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Between informal and illegal in the Global North: Planning law, enforcement and justifiable noncompliance

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8.1 Introduction

The phenomenon of the construction on or use of land without legal permission is a prevalent reality for most inhabitants of the globe. This is especially true for developing countries (also called the Global South). A burgeoning body of scholarly and practical knowledge about developing countries has enhanced our understanding of how ‘informal’ development (as many call it) of housing, shops, industries and other buildings fulfils essential human needs.\(^1\) Unregulated initiatives can also unleash human ingenuity and creativity, as Turner’s analysis of ‘vernacular architecture’ taught us long ago.\(^2\)

Some scholars have argued that planning and land policy in the advanced-economy countries (the Global North) have much to learn from the Global South.\(^3\) We agree. However, in advocating for knowledge transfer from the Global South to the Global North, insufficient attention has been paid to the ‘elephant in the room’: the vast differences in the legitimacy and effectiveness of the rule of law. Noncompliance with regulatory planning and related laws therefore calls for much broader rethinking of the relationship between planning and law.

Our focus in this chapter is on the laws and regulations pertaining to the built environment, sometimes called ‘regulatory planning’. That would include regulatory tools such as zoning, statutory plans
and building/development control. We do not directly address related legal areas, most notably housing law (occupancy, rental rules, health and so on).

This chapter begins by scoping current knowledge about noncompliance and enforcement in planning, showing a major gap. We then focus on linguistic usage of ‘informal’ versus ‘illegal’ (and ‘noncompliant’ and ‘unauthorised’). The main argument of this chapter attempts to construct a conceptual basis for reconciling ‘informality’ with the rule of law. To illustrate the complex challenges faced by planning when it meets the law, we recount two complex stories. One is a hypothetical story about the processes of change that occur in a rather nondescript neighbourhood when noncompliance with planning regulations gradually becomes rampant. The second is a dramatic story – which happens to be a real-life account – in which situations at the extremes meet in one place. These two stories are intended to highlight the complexity of the challenges faced by planners, enforcement agents and – sometimes – the courts. The readers are challenged to decide what and when to tag as ‘informal’.

The chapter then turns to the neglected zone between planning regulations and enforcement practices. We outline a set of six situations where noncompliance with planning or land laws may indeed be justifiable. Each situation is illustrated with one or more cases, based on our prior studies. From these situations, we attempt to distil six criteria for determining ‘justifiable noncompliance’. In the concluding section, we call on planners and planning theorists to engage much more with the parallel universe of law and enforcement. It is up to planners to learn from noncompliance and incorporate the lessons into more responsive planning, so as to minimise the need for enforcement in the first place.

8.2 Current knowledge about noncompliance and enforcement: The neglected linchpin

It is not easy to build a bridge between planning, law and noncompliance, because there is not a solid platform of knowledge on which to anchor it. Existing international knowledge about noncompliance with planning rules and about enforcement and sanctions is scant, both in planning theory and in planning law. One even wonders how these areas of knowledge have evolved without this linchpin. One good thing about the recent attention to ‘informality’ is that it should force scholars to start filling in this mammoth gap.
The problem is that, unlike planning theory, which is generic and conceptual, planning and related laws are concrete, heavy-bodied institutions. Moreover, they vary significantly from one jurisdiction to another.\textsuperscript{5} To date, there has been no broad systematic comparative research on the relationship between legal structures, enforcement practices and degrees of compliance. The recent evidence from the literature about ‘informality’ does not contribute much to filling in this specific knowledge gap, because it usually addresses only specific cases, and rarely the broader legal contexts.

Informality, noncompliance and enforcement

Much of the scholarly literature on built-environment ‘informality’ – whether in the Global South or in the Global North – is still far from addressing its relationship with the law. Even crucial differences between land-related and other types of informality are left vague. For example, researchers sometimes address informal/illegal street vending in the same breath as the illegal/informal construction of buildings. This non-distinction is appropriate for many Global South countries, where the rule of law may be weak and dysfunctional both for regulating urban development and for economic transactions. However, conceptually, the two forms of noncompliance (and interim categories) should be distinguished, especially by urban planners. Vending is often fully or partially transient, and thus has relatively small long-term impacts on the built or open environment. By contrast, construction of permanent buildings creates long-range externalities, whether positive or negative.

