COPING WITH ILLEGALITY IN HUMAN SETTLEMENTS IN DEVELOPING CITIES

A contribution to the ESF/N-AERUS Workshop Leuven and Brussels, Belgium, 23-26 May 2001

by

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In this paper emphasis is deliberately placed on the issues of illegality in human settlements. These issues seem to us more important than the question of informality. This latter question has already given rise to an large quantity of literature over the last two decades. Your reactions and comments are most welcome.

For at least three decades — that is to say since the expansion of "irregular" settlements has been perceived as a lasting structural phenomenon — the debate on housing policy insistently refers to the question of the illegality of human settlements, without reaching any satisfying solution. For a long time it appeared that, in order to get rid of this problem, it would have been sufficient to combine measures of repression of illegal occupations, prevention measures legal tenure regularisation and large-scale programmes of land delivery to the poor. The results have been limited and disappointing. In many developing cities, the map of illegality —corresponding largely to that of poverty — indicates a steady sprawling of the phenomenon, particularly at the periphery of cities, and this in spite of a slackening of their demographic growth, a relatively economically favourable global context and the emergence of governments which are more sensitive to the aspirations of civil society.

The question of the dealing with illegality remains to be answered: how can city authorities can cope with illegality (mainly related to land and planning) urban settlements and housing that accommodate the majority of the population of cities in developing countries? In order to tackle this issue it is necessary to question the actual nature of this illegality.

It appeared to us to be more relevant to tackle the problem of housing under the perspective of illegality rather that under the perspective of informality, even if these two notions largely coincide or overlap. The issue of informality (of activities, employment, markets, neighbourhoods, settlements, housing) has given rise to a great deal of literature, at least during the last three decades. Regarding urban management, it has produced various adjustments and compromises. This does not apply to illegality, as if it posed a series of politically embarrassing problems which city authorities are helpless to address, such as the unequal access to resources, exclusion and repression. To privilege/emphasise a reflection on illegality does not exclude however an analysis of its relationship with informality.

NOTIONS AND INTERPRETATIONS

1. WHAT MEANING DO WE APPLY TO THE TERM ILLEGALITY?

1.1. Illegality and informality

Regarding human settlements, the term "informality" raises the same definition problems as when it is applied to economic activities and to employment: it is defined negatively. Its main characteristics are known, but in many situations, the borderline between formal and informal remains blurred. A settlement with the same characteristics regarding land, urban planning and housing, depending on the contexts and public authority interpretations, will be considered either as formal or informal. In how many settlements are inhabitants in "legal" conformity, with regard to land, layout, construction, services and fiscal obligations? Certainly very few. Informality is not a sufficient offence to justify a repressive policy; we can however speak of abnormality, of irregularity of a habitat that does not obey either authority, or legal right, or norms and standards.

1.2. The two meanings of illegality

The term "illegality" poses the same problem of definition, but with a distinctively more repressive connotation. Used often by the administrative authorities (officials in charge of urban management, and especially of state property or land register offices), it reveals a clearly repressive intention, or hints at a menace. It can even — which comes to the same thing — underline the meekness public authorities want to demonstrate towards populations at fault, under the condition, obviously, that they keep quite… We can therefore see "informal" settlements become "illegal" — or the inverse — depending on the undergoing political or social circumstances.

Illegality, is what we must not do, what does not conform to "what one should be" according to jurists, what is outside of the law. We must focus on two meanings equally detrimental to the populations living in the concerned settlements.

The **first meaning** reflects a situation marked by the repressive character of the reactions enforced by public authority and consequently by the precariousness of the settlement and occupancy of it. The most visible expression — if not the most common — of repression is the demolition of the settlement (mostly outside any judicially organised legal procedure, hence in disregard of the law — it is to be noted). Fortunately, public authority is not always able to eradicate illegal settlements: as we observe more and more frequently, it does not dare or cannot do it.

A second form of repression, less visible but largely diffused, is harassment. Its elements are uncontrollable (or tolerated) initiatives of the police, of certain government officials or of powerful local individuals (including traditional or customary leaders). This situation induces the population to seek protection. Political leaders or organisations can provide it, but often it is provided by the local *mafia* : it is capable of containing or fighting in a dissuasive manner the abuse of government officials and public authority. The population therefore goes from one oppression to another. The social and economic effects of harassment, generally hardly visible from the outside, are devastating at settlement level.

