher rank place number) as opposed to municipalities that expect to grow. As especially shrinking towns often suffer from abandoned areas and buildings, this finding suits theoretical considerations pretty well.

Tab. 8. Inner city development approach ranking according to general development outlook

Inner city development approach [Z1]		
Development outlook (BBSR) [X1F]	n	rank
shrinking	4	62.00
shrinking by trend	35	52.74
shrinking/growing possible	15	44.77
growing by trend	19	45.50
growing	19	34.11
rank places indicate the compliance with [Z1], where high rank places correspond with a higher compliance		

The next influential factor on [Z1] is the feature 'land use plan for inner city development' [X7E/F]. Though the definition of [Z1] for data collection purposes is not linked to the formal presence of a land use plan for inner city development (§ 13a BauGB), a statistical nexus must be expected here. The highly significant differences can also be confirmed regarding the right order in terms of average rank placement (92.12 vs. 63.95 for [X7E/F = 0/1]). In addition to this, the question whether a land use plan is set up for the first [X8A] or is a changed one [X8B] is of importance for the environmental compliance related to the inner city development approach. As both questions are logically related to each other, it is not surprising[16] that both are very highly significant at the same time. The post-hoc analysis shows that a higher rank is attributed if the plan is either not the first one on site [X8A] or it is a different plan [X8B]. Finally, the inner city development approach appears to be put into reality through changing existing land use plans rather than planning for the first time. Though the legal provision also addresses new land use plans to aim at inner city development, this finding confirms a theoretical expectation.

16 The respective test indicates a correlation with ϱ = -0,612 and p = 0,000. Both, prefix and strength do confirm the above assumption that both variables are complementary to each other.

Limitation of impervious surface

The next environmental objective to discuss is the 'limitation of impervious surface to an appropriate extent' [Z2]. There are only two influential factors identified that are the 'German federal state / Bundesland' [X1C] and the 'built up area type' [X6A]. Table 9 (below) shows rank places for each Bundesland. It turns out that in a group of four German federal states (Berlin, Hesse, Schleswig-Holstein and Lower Saxony) land use plans quite often limit impervious surface whereas this environmental objective is not met as well in the other regions. It is very questionable why land use plans in North Rhine-Westphalia rarely limit the impervious surface as opposed to many other federal states. A nearby explanation could be that in this very densely populated region the average spatial extent of the land use plans [X4A] is smaller than elsewhere?

As Figure 2 shows, the distribution of the average extent of land use plans apparently supports this assumption. The average of 2.69 hectares is one of the lowest among the dataset. But in contrast just those two federal states with a lower average (Schleswig-Holstein and Lower Saxony) contain a larger number of land use plans that limit the impervious surface, as table 9 shows.

With regard to table 10 it is of interest to determine differences of built up area types between samples. It is a surprise that the limitation of sealing objective seems to be met best through land use plans that designate special purpose use areas (e.g. shopping mall; university, technology park) and business zone areas (e.g. high rise building complex in the central business district) to be most compliant with [Z2]. An

Tab. 9. Limitation of impervious surface ranking according to German federal state / Bundesland

Limitation of impervious surface to an appropriate extent		
German federal state	n	rank
Schleswig-Holstein	10	107,8
Hamburg	7	75,07
Lower Saxony	19	107,39
Bremen	2	78
North Rhine-Westphalia	52	60,78
Hesse	11	112.36
Rhineland-Palatinate	5	77.30
Baden-Württemberg	29	75.52
Bavaria	20	85.65
Saarland	1	40.50
Berlin	9	129.83
rank places indicate the compliance with [Z2], where high rank places correspond with a higher compliance		

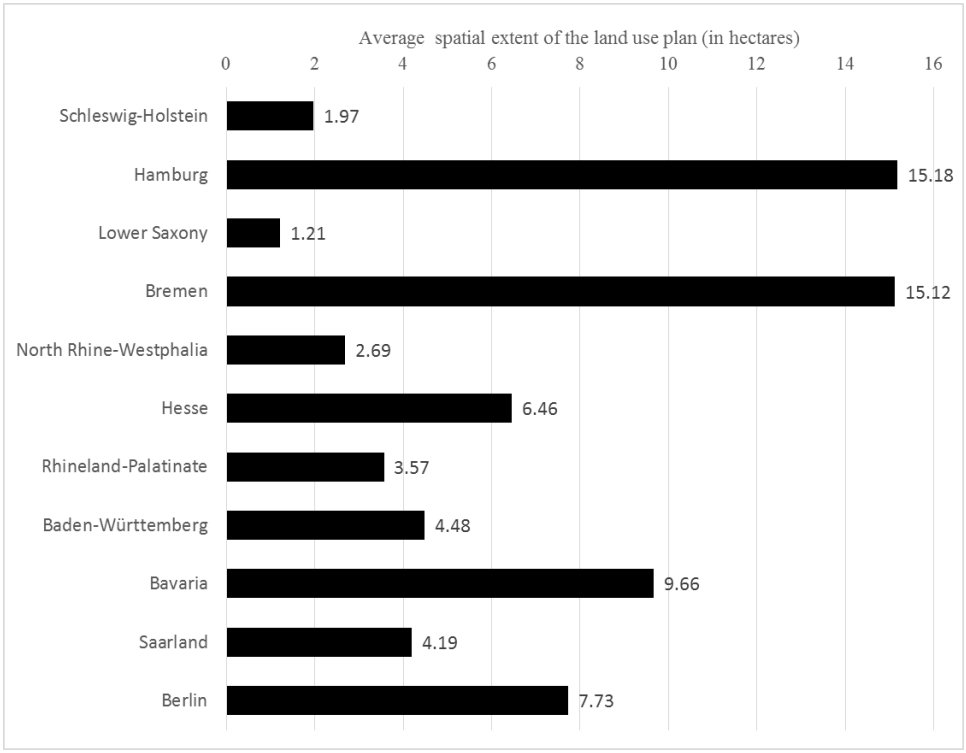

Fig. 2. Average spatial extent of land use plans

explanation could be that especially the above mentioned built up area types are related to a limited sealing, which demand quite large areas for their uses. With respect to table 10, this explanation probably does not really support the observations.

The preservation of agricultural and forest areas against a change of use

There are four influential factors that are meaningful for the preservation of agricultural areas [Z3]. Three of them, namely the 'land use plan for inner city development' [X7E/F], the 'land use plan set up for the first time' [X8A] and the 'land use plan that changes one or more existing plans' [X8B] were discussed in relation the both preceding environmental objectives. Their effects on [Z3] is very similar: Land use plans for the inner city development consume significantly fewer agricultural areas than other plans, probably as the inner areas in most cases comprises very few agricultural areas. If the land use plan is set up for the very first time [X8A], then it is more likely to go into greenfields but if the land use plan just changes an existing one [X8B] it does not appear to make use of agricultural areas.

Tab. 10. Limitation of impervious surface according to the primary built up area type

Limitation of impervious surface to an appropriate extent			
Primary built up area type	n	average rank	average area dedicated as built up area (hectares)
WR - housing only	9	59.39	1.2
WA - housing	68	63.13	3.3
MD - village	2	38.50	no information
MI - mixed use area	18	77.14	3.3
MK - business zone	5	87.00	0.9
GE - trade/manufacturing	10	70.10	3.2
GI - industry	7	38.50	7.3
SO - special purpose use	20	101.60	2.7
Average rank places indicate the compliance with [Z2], where high rank places correspond with a higher compliance.			

With the 'city size classification' [X1E], a new influential factor appeared to be highly significant when accounting for the variation of [Z3]. The influence can be easily explained. The rather small municipalities (population < 20,000) tend to enact land use plans on greenfields more often than medium (population 20,000 up to less than 100,000) or big (population ≥ 100,000) municipalities. As rather small towns often are part of a rural surrounding, it becomes pretty clear that the fundamental chance to get in touch with agricultural areas as a potential planning ground is much more likely than, say, in a major city.

Since the number of cases with forest conversion is very small, discussing those influence factors that turned out to be significant probably will not bring any new insights. Because of that, the discussion of this factor will be skipped.

4. Concluding remarks

Despite these four objectives for sure are only very few in relation to all environmental requirements towards land use planning, their placement within the federal building code is nonetheless exposed. They are exposed because their normative content supports a lot of other environmental objectives, e.g. preserving plant's and wild animals' habitats, sustaining the hydrological balance or taking care of the visual landscape scenery. In that understanding, the meaning of those four objectives is derived because they will be considered a surrogate. Furthermore, these objectives are exposed because they easily can become communicated as everybody will understand a normative order e.g. not to change a greenfield towards a residential area. Finally do these objectives form a pretty good benchmark for environmental considerations in land use planning since planning professionals as well as decision makers in the local politics sphere necessarily will understand the normative order of these objectives. There remain only few possibilities to misunderstand these objectives.

The conclusions of the present research need to put emphasis on three major but simple conclusions. First, the degree of the achievement of the four environmental objectives is a reason to be optimistic. Second, as only few land use plans comply partly with the discussed environmental objectives, it seems as if the compliance is the result of a conscious decision. Third, as none of the considered objectives was met entirely, the question remains if there is any 'hidden' ceiling or just a

practical reason that prevents the environmental objectives from being fully implemented?

Facing the questions formulated above must be clearly expressed that the four investigated statutory environmental objectives are mainly input into the development plans. The issue of consistency between the plans and the environmental objectives can be answered affirmative so far. Actually, this means that as many as three out of four environmental objectives in the majority of land-use plans are met. Regarding earlier findings (see chapter 1), this result is not self-evident.

About two-thirds of the studied land use plans follow the approach of inner city development. Yet much more consistently do planning authorities comply with the objective to prevent any agricultural and forest areas from become converted into another use. The proportion of plans that claim such areas is estimated to be not more than 14.8%. Reciprocally this means at least 71.1% of the land use plans require no agricultural land at all. The meaning of this finding reaches beyond the preservation of areas used for food production. Through the conversion of agricultural land to building land the use pressure is increased on the remaining agricultural land. This includes in particular permanent grasslands, which are often characterized by extensive farming and are recognized to be an important contribution to the preservation of biodiversity. Subsequently the use of former agricultural land may increase the yet observed pressure on permanent grasslands and promote that they in turn are converted towards arable land for food production. In this respect, nevertheless it must be noted, despite the very positive observation with respect to the claimed agricultural and forest area that even a small amount of land converted to agricultural fails to meet the environmental objective. Very positive is, however, that the use of forest land is quantitatively practically irrelevant.

The only objective dimension that is missed by a majority of the land use plans is the limitation of the impervious surface to an appropriate extent. The proportion of plans corresponding to this goal is only up to 26.8%. In this context, is certainly clear that this goal is clearly spelled out blurred and that especially the limitation to an ‚appropriate extent' opens a wide scope for interpretation.

Now it may be argued that already the maximum permissible site occupancy index of the Land Use Ordinance figures represents a boundary that corresponds to that environmental objective. In this respect any land use plan would aim for compliance. On the other hand, this raises the question whether in fact it makes sense to speak of a limit to an appropriate extent when this extent in up to 58.4% of all cases coincides with the already legally fixed ceiling.

Possibly the planning authorities see no substantive difference between an environmentally protective provision formulated as an 'appropriate extent' and the maximum allowable building density in an area. However, not achieving that objective is independent from pursuing inner city development. It may therefore by no means the wrong conclusion be drawn that a clear orientation towards inner city development and – as the mirror image - protection of the outer region and protection of local agricultural land would have resulted in an increase of land consumption within the city. In the contrary, the evaluations rather lead to the conclusion that the average area size and the urban density are independent from the matter of inner city development. However, regional differences in this respect can be observed. One central conclusion can be drawn: Obviously, there is no indication that particular factors would inhibit a further rise of the proportion of land use plans fully in accordance with the defined targets.

However, it should not be overlooked that there is a certain residue on development plans which do not correspond to the concept of inner city development. The first reason for this statement is simple, since it cannot be expected that any municipality has inner city development potential or this has already been exhausted. This assumption is also supported by the observation, that municipalities with a growth perspective match the objective of inner city development less than shrinking administrative entities.

Much more important than such trivial relationships is the note that this statutory objective comes with formulating a completely undifferentiated normative direction. The latent conflict is in fact that the inner city development objective implies an abstract environmental value difference among area types. The manifest thesis is namely that outer region areas and yet unused area are more valuable than others. That argument cannot be accepted from an environmental professional point of view. Yet a quick view e.g. on urban extreme habitats or the climatic compensation function in the city makes clear, that a schematic contempt in relation to e.g. intensively farmed agricultural land, cannot be carried out. In this respect should therefore be accepted that a certain proportion of land use plans justifiably will not fulfill an undifferentiated understanding of inner development.

To conclude that very brief discussion on environmental compliance in land use planning it is worth to add that a responsible land use planning should not pursue any environmental objective for its own sake, but as a part of an integrated view of sustainable development.

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Abstractly, persons who are homeless have the same property rights as anyone else, with respect to whatever they might own. But it is unlikely, if a person is homeless, that she owns much.

Jane B. Baron

Formal property rights in the face of the substantial right to housing

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Although the article should be considered a result of the common work and reflections of the two autors, A. Giampino took primary responsibility for sections 2, 3 and 5, F. Lo Piccolo took primary responsibility for section 1, 4 and 6.

Abstract

This paper explores the dichotomy between formal property rights and use value of rights in the field of the right to housing for homeless people, focusing on the entitlement of the squatting practices to claim the collective rights in the public domain. This collective claim can be considered an alternative to the 'traditional' conception of the public property as ´exclusive' domain of State. In the cities of Southern Europe, urban space has become an 'object' of contention by groups of inhabitants, who are organized at various levels, and an object of claiming – through illegal (although not illegitimate) forms of occupation of public or social private properties – the right to housing as primary expression of the broader 'right to the city'. Starting from the evidences emerging from the informal practices of reappropriation of spaces (occupied spaces) in the case study of Palermo, the aim of the paper is to demonstrate that the use value is applicable in the housing field through the lens of the right to the city. The self-help housing practises suggest a "third way" in the theoretic interpretation on the right to housing, overtaking the division between natural rights and legal rights.

Keywords: capabilities approach, right to housing, squatting

1. Introduction

Homelessness is a "hot issue" in many European countries, and there are no reasons to believe that the total number of homeless people will decrease in the next years, particularly in the framework of post-crisis scenarios where the levels of urban poverty are rising. The data seem to confirm that we are dealing with a new housing emergency. Based on UE data (2013), an estimated 4.1 million people in the EU are exposed to rooflessness and houselessness. However, paradoxically, we estimate that more than 11 million homes lie empty across Europe. The European Union Statistics Agency (EUROSTAT) has released data on the amount of people at risk of poverty or social exclusion: in 2012 it concerned a quarter of EU's population, having increased by 6 million since 2009 to 123 million in total. Between 2012 and 2013, the rate increased especially in Southern European Countries, where the application of the austerity programs have had dramatic and controversial effects on their social protection systems.

The actual housing emergency is not just a problem connected to poverty or a lack of low prices houses. It is the outcome of complex dynamics depending on the overlapping of different factors such as the economic crisis, urban poverty and the implementation of mainstream policies of social and spatial transformation. Across the world, governments are struggling to cope to both economic recession and deficits, and as a result many of those countries - often under the urging of international financial bodies - agree to implement austerity programs with a shrinking effect on the social services sector connected to wealth redistribution, reducing the impact of the State in the economy.

Poverty and social exclusion are concentrated especially in Southern European cities where it is possible to detect a policy vacuum and an increase in protest movements and illegal occupations offering alternative and radical project proposals in contrast to the dominant social housing policy model. In many urban realities of Southern Europe like Palermo, Madrid and Lisbon, urban space has become an "object" of contention and claim by groups of inhabitants, who are organized at various levels, and claim – through illegal (although not illegitimate) forms of occupation of public or social private property – the right to housing as primary expression of the broader "right to the city" (Lefebvre 1968). Empirical evidence of these movements suggests that there are emerging

practices of reaction to traditional policy to address homelessness, but the studies of these practices are often fragmented and there is urgent need to understand their potential through a systematic approach.

In the last years a growing body of literature has critically analysed the phenomenon of squatting and the movements claiming for the right to housing in Southern European cities (SEc), focusing on the processes of institutionalization and cooptation (Mouffe 1999; Martínez 2013) of urban movements or the strategies used to permit homeless people to find a house, at the margin of norms and legality (Ward 2002; Reeve 2011). As Aguilera (2011, p.5) argued: «All these works however put aside local and national governors and decision makers. They usually do not deal with the public policies which could be implemented beyond eviction strategies». Confronting with the acute housing crisis it is possible to detect new self-help forms proposed by housing movements where the occupants/tenants adapt the empty public properties (or social private property) to the new residential use, also through micro-projects of renovation which fill the lack of formal housing policies and intend to be an innovative alternative to the current model. These practises appears as a successful model for cutting housing production costs, providing an affordable and accessible form of housing, enhancing user empowerment (Teasdale, Jones and Mullins 2010) and producing social capital in the process (Garcia and Haddock 2015). Furthermore, the renovated and transformed public property remain public and become part of the housing public stock. Nevertheless, in the Southern Europe context, the clear distinction between lawful/unlawful, legal/illegal, which descends from the legal systems, accentuates the antagonistic nature of these practices (Sandercock, 1998) and the irreconcilability of the interpretative frameworks among vulnerable people (homeless) and strong entities (State). The dominant politics of "zero tolerance" fights against every kind of "squatting" and it still remain the main form of intervention, deriving from the Southern European juridical systems based on the classical division private/public property. However, the Charter of Fundamental Rights of the European Union (2012) affirm that «in order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices» (p.16). In the last years a growing body of literature have been helpful to underline that many people squat because they have no other option, as well as squatting is not a criminal justice issue. A promising approach to solve this limitation is the theoretic approach on right to housing based on the Nussbaum's theory (2011). The capabilities approach allows an assessment of implemented housing public policies and informal practices, verifying the use value of the right to housing, its guarantee and the use value of public heritage as a means to fully empower people.

This paper is organised in two parts. The first part deals with the nature of the right to housing. The recognition of a substantial, and not merely nominal, right to housing is discussed in terms of positive rights and negative freedoms. The theoretical argument questions the competitive nature of these categories of rights within the framework of the right to housing, to show that it is in the verified enjoyment of those rights that differences are cancelled. Through the capabilities approach, theorised by Sen (2005) and Nussbaum (2011), we can verify the use value of the right to housing in practice, whether within an institutional or informal context. However, the use value of the right to housing may not transcend the physical order of this right which translates into having a physical space where such right may be enjoyed (Waldron 1993). It is within this theoretical framework that the theory of commons – viewed as essential public goods and instruments that allow homeless people to enjoy their freedoms – is rooted. The theoretical framework introduces, based on the metrics of the capabilities approach, an assessment of both public policies and squatting practices in Italy, and more specifically in Palermo, showing that the alternatives, developed by marginal groups in conditions of distress, have proactive capability which challenges the traditional approaches of public policies and their problem-solving strategies (Holston 1998; Miraftab 2009; Miraftab and Wills 2005). If we embrace as our working hypothesis the principle according to which «every public policy is testimonial evidence of a theory of social change» (Mény and Thoening 1996, p.115), by comparison with the current policy void, the increase in protest and squatting movements offer inputs and project proposals which are radical and alternative to the dominant policy models (Cellamare 2011), moving towards an action model that is more careful to the use value of the right to housing and of public heritage. The aim is to develop an argument that is generally applicable and not merely determined by particular circumstances in the theoretic interpretation on the right to housing, overtaking the division between natural rights and legal rights.

2. The use value of right to housing and property rights through the capabilities approach

Before addressing the way in which squatting contributes to the reformulation of the right to housing and related policies, we must discuss the debate on the "nature" of the right to housing. In the countries of Southern Europe the right to housing has evolved, within the framework of fundamental rights, as a "social right with great uncertainties" (Modugno 1995), being subordinated to the amount of resources available to public institutions. This definition has fuelled a far-reaching discussion on the right to housing as a positive right, which implies "benefits" and therefore costs for the public purse, as opposed to negative freedoms (such as freedom of expression and private property) which tend to reject State intervention and are in theory considered as "cost-free". As Bellamy (2007) and Waldron (1999) point out, these disagreements are intimately linked to the ideological divisions (liberal vs. social view of the State) that characterise any modern, pluralistic democracy. Apparently, the debate on the right to housing as a fundamental right seems to be more a matter of ideological contraposition than a technical issue. In reality, the different acceptation of the right to housing at regulatory level has direct consequences for the public policies in this

field. In Southern European welfare systems, where housing policies are based on a positive right, lack of housing is viewed as a "need" rather than as the violation of a fundamental right. As a consequence, homeless people are regarded as "beneficiaries" of public policy, as passive subjects and not as the holders of rights (Spicker 1984). Pinker suggests that this «is the commonest form of violence used in democratic societies» (1971, p.175). This stigmatisation is relevant also in terms of space (Fitzpatrick et al. 2014). Public housing neighbourhoods in the South of Europe, built by public entities to meet housing needs, can be re-interpreted as coercive, top-down planning policies implemented by governmental institutions, often in order to guarantee an established order, including spatial order, rather than to enforce a more general right to housing, accentuating the divide between haves and have-nots (Lo Piccolo 2015). Also in economic terms, the classification of housing as a positive right has significant repercussions, for at least two reasons. First because the allocation of public funds (see Bengtsson, 2001) strongly influences housing policies. Given that the right to housing is a socio-economic claim, the State must allocate public resources to this area with a degree of discretion influenced by economic and budgetary questions, while such limits would never apply to "negative" freedoms. In practice, this is tantamount to admitting that market interests prevail over ratio of rights. The libertarian thinkers (Berlin 1969; Machan 1989) maintain that negative freedoms such as, life, liberty and property are rights that prohibit coercion and interference by third parties and that their exercise is ensured also in respect of interferences by the State. As a matter of fact, not only such theoretical outlook does not involve any dialogue between formally guaranteed legal equality and factual inequality, but it also does not consider that negative freedoms, on pair with social rights, have a cost[1]. At international level, Holmes and Sunstein (1999) maintain that «A legal right exists, in reality, only when and if it has budgetary costs» (p. 19) and therefore «all legally enforced rights are necessarily positive rights» (p.41) Politically, the fact that the right to housing depends on what public resources are allocated and how they are assigned essentially makes this right depending upon a political choice. This position is found also in Bengtsson who writes «The right to housing is best seen as a political ´marker of concern' pointing out housing as an area for welfare state policy» (2001, p.273) and is opposed by King (2003) who claims the primacy of the existence of the right to housing on politics.

Compared with other arguments recalled so far, an approach to the right to housing in terms of acknowledging the use value of such fundamental right based on the capabilities approach theorized by Sen and Nussbaum, rather than in terms of positive rights or negative freedoms seems more promising. The capabilities approach applied to the right to housing is not based on the axiom for which individual X is entitled to right Y (in this case we would be dealing with a generic right to house), but rather on the principle that in order to be a person, and function as a person, X needs Y (namely, the right to housing). It is no coincident, in fact, that Waldron (1993) and King (2003) both agree that the right to housing is a fundamental right which other fundamental functions depend on. Reasoning of the right to housing in terms of capabilities entails introducing public policies to enable the homeless to function as individuals, taking action to exercise the right to housing which would otherwise be granted only verbally. The current housing emergency in the urban areas of the south of Europe, such as Spain or Portugal, testifies that simply acknowledging the right to housing in the Constitution is not enough to guarantee the right in terms of capabilities. In a nutshell, thinking in terms of capabilities creates a point of reference to understand what guaranteeing a right actually means: «it clarifies that it entails interventions against discrimination and institutional support, not simply absence of obstacles» (Nussbaum 1999, p.306). In other words, it shows that in order for a negative freedom to be just that, it must refer to social rights, allowing us thus to solve the querelle between positive rights and negative freedoms. This allows us to examine the issue of the right to housing in terms of public policies implemented to combat housing deprivation within the framework of a constitutionally recognised right to housing. If Sen's functionings can be viewed as beings and doings constitutive of a person's being, Nussbaum (1999) defines the capabilities to perform such functions as the object of interest of public policies. In this sense, the capabilities approach is an assessment method of housing policies, rather than a designing method of public policies (Sen 2009), that allows to assess the presence of those real political and social measures which empower those who are, in fact, capable of fully exercising their rights, with the opportunity to raise governments' awareness of their needs and call for public action beyond mere paternalistic assistance. As we will see in the next paragraphs, the capabilities method is extremely useful in assessing public housing policies, as well as informal squatting as a reaction to house-related poverty. At the same time, they permit an assessment of the different degrees of existing "social capital" of homeless and consensus/resistance to traditional public policies. In more general terms, it could be said that, in contrast with a paternalistic vision that has seen the homeless/occupant as passive subject receptor of policies, the capabilities approach enables detecting the active resources of these practices, with particular attention to the capacity of existing vulnerable groups, social movements and grassroots initiatives to solve concrete problems, and to the possible role that may be played by the public hand in integrating-regulating-supporting these kind of resources. In this respect, it is clear that the house asset is not the end of public policies but the means through which ensuring human dignity, hence personal freedom in Nussbaum's interpretation. On this basis, Waldron (1993), with a similar theory on the basic functions guaranteeing human survival, argues that homeless people can only perform these functions in public

1 As sustained by Bin, Donati and Pitruzzella (2014), with reference to the Italian context: «*Misunderstandings arise from the rather common belief that with regards to freedom what we ask the State is basically to refrain from taking any action whatsoever – which makes them "cost-free" for public finances –, while public intervention is essential for rights which are therefore "costly". This conviction is unfounded. Taking into consideration typical "negative" freedoms – such as individual freedom, freedom of establishment or private property –, we can observe that they imply major interventions and public "costs". What guarantee would there be, indeed, to the physical integrity of individuals without a massive (and costly) security system to protect it or without the complex (and costly) judicial system? And what would property be without a protection system safeguarding – not only with police service, but also with firefighters – water supply, civil protection and public "guarantee" against natural disasters? Once more, it is clear that this distinction is more ideological than "objective"*» (p.154).

spaces and commons as they are «excluded from all the places governed by private property rules» (1993, p.313). However, if the use of common property resources becomes exclusive (King 2003), on a par with private property, Waldron argues that «a person not free to be in any place is not free to do anything» (p.316). While the capabilities approach allows us assess the use value of the right to housing, Waldron's hypothesis allows us to reason about and assess the use value of property and, in particular, of public property which, based on the capabilities approach, should be the resource actively used by people, laying the basis for active construction and free expression of a person's individuality.

Public assets are a form of collective property which falls within the broad and complex category of common property resources or simply commons. In urban planning, public essentially means a space for collective use (as opposed to private) which is considered as destined and fit for collective use by a public authority. In Crosta (2000), this interpretation defines a relation between society and State where society expects the State to acknowledge and meet its needs: society is, and expresses, a social demand; it does not meet this demand itself, on the contrary it delegates the answer to the political system. This paradigm is marked by the conviction that the solution to collectively perceived problems cannot be freely determined by individuals and their interactions. Always according to Crosta, "public" is not the space permanently destined to collective use. This would be a simplistic association: collective use does not equal public space,

[…] but rather a space is public when it is designed by social interaction under certain conditions: it is a possible, not a necessary social construct, […]. The public connotation is assigned to a place if and when all those who find themselves interacting in a situation of co-existence, using different methods and for different, unshared, reasons (co-presence can be – and usually is – characterised by tensions and conflicts), learn by directly experiencing diversity (of which they "feel" the problems) and by experiencing co-presence in terms of co-existence. Through this learning process they "become" public (Crosta 2000, p.43).

The construction of the public space as product of social interaction (possible outcome) can thus be considered as public policy. Dunn (1981) and later Dente (1990) define public policy as the set of actions carried out by a group of subjects (not by the State) which, in some way, are related to finding an answer to a collective need (problem, demand, opportunity) which is generally considered to be of public interest. If we take these concepts to extremes, the self-help practices proposed by housing movements is a form of public policy – designed by a group of subjects – which meets a collective need. The collective need in this case is not only housing, but also the exercise of right.

The category of common goods aspires to be an alternative both to public and to private goods, transcending the alternative between public and private property to which neoclassic economics traces back all possible forms of ownership. Over the past decade, there has been wide, complex and cross-cutting debate on commons. Yet the legal and economic definition of commons is still unclear. In Mancur Olson (1965), commons can be considered as any kind of property to which the characteristic of "impossibility of exclusion" can be proven to apply, although the author associates with this distinctive feature the notion of group theory, according to which common property resources can be considered such only in respect of the group that uses them. The contemporary debate on commons originates from the need to remove some categories of commons defined as functional to the enjoyment of fundamental interests and necessary to the development of the individual from the logic of appropriation and from the market circuit. According to Elinor Ostrom (1999, p.30) «common property resources are all natural and/or artificial resources exploited jointly by a number of users, whose exclusion from their use is difficult and/or costly but not impossible». Ostrom states that the problem of commons governance can be resolved through forms of collective management which represent a sort of third way between private property and the involvement of an external coercive authority. She defines seven essential points plus one for the management of commons, where the eighth principle deals with the thorny issue of goods:

- Define clear boundaries.
- Match rules of appropriation and use to local conditions.
- Methods of collective participation in decision-making.
- Control.
- Graduated sanctions.
- Means for conflict resolution.
- Minimum recognition of the right to self-organization.
- Organizations structured in nested tiers.

In Ostrom's model, the relations between commons, on the one hand, and democracy and self-government on the other, is not occasional but rather imposed by the very nature of the common resource.

3. Public policies vs squatting practices for the right to housing in Italy

In the Italian law, the right to housing is not explicitly specified in the Constitution. In fact, the establishment of the right to housing is the result of constitutional judicial activity which has progressively recognised it as a so called fundamental social right which the empowerment of the individual depends on and from which other social rights derive. In particular, judgement no. 217 of 25 February 1988 by the Constitutional Court establishes the right to housing as a fundamental right, stating that «Laying the minimum conditions necessary for a Welfare state helps ensuring to the largest number of citizens possible a fundamental social right, such as the right to housing, and making sure that the life of each individual reflects every day, and in every aspect, the universal concept of human dignity, are duties which the State cannot, under any circumstance, renounce» while at the same time stressing that «society as a whole must prevent people from becoming homeless». However, not only there is no mention in the Italian law to the house as an instrumental asset fundamental for human dignity in Waldron's definition, but the legislation underlines that private property «is recognised and protected by the law, which establishes the methods of purchase, enjoy-

ment and limits to ensure its social function and make it universally accessible». The legislator clearly intends to balance out property rights on the house, should it be necessary to favour the right to housing, so much as to condone so-called "unauthorised building by necessity", justified not so much by poverty as by the actual danger for the safety of the individual (Scotti 2015). If on the one hand, in theory, there are references in Italy to a right to housing as a fundamental right with precedence over the right to property, on the other hand it is yet to be determined whether this right is, indeed, merely nominal or actual. The most recent measure on housing is Law no. 80 of 2014, also known as the "Lupi's house plan". An analysis of this provision, using the capabilities method – in other words assessing whether, in fact, the house plan put homeless people in the conditions of finding their way out of poverty and fully exercise their freedoms and, therefore, also their right of participation to the public debate on policies to be implemented on housing deprivation (Sen 2009) –, highlights the inefficacy of the provision. In fact, beside the meagre funds allocated for this measure, the house plan suggests transferring public property (art.3) and combatting unauthorised occupation of buildings by preventing homeless/squatters from being able take residence, thus precluding them from enjoying a series of related rights. Furthermore, for the five years following the conviction, it forecloses the possibility for occupants to qualify for social housing. In respect to these repressive measures, which, de facto, identify the right to housing as merely formal and not as a substantial right, if on the one hand the squatting phenomenon and the movements for the right to housing bring to the surface the inefficacy of social and housing public policies, on the other hand, although by means of conflicts, they offer a solution to the housing emergency which should take the form of collective organisation and interest. If we accept to reason in terms of capabilities, the voice capability (the ability to make one's voice heard and discuss it publicly) theorised by Sen is undermined, to the extent that an institutional entity suppresses struggle movements for the right to housing instead of involving them in a public decision-making process on issues revolving around the claims for a fundamental right such as the right to housing.

Moreover, the measures envisaged by the house plan in terms of transfer of public property (art. 5) are against not only the use value of the public property claimed by the movements for the right to housing through forms of squatting, but also the recent debate started in Italy on commons. This debate has reached at an attempt of constitutional reform undertaken by the committee chaired by Stefano Rodotà[2] which, re-working Book III of the Civil Code, in addition to the category of private and public goods, identifies the category – unprecedented in the Italian legislation – of common resources[3].

Well aware of the need for a radically new perspective, the Rodotà project, by adding the category of commons, recovers a "new way of possessing" at anthropological, before legal, level. Indeed, Rodotà, in *Il terribile diritto* (The Terrible Right), asks the following question:

Should access to social citizenship come through property or through rights? If the response is the second alternative, not only is the role of property in the system diminished quantitatively, it may also be altered qualitatively, as the disconnection of the link between property and individuality becomes more radical.

It is worth underlining that the commons regime is indifferent to the concept of "ownership". In practice, this translates into a restriction of property rights, both in terms of enjoyment of the good, and of its circulation. In other words: the utility that can be derived from the good, as use value and exchange value, is not all destined to the owner (Nivarra 2012). The common good, according to the Committee's way of thinking, is a paradigm which is strictly alternative to the other forms already present in Italian law. The work of the committee is invaluable for its effort to transcend the public-private dichotomy and to provide a regulatory framework for common goods. The category of commons which the Committee refers to is broad, not limited to an attempt to legislate their management, as in the Ostrom model. Such arguments show that if we assess housing policies in Italy through the lens of the capabilities approach, we should recognise that we are far from actually guaranteeing the right to housing. At this point, we will try to understand, through the case study of Palermo, if the assessment of squatting with the capabilities approach can provide a new meaning to the public action in the changed post-crisis scenario, towards forms of creating the (democratic) space based on emerging practices and cooperation with entities (residents, communities, groups, institutions) with different political "potentials" (Bonafede and Lo Piccolo, 2010). Where these practices are exercised, the debate, even confrontational, among different parties involved, allows, agreeing with Cellamare (2011), to collect suggestions and project proposals arising from the informal consensus of self-organisation to bring them to the level of collective organisation and interest.

4. The housing emergency in Sicily

Before going into details of the analysis of current squatting practices in Palermo, we should take a closer look at the issue. The data calculated by ISTAT (the Italian National Institute of Statistics), show a relative poverty rate in Sicily in 2015 of around 32.5%, with 1,010,154 households living in conditions of deprivation, or more than half of Sicilian households. This is the worst figure in any Italian region and, when considered together with the employment reduction of 73,568 and a 10.2% rise in the number of job-seekers (Region Sicily 2015), it paints a picture of the emergency situation which Sicilian households are going through. A long, complex scenario re-

2 Rodotà Committee (14 June 2007), the text of the draft law is available at www.giustizia.it.

3 Article 1 (c): Establishment of the category of common goods, namely things which are functional to the enjoyment of fundamental rights as well as to the free development of the individual. Commons must be protected and safeguarded by the legal system, also to the benefit of future generations. The holders of common goods can be public or private legal persons. In any case, their collective enjoyment must be ensured, within the limits and in accordance with the methods set by law. Commons can be the property of either public or private subjects: that is, it is not ownership that defines the nature of commons but rather their use.

sulting from the effects of the economic crisis overlapping with underlying fragilities of the Sicilian production system.

Within this framework, squatting for housing purposes in Sicily has become a substantial phenomenon, and it is interwoven with a social and economic context worsened by the continuing recession. Between 2005 and 2014 eviction notices have gone up from 5,040 to 8,120, while the number of evictions for arrearage or other causes has remained stable at 3,000 per year (Ministry of Internal Affairs 2014). Moreover, based on a recent sample survey (ISTAT-Caritas 2014) there are 3,997 homeless people living in Sicily, of whom 2,887 in Palermo, confirming its third-place ranking among Italian cities in number of homeless. The data would appear to indicate that we are facing a dramatic new housing emergency related to the increase in forms of urban poverty, mainly concentrated in the three large cities of Palermo, Catania and Messina.

National measures have also proven unable to reverset the regressive trend of this item of expenditure in the welfare budget. In fact, Law 80/2014, "Urgent measures for housing emergency", allocated to Sicily: € 1,492,921.50 for the Faultless Arrearage Fund; € 7,555,321.14 for rent support and € 37,40,874.41 (with an additional € 4,409,618.87) for the recovery and restoration of public buildings. Yet to date, only funds actually assigned have been those of the Faultless Arrearage Fund, and in particular the municipality of Palermo has received € 243,932.21 in respect of the 865 evictions executed in 2014. As a reaction to a policy framework which gives only partial and insufficient responses, in Palermo some 350 households, supported by committees for the right to housing, have squatted historical buildings, convents, schools and non-residential public buildings, reconverting them to residential use with self-restoration micro-projects which compensate for the lack of official housing policies.

5. Squatting in Palermo: a narrative

In the capital of Sicily, the acts of illegal occupation of property with the intention of living there have increased considerably, in a social and economic framework exacerbated by the economic crisis which is currently affecting Italy. Based on ISTAT data (2014), in Sicily over 547,000 households live in relative poverty, and 180,000 in absolute poverty. It is the worst figure all over Italy and, on top of this, between 2009 and 2013, 46,000 jobs were lost in the city of Palermo (data from the Chamber of Commerce of Palermo and the Tagliacarne Institute, 2014). Households are facing an emergency situation; a long and complex phase caused by the effects of the economic crisis combined with the weaknesses that characterize the production system of Palermo. A sample survey recently carried out by ISTAT-Caritas (2014) highlighted that Palermo is the third city in Italy for number of 'homeless'[4] people.

The case of Palermo exemplifies the emergency situation confronting the large Sicilian urban areas. The latest update of the "Housing emergency ranking" of the Municipality of Palermo reports that a total of 1,513 ERP housing applications have been accepted, involving roughly 400 households more than in 2014. Unfortunately, this rapidly-escalating situation has been tackled with inertia, with only 222 houses having been assigned in ten years, against 9,865 applications received until the last "Notice of open competition 2003/2004 for the allocation of public housing units in the form of lease,". On the one hand the allocation of housing units is extremely slow, on the other hand the funds available to the public institutions for rent subsidies are clearly insufficient. Between 2009 and 2012 the funds were reduced from over € 6.5 million to under € 250,000 (specifically, from € 6,547,561.95 to € 247,409.48). In the best case scenario, these figures can cover an average contribution of a mere € 400.00 per year per applicant. From 2012 to December 21st 2013, 2,617 evictions were executed, of which 1,137 for rent arrears (Ministry of Interior 2014). The figures seem to confirm this new and dramatic housing emergency associated with increasing urban poverty. Although the problem is skyrocketing, the municipal administration showed indifference and inactivity on the one hand, while implementing a repressive policy and taking a 'zero tolerance' stance against squatters on the other. Nevertheless, squatting for living purposes, or at least the occupation acts supported by the main movements promoting the right to housing in Palermo – *Comitato Lotta per la casa 12 Luglio*[5] and *PrendoCasa* – represent an extreme way of 'democratically' obtaining a denied right.

As recently stated by Nino Rocca, member of the *Comitato Lotta per la Casa 12 luglio*: "When legality is not legitimized by the ethics of human rights and civil rights stemming from it, the word *legality* is used as a cover for the senselessness of a society and an institution that have lost any contact with the dramatic situation faced by a community hit by poverty and despair [...]; we do assert the ethical legitimacy of the occupation of property – often deemed to decay and looting – by poor families who are denied not only the right to work, but also the right to housing. We want to carry out the 'revolution of common sense', a revolution that comes from the common sense of things; when you get to know the despair of people, you understand that illegality is indeed the illegality of the Institution that does not provides for and grants the denied right to housing"[6].