Enforcement is the administrative and legal mechanism that any planning/development control laws would stipulate, at least on paper. This is the zone where planning, law and human needs and behaviour should meet. Sadly, enforcement is neglected not only by planning scholars, but even by legal researchers on planning law. American planning law texts usually skip the enforcement topic altogether. The technical rationale may be that enforcement is classified as a separate legal field, but the outcome is that planning students and practising planners are disconnected from the enforcement function. British literature on planning law devotes somewhat more attention to enforcement,\textsuperscript{6} and there are several dedicated texts (including Harwood, and Travers, Grant and Lambert).\textsuperscript{7}

Empirical research on enforcement of development control is also scant. Even in the UK (with the world’s oldest national planning law – 1909) there are only a few scholars who have delved into the topic
empirically. This is more than could be said for most other countries. Comparative research is equally scarce. Our own comparative evaluation of Portugal and Israel is a rare example. By contrast, the enforcement of building regulations (the technical engineering aspects of construction) has attracted more attention, perhaps because noncompliance may lead to direct health problems or loss of lives. Several scholars have surveyed building regulations in selected European countries. In the US, Burby and others extensively address enforcement of building codes.

Overall, the many questions – empirical and normative – concerning enforcement of planning laws and how these relate to patterns of noncompliance constitute virtually uncharted research territory.

The predicaments of enforcement

To understand the meaning and implications of noncompliance with planning regulations, planners should become more familiar with the crucial arena of enforcement. Unlike planning regulatory policies and plans, which have quasi-legislative characteristics, enforcement is an executive (or administrative) government function. It depends on available financial resources, on policy priorities and on politics. Enforcement practices necessarily entail discretion about what, how much and when to enforce. The courts will consider this fact; but, at the same time, this fact exposes the authorities to petitions in many situations of noncompliance – justifiable and non-justifiable alike.

Comparative research on the de facto exercise of discretion in enforcement of planning law is extremely lean. Smart and Aguilera’s chapter in this volume is a pioneering contribution, and our own empirical study of Portugal and Israel touches on this issue to some extent. From our interviews with enforcement agents in several local governments we learned that their reports reflected recurring predicaments about how to prioritise their work, given the limited human and financial resources available.

We doubt that many OECD countries have indeed enunciated priorities or have instructed local governments to do so. Even the UK took its first steps in this direction only in 2012, and the process of adoption was still incomplete in 2019.

Planning law, noncompliance and planning theory

Theories about justice in planning have made much headway in recent years. If we compare textbooks on planning theory from the 1990s with more recent texts (compare Alexander and Brooks with Gunder,
Madanipour and Watson, for instance), we can observe much greater awareness of the role of power and the ‘dark side’ of planning. But this scholarship has yet to bridge planning theory with planning law, and to address the many sides of the rule of law. The legal realm provides tools of legitimacy for planning policies and tools for implementation, but it also constrains citizens’ behaviour. Planning regulations (zoning, local statutory plans and building permits) restrict many actions that individuals may wish to carry out, vis-à-vis the use of land, construction or alteration of built structures. These regulations may be good or bad – depending on the point of view of those involved. Violations of these rules can entail sanctions – sometimes economically or personally severe. At the same time, some actions are not controlled and thus left to self-initiative.

In extreme situations of noncompliance caused by deprivation, planners or NGOs can try to draw on (rather vague) norms of international human rights law such as those regarding the right to housing. These norms are also anchored in the European Convention on Human Rights (ECHR). Some books on UK planning law devote a special section to examining how human rights impinge on planning powers. As noted by Harwood, the ECHR could have a direct bearing on planning enforcement. However, international human rights law is not a panacea. It leaves considerable room for interpretation. Its adjudication is usually left to local jurisdictions. Most cases are unlikely to make it to the highest-level courts, and even if they do, winning is not assured.

