

Between informal and illegal: Noncompliance with planning and building laws

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Any planning law is predicated on the assumption that the public and government institutions will comply with planning laws and regulations. However, in the majority of countries around the globe – including some OECD countries - this assumption is far from reality. In the discussion about developing countries, there is great attention to the land tenure issues in informal settlements, and almost none to compliance with planning and buildings laws.

Today, most countries have planning laws on their books. Since the collapse of the Soviet Union in the early 1990s, most of the countries that did not have planning regulations, including China, adopted them. However, among developing countries, planning laws are often a legacy of colonial past or more recent Western imports unsuited to the local social and administrative cultures. UN Habitat and the World Bank have recently been placing heightened attention on updating planning laws and control of development.

The dominant pattern of unauthorized development prevalent among developing countries – the majority of the world's countries – differs in many ways from the pattern characteristic of advanced-economy countries. The attention of scholars and various development-aid organizations has been directed mostly to the mammoth phenomenon of illegal construction in developing countries (called “informal”, “irregular” or “unauthorized”). On this issue, there is a considerable body of scholarly literature and policy report⁵.

By contrast, the issue of unauthorized development among developed countries has been largely ignored by researchers – whether planners or legal scholars. Yet, the entire structure of planning law stands on the lynchpin assumption that there will be general compliance with development controls along with an effective enforcement system. There is only a thin body of prior research on this issue among the advanced economies (see the following section). There is no existing comparative data base, very little empirical research even on individual countries and little theoretical thinking to enhance understand of the differences in illegal development across countries.

So, a major distinction between developed and developing countries pertains to property rights and land titles. Among many developing countries, much unauthorized or informal development occurs through “squatting” on land where the residents have

no clear property rights (in some cases these are later regularized). Tenure may have various gradations of informality, from outright unauthorized squatting on land owned by others, through various categories of public or quasi-public land, traditional or customary land rights not (yet?) recognized legally, to fully titled land rights.

Among advanced-economy countries, including our two case-countries, the phenomenon of squatting is rarer, except for special small-scale cases such as the Romas in Europe. These special cases are not the focus of this paper. In advanced-economy countries, the major part of illegal development occurs on land where the builder or occupier does have property rights. One cannot exaggerate the importance of this distinction, which currently received insufficient recognition in the literature.

The discussion of noncompliance usually neglects a key player: planning laws and their enforcement mechanisms. Their format and contents may be contributing factors in the degree of non-compliance. There is no systematic comparative research on these questions.

Because planning and building laws always pertain to real property – the main capital asset of most households around the globe –reliance on socially embedded norms for compliance is usually not enough. Thus, all planning laws do contain some enforcement mechanisms or sanctions.

Enforcement of planning laws is not an easy area of law or public policy. The nuances of law and policy are very important, and any analysis must carry a magnifying glass. Enforcement it is often not politically popular, and may even carry a stigma for the officers carrying it out. Seemingly minor differences in the law may make a major difference in practice. These considerations are the motivation behind our comparative research, as a way to promote cross-national learning

Enforcement mechanisms often fall short of preventing noncompliant development. Even if enforcement officers do monitor and deliver information about infringements, in practice, some forms of illegal development do occur, to varying degrees from country to country. Once built, reversal of illegality through outright demolition is much more difficult than it may seem. Planning bodies or elected officials are often faced with dilemmas of what to do with existing violations: To demolish and be responsible for the social or political costs of loss of homes or livelihood? To grant time extensions? To tolerate and do nothing? To legalize through an amnesty? Legalize through fines or fees? Or perhaps to legalize through “retrofitting” the statutory rules in the plan (or another regulatory document)? In practice, the twilight zone between legal and illegal development is a much larger legal issue than may seem from simply reading the letter of the law. This is true also for advanced-economy countries.

The presentation will provide a framework for cross-national comparative analysis of non-compliance in different socio-cultural and economic contexts. Two Mediterranean countries are the focus of field study and evaluation: Portugal and Israel (Calor and Alterman 2017). They have been selected because even though they are OECD member countries and belong to the advanced economies, the degree of compliance with planning laws is not as high as in central and northern Europe, North American or Australia. Thus, the lessons learned from these countries can be relevant to developing countries as they try to extend the relevance of their planning laws and enforcement functions.

The phenomenon of illegal development

- Most research attention has been on developing countries. Often called “Informal, irregular, self-help”
- There, non-compliant development is often the rule, not the exception
- But – the phenomenon and motivations in developing countries are usually different from advanced-economy countries.
- We focus on the less-studied phenomenon of illegal development in advanced-economy countries
- Where the planning and land system are working, and illegal construction is the exception, not the rule

Between “informal” and illegal

All advanced economies have a functioning planning law system and it does achieve some “public purposes” at least in some eyes

Not all illegal merits the term “informal”

And not all informal may in the future be illegal

Sometimes legal is exclusionary, unjust, hegemonic power

Some informal has important public-interest functions

But - sometimes informal might be a euphemism for illegal

Where does the demarcation line pass? Not easy to answer.

Enforcement is not a popular topic anywhere

- For politicians
- For budget priorities
- For planning research

It's like the "backyard" of planning – less future-looking, ridden with conflict

Comparative research has a crucial role in this "in between", unpopular field of knowledge and action

CONCLUSIONS 1 ABOUT ENFORCEMENT TOOLS

Demolition-only rule is political unfeasible in many counts or local government.

Demolition only without discretion may cause social deprivation

Demolition-only may be unjust across time – regarding past development

A law of "One size fits all" of infringements is not practical to enforce, and is susceptible to legally unjust – selective enforcement

Reliance on neighbors' reporting is effective, but selective: tends to work in better-off neighborhoods only

It also raises deep social-justice questions, and exacerbates conflict among neighbors rather than seeking cohesion

Real-estate based rules and sanctions - effective if self-administered

CONCLUSIONS 2 – broader thoughts

- Enforcement is the WEAK LINK in the planning-implementation chain
- In the public administration, it suffers from the “Cinderella syndrome” (but without the fairy to save it.... Or the prince....)
- Both countries, not enough thinking has gone into designing the compliance and enforcement systems.
- Enforcement laws should be consistent over time, and predictability for the public. Should avoid zig-zag periods of clamping down versus relaxing the rules
- Enforcement agencies too need planning ahead, more understanding of planning goals
- Most importantly – enforcement must go hand in hand with public education, to reduce social differentiation in knowledge, and avoid selective enforcement

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Reference:

Parts of this presentation have been published in:

Calor, Ines and Rachelle Alterman (2017). “When Enforcement Fails: Comparative analysis of the legal and planning response to non-compliant development in two advanced-economy countries”. Journal of Law in the Built Environment Vol. 9 no. 3.