As said before, in the city of Palermo roughly 350 households have occupied different public buildings and have adapted

4 This category includes people living in extreme poverty, who over the months of November-December 2011, received food or night shelter services in 158 Italian municipalities where the survey was carried out.

5 The *Comitato di Lotta per la casa 12 Luglio* has been working in Palermo for about 14 years. Made up of the same "homeless" families, the movement promotes squatting of social private and public buildings in order to establish either a dialogue with the institutions, or a conflict with the aim of obtaining a denied right in a democratic way. Since 2002, 150 households have been assigned a house owing to this struggle. Actually the struggle for a house is part of the history of the city of Palermo and reflects the need of thousands of families, which the municipal administrations have not been capable of satisfying since 1968.

6 Plea made on January 25, 2014 by the *Comitato Lotta per la casa* and signed by Father Cosimo Scordato, Giovanni Impastato, Umberto Santino, Anna Puglisi, Augusto Cavadi, Salvatore Cusimano, Fulvio Vassallo Paleologo and by the municipal councillors Alberto Mangano, Antonella Monastra and Giusi Scafidi.

them to residential use, also through micro-projects of renovation which fill the lack of formal housing policies and intend to be a radical alternative to the current model. However, the Municipality of Palermo owns 4,827 social housing units as a whole, and 2,580 of them are squatted. In marginalized contexts such as the city of Palermo, squatting is contradictory and ambiguous; acts of claiming for a right are combined with illegal and illicit forms of occupation of public property. These buildings are taken away from homeseekers who are regularly registered in the homeseeker register and could be potentially selected; according to the figures estimated by Sunia and Sicet, in Palermo there are about 1,000 squatted houses. A real illegal market controlled by the mafia took hold: they do control the market of squatting against payment. Such a contradiction may undermine the protest acts of those having the right to it, thus firing empty talk and the commonplace that every squatter is a Mafioso.

Among the buildings owned by the municipal administration, which are still occupied, is the former ONPI in the borough of Partanna. It is a rest home built on the land donated at the end of the '50s by Baron Filippo Santocanale to the O.P.C.E.R (Opera Pia Cardinale Ernesto Ruffini), and for many years it has been an excellence of the territory, in terms of services offered, dimensions and characteristics. Covering a surface of 10,000 m2, the rest home consists of a complex of 25,000 m2 split in many building having various functions: two symmetric three-storey buildings host the bedrooms for elderly people and common spaces; a chapel and clergy house connected to the two symmetric buildings (at present, allocated for free to the local Parish); a building used as a 200-seater theatre and a two-storey building symmetric to the theatre, where on the ground floor are located the decentralized offices of Partanna-Mondello borough council. Thanks to an intervention of self-renovation supported by the members of Aiace Association, the rest home was transformed into dwellings by the tenants[7]. In 2010 the complex was vacated, and the following year forty-six families (150 people in total) coming from different districts of the city transformed the spaces to adapt them to their residential needs, bearing the costs of it. In November 2012, the small church was partially renovated; it is the heart of the complex, as well as the point for meeting and social gathering of both squatters and residents in the district. Although being aware of the ambiguity of the said experience where 'legitimate occupiers' and 'illegitimate squatters' coexist, the story of the ONPI structure, in its inception, witnesses of the potential associated with self-renovation. Nonetheless, the coexistence of different types of occupiers generates a twofold conflict: externally, between residents and occupiers, and inside the complex itself between authorized legitimate occupiers and squatters. It is not only a mere formal conflict, but it also translates into the quality of the renovation interventions: the ones having the right to do so, usually perform unrefined interventions using low quality materials, whereas squatters perform more comprehensive interventions with higher quality materials. The same dynamics can be found inside the complex, in a "geography of differences", where the contrast between the two symmetric buildings is reflected in the homogeneous settlement of the two different groups of occupiers, in the different quality of renovation and in the fortified look of the buildings occupied by squatters.

Despite the tenants renovated it, the ONPI is stereotypically seen as many places in the suburbs of the cities of Southern Italy (Magatti 2007), where occupied buildings are hardly penetrated or accessible, like islands to be protected from an 'alien' external world; as a result, communities tend to exclude and take these places out of urban life, because they are produced by a sub-culture of illegality (Bonafede and Lo Piccolo 2010).

To face such a situation, the inhabitants have implemented bottom-up adaptive processes, by organizing themselves and providing for the lack of public institutions, while at the same time, giving value to the common spaces, by taking care of the church, or refurbishing and cleaning the garden. The local associations, including Aiace, and Comitato Lotta per la casa 12 Luglio are dealing with these contradictory behaviours; they are committed to regenerating and integrating it with the other areas of the district, by urging institutions to tackle the high conflicts between occupiers and squatters and between occupiers as a whole and residents. However the municipal authorities have turned a blind eye on the problem, tolerating squatting (namely refraining from issuing an eviction order), while at the same time selling approximately 2,000 building units of public housing, instead of finding a shared path with the homeless towards solving the problem.

This is a good example and a test case to assess the metrics of the capabilities approach, while also reflecting upon the commoning process triggered on public property. If we consider the self-restoration practice of the building of the ex-ONPI (former National Body for Italian Pensioners) as an alternative housing policy, in terms of capabilities the following can be observed:

- Compared with the economic subsidies allocated under the form of rent allowance (often insufficient) or temporary accommodation in reception facilities (where sometimes families are forced to sleep all in one room), the adaptation of a public property (empty) for residential use can be re-interpreted as a self-driven process in response to a need. The agency dimension of individuals, implicit in the self-restoration practice, is an essential factor in Sen and Nussbaum's theory: the homeless who self-restores a space is an active subject, as opposed to the homeless who passively receives aid. This active role, indeed, contributes to overcoming the stigmatisation which is implicit in formal housing policies based on the axiom homeless = need (moral need) while, at the same time, giving the homeless voice capability in social choices and public decision-making (Sen 2009, p.11). Voice not only as a political protest (Hirschman 1970) but also as aspiring capability (Appadurai 2004), in other words contributing to develop a policy "by" the homeless rather than "for" the homeless.

7 In 1999 the bishop Salvatore Pappalardo sold the rest home to the Municipality of Palermo. Subsequently, the rest home was managed by many different bodies – with many co-operatives alternating rapidly – thus creating a condition of distress for the guests. On June 4th 2010, the Municipality of Palermo, led by the Cammarata administration, and after a number of attempts, issued an order to vacate and transfer the elderly people living in the rest home to other facilities, as the rest home was judged non-conforming.

- The conversion of a public building, as previously highlighted, triggered in the homeless the desire for integration, both social (with the residents in the neighbourhood) and physical (with the rest of the city), by taking care of the community spaces in the building. Using the categories of the capabilities approach, this experience suggests that the object of change observed are the functionings within which the homeless use the resources (public assets). In contrast with other forms of divestment of public property, self-restoration practices are an opportunity to use the public properties (defined as available material facilities) for individual, as well as collective, functionings to improve the quality of life of people. King (2003), agreeing with Waldron (1993), states that the right to housing implies that "we must have a place to be". If the right to the city can be re-interpreted as "a right to belonging to a place, whether in spaces that we call cities or do not (Aalbers and Gibb 2014)", then taking the concepts to the extreme, we could say that not having a house is tantamount to being deprived of the very right to urban life and urban spaces. Hence, public property is the element on which to rebuild urban welfare, which is progressively being eroded by securitisation policies.

6. Conclusions

As illustrated in the previous paragraphs, in Italy – although not only in Italy – formal housing policies are clearly inadequate; they are repressive or prone to privatise or abandon the public heritage. At the same time, self-organisation of public space is on the rise, and new ways and places of social production are spreading. The "inhabitants" of these spaces are sometimes very good at behaving in ways and forms that challenge the regulatory, control/repressive purposes of dominating groups (Paba 2003). By "taking possession" of space, and namely urban space, a community or group is established, with its own institutions, activities, places. As stated by Harvey (2013), it is indeed through these emerging practices that the current values can be renovated and we can take on the challenges imposed by urban neo-liberalism to societies, also in terms of democracy and social and spatial justice. If we look beyond the space of self-organisation processes, we can spot a request for sharing, for acknowledging one's own status of inhabitant and citizen that goes well beyond the initial, although primary, claim for a physical space. Common goods do not only provide resources to their users; they also ensure the production of forms of utility and functions, to use the concepts of Amartya Sen (2005), that greatly widen the number of beneficiaries (direct or indirect).

Now it is worth wondering how research and self-help practices implemented by squatters can contribute to modify, both theoretically and practically, the legal system they originate from. Sandercock (2000) has rightly pointed out that reviewing the legal system and the laws stemming from it is a long-term objective, which requires extensive and stable lobbying and participation actions, during a time period that can involve even more than one generation. However, in spite of being a long and complex process, it is undoubtedly paramount to come up with widespread and recognized policies, regardless of changeable political positions. In this respect, the cumulative process of knowledge and experience – both in terms of self-help practices and drafting of local regulations on the use of public heritage – that we have been experiencing over the last few years in Southern Europe is not at all marginal or irrelevant. Even Ignatieff, despite his partial scepticism towards human rights, sees in them a valuable "common language" (Ignatieff 2000, p.349). In the long run, these practices can be the seed of a substantial change in the legal foundations of the right of ownership of public goods, and therefore could have a considerable impact on the housing policies through which the right to housing is substantially granted.

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Watch your thoughts for they become words. Watch your words for they become actions. Watch your actions for they become ... habits. Watch your habits, for they become your character. And watch your character, for it becomes your destiny! What we think, we become.

The Iron Lady (2011)

Derry/Londonderry: A city of walls

Keith Henry, Emma Farnan, Greg Lloyd

Abstract

Many public urban areas are susceptible to intense inter-communal antagonism due to seemingly irreconcilable cultural, historical and ethnic differences, with conflicts about a place's identity, form and use becoming characteristics of the urban in the 21st Century (Eggertsson, 2013). This can complicate the nature of what constitutes as the 'public interest' within public places, with society in the contemporary city spatially responding to such challenges by becoming more privatised in nature (Miles, 2010:13). There is the potential retreat from the 'civic' stemming from ambiguity and a lack of consensus in what the term 'civic' represents. The paper focuses upon the spatial context of Derry/Londonderry in Northern Ireland and demonstrates that the politicisation of land has had a profound influence upon the perceived assertion of property rights over public places alongside the creation, management and use of public places. It concludes with some important findings for planners, policy makers, and others concerned with the future of public places.

Key Words: Public Places, Property Rights, Privatism

1.0 Introduction

Many urban areas are susceptible to intense inter-communal antagonism due to seemingly irreconcilable cultural, historical and ethnic differences, with conflicts about a place's identity, form and use becoming characteristics of the 21st Century (Eggertsson, 2013). This creates pressures for group rights and complicates the nature of what constitutes as the *'public interest'*, with society in the contemporary city responding by becoming more privatised in nature (Miles, 2010:13). There has been a retreat from *'civic'* stemming from ambiguity in what *'civic'* represents. This is demonstrated in post-conflict societies by city spaces often becoming territorially segregated as societal groups regress to the sanctuary of parochial publics and the perceived safety associated with homogeneity. The latent danger within diversity is eroded by *gemeinschaft* and group solidarity, with the group's identity/ownership asserted over land to exclude those who don't conform to it. By facilitating this, urban planning has been heralded by Jerram (2011:317) to be responsible for small mindedness and boredom inherent in planned, ordered cities, with Davis (1992) acknowledging the detrimental impact that this has had upon the spontaneous, dynamic urban public places.

The scarcity of resources and the increase in pressures exerted upon public places by an increasingly heterogeneous population and their attempts to appropriate the common property rights to utilise land creates competition for it (Davy, 2012). These struggles can become particularly problematic within post-conflict urban areas that comprise of co-habiting polarised communities. Competing demands upon limited public places have led to urban planning and politics becoming increasingly complex and fragmented, delivering unpredictable political fields of action (Ploger, 2004:72), with common property rights replaced by seemingly privatised rights. This encroachment of private rights has encouraged the dystopian perception of publicness of contemporary public places. Foretold by Jacobs (1961) with *The Death and Life of Great American Cities*, lamented over in Sennett's (1986) *The Fall of Public Man* and ridiculed within Sorkin's (1992) *Variations on a theme park: the new American city and the end of public space*, the publicness of public places is heralded as being lost[1].

1 It should be noted however, that it is questionable if public places have historically been more public in nature as there has always

This paper challenges this dystopian perception and develops the thesis that in reality post-conflict cities find functionality within such fragmentations. Using the city of Derry/Londonderry, Northern Ireland, as an exemplar and the conceptual framework of new institutionalism (Williamson, 2000), the argument acknowledges the delicate balance of urban order and disorder. Discussion focuses on how communal property rights over public places has developed a more functional and efficient urban system. Burnham and Bennett ([1909] 1993:1) interpret planning as stemming from the want and need to create order from chaos. Subsequently, Derry/Londonderry acknowledges that the pursuit of a public place for all publics is unnecessarily problematic; instead the city functions through the providing an assortment of public places for all publics.

Derry/Londonderry isn't blinded by its turbulent past, instead it focuses upon its spatially shared present; demonstrated by the complimentary nature of its public places. Nationalist spaces, unionist spaces and shared spaces remain, and whilst physical borders and psychological boundaries persist, they have become more fluid due to the acknowledgement of property rights.

2.0 Urban Public Places

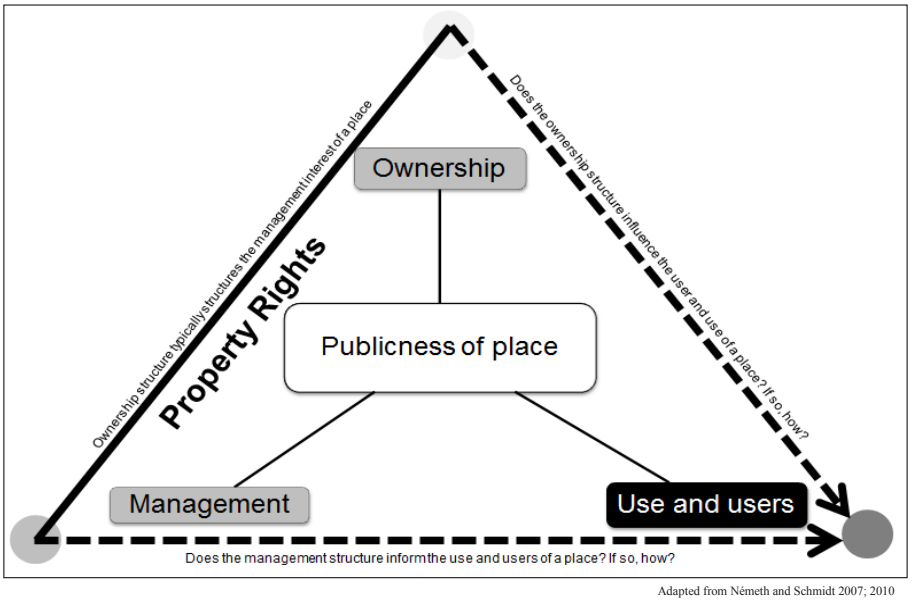
Public places are defined by a range of characteristics, including ownership (Kohn, 2004), the presence of people (Gehl and Gemzoe, 1996), the extent of unrestricted access (Carmona *et al.*, 2008) and characteristics which are held by Carr *et al.* (1992) to be democratic, responsive and meaningful. Nevertheless, despite the flexibility of the term and the range of associated eclectic definitions, there is a degree of consensus (Christopherson, 1994; Kohn, 2004; Minton, 2009) that public places have lost a degree of their publicness, to the detriment of the *'public man'* (Sennett, 1986). By attempting to create planned, ordered cities, the democratic potential of public places, according to Davis (1992) has been eroded, having a detrimental impact upon the quality of urban places.

Urban places matter, superseding the countryside as the foci of power, vortex of social change and regional drivers of the economy. They account for the spatial concentration of approximately half of the world's population (Cohen, 2003), yet there remains a distinct lack of clarity in the dynamics of urban ecology with Davis (2002) claiming that there is greater knowledge and understanding of rainforest ecology than that of the urban. It is within the complex, intricate urban relationships that the study of public places will focus upon:

'Public space is almost by definition urban space, and in many current treatments of public space the urban remains the privileged scale of analysis and cities the privileged site' (Low and Smith, 2006:3).

Understanding *'urban'* as defined by Davis's (1965) conception of the social structures which enables a recognition of control and not through Wirth's (1938) definition of numbers, density and heterogeneity, there is an acknowledgement of the importance of control. Control requires power, with power existing only when there are encounters between people; power remaining latent until the point of interaction (Jerram, 2011). The element of control, which may be as a result of ownership or management, is a central factor within discussions of place, space and land use (Krueckenberg, 1995) with the relationship of how the intricate factors of ownership and management are structured having a profound impact upon how a place is accessed, utilised and by whom (Figure One).

been a diverse range of publics competing for access and entry to public places. Within the Greek Agora, slaves, women and children were not permitted, yet it is often held as the utopian public place.



Adapted from Németh and Schmidt 2007; 2010

Fig. 1. Model of publicness of a place

The elements of control, ownership and management are incorporated within the social structural paradigm of property rights, with property rights providing a means of organising and asserting power (Mitchell, 2003:22). Property rights determine who is allowed to be where and when within urban places (Waldron, 1991:226). This is as the bundle of property rights delineate rights of which the respective claimant can utilise, such as the right to exclude.

The rights to exclude facilitated the fragmentation of the urban society and created an urban environment in which *'conflicts and tensions between groups are just part of life'* (Woitrin, 1979:20). Urban areas represent a paradoxical place between order and disorder, similarity and difference, instrumental use and expressive use and those with and without power and control. The impact of these social relationships will influence how a place is perceived, interpreted and utilised (or not) with the scarcity of public places (Low, 2006). It also involves the pressure that is exerted upon them by an ever increasing and heterogeneous urban population (McIntyre *et al.*, 2001) creating a situation in which conflicts about place's identity, form and use are becoming an inevitable characteristic of the 21st Century (Eggertsson, 2013).

This has facilitated the professional, academic and governance interest in urban public places with research growing rapidly during the 1990s and 2000s (Adams and Tiesdell, 2013), with it focused upon diverse components of the urban 'system'. Following the decline of industry in many important cities there was an effect on the aesthetics, form and function of urban areas. Many deteriorated urban centres began to pursue regeneration measures in an attempt to reinvent themselves (Raco, 2003:1869) with cities adopting different means of achieving this, for example through waterfront regeneration, retail-led regeneration and culture-led regeneration.

Nevertheless, with increasing acknowledgement and production of public places, a negative social phenomenon within urban public places began to be collectively recognised across the developed world. This was the *'serious decline in the quality of the public realm'* (Tibbalds, 1992:vii), one issue being the perceived erosion of publicness of the public places:

[Public places] *'are now subsumed under a broader narrative of loss that emphasises an overall decline of the public realm and public space'* (Banerjee, 2001:12).

With the loss of publicness of public places increasingly appreciated as a worldwide phenomenon, it indicated that there was, and remains, a general consensus of the fundamental need for research to help halt the escalating expression of discontent regarding our urban public places (Carmona *et al.*, 2008), abandoning the reluctant stance of academics who have largely shunned the urban environment (Grimm *et al.*, 2008) and to fulfil the aspirations of urban planning as acknowledged by Healey (2010) to involve the promotion of sustainability for the betterment of society, and not just for the few.

As core components of urban life, public places are the stage in which life is enacted out upon; *'The existence of some form of public life is a prerequisite for the development of public spaces'* (Carr et al., 1992:22). The interaction and engagement of social activities that occur within public places are fundamental to the social vitality of a society with public places interpreted as a place of civil functioning and order (Jacobs, 1961; Gehl and Gemzoe, 1996). Jacobs (1961), for example, acknowledged that everyday activities in urban places, such as streets, are essential to the vibrancy and vitality of an urban area and it is this interaction that establishes the foundation of trust between people. This also serves to demonstrate why *'The public spaces created by societies serve as a mirror of their public and private values'* (Carr *et al.*, 1992:22). Public places are a social product, a historical and cultural artefact of a specific place at a specific time, created as a reflection of the specific society's views, culture, beliefs, norms, values, history and ideals.

The acknowledgement that public places are a social product indicates that the contemporary urban problems may be influenced by changes within society. Kohn (2004), for example, identified the phenomenon of privatisation of urban space as a potential cause to the erosion of publicness of public places. Jacobs (1961) stated that there must be a clear demarcation between what constitutes as private and public places for public places to be successful. Urban areas, as defined by Madanipour (2003:1) are:

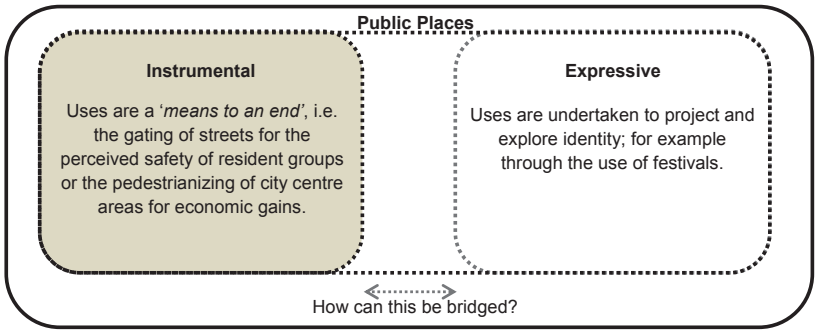
'broadly structured around a separation of public and private spaces. It appears to be a defining feature of these settlements: how a society divides its space into public and private spheres… [with the] public-private distinction having been a key organising principle, shaping the physical space of the cities and the social life of their citizens.'

Nevertheless, such demarcation is often difficult to achieve in reality due to the blurring of the boundaries between the public and private realm. The urban realm, as perceived by Gehl and Gemzoe (1996) and Jacobs (1961) is an area of spontaneous, creative playful public places that provide the stage for a mosaic of internationals to assert themselves upon (Christopherson, 1994). It is this seductive place of spontaneous encounters that urban designers attempt to deliver. The reality is, however, that the social public realm is a lot darker than the perceived dichotomy between order and disorder.

Issues may arise as society is often unwilling to embrace the latent messiness of spontaneity and have taken practical measures to create the illusion of spontaneity within urban experience in a subtle and highly ironic framework. The *'spontaneity'* that remains in public places may be a result of practical measures taken to create the illusion of spontaneity within the urban experience in a subtle and highly ironic framework, ironic in that what may appear as highly spontaneous is indeed highly controlled. Nevertheless, there may be a fine line between order and disorder due to the messy simmering of social tensions bubbling below the surface. How a place may be utilised by the ever dynamic, heterogeneous public has the potential to be very messy; not what planners, politicians and those involved with the creation and management of public places desire. They strive for the certainty of order and control. Subsequently, action has been taken to erode the uncertainty that surrounds the public and how people interact with each other. This has led to urban areas that may be perceived as being spontaneous, being highly manipulated in reality.

Control requires power, with power existing only when there are encounters between people (Jerram, 2011). Acknowledging this point contributed to the interpretation that public places have become a site of power and, subsequently, resistance and contest between those with power and those without, those who are deemed inclusive and those who are subordinately excluded, and those with property rights and those that don't (or at least perceive themselves as not having property rights). There has been the blurring of boundaries between public and private places so that most of the places shared with strangers exist within the grey area between the two with this having a detrimental impact upon a place's perceived publicness. This has led to the necessary questioning of whom is entitled to utilise public places. Is Lefebvre's (1991) perception that the *'right to the city by all'* merely a utopian ideology and not indicative of the real world? Is there the need for research to better understand the struggle between residents and local authorities as to who has the legitimate right to define, design, utilise and manage contemporary public places? These concerns have contributed to the escalating appreciation of the concept of property rights within public places.

This is expedited by concerns regarding the phenomenon of public places being utilised as arenas for art, performances and festivals. These expressive uses of places are easily identifiable and have attained a prominent position within contemporary public places due to the marketability of cities having a profound economic impact, particularly within tourism. Expressive uses, however, can delineate a sense of identity which a particular group(s) can identify with and embrace, which may simultaneously segregate another group from availing of the public place's instrumental use due to psychological boundaries arising from their inability or reluctance to affiliate with the expressed identity (Figure Two). This demonstrates the entailed complexity of achieving inclusive urban public place; a complexity that may not be deliverable due to the eclectic range of public perceptions.



Author's original work

Fig. 2. Instrumental and Expressive Uses

The ability of expressive uses to emblazon an identity upon a spatial area may either include a specific group or exclude them. There is the informal assigning of property rights upon the place; where property rights are defined as socially constructed rights to a resource which shapes peoples' use of a resource and their behaviour to each other. They are socially structured constraints that shape human interactions, comprising of a bundle of rights (Ostrom and Schlager, 1996) which formally or informally assign the use of the multiple attributes of land (Barzel, 1989). The delineation of property rights can entitle the owner the right to avail of the use of the resource, obtain income from the renting of the resource, or sell the resource and transfer the resource to new ownership (Dequech, 2006; Davy, 2012). Segeren *et al.* (2007:12) argued that property rights can then legitimately be claimed to be rules that establish *'how a person may use an object and when that use might be affect or be affected by another person'*.

Within the understanding of property rights of public places there is acknowledgement of the element of social interaction. It is this social element that makes them public, not the commonly understood element of ownership alone i.e. the state providing public places and the market providing private place. This is as private places may be provided by public bodies, as can be seen by social housing and public places may be provided by private owners as can be seen with the provision of shopping centres. Public places, even if not equitably used by all within a given social use, typically include a variety of users, and with a variety of people comes a variety of values, competing ideals and the potential for urban conflicts. Through understanding social structures like Fraser's (1990) multiple publics, it can be argued that the idea of *'the public'* can no longer be acknowledged as a homogenous grouping; if indeed it ever really was as even the Greek Agora excluded women and slaves. Different social movements have, however, demonstrated that inequalities remain for many groups within society - women, ethnic and sexual minorities - with conflicts emerging as they challenge to be incorporated within the spatial specific public. Whilst there is the potential for interactions with other members of society which enables the potential for co-consumption of public places (Webster, 2007) by a spectrum of users across society,

it does not crucially guarantee equitable consumption.

Fundamentally, this inequity of use has the latent potential to expedite into conflicts and competition, which Pejovich (1997) defines as being the result of two or more individuals or groups attempting to capture the utility or value of a resource of which only one can have. This is particularly problematic in regards to the instrumental and expressive use of place (Figure Two) particularly within heterogeneous, polarised communities, as competition for place is a major source of tension (Madanipour, 2010:119). Public places, no longer interpreted as a singular space within a homogenous society, are exacerbating socio-spatial polarisation and can be heralded as a petri dish to observe and investigate the cacophony of conflicts that are played out upon the urban canvas in attempting to attain the control and capture the value of the public place. Contemporary governance decisions have, however, pursued the goal of *'sanitising'* these places into more ordered forms. These decisions have seemingly facilitated the movement away from values of shared places for active civilians by manipulating the institution of property rights to enforce self-preserving (Sennett, 1986) homogenous semi-public places.

Privately owned public spaces are frequently criticized for diminishing the publicness of public space by restricting social interaction, constraining individual liberties, and excluding undesirable populations (Nemeth and Schmidt, 2011:5). The privatisation of the *'public'* realm has led to arguments that there has been the dissimulation of the public place which is eroding the spontaneity and the serendipity of the place. Shatkin (2008:384) has stipulated that one prominent challenge of contemporary global urban planning is the *'unprecedented privatisation of urban and regional planning'*. Through urban planning practice facilitating security agendas and neo-liberal commercial initiatives, there has effectively been the rejection of the concept of public purpose or of public benefit in favour of the interest of the commercial elites. Under such circumstances, public places have become manipulated by powerful individuals, groups and institutions who attempt to gratify their parochial interest. This can create a situation of conflicting demands upon the land; an innate issue within many elements of contemporary urban planning.

Competition for land and the rights to utilise and capture its value have expedited into conflicts (Davy, 2012) which have become particularly problematic within urban areas that comprise co-habiting polarised communities. This has led to ensuing conflicts regarding the identity, form, ownership and use of public place. The failures of previous planning thinking were seen to be its advocacy of the simplistic separation of sanitising order. Ultimately these failed. This fuelled the need for theoretical discussion on how to cater for the plurality of the modern society and their potentially incompatible interests of public places. An example of where public places embroiled in conflict attempted to have order instilled within them through separation is in the socially turbulent context of Northern Ireland with the separation most visually encapsulated through residential segregation, which in certain cases has a very physical border through the somewhat ironically titled[2] *'peace walls'*. One way of conceptually understanding the plurality of society and the outcome of the contestations that emerge within public places is through an appreciation of the insights attained from the concept of privatism.

3.0 Privatism

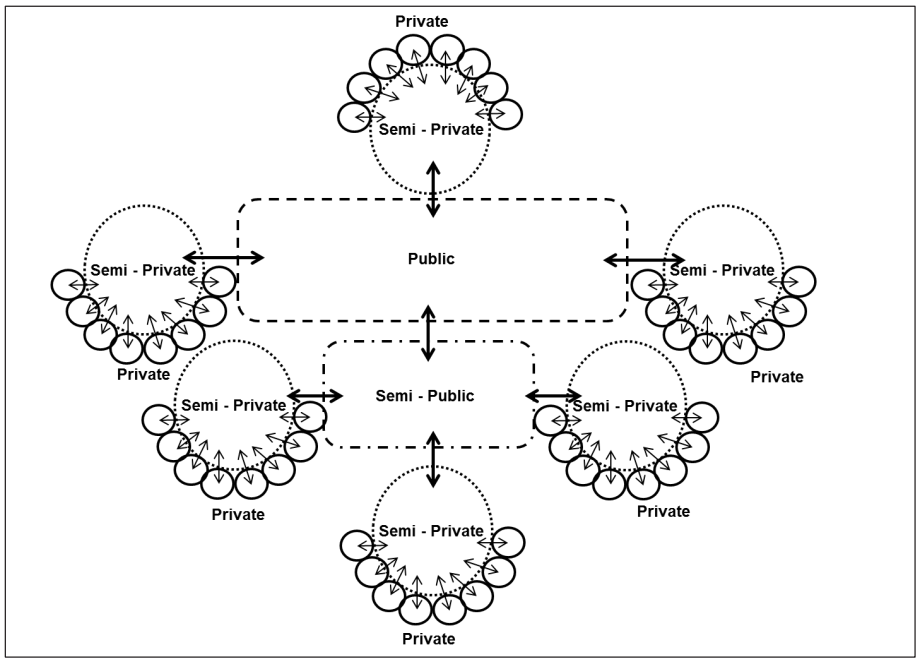
In the sociological literature, privatism is frequently understood as 'home-centeredness' (Hirt, 2012). As a result of privatism personal networks have become increasingly privatized, consisting of a dense network of interactions centered on private dwellings like individuals' homes. This is in contrast to public places which are characterised by diverse, loosely coupled interactions. Such interactions are shaped by privatism being characterised by the sacrifice of *'bridging social capital'* for *'bonding social capital'* (Putnam, 2000). Bonding social capital is formed through the interaction of tightly-knit networks of similar others, often close friends and kin. Personal communities high in this form of social capital tend to provide generalized social support (Wellman and Wortley, 1990) but they can also be repressive and tend to be racially, culturally, behaviourally, and ideologically homogeneous (McPherson *et al.*, 2001). Bridging social capital exists through access to diverse, and relatively *'weak'* social ties that provide specialised social support and access to novel information and resources (Burt, 1992). Individuals who have more bridging social capital, which can only come from participation in diverse social milieus, are more trusting and demonstrate greater social tolerance. Subsequently, it is the home-centered focus of privatism that shapes perceived publicness (Figure Three).

Areas in which privatism has occurred and there has been bonding social capital between local residents can be perceived as private in relation to who and how they are utilised by those who are beyond the social bond. There has seemingly been the encroachment of private rights over the public places that are located within close proximity to their homes.

'When public spaces are successful...they will increase opportunities to participate in communal activity...As these experiences are repeated, public spaces become vessels to carry positive communal meanings' (Carr *et al.*, 1992:344).

If there is no communal activity the publicness of the public place is perceived as being eroded. As a result there may be the creation of a spectrum of increasing publicness of public places as you move towards the urban centre, as there are not only less residents in the urban centre, but the interactions that occur in the urban centre public places are characterised by bridging social bonds. Such privatism can facilitate an increased sense of security. Through the bonding of social capital there is expectancy in how other people will behave and conform. Segregation and social boundaries into zones of comfort has become *'a zeitgeist of urban restructuring and a master narrative in the emerging built environment of the 1990s'* (Davis, 1990; 223). As such, privatism has enabled parts of the public urban fabric to become fragmented into zones of private or quasi-private interests, restricting *'the right to the city'* (Lefebvre, 1991) into a narrow landscape of an accepted public. This enables the selected public to be in a position in which they can shape *'their'* part of the city (Harvey, 2008:38).

2 Ironic as this is often the locations of the most intense outbreak of temporal violence.



Adapted from Newman, O. (2001)

Fig. 3. Spectrum of public places due to privatism

This has been facilitated by the closing, redesign and management of public parks (Low, 2000), the developments of Business Improvement Districts (Zukin, 1995) and in the suburbs there has been the construction of gated residential communities (Low, 2003).

Within Northern Ireland order has been attempted to be instilled through separation, most visually encapsulated through residential segregation as a result of ethnical engineering, security intervention or political interference (Murtagh, 2010:163-167). With the concept of publicness of public place significantly impacted by the nature of public place, use and users of the place, it is inevitable that such segregated residential patterns would instigate the phenomenon of privatism. Given the psychological boundaries and/or borders that are associated with segregation, alongside the perception of the respective place being implicitly or explicitly owned by one community, privatism has seemingly occurred in many public places. With society in Northern Ireland focused upon the private realm, given that there was no agreed consensus of what the public or civic constituted, society became more intimate, closed, and homogeneous. Such segregated residential areas have enabled the perception that the phenomenon of privatism and the encroachment of private rights over public places has occurred in Northern Ireland, and specifically in the city of Derry/Londonderry.

4.0 Derry/Londonderry: A city of *'walls'*

Whilst Belfast is the political capital of Northern Ireland and the predominant focus of research of sectarian conflict and divided societies, Derry/Londonderry has been heralded as a *'symbolic place in the history of the conflict'* (Cohen, 2007:952). Derry/Londonderry is a landscape of many narratives creating literal and symbolic walls, barricades, boundaries and borders which have only served to define the western political and social rhetoric of division that the city has endured as a consequence of the colloquially labelled *'Troubles'*[3]. Located on the north coast of Ireland (Figure Four), the city's title illustrates how deeply emotive the naming of a place can be, with Nationalists having a preference for Derry and Loyalists tending to adopt the title of Londonderry[4]. This reflects Tonge's (2002:4) assertion that many of the current political problems of Northern Ireland are colonial in nature, between the native Gael and the *'planter'*. Despite the acclaimed success of the plantation in the city (Scheitz, 2013), Derry/Londonderry illustrates the problems experienced by an urban centre in a marginal and border situation. In doing this, the city conveys the fundamental importance of its physical and its historical political situation and how it can be seen to be a dual city; two groups of people with two distinct views of history and perceptions of place.

The city holds a symbolic value for Protestants as history and identity converge in a spatial sense as a consequence of the Siege of Derry/Londonderry during the Williamite War between the Protestant William of Orange and the Catholic King James II. The city also has a special significance for Nationalists as the city symbolises the perceived second class status of Nationalists within Northern Ireland (Ruane and Todd,

3 The Troubles as accepted by the Northern Ireland Office refers to the socially turbulent period of history in Northern Ireland from the outbreak of the violence in Derry/Londonderry in 1969 until the signing of the Good Friday/Belfast Agreement in 1998.

4 It is due to the contentious nature of the city's title that the circumlocution of Derry/Londonderry has been utilised in the paper as it is widely accepted as a neutral term for the city.

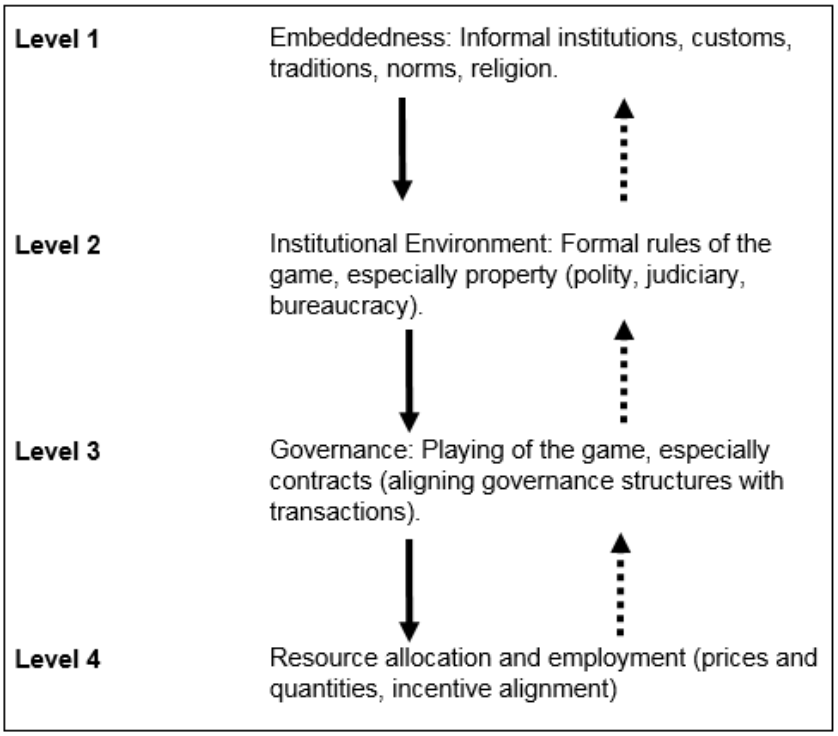
Source: clker.com

Fig. 4. Locational Map of Derry/Londonderry

1996). Despite having a majority Nationalist population, Unionists retained control of the city council as the Stormont government was accused of gerrymandering wards (Bryan *et al.*, 2007). It is within this emotive context of Derry/Londonderry that it has been alleged (Dochartaigh, 2005) that the Troubles were ignited.

Derry/Londonderry clearly illustrates the spatially divided landscape of *'us'* and *'them'* with the eastern bank of the River Foyle being mostly Protestant and the western bank being almost exclusively Catholic (Doherty, 2007) with defaced road signs, flags, political murals and painted kerbstones being some of the means in which areas have been demarcated. Such informal assertions of property rights over public places can appear to support Madanipour's (2010:1) view that public places mirror the complexity of the urban society, with a fragmented public place reflecting the fragmented society that exists in Derry/Londonderry. In order to ascertain whether such politicised public places have property rights asserted over them to appear less public and more controlled than other public places, there was the need to adopt a more holistic model of publicness that conceptualises the various dimensions acting on this concept, thereby establishing a methodological benchmark and grounding future empirical work on this subject; new institutionalism.