The **second meaning** reflects the abnormality, the marginality of the settlements. The illegal settlement is tolerated and its population is generally not threatened by eviction. However, this settlement does not conform to official norms and standards. It cannot therefore expect to be provided with the infrastructure, the services, the improvements and the management to which the "official" city has access. It is worth noting that it is still frequent that the concerned settlements do not even appear on maps and city plans, or that when they do appear, this is in the form of a shapeless area. The illegality of the settlement marginalises it and prevents it from benefiting from the advantages of services and of urban management, shaped for and by the inhabitants of the "formal" neighbourhoods. The settlement is, somehow, punished for not being normal, and the punishment has the effect of marginalising it even more.

2. ILLEGALITY OF CITIES, SETTLEMENTS AND DWELLINGS

2.1. Illegality of cities.

This situation is not very common. Some cities cannot be recognised by public authority and be considered, in their totality, as "illegal" (or at best "informal"). Among these are "spontaneous" agglomerations of activities, and settlement areas which are not planned as part of cities, which are not subject to the statutes of a city regarding construction, land use and taxation.

We can refer to some historic examples borrowed from the urban history of Europe and developing countries:

- The "out-of-town" towns: the suburbs beyond toll-gates, manufacturing towns beyond the jurisdiction of corporations and municipal authorities;
- The camp towns, the fair towns, the pilgrimage cities;
- The pioneer/frontier towns, the trafficking and smuggling towns, the more or less illicit mining towns;
- The repatriation towns (Mbuji Mayi in Congo), the transit and refugee-camp towns.

2.2. Illegality of settlements.

This is the most common situation. It covers a wide range of situations. It concerns unrecognised settlements, often developed beyond the municipal limits and progressively integrated within the urban fabric:

- Settlements formed without a legal land basis (through organised invasion, progressive occupation, or by informal acquisition of land from vendors without official rights to sell them);
- Settlements inhabited by people deprived of citizenship rights, or whose rights are being contested because of their origins (minorities, foreigners, immigrants workers, etc);
- Settlements built without authorisation from administrations in charge of urban planning or land management;
- Settlements built ignoring surveyed boundary lines and official construction norms;
- Settlements built on sites inappropriate for construction (hazardous or fragile);
- Settlements on lands intended for functions other than housing.

2.3. Illegality of structures and constructions

The illegality of a settlement also results in the illegality of every building, be they might for housing, commercial, or production purposes. Yet, some illegal buildings can occupy often-important spaces within neighbourhoods considered as perfectly legal:

- Provisional buildings that become permanent (building-site shelters, shacks set up for the temporary shelter of homeless people);
- Small clusters of unsanitary dwellings or mini-slums within a legal urban fabric: they often consist of illegal commercial subdivisions; the occupants are sometimes squatters, more often renters or sub-renters.
- Dwellings — often for rent — in the dilapidated buildings of old historic residential buildings of city centres (vecindades of Mexico City, cortiços of São Paulo)
- Precarious occupations in abandoned and unserviced industrial or commercial buildings (Johannesburg)

- Undeclared or temporary constructions and extensions in urban in-fill spaces, courtyards, gardens, along rail-tracks, slopes, embankments, ramparts, etc.
- Over-densified sub-standard rented housing (the "entrées-coucher" in Francophone African cities courtyards, the "backyard shacks" in South Africa).

2.4. The extent of the phenomenon

In reality, a situation is not always predominantly illegal. It is common that one building or settlement considered illegal has a few legal features. For example, the sale of a plot might be legal but its construction is not; the construction might be legal but does not conform to current norms and standards; the occupation might be considered as illegal but dwellers do pay certain taxes and rents, and so on.

On a strict legal basis, we can estimate that between half and two-thirds of the built-up area in developing cities and four-fifths of residential and commercial are illegal (even if they have some attributes of legality), or they have been illegal in the past, before public authority decided their regularisation.

3. THE MAIN FORMS OF INFORMALITY AND ILLEGALITY

Land tenure inconsistencies

- Irregular procedures of appropriation of the land (broad variety of types of informality)
- Illegal sale or rent of the land by someone without property rights
- Progressive occupation or squatter invasion of public or private land

Urban planning inconsistencies

- Subdivision for housing of land protected for farming
- Housing use of land assigned to other use (industrial , for example)
- Occupation of public spaces (land allocated to services and community facilities, along rights of way)
- Disregard for density ratios defined by the planning documents (when these documents exist)
- Disregard for planning procedures

We should observe also that the notion of irregularity refers often to the geometrical irregularity of the settlement lay out, and its physical organisation

Infrastructure inconsistencies

- Occupation of unserviced and undeveloped lands
- Lack of connection to the infrastructure network

Construction inconsistencies

- Construction materials either inappropriate or illegal
- Improper size and layout of dwellings (rooms dimension, ventilation, etc)

