Should there be a "Right to the City"?

Arguments in Favour of Conceptually Separating Control of Space and Place from Ownership.

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Abstract

Henri Lefebvre coined the phrase the 'right to the city' in 1968, which encapsulates a set of collective rather than individual rights. It is based on two principals for urban dwellers: the right to participate in decision-making in regard to the city and the right to appropriate or "physically access, occupy, and use urban space" (Purcell 2002, 103). This original social-philosophical discussion has recently evolved to include legal arguments in the context of a global system which espouses the supremacy of human rights. Though there is not anywhere with a functioning, Lefebvre-inspired "right to the city", radical and incremental attempts to create its foundations are occurring in South America and common law jurisdictions.

Introduction

The sociologist Henri Lefebvre coined the phrase the 'right to the city' in 1968 (Purcell 2002, 99), which encapsulates a set of collective rights, providing a framework through which to pursue individual human rights. David Harvey captures its essence by defining it as "a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization" (2008, 23). It is based on two principles for urban dwellers: the right to participate in decision-making in regard to the city, and the right to appropriate or physically access, occupy, use and produce urban space (Lefebvre 1996, 179). It recognises that the city is "individually and collectively" made "through our daily actions and our political, intellectual and economic engagements" (Harvey 2003, 940). This original social-philosophical discussion has recently evolved to include legal arguments in the context of a global system, which espouses the supremacy of human rights, such as the freedom of movement and the freedom of association (Grey and Grey 1999, 23). Current conversations surrounding the "right to the city" reconceptualise the notion of citizenship, exploring the potential practical steps that can be taken to create a truly democratic system at and beyond the urban level (Fernandes 2007; Harvey 2003; Marcuse 2009; Purcell 2002). This article will take the ideal form of democracy as deliberative democracy, a radical idea 'of democracy as a process for preference building' guided by the 'popular control and political equality from which can be drawn out a range of other principles such as openness, accountability, responsiveness, and participation' (Morison 2007, 134). The democratisation of urban land use is becoming an important issue because as of 2014, 54% of the global population lives in urban areas, a large shift from 1960 when this figure was only 34% (World Health Organisation 2014).

This article will propose that wealth disparity affects the use of public space, and will explain how the law regarding the use of public space is framed. This is not a uniquely contemporary phenomenon; in

the nineteenth century, the ruling class tended to be large landowners and voting rights were limited to those owning property until franchise reform began in 1867 in the United Kingdom. Today citizens who are eligible to participate in democracy are drawn from the full spectrum of society. However, there are restrictions on the use of space in urban areas traditionally considered 'public' due to private ownership of the land by corporations and big businesses. Such disparities are caused by neoliberal economic policies, particularly the privatisation of public services. Neoliberalism stands for 'open, competitive and unregulated markets, liberated from state intervention and the actions of social collectives, represent the optimal mechanism to socio-economic development…This is the response of a revived capitalism to "the crisis of Keynesian welfarism" in the 70s' (Hall 2011, 10). In this light, neoliberalism has diminished democracy; organisations consisting of unelected people are given power to decide policy which was previously under government remit. In Britain, Business Improvement Districts are privately owned companies that govern centres of 20 towns and cities (Minton 2006, 2). As Brazil has implemented a legal system based on a "right to the city", in order to combat urban problems such as stark class separation which requires a high level of direct participation, it will serve as an alternative to the increasing privatisation of British governance structures. Examples of legal framing, taken from the United Kingdom and the United States Supreme Court, where these policies of privatisation originated, demonstrate how the law gives supremacy to the rights of property owners over the rights of individual citizens. An attempt to develop a 'right to the city' in the UK and the U.S is a way to reduce inequalities in society, requiring the law to reject the supremacy of absolute property rights in urban areas and implement participatory urban processes. A 'right to the city' could alter the law's conceptualisation of land ownership and its use.

Rights of Access to Public Spaces

The current legal arguments for the conceptual separation of space and place from ownership in common law focus on the question of access. The dispute over private ownership of large swathes of urban land, and attempts to exclude members of the public from using them is not a new phenomenon. In early nineteenth century England, before the establishment of local government, aristocratic competition for property fuelled the geographic expansion of London. Private estates, with their own private security and no rights of way for the public, became commonplace. This is the case in contemporary British and American cities with the development of city centre shopping malls and private corporate complexes (Gray and Gray 1999). As local government began to develop, landed elites lost absolute authority over these properties. Indeed, in the years between 1864-65 the control of 163 miles of privately owned London roads and streets was transferred to the local governments (Minton 2009, 20). However, restrictions remained into the 1880s when public opinion against these large private estates reached its peak; for example the ***Daily Telegraph*** declared that the aristocracy 'have enjoyed that fantastically feudal privilege quite long enough' (1882, 5). This led to the adoption of public spaces by local authorities becoming the norm.