New institutionalism seeks to appreciate the intricate nature of relationships and action within a specific spatial location so to understand the eclectic range of factors that influence and shape the local level. New institutionalism is diverse in attempting to interpret the theory of behaviour under uncertainty (Dequech, 2006:109) by acknowledging the importance of political institutions, history and culture, present actions, thoughts and behaviours of agents to deliver a more holistic interpretation of the intricate relationships that are in constant flux within the urban environment. Subsequently, new institutionalism seeks to better determine a means of analysis of the intricate relationships that exist in the social, political and economic systems that are at play within the urban environment by acknowledging the intricate levels of Williamson's (2000) model of new institutionalism (Figure Five). With appreciation of the complex, dynamic network of social embeddedness, institutional and governance structures which profoundly influence the publicness of public places there is a move beyond the mere recognition of the institutions and structures that are provided by alternative perspectives to a narrative which seeks to explain their rationale, existence and form.



© Williamson, 2000.

Fig. 5. Williamson (2000) model of institutions

4.1 Social Embeddedness

Collective spatial gathering is evident in the present form of the city of Derry/Londonderry, due to the heavy influence of the city's history. The sense of belonging tends to be duopolistic with belonging to one place or one group, very often meaning exclusion from the other. The embedded distrust of the *'others'*, a socially turbulent past and the pro-longed conflict are visible within the urban form, urban structures and peoples' behaviour and interpretation of different public places in the city. Areas in which there are a significant number of Protestants will hold a degree of trepidation for people of a Catholic religious belief or Nationalist political belief, in much the same way that areas of a Nationalist majority will hold a degree of fear for Protestants/Loyalists. This inhibits the perceived publicness of the city's public places, with:

'Power and identity having had an impact upon the public place' (LD6).

There has been a persistent struggle over 800 years between the two communities with both communities attempting to assert their identity and establish their respective community's political ideology over place and people. The presence of such narratives shapes people, their relationships and how they relate to land. The assertion of narratives of identity and power have been met with resistance, often violently, by the *'other side'*; helping to create a situation in which Derry/Londonderry's:

'public places and city centre are contentious' (LD6).

Public places are characterised by the society in which they are in situ. Due to distrust of the *'other side'* there has been the spatialisation of identities and a desire to live within an individual's own community as there is a degree of safety attached to this. As such, the city and its public places have evolved over time as the political and social context has shifted:

'our places have been created through an evolutionary process…I suppose historically, the idea of 'their' place and 'our' place wasn't the perception, it was very much the reality' (LD7).

The withdrawal of the concept of civic places and the retreat into parochial public places in which the demographic of user was consistent gave people confidence. Segregation enabled a degree of certainty in how other people would act within a specific place as they had a degree of homogeneity; the *'public'* place felt safe. Public places in which there was the potential to engage and interact with the *'others'*, especially during the Troubles, held a degree of trepidation for many as such places often had latency for disorder. Distrust and suspicion of the *'others'* exacerbated residential segregation; having a profound impact upon the spatialisation of the population demographic in the city. There is a marked distinction between the population profile of the Nationalist Cityside and the Unionist Waterside on either side of the River Foyle physically demarcating *'our side'* from *'theirs'*:

'[People] *are introverted looking and don't want to share so become isolated and siloed so you get that ghetto-like mentality where places are welcoming if you 'kick with this foot' and if you wear this football top'* (LD8).

Whilst this can create feelings of discomfort for people who don't conform to the asserted identity and access and utilise the place, such feelings are so embedded in the people that they are almost expected and dismissed as being the norm:

'If you want to be offended, you will be offended…You know what you are going to expect, no matter where it is Londonderry, Belfast or wherever. So, I'm just saying it's a culture thing now' (LD12).

Sectarianism and segregation are both causes and effects of the Troubles. The events of the Troubles only served to reiterate the hundreds of years of division and distrust that had left people suspicious and afraid of what the *'other side'* represent. The presence of physical demarcation s influenced how people access and utilise the urban environment by enabling people to create psychological interpretations of the city of places they can and cannot go. There has been the creation of mental maps as a result of the:

'Perceptions of who owns what and who has the right to share in a particular culture and who has the right to share and understand it' (LD6).

Memories of events, stories of areas, and perceptions of the *'other community'* have left communities with a predisposed impression of what the *'other'* is like and have aggravated the mental maps of places that they can and cannot access and use. Consequently, people seem to feel threatened or intimidated upon accessing or utilising public place that has the *'others'* identity, particularly if there are symbols or emblems visible. This is as:

'The Troubles has left us with a legacy of issues in terms of where people can go and be safe in' (LD3).

Subsequently, socially embedded attitudes have an impact upon the perceived publicness of public places. Enduring sectarianism and segregation acts as a means of asserting property rights over an area for one religion or community background. With the relatively social stability that the city has endured in recent times, there has been acknowledgement that such perceptions are often misguided. There have been attempts to erode the negative perceptions attached to the two communities by cultivating dialogue and relationship building. This is hoped to modify the situation so that publicness is predominantly influenced by ease of access, as opposed to negative perceptions:

'The inhibiting factor should be proximity not perception' (LD3).

Nevertheless, given the inert characteristic of socially embedded attitudes, such perceptions are difficult to overcome:

'Sometimes perception is even worse than reality and if it takes hold there is a real challenge there to change it' (LD7).

Informal social relationships have created mental barriers to certain places for both communities. The breaking down of such mental barriers may be assisted with physical environmental changes; facilitating a change in seemingly entrenched social divisions:

'The physical enables the mental…Removal of the physical barriers and easier physical access - then they will start to breakdown the mental barriers' (LD10).

History and culture have a significant role to play in shaping contemporary society and in affecting the context of the *'game'*. The contemporary urban environment and the people who utilise and engage with it cannot be examined without an historical and cultural appreciation of how they are formed. To do so would undermine and over-simplify the layers historical memory brings to society today. In understanding the historical and cultural context of the city and socially embedded attitudes, there is evidence that both communities have a tendency to focus on the past. Nationalists romanticise the idea of Ireland prior to the British invasion and colonisation, illustrated by murals which celebrate the idea of a united island, providing the incentive in how their behaviour and relationships are structured today. Unionists sentimentalise about the times that they had a hegemonic position within Northern Ireland and the strength of the union they had with Great Britain prior to power sharing. Nonetheless, it has been expressed that despite the influence of socially embedded attitudes of sectarianism and segregation, there is the aspiration for all to move on. This is despite in being individually or collectively problematic:

'The past is the past. I think that we have to remember who was killed but we have to move on for the generations who are coming in' (LD11).

The expression of such feelings has led to the genesis of a change of attitudes in the city with there a movement away from being fixated on the social problems of the Troubles of the past, to focusing on the situation as it is today, which is predominantly economic. Places that were characterised by divisions, for many, have had such embedded feelings challenged by all publics accessing and utilising them; their boundaries or borders have become more fluid. In illustrating the *'feedback'* loop of the Williamson (2000) model, the political, governance and local level changes which have attempted to bring peace to Northern Ireland has initiated alterations in how people interpret and perceive public places. There is a view that no longer should public places be viewed as territory to be claimed by one side over another, but:

'that public places should be shared by all…I don't think that anybody should have one grab over another' (LD12).

To enable such changes in public places to occur, socially embedded attitudes for many have evolved. Within Derry/Londonderry, there has been a marked transition away from polarised positions in which:

'You couldn't have got Billy and Seamus representing both sides of the community to sit down in the middle of the Seventies and think about shared space and whether they would like a park or to increase the permeability of the two communities' (LD8).

There has been the cultivating of a *'culture of continuing conversations'* which has been established over a prolonged period of time. This has helped to remove some of the embedded prejudices and suspicions of what the 'other side' are motivated by to establish a:

'mature relationship, which you know, has been built up on over a period of years. There has been the element of trust built up where people will have had a bit of give and take and where it has been reciprocated' (LD10).

Nevertheless, there is the argument that socially embedded

attitudes haven't been overcome; they have just been muted within the public realm. Certain public places have become more mixed in terms of the demographic of the users, with physical segregation beginning to be challenged. They, however, to a degree remain psychologically segregated from each other. Within the public realm there has been the assertion, not of a true civic realm in which people use, express and represent themselves as their true selves but there has been the emergence of a seemingly accepted narrative of neutrality which will enable the public place to function. People suppress details that could give their identity away. Given the lengthy period of violence, distrust between the communities, such embedded attitudes remain:

'I can understand and there's no doubt that there would be, I suppose 'hangovers' from the past' (LD7).

The inertia or path dependence of institutions within this level causes organisational and behavioural change to occur slowly, generating a lag between changes of the formal structures and that within the embedded level. Sectarian feelings remain prevalent in how individuals and communities engage with each other and public places. Whilst such embedded attitudes are changing, some are frustrated with the degree of inertia that is attached to socially embedded attitudes:

'I'm getting increasingly frustrated as we are a couple of generations away from actually getting this sorted and resolved' (LD6).

There is a very real sense that the worst of the Troubles is over and that the city is moving, all be it slowly, towards a more stable state of affairs. The socially embedded attitudes however, ensure that sharp political and religious divisions remain and the tensions of the troubles are not far from memory. Given the ancient and modern history of the contemporary city of Derry/Londonderry and the heavily polarised embedded attitudes that communities have, it is unlikely that the city will realise *'perfect peace'*. The imperfect knowledge of why incidents occurred and the fresh grievances of the troubles compound ancient differences. The distrust that the communities have for each other has therefore remained. For many, socially embedded attitudes continue to inhibit the publicness of public places in the city. This infiltrates the various levels of the Williamson (2000) model, influencing relationships within the public places at local level where the *'game'* is played, between the governance structures that enforce the *'rules of the game'* and between institutions where the 'rules of the game' are established which has accumulatively resulted in differing perceptions of property rights being asserted over public places.

Searle (2005) acknowledged that society functions through the institutional stipulation of the *'rules of the game'*. Subsequently, the problems of public places can be seen, in essence, as institutional problems (Young, 2002:20). Following the Williamson (2000) model, the socially embedded level highlights the characteristics which have facilitated the creation of public places in the past and illustrates how the inertial characteristics are slowly beginning to develop in conjunction with evolving transformations in the inter-related tiers of the model. Whilst the physical construction of the public realm through urban design and place making has dominated the literature, socially constructed narratives that acknowledge the role of institutions have begun to acquire greater importance. North (1990) defines institutions as the socially constructed constraints that shape human interactions; setting the *'rules of the game'*. In most developed societies, political institutions, identities and structures are strengthened by the exchanging of a particular set of values from generation to generation (Denver and Hands, 1990), informed by socially embedded attitudes, with these processes of embedded socialisation infiltrating the institutional level seemingly true of Derry/Londonderry.

4.2 Institutional Level

One of the main issues, influenced by the aforementioned socially embedded attitudes, is that politics has become intertwined with the social conflict in Northern Ireland:

'It's all about resolving the power over public places and we haven't got a political system in place that has any chance of overcoming it as they are all so embroiled in it as well' (LD6).

The hegemonic political power that Unionists had in the early years of Northern Ireland, prior to the Troubles, had implications for political institutions in the city of Derry/Londonderry. Even after this hegemonic position was eroded, however, there was a perception that political institutions still were not equitable in the city:

'Even after the Unionist controlled gerrymandered council was abolished…it still wasn't addressed' (LD7).

The Troubles in Northern Ireland didn't just bring incidents of deaths and injuries, it also created the situation for great social and political upheaval. As the political system has been intertwined with the social conflict, during the Troubles, the political system failed to deliver. Political parties were interested primarily in their own community and didn't trust political representation from the other community:

'They couldn't see each other far enough. They didn't want to listen or speak to the other' (LD8).

This began to adjust after the signing of the Belfast Agreement/Good Friday Agreement (GFA) in 1998 which initiated a devolved administration in Northern Ireland and provided a framework for developing a pluralistic society in Northern Ireland. This was based on mutual recognition of opposing traditions through the adoption of a consociation model. Although it remains contested and seems to operate within a constant turmoil of tensions, the GFA is still regarded by many as providing the framework within which future generations can express their differing cultural and political identities with equivalence and confidence. The consociation model can best be understood as seeking consensus and cooperation to manage such deep social and political divisions, without attempting to dismantle them with a degree of consensus and support for consociation from all parties. Within the consociation model, however, the traditional ethno-political grounds that the parties have long embedded themselves in continues. Sinn Fein still has the aspiration of a united Ireland whilst simultaneously sharing power with the DUP who have the goal of retaining the union with Britain. Such discrepancies have profound implications within the political realm, particularly as embedded attitudes of sectarianism and distrust can often compound their ability to

function together.

As such an underlying, if not undeclared, premise of the GFA is that sectarianism remains a permanent feature of society across Northern Ireland; socially embedded attitudes have been institutionalised within the political realm which can influence the governance and local levels. This is as the parties, whilst taking part in a power sharing Executive, remain divided along community and religious lines. As such, regarding contestations over identity and power over public places, it has been asserted that:

'The leaders are helping fuel it all' (LD13).

As the Northern Ireland Executive remains a relatively new institution there has been claims that it offers:

'No grown up leadership, we are still at kindergarten level' (LD6).

This has left many people claiming that the issues of power, culture and identity and the contestation of these in the public realm are instigated by political disputes. Such frustrations can be aggravated as politicians have the potential to aggravate issues for their own or party interest. Ruane and Todd (2004) acknowledged that such *'ethno political entrepreneurs'* can manipulate public opinion for their own ends particularly during the run-up to elections. This is readily acknowledged within the interviews:

'I am sorry to say that a lot of politicians play to the gallery and do play for the vote. There are a number of things that they wouldn't bring up if the election wasn't on. There are some things that are green and they try to make them greener…and the same is done on our side' (LD12).

The institutions that establish the *'rules of the game'* have been interpreted as manipulating socially embedded prejudices to attain votes. This is important to note, as political parties on their own have no mandate, deriving from being democratically elected by the people of Northern Ireland. As such, parties are very often accused of playing to the extremists on both sides which can motivate voters to come out and participate with democracy. This appears to have led to *'tit for tat'* political discussions in which one political party accuses their rival party from across the community divide as being the reason for no or slow progress:

'Unionists don't want to engage so at this particular time it seems that Unionists will only engage when they are absolutely forced to engage and even then it's in a minimalist way…they are still quite negative in trying to fight the past and the present' (LD4).

The consociation model has institutionalised politics in which there can be no situation in which there is a party for all. This institutional division has been reflected within the public realm with functional *'civic'* places with expressions when people can represent their true selves largely being restricted to when they are within *'their'* own area. Others have contended however, that the power sharing model has created a more representative political system that has largely eroded the feelings of social inequality. People are largely perceived to be equal and such advances in the social relationships in the political realm have created the potential for compromises within the public realm:

'I think that we are in a much better place than we were say ten or fifteen years ago and our politicians are much more open…so we can have these discussions and have the accommodations' (LD10).

This progressive approach has had a profound impact upon the people and city of Derry/Londonderry. The annual Apprentice Boys of Derry[5] parades have recently occurred in the city centre on the Nationalist Cityside with little or no violence. This is in stark contrast to the violence that surrounded the parades during the Troubles. There is now recognition of the importance of working together, even if tensions remain institutionally and socially embedded:

'In taking this collective approach we deliver' (LD7).

It should be acknowledged, however, that the socially embedded attitudes are inertial; they take a long time to be transformed. As these are embedded in people at the local level, governance and institutional structures in addition to the issue that political discourses are historical constructs and therefore vulnerable to shifting political and social forces, it has been expressed regarding peace that:

'I think that politics and the people hold it back' (LD8).

Despite this, the political institutions determining the *'rules of the game'* in Derry/Londonderry have been held as an exemplar for the rest of Northern Ireland, with the city:

'looked upon as a model of how things should be worked out and as to how relationships can be built over the years.' (LD13).

Contemporary practices of public realm provision (Kohn, 2004; Minton, 2009) demonstrate that through the delineation of property rights there is the potential to instil a sense of security and safety. Property rights increase the knowledge and understanding of each individual and group's behaviour and expectations of behaviour upon accessing and utilising the public realm. In Derry/Londonderry there has been the ability to increase the knowledge and understanding of individual and group behaviour as there has been the cultivating of a *'culture of conversations'* (LD8). With society functioning through the institutional stipulation of the *'rules of the game'* (Searle, 2005) the problems of public places can be seen, in essence, as institutional problems (Young, 2002:20). By getting the 'rules of the game' right, there is the ability to establish the optimum situation for the public realm.

4.3 Governance Level

The governance level is concerned with the enforcing of the *'rules of the game'*. Enforcement of the *'rules of the game'* in Derry/Londonderry during the early years of the state of Northern Ireland was heavily influenced by the institutional and socially embedded levels. Unionists enjoyed a political hegemony and socially embedded attitudes of distrust and suspicion contributed to the rules of the game, favouring Unionist agendas in the city. The creation and enforcement of inequitable rules of the game contributed to some asserting that:

'The public places were poorly managed' (LD7).

Governance structures enforced the rules of separation and

5 A Protestant/Unionist marching institution that commemorates the closing of the city gates of Derry/Londonderry during the siege.

distrust of the other community by facilitating segregation. Subsequently, planning, as a governance structure, was influenced by these attitudes and used as a tool for separation. With sectarianism and segregation being instigated by socially embedded informal cues and institutionalised by formal rules, governance structures began to apply societal division:

'We have clearly identified our segregated positions within our polarised society with housing which leads to our schools following and becoming part and parcel of this segregation as well... there is an air of exclusion from a specific area for a lot of people' (LD13).

The physical division of the two prominent communities was an attempt to create order by minimising the latent potential for conflict and disorder that could be instigated by both sides. Governance structures, however, have been criticised by some of the means in which they attempted to instil 'order' in the city, most emotively demonstrated by the events of Bloody Sunday:

'If you use violence then you get violence... Police using violence - it was inevitable there would be a spark lit with this spreading across Northern Ireland' (LD7).

This demonstrates that the decisions taken in Derry/Londonderry have had implications across Northern Ireland as it is an emotive site for both communities and demonstrates the ability for governance level actions to influence agency at the local level. The signing of the GFA, however, instigated changes in socially embedded attitudes and institutional structures, having a profound impact upon how the 'rules of the game' have been enforced. There has been an acknowledgement of the enforcing of the rules of the game to be conducted in a manner that is:

'coming at it from a spirit of compromise, consensus and conciliation' (LD10).

As the political and social climate has changed, so have the rules of the game. As community relations have improved, there has been a reduced need to focus on enforcing security agendas, to focus on shared interests of economic development. This shift was thought to have been facilitated by:

'a lot of collaborative work that was set at driving the tourism context' (LD6).

In the past, governance structures would have been unable, and potentially unwilling, to acknowledge shared agendas due to the divisions at the higher levels of the schematic Williamson (2000) model. The culture of conversations that was initiated with advances in embedded attitudes and the institutional level has left the city in an enviable position in Northern Ireland as conflict has been minimised through the development of more respectful and transparent governance structures:

'they have been way ahead of the game in all of these...Two distinct cultures and traditions can co-exist and how do you do that? You do that by just respecting each other and getting on in a non-threating manner. I think this city took that approach, to respect all views and respect all cultures and all traditions and recognise that there are a number of cultures and traditions in this city and of course afford people the right to express their culture, express their identity but as long as it is done in a non-threatening manner and in consultation with the wider city' (LD7).

Whilst it may be heralded as being the optimum result for the entire population of Derry/Londonderry, the conversations and relationship building was not an easy task. There was the need to utilise a neutral mediator to overcome institutional division and embedded distrust:

'there was a couple of key business people that I think played an invaluable role in it in terms of being the honest brokers in terms of speaking to the parties; because sometimes you know that with two polar opposites it can be difficult to organise a conversation, whereas if someone who is maybe recognised by the two polar opposites as being an independent broker can give them a collective sense of purpose' (LD7).

As a result, community relations to a large extent have improved within the city. During the marching season when tensions would traditionally have been high, attitudes have somewhat changed:

'People seem to be taking steps to if not respect each other, to at least tolerate each other' (LD5).

Inevitably, governance structures have evolved with transformations in the socially embedded and institutional levels. As the context of the game and the rules of the game have evolved it is inevitable that this has had an impact upon how the rules have been enforced. As the higher schematic levels have become more representative of the population and shared physically, if not psychologically, then the governance level would respond. There has been a marked shift from the securitisation of public places to an attempt to make them more shared. Whilst some barriers and boundaries remain, the erosion of others has had a profound impact upon the publicness of the market level, the public places of the city.

4.4 Market level – the public place

It is at this micro-level in which the public place operates. As such, at this level the 'playing of the game' or the agency of the agents are studied, having been shaped by the governance structures adopted in response to the influence of the informal and formal institutions alongside the cultural and religious norms of the social embedded level. At this scale people live their lives and share their experiences. This not only shapes the social relationships within the urban environment but will in turn shape actions and use of the built environment and its public places. Within the city there is an appreciation that public places are an arena in which many publics and citizens interact:

'Public places are where you would encounter publics, being places through which they move, congregate and spend time either individually or collectively with public, I guess, being the opposite of private…I think I would also use the term 'citizens', all be it that citizens tend to be associated with a place…so the public is made up of citizens. The public then by inference has rights, but citizens also then have responsibilities' (LD2).

The acknowledgement of rights being affiliated with responsibilities is an important consideration. There has been an acceptance of the need to recognise people's right to assert their identity be it through parades or protests. This has been accompanied by an identification that with rights come res-

ponsibilities to respect and tolerate other views:

'I think it is very important for cities to have places which are free from being aligned to a political position of people…you can't have one particular viewpoint being espoused at one particular place as that in turn makes the area unwelcoming to other sections of the public.' (LD3).

Nevertheless, the initial accord made by the political leaderships has not been fully reflected at the community level, which remains in many parts divided. Further, an underlying, if not undeclared, premise of the GFA is that sectarianism is to remain a permanent feature of Northern Irish society. The GFA may be understood as a consensus about how cooperation can manage such deep social and political divisions, not dismantle them. The inability for the institutional level to change the rules of the game, instead merely altering them, has meant that perceptions towards some public places have remained unchanged:

'Nationalists from the Bogside are more than likely to feel uncomfortable in Waterside areas such as Irish Street, Clooney and Lincoln Court and the same for Protestants from the Waterside area who will feel uncomfortable around the Bogside, Creggan Estates and Rosemount areas which are recognised as being Roman Catholic, Nationalist or Republican areas' (LD13).

The market level presence of a demographically mixed and polarised population helps maintain the psychological and physical divisions with incidents of political violence and community tensions fortifying these trends and patterns of social division (Darby, 1997). The physical demarcation of segregated public places reiterates socially embedded attitudes:

'Religion and sectarianism is still an issue in the North. There is for some people, and caused by some people, an actual real physical danger of going into a specific area as the reality is that these sectarian feelings still do exist and will influence who will go into an area or place' (LD11).

Such perceptions are shaped by explicit and implicit assertions of identity which influences the dual meaning of not just what identity *'owns'* a place, but also informs which identity isn't welcome. Many of the interviewees saw a distinction between public places that were surrounded by residential properties and the public places within the city centre. Residential properties are privately owned, or privately utilised if properties are publically provided, with this private element seeming to encompass surrounding public places:

'There are areas that are not shared. There are areas that are clearly marked territory and that is evident with housing with the result being that there are parts of the city in which people feel like they are not welcome' (LD13).

The potential for such residential areas to be shared spaces has been inhibited by the presence of physical borders, in addition to psychological and embedded cues. Such physical borders, like peace walls, were intended to separate communities and facilitate public order. Yet, many contend such governance and institutional responses as they were thought to exacerbate local level tensions and distrust:

'Peace wall - if ever there was a word that just didn't sit right…we become isolated and siloed…you get this patchwork of you can go there and can't go there in a city' (LD8).

Due to the spatialisation of the population and natural partition provided by the River Foyle, segregation of the city is clearly physically demarcated. In response to this residential segregation, it has been expressed that there is a need to question whether such segregation is a negative thing:

'The Bogside, Tullyally, the Fountain can never be neutral areas and you can't force them to be. An area is what it is and it isn't wrong. You can't say that the Bogside is wrong because it's virtually all; the majority of the people who live here are nationalist or Republican. You can't say that the Fountain is wrong as basically everyone that lives there are Unionist or Loyalist' (LD11).

Notably, the market level (Williamson, 2000) has the ability to influence the higher schematic levels by incrementally influencing change. Accordingly, when the community is ready to have increased publicness within the public places that are in or within close proximity to their residential areas, then they will instigate the change. Whilst this is evident in some parts of the city, it hasn't been the case in others. It should be recognised however, that the agency of the market level within an area does not just have the ability to incrementally influence the higher schematic levels of the Williamson (2000) model. Due to the deeply embedded religious and political connections that exist between communities across Northern Ireland, they also have the ability to influence all levels of the Williamson model in other areas:

'In Northern Ireland when other parts become involved in sectarianism and it is acted out, probably in the streets of Belfast, it does have an impact here…it's not just what is happening here with the public, it is what is happening elsewhere and the perceptions that derive from them events' (LD6).

The evolution of publicness within public places in the city of Derry/Londonderry was therefore influenced by events that occurred in other parts of Northern Ireland:

'Incidents like Bombay Street and it getting burnt out, the tension and sectarianism that were occurring in Belfast had an impact back in the city. This led to people in the city moving as they wanted to be in their own comfort zones rather than potential intimidation…The situation in Belfast exacerbated what happened in the city' (LD13).

This exacerbated the residential segregation within the city of Derry/Londonderry. Yet, events that occurred within economic public places of the city centre also influenced the publicness of public places beyond the city, with it stated that events in the city:

'led to the whole issue regarding parades and protests. Derry was the setting of the flame for the problems throughout the country' (LD13).

Contestation over the rights to parade and opposition to the parades was highly emotive, resulting in significant civil disorder and damage to property and businesses. The economic implications of such incidents motivated the Chamber of Commerce, amongst others, to cultivate conversations in an attempt to negotiate some form of compromise. The agency of local people at local levels, facilitated and abetted by institutional and governance structures instigated such changes within the city. There is the belief that for local change to occur, and for publicness to improve, then it must be driven

by local people:

'There is no white knight coming to save us. It's just not happening and we have sat for years and years waiting for someone to do that and that time has changed. The 'City of Culture' has shown us as a people what we can do and what we can deliver and given us the confidence to say you know what; we can do this for ourselves' (LD10).

Such action and positive outcomes, enabled by a more inclusive and open dialogue, has assisted people in taking deliberate steps to respect one another. It is hoped now that Derry/Londonderry can play a role in helping to find some forms of compromise within parading disputes across Northern Ireland as:

'The city has now become looked upon as a model of how things should be worked out and as to how relationships can be built over the years' (LD13).

The agency of the local level, facilitated by governance and institutional level sponsors has enabled certain public places to become more civic in relation to its use and user. In contrast though, public places (particularly those within or in close proximity to residential areas) continue to have an assertion of identity and ownership delineated over them. This has created a mosaic of public places in the city with differing perceptions as to their respective level of publicness:

'There are perceptions of who owns what and who has the right to share in a particular culture and who has the right to share and understand it' (LD 7).

This is demonstrated by psychological maps of the perceived assertion of private property rights over public places (Figure Six).

Whilst there is the acknowledgement that there have been significant advances within the publicness of public places in the city many challenges remain with the delineation of ownership over an area, demarcated by flags and murals. To tackle such challenges requires leadership from each of the bottom three levels of the Williamson model of New Institutionalism if the socially embedded practice of sectarianism and segregation that characterise public places in the city are to be tackled.

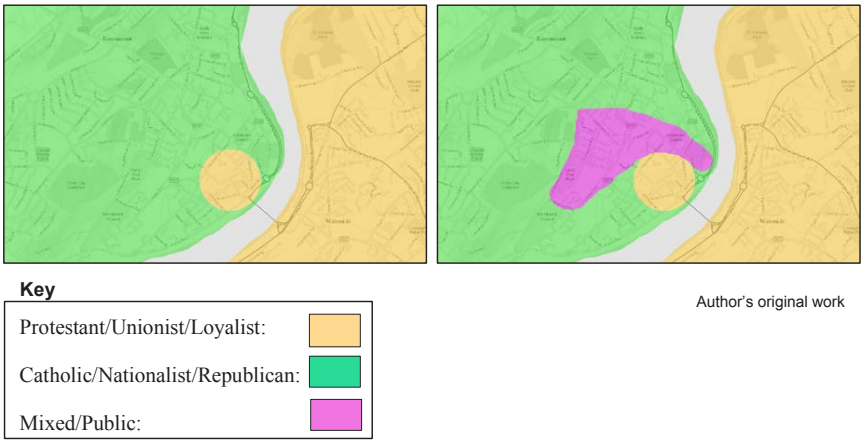


Fig. 6. Psychological maps of the publicness of public places in Derry/Londonderry

5.0 Conclusion

The research indicates that the distinction between public places and private space has become less clear, with the creation of 'private public spaces'. Such places blur the lines between public management and public use with elements of seemingly private management and private use. Body-Gendrot *et al.* (2008:1) state that the questionable distinction between public policy and private interest has redefined the contours of public places in urban areas. This is thought to have confined public social life to 'certain locations, certain hours and certain categories of 'acceptable' activities' (Gehl, 1989:8).

The places and spaces in the city of Derry/Londonderry are a socially constructed spatial mosaic of publicness. Shaped by socially embedded attitudes, institutional and governance structures and the agency of the 'market' level, public places have evolved with differing perceptions as to the publicness of specific public places. Some places act as an iconic place for remembering, contestation and resistance like the Bogside and walls. Other places resemble how the past can be changed to improve things for people there today, demonstrated by Ebrington with the military space becoming a celebrated utilised public place.

The city isn't blinded by its turbulent past but is reminded and focused on its spatially shared present; demonstrated by the complimentary nature of public places in the city. There are nationalist spaces, unionist spaces and shared spaces and whilst physical borders and psychological boundaries persist, they have become more fluid. There is no singular place for all the people, but there are public places for all the publics; demonstrated with the nationalist Bogside and Unionist Waterside and Fountain area and the largely civic place of the

Guildhall and the Walls. Whilst for a minority of people these public places remain affiliated with Unionism due to their colonial history, education and shared use have largely eroded this colonial history for many so that they aren't perceived as being solely for the use of one community.

Nevertheless, under the thin veil of peaceful sophistication which has taken time, money and great effort to deliver, the truth is that political polarisation and social unease persist within many public places in Derry/Londonderry. Through the rejuvenation of public places with public art, headline music festivals and light projects that embellish tourist brochures and enhance the marketability of the city, has there merely been what Neill (1995) refers to as the application of *'lipstick on a gorilla'*? The 'monster' behind the segregation of public places may not have been addressed, omitted by fear of opening wounds and aggravating socially embedded attitudes of distrust and hatred. Within the duopolistic society of Northern Ireland there has been the need in many situations to acknowledge and open up potential divisive feelings to enable the removing of the anchor certain issues has upon one or both communities. The dissipation of resources in public art schemes and festivals may temporarily paper over the cracks of social division; they do not solve the embedded problems that underpin the division. Subsequently, the publicness of public places in the city are as dynamic as the society in which they are in situ, both being temporally and spatially specific.

Echoing the quote at the very beginning of the paper George Orwell (1950:37) is quoted as having said *'Whoever controls the past controls the future. Whoever controls the present controls the past'*. This is demonstrated by the findings of the Derry/Londonderry case study where divisions can be considered historical artefacts that remain physically in places and psychologically in people today.

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Disregarding the land is not just one theoretical choice among others; it emerges as a feature of the ideology of neoliberal society.

Raewyn Connell

Local indigenous communities and oil industry

Property rights of local indigenous communities and oil industries through lenses of environmental justice

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Abstract

This paper looks into the practices of oil industries and their effects on land and people living in these environments. The land belonging for centuries to these communities is being irreversibly changed and devastated. Not only the land, but also their lives are altered and changed forever as usually they are appropriated by force.

The paper is looking at the issue through the lenses of environmental justice as a concept which deals with unfair distribution of environmental risks and attempts to prevent environmental injustices.

This paper is based on the research utilizing case study approach, taking a look at three particular examples of oil exploitation and what are the impacts of this industry there. Principal focus is on issue of land ownership and rights to the land and how the oil companies and state governments approach this issue. The cases are studied through analyzing policy documents and official reports and papers of international NGOs and academics.

The first case study is from Central Africa and studies the project of Chad-Cameroon pipeline project. In order to ensure enforcement of human laws and to protect the environment, the World Bank was included in the project. The focus of this study is on local indigenous community of Bagyeli which should have been modernized during the period of this project, but the result was impoverishment and considerable decrease in quality of life.

The second case is from Niger Delta region. This area is oil extraction site since 1958 and unlike the first case, it depicts long-term effects of oil extraction. Indigenous community of Ogoni is observed and what were the effects on their land and life during this long period.

Last case study describes the vast area of Arctic North which is cursed by being rich in gas, oil and precious metals. The heaviest damage of environment took place in period of 1950s-1970s, but the effects are visible until today and are likely to continue in the future. Study regards the indigenous communities living here and mostly socio-economic impacts of oil industry on them during longer period of time, especially the aftermath of exploitation.

The paper aims at discussing the internalization of environmental externalities by their producers and other responsible parties (for example nation states who authorize the development), specifically how these externalities are treated in distant parts of countries which are inhabited by local indigenous communities. It is demonstrated by case of oil industry companies entering these distant locations with blessing of nation states (or directly national companies) and their practices of how they compensate the damage they create to the environment and to the inhabitants of these locations. Environmental justice is used as a tool to look at distribution of risks during the oil extraction processes and provides a solid framework for analyzing the impacts of oil companies on local communities.

The expected outcome of the paper is increased awareness about the impact of oil on the area it is extracted from and argues that it is an issue for politicians and planners, too. Another outcome is a discussion about the policy recommendations for decision makers on global level. The power of international NGOs is high and they can influence how oil companies behave. Indigenous communities have to be regarded not only as minorities, but their unique status has to be recognized and their rights have to be enforced.

Introduction

We truly are currently living in the age of oil. Fossil fuels account for 85% of energy in the world (Klare, 2008) and oil itself for 35% (Salter & Ford, 1999). In does not matter whether we are at, before or beyond the peak oil (a point in which maximum extraction of oil is reached (Hirsch, 2005)), it is more than clear that the world's oil reserves are decreasing (in spite of the new technological methods of oil extraction such as fracking, the reserves are not unlimited) and the road down the Hubbert's curve will be difficult (Martinez-Alier & Temper, 2007) and to access the remaining reserves the oil companies will have to be explored in more inhospitable and remote locations. The first oil was found in Pennsylvania in the United States in 1850s (Yergin, 1993) and during its more than 150 year long history it became the central element of western and later global development, "the single most controversial and influential commodity in the world" (O'Rourke & Connolly, 2007:26). This paper is going to look into the practices of oil industries when entering these distant territories, particularly the way the indigenous communities are treated during the process of the upstream phase of oil refining - exploration, exploitation, refining and transport.

The positives of oil and the derived products are numerous, other than transportation or heating there are more than 2000 other end products we use in our lives and it was also the first trillion dollar industry on Earth (O'Rourke & Connolly, 2007). On the other hand, oil is in the center of the most disturbing health, social and environmental problems of today (ibid.). These can be obvious, such as pollution in contemporary cities, mostly in cities of Global South, but also more subtle and not so obvious, in form of a wide range of climate change implications or health difficulties connected closely to oil products and their use.

However, using the end products is one thing, but the phases before we get our hands on these products is rather black-boxed and little is known about what it takes to get gas for our cars or how we can heat our homes. People imagine oil wells and tall oil towers, but very few of us can imagine either what this processes require or how these procedures impact the landscapes and people living in them. The paper is looking into these processes and how the people living in and around these sites are affected and treated from the side of oil companies and national governments who allow these processes to take place. It is not a black-and-white issue, it is impossible to say if it is good or bad, because the process on the one hand cannot be stopped or on the other hand that everything that is going on is ill-suited. The purpose of this paper is to raise awareness of these issues and provide analytical lenses for looking at them critically and hopefully slowly improve the status quo of affected communities. In doing so, authors use the concept of environmental justice and look into property rights and how these affect oil industry practices.

The study is based on literature review of environmental justice, its history and core points, trying to put the concept of environmental justice into debate of oil industry practices in third world locations and in indigenous communities, and looking at them through the lenses of property rights. The argument is that one of the core issues of environmental injustices lays in unclear ownership rights and their insufficient enforcement and their disobedience and neglecting. Then the paper moves to exploring three cases studies from various parts of the world. This research is based on the research of available scientific literature. Each case is briefly introduced and the focus is on the practices the oil industry companies have in those locations. The final part is a discussion of what was going on in the examined sites and how came to the environmental injustices and paper concludes by a number of ways forward to challenge the status quo. As the paper is desk research based, it also outlines some ideas for potential future research.

Impacts of oil exploration

There are various social and environmental implications of the oil exploration. First of all, it is potentially vastly invasive to the ecosystems and causes harms to health of humans and animals as well. The alternation of the physical environment during the upstream phase is often greater than the destruction caused by larger oil spill (O'Rourke & Connolly, 2007). These changes to environment include "deforestation, ecosystem destruction, chemical contamination of land and water, long-term harm to animal populations" (O'Rourke & Connolly, 2007:8). According to the same authors, the impacts on human health are visible on local and wider scale and involve potential exposure to radioactive materials, toxic materials, chemicals, vibrations and noise. The landscapes are often considerably changed and the implications of oil production last for decades or more. Generally speaking, the ecosystems end up changed and the industrial production impacts the existing flora and fauna there (depending on location, for example in areas with extreme conditions with no flora, the impacts are on local fauna) while compensation for these changes are little and sometimes non-existent.

The social impacts on indigenous communities are harsh and the whole features of the people's lives are often irretrievably altered. Indigenous groups of people living in these sites for centuries are unique in many ways and their distinctive status is often overlooked. In many cases, their first contact with outer world is through the oil industry companies. These companies often have insufficient understanding of this and in some cases they simply care very little. These interactions are known as the *process of acculturation* (Swing et al, 2012) and are characterized by the mixing of clothing, housing or diet as well as bring new phenomena such as the idea of remoteness or poverty that were unknown within the indigenous communities. These people before lived isolated, but now are presented to a whole new world and their way of life and values are in question. These large scale impacts form a particular problem of environmental justice, which is connected to environmental externalities. These are hard to measure and even more difficult to include into the budgets and overall costs of industrial production and, moreover, the willingness of large companies to include these externalities is even lower. Later in this paper these clashes of civilizations are described on case studies from different parts of the world.

However, there is also another side of the coin, for instance when looking at people who can potentially benefit from the-

se developments, such as those who get jobs and who move there. There are risks for these people, too. In Caribbean area we could have witnessed in 2009 massive fire and explosion of petroleum tank on the coast in Bayamon, Puerto Rico, resulting in damage to 17 of 48 petroleum storage tanks. According to report published by the U.S. Chemical Safety and Hazard Investigation Board (2015), the petroleum products leaked into soil, nearby wetlands and waterways in the surrounding area. This led to damage of 300 homes and businesses up to 1.25 miles from the accident and it resulted in an emergency declaration for assistance from President Obama for impacted municipalities. This illustrates the utmost risks oil industry sites bring not only to actual industrial sites, but to its relatively large surroundings.

Environmental justice

Due to the number of dimensions that the environmental justice contains it is difficult to settle on a single definition. The following section attempts to outline the basic notions of the concept and a short history of the environmental justice movement.