The duty to address the topic of noncompliance and what it should signal lies at the doorstep of planners and planning theory. Most planning theory is directed at the planning process (such as visioning, public participation, communication and negotiated development) or to the contents of plans. There is little discussion of what messages noncompliance with planning law convey for planning modes and norms. In surveying the literature, we found only a few contributions in this direction. Among the more relevant is Alan Prior’s discussion of problems in the theory and practice of enforcement of environmental regulations. Britnell and Sheppard shed light on the issue of the public interest and social justice behind enforcement practices, noting ‘it is often the impact of unauthorized development upon citizens’ sense of well-being and their perception of justice that lead them to complain in the first instance’. Neil Harris’s paper draws on Foucault’s philosophy, unveiling an interesting fact: the major source of information about violations – even in the era of remote sensing – is neighbours’ complaints. According to Harris (for the UK) and our own findings (based on interviews in Israel and Portugal), neighbour reporting is more prevalent among middle- or higher-income
neighbourhoods where social cohesion is not strong. Some jurisdictions –
national or local – have established a dedicated web page to communicate
a statement promising full confidentiality for those who report planning
violations. What do these findings mean for planning theories such as collab-
orative planning? This is just one example – a teaser – of potential
insights that could contribute to the understanding of the interrelation-
ships among planning, law, enforcement and noncompliance. But we
have barely taken the first steps.

In this chapter, we do not attempt to take on the big mission of fill-
ing in the gap between planning theory and law. More modestly, we
seek to demonstrate that, without considering the attributes and con-
straints of the legal system, the research on ‘informality’ will not be able
to contribute broadly to better planning and regulation. Moreover – from
the other side – without better understanding of the reasons for noncom-
pliance with regulatory planning and its implications, planners will not
be able to achieve more just and effective planning.

8.3 Language matters

The knowledge gap is reflected in terminology. When do violations of
land-related laws and regulations merit the term ‘informal’ and when
would it be more appropriate to call them ‘illegal’ or other similar terms?
We did not find in the literature any thorough distinction between infor-
mality and illegality. Drawing such a distinction should be especially rel-
vant for Global North countries, but our impression is that there is, in
fact, an accelerated trend to blur the distinction among these concepts.
The evolution of terminology from ‘illegal’ to ‘informal’ can be
observed if we look at the titles of books. One of the earlier books about
our topic in the Global South, published in 1998, was titled ‘Illegal Cities:
Law and Urban Change in Developing Countries’. Today, similar books
about the Global South prefer the term ‘informal’. In very recent years,
one can observe increasing use of the term ‘informal’ regarding planning
violations in Global North countries too – including the title of this book
volume. Some authors use the term with the specific intention of con-
veying that the reported types of noncompliance merit special consid-
eration. In this vein, ‘informality’ is widely used by authors who focus
on special ethnic–cultural groups, to show how their needs are grossly
unmet by modern planning and legal systems. The term is also used in
a distinctive context of ideologically motivated noncompliance, such as Low Impact Development\textsuperscript{30} or the historic Plotlands in the UK.\textsuperscript{31}

However, some very recent publications regarding the Global North have been using the term ‘informal’ interchangeably with ‘illegal’, without any attempt to argue that noncompliance in the cases described is justified due to some special circumstances, needs or wrongdoing by government. Some US authors have used ‘informal’ to refer to the phenomenon of illegal accessory housing in relatively well-off neighbourhoods, where noncompliance is largely motivated by economic profit.\textsuperscript{32} Similarly, the massive illegal construction all over Greece – a long-time member of the EU and the OECD – has been called ‘informal’, with no distinction made according to need, socio-economic level or other special circumstances.\textsuperscript{33} A leading scholar in the field, Francesco Chiodelli, indirectly conveys a degree of malaise regarding the overly broad use of ‘informality’. In a recent paper discussing corruption and the illegal construction of mansions and other lucrative properties in Italy, he does use ‘informality’ in the main title, but only to retract in the subtitle: ‘Housing Illegality and Organized Crime in Northern Italy’.\textsuperscript{34}