Non-application of safety rules

- Construction in hazardous sites inappropriate for housing (such as unstable slopes, areas subjected to floods, corridors of high-voltage lines, etc)
- Vulnerability to fire hazards (use of inappropriate construction materials, high density of construction, lack of access routes for motorised vehicles, etc)

Non-application of rules for environment protection

- Absence of sanitation and sewerage (pollution of the ground water table, spilling of waste waters in the drainage and in the canalisation systems meant for the evacuation of the rainwater, or in the rivers)
- Various disturbances provoked by the economic activities in the illegal settlements

Institutional or administrative inconsistency. It occurs as a consequence of the settlement not being taken into consideration by the municipal or state administration because of its being considered irregular.

4. WHY DO WE GIVE SO MUCH IMPORTANCE TO THE LEGALITY CRITERIA?

Three different approaches converge into making legality an essential objective.

4.1. The doctrines of urban order

The supremacy of "having to be" over the "being" as a way of conceiving the city is historically the legacy of urban management or planning models based on the doctrine of urban order: the city organisation, its spatial order, has to conform to precise norms.

The three dominant models of urban management and planning models, (1) the 'colonial' model, (2) the model known as 'modern' (Le Corbusier and others) and (3) the model referred to as 'development model' (Ecochard and others) have all the following common characteristics:

- To plan up to the minimum, last detail
- To consider that the provision of land for housing depends on a decision of public authority;
- To give to the central public administration the mission to "give birth" to the city, giving this administration all authority to control and demand the enforcement of the law considered as an ultimate norm

4.2. The liberal utopia concept believes that the totality of goods has to be integrated to the capitalist sphere of production and exchange. During the last two decades, international finance institutions, often backed by bi- and multi-lateral co-operation agencies, have seen in the illegality of some human settlements an obstacle to the development of mortgage credit and consequently to the development of a formal land and housing development sector.

4.3. A wide range of experts frequently evokes **the fiscal and taxation objective**: officials in charge of urban and land management, taxation and providers of marketable urban services. Informality and illegality are often presented, not without a hidden agenda, as an obstacle to the servicing of settlements, the illegality complicating the identification of users of urban services, hence the recovery of the service costs.

To these three currents, has to be added the **pressure exerted by many third sector organisations** (NGOs, CBOs, etc) intervening in illegal/informal human settlements. Regularisation, even within the framework imposed by public authorities, appears to them as the indispensable condition for a long-term improvement of security of tenure, and a precondition for the servicing of the settlement.

5. POLICIES RESPONSE TO ILLEGALITY IN HUMAN SETTLEMENTS AND HOUSING

5.1. Converging trends

Dealing with the illegality in human settlements and housing reflects these approaches. First of all, the notion of illegality itself is never questioned. Nonetheless, the term informality has a growing tendency to replace it. This semantic slide is not the result of an evolution internal to the settlements themselves, or of an improvement of their judicial/legal statute, but rather of a change of attitude of the public authorities that consider today as informal, therefore tolerable, settlements qualified as illegal yesterday. Within the responses of public authorities regarding illegality of

human settlements, two approaches meld: a repressive and an integrative one. Public policies have in fact followed similar trends.

Low-income neighbourhoods have been initially ignored. When they have been labelled as illegal, State intervention has been marked, in a first stage, by repressive and dissuasive eradication measures. When it appeared that the extension of the illegal settlements was a long-term structural phenomenon, a consensus progressively emerged, among officials and decision makers, city authorities, experts, international aid agencies and third-sector organisations, combining the following action principles: (i) some actions aiming at preventing illegal occupation, (ii) the provision of serviced land at a low cost and (iii) selective tenure regularisation measures at settlements level.

5.2. The limits of an approach in terms of legality-illegality

It is accepted that the implementation of these principles requires, (i) a revision of the norms (legal, planning, infrastructure, construction norms), (ii) measures intending to enable households concerned to have access to housing (establishing financial systems adapted to low-income household needs, organising the population), (iii) the provision of sufficient public resources and (iv) a long-term political will.