The idea behind the environmental justice movement is to prevent and to resolve environmental injustices. Bullard and Johnson (2000) see environmental justice as the fair treatment and meaningful involvement of all people regardless of their race, color, national origin or income with respect to the development. One of important dimensions of the environmental injustice is the fair/unfair distribution of environmental risks (Ikporukpo, 2004). In other words, the aim is to avoid the environmental externalities being treated separately from the benefits e.g. pollutions located in poor neighborhoods so that the affluent users of society's assets are free from the pollution created in order to produce these goods. Environmental justice is composed of two main elements, the civil rights and ecological sustainability (Tsosie, 2007). It is often perceived as a human rights issue of equal access to society's natural resources and quality of environment too. It brings the focus of environmentalism back on humans (ibid.) as opposed to the traditional activism favoring the natural world – known as environmental fascism or misanthropic biocentrism (Shrader-Frechette, 2002).

However, what needs to be emphasized is that definition comes from the United States and their conditions, in which the environmental justice movement had developed as a response to people living in unsafe and dangerous environments. In the United States, the focus of environmental justice had been on parts of the cities which were exposed to environmental externalities and people who could afford it, left these districts. This rendered the exposed districts inhabited by mostly poor families who did not have an opportunity to relocate to healthier neighborhoods and it led to segregation and more importantly not solving the issue of environmental conditions in their living areas. In many cases, people of color or of low income have been suffering from externalizing environmental dangers to their neighborhoods, however, in case of oil industry sites and indigenous communities the situation is different. Indigenous communities inhabit distant locations, previously untouched by developed society formed in the national capitals and other industrialized parts of countries, and then they are approached by nation states and oil companies who come there to drill for oil or for other oil-related activity. The problem is that up until introducing the oil industry works, they were let alone and neglected and after the works began, their living conditions diminished and they obtained little compensations for it. Bullard and Johnson's (2000) definition also encompasses involvement of people in decision making, but in these cases the involvement is very little to none.

In comparison to earlier compensation ideas of 'polluter pays' the concept of environmental justice emphasizes "incommensurability of values" (Martinez-Alier, 2003:56) because such approach demonstrates that the destroyed environment can be financially redeemed. In the past, sectors such as the oil industry were operating in parts of the world where the economy is put above the value of environment or human life (Martinez-Alier, 2003) and environmental justice provides a framework to eliminate such practices. In these locations, local communities have little instruments to protect themselves as often national governments are engaged in maximizing profits from oil production.

The roots of the environmental justice movement are in the United States in 1980s. The document that began the journey to end the environmental injustices was a report produced in 1987 by The United Christ Church Commission for Racial Justice (Shrader-Frechette, 2002). The document provides the evidence of disproportionate deployment of toxic hazard waste sites – locally unwanted land uses - in regards to city layout and the low-income, ethnic and racial – mostly African-American, Latino and Native-American – communities that are bearing unreasonably higher environmental risks in comparison with more affluent parts of the city. In October 1991, in Washington D.C. the First National People of Color Environmental Leadership Summit took place and the declaration '17 principles of environmental justice' was agreed to (O'Rourke & Connolly, 2007). This document served as a background to the development on the movement in the United States and gradually across the world and encouraged many small groups of activists to enforce their rights. In February1994, Clinton's Executive Order passed according to which "all federal agencies must identify and address disproportionately high and adverse health or environmental effects of their policies and activities" (Martinez-Alier, 2003:53) – notice a similarity to Strategic Environmental Assessment Protocol agreed by the EU in 2003, almost 10 years later. These were the two victories of environmental justice movement, however, only in the United States. Bullard sees the potential for these ideas all over the world as injustices like these occur everywhere and even small well-organized groups can relate their struggles to issues of civil and human rights, land rights and sovereignty, cultural survival, racial and social justice, and sustainable development (1993). This development took place mostly in the United States, but it soon found fertile ground in Latin America and further.

Shrader-Frechette builds the idea of environmental justice on Rawls' definition that justice entails "providing a standard by means of which society can assess the 'distributive aspects' of its basic structure" (2002:24). Distributive aspects here signify that technologies as well as risks of the society are fairly and

equally deployed. This means that justice is not in just distribution of benefits, but also the costs and these both need to be shared more equally. Costs here do not entail just financial costs, but also social and environmental costs.

Exploitation of the natural resources is in many cases divided from territorial sovereignty. Hofrichter perceives the exploitation of the resources in poor countries by developed nations as a form of "new colonialism" (2002:3). Many countries which are being exploited in this way have in common so-called 'resource curse' - countries with weak central governments such as Algeria or Nigeria are not prepared for large incomes from the industry and therefore result in further centralization and bureaucratization rather than investing into sustainable development for their future (Karl, 1997). For society it means social disharmony and large impacts on environment (Stammler & Wilson, 2006) and this way they are entering and being locked in vicious circle from which it is extremely difficult to go out.

Ensuring environmental justice in the developing countries is also a challenge for developed countries based on the ideas of democracy. Considering the notion of having the justice and the government that people deserve, developed countries have the duty to ensure that poorer nations achieve these assets as well (Shrader-Frechette, 2002). Another point of view on democracy in regards to environmental justice is the notion of protecting the rights of minorities, in this case indigenous groups, which are usually in very small percentages within the countries. Minorities can easily be neglected of their rights for clean environment as they are marginal in terms of number of people and their political power and therefore are easy target for environmental externalities to be deployed on them and environmental justice puts focus on their rights irrespective of their occurrence in society. They are part of nation and their rights need to be protected.

Property rights

Environmental justice is closely related to property rights, particularly to collective property rights and their infringement and non-recognizing collective rights to natural resources resulting in environmental injustices. Property and ownership rights are societal instruments to help with transactions and exchange of goods. It is a bundle of rights attached to physical property or service, but what determines the value of what is exchanged is the value of rights (Demsetz, 2002). Owning these rights grants the owner the consent of others to allow him to act in certain ways and he expects the society to prevent others from interfering with these rights and actions.

Therefore the primary function of ownership rights is to guide incentives to achieve a greater internalization of externalities (Demsetz, 2002). Costs or benefits associated with social interdependencies are externalities. Allowing transactions between parties increases the degree to which internalization takes place. This is the core issue at heart of environmental justice movement. In the cases below it is possible to see that these rights are often not granted to indigenous groups and they bear the significant portion of environmental and social externalities. Pigou (1920) perceives environmental problems as externalities between agents for which no price is paid or compensation is obtained. Based on the premise that one of the main functions of property rights is the internalization of both beneficial and harmful externalities, their emergence is associated with issue of environmental justice.

What seems to be a problem in analyzing property rights in developing countries is the western view of these rights among scholars. The system of property rights found in western economies is a product of many years of economic and legal changes (North, 1981) and oftentimes similar system is presumed to be world-wide (Feder & Feeny, 1999).

There are several types of property rights and the differentiation can be based on several criteria. From the scale point of view, Demsetz (2002) distinguishes private ownership, community ownership and state ownership. Society recognizes private ownership as a right to exclude others from exercising one's private rights. In case of community ownership, all members of community exercise property right, for example over particular energy source. State ownership is a case of ownership in which state meaning national government owns property rights and consequent rights to manage and decide about the property. In analysis provided below, we will see that all the types of ownership are interrelated and have particular implications for specific situations.

Very close and crucially important for property rights are institutions as these developed in order to reduce uncertainty and increase efficiency in credit and in land markets (Feder & Feeny, 1999) and also enforcement of these rights. These institutions are crucial to developing countries and as we will see also in issue of environmental justice in case of oil production in these countries. There are three basic types of institutions which have impact on property right. These are constitutional order, institutional arrangements and normative behavioral codes (Feder & Feeny, 1999). Constitutional order means fundamental rules about society organization and meta-rules (rules of making rules). Institutional arrangements include laws, regulations and also property rights. These are created based on constitutional order rules. Institutional arrangements include mechanisms for defining and enforcing property rights, comprising of both formal procedures and the social customs concerning the legitimacy and recognition of property rights (Taylor, 1988). Paavola (2007) additionally suggests that institutions have the power to resolve conflicts over environmental resources and the choice of the institutions is a matter of social justice. Social justice as the objective of institutions is rather broader and more complex than economic winners and losers (Paavola, 2007). However, this holds true when these institutions are legitimate and their conduct is in line with doing the good for their citizens, which, as we will see, can be sometimes skewed in favor of hidden financial and power relations. Normative behavioral codes are cultural values and traditions and these in particular differ from western traditional views.

Case study 1: The Chad-Cameroon project

The first case study is from the Central Africa. In June 2000 the project of Chad-Cameroon Pipeline Project was approved by World's Bank Group (WBG). It is so far the biggest development project in Africa with project costs of $4.2 billion that aimed to break the aforementioned resource curse. The project includes 300 oil wells and about 650 mile long pipeline from Chad to Cameroon coast. The basic data for this case study are taken from report elaborated by Horta et al (2007).

The WBG was directly involved in the project with two main objectives – to assure the oil revenues will be used for the well-being of all citizens mostly to fight the wide-spread poverty and to ensure that the project will be environmentally-friendly. It also contributed 3% of total project costs. Unfortunately, it seems as it failed on both accounts.

During the approximately a decade lasting project, Chad went from 167th position in Human Development Index to 173rd position. Moreover, both countries are currently in even larger debt than before the construction. In January 2001, the Chad government used $25 million from oil incomes to purchase the weapons needed to secure the power and legitimacy of the regime; also problems such as corruption, cost-overruns or ghost projects are present in both countries.

Our focus here is on one of the indigenous groups living here called Bagyeli people. This community was in the past only partially incorporated into the society and lived in equilibrium with the nature for centuries. The oil company entered the community and promised the 'modernization' and economic improvements as part of the planned project. This is what happened eventually. The investors through the national governments promised jobs – in reality the community members were given the hardest jobs with low wages, great health risks and unfair treatment, moreover most of these jobs were available during the construction period only – these jobs were not sustainable for them; access to modern medicine was ensured by building a small clinic that is regularly under-staffed and under-supplied; access to education was assured by building a school that experiences similar problems as the clinic; the roads to access the local markets were build, however physical access to them does not mean financial access – with the amount of money they got for their work, they could not afford to buy from them; access to electricity and water was assured, however the process is expensive and slow and they often face pollutions from numerous oil spills.

Impacts on local populations do not end here, about 1 000 people were displaced and the health conditions worsened by environmental pollution, the life age expectancy is less than 50 years and children less than 5 years old have a danger of 1 to 5 to die (Jobin, 2003). As for compensations, $10 million were given to the community which is when divided the population number less than $50 per capita (ibid.). A pattern like this one is not unique and similar cases occur all over the world.

Although formally the land has been owned by the government, the real holder was Bagyeli community. For Bagyeli people living on these lands for centuries, property rights were a new phenomenon and they did not have capacities to take more meaningful part in the decision making processes about their rights. It is highly unexpected for these indigenous societies to participate in decision making based on very little knowledge they have on the concepts of property rights. The actual results seem more like they were tricked and that the promised effects turned out rather different. It is difficult to say to what extent this development was from the early beginning the part of a strategy, and of whom, but the outcome is sad and the impoverishment of Bagyeli people lasts till today.

Case study 2: The Niger Delta region

The second case study is from Nigeria, also in Central Africa. Nigeria is the largest producer of oil in Africa, extracting oil since 1958 (Shrader-Frechette, 2002). Until 2002, about 1 000 indigenous Ogoni people were killed during the works on oil fields during refining oil and natural gas. Moreover, around 30 000 people lost their homes due to exploration, vast pollution and flaring of gas (ibid.).

The gas flaring is one of the biggest causes of environmental pollution in the country and significantly contributes to the global warming increasing the greenhouse gas emissions. Around 75% of gas is being flared in Nigeria while the world's average is 5% of total extracted gas (Ikporukpo, 2004). 30% of this gas is methane which is 64 times more potent contributor to global warming than carbon dioxide. Another crucial aspect of oil extraction in Nigeria is that it has the largest oil spillage record in history. Shell is one of the largest oil refining corporations in the world. 1953 was the year when international companies started looking for oil in Nigeria (Walker, 2009), Shell being one of the pioneering ones. They became the largest oil company operating in Nigeria. 40% of Shell's oil accidents occur here while only 14% of their portfolio is located in Nigeria (Ikporukpo, 2004) which has detrimental consequences on local flora, fauna, groundwater and humans. Additional contribution to the amount of oil spills is the condition of the pipelines. These should be replaced after about 15 years while almost a half of them (40% in 2004) are beyond this threshold (ibid.).

It is worth noting the collaboration of oil companies with Nigerian government. Nigeria has military dictatorship government that relies heavily on oil revenues to finance the dictator regime and to keep the power in their hands. It is the classic example of the resource curse where increased incomes and corruption led to over-centralization of government (Agbese, 2000). However, the Nigerian government is not the only one to blame as when presented with proposal to extract oil from Nigeria for which they were given large revenues, it is hard to reject as they need the money to support their regime. What is often neglected is the role of true regulator of large companies – their own government, it this case the Dutch government which should be controlling operation of their companies as the taxes goes to Netherlands. Their role is not often mentioned and the responsibility is discussed mostly on the level of Shell and Nigerian government, neither of

which have interest to regulate the production for some higher values such as justice and good environmental conduct. There are also cases when Nigerians non-violently protested against the oil industry's actions and the company called the Nigerian military forces to suppress the protests. During one such protest in 1990, 80 Nigerian people were slayed by Nigerian army (Shrader-Frechette, 2002).

When the oil companies are confronted with their practices in countries like Nigeria, the usual response is that they simply obey the laws of the country (ibid.). Considering that Nigeria has no pollution control policies, their actions and behaviors are in legal terms justified and no fines are imposed.

Officially the people have the right for compensation for the crops, trees or animals that are lost as a result of exploration, however the actual compensations are very low to none in reality, particularly in relation to the lost land or water resources (Ikporukpo, 2004). Ikporukpo (2004) reveals a case when 60 000 naira (about $120 000) were asked as a compensation for lost crop and in the end only 315,5 naira were received.

The pattern is very similar as in the previous case study in terms of ownership. The tragedy is in the involvement and conduct of Nigerian national government and control of foreign companies and the governments responsible for their conduct, in this case the Dutch government. Legally for Shell, everything is in line with the law and it is going on like this for decades. In Netherlands, Shell would have to respect more strict environmental and social policies and would have to compensate more damage than in Nigeria. Nigeria as a country is for a long time a victim of the curse of vast natural wealth, but institutions are failing and working against its citizens oftentimes. The ownership relations matter also only little as Nigerian is strong centralist state and will of the state is above all.

Case study 3: The Arctic North

The last case study is a 7 000 km wide area stretching across northern Russia known as the Arctic North, part of Russian Siberia, where heavy mineral exploitation took place in the second half of 20th century. This region is covered for the most part by permafrost and has the lowest resilience to human activities i.a. because the toxic substances are absorbed into the permafrost and can remain there for centuries (Saiko, 2001).

The region has been inhabited for more than 2 000 years, but the environmental degradation occurred only during the 20th century (ibid.) which indicates a clear connection between industrial activities and ecological impacts. The area is rich in oil, gas and mineral resources such as nickel, platinum or palladium.

The most damage to the environment in this area had been done between 1950s and 1970s during the post-war recovery and later intensive industrialization period (ibid.). It is suggested that the region is "on the threshold of a large-scale ecological catastrophe" (Saiko, 2001:31) and experiences almost desperate environmental situation.

The results of mineral and energy resource exploitation include consequences such as: rivers and lakes are polluted by oil products; soil and ground water are affected by heavy metals and other hazardous substances and also massive radioactive contamination takes place in large areas due to former nuclear testing (it is estimated that around 130 were performed here), nuclear waste dumping and the pollution from the explosion of Chernobyl nuclear power plant that is still present there (Saiko, 2001), although it happened 1986 and relatively far from here. It illustrates the accumulation effect of the arctic environment – even though the natural resource exploitation and the Chernobyl disaster occurred decades ago, the permafrost environment accumulated the chemicals and it up to today impacts the environment.

The area is being exploited for oil and natural gas since mid-1960s (Starobin, 2008). To transport the oil and gas to other parts of the country, kilometers of pipelines had been built which are operating till today. As well as in case study from Nigeria, the region experiences oil leaks from production sites and accidents on pipelines – in approximately 300 major and 11 000 minor accidents in volume of 3-10 million tons of oil are spilt in the production areas (Yablokov, 1996 in Saiko, 2001). It is also suggested that roughly a half of gas from Siberia reaches the consumer sites due to technical problems (Wolfson, 1994 in Saiko, 2001).

Although the region is only sparsely populated (population density is between 1-5 people per sq. km) the resource extraction has severe consequences on local indigenous people. Their main occupations for a long time have been hunting, fishing and reindeer grazing and due to the disturbances to the environment it is still more difficult to perform these traditional crafts (Saiko, 2001). The result is, among others, growing alcoholism, decline in standard of living and a migration from the region. Moreover, the 1990 crisis changed the relationship between these communities and the state as for decades they were supported with goods and now these institutions refuse to provide adequate support to them and they are literally held hostages as they cannot afford to move away as a result of inflation that left them with no savings (ibid.). All of this has severe health implications, for example the life expectancy in the last 3 decades went from 61 to 45 years (ibid.).

In this case study it is possible to clearly see the effects of strong national government which needed to extract the vast natural wealth of the area for its development. It is hard to argue if it was right or not, but what is worth noting are the impacts on nature and people living in these areas. In Soviet Union it was hard to talk about private ownership as everything belonged to people, in reality to state and voice of one person or one community was of very low weight. After the transformation, though, the situation arguably got even worse as the state before was at least up to some extent supporting the indigenous people living in these areas and now this support is gone. The people experienced shock and the extreme continues. When community lives in one way and suddenly it changes, it is very hard for people to respond and it is even harder to respond in Arctic conditions. Even if they are provided property right to these lands, they are not used to it and do not know how to respond and manage the territory.

The three case studies contain two basic types of governments, either weak governments where foreign powerful companies can operate with little limitations, and very strong totalitarian governments which operate without limitations on their own. Weak governments need money from foreign companies to support the regime and in the end care little about what is going on with the environment. Strong totalitarian governments in the end do the same and do not care much about the environment as oil production and similar activities are in national interest and there is no one to oppose. In both forms, majority of forms of protest are silenced by governments to keep the industry running as it brings profits. Moreover, the former Soviet Union was acting that all this is done in the name of progress and the objective was well being of its citizens, even for the price of environmental damage. In the end, the result is similar. From the point of view of environmental justice the situation is different, though. In case of weak governments, the focus is to make the foreign companies accountable. For strong governments where the governments are the oppressors, the question is how to make the powerful regime more environment-friendly and bring sustainable development for their citizens.

Conclusion and ways forward

As it is demonstrated on three case studies the practices of oil industries and the landscapes resulting from extensive oil exploitation often have very negative implications on indigenous groups of people. The question emerging from this is how to challenge and change the status quo and bring justice in environmental affairs, how to achieve fair distribution of environmental externalities. But maybe more apt is the question whether it is possible to regulate such a giant industry as oil and gas business that makes $2 billion in daily transactions (O'Rourke & Connolly, 2003).

In many cases the countries that bear greatest environmental damages from oil industry are weak, failed and developing (Ikporukpo, 2004) with no regulation laws to take care of their environments and people. Hereby the regulation from higher – international - level and pressures from international NGOs, and also from democratic states where the oil companies originate, are necessary to control the activities as well as a gradual increase in environmental standards so that these regulations are realistic and industry can implement the measures to improve their performance. Shell is a Dutch company and the Dutch government does not regulate their production in Nigeria as it is not happening in Netherlands. It is question for Dutch government, too. As Salter & Ford (1999) and many large companies in Europe demonstrate, it is possible to be environmentally-friendly and still show profits and stay competitive. Staying competitive in field of oil industry lately seems more as a question, in the light of falling oil prices on international markets. Another question can be how much oil can we use and extract before we change our climate irreversibly.

On European level, in 2003 the Strategic Environmental Assessment protocol has passed that focuses on preventing the negative environmental consequences of strategic plans and groups of projects. This initiative was agreed to in order to prevent the undesirable impacts of activities in earlier stage than individual projects and appears to be a positive step within the theme of this paper.

What is usually missing from the projects is often participation among the stakeholders. In most cases there are three main groups of them – the oil companies, the national/regional/local government and the indigenous groups. The fourth group, the governments responsible for the oil companies, in Shell's case the Dutch government, are often absent from these negotiations . If any form of involvement of indigenous people is performed, it ends so that they are being informed about the project and being told not to make problems, which renders them informed, but not involved. Moreover, even if they are involved, any forms of bargaining or negotiations are often new concepts to them. This was illustrated on Nigerian case study in which they were formally involved in the project development; however the result was not desired for them. Stammler & Wilson (2006) demonstrate the use of roundtable discussions as one form of stakeholder participation and suggest that in many cases it is possible to find a dialogue and common grounds so that the most damaging consequences can be prevented. It is one of the ways how to deal with the issue, but it is rather ineffective and not sustainable. Participative methods are effective in developed countries, but their effect is questionable in given conditions in Nigeria for example.

Stammler & Wilson (2006) also promote the idea of collective agency which builds on Ostrom (2000; 2002) who got a Nobel Prize for economy for her work on decision-making of common pool resources where she studied how small groups of people behave when distributing the common pool resources and she suggests that in some cases, such as when facing oil companies while trying to protect their livelihoods, maximization of common good stands above the individual benefits. Ostrom's theory of common pool resources is novel and effective method and a way of thinking about issue of natural resources and their management. However this method cannot function on its own, it needs to be combined with reforms in institutional settings and property rights.

This brings us into a kind of a paradigm shift necessary to challenge the current situation that is to focus on damage prevention rather than damage compensation. Here the incommensurability of values is expressed challenging the older 'polluter pays' where worsening of environment can be bailed out by economic improvements (Martinez-Alier, 2003). Some values can be compensated and restored, but there are also values which cannot be retrieved after being destroyed, they are unique and need to be protected.

It is also important to recognize the unique status of indigenous groups as opposed to conventional fashion of them being a very small minority within their country as these people possess 'indigenous identity' (Tsosie, 2007) that connects them with their land and the traditional lifestyles. This status would identify their human rights that would be enforced by institutions of international human law that is robust and influential (ibid.). For oil companies these groups are not unique and they are likely to perceive them as burdens for implementation of their interests and unless their status is internationally recognized and protected, indigenous

group will remain more vulnerable and exposed to interests of stronger international actors and strong totalitarian states.

The argument of the paper was that granting indigenous people property rights to their lands can help improve their situation and fight or at least better cope with interests of oil companies and national governments. However, as we could see in the case studies above, it is not enough. It can be seen as one of the initial steps. Formal property rights are one thing, but legal enforcement of these rights and their legal weight is something different. It is not only about rights and central states, but about institutions which are crucial as they are important actors mediating the dialogues between international companies and national governments. The Arctic North case study is a great example of this. In the early 1990s the political situation changed and state subsidies and other forms of help ended and people were left on their own. They have formal rights to these lands, but in reality this is not helping them in their situation.

These are hard debates as evidence is clear that the current situation is difficult and people have hard time coping with these issues. There is no single solution, no panacea for all. Raising awareness of these issues, though, is one of the steps towards improving the living conditions of these indigenous communities. It is possible to say that they pay for our comfort and now it is time for us to recognize this, acknowledge it and do something about their situation. Slow steps are required, more recognition is vital and help from other world is needed.

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For a colonized people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity.

Frantz Fanon (1961)

The difficulty of justifying eminent domain: The Indian scenario

Shruti Yerramilli

Abstract

Eminent domain is the right of a government to expropriate private property within its territory or jurisdiction, for what it deems is 'public purpose'. To understand eminent domain, we need to understand how the interpretations of property rights have changed over time. Property rights have been viewed as natural rights and also as rights as a result of birth of the sovereign state. One such thinker, Hugo Grotius, introduced for the first time, the notion that these rights were alienable and transferable. It strengthened the idea of eminent domain as a mechanism to improve allocative efficiency in markets where high transaction cost may not result in mutually agreeable contract. However, eminent domain is a right attributed to the sovereign state, outside the property market. There are no naturally existing checks to the scope of power it can wield. We study the Indian scenario in this context, to understand how eminent domain is interpreted within Indian legal system and how it is a difficult concept to justify in terms of the social benefits it is supposed to facilitate. The most recent law that governs the issue in India is the Right to fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. In the absence of land ownership records and formal land markets, the idea of 'reallocation' of property rights seems misplaced.

Introduction

Eminent domain is the right of a government to expropriate private property within its territory or jurisdiction, for what it deems is 'public purpose'. Historically, it has often been subsumed within sovereignty and counted as its attribute. Eminent domain comes from the Latin phrase *dominium eminens*, taken from Hugo Grotius's legal treatise, *De Jure Belli et Pacis* (on The Law of War and Peace), written in 1625 (Fellmeth and Horwitz, 2009) . It allows the government to transfer or reallocate private property rights against the payment of 'just compensation'. Though the concept has evolved over time, it is distinctly different from forceful acquisition of property, in an exhibition of power by the state or ruler. Here, 'just compensation' becomes a defining and distinct feature of eminent domain. It is difficult to categorize eminent domain as right of the government or its power. As a right, it's a feature of the government's power; however, unlike the concept of power, rights are not absolute. They are truncated to ensure minimum overlap of conflicting interests.

We know that property rights add substantial value to a piece of property by conferring ownership, use, modification and transfer rights (among others) to the owner of it. In the absence of duress-free consent or transfer of rights, in an involuntary exchange process, property rights lose a part of their monetary value as well as their ability to secure the socio-economic status of the private owner. This is especially true in case the owner derives his primary livelihood from land or is dependent on it for sustenance.

Eminent Domain lowers the bargaining power of the private owner, and yet this expropriation by law is said to be aimed at a 'public purpose'. This statement is not to discredit the importance of a government's 'transcendental propriety' (The American Law Register, 1856, 642-3) in regulating property rights and reallocating those rights towards creation of a social value from a product, for which transaction costs are very high for private investment to exist in the market. It is, however, to focus on when eminent domain becomes imperative or best solution and if there are pre-requisites for better implementation of the same. At the end of the day, it is a compulsory transfer of property rights and is not a mutually agreed transaction between two contracting parties. In the following sections, we will look at how 'public' or social-value-generating must this purpose be, to justify use of eminent domain and is there is a threshold value for the same.

Our discussions so far help us tie together two concepts, namely eminent domain (the right to expropriate private

property) and public purpose (the justification behind invoking the right). Public purpose remains a limitedly defined term within most acts governing implementation of Eminent domain, within different countries. In India, the concerned legal framework is laid down by the *Right to fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013* (LARR 2013, hereon). Section 2(1)(a-f) of the Act outlines what is meant by Public Purpose in six indicative and broadly spelt sub-clauses. These sub-clauses are fairly broad, in that they cover items like infrastructure projects, projects for industrial corridors, tourism and projects for residential purposes, among others. This makes the scope of 'public purpose' wide enough to incorporate a large variety of projects, effectively reducing the threshold level of net social value, that the projects must be able to generate to be considered as fulfilling 'public purpose'.

How do we justify eminent domain if not on the basis of a strong 'public purpose'? The subsequent sections will discuss the concept of eminent domain and how it developed with time; the need for it (or not); its effects and problems. The scope of this paper is limited to the Indian scenario, save the examples that have been taken from certain other countries to establish context. The paper will focus on the nature and effects of eminent domain in India, particularly its socio-economic effects.

The idea of property rights

Eminent domain, by virtue of its definition, may have followed two important changes in history- the institution of benevolent rule or government that was responsible for creating public works/goods like roads and water-sewage systems; and the establishment of demarcated property rights for the people (The American Law Register, 1856, 642-3). Clear property rights a characterized either by the bundle of rights allowed to owner of the property like use rights, right to exchange etc.; or by benefit of exclusion- one person's property right excludes all others in ownership and sharing of benefits arising out of ownership.

A lot has been said about property rights of individuals and their relationship with the society and state, mostly in political contexts and later involving legal connotations. Several aspects of these have been covered in the writings of Plato, Aristotle, Hegel, Grotius, Hobbes, Locke, Rousseau, Hume, Marx, and Mill. Aristotle's Athenian Constitution (discovered in 1891) is one of the earliest accounts of discussion on expropriation by fiat and payment of compensation. It talks about *"…the adjustment of a dispute between the cities of Athens and Eleusis, among the agreements of settlement was one providing for the transfer of property in Eleusis to the Athenians, on terms that imply the use of an existing rule for the valuation of private property by representatives of the city"* (The American Law Register, 1856, 642-3). The same extract within the American Law Register also discusses the Roman interpretation of the same. For the Romans also the property rights were political matter and expropriation was the symbol of power of the state. However, the requirement of compensation and consent was observed.

It was an important process for these thinkers to evaluate the need for property rights and to some extent examine the moral justification of same in a free society. Where Plato argued that collective property rights were necessary to achieve common interests of the society (Bloom, 1968); Aristotle believed that private ownership of rights will reduce free-riding, improve a sense of responsibility (as a result of ownership) and propel greater progress (Jowett, 1984). Their discussions revolved around debating the form of ownership. Discussions about how they were established and in what manner they must be interpreted, flourished later in time.

Around the 17th century thinkers like Grotius started to focus their attention to the structure of society and what caused societies to abandon or move beyond anarchy and become part of governed communities- effectively giving up a part of their freedom in the process. Grotius, unlike his predecessors, looked not at the rights of people but at the powers and entitlements that came with this right. Miller discusses that, *"…he* [Grotius] *played a crucial part in the commoditization of rights. Once rights became possessions, they can be traded away just like all other possessions"*(Miller, 2014). This was new and transfer of rights had not been discussed in this light before. This is unlike the understanding of exchange of commodity rights. These were understood as natural rights of the individual and their alienation had never been discussed.

Hobbes and Locke, however, discussed that property rights were in no way 'natural'. Their theories differed significantly, even as they shared this common belief. Hobbes believed that the beginning of property rights must have come with the creation of the state, to provide stability and security to the individuals as they grew within this co-dependent set-up (Waldron, 2012). Locke, on the other hand, believed that the natural resources belonged to everyone equally and the creation of property rights in itself posed a moral dilemma. Property rights must have been established when the first individual to claim a natural resource (land), must have done so without dispossessing anyone (First Occupancy theory) and then sustained the right on his property by improving it through his labor (Locke 1988 [1689], II, para. 27).

A few years later, Vattel also formalized his theory about the formation of a society and the distribution of rights between them. He expressed clearly that shedding a part of individual freedom was necessary to consolidate a governed society (The Law of Nations, Ch-4 §38).

> *"This authority originally and essentially belonged to the body of the society, to which each member submitted, and ceded his natural right of conducting himself in everything as he pleased, according to the dictates of his own understanding, and of doing himself justice. But the body of the society does not always retain in its own hands this sovereign authority: it frequently entrusts it to a senate, or to a single person. That senate, or that person, is then the sovereign."*

While this is by no means an exhaustive list of the important landmarks in history of development of idea of property rights, a detailed discussion on the same is beyond the scope of the paper. However, our discussion was aimed at tracing how the idea of property rights changed and eventually morphed into what it is today. It follows from the arguments mentioned that two main characteristics of property rights are in fact residuals of the ideas discussed-

1. These rights are transferable, and not above the overarching rights of the sovereign (as the protector and guarantor of these rights). The Lockean concept adopted by the US constitution also stresses that *"the concept that rights, in addition to being individually held, may also be held collectively by the body politic, which creates and provides the justification for civil government"* (Doernberg, 1985); and
2. These rights needed to be limited but justifying limits to property rights is as difficult as justifying the idea of private property itself. However, *"…philosophers have often argued that it is necessary for the ethical development of the individual, or for the creation of a social environment in which people can prosper as free and responsible agents."* (Stanford Encyclopedia of Philosophy, 2004)

Eminent domain and its evolution as a legal concept

We start with the assumption that for a stable society, the sovereign government must be the protector of the property rights. For property rights to aid value-addition in any way, they should be justiciable. Clearly defined rights, in terms of ownership, permitted use, and value, allow for a well-established market for its exchange. The limits on property right are essential to safeguard them against infringement, misappropriation of the same and any conflict of interest that may arise due to exercise of excessive freedom. Intuitively, benefits arising out of ownership of private property rights accrue to the individual, however, these may not generate greater net social benefit. Also, several productive activities involving a trade of the right (purchase of land), may have very high transaction costs and generate market failures that reduce the net expected benefits. These are the two most important reasons why government must step in to facilitate creation of net social benefits and improve expectation of private benefits, to the extent. This role of government, ideally, must be the essence of eminent domain.

Given the understanding we just established, it is not difficult to see why the power of eminent domain had usually been limited to expropriations for a public service enterprise which *"serves the public so directly that it would be subject to such incidents as public supervision and regulation of rates."*(HCK, 1914). However, the scope is no longer limited to public sector enterprises and in many cases today (like in India) expropriations may also be on behalf of a private entity that contributes to a public purpose. This change leaves us with one question-when is it justified to invoke eminent domain?

Land markets, in the absence of titling and maintenance of records, are beset with problems of asymmetric information and high transactions cost. Land is a limited resource. This means that for a country like in India where majority holdings are small, purchase of large portion of land requires integration of several plots and just as many mutually agreeable transactions. We can see how this may be a problem. With every additional fragment of land purchased for a large project, every next fragment becomes more important. As willingness to pay increases, prices also escalate. This increases the total transaction cost and may render the project infeasible. This is the hold-up problem. If the project can generate enough social benefit, this is a case for eminent domain.

Eminent domain becomes appealing if the number of landowners is large (Shavell, 2010). Calabresi and Melamed, in their seminal work, explained that when mutually-agreed-upon transaction becomes difficult due to high transaction costs and property cannot be re-allocated to improve private and social benefits, we need to switch from *"property rule to liability rule protection to achieve allocative efficiency"* (Calabresi and Melamed 1972, pp. 1106–7). Property rules are in the interest of protecting against infringement of property rights; liability rules are focused towards internalizing cost of negative externalities, no matter the ownership. This is gives some legal basis to our understanding of Eminent Domain.

Eminent domain offer eclipses private property rights and one may question the extent to which government interference can serve either the market or the purpose of social benefit. In the light of our previous discussions, it is clear that the impact of eminent domain is equivocal. Eminent domain could aid economic growth not only through provision of public goods like roads etc. and as a solution to hold-up problems; it could also help in blight removal (Collins and Shester 2011).

However, eminent domain removes the element of free bargaining power between contracting parties and even with payment of 'compensation', it distorts expected value of land. Continued presence of the government could, therefore scar the market's ability to natural move towards optimal prices. Chen and Yeh, empirically studied this phenomenon in their paper and concluded that, if eminent domain seized to be a special case scenario and government's easy access into the market is exploited, it would lead to reduction in economic growth *"because of distortion in investment incentives, unless the public use channel dominates."* (Chen, Daniel L., and Susan Yeh 2013)

The way eminent domain has been understood, it is seen as a part of sovereign rights of a government focused towards facilitating 'public purpose'. It is, therefore, not something that may be used by individuals or is in private domain, nor must it be used by the government to run its everyday roles. So it must also be distinguished from the public domain (The American Law Register, 1856). Eminent domain is not 'enjoyed' by governments. It is an acknowledgement that limited resources like land must have belonged to the society as a whole before becoming demarcated and therefore, they may be re-allocated for benefits of the society. The effects of eminent domain, thus, depend heavily on administration of it use and strength of legal standards to prevent its abuse. We will discuss the same in the context of India. Examples from the extensive discussions on subject, in USA, would aid our understanding. Both countries largely follow a common law system, as a residual of the British Imperialist influence.

Eminent domain in India: Practice and problems

The constitution of Indian drew its sources from The Government of India Act, 1935 and Universal Declaration of Human Rights, 1948, among others. Both of these included specific

provisions to safeguard property rights. Section 299 of the Government of India Act stated that private property could not be expropriated without payment of just compensation and only for public purpose. The Universal Declaration of Human Rights recognizes the right to private property under Article 17. However, The Indian Constitution no longer recognizes right to property as a fundamental right. The 44th amendment eliminated Article 19(1) which guaranteed "the right to acquire, hold and dispose of property". Article 31, which stated that "no person shall be deprived of his property save by authority of law" (not fiat) was also removed. Article 31 in a way morphed into Article 300 (A), so that property rights were no longer constitutional but just statutory. This was almost like perversion of law that diluted the strength of the state's guarantee of property rights and expanded its powers of appropriation.

Land is largely a state subject however 'Acquisition and requisitioning of property' is listed as Entry 42 in the Concurrent List. This meant that both the Centre and States could make laws governing land acquisition. Land Acquisition in India was governed by the Land Acquisition Act (LA), 1984 for the longest duration since independence. In the same vein, "Public purpose" was described as projects which fell under the planned development schemes of the government or projects sponsored by them; projects for public enterprises; and any other welfare projects like housing, education and health. The acquisition for Private Companies was explained in a different section. Perhaps the idea was that acquisition for private companies does not directly point towards a public purpose. Therefore, the company needed to enter into agreement with the concerned government, regarding the nature of its need (wither for dwellings for workers or construction which has public use) and the timeline within which it would realize its proposed projects. With time, the nature and extent of acquisition for private companies took new shape.

The Standing Committee on Rural Development (SCRD), in its report on the Land Acquisition, Rehabilitation and Resettlement (LARR) Bill 2011, explained the amendments made over the years:

"Initially, the exercise of the doctrine of Eminent Domain was limited to acquiring land for public purpose such as roads, railways, canals, and social purposes like state run schools and hospitals. The Act, however, added the words 'or Company' to 'public purpose' to distinguish land acquisition by the State for 'public purpose' from land acquisition by the State for a 'Company'." (Department of Land Resources, Ministry of Rural Development. 2015)

Initially, the idea of 'Companies' was restricted to Railway Companies. The amendment in 1933 amended this to include private companies as well. Acquisition was permitted for the '…erection of dwelling houses for workmen employed by the Company or for the provision of amenities directly connected therewith.'(Department of Land Resources, Ministry of Rural Development. 2015).

Since property rights had been demoted from having a constitutional status, the Act acknowledged them only providing for "just compensation". The questions concerning rehabilitation and resettlement of affected persons or families were not addressed till Land Acquisition, Rehabilitation and Resettlement (LARR) Bill was introduced in Lok Sabha in 2011. It took sixty-four years and several acquisitions to give resettlement issues the discussion space they needed.

Although, the Bill touched upon the issue of displacement, it is the Act which succeeded it that acknowledged the right to property, even if the scope remained limited. Although, National Policy on Resettlement and Rehabilitation for Project Affected Families, 2003 and subsequently, National Policy on Rehabilitation and Resettlement, 2007, addressed the question of minimization of displacement and rehabilitation & resettlement plans for the affected people; their efficacy was constrained by the fact that these were only policy documents and did not enjoy the legal status of an Act. To this extent, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement, 2013 (hence mentioned as RLARR, for brevity) was significant milestone in improving our legal framework for land acquisition.

RLARR, 2013 came into force on January 1, 2014. 'Public purpose' was repurposed, such that acquisition must not only be for reasons laid down in Section 2(1)(a-f) of the Act, but must be mindful of its impact on the affected parties. The latter statement points towards the inclusion of the provision for Social Impact Assessment in the Act. It was aimed at informing decisions regarding rehabilitation and resettlement provisions that would be provided to the affected parties.

The noteworthy change that came with this Act was the inclusion of the word 'Right' in its title. The Act recognized that compensation was not a necessary accompaniment to eminent domain, but the right of affected people. It seemed that the Act acknowledged their rights to their properties and also that compensation in effect should be representative of the value of their properties and loss of expected increase in value. The Compensation amounts thus were increased significantly. Not surprisingly, this increased the cost of projects and caused delays in their implementation (Economic Times, 2015). Favoring social benefit here reduces net benefits from the projects. It seems a flat increase in compensation may not be the ideal way of dealing protection of property rights and increasing their allocative efficiency. This brings us to the concept that forms the base for the idea of eminent domain – well defined property rights.