The dictionary definition of ‘informality’ or ‘informal’ has nothing to do with the rule of law. This term denotes certain types of human behaviour, as distinct from ‘formal’ (or the many in-between shades). For example, one can prefer to wear informal clothes, to use informal speech or to skip formal table etiquette and eat barbeque-style. Such behaviour is usually not illegal – it is simply part of the vast range of human behaviour that is not addressed by laws and regulations.

Terminology should matter. In Global North countries, where planning laws are functioning reasonably well (no planning law is perfect) the use of ‘informal’ is inappropriate and self-defeating. When ‘informal’ is used as a synonym for ‘illegal’, this delegitimises planning law and the rule of law in general. Furthermore, by denoting noncompliance as ‘informal’, we are diverting attention and possible responsibility from the planning laws and regulations and their role in anticipating eventual cases of noncompliance, or adjusting the regulatory planning to accommodate them ex-post.

In the Global North context, ignoring or bypassing planning law in an ad hoc manner undermines the planning system in general and its capacity to serve other public interests. Despite their many faults, planning laws are here to stay, and are even on the rise globally.\textsuperscript{35} We – citizens, scholars and advocates – need planning laws in many contexts, such as to designate land for public services, to ensure public access, to enhance environmental sustainability or eventually to implement a
minimal portion of affordable housing units in private projects. Just as we would not lightly call a major tax evasion ‘informal’, even if we think the taxation system is not progressive enough, we should not use the term ‘informal’ to refer to violations of planning law in a casual manner.

By contrast, where a legal system is grossly malfunctioning, as in many developing countries, the term ‘informality’ is appropriate and useful. Technically, the residents of the world’s huge favelas may be violating a battery of rules lurking somewhere in the law books, but these are often dysfunctional. Even worse, they are prone to being selectively enforced and misused. If the legal system clearly does not serve major parts of society for housing, livelihood, mobility or public services, alternative modes of social or economic institutions are likely to emerge to serve the public needs. They will gradually acquire what Peter Ho calls ‘credibility’ and replace the rule of law.36 In the Global South context, the term ‘informality’ appropriately exonerates the residents of favelas from being tagged as violators of the law. At the same time, this term also directs attention to the many positive functions of the self-help and spontaneous solutions.

However, the loose use of ‘informality’ in jurisdictions where the rule of law, in general, and planning law, in particular, are expected to function undercuts the foundations of the very same institutions that the critics may wish to repair. Ironically, the use of this behaviour-based, rather than institution-based, term implicitly absolves planning law and the manner of its enforcement from any responsibility for the types and degrees of noncompliance.

8.4 The Global North contrasted with the Global South

Before importing ‘informality’ from the Global South to the Global North, one should be aware of some more (generalised) differences between these two broad spheres.

The Global South: Land tenure is the focus

In cities of the Global South (and in many rural areas too), informality in relation to land – and thus also in relation to building – is the rule, not the exception. The converse holds for the Global North.

In the Global South, much of the informality in the built environment context pertains to land tenure, not to planning law or development control. In developing countries, security of land tenure is the primary concern, and key international bodies have invested large resources in promoting it.37 The very first of the UN Sustainable
Development Goals addresses the importance of securing tenure rights. The priority of land tenure over regulation of building is reasonable: where land tenure is not secure, planning is almost irrelevant. Granting of a building permit is predicated on the long-term responsibility of the landholders. Therefore, in Global South countries, planning regulations (and thus planning law) usually hold a much lower priority than land tenure issues. Only recently did UN-Habitat establish a tiny unit with the mission of introducing working planning laws to developing countries, whereas land tenure has been UN-Habitat’s core mission for decades.