In recent decades a similar situation is emerging in the context of the modern city through corporate ownership of large areas of land, as exemplified by the construction of the private estate, Canary Wharf, in the 1980s. This "architecture of extreme capitalism" (Minton 2009, 5) is the location of huge

global financial firms and all other establishments are created in order to cater solely to employees. It is clear that Canary Wharf and similar places in the London Docklands belong to a particular social class, one with privileged access to the education, and thus skills, necessary for employment in the financial sector. Meanwhile at the next tube station stop, the population of the Isle of Dogs has an unemployment rate of 25%. A quarter of the community do not have the qualifications for any kind of work or do not have the means to secure the type of work they have a preference for. The class distinction of these two locales is mirrored by the physical distinction of corporate culture, and a local population feeling as if they have no stake in the development; 'On one side of the road, by the station, are newly built office blocks and a host of construction sites, while on the other side is a dilapidated housing estate' (Minton 2009, 5-8). As will be discussed later, there have been a number of cases taken by members of the public against landowners, attempting to claim their right to use spaces such as Canary Wharf and shopping centres. The growing distinctions between the rich and poor in urban areas are the result of the involvement of corporate actors in the governance of cities, and as a result of neo-liberal policies.

Neoliberalism and Access to Land

Neo-liberalism and the policies it inspires orients the global economic system to the pursuit of profit above all else, causing huge material inequalities as a result. Like the increasing privatisation of city space, this inequality is not novel; the gap between rich and poor is similar, if not wider, than the gap that existed at the beginning of the First World War (Piketty 2014, 15). Mark Purcell argues that governance is becoming privatised, and as a result, less democratic (2002, 100). For example, the redevelopment of the London Docklands was the "result of planning outside of laws", involving "no recourse to local democracy" (Minton 2009, 10). Decisions were made by quasi-autonomous non-governmental organisations (QUANGOs) like the Urban Development Corporation, chaired by property developers, and empowered to implement compulsory purchase orders. This QUANGO forced businesses and property owners to sell their land for development after proving that it was for the benefit of the public (Minton 2009, 22). The Planning and Compulsory Purchase Act 2004 reformed the definition of public benefit by allowing the aim of a development to be a choice between "any one or more of the following objects- the promotion or improvement of the economic well-being of their area; the promotion or improvement of the social well-being of their area; the promotion or improvement of the environmental well-being of their area" (Part 8 Section 99, 78-79). This is problematic because what is considered to contribute to the 'well-being' of business (in economic terms- profit) does not necessarily correlate with what is needed for the 'well-being' of the population in a particular locale such as the Isle of Dogs. Continuing in this vein, city centres such as Manchester have been governed since the 2000s by private companies known as Business Improvement Districts (BIDs), who aim to improve the local trading environment. They are businesses operated for profit and their policies are aimed at helping other businesses to make profits. A local governance system which does not have any explicit interest in solving social problems is completely at odds with a modest model of democracy, where citizens vote for politicians to represent their interests, never mind a more participatory conception.

This shift in governance has disenfranchised citizens of nation-states by excluding them from decision-making, in relation to the economy and political system. Citizens are traditionally "associated with the rise of a 'public realm' in which both citizens and public institutions…are more or less insulated from private interests" (Clarke 2007, 2). In contemporary Britain and America, citizens participate in the system by voting for a representative; yet these representatives have given powers to private corporations. While there is a substantial body of literature and popular concern regarding the democratic deficit between individuals and supranational organisations, such as the European Union (Peters and Piene 2004; Follesdal 2006), outside critical urban studies there does not seem to be as much discussion about the democratic deficit at the local level: the place where decision-making should be most intimately connected with the individuals who make up the community. Perhaps this is because "the distinction between public power and private power is not clear-cut and one may shade into the other" (Gray and Gray 1999, 26) rendering it opaque to the general population who is a member of the public service and who is not.