Why eminent domain fails in India: Expropriation of property rights that may not exist

Proof of existence of property rights lies in its documentation. In India, we are still struggling with rudimentary paper documentation of the same. The step towards digitization of the records and their e-maintenance is ofcourse next, but a significant leap from our present situation, when we do achieve it. In the absence of clear ownership, 'reallocation' of the right is meaningless. How can you transfer a right that has no legal existence?

The *right* to compensation has preceded the idea of right to property in India and poses several questions regarding the understanding of eminent domain. In the State of Bombay v.

R. S. Nanji 1956, the SC judgment spelled out the difficulty in providing a binding definition for 'public purpose. *"Prima facie, the government is the best judge as to whether public purpose is served by issuing a requisition order, but it is not the sole judge. The courts have the jurisdiction and it is their duty to determine the matter whenever a question is raised whether a requisition order is or is not for a public purpose"* (Somayaji and Talwar, 2011, Ch-2, 18).

Although, several states are now moving towards formalizing and digitizing rights to property (e.g. Karnataka) (Bhatnagar and Chawla, 2005), these will address only questions of existing paper-right holders. This does not address the problems of unidentified ownership or multiple possessors. Affected families are recognized by the head of the family, usually a male member, or a lady (in case she is a widow). This recognition comes from a stake in the title deed. Abandoned women, child widows usually get neglected, if they are not supported by the rest of their kin. It is easy to see how record of ownership and type of ownership can lead to gendered responses to land acquisition. Even if gendered responses to displacement are ignored, lack of formal titling could mean that some affected parties may be missed out completely from the count.

If all goes well, the administrative efficiency in dealing with compensation and rehabilitation & resettlement planning may leave much to be desired. Several Studies show that the number of people displaced due to dams alone during the first four decades post-independence, is upwards of 20 million. *"According to another estimate, the country's development programmes have caused the displacement of approximately 20 million people over roughly four decades, but that as many as 75 percent of these people have not been rehabilitated"* (Cernea, 1996).

Even as the new act attempts to better the provisions of the older acts, several caveats have been built into it to allow for the most latitude in interpretation of the act by the government. For instance, as Section 105 of the RLARR 2013, 13 Central Acts have been left outside the direct purview of the act, since these acts governed sectors that were considered to be strategic or critical for development (Raghuram and Sunny, 2015).

Government has tried justifying these exemptions by differentiating between *"enmass acquisition and row acquisition"*. The concerned ministries believe due to the critical nature of their work, provision of rehabilitation infrastructure (as specified in Schedule III25 of the RLARR 2013) will be tedious and will escalate project costs (Raghuram and Sunny, 2015). There exists a struggle between maintaining a balance between pace of positive changes in legal interpretations of eminent domain and improved efficiency in implementation of the laws.

Conclusion

Eminent domain is severely constrained and also defined by how it views the "public purpose" for which this right may be invoked and the administrative/ legal strength to back its implementation. In case either is lacking, eminent domain will lead to less than optimal solutions for property allocations and lower overall social benefit.

With years, the interpretation of the laws governing land acquisition has undergone several changes. For comparison, let us consider its treatment in another legal setup, namely that of the USA. The Supreme Court of California deliberated on the question of extent to which an affected party may be compensated.

"… unless the constitution or legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is damnum absque injuria and does not form an element of the compensatory damages to be awarded." (MPG, 1916)

Though, this is an old judgement, it signposts the path that understanding of eminent domain has taken. The judgment followed the long held understanding that compensation under eminent domain only covered bare property and not injuries to the business on it. It is interesting how the onus of expanding the extent of coverage under eminent domain, for compensation, was left to the legislature. In case of India, The Land Acquisition Act of 1984 did specify that the compensation amount needed to take into account, the damages to movable or immovable property, due to the expropriation, into consideration. However, it did not need for the value of property or business on identified piece of land to be included in its market value. A decided thirty percent of the market value of land had to be paid on account of the compulsory nature of the acquisition. Where this acknowledged the damages to the business and livelihood of the affected parties, calculation of damages offers a lower value as compensation than the actual value of business or property (attached to land) lost. The RLARR 2013 tried to remedy that by including the value of the standing property on the land being acquired, when the compensation value is calculated. This was a step forward. However, in the absence of formal land records and asymmetric information in the land markets, proper valuation of land is a far cry. The distortions created by high compensation values (four and two times that market value of land, in rural and urban areas, respectively), not backed by market clearance values, have led to an increase in farmland values due to spike in speculative interests.

The price of land must include both its present value as well as its expected future value. Arbitrary calculations of land prices, lack of documental evidence of ownership creates asymmetry in the information available in the market. This, in the long run neither serves a public purpose, nor does it improve social benefits.

Eminent domain, if invoked for the cause of a public purpose, must be supported by will of the government, strength of the administrative and judicial machinery and well established documentation of property rights.

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No man made the land. When private property in land is not expedient, it is unjust. It is no hardship to any one to be excluded from what others have produced. But it is some hardship to be born into the world and to find all nature's gifts previously engrossed, and no place left for the new-comer.

John Stuart Mill

The transformation of social obligations of land rights on state-owned land in China

Zhe Huang

Abstract

Historically, Chinese residential housing was social welfare in nature, and the state mostly bore the social obligations rather than gaining any profit from it. Work units, as the most important social welfare engine in the society, helped to relieve the state's burden of providing social welfare to urban residents. The practice of the central state government subsidizing low-income residents or residential developers also conformed to the social norm.

After 1978, Deng Xiaoping launched a series of drastic land use and housing reforms and eventually transformed the picture of Chinese social welfare. During these land use rights reforms, Chinese land ownership and property rights again played a role of instrumentality to achieve the state's goal to strengthen state land ownership. These reforms have produced significant problems, such as that Chinese state government has completely abandoned their social obligations as both landowners and land regulators.

I. Introduction

"As long as the government has land use rights that it can sell, it will never run out of cash." (Stein 2006, p.39).

–An expert of Chinese real estate development

The history of Chinese state landownership can be seen as a vivid picture of transformation of relatively robust social obligations to weaker social obligations. Throughout the Maoist era, the nature of Chinese landownership was mostly public and social (Tang 1987, p.7).[1] Real estate was not marketable and the government did not gain direct revenue from it (Kremzner 1998, p.619). In fact, commercial buildings were mostly neglected; the state's surplus funding was used for public building constructions and governmental buildings (ibid.).

Similar to the people's communes in rural area, urban public housing was mostly owned by working units (ibid.).[2] Described as "egalitarian and proletariat," a work unit was "an organization for work. … The distinguishing feature of a work unit was a lifetime social welfare system virtually from cradle to grave, and a network of relationships encompassing work, home, neighborhood, social existence, and political membership." (Yeh 1997, p.60). Work units acquired land use rights from local governments and built apartments for their employees.[3] (Wilhelm 2004, p.237; Bian, Logan, Lu, Pan & Guan 1997, p.228).

Work units' properties were essentially of social welfare nature (Sigley 2013, p.33). Work units let their employees and family members rent their property units at a very low price

1 Under the old working unit system, land was considered as a "gift of nature," and had no market value because there was no market for real estate. This proposition was based on Karl Marx's labor value theory, which argued, "Value can only be created through labor. … Land was not product of [the] labor and should not have [a] market value like air and water." Marx theorized, in socialist countries, "Land does have a use value for human beings but it should not be privately owned. … Land belongs to *all people*, no sales and purchases of land should be allowed."

2 Although work unit system has been widely castigated, this article argues that work units property was featured with a social welfare character that has been largely abandoned by the current state. Among many other functions work units have served, this article focuses on the social obligations of work units' real properties, or housing and land use rights in particular.

3 Work units' employees received public housing "that [was] owned, managed, and distributed by work unit[s] … as an employment benefit." There were three types of work unit housing: first category was "direct ownership and management" of work unit; the second category was "allocation of the municipal stock"; and third category was "work unit participation in housing." For the last two categories, work units did not own housing, but were given the power to allocate housing; either the bureau or the municipal government own the housing.

(He & Lu 2009). They also provided various social benefits to their employees and family members, such as school and health care (ibid.).

In addition, one feature of the Maoist work unit was that "the workplace doubles as a community." (Chan 1997, p.96; Lin 2006, p.87). Within such a community, workers were also neighbors, and work-life and after-work life were largely intertwined.[4] (Lu 2006, p.53). People were acquaintances, as "frequent travel along mutual pathways and shared activities at common meeting places create[d] plenty of opportunities for people to form neighborly bonds." (ibid.). As a resident who once lived in a work unit recalled, "We used to live on a work unit compound and knew almost everyone. We paid visit to neighbors and friends in our spare time." (Zhang 2008, p.35). Another resident said, "[Perhaps] after one or two decades of living together, these people will gradually form some sort of common lifestyle, tastes, and dispositions." (ibid.).

Work units also relieved the state's burden of providing social welfare to urban residents (Lu & Perry 1997, p.7). During wartime, work units exerted social and public functions in China (Lu 1997, p.36). When the army lacked resources, the CCP encouraged work units to conduct economic activities to support and improve the livelihood of their members (ibid.). In fact, work units also "played an indispensable part in the survival and expansion of the Communist troops and the base area government."(ibid.).

After the establishment of People's Republic of China, this practice continued (ibid.). Especially in the early 1950s when the state was short of revenue and resources, "production activities by [the] army and administrative units remained a major source for solving the budget problem." (ibid.).Work units provided major materials, consumer goods and many other social welfare services to its members, usually free of charge (ibid.). Some work units also acquired land and production materials from local villages for free so that they could grow vegetables or grain to serve the needs of their members (ibid.).

Since the real estate market was firstly introduced in the 1980s, China has almost completely abandoned the "work unit socialism." (Lin 2006, p.57, 87). Because work units used to be very influential upon urbanites' lives, losing work units "meant more than the loss of a means of living." (ibid.). The openness of the real estate market generated huge potential value for real estate, and the overly commercialization of urban real estate greatly transformed the picture of "work unit socialism." (ibid.). The once robust social obligations of state ownership were completely gone. This paper will analyze the history of social responsibilities of Chinese state landownership and land use rights prior to the economic reform, and the transformation of social responsibilities during the land use reforms.

4 There were some land use controls inside most work unit's compounds. Larger work units planned and separated different districts according to different land uses by walls or roadways, such as recreational areas, production areas, and residential areas. Indeed, a map of a work unit's compound was roughly a mini-zoning map of a city.

II. The transformation of state landownership and land use rights and its social obligations

A. Pre-land use reform (1955-1982)

Socialist ideology became the dominant force since the establishment of the People's Republic of China (Zhang 2008). Mao considered the core of socialism was public ownership (Randolph Jr. & Lou 2000). In 1950, the first session of Chinese People's Political Consultative Conference enacted the "Common Program," which provided that "any enterprises that were related to national economic lifeblood and national benefit and people's livelihood should be managed by the state," (ibid) and "any national resources and enterprises should be public property of all Chinese people." (Wang 2006, p.98).

From 1949 to 1956, due to a lack of funding and technology, the CCP and the new government acknowledged private home ownership in the urban area in order to maintain and increase the housing supply.[5] (Liu 2008, p.304). According to a survey conducted in 1956, private ownership in urban areas accounted for a majority of the total housing stock.[6] (Li 1996, p.34; Zhang 2008; Clarke 2014).

Starting in 1955, as the socialization movement was progressing, private ownership in urban areas began to be imposed with social obligations. Under the socialization movement, all private properties were considered obstacles to social welfare, and private housing was no exception. In 1955, the central government issued "The Opinions On the Current Situations On Private Housing and Opinions For Socialization." (Liu 2008, p.306; Kremzner 1998, p.618). The Opinion had a strong socialist character. According to the Opinion, the central state established a mandatory leasing system, under which "private owners were no longer free to decide how much or at what price to lease, despite the fact that they still legally retained ownership in their property." (ibid.). It provided a minimum housing quota that private owners could occupy, and "[a]ny space beyond the minimum standard had to be rented out to the public at a state-set rate." (ibid.). Any space that was

5 In August 1949, the central government published an article in the People's Daily that "urban housing was not a means of feudal exploitation and, therefore, should not be subject to confiscation." This greatly relieved urban homeowners' anxiety, as they were previously afraid that their home ownership would be confiscated.

6 Scholars have different opinion about the percentage of private and public properties during this area. For example, scholar Ling Hin Li pointed out that in Beijing, 53.85% of total housing belonged to private owners; in Shanghai, the number was 66%, and in Suzhou, 86%. Scholar Katherine believes that the much of the urban housing stock belonged to city governments. Professor Mo Zhang pointed out, "All private properties were either confiscated or transformed into public use, and all private ownerships were replaced by public ownerships." Professor Clarke argued, by the end of 1950s, most urban land was in government hands; even a substantial amount of housing on the land was still privately owned.

subject to mandatory leasing would be under the control of the central state government, which "acted as an agent for private owners in exercising property rights such as entering into contract[s] with tenants and collecting rent."[7] (Solinger 1997, p.228). The central state government then paid rent to private owners, usually amounting to around 20% to 40% of collected rent (ibid.). Because of such restriction, private landlords became merely a nominal owner, whereas the municipal government exercised actual control (Clarke 2014). By the end of 1950s, most urban land belonged to the government, although some private land still remained in the form of owner-occupied housing (ibid.).

Starting from the Great Leap Forward, because available financial resources became fewer, the central government shifted its housing responsibilities to the local authorities.[8] (McQuillan 1985, p.11). The socialization movement gradually transferred private commercial and industrial enterprises to private-public collective owned enterprises, and their real estates were gradually transformed to state-owned properties (Institute of Finance and Trade Economics Chinese Academy of Social Sciences & Institution of Public Administration of New York 1992, p.19). State-Owned Enterprises acquired land from local governments to build new apartments for their employees. (Wilhelm 2004). No matter the residents rented houses from private owners or work units, housing was offered to urban residents at extremely low rents.[9] (ibid.; Li 1996, p.34). These cheap houses were actually provided to low-wage workers as a subsidy and showed that housing in the socialist economy was clothed with social welfare nature.[10] In addition, when the housing ownership belonged to the state, in practice, households had permanent rights to live in their houses (Gu 1998).

During the Cultural Revolution, private housing was almost eliminated. The homeowner's work units took over private homes without paying compensation whereas the central state government maintained forceful renting or taking "surplus" housing (Solinger 1997, p.228). In Shanghai, for example, a total floor area of 881,000 square meters was demolished (Li 1996, p.35). By the end of the 1970s, urban housing was predominately owned by the government (Liu 2008, p.307).

B. The land use reform in the early 1980s

Although the 1982 Constitution explicitly announced that all urban land belonged to the state, not all urban land belonged to the state at that time (Randolph Jr. & Lou 2000, p.73). A small portion of privately owned land still existed, including "homesteads owned by individuals and urban collective-owned land which used to be the land owned by self-employed individuals for their business." (ibid.). Meanwhile, not all state-owned urban land was controlled directly by the state. Work units still firmly managed land that they occupied; they had permanent land use rights that the state governments took efforts to interfere with (Wang & Li 2009, p.91). Work units also owned constructions that were built on the land (Yeh 1997, p.60).

Land ownership and land use right transfer were still prohibited by the central government in the market, as real estate was not considered as commercial product itself (Li 1996, p.30). State governments did not have the right to sell land use rights, and therefore did not gain direct revenue or profit from land transfers (ibid.). It was estimated that the real estate industry accounted only 3 to 4% of China's Gross National Product until 1987 (ibid.). One of the reasons "was mainly the result of antipathy to private landownership in China's political leadership. … Socialism was very much against private landownership for it created a privileged class of people who could exploit the labor of tenants." (ibid.).

This rudimentary socialism brought about two negative outcomes. In the first place, since the state did not gain any revenue from housing and at the same time it had to subsidize it, it did not have incentive or adequate funding to maintain, improve the quality of housing and construct more houses (ibid.). The housing quality deteriorated in many places (ibid.). A survey conducted in the early 1990s showed that "nearly 60% of public housing was not equipped with private toilets and kitchens due to high cost of installation." (Liu 2008, p.309). Housing was also in short supply; it was common for three generations of a family to live in one apartment.[11] (ibid.).

In addition, since the land and housing did not have a market value and the land market was strictly prohibited, the private sector had very low incentive in investing and developing housing (Li 1996, p.36). Housing was considered consumptive goods, not productive goods and therefore, "capital funds seldom were invested in housing construction or improvement." (Kremzner 1998, p.619). Investment funds allocated to housing declined drastically from 9.1% in the mid-1950s to 2.6% in the 1970s (Bian, Logan, Lu, Pan & Guan 1997, p.225).

Under this backdrop, there was a heated debate between the central and local level leadership regarding whether land and housing should have a value (Tang 1987, p.3). Scholars and officials were gathered together to settle this issue through a common ground that eventually constitutionalized the transfer of land use rights in China (ibid.). One theory argued, "Land provides a valuable return, [or rent] in the context of a competitive market." (ibid.).This theory claimed that it did not contradict Marx's labor theory, as "the return from land [could] be used in exchange for goods which may be valued by the amount of labor necessary for production. ... What [Marx] argued was only that the part of that return attributable to the land itself should not go to any private party."[12] (ibid.).

7 In practice, some private homeowners had to surrender their "surplus" houses to the central state government or the work units in which they worked.

8 Although the central government wanted to improve the quality of existing housing and build new housing, due to the lack of funding, technology, and coordination with local governments, the central government could not effectively upgrade housing. A survey showed that the central government had spent 225 billon *yuan* on public housing, far more than food, textile, or oil industries.

9 Housing rent only accounted for 1% of average household income.

10 In fact, prior to the 1987 Land Use Reform, in order to subsidize housing, the central state spent significantly more expenditure on housing than other industries.

11 The average square meters in 1979 were 3.6 meters whereas in 1949 the average square meters were 4.5.

12 The problem that was not resolved by this debate was the nature of land revenue. Some scholars proposed that it was a land tax.

Deng's economic reform was essentially an effort to relieve state ownership of social obligations and gradually abandon the socialist nature of urban residential land and housing. During this reform, land ownership and property rights again played a role of instrumentality to achieve the state's goal to strengthen state landownership. The first effort was reclaiming the small portion of private urban land as state-owned land.[13] (Zheng 2003). The 1982 Constitution announced, "All urban land belongs to the state." As a result, although private owners still maintained their private ownership over their houses, the land upon which the houses were built belonged to the state (Zheng 2003). These residents would have state land use rights (ibid.). This generated much controversy and opposition among property owners because (1) many of these houses were built a long time ago and were not registered[14] (Zhen, Bi & Du 2009, p.16 &20), (2) when the state governments tried to register their land use rights, problems occurred because no information was available regarding the types of land use rights or expiration dates, (3) many homeowners objected state governments to register their land use rights as allocated land use rights because they worried that they would need to pay land use fees in the future (ibid.).

The second effort was that the central state government started to reduce investment in public housing (Mcquillan 1985, p.11). The policy behind the first housing reform policy in the 1980s was "the state, the work unit, and individuals share the responsibilities for housing investments, projecting that each would contribute one-third of the investment in new housing projects." (Bian, Logan, Lu, Pan & Guan 1997, p.225). Despite the fact that the central state government invested more in public housing projects, after 1978, it reduced its budget appropriations to work units for building new housing.[15] (Bian, Logan, Lu, Pan & Guan 1997, p. 225). It was estimated that the central state contributed to urban public housing before 1978, whereas after, "Chinese work units controlled 90% of urban public housing. … Only 10% of urban public housing was managed by local governments." (Lu & Perry 1997, p.10). As a result, work units had to raise funds by themselves.[16] At the national level, as of 1990, work units housing occupied 59% of the housing space, municipal occupied 16% of the housing space, and private held space accounted for 24%.[17] (ibid.).

Deng started the first housing reform in April 1980 (Bian, Logan, Lu, Pan & Guan 1997, p. 223). Deng Xiaoping's housing reform showed the central state's desire to turn urban public housing into a profit-making project. His idea was to make public housing a commodity, "so that in the end the state can [be] released from its responsibility to provide housing as a welfare good." (Bian, Logan, Lu, Pan & Guan 1997, p.224). As early as 1984, Deng pointed out that "housing should become a profit-making industry contributing to the national revenue … Residents should be allowed to buy their houses." (Mcquillan 1985, p.14). Deng indicated, "Rents should be changed to reflect housing prices so that people would feel that it was more rewarding to buy housing than to rent." (ibid.). Deng's economic reform largely abandoned the socialist nature of urban residential land and housing.

This article also points out that during the 1980s, although more sources contributed to the urban residential housing development, it still had a social welfare nature. For example, although private sectors were allowed to invest in housing and private funds were increasing, these funds accounted for a small share of total investments in public housing: from 1.9% in 1978 to 4.3% in 1982 (ibid.). Meanwhile, privately owned housing survived in some places after the Cultural Revolution (ibid.). In some places where private housing existed, it was restricted to one single dwelling (ibid.). Private landlord housing was very rare and was allowed only on a temporary basis (ibid.).

In order to mobilize more funding for urban development, the government also imposed social burdens on state-owned or urban-based enterprises. For example, in 1978, all urban-based enterprises were required to "contribute 5% of their profits to a fund for badly needed urban improvements – roads, sewers, schools, and parks." (ibid.). All housing agencies had to obey the national policy "on building standards, allotment standards and rental standards." (ibid.). Although the central state government direct investment share dropped relative to other investment sources, the state government still exerted control on leasing and managing the properties (ibid.).

This first housing reform policy failed in the end because it miscalculated the actual contribution ability of ordinary individual families and did not afford full ownership to property buyers (Bian, Logan, Lu, Pan & Guan 1997, p.240). As a 1983 report showed, urban employees' average wage was 826 *yuan*, whereas an average apartment of 40 square meters cost 10,000 *yuan*.[18] (ibid.). This housing reform also clearly demonstrated the all-too-familiar instrumentality of property rights: boosting the state's financial income whereas not

Land tax is taxed to either owners or beneficial owner of the land. But as the state still held the landownership, it would not tax itself; it would tax user of the land. In this sense, the land users are in the same status of landowners.

13 In 1982, around 4.5% of urban land was still privately owned.

14 It showed that less than 1% of such houses were registered or still had files.

15 After the Cultural Revolution, housing was buoyed as a top priority among other things. From 1980 to 1985, the state's total investment in housing increased 21.3% of its fixed assets per year (in 1978, the number was 9.7% of its fixed assets), and in 1981 and 1982, the number was more than 25%, more than the U.S. (14.7%) and Japan (20.9%).

16 Prior to the 1980s, work unit received funding for housing construction or housing investment from the central government, but after 1978, the work unit had the obligation to make investment out of their own pocket. "Between 1979 and 1986, self-raised funds by [work] units to build housing accounted for 60% of the total investment in new housing."

17 This should not be confused with the percentage of investment. As of 1983, work units raised 57% of new investment, 26% came from state and 17% came from private individuals. Work unit housing was designed to relieve the social obligation of state government to provide affordable housing to its residents. But when a municipality could earn a profit through renting, it maintained its control of public housing. For example, Shanghai's public housing was predominantly owned and managed by the municipality. The Shanghai government gained surpluses after output costs to public housing, such as maintenance and management costs. It maintained about 30% of public rent or surplus for its new housing projects. Work units in Shanghai owned only 15% of housing stock, whereas in Beijing, work units owned 68% of housing stock.

18 In some places, where housing was offered at a lower price to promote sales, wealthier and more influential cadres quickly "swallowed nearly all the housing units on the market."

affording private housing ownership. Although the central state government wanted to promote privatization of public housing, "[t]he government was reluctant to award full ownership of housing purchased during the reform." (Liu 2008, p.311). This lack of housing ownership was a major hurdle for the reform (ibid.).

C. The land use right reform from the late 1980s to 1990s

Starting 1987, the central leadership launched a deeper land use right reform, and a series of policies and rules were promulgated to segregate landownership and land use rights (Li 1996, p.37). The State Council recognized the transferability of land use rights in a free market, and created four special economic zones to test this idea.[19] (Kremzner 1998, p.620; Tang 1987, p.14; Institute of Finance and Trade Economics 1992). Some local cities, like Shenzhen, had piloted a proposal to legitimize public land lease to developers through auctions or bidding (ibid.). In 1988, the Constitution was amended to allow "[t]he right of land use [to be transferred] in accordance with the law." (ibid.). The Land Administrative Law was also amended in the same year to conform to the Constitution. Starting in the early 1990s, municipal governments have employed various methods to "consolidate and reinforce their control" over urban land, including reclaiming land occupied or owned by work units (Hsing 2008, p.36). This process of consolidating control of local state governments over land could be seen as a gradual loss of the socialist feature of urban land and expedition of marketization.

During the second housing reform, the state government wanted the individual homebuyers to contribute to the housing industry (Liu 2008, p.315). To achieve this goal, property purchasers were afforded larger property rights if they paid higher prices (ibid.). In 1994, the State Council issued "The Decision on Deepening Urban Housing Reform," which provided that public housing should be sold "either at market price for high-income families or at prices based on construction costs for middle and low-income families." (ibid.). This document also provided full ownership of housing to work unit employees if they bought housing at the market price (ibid.). This measure was aimed to encourage employees to pay market price for housing rather than rely on state subsidies (ibid.). Affording larger property rights to private homebuyers became an instrument for the state to deepen and promote privatization of public housing. As a result, private homeownership increased, and public housing decreased, dramatically.

This land use right reform produced at least three results. In the first place, urban residential land and housing were no longer social welfare goods that were free or had no monetary value, but became the state governments' coffers that ultimately become the largest revenue up to date (ibid.). Although land ownership could not be transferred, the price of land use right conveyance was in fact price of the land.[20] (World Bank 1993, p.2). Essentially, the state governments seized the monopoly power to transfer land use right as any other entities were prohibited from initially carrying out such activity (Li 1996, p.38).

Secondly, this land use right reform bred real estate development companies and professional real estate developers (ibid.). The first generation of such private developers had certain advantages either because of their unique relationship to government officials or party leaders or because of their unique social status (ibid.). In the early 1990s, real estate development companies were usually managed by or doing their business through state government agencies (Bian, Logan, Lu, Pan & Guan 1997, p.245). The most successful real estate brokers were either state unit staff members or officials of state agencies (Hsing 2008, p.62). While the real estate market was still immature in the early 1990s, the earliest practice of land use right conveyance was that the government still gave out land use rights for free or would charge a nominal fee (ibid.). This was especially true in the case of urban residential housing land, where the central government was eager to shift its burden to other sources.

At the early stage of land use right reform, the social obligations upon real estate development companies or developers were relatively heavy. Investors usually were required to invest at least 25% of total development fees before it could sell the land to others in order to deter land speculation (Li 1996, p.44). As a study conducted by the World Bank in 1992:

[Real estate development corporations] charged with carrying out inner-city redevelopment projects have often been required to make significant improvements to the base of community facilities provided in old areas (unless the site involved is very small), and to do so without receiving compensation from the district governments to which these facilities are transferred (World Bank 1993, p.24).

As China's land use rights market was formally established in 1988, urban land became commoditized and more valuable (Hsing 2008, p.57). Coupled with the reality that central government's revenue support had been greatly reduced, local municipal governments needed more revenue to cover their governmental expenditures (ibid.). As local state governments could gain a significant amount of reve-

19 The four special economic zones are Tianjin, Shanghai, Guangzhou and Shenzhen. Before 1987, Fushun, Liaoning province initiated a land survey and a land use fee schedule. More than 13.6 million square meters of land were reclaimed to the municipality. The municipality then redistributed the land, collecting about 13 million RMB of annual land use fees. It is unclear where these 13.6 million square meters of land came from, but the author assumes most of them probably came from work units' property or private urban housing. The first land use transaction involving commodity housing occurred on September 26, 1987, in Shenzhen. The Shenzhen municipal government issued an invitation to bid on a 46,355 square meters piece of land for residential use. The bid price was 108,240,000 yuan and the land was sold to the Shenzhen center of China National Aero-Technology Import and Export Corporation. After this incident, many other cities started to experience commercializing land use rights. China National Aero-Technology Import and Export Corporation was a corporation established in 1979; it monopolized the trade of Chinese aero defense products and technology.

20 Deng described the economic reform as "crossing a river by feeling the stones." From 1984 to 1992, most aspects of land use right were both unclear and ambiguous, such as rights and obligations of the state and the leaseholder. Most changes among regions were incoherent and land market development was uneven among different provinces. It was not until the 1990s when the economic reform was implemented in a larger scale.

nue from direct sales of land use rights or from land leases, land-related revenues became extremely important to the local governments' coffers (ibid.). Local municipal governments started competing with each other to expand their territories of land because the more land they acquired, the more revenue they got from lease of land use rights (ibid.). For example, in 1991, Shanghai's urban area covered 748.71 square kilometers, whereby in 1997, the urban area already reached 2643.06 square kilometers (Wu & Li 2002, p.23). Taking a glimpse at Chinese urban development over the last two decades reveals that almost all urban cities followed the same pattern.

Furthermore, the land use right reform directly diminished work units' property rights and further weakened the socialist welfare feature. Starting in 1991, almost at the same time as the land use reform, the central state government initiated a new housing reform.[21] (Solinger 1997, p.241). The main goal of which was to promote commodification of housing in the urban areas (ibid.). The second housing reform could be seen as the states' effort to reclaim back work units' properties as state-owned land and to build commodity residential houses.

During the process of this reform, work units were obstacles to the territorial expansion of local municipalities (Hsing 2008, p.57). Work units had occupied a great deal of urban land since the establishment of the People's Republic of China.[22] (Bian, Logan, Lu, Pan & Guan 1997, p.230). While the land that work units occupied was public, land use rights belonged to work units permanently (ibid.). Under the old work unit system, the role of local state government was limited because "most municipal governments had little or no role in land management and ceased to enact or enforce land use and land planning regulations."[23] (Kremzner 1998, p.619). More importantly, work units were largely independent of the control of local governments; they were subject to a "vertical budgetary and personnel system." (Hsing 2008, p.61). It was not easy for the state government to reclaim land from work units or other land users either (Zhu 2004). Statistics revealed that between 1988 and 1992, in Shanghai, most land use right sales occurred on agricultural lands (or "green-field" sites), not older urban land (or "brown-field" sites) because the sitting land users occupied most of the land (ibid.). As a result, within the old work unit property system, the process of commodification or privatization proceeded very slowly (ibid.).

Similar to the problems that occurred when the state government reclaimed private housing land in the early 1980s, the state government encountered additional problems when it reclaimed public land from work units. Because most work units originally acquired land use rights without a charge, under the new state-owned land use right regime, such land use rights were deemed as allocated land use rights.[24] (Kremzner 1998, p.618; (Bian, Logan, Lu, Pan & Guan 1997, p.235, 238). According to the new law, when work units transferred their allocated land use rights, the transferees had to pay a land use fee to the state governments and the transaction had to be approved by state governments (Chengshi Fangdichan Guanli Fa 1999; Ye 2011, p.95). Accordingly, if work unit employees already obtained their houses and allocated land use rights from their work units before the reform, when they transferred their houses and land use rights to third parties, the transferees had to pay a land use fee to the state governments (Ye 2011, p.95). Initially, most work unit employees strongly opposed this rule, and argued that their land use rights should be considered granted land use rights rather than allocated land use rights (Zhen, Bi & Du 2009). This restriction was much harsher under the old work units' property regime, which did not require transferees to pay a land use fee to the state.[25] (ibid.). This process tremendously strengthened the state's power.

During this backdrop of the land use right reform, housing still entailed a social welfare nature within the work unit property system, albeit rents became somewhat commoditized. For example, in the early 1990s, less than ¼ of work units in Shanghai or Tianjin reported that they had sold their housing to employees; in 1995, about 20% of work units planned to sell commodity houses to their employees (ibid.). Yet a much higher percentage of work units had planned to offer subsidies to their employees (commonly around 30% of the market price) if they wanted to purchase housing on their own (ibid.). Also, a survey showed that in 1996, most commodity housing sold was re-allocated or redistributed by work units to their employees (ibid.). Meanwhile, the sale price offered to workers was extremely low compared to the market price (ibid.). Considering the wage levels at that time, the status of the worker, and the nature of public housing, housing purchased or built by work units was usually sold to workers at significantly discounted prices.[26] (ibid.).

The social welfare nature of work units' housing was also reflected by the restriction on the transferability of housing (ibid.). Work units still had ownership of the housing; workers had use rights, which could be inherited by the next generation of their families (ibid.). In some places, workers could sell a unit after five years, but had to give the work unit an option of first purchasing and accept a price that was lower than the market price (ibid.). Despite the fact that employees only had use rights and not actual ownership of houses, the price difference between use rights and ownership

21 The State Council issued "Opinions Concerning an All-Around Promotion of Housing Reforms in Cities and Towns" in 1991.

22 State-Owned Enterprises were the main recipients of urban public land, state budget expenditures, and housing development funds.

23 Most land use decisions were about the "sitting of manufacturing plans," and were primarily responding the need of economic planning. It was said that "many incompatible land uses, infrastructure failures and environmental problems" occurred because of "lack of coordination among enterprises and government units."

24 Prior to 1978, the central government played an important role in developing work units' housing projects because the central government contributed funding to work units. These work units, usually State-Owned Enterprises, were allocated land from the state without a charge and they usually would ask for more land rather than less, which was contrary to the will of local officials.

25 The benefit under state land use rights regime was to promise work employees' private ownership of housing and to upgrade quality of housing. Private ownership of housing, however, did not make too much difference on the value of houses.

26 The author estimated that a new apartment's price in 1996 was equivalent to five or seven years of a worker's salary whereas now a new apartment's price is almost 200 years of a worker's salary.

seemed insignificant, according to some statistics (Zhu 2004).

The rapidly growing demands and value of urban land after 1992 further incentivized local municipal governments to condemn these old constructions (ibid.). Municipal governments argued that land should be used in ways that generate the highest market value, such as luxury hotels, offices, shopping malls, or commodity housing (Yeh 1997, p.63). They wanted profit-losing work units and nonprofit institutions such as schools or hospitals to give way to the higher-market-value uses.[27] (ibid.; Stein 2006, p.17). Municipal governments also proclaimed to improve the living environment for urban residents (Stein 2006, p. 65; Logan 2002, p.31). They also acclaimed unified land planning and opposed the mixture of uses inside work units' compounds (Logan 2002, p.64). They also promoted the ideas of zoning, more efficient land use and adequate public facilities (ibid.). In practice, however, these promises were not fulfilled. Urban residents found their houses were demolished and developers took advantage of them (Liu 2008, p.315). Zoning system was still either not established or largely implemented in a lax way in many cities (ibid.). Public facilities were continuing to shrink in most cities. The robust social life that once thrived in work units had been eliminated.

Since the early 1990s, state governments started to tear down work units' compounds and reclaimed the land that was once occupied by work units (Li 1996, p.65). Although state governments encountered problems, they first targeted those compounds with a less tightly knit community (ibid.). They also promised these residents with excellent prospects. Since then, the featured socialist "tight-knit community" was gone and the public nature of property was also eliminated (ibid.) As we see, however, homeowners were the true losers, as their property rights were instrumentalities in achieving the state's goals.

After the municipal government reclaimed its control over urban land, it quickly established its own real estate development business and partnered with commercial developers to undertake new real estate projects.[28] (Yeh 1997, p.65; Zhu 2004). One immediate outcome of tearing down work units' land was the sale of land use right to land developers (Yeh 1997, p.65). During this process, municipal government clearly abandoned the social and public nature of urban housing.

It must be noted that initially the state demolished these old houses to improve the living conditions of local residents (Liu 2008, p.315). When the state's funding was used up for construction, commercial developers took the lead to finish urban renewal projects in the late 1990s (ibid.). Selling land use rights gave the state governments a decided advantage as they gained huge profits from selling them to commercial developers (ibid.). These sales also freed the governments from providing affordable and habitable housing to residents. As urban land became more valuable, these new homeowners soon found they were in limbo because "they were no longer in the government's favor." (ibid.). Deep-pocketed developers had the favor of the government (ibid.). Commercial developers did not pay adequate compensation and relocation costs to residents, which aroused great opposition (ibid.). Whenever conflicts arose, the state governments chose to stand in favor of commercial developers, which made the situation worse (ibid.). Although these demolitions were mostly under the flag of "redevelopment of dangerous and old districts," the option of enabling these residents to move back to their original neighborhoods was not a primary concern for the government (Wilhelm 2004, p.265). In this process, the state government was the biggest winner as it regained the urban land.

There are significant problems derived from the urban land use right and housing reforms that still loom large in China today. The first problem created by this land use right reform was that it created fierce competitions between central state government and local state governments, which continues to be problematic today. It is apparent that whoever controls land gains significant profit. In fact, since the beginning of this reform, the central state government and localities had conflicts about the nature and split of the land revenue from the transfer land use rights. For instance, the Ministry of Finance argued that a land tax should not be a purely local revenue issue (Tang 1987, p.8). Instead, it argued, "The land tax revenue [should] be incorporated in the unified tax-sharing system existing between the central and local governments." (ibid.). In practice, various local governments on the state's behalf carried out the actual conveyance of land use rights (ibid.). This created great tension between central and local governments. On one hand, central government wanted to share the land revenue from the state and did not want local state's power to become too expanded. On the other hand, the central government worried about things that local governments did not consider, such as farmland loss, social stability, food security and environmental protection. These conflicts worsened the social obligations that should be attached to both central and local governments, because these conflicts were power competitions between the governments; their focus was not on the public.

The second problem created by this reform was that urban residential land lost its social welfare nature. In the early days of People's Republic of China, housing was a strict social and public product, which the state offered to its residents. After the land use right reform, although the housing stock was increased because investment in housing boomed, housing was still allocated through the work unit system in the mid-1990s (Logan 2002, p.10). In the mid 1990s, about 45.7% of housing built in Beijing was self-built and joint-built by work units, and another 54.3% was commodity housing (ibid.). Around half of the commodity housing was used for "compensation and the municipal government." (ibid.).

27 Furnishing housing as non-commodity to their employees rendered these work units or State-Owned Enterprises uncompetitive and losing profits. State governments could not gain profits from these work units or State-Owned Enterprises, nor could they enjoy profits from the urban real estate because work units allocated houses to their employees at very low prices.

28 For example, in 1992, Shanghai city government drafted "Shanghai Municipal Ordinances on Urban Land Management," which provided 70% of the revenues from land use sales should compensate the dislocated residents and build infrastructure, remaining 30% went to central government (5%), municipal government (12.5%) and district government (12.5%). It was not until 2001 when Shanghai city government clarified the compensation for land users; the residents received 80% of the compensation and work units received 20%. This compensation plan almost recognized private ownership of residents despite the fact that work units owned the land and the housing.

However, this situation was significantly changed after 1996, when it was estimated that 65% of housing completed in Shanghai was commodity housing, and "sales to individuals at market price also increased." (ibid.). For example, in Shanghai, the market price (without government subsidies) for a unit of commodity housing was 24,000 *yuan* per square meters (Rhee & Blank 2012). Homes built under affordable housing programs were sold around 14,213 *yuan* per square meters ($2,163 per square meter) in 2010. (Shanghai Daily 2011). Without government subsidies, a standard 90 square meters apartment with two bedrooms and one bathroom, is 2.1 million *yuan* ($310,000) (Rhee & Blank 2012), more than 65 times of Shanghai household average disposable income.[29] (Shanghai Daily 2011). Not only did the market price exceed affordability for ordinary Chinese citizens, but also the original restriction to property owners regarding maximum number of houses was also eliminated. A survey showed that "more than half the buyers of new homes [owned] multiple homes, and the overwhelming majority of buyers [belonged] to the top 10 to 20 percent income brackets." (Rhee & Blank 2012).