The Global North: Planning law is the focus

In the Global North, most references to informality and to illegality address planning law rather than land tenure. The reason is that, in advanced-economy countries, property rights are usually well established and administered. Landowners are aware of their rights, and the courts enforce claims against private transgressors. Cases of squatting – so rampant in the South – are exceptional.

With stable land tenure, planning law can function. Although violations of planning law are by no means rare – we all know of some, often in our own neighbourhood – they are usually not the main force that shapes cities or neighbourhoods. In most Global North jurisdictions, neither spontaneous occupations nor self-help housing predominate (although here, too, there are special exceptions).

A recent OECD report, in which the planning ‘systems’ of all member countries are evaluated, notes that, in general, cities and regions are governed according to planning and law. The report also assesses the degree of satisfaction with planning enforcement. Two-thirds of the countries receive a high score of four or five (out of five), and only very few a score of one or two. This finding indicates that violations of planning rules in the North are an island, not an ocean.

There are four other relevant differences between South and North. First, construction of structurally dangerous, unsafe and unhealthy housing is typical of developing countries, but is rare in developed countries. This is because the regulation of structures is usually adequate, and builders obey them for fear of endangering lives (and insurance policies …). Second, in the North, violations of planning law usually occur on the violator’s own land. Third, large-scale evictions from housing are less frequent in the North. If evictions do occur, there is likely to be at least a minimal housing-security system, and governments are obliged to provide replacement accommodation.
The fourth difference is perhaps the most pertinent to our discussion: noncompliance with planning law in the Global South (if discussed at all) is usually viewed as binary and focuses on whether there is a building permit for the entire structure. There is rarely any discussion of smaller violations. But in most countries of the Global North (with a few exceptions), the majority of planning-related violations concern divergences from the original permit, such as an addition to a building, an unauthorised change of use of the premises, noncompliance with architecture design, or inaction – such as non-instalment of compulsory thermal energy.

8.5 A dedicated term for the Global North: Justifiable noncompliance

In the Global North contexts, too, there may be unique situations in which violations of planning laws could be justified. We propose that the term justifiable noncompliance becomes the focus of the planning law discussion in the Global North.

Among the various synonyms related to illegality, we chose ‘noncompliance’ over other terms for two reasons. First, ‘illegal’ suggests a yes-or-no status, whereas, in the Global North, cases of noncompliance are a matter of degree – some are minor, some major. Second, we preferred noncompliance over unauthorised because the latter pertains only to actions, whereas noncompliance encompasses also inaction (for example, failure to install a renewable energy element). Unlike ‘informality’ – which (as we have argued) refers to behaviour, is descriptive rather than normative and does not address any institution – noncompliance addresses the legal framework. When we add justifiable noncompliance, we are explicitly normative, and this term suggests that, within the broad realm of planning-law violations, a small subset may be justifiable.

Our aim is to develop criteria for determining what types, degrees or contexts of noncompliance may be justifiable. This would be a first step towards helpfully reforming planning and enforcement practices. However, this mission is not simple. The potential justifications have to pass through the filters of the legal system. To demonstrate how planning and law may react to noncompliance, and some of the complex dilemmas involved, we set out two scenarios. The first is a hypothetical story, where we simulate events and processes that often occur in real-life urban contexts. The second is a real-life case, perhaps more reminiscent of a fictional scenario because of the unique and heightened dilemmas it presents.
8.6 A hypothetical story

A well-off middle-income neighbourhood had been planned according to the urban standards that prevailed at the time, and it offered satisfactory density and a good social fit with the characteristics and desires of the inhabitants. The number of infringements was moderate, similar to that of other nearby areas. The main source of information about violations was neighbour reporting, as is often the case in well-off neighbourhoods.

After a few decades, the neighbourhood lost its prestige and new residents trickled in, usually with a lower income level. The ethnic composition changed gradually, with newcomers mixing in with more well-established residents. The average number of children per household increased. Some homes were crowded. The number of planning infringements escalated significantly. Some residents constructed an illegal annex to their house to relieve family crowding, while others extended their homes or converted their basements into accessory housing units, offered for market rental. Some owners paved over their yards to save on gardening costs, thus hampering water seepage and causing occasional mild flooding.