These policies have responded to certain expectations (ensuring social peace and limiting the effects of marginalisation of the settlements), however, the objective of massively reducing the proportion of urban population living in illegal neighbourhoods has not been achieved. The issue is rather to know how the city officials can face, on a long-term basis, the illegality (mainly regarding land and planning) of human settlements, where the majority of the population of developing cities is living

It is the very notion of illegality and the qualification "legal-illegal" that is politically and scientifically unacceptable. It is dangerous, restrictive and inoperative. It is dangerous because it is arbitrary, it is abusively prescriptive and it justifies the worst repressive options, low-income settlements being often assimilated into illegal settlements. In this sense, it is equally dangerous to formulate a judgement on a neighbourhood or a settlement in strictly yes or no terms. It is grossly restrictive to do so, as often this illegality is a simple non-conformity to modest regulations established by a bureaucracy in charge of planning and land management looking for profit. Apart from judicial and technical contentions, it tends to perpetuate the cycle from poverty-marginalisation-precariousness-sub-services. It is inoperative because it has not permitted the achievement of any of the objectives claimed by public authorities.

QUESTIONS FOR A DEBATE

1. Renewal of ways of thinking about and treating the illegality of human settlements

On what assumptions are founded the different ways of thinking about and treating illegality in human settlements?

On which technical, political and ideological premises are they based?

What are the constants and the main breaking points observed in treating illegality in human settlements?

2. The illegality of human settlements: society of rights or society of regulations?

When we examine the criteria of illegality, we notice that, except for the occupation or "theft" of land owned by people having bought in good faith the property rights in question, the legality invoked is not that of the state of law (or society of law). It rather refers to modest regulations. One has to be careful not to mistake the 'state of police' or 'state of administrative regulation' (or 'society of regulation') with the 'state of right'. It is therefore more appropriate to talk about non-

conformity to regulations than of illegality. We must let the law fulfil its functions of normalisation of social relationships, and cease invoking it abusively in order to condemn modes of living or of urban space use.

3. A bundle of norms applicable to each urban dimension

Instead of a supreme and unique or single judicial norm, the objective would be to define a number of particular norms applicable to each urban dimension.

Each norm would express:

- a minimum under which there is (i) an unacceptable tenure insecurity (ii) an insufficient service, (iii) a hazardous habitat;
- an objective to be reached, taking into account both the revenue of concerned households and public subsidies available.

4. The advantages and the disadvantages of a normative system

Each low-income settlement is to be considered as a whole, through the aggregation of its qualities; some particular defects (for example, the presence of untreated sewage in natural environment) can be compensated for by particular advantages (for example, the self-organising capacity of concerned communities can operate to resolve this type of problem, leaving it to them to exercise free choice.

This observation leads us to draw a balance sheet of the advantages and disadvantages depicted by this situation for each category of stakeholders. The advantages can compensate the disadvantages produced by inappropriate or insufficient norms.

5. Understanding the situation of illegal housing in its dynamics

It is essential to understand the situation of low income housing qualified as informal or illegal in its dynamics, to locate/position it in an improving or, on the contrary, a worsening trajectory. If we are in a phase of improvement-appreciation-valorisation (this is what happens in the process of tenure regularisation-legalisation of the settlement), we can accept that housing conditions at the settlement level as being mediocre and the provision of services and infrastructure temporarily insufficient. The attitude of public authorities is crucial : it is sufficient that municipalities undertake some construction works and advertise their intention to improve the quality of housing in a neighbourhood, for the inhabitants to feel authorised or encouraged to undertake improvement actions of their dwellings. Municipal programmes of housing improvement, even if modest, play a fundamental role as they stimulate the initiatives of the inhabitants of the neighbourhoods concerned.

6. Legality and legitimacy in respect of the plurality of the law system

In some cultural contexts, the notion of legality does not form part of a coherent discourse, the legitimacy of which is obvious, largely accepted, and enforced by universally recognised institutions. The notion of legality can often be perceived in a rather hazy way. Furthermore, it has to deal with the existence of partial judicial practises, which are fragmented but still referred to by the great majority of ordinary people. This is well-known in Sub-Saharan Africa in urban planning and land matters. It is the case, for example, of the popular judicial practises to which the Chariâa refers. Hence, when an inhabitant of Piline (Senegal) wants a land transfer to be authenticated by a private agreement signed before witnesses after an identification, by the parties involved, of the plot and its boundaries, are we facing a strident manifestation of illegality? If an inhabitant of Arafat, in Nouakchott, expresses the same wish and wants the sale agreement to be signed by the public letter writer and deeds drafter recognised by the mosque, is it legal or illegal?

Is it necessary, for it to be legal, to appeal to a government or chartered surveyor, to request the services of a notary and to register the transfer at the land department ?

7. The offer and the demand of legality: cultural and economic dimensions

We can conclude that access to legality is a cultural and an economic question. It is only possible when an offer of legality accessible to all-income groups responds to a demand for legality. If the social offer of legality is not sufficient as to quantity and to quality, we cannot expect anything from ordinary citizens.