The third problem was that land right holders, particularly the state, abandoned social obligations that should be attached to urban land. This is clearly shown by the reality that state governments have teamed up with developers to generate more revenues or make profits (Rhee & Blank 2012). In the first place, the state sided with developers to build high-rise, commercial projects or expensive houses, at the expense of replacing poor urban residents (Liu 2008, p.315). In addition, because the costs of vacating dense residential areas drove up costs of development, both the state and developers preferred vacant land (Stein 2006). Furthermore, because the state's interests and developers' interests were in harmony, as long as the state got cash, it was lax in enforcing laws and regulations (ibid.). For example, developers could evade the two-year legal restriction of commencing construction by submitting an additional fee to the state government (ibid.). The state government has low incentive to enforce land use or zoning regulations when these regulations are in conflict with governmental interests, and thus the state tended to favor developers in its zoning policies (ibid.).

III. Conclusion

During the land use right and housing reforms in the 1980s and 1990s, Chinese property rights played an instrumental role to achieve the state's goal of strengthening state landownership. These reforms have resulted a complete loss of the socialist welfare nature of urban land and housing. The reforms also have caused the abandonment of social responsibilities that were attached to urban land and housing.

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It is a position not to be controverted, that the earth, in its natural uncultivated state, was, and ever would have continued to be, the COMMON PROPERTY OF THE HUMAN RACE.

Thomas Paine

Regulation in a crony capitalist state: The case of planning laws in Bangalore

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Abstract

The city of Bangalore came up with a draft structural plan 2031 to accommodate the emerging challenges of urban growth, congestion and environmental concerns through planning and regulation. In the decade 2000-2010, when the city opened itself to the booming IT industry, its developmental response to the pressures of growth has been through policy measures like airport relocation, introduction of metro rail, satellite township development, traffic improvement projects and revenue layout development. This paper focuses on regulatory evolution in the period 2000-2015 and the way the city regulations changed to accommodate this process.

The study attempts to understand what drives planning regulations in Bangalore. The literature on the changes in planning laws in capitalist contexts such as European cities informs us that demands for changes in planning were made by creative class and the political class responded to the same in the interest of the city. In this backdrop, we examine the impact of private sector participation in the city planning and regulation in Bangalore city. Through an analysis of recent changes in the planning laws and the infrastructural regulations, we argue that rent-seeking interests engineered through the nexus of politician-realtor class have driven the regulatory changes in Bangalore.

Keywords: Bangalore, Regulation, Revenue layout, Urban growth

Introduction

The public debates on land issues in South Asia, in recent times, have been around the discourses of private property and dispossessions through state-facilitated land acquisitions (Baviskar 2010). These discourses, in the context of urban property, have to be understood in the context of two phases of developmental orientations. First, post-independent India, since 1947, has carried out a city-centric growth model through a state-led centralised planning approach (Kohli 2004) by neglecting rural areas where majority of Indian population resided (rural population: 1951 – 82.7%; 1991 – 74.4%; 2011 – 68.8%). Second, since the era of economic liberalisation in 1991, increased investments for businesses, particularly focusing on urban hubs in developing countries have led to significant spatial restructuring through a market-led process. By 2031, Indian urban population will be over 600 million (about 40% of Indian population), and how cities are planned and managed today is going to determine the quality of life in the future.

In the context of rapid infrastructural changes, this paper attempts to understand what drives the planning regulations in Bangalore, one of the fastest growing cities in India. To answer the question we examine the case of a key infrastructural change, namely 'revenue layout', a deviation from planned residential infrastructural development. 'Revenue layout' refers to quasi-legal property that is formed on agricultural land. In other words, the approval from a competent authority for the required conversion from agricultural purpose to residential purpose is not full and thus, quasi-legal status exists. The vagueness in the legal status of a property enables politicians to extract rents from property owners on a continuous basis. The weakness of regulatory capacity and the limitation of planning laws in crony capitalist states are the key arguments this paper advances.

In the first section, an overview of the urban sprawl is provided by showcasing the magnitude of urban challenges. Then, an overview of the evolution of planning laws and bodies responsible for urban planning is provided primarily aiming at the readers who may be new to Indian planning system. After these two introductory sections, the case of revenue layouts and driving forces behind such developments is analysed. To

develop the argument of how politician-realtor nexus paralyses the planning regulations, we analyse two sources of information. First, we systematically look at two master plans and associated planning bodies responsible to implement these plans. Second, we critically analyse the practices of urban development particularly around revenue layout expansion. Here, we depend on evaluation reports, newspaper reporting and case laws.

The urban sprawl in Bangalore

After the liberalization of Indian economy in early 1990s, there was a constant flow of investment toward India. Indian economy has since then seen a dramatic change in the growth of urban areas that were the hubs of these frantic transnational market activities. Cities attracted more population due to the improved infrastructure and investment opportunities resulting in large scale migration from rural areas. The idea of a secure job for the Indian middle class changed from exclusive government jobs in the 1960s to the growing IT based engineering jobs. The city of Bangalore in the south of India (in the state of Karnataka) was the epicentre of these developments, metamorphosing from a quiet green cantonment town to the 'Silicon Valley' of India.

Bangalore is the fastest growing city in India in terms of its population growth, having added an estimated 46% to its count over the last decade (Census 2011)[1]. The estimated population in the city municipality area, called Bruhat Bengaluru Mahanagara Palike (BBMP), as per the 2011 census is 84.74 lakhs[2], up from 45.92 lakhs in 2001 with a corresponding increase in area from 254 sq km to 800 sq km. The population density in Bangalore Metropolitan Area has also seen proportionate increment in the past decade from a mere 2985

1 Bangalore is the third most populous city in India and the 18th most populous city in the world.

2 1 lakh=100,000 persons

Tab. 1. Trajectory of Urbanization in Bangalore- 1991 -2001 [a]

a The data for 2001 is the latest data available from the government sources on urban agglomeration. Results from 2011 are still awaited.

Indicators	1981	1991	2001
[b] ***Bangalore UAA[1]***			
Total population (million)	2.9	4.13	5.69
Total area (km^2)	365.65	445.91	531.00
Decadal growth of population (%)	76	41.36	37.69
Annual growth rate (%)	5.8	3.52	3.25
Density of population (per km^2)	7991	9263	10710
Urban Karnataka			
Annual growth rate (%)	2.37	2.63	2.57
Share of Bangalore UAA in urban Karnataka (%)	27	29.70	31.73
Urban India			
Annual growth rate (%)	3.79	3.14	2.77
Share of Bangalore UAA in urban India (%)	--	1.90	1.99
Size class of cities			
Share of Bangalore UAA in Class I cities in Karnataka (%)	46	45.90	47.22
Share of Bangalore UAA in Class I cities in India (%)	3.04	2.91	2.90
Share of Bangalore UAA in Million plus cities in India (%)	6.94	5.85	5.27

Source: Compiled and computed by the authors, using the basic data in Census 2001.

Notes: (a) Annual growth rate refers to compound average annual growth of population during 1971-1981, 1981-1991, and 1991-2001. (b) UAA refers to urban agglomeration area. (c) Class I cities are those with population size of 0.1 million and above.

b The Bangalore Metropolitan Area is the metropolitan area comprising the erstwhile Bangalore city corporation and cantonment area. The city had an urban and rural taluk which were regrouped as Bangalore Metropolitan Area in 1986. This is the term used in all plan documents of Karnataka and these are the figures given in the text.However, to understand the urban sprawl especially the growth of industries in the periphery, Urban agglomeration is the unit of analysis given in the Census of India data since 1971.

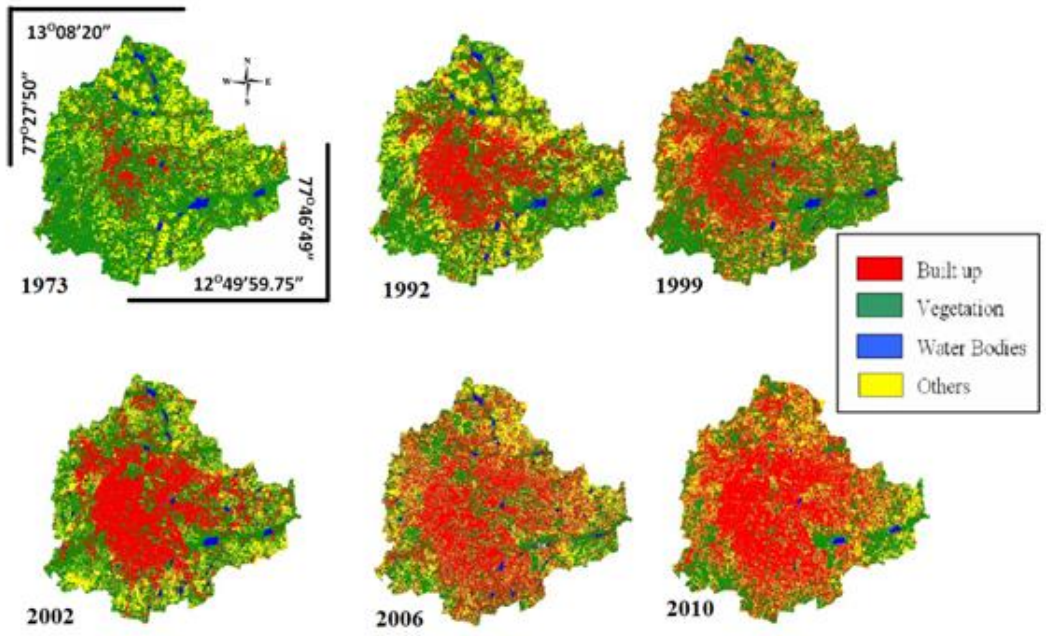
per square km in the year 2001 to now 4378 per sq km in the year 2011.

These demographic changes have put tremendous pressure on resource distribution, especially that of land availability. The emergence of satellite towns on the periphery of the city, the relocation of public transport hubs like the airport, metro and the B Trac[3] and revenue layout development have all been unique ways in which Bangalore has responded to this transformation. As a result, seven neighbouring city municipal councils, one municipal town and 110 villages were merged into Bangalore in 2007. The last available city profiling of 2001 had already placed it as the fifth biggest urban agglomeration area (UAA) in India. Table 1 summarises the trajectory of urbanization in Bangalore during last three decades.

The rapid growth of Bangalore has been accompanied by a constant expansion of residential and commercial land development outside the Bangalore Metropolitan Area, leading to displacement of population from the core area to the outer zone. For instance in 2010, 15,416 dwelling units were absorbed against 13,413 in the previous year. 264 sqft per minute was additionally built up in Bangalore between 2006 and 2012 (Bharadwaj 2015) There were regional disparities in the nature of urban growth in Bangalore. The north and south of Bangalore saw maximum localities reporting rising land values, which eventually led to increase in urban sprawl in the Metropolitan Area.

One of the notable changes in the land use pattern due to urban sprawl is what is locally described as 'garden city to garbage city'. Bangalore had 280 lakes in 1960. These lakes used to be the elixir to keep Bangalore as a garden city. As of 2012, Bangalore has only 17 lakes. Most of the lakes were encroached upon by realtors for land. A looming crisis for water is overshadowing the sparkling growth of Bangalore. In the context of this urban sprawl, this paper demonstrates how the planning regulations emerge from the rent-seeking interests of politicians because of their nexus with realtors.

3 B Trac 2010 is the government initiative to manage traffic congestion in Bangalore through modern technology system.



Source: geospatialworld.net

Map 1. Land Use Change due to Urban Sprawl in Bangalore (1973-2010)

Evolution of planning laws in Bangalore

The first major legislation in Karnataka for urban planning and development came in the form of the Karnataka Town and Country Planning Act, 1961. This was done with the belief that physical planning had to precede economic planning as otherwise cities, towns and villages would grow to unmanageable sizes without proper planning, resulting in unhealthy surroundings. This act therefore promoted the regulation of planned growth of land use and development and for preparing and executing town planning schemes. The state then went on to enact the Karnataka Municipalities Act 1964 in order to manage the affairs of the towns and cities of the state.

Over the years, through multiple legislations, multiple agencies began to exercise jurisdiction over the city of Bangalore with some of them having overlapping functions. These included authorities such as the Bangalore Metropolitan Corporation (1945), the City Improvement Trust Board (1945),

the Karnataka Industrial Area Development Board (1966), the Housing Board (1956) and the Bangalore City Planning Authority (1961). A need was felt to establish a common authority in order to coordinate development activities. The BDA (Bangalore Development Authority) was thus setup through the enactment of the Bangalore Development Act 1976 in order to bring together the functions of the City Planning Authority and the City Improvement Trust Board. Thus, the BDA became the body for plan preparation, enforcement as well as implementation. The Act however did not bring much improvement as the jurisdiction of the BDA was not coterminous with that of the Metropolitan Area. This meant that local bodies like BDA (1976), Bangalore Water Supply and Sewerage Board (1964), Karnataka State Road Transport Corporation (1961), Karnataka Electricity Board (1970), Karnataka Slum Clearance Board (1975) and Bangalore City Corporation (1945) saw very little coordination. This led to the formation of the Bangalore Metropolitan Area Development Authority in 1985 which had jurisdiction over both the Bangalore Metropolitan Region, as well as surrounding rural areas.

None of these many bodies is constitutionally mandated to carry out planning functions. The absence of a constitutional mandate for planning made them less accountable in carrying out planning regulations. After a long battle with the government by the civic activists, and a favourable decision from the High Court, government was forced to set up a constitutionally mandated Planning Committee for Bangalore in 2014 namely, Bangalore Metropolitan Planning Committee (BMPC). However, government found this institutional arrangement as a challenge to the politician-realtor nexus, since the new body had limited participation of members of legislative assembly , whose real estate interests were pushing haphazard development in Bangalore. One of the ways to reinstate the power balance of crony capitalism was to appoint a minister for 'Bangalore Development' who would make sure interests of politicians are first met than the planning requirements (Bharadwaj, 2016).

The history of planning in Bangalore has been of a kind that has exuded chaos and delays in which the first phase was predominated by planning. The first development plan for Bangalore was the Outline Development Plan (ODP) for the Metropolitan Region, adopted under the 1961 Act. This plan was prepared for a period of fifteen years from 1961-76; however it was approved by the government only in 1972. This plan divided the city into two areas of a total of 500 sq. km. of which the outer ring was to be conserved as a green belt. In the meanwhile, the BDA in 1974 was tasked with the duty of preparing a Comprehensive Development Plan (CDP) to succeed the Outline Development Plan. However, this did not take place till 1984, making the Outline Development Plan the governing plan for a full eight years past its period, and by then the natural growth of the city had already encroached the green belt (see Map 1), resulting in large scale unauthorized development. The Comprehensive Development Plan was enacted for a period of fifteen years from 1986-2001, and extended the planning area - inclusive of the new green belt area and a new conurbation area which absorbed the encroachments in the old green belt - to a total of 1279 sq. km.

Up until 1991, Bangalore City development plans were mandated to be prepared once every five years under the 1961 Act. In 1991, an amendment was brought to this legislation to increase the time period to ten years. The Bangalore Metropolitan Region Development Authority has since prepared two structure plans, one with a period up to 2011, and another draft that has been in preparation from 2008, and will be in force until 2031. A comparative analysis of these two plans, gives an idea of the shifting priorities for the city planning of Bangalore over time, and since this planning usually lays the ground work for a lot of land and urban policies, it becomes hard to ignore.

A blue print for the expansion of Bangalore

A structural plan is a perspective plan that attempts to integrate two axes of planned development- the levels of planning from national to the sub national and local level and the concerns of planning like social, economic and environmental. Structural plans have been identified in the Indian planning context as the tool to tackle regional disparities. For instance, Bangalore is the only metropolitan region and megacity in the state of Karnataka. To address the disparity of urban development in this region and balance it with the hinterland, structural planning was thought of as necessity. Secondly, the development of other regions not only vis-a-vis Bangalore, but also as independent settlement required long term planning.

The structural plan 2011 for Bangalore Metropolitan Region (BMR) was first developed in 1997 and received approval in 2005. This plan conceived the BMR and South Karnataka Region as separate but contiguous entities. The South Karnataka Region constituted six districts around Bangalore Metropolitan Region namely Bangalore, Tumkur, Hassan, Mandya, Mysore and Chamraj Nagar with a total area of 50,555 sq km and a population of 203 lakhs in 2001 (BMRDA 2011: 12). The Bangalore Metropolitan Region has three districts called Bangalore Rural, Bangalore Urban and Ramanagaram.

The mission statement of Structural Plan 2011 says:

The mission of the integrated South Karnataka Region and Bangalore Metropolitan Region development strategies is to change the landscape of investment opportunities of Southern Karnataka so that development is appropriately managed in the Bangalore Metropolitan Region and successfully promoted in the surrounding South Karnataka Region thereby creating more equitable and sustainable regional economic conditions and growth prospects. (BMRDA 2011: 27)

The 2011 structure plan attempted to make Bangalore investor friendly, but also decentralize industry into the areas surrounding Bangalore, so as to retain the primacy of Bangalore. At the same time it also attempted to decongest and reduce the burden on the city, while containing its outward growth. For this it chose to break the surrounding region into six Interstitial Zones and five Area Planning Zoneswith their own local planning authorities. Within these regions, it also tried to push industry and investment toward the more water plenty South-Western Areas.

The 2031 Plan (revised version of the 2011 Plan) (BMRDA 2011) significantly differs from the earlier version and sheds light on the changing contours of planning objectives. For instance, the mission statement reads thus,

To promote the region's ecological and cultural values while seeking optimum land utilization suited to its capability for sustained balanced economic production and inclusive growth by inducing agglomeration economics and clustered development through a decentralized planning and governance system (MRDA 2011: 12)

The 2031 Plan which has been drafted with the help of private participation focuses more on issues such as environmental sustainability, public participation, transparency and accountability. Thus while the previous plan focussed on attracting investment and spreading it in the right areas, this plan is focussed more on governance and making sure the city runs in an economically and environmentally sustainable manner. The mode chosen is also different. Plan does not use development zones that the previous plan did, but rather delineates eight economic cluster zones, and four growth nodes that will fuel development on the outskirts of Bangalore in a planned manner, restrict further migration to the core city, and also maintain the environmental characteristics of the surrounding regions. It also zoned land into either of possible urbanisation, industrial, agricultural or conservation zone and delineated the zonal regulations, ensuring also that there will be no urban encroachment into ecologically sensitive zones.

The 2031 Plan also suggests a land allocation strategy supporting mixed use and having adequate infrastructure to ensure compact development. It also suggests the designation of certain lands on urban fringes as transition zones, for urbanization in case of stress post 2031, so that any encroachment on such land can also be more easily accommodated and assimilated. In order to tackle the growing housing deficit, it suggests the supply of government land in the nodes and clusters for development in partnership with the private sector, and a change in the functioning of the Karnataka Housing Board in order to make it a facilitator and joint partner with the private sector. The same 'innovative' housing solutions have been suggested along with the similar changes in rent control, and a 'pragmatic policy' of formalizing or regularizing unauthorized development.

Revenue layout is the most demonstrable case of how unauthorised developments were permitted to serve the interest of politician-realtor nexus.

Revenue layout development in Bangalore

The Bangalore Metropolitan Area falls into three types of layouts: BDA layouts that are called planned layouts, private layouts that are built by private players respecting the zoning norms and organically grown revenue layouts. BDA layouts are completely planned with access to main roads and arteries of adequate width, transportation hubs, sites that are set apart for schools, hospitals, parks and greenery. BDA layouts had been acquired through the legal principle of eminent domain of the state. Property owners in BDA layouts benefit from what is known as 'pre serviced utility connections' (water, electricity, power and sewer lines) which are arranged by the BDA, in accordance with the land planning and development norms. There are 62 BDA layouts, each of about two hectares and around 200,000 sites made so far in Bangalore (Venkataraman 2013). However, due to the monopoly that BDA assumed in providing housing sites since 1980s, the 'legal' housing provided by the BDA also became non affordable to various sections of the society.

Outside the prism of property laws and planning regulations, there exists a world of illegality in land use and housing that negotiates with the planned and legal spaces of the city. Development of revenue layout is a direct offshoot of the inadequacy of the government to provide housing and the usurping of the private players to take on this role through the natural growth of the market. 'The term "revenue layouts" is used generically to represent quasi-legal layouts that are formed on agricultural land without proper approvals from the concerned planning authorities under the relevant laws'(ALF Report 2003: 96). Revenue layouts have been systematically and organically forming a part of cities like Bangalore since the 1970s by sub dividing agricultural land in the periphery without regard to zoning regulations, layout norms and building codes.

With the increasing pressure to accommodate migrants who came to the city with the IT boom, a middle way was found to convert agricultural land in the periphery to residential layouts by exploiting a loophole in the Karnataka Land Revenue Act . There are three distinct types of revenue layouts formed in Bangalore. The first is one in which for certain specific purposes, land use conversion is permitted by paying the Deputy Commissioner (locally known as 'DC Converted'), who is the officer in charge, a 'conversion charge' and obtaining a No Objection certificate from BDA. Revenue layouts formed through this manner apply their land use under Gramthana and plantation category which is in the exempt list. The second type of Revenue layout is one which is DC converted pending approval from BDA. These layouts are technically illegal since they do not have the approval of BDA. Instead they have the approval of the local body concerned. They are therefore not given Khata (title deed) as well as access to public amenities like power, water, sewer and electricity. In Bangalore's case, it is found that there are revenue layouts that manage to have access to basic amenities by informally paying the administration. The social profile of residents of these revenue layouts range from high end classes (housing enclaves), middle classes (housing co-operatives and residential associations) to low end classes (farmers). BDA has the right to demolish all these settlements within the framework of law. The third type is one which is neither DC converted nor BDA approved but is approved by the local body.

All the three types of revenue layouts can be distinguished from planned layouts through the absence of grid development, presence of encroachment of buildings into roads and absence of piped water network. Today 90% of settlements in Bangalore's periphery form revenue layout (Ranganathan 2011:168).

The process of acquiring property in a revenue layout cannot

be understood without the framework of crony capitalism. A prospective buyer in the 'revenue layouts' has to navigate through a networked web of various actors in the informal space, which includes brokers, landowners, very often the 'land mafia' and very significantly the lower level government officials that has significant discretionary capacity to acquire a parcel of agricultural land, and consequently move in but without preinstalled utility connections (Benjamin, 2004, 2008).

Now that some of the principal distinctions have been established, it will be possible to appreciate how varying degrees of informality within the binaries of BDA layouts and the Revenue layouts play out with the help of political agents on the ground, and how governmental agencies through different actions may blur the original distinction between the BDA layouts and the revenue layouts, both of which should be read as authorised layouts and unauthorised layouts respectively. Therefore it is important to appreciate in the context of land development in the informal layouts that, with the passage of time, certain residential layouts acquire a relatively greater legitimacy over others, all of which are determined by a very haphazard interaction of political agents, government officials, land mafia and their connections with political agents and subsequent patronage, in addition to a host of other factors.

There could therefore be many indirect indicators for a gradual and in some ways incremental improvement of legitimacy for such land and hence it is important to acknowledge the role of the various informal processes that might play a crucial role in such improvement or transformation of land that had illegal land use to start off with, but increasingly has enjoyed greater legitimacy. The typical ways and methods through which such illegal land use incrementally enjoys greater legitimacy are through interactions with public authorities. This blurs the distinction between formally approved BDA layouts and the informally and illegally acquired revenue layouts. – For instance, the acceptance of taxes on property remitted by the informal residents to the local government responsible for such tax collection, implies sanctions from a local urban development authority. In another example, any investment towards roads and infrastructure by a local politician that seeks to win favour, popularity and votes from inhabitants of a local constituency offers the tacit protection of different kinds of political actors. These practices result in operational claims to informal land by residents of land with improper land use or ownership titles.

Towards regularization

By the early 1980s, the problem of encroachments on lands belonging to Municipalities, BDA, Improvement Boards and other local bodies had assumed serious proportions. This was due to the lack of deterrents in the existing legislations. An amendment to the 1964 Act in 1984 therefore provided for the offence to be punishable with imprisonment for a term which could extend to three years and with a fine which could extend to five thousand rupees. Further, it is also proposed that any person who had occupied land belonging to any of the said bodies without authority and who fails to vacate such land shall on conviction be punished with imprisonment for a term which may extend to three years and with fine which may extend to five thousand rupees, and with a further fine which may extend to Rs. 50 per acre of land or part thereof for every day on which the occupation continues after the date of first conviction.

The problem however did not disappear mainly because the legal deterrent was insufficient to induce corrective behaviour. This led to the clauses in the plan document to regularise unauthorised occupation of Government land subject to certain conditions and restrictions and on payment of regularisation charges. The Karnataka Land Revenue Act, 1954 was amended in 1991 to provide for making unauthorised occupation of Government land punishable and regularisation of unauthorised occupation of Government land prior to 1989. The extent of regularisation was a maximum of two hectares, regularisation charges was deemed to be 500 times the assessment of land and there were special provisions for certain sections of communities.

Another attempt to combat encroachment was introduction of Transfer of Development Rights (TDR). By amending the Karnataka Town and Country Planning Act in 2004 additional built up floor area ratio up to 100 per cent was allowed. The purpose of awarding Transfer of Development Rights to the owner of property was when urban planning with a public purpose like building of civic amenities, parks or playgrounds required land acquisition. However, the scheme was not successful since the area issued for TDR was 15.75 sq km as against actual utilisation of 5.29 sq km.

The regularisation of unauthorised structures was an important strategy of combating urban expansion. This came about with a provision for regularisation combined with penalty payment. The penalty was not more than the amount calculated from market value of property of that area. There was charged a levy for granting permission for development of Land or building from the owner of such land or building, for supply of water, formation of ring road, slum improvement and mass rapid transport system at such rate not exceeding one tenth of the market value of land or building. The building was to be forfeited in case of contravention of rules or non-payment of penalties.

Master plan and regularisation: Inconsistencies

The Karnataka Town and Country Planning (Regularisation of Unauthorised Development of Constructions) Rules 2014, popularly known as AkramaSakrama (literal translation in local language means 'regularising irregularities') is the amendment to various acts including Karnataka Town and Country Act. The scheme was conceived in 2006. It was framed to bring 'decorum' to the process of urbanisation while aiming at addressing issues such as demarking land use as commercial, residential and mixed. The laws enclosed prescribing building setbacks, addressing agricultural land being constructed upon in violation of town planning rules, buildings having been constructed that are not in line with

building regulations and punishment for encroachments.

The scheme applied to all layouts and buildings that had come up on private property before October 19, 2013. The government called for illegal property owners to file for regularisation from March 2015, to be extended to a period of one year till March 2016. No building or layout on encroached government or semi-government land was eligible for regularisation. Houses constructed within eighteen kilometre radius of BBMP were to be regularised.

Funds mobilised through *AkramaSakrama* were to be used for the development of infrastructure and the creation of parks and open spaces in the state. The government claimed that it will be in a better position to provide amenities like better roads, street lights, garbage pickup and water connections as the regularisation of 2.5 lakh properties stood to bring in up to 5000 crores to the Karnataka government through betterment charges, stamp duty and registration charges.

There are a number of consequences to the enactment of this Act. In the short term, properties that currently attract a lower price due to their status as 'illegal constructions' will increase in value up to 20-30% after regularisation. Such a spike in supply of real estate may temporarily lower buying prices. However, in the long run, by paying the prescribed fee to regularise illegal constructions, professional builders could pass on the burden of these penalty fees to the ultimate buyers. Therefore, property prices may increase at purchase. Further, a large number of properties that are currently seen as 'unsalable' due to lower prices due to their 'B' Khata registrations will become attractive in the real estate market, resulting in increasing supply and lowering prices. But in the long run, this will gravely affect the real estate market in the city. Perception of real estate in Bangalore will be that of lower-quality construction since it will be a known fact that buildings in violation of legal requirements are permitted to exist (Kumar 2014).

On 20 March 2015, the High Court stayed the scheme based on Public Interest Litigation by civil society groups . The contention put forth in the litigation was two-fold. The High Court was requested to look into the interests served while implementing the scheme. The issue raised was that though property developers and the bureaucrats concerned have been able to construct and permit illegal buildings, the buyers alone had to pay for regularisation. This may not deter illegal development of land per se. The second issue was the hurried manner in which the law was passed though there was a lot of opposition. The government's contention was that nearly 10000-15000 crore rupees would be generated from the scheme across the state of Karnataka that could be used for urban development. After three governments and seven years of debates, the scheme was introduced through the ordinance route . A second petition filed by a Bangalore based Citizen Action Forum demanded that the scheme should have provisions to respect the neighbourhood sentiments and interests. The Forum also asked the HC to enforce penalties and payments against the violators of building regulations. They have pointed out that the scheme renders irrelevant the master plans and comprehensive development plans.

Gains of crony capitalists through regularization of revenue layouts

The development of revenue layout was fostered by the interplay of various interests of the stakeholders. The main stakeholders involved in the Bangalore urban development scenario were politicians, bureaucrats, realtors and residents. The revenue layouts that organically developed were to satisfy housing needs of the people who could not afford both the planned and private layouts. The residents supported the revenue layout since they were looking for housing property and access to public amenities in a city that they migrated to for employment. In order to do this, they bought property built in by realtors often through credit offered by banks. Thus the formation of revenue layouts was demand driven through a market that was allowed to grow with State complicity. The realtors benefitted from the unmet demand by investment and their interest was primarily financial. The layout formation was indirectly aided by bureaucrats and the political class through two different ways- often they turned a blind eye to the illegality though they had the power to demolish the construction through BDA, thereby giving implicit sanction for layout formation. In the second type of response, certain kinds of layout were given permits in the local bodies.

Once the revenue sites were generated, for the politicians across three different political parties over the period of seven years from 2007 to 2014, the main impetus was to regularise revenue layout through AkramaSakrama law. This was because they had initiated the private layout formation through planning and laws in the 1990s when housing was shifted from being an exclusive monopoly of the state to provision through private players. They now stood to gain public support and exert state authority to bring the layouts under the purview of law. The political class presented the issue in public interest by stating that they were regularising what was illegal through a onetime payment thereby enabling residents to have title deeds. Furthermore, the interest stated was revenue generation to the state that could be utilised for public service provision. The bureaucratic class also showed rent seeking behaviour after regularisation of housing, by exploiting the loop hole in the Karnataka land reform Act to regularise residential property in the green belt through onetime payment. The class of realtors supported the regularisation drive since the penalty of irregularity was completely borne out by the residents. It was this objection that was repeatedly raised in the judicial proceedings in the Karnataka High Court. Thus the resident class opposed the way in which regularisation was carried out.

The period of revenue layout formation and regularisation exhibits a collusion of the political realtor class in encouraging the development of a parallel illegal market for housing to cover the inadequacy in supply of the state provision for the same commodity. Once the revenue layout was well established, then the drive to regularise them and bring them under the law penalised only the buyers of property and not the authorities who sanctioned it or the realtors who constructed these properties. By presenting the case of regulari-

sation as the State helping the residents receive title deeds, the attempt was to exert authority, gain public favour and generate revenue.

Stakeholder mapping (table 2) reveals that the three political parties in the last seven years in power namely the JDU, Congress and BJP were in favour of the scheme along with property developers. Those that mainly contested the claims of the law were civil society groups comprising residents of the layouts and urban planners.

Tab. 2. Stakeholder's Interest Map

Phase	**Revenue Layout formation**		**Revenue Layout regularisation**	
Stakeholder	**Type of involvement**	**Interest displayed**	**Type of involvement**	**Interest displayed**
Politician	(Active) permit through local bodies; passive collusion by realtor nexus	Gaining Public support politically, financial gains from realtors	(Active) legislation for regularisation to re-establish state authority	Revenue generation, political support from residents
Bureaucrat	(Passive) collusion by rent seeking from illegal property	Financial gains from realtors	(Active) promotion of regularisation by onetime payment	Exertion of authority, revenue generation
Realtor	(Active) provision of housing	Revenue generation from selling property without legal hassles	(Active) support since no penalty on the builders	Opportunity of non penalty for illegal activity
Resident	(Active) purchase of property	Access to affordable housing, amenities	(Opposition) since penalty entirely borne by them, demand for accountability of political and bureaucratic class	Concern about shouldering entire financial liability, corruption

Source: Developed by Authors

Conclusion

Bangalore had unique ways of coping with its urban sprawl. The initial idea of planned development with master and structural plans saw the growing unauthorised development through revenue layouts with the consent of the planning authorities, though outside the law. In the first phase, the property providers were the real estate builders who took the initiative to provide buildings together with the necessary infrastructure in the place of BDA. As the second phase of unauthorised development was largely a result of ineptitude of regulation to deal with urban growth, the politician realtor nexus took charge of the next change in regulation through regularisation. Successive governments have justified it on two counts- that it would legalise the unauthorised revenue layouts and it would generate revenue to finance further infrastructure provision. However, the residents and property buyers have opposed the move with the intervention of the judiciary. Their contention is that the penalty imposed on regularisation only concerns the buyers, leaving out the politicians, bureaucrats and realtors who consented and effected the development of the property. Thus, the dominant political force of politician-realtor nexus can be a better explanatory variable of the Bangalore growth story, comparable with the creative class factor in European cities during their expansion.

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Property, however small, gives security and insurance against misfortune and liberty for new adventure, thus cultivating a sense of proprietorship in a civilisation, of independence of status, which makes governments appear as servants, not as masters, and institutions as the means to freedom, not to servitude.

Thomas H. Marshall

Responsible localism, reactionary localism: Lessons on land use controls and sustainability from the Global South for the Global North

James S. Krueger, Harvey M. Jacobs

Abstract

This article engages the debate about whether localism – here defined as neighborly concern over land use – is favorable or unfavorable for environmental sustainability. Many scholars in the Global North criticize localism for its misguided incentive structure favoring local advantage and amenities over regional coordination and more environmentally sensible land uses like denser housing. In the Global South, on the other hand, many scholars and advocates argue for localism as a democratic right and a key to greater participation in natural resource management (leading to more sustainable land use). Looking at the dynamic of advancing central-formal control and retreating local control, this article argues that there are broad similarities between the Global North and South and that there are broad dangers of a "reactionary localism" – disorganized and defensive assertions of local interests that may have negative consequences for the environment. The article develops a case study of the national-local dynamic of land use control in Igembe, Meru County, Kenya and then considers how lessons from Kenya might be useful in the context of U.S. land use. Particularly, it is argued that local institutional breakdown in Kenya and the U.S. makes it harder to generate meaning around land use decisions and, hence, harder to enforce environmentally-oriented land use rules.

1. The debate about local control and sustainability

Localism is not just a concern about one's own property but also a concern about the neighborhood. The great localists are those who maintain their own suburban lawns and put peer pressure on others to do the same. Or, if offered a more formal venue, they might meet on a beautification committee or organize to advocate for restrictive local zoning (Fischel 2001). These might seem like unlikely environmentalists but, it is suggested here, they might have more to offer in support of the existence value of land than at first it seems (Rome 2001).

Environmentalists in the Global North often view protective homeowners (or groups of homeowners) as too parochial in outlook (see for example the overview discussion in Jacobs 1989). Such people are concerned with their local environment but are unable to make sacrifices – particularly denser housing – that would benefit society and the environment as a whole. Local homeowners do not mind destroying the environment of others, so long as it is "not-in-my-back-yard." Individuals and small groups are also thought to be terribly inefficient at managing "sheds" – watersheds, eco-sheds, wildlife sheds, etc. – because of collective action problems and the high costs of coming to agreement on a course of action (Olson 1965; Hardin 1968). A locality on its own can not easily coordinate with ten other localities to protect a forested water catchment and wetlands that help provide water to all ten localities. Competition among local governments to attract jobs and people, at least in the U.S. context, is seen to contribute to local deregulation and environmentally inappropriate land uses (Molotch 1976).

Those who dislike localism find support from both government professionals and market enthusiasts. Many planners want to manage land and natural resources at regional and national levels to deal with the broad inter-connectedness of natural resource systems and the high potential for negative external consequences of local decisions (see e.g. Beatley 2000; Lane & McDonald 2005; Orr 2008). Economically-oriented scholars often view local control over land use as a kind of protectionism that interferes with (global) price signals and that prevents land from going to its highest value use (Fischel 2001, 2015). New environmental rights like carbon credits work only with many participants in a national or global marketplace and with broad standardization of rights and so also push against local control (Wissel & Wätzold 2010). Those arguing in favor of local control, as for example food

systems scholars, argue first for a localized rural economy within which local control would make sense or alternatively argue for a highly circumscribed form of localism (see e.g. DuPuis & Goodman 2005; Krueger 2015; Lane & McDonald 2005). Even then, this variant of local control has met with a great deal of criticism on sustainability concerns as well as on concerns about protecting minorities (Born & Purcell 2006; Komesar 2001; Parvin 2009).

The environmental movement in the Global South, on the other hand, has a more favorable view of localism. Local control is seen as empowering for indigenous groups, as a needed offset to powerful elites in government and private corporations, and as a necessary component for collective action for the environment (Alden Wily 2003, 2008; Larson 2008; Nelson 2010; Ribot 2003, 2004). In places where the law does not work well or lacks legitimacy, local social attachments seem to offer a next-best alternative for enforcing property rights and land use rules (Joireman 2011). Indigenous societies are found to have intensive daily interactions with local ecologies and environmentally-friendly values and beliefs (Cox et al. 2014; Peacock & Turner 2000; Whiteman & Cooper 2000).

Communities in the Global South appear to overcome collective action problems in part by virtue of their exclusivity. As Ostrom (1990) notes, one of the first steps for successful commons management is to carve out the local area, controlling its borders and membership so that the group will reap the benefits of group discipline. In this context, the bad of parochialism becomes the good of community concern, commitment, and participation. This line of argument dovetails with human rights assertions about self-determination and about the right (of groups) to property (de Schutter 2010; Murray & Wheatley 2003).

It might be argued that the context in the Global South is different from the Global North. Local control makes sense for places where formal law lacks legitimacy, where government lacks funding, where people access resources like land through local social networks, and where there are high levels of official corruption. In Western countries, law pervades everyday life and informal social control is often perceived to be less functional. People are so mobile, and populations so urbanized, that exclusivity of local communities seems to lose much of its meaning.

The argument here, however, is that contexts are not so different from South to North and that problems – previously perceived to be developing country problems – are also incipient in the Global North. Across contexts, an uncomfortable dynamic over property has developed with the advance of formal land use law and the defensive posture of localized control. This dynamic produces a reactionary localism, one of property rights fundamentalism (i.e. this is my property and I can do what I want with it), racist-ethnic protectionism (let's keep those "other" people out of our neighborhood and away from our resources), and social compartmentalization (those types of environmental problems are not happening in our group so they must be other people's behavioral problems).

This article traces reactionary localism across contexts. It starts by exploring the dynamic of advancing formal land use law and defensive local control in Kenya. The article then considers the lessons from Kenya in the context of land use in the United States. It is argued that, while the U.S. context is significantly different, a degree of local autonomy similar to what is demanded by indigenous institutions in Kenya may be useful in the U.S., if the U.S. is to achieve a healthy dynamic between law and local control going forward.