This problem could be combatted by a form of urban participatory budgeting, as used in Brazilian cities such as Porto Alegre. The process encourages citizens to engage with local government and community organisers to decide on investment priorities, mostly in regard to infrastructure. It has shown that the priorities of local governance organisations are not in line with those of the urban population. For example, in the first year of participatory budgeting in Porto Algere, "the administration thought that poor people's priority was public transport but what they voted for in Participatory Budgeting was water supply and sewerage" (Souza 2001, 167-168). In 2008 there were about 100 European cities with a participatory budget, but the majority of processes are not "the ideal-type 'Porto Alegre adapted for Europe'" (Sintomer and Herzberg 2008, 170). Granted, European cities do not suffer from privatisation to the same extent as Britain; steps were taken to protect small business owners in Italy, France, and Germany (Minton 2009, 26). As a result, poverty is characteristically concentrated in the suburbs, while in the U.S and Britain it is concentrated in inner-city areas.

An Alternative Approach from Brazil

The infamous slogan of Margaret Thatcher's neo-liberal programmes which spawned the corporate take-over of cities was 'There is no alternative' (TINA) (Minton 2009, 9). However, an example of an alternative has been implemented by the Brazilian government. In Brazil, a traditionally corporate state, there was a realisation by the federal government that private interests were given precedent over those of the very poor public in urban areas. This resulted in the 'City Statute' of July 2001, explicitly recognising the "right to the city" as a collective right and establishing a new legal-urban order. In his work on South America, Edesio Fernandes outlines the arguments which led to Brazil's attempt to separate the control of space and place from ownership. He argues that a "right to the city" is necessary, as the socio-economic, political and territorial changes of the last two centuries, due to industrialisation and urbanisation, have not been accompanied by a change to the conceptualisation of democracy (Fernandes 2007, 205).

The development of the City Statute legislation was preceded by a number of individual reforms: the introduction of urban planning, the social right to housing, the right to environmental preservation, the right of the state to capture surplus value of individual properties, and the right to the regularisation of informal settlements. Taken together, these changes recognise that the interests of private property owners "necessarily co-exist with other social, cultural, and environmental interests of other groups and the city as a whole" (Fernandes 2007, 213). Building rights are separated from property rights so that land use can be regulated, rendering them coincidental with a local Master Plan concerned with planning and environmental laws. The legal foundation of a 'right to the city' has been laid on the federal level, but it is up to municipalities and their communities to produce both policies and programmes to construct a city which recognises and serves the interests of its inhabitants. As of 2009, 87% of "Brazilian cities completed master plans 'incorporating the guidelines and instruments of the City Statute' (Caldeira and Holston 2014, 5). Understandably, 'there is a distance between discourse, law and reality' (Friendly 2013, 171)." Caldeira and Holston's work documents that citizen groups are being used in the development of urban planning but so far discussions have been dominated by the upper-classes and corporate interests. For now, it is "the courts and the Public Ministry" of cities that "legitimate and safeguard principles such as the social function of property and the democratic management of cities" (2014, 12). In the meantime, officials must find a way to include the working-class in discussions, as those in Porto Alegre managed to do in the 1980s (Souza 2001, 170). Criticism of the City Statute itself is based on the legal view of property rights as supreme, "regardless of wider social and environmental interests" (Fernandes 2010, 66). Fernandes accredits this to the curriculum of law courses in Brazil, in which the formal aspects of civil law are fundamental, and urban law is not taught. In this respect, Brazil is not alone. Examples from America and Britain in particular, reveal how the legal emphasis has been on the rights of property owners, rather than the effect those rights have on the rest of the population.

Property Rights in the English and U.S Courts

In common law jurisdictions, there have been cases where absolutist conceptions of property rights have either been confirmed or recognised as unsuitable, specifically in relation to the characteristics of a modern city. A step towards establishing the rights of the public to merely be present in quasi-public spaces, such as shopping centres, is outlined by Kevin and Susan Gray. In their analysis of the English Court of Appeal case ***CIN Properties v Rawlins*** ([1995] 2 EGLR 130), they raise the human rights implications of a private property owner's privilege of arbitrary exclusion, invoked to ban a group of mostly black teenagers from their city centre shopping mall, despite them not being guilty of any criminal activity. Originally intended to protect citizens against the intrusion of the state, this conception of land law is unsuitable for questions relating to the freedom of movement within city centre shopping malls. They are essentially enclosed city squares, spaces traditionally open to public use without restriction; they are not only a place in which to be a consumer, but afford "much of the recreational aspect of a social, cultural and artistic meeting place" (Gray and Gray 1999, 11). The problem is that it is "the unemployed, the disadvantaged and the discouraged" (Ibid, 21) who are the easiest to exclude, through invoking security risk profiling based on stereotypes (von Hirsch and Shearing 2000, 78). Courts in the U.S, Australia and Canada have been better at recognising the

damage that is being done "to a range of more highly rated human interests and values", such as freedoms of association, assembly, and movement (Gray and Gray 1999, 62). Although a promising development and one that would be welcome in Britain, this particular argument for the conceptual separation of space and place from ownership has admittedly "relatively modest parameters", as it "affects only public land or land "affected with a public interest" (Gray and Gray 1999, 38). Their argument is for a small change, which is nonetheless a form of the right to appropriation, and a move towards the adoption of more principles of "the right to the city".