8. A legality shaped for the poorest?

The project by some authorities to create a 'second legality', a second model shaped for the poor, appears to us to be based on false and potentially dangerous premises. It should be discussed. It appears to us sufficient to admit that the respect, by poor citizens, of customary laws, manifests their rejection of total and obvious illegality, and their desire to conform to a certain form of legality. The reference to popular practises of judicial order is a form of proto-legality.

9. Has the legalisation-regularisation of illegal settlements a perverse effect? What and how?

The simple legalisation-regularisation of a housing unit results in a rise of its market value. It is nevertheless not certain that this improvement, combined with its new negotiability, can lead its resident-owner to upgrade the dwelling, or contribute to the improvement of the neighbourhood environment, as suggested by many partisans of massive regularisation operations. The inhabitant involved does not always desire to do so, or does not necessarily have the required means. Sometimes, he/she will prefer to sell and go to live elsewhere. Thus, it will be the new buyers — of a higher income group — who will undertake the improvements.

The promoters or initiators of the operation will generally declare themselves disappointed by such behaviour by the beneficiaries' households. Their adversaries, for their part, will declare publicly that the legalisation measures do not solve the problem but simply shift it by encouraging the extension of other irregular settlements at the periphery of the city. They will assume that such a policy encourages illegality, rewards swindlers, penalising honest citizens, and allows the poor to speculate.

10. Does the legalisation/regularisation of the illegal settlements constitute an effective means of fighting poverty?

The argument according to which the legalisation of a settlement favours land speculation by the urban poor is very often sustained by administrative authorities. It deserves further attention. Legalisation-regularisation measures generates indeed incremental value that benefits the resident-owners. Thus, if we really seek to improve the economic situation of the low-income urban populations, as declared by the responsible authorities of the poverty alleviation programmes, we must recognise that to induce the poor to be able to capture — for once — this incremental value can be considered as a poverty alleviation method. It can be thus more effective than many other expensive integrated programmes that require complex organisation such as professional capacity-building, support for employment, community participation and micro-credit. The ruling classes — and with them, a part of the international experts —, tend to deny to the inhabitants of low-income settlements the right to capture incremental values generated by the regularisation of their settlement.

11. Illegality, legalisation and rental housing

Housing produced informally or illegally is often used for rental. The non-respect of standards associated with the precariousness of the settlements allows for the production of low-cost dwellings with a rent accessible to low-income households. The legalisation of these settlements inevitably raises two questions. The first related to the identification of the beneficiary households: is it the owner of the land or the occupant of the dwelling who is going to be regularised? The response is clearly political. The second question concerns the impact of the legalisation of a settlement on its social composition: to the extent that the legalisation of a neighbourhood always means, at a certain point, a rise in land and housing prices, and consequently also in the rent, the lowest-income households will tend to leave the neighbourhood, handing over the space to a better-off part of the population. This phenomenon has been overestimated. Even so, it is none the less real and it is even more sensitive than (i) the legalisation of the settlement which benefits the property owner and not the occupant of the dwelling and (ii) that the process of legalisation is rapid and is implemented without parallel measures and community mobilisation.

This argues for a progressive regularisation/legalisation, stretched over a long period of time and supported by organisations representatives of the inhabitants of the concerned settlements.

12. Land and housing development, and illegality

A striking phenomenon in southern cities is the development of a formal land and housing development sector operating at the limits of legality. The land and housing developer will operate either within a legal framework or an illegal one (unauthorised land subdivision, illegal land sale procedures, etc). The same developer will often play on the two registers. Part of the operation will be legal (the land sale, for example), the other will not be legal (non-conformity to the planning documents or to the norms regarding services and construction). The developer will shift from one frame to the other according to circumstances and the risks of repression.

The formation of certain illegal settlements — in particular those inhabited by medium-income groups — is consequently the result of a development activity presented to the buyers as perfectly legal or at least tacitly authorised by public authorities. These are therefore susceptible to further regularisation, following the demands or under the pressure of the inhabitants of the neighbourhood, once it has been built and occupied (Thailand, Sri Lanka, Pakistan, Morocco, Egypt, Brazil, Mexico, etc).

Who bear the costs of these practices? Who benefits from them?

13. Illegality of human settlements and environmental protection

The environmental issue (or the legislation related to the protection of environment) is more and more often used by the most affluent segment of the urban population to call attention of the officials at city level to low-income illegal settlements and to demand their removal or eradication. The environmental argument is thus raised to legitimise the old but undeniably segregationist claim of the middle and upper urban social classes. What is the impact of such claims and statements regarding the legalisation of the illegal settlements?