2. Local control and land use decision-making in Igembe, Meru County, Kenya[1]

Presently there is a great deal of *de facto* local control over land use in Igembe, a sub-region located in Meru County, Kenya. The main driver of the Igembe economy is *khat*, a small tree that, when its twigs and leaves are consumed, produces a mild stimulating effect. Outside of Igembe, *khat* is considered by many Kenyans to be a drug crop and, in practice, has been ignored entirely by an embarrassed agricultural extension service. That means that most farmers (particularly in the middle elevation "homestead" zone between 1200 and 1800 meters) carry out their farming using traditional methods without much government planning or oversight. In the past government-appointed chiefs and agricultural officers attempted to enforce certain land use rules via the criminal law, for example forbidding cultivation of steep slopes and tree cutting in water catchments on pain of fine or imprisonment. For the most part, these formal rules now exist in the background, rarely enforced. Chiefs have come to take a more collaborative approach. During fieldwork in 2014 one chief explained that his job was not to enforce land use law but rather to create awareness and bring in experts so that people would learn to use land wisely. In fact, many chiefs in Igembe do not know the formal rules of land use. Informal local authorities like clans and *Njuri Ncheke* council of elders (and indeed elders at the household level) continue to exercise some control over land use, mostly by reproducing traditions and thus indirectly influencing private landowners (e.g. to plant more indigenous trees on their property). These informal authorities are supported by the *khat* economy, which puts money and influence into the hands of some traditionalists (who stand apart from the educated elite and the civil service).

Despite its seeming weakness on the ground, government has greatly influenced the trajectory of local control over land use over time. On arrival in Igembe, the British found clans that were deeply involved in land governance[2] (Goldsmith 1994, 64-66, 70-75; Lambert 1947). "Clan" (or *mwiriga*) is used here to mean a neighborhood organization (sometimes of mixed blood relations) whose members are initiated together into age sets and who form the basic governing units of the Meru tribe. Ruling clan elders imposed livestock fines for violations of clan land use rules, as for example cultivating in areas designated as fallows, or cutting down trees without permis-

1 Research for the Kenyan case study was undertaken in Kenya from 2014-2015 with generous support for the senior author from a grant from the U.S. Department of Education Fulbright-Hays Doctoral Dissertation Research Abroad Program.

2 V.M. McKeag, "Native Land Tenure," 26 November 1938, DC/MRU/2/4/9; V. M. McKeag, "Collective Farming in Meru," 2 August 1944, DC/MRU/2/4/9.

sion. Such rules were enforceable by religious-spiritual threat and (more directly) by Igembe warriors who lived together in each neighborhood unit in a community barracks and who served as a military and police force. The *Njuri Ncheke* council of elders is a Meru governing body that runs parallel to clan organization and convenes at various administrative levels (from local to pan-Meru) to deal with matters that go beyond the local neighborhood. The *Njuri* protected larger swaths of forest like Nyambene and Ngaya forests and lent strength to religious prohibitions against cutting trees from sacred groves and from riparian areas (Fadiman 1993, 344).

British rule in many ways upended community control over natural resources. In an effort to control cattle raiding and inter-communal warfare, the British forbade travel into larger forests and from one community to another and also dissolved Igembe warrior societies (Fadiman 1993, 144). This threw the youth into a state of crisis and left the elders without a police force. The British overrode clan unit organization with a colony-wide system of chiefs and subchiefs whose job was to enforce colonial administrative directives (including organizing work on roads and terraces for soil conservation). This was a strongly top-down system (Branch & Cheeseman 2006; Stamp 1986). Chiefs were chosen for military qualities like youth and vigor and obedience to orders, not for their authority within the community (Fadiman 1993, 142-43). By contrast, clans selected their leaders for their age, wisdom, reasoning ability, moral qualities, and oral eloquence, the better to mobilize consensus and steer the community. The British chiefs and the clan and *Njuri* elders co-existed in a state of uneasy tension. During the 1920s elders continued to govern, particularly in areas remote from colonial outposts, but often met in secret and used evasive tactics to avoid British dictates. British officials were paranoid about their chiefs and other executive officers being co-opted, or cowed, by clan and *Njuri* elders (Fadiman 1993, 308).

Colonial administrators became increasingly concerned about soil erosion in the 1930s and 1940s and, in a change of policy, attempted to enlist traditional organs of local government like clan elders and the *Njuri Ncheke* council in the new program of land use control (Mackenzie 1998, 155-167). British officials realized that chiefs alone were not very effective at reaching people in rural areas and at changing their day-to-day behaviors (Lambert 1947). Clan and *Njuri* elders entered a complex field of governance, concurrently occupied by the remnants of their tribal organization, the chiefs and their strongmen, other members of the Provincial Administration (like District Officers and Agricultural Officers), the Local Native Council (a local law-making body with some native Kenyan representatives), and Local Native Tribunals (for resolving disputes and prosecuting people for violations of custom and statutory law). These disparate institutions in some cases had overlapping staff, such that for example chiefs were appointed members of the Local Native Council and elders served on the Council and the Tribunals. Land use controls were initiated by the British Provincial Administration and then pursued simultaneously through all of these local institutions.

The British, with their pragmatic approach to land use law, saw the different local institutions in Igembe as a means to an end. Each institution was made to oversee the others; all were dispensable. The problem with this system in regard to land use is well-captured in a 1947 Meru district report:

"It is… the responsibility of the 'Mwiriga' [clan] to decide, in consultation with Agricultural Department staff and the locational Agricultural Committee what areas should be closed, terraced or opened. The initiative should come from the 'Mwiriga' but if it does not then the Agricultural Department staff and Agricultural Committee must invoke the aid of the Government i.e. Chiefs, D.O.s [District Officers] or Agricultural officer."[3]

Clan elders were expected to take their own initiative but only in consultation with agricultural experts. Where elders failed to make the "right" decision (as determined by British expertise), the chiefs were brought in to enforce the better policy. By the 1940s, this kind of forced cooperation had penetrated quite deep into the structure of traditional Meru society. The colonial government "[…] set up committees in each mwiriga [clan] who meet the chief, District Officer and Agricultural Assistant and draw up plans for any work to be done in the location."[4]

Colonial officials in Kenya expected custom to evolve to fit new conditions (Shadle 1999, 414-415). Custom might evolve on its own, but the British also positioned themselves to be the paternalistic molders of custom. "It is the business of the [British] administrative officer carefully to initiate and guide such amendment [to native institutions] as may be desirable" (Lambert 1947, 15). Whatever appreciation the British had for traditional authorities, their policies were built on the conceptual architecture of progress: progress from less civilized to more civilized, and from informal customary relations to written rules, formalized procedures, and, eventually, private property (see Shipton 1988, 96). In the evolution of custom, European institutions implicitly stood as the ideal end of human social progress toward which custom was striving. Colonial support for traditional authority, while often seemingly sincere, also rested on some truly surprising justifications, bordering on the arbitrary. Meru District Commissioner Lambert, for example, strove to resuscitate traditional oaths among the Meru, along with rule by the *Njuri Ncheke* council of elders, because he believed that sacrificing livestock for such oaths, and paying fines in livestock, would help to reduce Meru herds and prevent overgrazing (Fadiman 1993, 335). In other words, environmental protection was given as the reason for shoring up a fundamental component of the indigenous legal system and a fundamental part of Meru religious beliefs.

It is important to understand the difference between colonial and clan regulation of land use as it has great implications for the present day. Colonial law was pragmatic and positivistic, designed to achieve specific policy goals. Positive law works by *threat of punishment*, not by generating meaning among the people being governed. *Njuri* and clan prohibitions, in contrast, had internal meanings, achieved through ritual and deliberation at the local level. A violation of rules brought a person into a state of ritual impurity, characterized

3 Meru Soil Conservation Report, January-June 1947, DC/MRU/2/2/16.

4 Letter from Meru District Commissioner to the Provincial Commissioner of the Central Province, 9 April 1946, DC/MRU/2/4/9.

by contagious bad luck (Fadiman 1977, 91). Violations of clan rules no doubt happened regularly (as the Meru worldview anticipated) but brought with them great internal distress for the wrongdoer. The wrongdoer began to expect calamities at every turn, for him or herself and for loved ones, varying in degree with the severity of the offense. Friends and family, who often knew that some wrong had been committed, shunned the person, fearing that the bad luck would infect them too. People are said to go insane from a curse if they do not address it, for example if they divulge the secrets of *Njuri* or cut down trees from a sacred woods (see e.g. Bernardi 1959, 201-203). The Meru regulatory system generates intense psychological pressure. In a sense, though, the actual rule violation was (and still now is) tolerated over the short-term. This is frustrating from a positivist perspective that seeks immediate results, individual accountability, and immediate cessation of illegal logging and soil disturbance. Unlike colonial officials, elders preferred to wait, to draw meaning out of the seeming chaos of natural events that followed a wrongful act, all the while apportioning blame (and inviting real revenge) on the known culprits via the culprits' family and clan.

With Kenyan independence in 1963 came a rejection of the colonial program of cooperating with Meru elders. The new Kenyan government sought to centralize land use control and other aspects of local government (Stamp 1986). National land use rules, enacted in 1965, remain in effect to this day (although they will soon be replaced or augmented by county-level legislation). The rules set penalties for cultivating on steep slopes and cultivating near watercourses and authorized agricultural officers to prohibit tree cutting (and removal of vegetation) and to force owners to implement soil erosion control measures.[5] The Agriculture Act allowed local districts to pass their own rules to supplement the national rules, but, notably, the power to enact rules shifted from the semi-democratic District Councils (formerly the Local Native Councils) to the District Agricultural Committee (which was under the control of the Ministry of Agriculture and the provincial administration). Local democratic government ("democratic" in the sense that it was partly participatory), which previously in Meru had a traditionalist element, was greatly marginalized under the independence government (Oyugi 1983). Surprisingly, independent Kenya kept the much despised system of provincial administration, including government chiefs. Of the multiple local institutions authorized to administer land use under the British, only the chiefs and agricultural officers remained. Chiefs at various times have been instructed to issue orders requiring people to plant trees, to stop cultivating on steep slopes, and to construct terraces. Other bodies, such as clans and *Njuri Ncheke*, shifted to the informal social sphere.

In practice the independence government began a program of cooperative land management that was intended to displace the command and control mechanisms of the British (Ondiege 1996, 132-134). The Ministry of Agriculture noted in a 1978 memorandum: "As opposed to colonial times the soil conservation work is not based on force but on education, advice, incentives, and agreements."[6] This cooperative program would be familiar to citizens of Western countries, and indeed was initiated through a partnership with Sweden following the influential 1972 United Nations Conference on the Human Environment. In practice, incentives and punishments for land use practices have been pursued very erratically, depending very much on the personality of particular chiefs, the availability of funds, and the interests of politicians. Östberg (1987, 68) observed in the 1980s both the positive response of Kenyan farmers to education and incentives and also the occasional assistant chief "who ordered people to do soil conservation, and who punished those who failed." The local nodes for cooperative land management – those places receiving and distributing funds and education – include chiefs, community groups organized under the chiefs, agricultural extension and, more recently, community forest associations and water resource user associations.

The process of land privatization, which began in Igembe in the late 1960s, usurped clan elders' control over land and, at the same time, gave elders a new formal governing role. Clan and *Njuri* leadership were so closely tied to communal ownership of land and resources that the prospect of privatization led several British observers to predict that privatization would completely overthrow traditional government.[7] The *Njuri Ncheke* council of elders in Meru at first resisted the privatization program, asking instead that title be issued to each clan which would hold the title to clan land as a neighborhood collective.[8] When the *Njuri* finally gave in under pressure from the British government, their express reasoning for allowing privatization was that they wanted to prevent Meru land from being taken by outsiders. Across Kenya, local support for privatization initially was motivated by people's fear of dispossession (Lawrance et al. 1966, 24-25). In fact, the process of privatization in Meru relied entirely on clans and *Njuri* to substantiate existing claims to land. In this way, Meru customary institutions have had some small opportunity to pursue their own agenda through the privatization process which, in most places in Meru, has been on-going from the late 1960s to the present day.

The present situation in Igembe is reminiscent of the 1940s and 1950s in that national land use rules, chiefs, elders, and elected local government (Meru County) all overlap on the ground and influence land use. Unlike the situation under the British, however, these different institutions are not being used as tools of one dominant policy. There is rather a kind of bottom-up opportunism, such that these institutions can be used as the tools of this or that private interest. New and often ephemeral stakeholder forums have sprung up, for example the District Development Committee or the environmental impact assessment process. Stakeholder forums bring institutions together in a moment in time. The forums invite input on the distribution of benefits from a development project and consider what different institutions need in order to create the incentives to protect a particular resource. In this way, land use becomes transactional in nature; people offer to protect a resource in exchange for economic benefits

5 The Agriculture (Basic Land Usage) Rules, 1965, Art. 4, 5, and 6; Agriculture Act Chapter 318, 1955, Art. 48, 50, and 51.

6 Ministry of Agriculture, Land and Farm Management Division, Memorandum, 25 January 1978, DC/MRU/2/2/16.

7 See e.g. H. E. Lambert, "Memorandum on Policy in Regard to Land Tenure in the Native Lands of Kenya," 19 March 1945, DC/MRU/2/4/9; W. E. Taylor, "Meru Land Tenure," 19 January 1955, DC/MRU/7/1.

8 Meru District Annual Report, 1957, DC/MRU/1/13.

for individuals or groups. In addition, legal complexity also creates openings for opportunists. The amount and complexity of Kenyan law touching on natural resources and land use has led to a situation where even officials (let alone average farmers) often do not know who is responsible for what management or enforcement activity (see e.g. Okoth-Ogendo 2008, 227-228).

Social control at the local level in Igembe has taken new forms. The *Njuri Ncheke* council has seen a recent revival. The 2010 Constitution recognizes the role of elders in resolving conflicts particularly over land.[9] The Chief Justice of the Kenyan Supreme Court has promoted traditional dispute resolution as a means to achieve access to justice for the nation's poor. Several informal *Njuri* courts continue to hold sessions and occasionally hear land use cases (for example involving soil erosion, indiscriminate tree cutting, or pesticide use). Some *Njuri* members hold out hope that, with the new constitution and the new democratic county governments, there will be more involvement of *Njuri* members in environmental decision-making and even a resuscitation of clan leadership. At the same time, chiefs have seen their authority retreat somewhat; they no longer compel people to attend chiefs' *barazas* (public meetings) and rarely use their authority to force compliance with land use rules.

Oddly, the primary way that local social traditions now impact land use is through private property owners. The advent of private land ownership has not "commercialized" life in Igembe in a straight-forward way. Certainly, land privatization greatly weakens clan influence over land and resources. Moreover people involved in the modern economy in Igembe are often too busy to participate in social forums like clan meetings that give rules a dynamic life. Yet informal social rules continue to influence private property owners even as the local decision-making bodies that made the rules weaken and atrophy. Such social rules pervade householder decisions about how to use land and also shape market demand (e.g. creating a demand for *khat* grown in a traditional way). Unfortunately, without local decision-makers, the social rules cannot be adjusted or reinvented for new circumstances. As happens with custom in many places, the rules become rigid and reactionary.

3. Lessons from Kenya for the U.S.

There are a number of elements from the Kenyan story of local land use control that may be useful for the U.S. context. First, Kenyan land use follows a general dynamic of national action and local reaction-subversion. Policy elites at the national and international level first articulated environmental concerns about irresponsible land uses. The first erosion control measures in colonial Kenya came from the national government, as for example the establishment of a soil conservation branch of the Department of Agriculture in 1938 and the passing of the Land and Water Preservation Ordinance and Rules in 1940 (Okoth-Ogendo 1991, 125-126).

Continued local control over land use in Kenya – even when motivated by concerns about environmentally irresponsible land uses – has always been somewhat subversive of national land use policy. The *Njuri Ncheke* council of elders adopted a very clever stance in this regard, promoting peace with the colonial and independence governments on the one hand and operating in secret on the other to further its traditions and its own (local) environmental agenda. It is arguably only because of the *Njuri*'s secrecy and religious-spiritual values that it has been able to survive the steady expansion of the organs of modern government into rural areas. In other words, in those areas of effective local control, the *Njuri* has worked effectively *despite* national land use policy, not because of national land use policy.

Various social rules, such as those encouraging traditional *khat* agroforestry, also remain, even as decision-making bodies (like clans) associated with such rules wither away. Again, it is by subverting national land policy that the traditions continue. They enter the thinking of private property owners by the back door. Privatization was intended to modernize smallholders, allowing them to obtain larger parcels of land and loans for modern agricultural inputs like chemical fertilizer and pesticide (Swynnerton 1954). Private owners in Igembe, newly empowered by privatization to make their own land use decisions, often chose to continue the tradition of *khat* agroforestry and intensive intercropping instead of modernizing with input-driven mechanized farming techniques. These traditions of artisanal *khat* production have proven to be both profitable and adaptable to the burgeoning international trade in *khat*, leading to a situation where "modern" farmers of coffee, tea, and other cash crops have converted farms over to more traditional *khat* production.

The problem of the national-local dynamic in land use has been mistakenly attributed to foreign law when in fact it is a problem of positivist law. Positivism in this context is the idea that good land use rules can be imposed by threat of punishment (or promise of reward) *without regard to semi-independent local decision-making and meanings*. Kenyan independence did not render land use rules more enforceable, even though it removed the element of foreign domination. Independence may have exacerbated the problem, in fact, as incoming officials had greater enthusiasm and higher expectations for what they could achieve through positivist law. Exhausted British administrators were losing faith in the positivist system of land use rules that they themselves had set up. The colonial governor confessed in 1945 that "you cannot make good farmers by the criminal law."[10] Complaints about land use rules and the colonial soil conservation program were ubiquitous in Meru in the 1940s and 1950s and were said to contribute to the Mau-Mau anti-colonial uprising.[11] Interestingly, the white settler community in Kenya also resisted the imposition of positive land use law. When the colonial government proposed the 1940 Land and Water Preservation Ordinance, the settlers insisted that all land use rules go first

9 The Constitution of Kenya, 2010, Art. 11(2), 67(2)(f), and 159(2)(c).

10 P. E. Mitchell, confidential memorandum, 27 November 1945, DC/MRU/2/4/9.

11 W. A. Burgwin, Meru District Agricultural Officer, letter to the Assistant Director of Agriculture, Central Province, 18 January 1962, DC/MRU/2/2/16; letter to Meru Senior Agricultural Officer, 1 August 1951, DC/MRU/2/2/16; Soil Conservation Report July-December 1947, DC/MRU/2/2/16.

to the local authority for its approval before being enacted, since it was the local community that was best positioned to make decisions about land use (Okoth-Ogendo 1991, 126).

The Kenyan example of national action and local reaction also highlights what it is about local control that matters. Localism is defined here as neighborly concern. Local governing institutions are places where the localism of neighborly concern meets professional advice from planners, lawyers, and scientists. In terms of the national-local dynamic, the local component is significant for its ability to generate meaning with regard to actions on a particular landscape within a smaller size (and somewhat rooted) group. The *Njuri Ncheke* speaks of environmental degradation as an offense to the Meru spiritual world, as an immoral act. It is an offense that people commit with respect to other people living in Meru that, in response, brings natural calamity like reduced rains, drying up of springs, and loss of earth's fertility. (In Igembe, it is even said that generations unborn can place a curse on the living for destroying the environment.) This meaning is enacted through participation in local forums and rituals. It can be part of both formal local government and informal social forums.

Professional environmental planning clearly offers a more pragmatic approach that targets specific environmental problems. In terms of the national-local dynamic, the professional approach is national. The methods of professional disciplines are standardized at the national (or even international) level, and the internal hierarchy of professional disciplines goes down from the national level (with the most influential people in each discipline concentrated in regional and national capitals). Arguably, localism is made defensive and reactionary when professionals treat neighborhood leaders as fools or competitors. As is seen in the history of Kenyan land use, the process of formalizing and centralizing land use law and standards has tended to marginalize the decision-making authority of local institutions and has greatly impeded their ability to generate meaning around land uses. In the case of Igembe, Kenya, it is clear that edging out the influence of clans and the *Njuri Ncheke* council of elders has not made government rules more meaningful. Rather, it leaves the meaning of land use more indeterminate and opens up land use both to reactionary sentiment and to economic opportunism.

4. U.S. land use policy and its discontents

As in Kenya, policy elites at national and state levels in the U.S. have developed legislation to respond to the environmental challenges of irresponsible land uses. Such legislation includes rules to protect environmentally sensitive areas like wetlands, riparian areas, and forests and offers incentives for various kinds of conservation agriculture (like retaining ground cover and not plowing up and down steep slopes). Land use law in the U.S. is detailed and complex, and the social response is often diffuse. This section begins by briefly recounting three examples of reactionary localism: the property rights movement, land use ballot initiatives, and Native American forestry.

The property rights movement is an extreme-right political movement in the U.S. that generally supports strong private property rights and a minimum of government regulation of private property (Jacobs 1998, 2010). Property rights advocates in the U.S. believe that property owners' control over land is threatened by national and state environmental laws and, more generally, by the class of urban professionals and planners who implement these laws. They tap into the cultural tradition in the U.S. that associates land ownership with individualism, self-sufficiency, and democracy. Although they typically organize at the national level, property rights advocates claim to give voice to frustrations felt at the grassroots. Property rights advocates have eroded popular support for planning and have successfully supported pro-property rights legislation at state and local levels across the U.S. that attempts to limit land use regulatory activity (Brick and Cawley 1996).

Another area where reactionary localism has coalesced is in ballot initiatives. A ballot initiative puts a proposed law or policy up for a vote on a local or state-wide ballot. A number of land use issues have come before the voting public this way, including zoning decisions (i.e. which land uses to allow in a particular area), compensation to private owners for land use regulation, measures to limit local growth and development (e.g. restrictions on big-box stores), and measures to protect open space (Burke 2009; Caves 1990). Ballot initiatives have been criticized for frustrating more in-depth deliberation and for impeding long-term planning (Burke 2009). They also might be viewed as inherently flawed attempts to express and generate meaning around land use concerns. The meaning of ballot initiatives is expressed through the medium of political advertising which is often paid for and controlled by wealthy donors and interest groups (Burke 2009, 1469; Callies & Curtin 1990). People use the ballot initiative to bypass the day-to-day processes of local government; it is therefore both a populist and an extremely ephemeral mode of expression. Local initiatives are often prejudicial to important interests outside the community (including environmental interests) and prejudicial to racial and ethnic minorities within the community.

A more effective and sympathetic act of rebellion from U.S. land use policy occurred on some Native American lands. Many Native American tribes have a strong conservation ethic, attributing spirit to natural things like forest and wild animals (Booth and Jacobs 1990). They also have a tradition of local tribal governance over collective resources. The U.S. government for a long time strongly encouraged land privatization (or "allotment") on tribal lands with the intention of turning Native Americans into self-sufficient farmers. The Menominee of Wisconsin successfully resisted allotment and managed, with the help of Wisconsin legislation, to establish a collective timber harvesting operation on tribal lands. This was not an easy struggle. The Menominee fought against professional advice that advocated private property and modern tree harvesting techniques like clear cutting. At various times, they also joined their land values to the alternative formal avenues of land use control that were offered to them, for example partnering with the Wisconsin legislature to establish a collective timber mill, suing the U.S. government over forest management, and establishing a for-profit timber

corporation (Peroff 2006; Trosper 2007). Thus, their success in maintaining a sustainable forestry operation is in part due to resistance to the breakup of local control and in part due to their willingness to join their values with the work of professionals (as for example in developing forest management plans).

From these brief summaries of reactionary localism in the U.S., it is possible to make a few observations. First, the United States' local-level organizational capacity for generating meaning about land and its uses is weak, or at best underground. Even Native American tribes like the Menominee, which had a long history of tribal identity, religion, and local organization, could only maintain their cultural input into local government by herculean efforts, against a barrage of laws, policies, and economic factors that favored individual decision-making based on professional advice. The same trends which in Kenya are mixed up with colonialism can be seen in the U.S. as the advance of positivist notions of law and order: the individual rather than the community as the basic unit of governance, the threat of punishment to motivate compliance with rules, and the general hollowing out of local control in the interest of cultural progress, standardization, and a broader land market.

Yet the lack of organizational capacity does not remove the localist sentiment at all. Rather, fleeting political advertisements and slogans, for example supporting a particular ballot initiative or the property rights movement more broadly, become the favored vehicles for expressing localism. These expressions are often temporary, reactionary, and desperate-sounding. This is not to dismiss the many community meetings and forums for collecting public comments that take place as part of the planning process or part of environmental impact assessment in the U.S. Rather, it is to place such meetings within a broader national-local dynamic. One can imagine local land use decisions, for example to accommodate a big box retail store, that generate a lot of community interest around changing traffic patterns, changing downtowns, changing town aesthetics, and changing natural landscapes. Community members have the opportunity to express themselves about such changes, as individuals, in local forums. From a certain cynical viewpoint, however, local meetings seem to be intended to contain localist sentiment, to allow disgruntled citizens to shout and exhaust themselves on deaf ears, to cabin environmental concerns and repackage them as unreasonable and parochial, to break up local-level group coercion by approaching community members as self-interested individuals. Certainly, localist sentiment might be put to better use.

5. A global convergence on the issue of localism and land use regulation?

From Kenya to the U.S., neighborly concerns about land use are common. Anyone trying to site a garbage dump, or trying to clear cut trees across a landscape, will learn about neighborly concerns very quickly. Local land use concerns are not necessarily environmentalist concerns, but they are certainly a force that environmentalists and land use professionals ignore at their peril. Arguably, if localism is not institutionalized in some way in the process of land use regulation, then there is the danger that it will become a reactionary localism that significantly impedes sustainable land use management. As the global movement towards formalizing and standardizing property ownership at the national level proceeds, it is all the more important to consider where local control fits in.

The differences in institutional context between the Global North and the Global South have been exaggerated. On the one hand, rural land use in Kenya, even in a region like Igembe with its traditional crop production, is strongly influenced by the national government. This is not to say that formal land use rules have been successfully enforced. Rather, government has achieved some formal organization of local government and property ownership, which has partly marginalized traditional authorities and opened up land use both to the new traditionalism (traditions without decision-making institutions) and to various opportunists. The picture of bureaucratic functionality in the U.S., on the other hand, masks a great deal of local discontent. Some of this discontent can be channeled into local meetings and diffused; some can be ameliorated by incentive payments to private owners or by promises of market benefits like rising property values. There are many indications, however, that localist sentiment in the U.S. is not going away. In both the U.S. and Kenya, the gap between the positivist law of land use and local cultural meanings of land uses seems to widen. This gap threatens to make positivist laws less enforceable and localist sentiment less constructive and useful.

Environmentalists in the Global North have similar hopes about what can be accomplished through dramatic law and policy changes as their developmentalist counterparts in the Global South. Environmentalists want farmers to protect sensitive lands and habitats and reduce negative impacts on soil and water. Developmentalists want farmers to intensify production and increase output. Both sets of reformers attempt to use law and policy to change individuals' fundamental behaviors on the land. In the process, they often marginalize local institutions. The idea of local semi-autonomy – of letting people at a small scale make and learn from their own mistakes – is anathema to many environmentalist and developmentalist aspirations. This article argues that the potentially progressive aspects of localism have been mistakenly overlooked. Expressions of discontent, of primordial attachments to neighborhood group and place, continually pop up, even as the web of positivist law expands and tightens. When it comes to making hard environmental choices, when people are asked to make sacrifices for long-term environmental health, professionals in the U.S. and Kenya may see the need to create a bigger institutional space for localist sentiment, to harness the power of neighborly concern.

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Existence value is the value of an object in the natural world apart from any use of it by humans.

Jonathan Aldred

Land values as the social construction of scarcity

Benjamin Davy

Abstract

Land values reflect the social construction of scarcity. The polyrational theory of property and land values (B. Davy 2012 and 2014) helps planners and other policymakers understand how different perceptions of land values influence scarcity judgments. The notion of exchange value explains scarcity in terms of demand exceeding the supply of land in desirable locations. The notion of use value explains scarcity with respect to the range of individual and social utility (J. Bentham) or capabilities (A. Sen, M. Nussbaum) rendered by land available for desirable uses. The notion of territorial value explains scarcity as a function of spatial power gained through territorial sovereignty or land use rights. The notion of existence value explains scarcity with a view to the ecological functions of land (A. Leopold). The four social constructions of scarcity sometimes overlap: Superb environmental quality may result in higher prices of building land which is not exposed to fumes or noise, but located near a pristine forest or an attractive lake. The four social constructions of scarcity, however, are fundamentally different from each other. A scarcity of spatial commons such as public streets or public parks cannot be expressed in exchange values of streets and parks (but rather in the dissatisfaction of users). Accordingly, planners cannot manage scarcity easily, and certainly not through a simple trade-off between different types of land values. Polyrational scarcity management requires that planners be critically aware of plural land values and a mounting pressure to choose judiciously from their tool-box of available instruments.

You want too much
You want too badly
You want everything for nothing.

Joni Mitchell (1991)
Windfall (Everything for Nothing)

Scarcity and the emergence of private property

Concepts of scarcity

Planners and other policymakers are fond of thinking about the goals and instruments of planning and land policy. Scholars abide and produce volumes on planning instruments that promise more effective, more efficient, more equitable, more sustainable, more resilient plans (Hartmann & Needham 2012; Janssen-Jansen, Spaans, & van der Veen 2008; Leshinsky & Legacy 2016). One of the aims of spatial planning instruments is the management of scarce resources, most prominently scarce land. But what exactly is 'scarce land?' This paper explores the relationship between land values and scarcity. It provides guidance to discussions of planning instruments, yet the paper does not focus on the variety of available or proposed instruments of planning.

The field which usually deals with scarcity is called neither planning nor property; it is called economics. The economics textbook I studied in law school told me that 'in the world as it is, even children learn in growing up that "both" is not an admissible answer to the choice of "Which one?" ' and claimed that relative scarcity turns free goods into economic goods (Samuelson 1976: 18–19). The message is universal for economists: 'A resource is *scarce* when the quantity of the resource available isn't large enough to satisfy all productive uses' (Krugman & Wells 2006: 6–7). Economics is 'the study of scarcity, of how societies make choices concerning how to use their limited resources' (Stiglitz 1988: 10). Mainstream economists presuppose a naturalistic (or essentialist) definition of scarcity: Scarcity occurs, and the markets deal with it. For a much too long time, the only serious challenge to the

very narrow view on scarcity was John Kenneth Galbraith's haunting 1958 book about *The Affluent Society* (Galbraith 1960). Voices critical of the scarcity assumptions of mainstream economics were, no pun intended, scarce (Matthaei 1984; critical Gowdy 1986; responding Matthaei 1986). In the 1970s, the economic paradigm of scarcity was attacked from outside when a Club of Rome report attacked the notion of scarcity as a predominantly economic problem. Meadows et al. 1972 discovered the *Limits to Growth*, a scenario when economic growth irreversibly depletes environmental resources and threatens the survival of humankind. The dread of ecological scarcity inspired environmental movements, environmental policy, and the 'greening' of Western societies. In the face of the energy crisis of the 1970s, a special issue of *International Political Science Review* examined the significance of scarcity to political philosophy (Kincaid 1983; Moon 1983; Jennings 1983; Schaefer 1983; Stillman 1983). Although the mainstream cure for scarcity provided by economists seems to be technological progress and more supply, the assumptions of neoclassical economics have been constantly criticized (Panayotakis 2012). Some have also asserted that the scarcity of natural resources calls for a decrease in consumers' and producers' demands (Malenbaum 1975; Kincaid 1983). Recently, a fresh look at scarcity promises a new science of the 'true cost of not having enough' (Mullainathan & Shafir 2013).

Although this paper is concerned with property, land values and the social construction of scarcity, it is by no means an economic paper with lots of equations, but deals with planning, land, and property rights in a more narrative manner. Scarcity, I shall assert, is a plural standard that pertains to the market economy, but also to territorial politics, ecology, or the economics of having, using, belonging. In the remainder of the paper I shall discuss how different types of scarcity (locational scarcity, spatial power scarcity, ecological scarcity, capability scarcity) relate to different types of land value (exchange value, territorial value, existence value, use value). The four types of land values and scarcity, most of the time, are present simultaneously. If property (as an institution) responds to many voices, many rationalities (B. Davy 2014), it might be called a 'credible' institution because function presides over form (Ho 2014: 13–14). The simultaneous presence of different rationalities is typical of polyrationality (B. Davy 2008, 2012, 2014), yet difficult to analyze. Dealing with this difficulty, I shall limit myself to explaining the different types of land value and scarcity and discussing some implications for spatial planning, land policy, and property theory.

Scarcity rationalizes

Because the property rights determine the allocation of scarce resources, '[s]carcity is a presupposition of all sensible talk about property' (Waldron 1988: 31). Scarcity is a political concept which often is employed to rationalize desirable, but unpopular changes and reforms. Austerity programs—ranging from cuts in university budgets to the subjugation of debtor countries in the current European financial crisis—are justified by scarcity statements: 'You want too much. You want too badly. You want everything for nothing.' Such a strategy is not new. For example, scarcity already played a significant role in property narratives long before modern economics was invented. In the 17th and 18th century, an age of rapid modernization of legal institutions, property theorists often preferred a naturalistic (or essentialist) view on scarcity. Such a naturalistic interpretation of scarcity (even if based only in an author's imagination) presupposes some fixed demand or supply in land and other natural resources from which an assertion of abundance or scarcity derives. Such assertions were used to justify private property. Take for example John Locke's labor theory of appropriation:

'As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common. … He that … subdued, tilled and sowed any part of it, thereby annexed to it something that was his *Property*, which another had not Title to, nor could without injury take from him. … Nor was this *appropriation* of any parcel of *Land*, by improving it, any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use' (Locke 1698: 290–291 [II, §§ 31–33]).

In a world of abundant ('still enough') resources, Locke contends, private property cannot harm 'the yet unprovided.' The right of owning and using land in exclusion of the same right of everybody else is merely a matter of convenience. Abundance—the absence of scarcity—justifies private property. It is surely convenient to know which land or other resource have already been claimed in the land of plenty, and everybody, who wants more, simply has to move on a bit. However, perhaps private property can also be justified by scarcity? William Blackstone, in his *Commentaries on the laws of England*, justifies private property with the scarcity of land:

'The earth therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose, that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required. … As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and, by constantly occupying the same spot, the fruits of the earth were consumed, and its spontaneous produce destroyed[.] … Necessity begat property' (Blackstone 1766: 3 and 7–8 [Book II, Chapter 1]).

Intuitively, the introduction of an institution regulating the use of scarce land and other natural resources is plausible. It is less compelling, however, to suppose that this institution must be private property. The response to Locke's world of abundance or to Blackstone's world of scarcity very well could have been the improved design of common property (Frost 2000). If all land has been appropriated, private property in fact exacerbates scarcity, as John Stuart Mill has argued *against* exclusive land ownership:

'No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of expediency. When private property in land is not expedient, it is unjust. It is no hardship to any one to be excluded from what others have produced … But it is some hardship to be born into the world and to find all nature's gifts previously engrossed, and no place left for the new-comer' (Mill 1848: 233).

The frequent argument *for* private property is, of course, the calamitous situation caused by the lack of exclusive rights to the fruits of the Earth. Richard Posner uses a bucolic setting to prevent policymakers from jeopardizing economic progress:

'Imagine a society in which all property rights have been abolished. A farmer plants corn, fertilizes it, and erects scarecrows, but when the corn is ripe his neighbor reaps it and takes it away for his own use. The farmer has no legal remedy against his neighbor's crop. Unless defensive measures are feasible (and let us assume for the moment that they are not), after a few such incidents the cultivation of land will be abandoned and society will shift to methods of subsistence (such as hunting) that involve less preparatory investment' (Posner 2007: 32).

Private property, as an institution, secures the wealth and income stream provided by the landowner's holding. Although private property (as right to exclude) makes resources scarce, without private property (as an institution), resources would be even more scarce. This claim is extended, far beyond the realm of economic thinking, to the political sphere: 'Civic virtue does not prosper in a world in which courts refuse to protect either personal autonomy or property rights' (Epstein 1985: 346). With good reasons, Ronald Dworkin (1980: 207) criticizes such declarations: 'A society is … not a better society just because it specifies that certain people are entitled to certain things.' The underlying assumption of libertarian and liberal claims to the institution of private property is taking advantage of the naturalistic (or essentialist) view on scarcity: 'Everybody wants!' If private property deals with scarcity as a natural given, than the outcomes of property bargains will be efficient. I believe that authors like Mill, Posner, Epstein, or Dworkin are not so much concerned about scarcity and efficiency, but about the distribution of goods and burdens, and justice. They use 'scarcity' to rationalize their justice claims, presumably because *efficiency* is more acceptable than justice to 'rational' persons like economists, lawyers, planners, and other policymakers.

The social construction of scarcity and land values

Polyrationality and the plural meanings of scarcity and land

The best account I know of regarding the relationship between planning, property, and scarcity is Chapter 4 of Barrie Needham's 2006 book *Planning, Law and Economics. The rules we make for using land.* Chapter 4 has a great title: 'The economic language: making a good use of scarce resources' (Needham 2006: 52–75). Chapter 4 considers everything: economic definitions of scarcity, Adam Smith, Arthur Cecil Pigou, Vilfredo Pareto, welfare economics, external effects, transaction cost, regulatory failures, efficiency, but also non-economic goals. Chapter 4, I presume, cannot be topped. Unless, of course, you refute the naturalistic (or essentialist) definition of scarcity. Professor Needham's Chapter 4 is based on a naturalistic (or essentialist) definition of scarcity: 'Scarcity … means that there is less of something than we want' (Needham 2006: 52–53). But in which way do we *want* land? Who is the subject of want and need, this greedy, yet faceless *we*? Does time influence scarcity because it matters *when* we want something? And *why* is it that we want something? Surely there is no simple answer to these questions. Mainstream economists seem to agree that scarcity is a fact they presuppose, but do not examine. In this sense, the preferences of consumers and producers are off-limits. Left to public choice theorists, psychologists, and the advertising industry for too long, preferences and scarcity deserve new attention (Mullainathan & Shafir 2013). This new attention would be helpful to planning, law, and property rights. Obviously, planning, property, and land policy greatly depend on the understanding of *land*, as the result of a huge variety of social constructions of land, of the ways in which we want land, and of how land can be abundant or scarce.

Figure 1 is a critique of the economists' prevalent notion that scarcity 'means that there is less of something than we want' (Needham 2006: 52–53). The gentleman, who satisfies his urgent need in public view fails to recognize the row of portable toilets as a possibility of a more modest needs satisfaction. The situation in Figure 1 is about an urgent feeling of scarcity in the face of abundance. We all have urgent needs, but do we have the *right* to satisfy our needs? The gentleman does not feel entitled to using one of the portable toilets which have been put up in preparation of a marathon around Lake Phoenix in Dortmund-Hörde. Figure 1 tells us that scarcity has a lot to do with social blindness that reaches far beyond the notion of 'less of something than we want' (Needham 2006: 53) into the realm of rights and functionalities. Scarcity is about perceptions and entitlements. To a real estate tycoon, land is not scarce in the same way as it is for a young Muslim male, who the Israeli police prevents from attending Friday prayers in *al-masdschid al-aqsa* in East Jerusalem. To a devoted environmentalist, who protects a wetland from a highway proposal, land is scarce, but not in the same way as it is scarce for a planning authority which seeks locations for 10,000 housing units direly needed for asylum seekers. From the perspective of planning and property, the economic rationale of scarcity is fundamentally naive. Everybody knows that land has different meanings for different persons. These differences result from the vast variety of ways in which stakeholders appreciate land and its values. Stakeholders, who 'want' scarce land, express their desire though their appreciation of the values of land. No monorational concept of value or scarcity can satisfy the curiosity of planners and other policymakers. Yet, how can we grasp the variety of land values, scarcity, and abundance?