The treatment of corporations as individuals with rights of exclusion was used historically as a way to promote structural inequality in American society, the results of which are still obvious today. The Supreme Court ruled in the Civil Rights cases of 1883 (109 U.S 3 1883) that African Americans, who had been granted legal equality in 1875, could be excluded from public accommodations on the grounds that "the actions of owner…were 'private' actions, not 'state' actions" (Moore 2014, 73). This "invention" (Gray and Gray 1999, 48) resulted in the protection of property accumulation by white men during the era when African Americans themselves were considered property. Further developments in favour of 'the right to the city' will occur only if legal framing favouring property and capital owners, and in regard to a wide range of issues, is recognised by legislators, legal practitioners and judges. As Thrasymachus argued in Plato's ***Republic,*** "each form of government enacts the laws with a view to its own advantage" (Plato 1930, 338e-339a). More often than not, the advantage goes to those well represented in business and politics; in 2007 83% of all company owners in the U.S (United States Census Bureau 2007) and 77% of Congress members were white males (Manning and Brudnick 2014, 80-81).

Towards the Right to the City

Nothing captures the essence of the "right to the city" better than the idea that "the homeless man in Los Angeles has not won the right to the city when he is allowed to sleep on a park bench in the centre" (Marcuse 2009, 192). The right to appropriation of space is important, but can only be fully realised when economic, social and political problems are addressed in the context of a more participatory model of democracy. Different groups of people will have alternate and sometimes conflicting interests, but surely our governance system should reflect the complexity of our society. Racial minorities may use appropriation to resist their "spatial concentration…in areas of economic disinvestment", gay people may resist their "heteronormative marginalisation", and women would seek the right "to equal access and safe movement in urban space" (Purcell 2002, 106). The elderly, and those with families, would probably advocate free public seating to facilitate their right to do nothing (loiter), or activities that do not involve consumption whilst in the city centre.

Legal reforms will have to exceed the legal right to be present in a quasi-public place, to encompass a Brazilian-style set of rights, including local neighbourhood participation in the planning and building of cities. If the model of corporate architecture, such as Canary Wharf, was only one of many models of city development, then it could contribute to "the pursuit of heterogeneous and hybrid urban geographies, all of which nevertheless share in common a city produced to meet the complex and multiple needs of urban inhabitants" (Marcuse 2009, 187). The problem in Britain and America is that

corporate architecture is now the only model, and threatens to make cities "more ghettoized as the rich seal themselves off for protection while the poor become ghettoized by default" (Harvey 2003, 940). The construction of places in which to consume is for a particular strata of society: 'ABC1s', who have disposable income and can easily identify where they 'belong', according to architectural cues. While it may seem like a utopian dream to separate the pursuit of profit and governance or to separate the control and ownership of space and place, there are sectors of society which have proved that worthwhile projects can be pursued without profit-making as an end in itself. Non-governmental organisations and co-operatives are based on collaboration with local communities and businesses to improve distribution, while Peer to Peer production has produced a 'third mode of production' creating use rather than exchange value (Bauvens 2006). A system which would recognise a right to the city would also recognise that urban space is not only valuable due to its ability to "generate maximum returns in terms of shopping and spending" but "must be about more than a balance sheet, or they will fail to connect with local communities" (Minton 2006, 4).

Conclusion

The current system of city governance and its effects have roots in the economic and political policies pursued in 1980s Britain and America, but there were alternatives. In France and other European countries, steps were taken to protect small business owners and restrict the establishment of large stores (Minton 2010, 26). Lefebvre claimed that each historical period produces the kind of public space, and therefore public life, best reflecting the political realities of the time (Lefebvre 1970, 124-134). The contemporary control and ownership of space and place has resulted in the imposition of the architecture and values of capitalism in the very fabric of our cities. Worryingly, this reflects the political realities of our society and cities all too well. Steps should be taken to realise a fully democratic system in which "the right to the city" is a given framework through which the participation of citizens, and the recognition by the legal system of the importance of their rights, could be more genuinely pursued. While it might be tempting to wait and see how a liberal legal-urban framework plays out in the democratic laboratory of South America, no system can be successfully cloned between jurisdictions. The citizens of America and the UK will have to work out the best way to govern their cities.

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