Polyrational land values occur not occasionally, but frequently (B. Davy 2012). Polyrational land values—and this also means polyrational perceptions of scarcity—do not merely pertain to different locations, for example, a pleasant mountainside which illustrates the existence value of land, or a boundary fence which illustrates the territorial value of land. Polyrational land values pertain to the very same location. Rashmi Bansal and Deepak Gandhi start their 2012 book *Poor little rich slum* with a description of the many meanings and values that Dharavi, the world-famous informal settlement in Mumbai, has for different persons:

Fig. 1. We all have urgent needs. But do we have a right to satisfy our needs?
© 2015 Benjamin Davy

'To the residents of Dharavi, it is a way of life. They live here, work here, marry here and even die here. What's the big deal anyway? ... The resident of Dharavi is blind to the inconvenience of living in a place where one toilet is shared by 1,440 residents. Because he knows no other world. ... To the residents of high-rise buildings in Mumbai—a small but important slice of people—Dharavi is "Asia's largest slum". A filthy place you see through a car, with windows rolled up tight. ... The high-rise resident is blind to the community and kinship of Dharavi. ... To the businessmen who operate in Dharavi, it is a convenience. Cheap labour and cheap rent make it a mega-hub of micro-enterprise. $650 million is the sum total of Dharavi's annual turnover. ... The businessman is blind to the toll of human life. ... To the builder who proposes to redevelop Dharavi, it is a goldmine. 1.7 sq km in the heart of the city ... The builder is blind to the human beings who 'occupy' this prime property. All he can see are the zeros people will pay for fancy new apartments. ... To the government, who "owns" Dharavi, it is a time-bomb. ... To the outsiders who come to Dharavi, it is a project. ... The outsider chooses to see a colourful, chaotic, creatively inspirational mess' (Bansal & Gandhi 2012: 6–7) .

Bansal and Gandhi (2012) mention stakeholders, who appreciate land and its scarcity in fundamentally different ways. The slum residents value the social capital accumulated through successful exchanges with their neighbours. They measure scarcity in a lack of social relations. The residents of high-rise buildings in Mumbai value the pristine and well-ordered atmosphere of apartment houses. They measure scarcity as the presence of unruly and possibly illegal land uses. The businessmen and builders expect healthy rewards from their managing the exchange value of land. Scarcity means rental protection and health and safety regulations for the businessmen and obstacles to slum clearing for builders. The government mostly appreciates the territorial value of land that can be moulded into a new city, once all opposing forces have been eliminated. The outsider, however, mostly values the existence value. A slum is valuable because it exists, and for tourists, scarcity is a lack of photo opportunities and heart-warming stories about slum life. Tourists hope to take 'slum selfies' which, once uploaded to Facebook or Instagram, will be liked by many digital friends.

One way to understand polyrational social constructions is to bring to mind the monorational concepts of land value that contribute to robust social constructions of scarcity. Although everybody knows that land means different things to

different persons, no one can claim what the 'true' meaning of land value or scarcity is. As a consequence, a theory of polyrationality must start with an account of possible types of land values (B. Davy 2012) without ranking one type of land value or scarcity higher than another. The map in Figure 2 is based on Mary Douglas grid-group theory or cultural theory. In grid-group theory, 'grid' indicates the acceptance of or defiance to external determination and 'group' indicates the proximity to or distance from a collective (Douglas & Ney 1998). The map in Figure 2 includes four types of land values: exchange value, use value, territorial value, and existence value (B. Davy 2012). Each of the monora-tional values corresponds to a particular type of land and of scarcity. Although the map is not complete, it is fairly comprehensive. Surely, the map in Figure 2 is more substantial than simply saying that scarcity means 'that there is less of something that we want' (Needham 2006: 52–53).

The notion of several types of values is not quite as unfamiliar as many economists seem to believe. Adam Smith inaugurated modern economics with a riddle. The paradox of values puts use value and exchange value into contrast:

'The word value, it is to be observed, has two different meanings, and sometimes expresses the utility of some particular object, and sometimes the power of purchasing other goods which the possession of that object conveys. The one

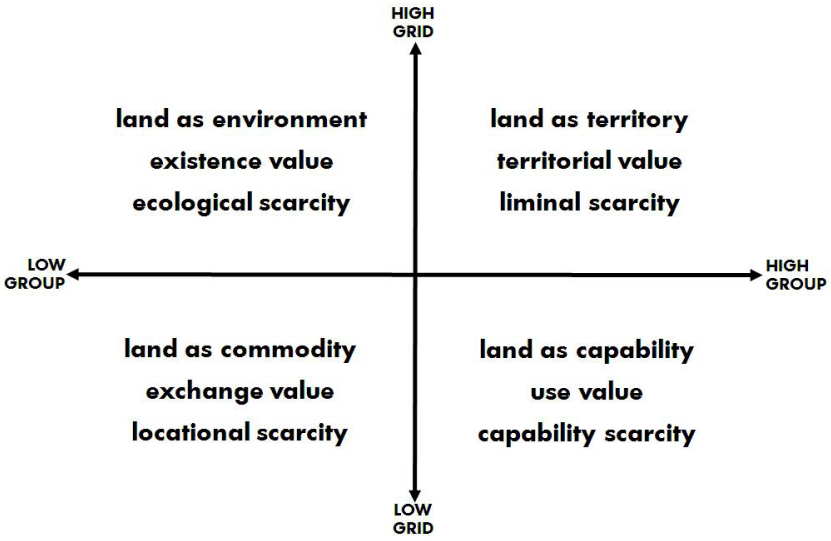


Fig. 2. A playful map of land, value, and scarcity

may be called "value in use;" the other, "value in exchange"' (Smith 1776: 34, Book 1, Chapter 4).

An object may be useful or useless, and it may be expensive or cheap. Utility and price emphasize different aspects of an object. A paradox emerges as soon as one type of value appears to be the opposite of the other:

'The things which have the greatest value in use have frequently little or no value in exchange; and, on the contrary, those which have the greatest value in exchange have frequently little or no value in use. Nothing is more useful than water: but it will purchase scarce a thing; scarce any thing can be had in exchange for it. A diamond, on the contrary, has scarce any value in use; but a very great quantity of other goods may frequently be had in exchange for it' (Smith 1776: 34–35, Book 1, Chapter 4).

The paradox of values has inspired great minds. The paradox probably does not exist. Computers or refrigerators are not like diamonds; they have a high use value and they are expensive. The paradox of values is still interesting because it reminds planners and other policymakers of a variety of social constructions of land values, scarcity, and abundance. In the remainder of this article, I shall explain the elements of polyrationality presented map in Figure 2.

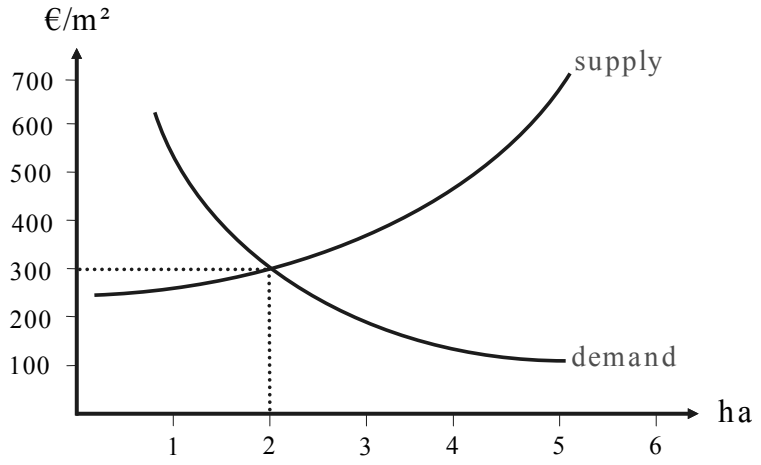
Exchange value of land

The exchange value of land regards land as commodity, as a good that is bought and sold (B. Davy 2012: 95–96). The exchange value of a good equals its market price. Speaking about the exchange value of land, we use words like real estate or commercial property. Such words, however, do not explain the exchange value of land. In a neoclassical economic model, the equilibrium price derives from demand and supply. In Figure 3, the supply curve and the demand curve illustrate how potential sellers and buyers react to an increase or decrease of the price of land. If the price increases, more owners are willing to sell their land, and the supply increases. The demand for land, however, diminishes with each price increase. Fewer potential buyers are willing to enter a market with increasing prices. A decrease of land prices has the opposite effect. Lower prices stimulate the demand for and reduce the supply of land.

In Figure 3, potential buyers demand 3 hectares of land at a price of about 200 €/m². At this price, landowners offer less than 1 hectare of land; they would supply 3 hectares of land only at a price of around 400 €/m². If neither buyers nor sellers monopolize the market, no individual has the power to impose a price or to dictate which amount of land must be

supplied. Instead, potential buyers and sellers enter into a bargaining process. After a while, the bargaining process establishes an equilibrium between supply and demand. At a price of 300 €/m² the amount of 2 hectares of land is bought and sold. 300 €/m² is the equilibrium price in Figure 3. The demand curve reflects the marginal utility that land has for potential buyers. The supply curve reflects the costs of converting land into an asset, yet also the preferences and property rights of the present landowners. Neoclassical economics ascertains that an unhampered market, at the equilibrium price, considers the demand of potential buyers and the supply of potential owners in a way that best satisfies collective preferences. Some potential buyers (or potential sellers) still leave the market unsatisfied. The equilibrium price of 300 €/m² is too high or too low for them.

In the neoclassical model, the exchange value reflects the relationship between the supply of and the demand for a good. The good is 'scarce' with regard to the existing supply (plus a potential for future production) and present demand (plus expected increases and decreases). In fact, this model is too simple to illustrate how land economics and property valuation employ various price theories (Isaac 2002: 57–68; O'Flaherty 2005: 117–118; Ray 1998: 420–444; van Kooten 1993: 43). The appraisal of the market value of land needs to factor in the ways in which market actors appreciate land. The market value of single-family houses, in an economy where such houses are predominantly owner-occupied, is determined by production costs. The depreciated replacement cost method uses classical price theory (and there is hardly a place for scarcity in classical economics). The sales comparison method uses neoclassical price theory: The price of building land frequently equals the average of market transactions resulting from an exchange between supply and demand. The standardized land values (Section 196 BauGB), published by land valuation boards in Germany, reflect average sales prices of land in a certain location (scarcity corresponds with the relationship between demand and supply). With commercial properties, however, revenue capitalization helps determine the market value. The exchange value of land as investment takes into account the land's capacity to store and produce wealth. Buyers of commercial properties



Source: B. Davy 2012: 96; adopted from Krugman & Wells 2006: 69.

Fig. 3. The neoclassical model of a equilibrium land price

consider their purchase as an investment decision (scarcity expresses the expectations of the landowner to receive a regular revenue from using or leasing out a piece of land).

Planners and other policymakers interested in the exchange value of land try to modify locational scarcity. Land considered as commodity is valuable, as realtors are fond of saying, because of its 'location, location, location.' In this sense, location is a bundle of positional and relational features of a plot of land. Some of these features are difficult to modify, e.g., the positional feature 'located in a metropolis' or 'located in a rural village.' Other features are easier to modify, such as 'located far away from a school' (planners can change this feature, if they deem fit, by siting a school in the proximity of the plot of land in question). Locational scarcity measures the quantity and quality of the positional and relational features of a plot of land as far as they are appreciated by the buyers and sellers in the land market (including owner-occupiers, developers, investors). Ideally, the sales comparison method can be used to reflect the overall appreciation of 'location.' It would be a mistake, however, to reduce locational scarcity and exchange values to imaginations of 'brutal' land market rationality. Locational features, in fact, are multi-dimensional and encompass many aspects which are also relevant for the use value, the territorial value, and the environmental value of land. Building land that is located, for example, in a pristine environment (at a lake or close to a forest or a public park) often yields a higher price than similarly located building land without any environmental amenities.

Use value of land

The use value of land expresses the utility of land—may it be urban or rural, commercial or owner-occupied, private or public—gained through the uses of land (B. Davy 2012: 102–104 and 109–113). Smith's paradox of values (> p. 135-136) reminds us to the fact that land has a use value, not only an exchange value. The use value of land relates to the fundamental capabilities that occupiers achieve by using the land:

'The use of a certain area of the earth's surface is a primary condition of anything that man can do; it gives him room for his own actions, with the enjoyment of the heat and the light, the air and the rain which nature assigns to that area; and it determines the distance from, and in great measures his relations to, other things and other persons' (Marshall 1890: 120–121).

An important step in understanding use values was utilitarianism. Bentham (1789: 1) ascertains that 'nature has placed mankind under the governance of two sovereign masters, pain and pleasure.' Utilitarians draw from this governance of pain and pleasure the principle of utility: 'By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have … to promote or to oppose … happiness' (Bentham 1789: 1). The use value of an object reflects the degree of benefit, pleasure, or happiness associated with its use: 'The use of a thing, in political economy, means its capacity to satisfy a desire or serve a purpose.' (Mill 1848: 437). The 'capacity to satisfy a desire' can be framed in terms of scarcity or abundance. Sometimes is the capacity to avoid harm, pain, or loss. In this vein, using land as site for a house creates happiness. Using land as retention area for a river prone to flooding avoids harm. The utility principle does not distinguish between the two cases, because the capacity to avoid harm can also be construed as the capacity to satisfy the desire for security. In so far, the 'two sovereign masters, pain and pleasure' (Bentham), are only one, and welfare economists refer to 'utility.'

The use value of land grows from the preferences of its users. Depending on their needs and desires, people may use the same parcel of land for various purposes and in different ways. David Harvey considers the incommensurability of use values, but also suggests some firm ground determining use values:

'Use values reflect a mix of social needs and requirements, personal idiosyncrasies, cultural habits, life-style habits, and the like, which is not to say that they are arbitrarily established through "pure" consumer sovereignty. But use values are basically formed with respect to what might be called the "life support system" of the individual' (Harvey 1973: 160).

Harvey (1973: 158) ascertains that land and improvements are 'commodities which no individual can do without.' His phrase of the use value of land as 'the 'life support system' of the individual' considers land values independently from market transactions and capitalist modes of production.

Martha Nussbaum and Amartya Sen have developed a theoretical framework for a qualified examination of the quality of life (Nussbaum & Sen 1993): 'The capability approach to a person's advantage is concerned with evaluating it in terms of his or her actual ability to achieve various valuable functionings as a part of living' (Sen 1993: 30). According to Nussbaum (2006: 70), human capabilities are 'what people are actually able to do and to be, in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being.' To Sen, such capabilities depend on achieving certain functionings:

'The well-being of a person can be seen in terms of the quality (the "wellness" as it were) of the person's being. Living may be seen as consisting of a set of interrelated "functionings", consisting of beings and doings. … Capability is primarily a reflection of the freedom to achieve valuable functionings' (Sen 1992: 39 and 49).

The capabilities approach is useful for analysis and design (Nussbaum 2011). With respect to land uses, it turns our attention to the access of every individual to minimal land uses. By taking the capabilities approach, land use planners and other makers of land policy can enable each individual to achieve a modicum of land-related functionings. Scarcity expresses how many individuals receive how much of this modicum of land-related functionings. The human rights approach to global social citizenship (U. Davy 2014) is one way to frame functionality scarcity. Land that is used for the development of central capabilities has a higher use value than land that is not used for this purpose at all or only at a lesser degree. A parcel of land with a large, detached single-family house and a pond set in marble and inhabited by pink flamingos certainly enables its owners to find shelter, to play, and to hold property. But at the same time, the size and quality of this property exceeds the limits of what a person requires with consideration of her central capabilities. A parcel of land with an apartment building for social housing, on the other hand, has a high use value because an apartment house accounts for central capabilities of many families. The parcel of land with the single-family house has a smaller use value because it also comprises many uses which do not address central capabilities.

Planners and other policymakers interested in use values consider capabilities scarcity. To them, a city map is the cartographic representation of opportunities to use land for central capabilities. From the perspective of use value, planning is an effort to secure a minimum of capabilities for everybody and to manage land use conflicts. Planning in the face of capabilities scarcity often involves spatial goods and services with a low or no exchange value. Public streets and public parks rarely are a source of revenues. It is important, nevertheless, that each city has a sufficient amount of public streets and public parks. Without these and other spatial commons with a high use value (and low or no exchange value), capabilities scarcity would become unbearable. Even if a city is very wealthy, without sufficient use values of land it is utterly dysfunctional.

Territorial value of land

The territorial value of land reflects the power bestowed on the landowner by exercising exclusive rights over a piece of land. In order to be owned, land has to be commodified and it has to be sufficiently clear where a plot of land starts and

where it stops. The commodification of land through land law is based upon a system of land survey and land registration. Commodification and territoriality are not facts of nature. Smith's paradox of values applies to land, but not due to its natural condition. Regarding land uses, the paradox of values occurs because of the particular social construction of private and common property, or of the shared and restricted uses of land. Literally, commodification means to turn something into a good, a commodity. Policymakers commodify land, among other things, through land law and land use planning. If policymakers privatize a public park by changing the rules for using it (Needham 2006), they have turned, to borrow from Adam Smith, water into diamonds.

Spatial power scarcity emphasizes that land and other natural resources are not naturally scarce, yet access is limited through legal or extra-legal powers. In a 1913 treatise on the social question and socialism, Franz Oppenheimer, a German sociologist, asserted that the land monopoly is entirely artificial, not natural. He called private property's impact on land uses *die Bodensperre* (Oppenheimer 1995: 631–643), literally the land barrier. Property institutions rather than resource scarcity, he asserted, exclude most people from owning land. The entitlement approach applies a rather similar idea to explain the relationship between poverty and famines (Sen & Drèze 1999: 45–51). Scarcity created through rights is a powerful instrument to influence the distribution of benefits and burdens. A lack of access rights, not natural scarcity results in food insecurity (Bowring 2003; Frost 2000; Hossain & Kalita 2014; Lee 1975; Moosvi 1985; Scanlan et al. 2010). In a similar vein, international conflicts and geopolitical unrest often indicate territorial scarcity. Resource wars result from unclear or contested boundaries and environmental scarcity (Gaan 2001; Hauge & Ellingsen 1998; Maxwell & Reuveny 2000; Percival & Homer-Dixon 1996, 1998; Stalley 2003). Spatial power scarcity does not so much depend on the exchange value of land or the land markets, but on land rights and territorial spheres of influence.

The territorial value of land expresses the spatial powers rendered to the territorial sovereign or proprietor. Territorial values relate to geopolitics and boundaries, not to capitalized net revenues. The Latin word *terra* means land and initially referred to the land dominated by a monastery, a castle, a city. But territoriality is limited neither to international nor to formal territoriality. A formal landowner ascertains territorial values by putting up a fence or locking her doors. A street vendor expects other informal land users to respect his 'right' to sell vegetables at a certain corner.

Everybody, who claims space, as an expression of their spatial powers, asserts territorial values. The exchange value and use value of land emerge as a result of formal or informal institutions which approve of the possible and profitable uses of the land. Without a land right, there is no land value. Joan Robinson asserts that 'the right to exploit territory is the archetypal form of property. The whole structure of a society is affected by the rules of the game in respect to land tenure and inheritance' (Robinson 1965: 283). The economic analysis of law often calls the 'rules of the game'—institutions governing land uses—property rights (Bouckaert & Geest 2000; Veljanovski 2007). Confusingly, lawyers and economists use the term property with different, yet overlapping meanings. From an economic perspective, property is 'a benefit stream that individuals (or a group of individuals) hope to be able to capture and control in the future' (Bromley 2006: 56; also Bromley 1991: 2). Common or codified private law can be the source of the benefit stream, but also planning law, public services, or local customs. For a lawyer, property is a legal right that guarantees the undisturbed restricted or shared use of the land (Penner 1997: 187). Of course, the two views have an overlap. Land cannot be used productively unless landowners enjoy legal protection. Landowners have to be able to trust that their rights—their power to exploit territory—are fully recognized. Potential buyers want to have a legitimate expectation that, by paying the price demanded by the owner, they will purchase not so much a piece of land, but a right that is protected effectively by formal or informal remedies. Also, the legal protection of property creates incentives to use resources efficiently (Posner 2007: 32).

The scarcity of land, regarded from the perspective of its territorial value, relates to the liminal functions of the land's boundaries. Whether or not a piece of land has territorial value depends on whether the affected stakeholders benefit from liminal functionality. Each boundary has to fulfill three functions: division, separation, and connection (B. Davy 2012: 122–124). Borderlands are a good example to study the relationship between space and people (Haselsberger 2014). Many borderlands between two or more countries are equipped with an elaborate system of boundaries which simultaneously divides, separates, and connects. Political boundaries draw from the idea of a clear *separation* of territorial sovereignty. Countries may have chosen a river or mountain ridge as 'natural' border between them, assuming that rivers and mountains are reliable separators. However, floods, migrating animals, or weather have little respect for separation and use the border as connection. The survival of many countries, in fact, relies on the simple truth that nature knows no borders. Nature is full of *connections*. And this is important for a functioning boundary system: Otherwise, downstream countries would be without water, or downwind countries without air. Borderlands use boundaries also to establish a *division* between uses: Economically valuable land uses become thinner close to the border, but the allegedly empty land is home to biodiversity. The division of land uses sometimes results in the siting of hazardous or unpleasant facilities (e.g., nuclear power plant, waste incinerator, refugee camp) close to the border. A country that permits the siting of locally unwanted land uses (LULUs) close to its borders does not wish to separate the site from its territory; it merely wishes a division of land uses conducive to political tranquility within its territory.

Assume that even one of the three functions is missing. If the unwanted land use—magically, let us say—is shifted towards the capital, the government cannot separate the uses of space the way it prefers. If no separating borders exist, the government cannot control who enters or exists the territory. If nobody can pass the border, the country will suffer from a lack of trade. Division, separation, and connection are essential functions of each boundary system. A borderland that everybody can enter, that cannot be used for different purposes, or that cannot be accessed or left, suffers from unsuitable boundaries, it is liminally dysfunctional. Liminal functiona-

Fig. 4. Informal fruit vendor, claiming space, checks WhatsApp messages (Bengaluru, Karnataka, India) © 2015 Benjamin Davy

lity depends on satisfaction. A boundary is liminally functional, if according to all concerned parties, the social practices of boundary making establish a satisfying level of division, separation, and connection (B. Davy 2012: 124). The three boundary functions, although varying in degree, have to be performed simultaneously.

- *Division:* A boundary, by dividing up a whole into parts, organizes the relationship between the whole and its parts. It also distinguishes between the parts. Dividing boundaries define the inside.
- *Separation:* A boundary, by separating a defined object from the rest of the world, creates a difference. Separation emphasizes this difference and permits inclusion as well as exclusion. Separating boundaries define the outside.
- *Connection:* A boundary, by connecting the separated objects, admits transition and crossing over. The connection highlights the similarities between the separated objects. Connecting boundaries define proximity.

Liminal dysfunctionality can be used to measure liminal scarcity. Borders help to manage scarcity. Liminal scarcity (or territorial scarcity or spatial power scarcity) measures the success of boundary regimes. Liminal scarcity results from too much or too little performance from each of the three liminal functions. As a result, the stakeholders suffer from powerlessness. Planning and land policy permanently establish, modify, or abandon boundaries. Most of the time, these boundaries are not international or even political boundaries. Yet, planning and land policy interfere with economic, legal, social, cultural, or environmental boundaries. Planners and other policymakers can perform as boundary makers only if they are familiar with liminal functionality and understand territorial scarcity.

Existence value of land

In the worlds of exchange values and use values, land without use has no value, but is just wilderness. Perhaps wilderness is waiting for an increase in land rent and to be converted into useful land, but perhaps it will remain a barren borderland. The perception of the value of the environmental quality of land changed with the experience of industrial pollution and overcrowded cities. Why can a city not be like a beautiful park or garden? In fact, Howard's concept (1898), although mostly concerned with land rent, municipal finance, and population control is still popular because of its

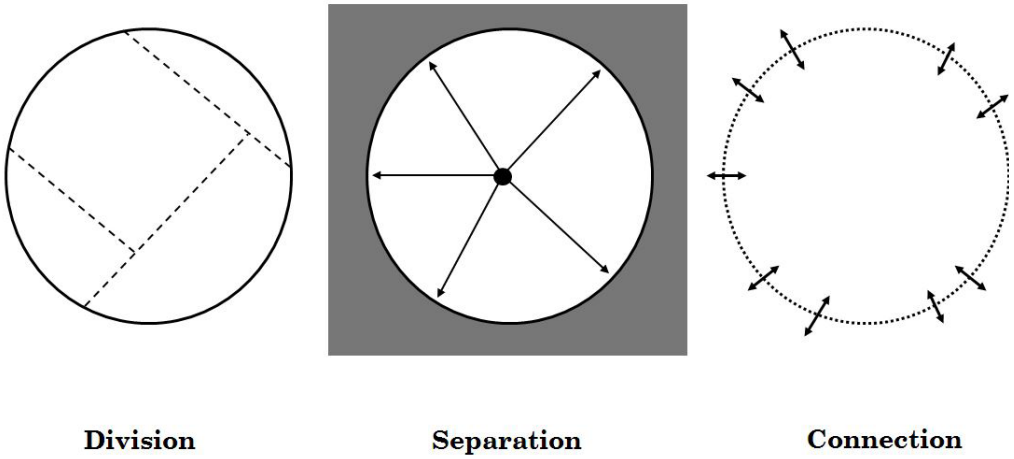


Fig. 5. Boundary functions (adopted from B. Davy 2012: 123)

charismatic label 'Garden City.' Neoclassical economics either ignores environmental quality or conceives of the loss of natural resources as an economic loss. According to Alfred Marshall (1890: 548), the conversion of open urban spaces into building land is 'a great blunder from a business point of view.' Environmental quality influences exchange value, use value, and territorial value. Market values relate to environmental quality in many ways. The proximity to public parks, air pollution, noise, scenic beauty, or the probability of natural disasters affect the market value. Often the influence is ambiguous. If a property in a floodplain is put on the market, potential buyers consider the attractive proximity of a river, but also the likelihood of flooding (Hartmann 2011).

Valuing nature veers between 'cents and sensibility' (Fourcade 2011). Environmental quality is a fuzzy concept that combines natural science and hard facts with vague perceptions and sentimental interpretations of nature. Perhaps land has value simply because it is here. Such value derives from the environmental quality of the land more than it does from its exchange value, use value, or territorial value. The technical term for environmental values that do not depend on market transactions, human uses, or spatial power is existence value (B. Davy 2012: 131–135). The existence value is 'the value of an object in the natural world apart from any use of it by humans' (Aldred 1997: 155). The existence value of land is a kind of ecological land rent. Economists consider the land rent a surplus income of the landowner independent from labor or capital investment. The existence value of land also is a surplus benefit that depends on the mere existence of land apart from any exchanges, uses, or power relations. The existence value, however, does not exclusively add to the landowner's wealth, it spills over into the general welfare. The existence value of land—natural beauty or biodiversity—is a positive externality with few opportunities to internaliza-tion. Also, the ecological land rent can be negative. If the use of land does not yield a land rent, or its costs even exceed the benefit, the owner ceases the unprofitable land use. But if the ecological land rent turns negative, the existence of the land—including the climate, vegetation, animals, human dwellers—is threatened. The market value of contaminated land is nil, yet its negative existence value encumbers present and future generations.

A Sand County Almanac is an early, yet compelling attempt to capture the notion of existence value. Aldo Leopold draws the land ethic from his broad understanding of community:

'The land ethic simply enlarges the boundaries of the community to in-clude soils, waters, plants, and animals, or collectively: the land. … A land ethic of course cannot prevent the alteration, management, and use of these "resources," but it does affirm their right to continued existence in a natural state. In short, a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such' (Leopold 1949: 239–240).

Leopold considers existence value, without mentioning the term, as respect for the land-community 'as such.' The land ethic has a utilitarian streak, however, because it doubts that humans can subdue the environment:

'In human history, we have learned (I hope) that the conqueror role is eventually self-defeating. Why? Because it is implicit in such a role that the conqueror knows, *ex cathedra*, just what makes the community clock tick, and just what and who is valuable, and what and who is worthless, in community life. It always turns out that he knows neither, and this is why his conquests eventually defeat themselves' (Leopold 1949: 240).

Governance based on a notion of monorational superiority is useless. But do we need to feel equal with soils, waters, plants, and animals in order to become respectful members of the land-community? Environmental values are hugely contested (O'Neill et al. 2008). Leopold (1949: 253) claims that land 'is not merely soil; it is a fountain of energy flowing through a circuit of soils, plants, and animals.' Deploring the ecological consequences of urban growth in the United States, he demands that policymakers look beyond the economic value of land:

'It is inconceivable to me that an ethical relation to land can exist without love, respect, and admiration for land, and a high regard for its value. By value, I of course mean so-

mething far broader than mere economic value; I mean value in the philosophical sense' (Leopold 1949: 261).

Environmental values enter policymaking at different levels. Most famously, the Club of Rome report *Limits to Growth* has alerted policymakers to the connection between economic growth, environmental degradation, and resource scarcity (Meadows et al. 1972). Often denounced as Malthusian revenant, political ecology and environmental economics have achieved a lasting effect on planners and other policymakers. Scarcity of land and other natural resources is a centerpiece of what has been called 'fundamentalist ecology' (Shantz 2003). Environmental economics examines the value that should be assigned to land and other natural resources in cost-benefit-analysis and similar decision making tools (Bromley 1995: 543–686; Common & Stagl 2005: 125–166; Fourcade 2011; O'Neill et al. 2008: 49–69; Tietenberg 2006: 14–61). Land policy, based upon a land ethic, considers the protection and promotion of environmental values (Beatley 1994; Caldwell & Shrader-Frechette 1993; Geisler & Daneker 2000). Moreover, environmental values are relevant to agenda setting. Labels like environmental justice, sustainable development, or global warming have powerful effects on policymaking. The ecological scarcity of land and other natural resources refers to environmental quality that does not serve any other purpose but the mere existence of natural resources. Nevertheless, as has been emphasized in the case of water scarcity, environmental scarcity is often related to the use value, territorial value, and exchange value of land (Alatout 2008; Kim 2008; Phadke 2002; Phansalkar 2007; Selby & Hoffmann 2012).

Planning and the scarcities of land

The four social constructions of land values and scarcity (Figure 2) sometimes overlap: An easement, giving the owner of a locked property the access to a public street, enhances the territorial values ('More rights!') as well as the exchange value ('Location renders more revenue!') of the land. The four social constructions of scarcity, however, are fundamentally different from each other. A scarcity of spatial commons such as public streets or public parks cannot be expressed in exchange values of streets and parks (but rather in the dissatisfaction of users). Accordingly, planners cannot manage scarcity easily, and certainly not through a simple trade-off between different types of land values.

This paper has three beginnings (and, in a sense, offers three lessons):

- The first beginning is a quote from Joni Mitchell's 1991 song *Windfall*: 'You want too much. You want too badly. You want everything for nothing.' Having listened to her captivating song so many times, in many different moods, Joni's lyrics to me express the scarcity dilemma. Yes, we want happy consumers, but above all we want to increase our profit margins (this is the 'critical of capitalism' reading). Yes, we want a clean environment, but we don't want to give up our resource consuming practices (this is the mainstream 'green economy' reading). Yes, we want to help refugees, but we don't want our cities and society to change (this is the 2015 German reading). Lesson: It's not enough to understand that we want more than is available; it is essential to examine *what* we want, *why* we want it, *when* we want it, and *who* is we.
- The second beginning is an observation about recent literature on planning, law, and property rights. Although I am respectful of all editors and authors, who study new planning instruments, I am suspicious of looking at *tools* (Hartmann & Needham 2012; Janssen-Jansen, Spaans, & van der Veen 2008; Leshinsky & Legacy 2016) while neglecting the multitude of the meanings of land, land values, and scarcity. Take, for example, the German example of the rift between goals and instruments in densification (*Nachverdichtung*) or internal development (*Innenentwicklung*). Land readjustment is a well-established tool that helps establish property boundaries conducive to the implementation of binding land use plans (B. Davy 2012: 6–8). This is, technically speaking, also true for land use plans that demand a higher density: Land readjustment can be employed to turn vast backyard gardens into build-ing land (increasing substantially the exchange value of land used for backyard gardens). Densification or internal development, however, lowers the territorial value of land and reduces the spatial powers of landowners, who enjoyed their backyards until new neighbors (and their effervescent kids) occupied the readjusted plots of land. The mounting opposition against land readjustment as a tool of densification in Germany cannot be explained in terms of exchange values, yet it is very plausible in terms of territorial value and locational scarcity. Lesson: Scarcity is about the goals, not the instruments of planning.
- This paper's third beginning looks at the emergence of the idea of private property in land, commencing in the 17th century, in the face of plural perceptions of scarcity. The notion of scarcity of land played a significant part in developing institutions of private property. The abundance of land makes private property convenient, as suggested by Locke, or the scarcity of land makes private property a necessity, as asserted by Blackstone. Lesson: If you want something, dude, scarcity is always a great argument (for whatever).

The theory of polyrationality (B. Davy 2012) juxtaposes monorational notions of land, land values, or scarcity with a consideration of other voices, other rationalities (Figure 2). With respect to the scarcity of land, planners and other policymakers have a variety of goals in their minds and influence land values and scarcity in different ways. Such interventions can have a great impact on the distribution of benefits and burdens, as demonstrated by the concept of *Bodensperre* (Oppenheimer 1995: 631–643), the entrenched distribution of the benefits of land uses in favor of the landowners. Planners and other policymakers constantly influence and modify the plural values of land. Often they do this through the social reconstruction of scarcity. The theory of polyrationality does not suggest that social meanings and social constructions be pulled out of thin air. Social meanings and social constructions often have a very solid basis in facts. The theory of polyrationality claims, however, that mere facts obtain their

meaning through cultural interpretations: 'Cultures incorporate their implicit agendas by framing selected issues, setting agendas, labeling, and foregrounding, backgrounding, and fading out' (Douglas & Ney 1998: 124). Territoriality is a good example of the social construction of land and its value. In Germany, the Nazi government deplored a *Volk ohne Raum* (people without land) when population density was about 140 people/km² (1938). Adolf Hitler promised the *Bodenpolitik der Zukunft*, the land policy of the future, and—in the name of the German people—extorted land in Eastern Europe. More than 70 years later, and at a much higher population density of about 230 people/km², the federal government of the reunified Germany bemoans the cities in Eastern Germany or in post-industrial regions as 'shrinking cities' or 'shrinking regions' (B. Davy 2012: 125–126). The power to define spaces as overflowing or critically empty is augmenting the government's or owner's power to determine the value of spatial purposes:

'Territoriality in fact helps create the idea of a socially emptiable place. Take the parcel of vacant land in the city. It is describable as an empty lot, though it is not physically empty for there may be grass and soil on it. It is emptiable because it is devoid of socially or economically artifacts or things that were intended to be controlled' (Sack 1986: 33–34).

Re-defining density and scarcity of land is a prevalent activity of planners who deal with scarcity. In most countries and cities, however, land is abundant. Planners and other policymakers still like to point to Venice and Manhattan, *Palm Jumeirah* in Dubai or the fragility of Dutch land to illustrate that land is finite. What is scarce, is building land, i.e., land with the highest exchange value. To deplore the scarcity of building land as a natural scarcity of land is a manipulation of public perception. This manipulation has a purpose. It is supposed to instill a feeling of urgency in the heart of citizens, who will never benefit from an increase of building land, although they very well might resist to the further destruction of natural resources and the existence value of land. Planners play a significant role in this version of the scarcity game. Designating undeveloped land as building land reduces the scarcity of land. Economically speaking, this increases the exchange value of the land prepared for conversion, but possibly decreases the exchange value of the entire supply of building land. Planners may have good reasons to speed up land conversion. Merely listening to the voice of 'scarcity,' however, turns planners into instruments of capital accumulation.

Not the physical space in itself, but its social construction results in assertions of abundance or poverty, urgency or tranquility, distress or relief, terra nullius or fully appropriated land. Although economics usually avoids reflections on the social constructions of scarcity, Paul Samuelson's concept of 'contrived scarcity' touches upon the power of certain economic actors to influence the effects of scarcity:

'If you own the best site for a bridge, then you must be careful not to sell anyone else the lot next to it; otherwise, he will be able to offer the bridge builders a site nearly as good as yours, and this will limit the dollars you can derive from yours. Thus, part of the rent you earn on Nature's bridge site has a monopoly element in it by virtue of your withholding its use for fear of spoiling your dollar market' (Samuelson 1976: 625).

Samuelson is one of the few economists who admit that 'scarcity' can be manipulated for increasing personal profit:

'Under imperfect competition, it pays people to limit the supply of their factors somewhat. By definition, natural scarcities are such that nothing can be done about them. But under imperfect competition, we encounter in addition so-called "contrived scarcities"' (Samuelson 1976: 625).

Samuelson's distinction between 'natural scarcities' and 'contrived scarcities' fails to accept fully that *all* scarcities are 'contrived,' or in other words: socially constructed. Talking about climate change, the flow of refugees, real estate bubbles, or inner city decline, all speakers try to impress *their* social construction of scarcity—urgency, rarity, abundance, poverty, need, market failure, bad governance—on their audience. Calling the interpretation of facts and the creation of social meaning a 'social construction' does by no means imply mere propaganda or manipulation. Although propaganda as well as manipulation distort—through social constructions—the perceptions of the public, social constructions very often are without ill will or wicked intentions. By 'selecting issues' (Douglas & Ney 1998: 124), a monorational bias determines what will be construed of as a problem or a solution. Monorational concepts of scarcity perform like Georg Simmel's 'condom' (B. Davy 2008). Monorational concept of scarcity determine the efficiency as well as the 'tunnel' of dealing with scarcity:

'Scarcity alters how we look at things; it makes us choose differently. This creates benefits: we are more effective in the moment. But it also comes at a cost: our singled-mindedness leads us to neglect things we actually value' (Mullainathan & Shafir 2013: 38).

Scarcity influences values by removing everything from a decision maker's mind that is not necessary to deal with 'now' and 'not enough' (Shah, Shafir, & Mullainathan 2015). Social constructions of scarcity create the sense of urgency and insufficient resources which supports a selected, often monorational value. In the case of spatial planning and land policy, the selection affects which land value is considered or neglected. Polyrational scarcity management requires that planners be critically aware of plural land values. Considering polyrational land values and plural constructions of scarcity or abundance, planners need to avoid the pitfalls of monorationality and plan 'without a condom' (B. Davy 2008). A greater variety of scarcities often will be confusing, but it also can ground planning much better than relying on one monorational standard only.

Polyrational property more likely is a *credible* institution. But credibility must not be confused with sustainability, resilience, trust, collective rationality, environmental justice, or economic progress. According to the 'credibility thesis' (Ho 2014), no exogenous, overarching plan commands that property rights be developed in this or any other direction. Scarcity or social justice, environmental protection or economic efficiency (and other claims) merely would be labels concealing the emergence of—*in situ, inter partes*—claims to use, exploit, and (sometimes) overexploit the land. A constant

flow of various rationalities (Davy 2014) perhaps helps explain which contributions to disequilibrium are essential for the creation of (in)credible property. But that's another story.

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