Some of the households were indeed poor and required the extra space to meet basic housing needs or to earn extra income. A few of the original home owners noticed their neighbours’ precedents and followed suit, building small rental units without a permit. As the neighbourhood demographics continued to change, reporting by neighbours reduced dramatically.

A similar neighbourhood not far away developed approximately at the same time. That neighbourhood did not experience the same demographic transformation and retained its middle- and upper-middle-income profile. The rate of infringements remained moderate, and enforcement actions were largely dependent on complaints by neighbours.

The enforcement agents were not prepared for the rise in the number of violations in the first neighbourhood. For a few years, they continued their reliance on neighbour reporting and remained relatively passive. The number of violations grew steeply and started to affect the character of the neighbourhood, for better or for worse (depending on one’s point of view). What could the enforcement agents do? If they took a light-touch approach and dismissed the violations, they risked legal challenges from the direction of the second neighbourhood. Some residents there were angry that enforcement was still being carried out in their neighbourhood for the same types of violations that were now being tolerated in the lower-income neighbourhood. They decried what they perceived to be ‘selective enforcement’ and demanded that the hands-off
policy be applied to them as well. At the same time, from the opposite direction, some residents in the second neighbourhood wanted the enforcement unit to be more proactive, to stem the increase in violations that had occurred in the first neighbourhood. Both sides threatened to take court action against the enforcement unit.

Simply describing the planning law violations as examples of ‘informality’, without distinguishing between them, would not be useful in this case (as in most cases), as it would not help achieve a better balance between planning law, planning policy, and human needs and behaviour. To argue that the violations indicate that the planning rules should be changed or that the legal rules of enforcement or sanctions should be revised, noncompliance should first be shown to be justifiable according to some principles. But what should these principles be?

There are some dilemmas involved here. Should the entire lower-income neighbourhood as one single spatial unit now be characterised as justifiably noncompliant? Or should the justifications apply only to individuals, according to their personal needs and circumstances? Should construction of an accessory unit to contribute to bettering the livelihood of poor people also be regarded as justifiable? Should the reduction in permeable ground-cover also merit the justifiable noncompliance label, and does it matter whether the family is poor or not? What policy regarding enforcement should the authorities adopt? Or should they simply continue their enforcement-by-complaint policy? Should the plan (planning regulations) be amended so that violations would be legalised retroactively? Should any fines or Sanctions be imposed, even if legalisation is possible? Should the deregulation also hold for future actions, or just for the violations to date?

Later in this chapter, we discuss possible criteria for testing whether some types of noncompliance can be classified as justifiable. Quite probably, not all the infringements in our hypothetical story will pass these tests.

8.7 A real-life story

Our real-life story is one of extremes. It takes place amid a set of small islands in the Ria Formosa Natural Park, near Faro, on the southern tip of Portugal. This modest but paradise-like location has attracted thousands of illegal summer homes (Figures 8.1 and 8.2). The degree of illegality today is one of the most extreme one could imagine, entailing cumulative breaches of several laws and regulations enacted over the years: squatting on coastal public land, noncompliance with environmental
regulations, noncompliance with regional and national plans, noncompliance with national coastal protection and, in addition, violation of EU-level landscape protection.\footnote{42} Sea-level rise, too, is gradually threatening some of the buildings; thus legal building permits cannot be issued. However, decades ago, some buildings did receive temporary permits from the Port Authority and some are still under its jurisdiction. Many local politicians (and academics) have summer homes on these islands, alongside the permanent homes of fishermen, whose families have lived on the islands for generations, and a few Roma people.

The very context of these islands is likely to generate dilemmas. Some of the homes are very modest, while others are more affluent. Yet, Farol also has some physical attributes of a spontaneous settlement that some scholars regard as ‘informal’.

Today, most people (but not the residents and owners) would probably agree that the islands should be returned to their original pristine state as open public domain. The interests of the islands’ residents are clashing head-on with highly consensual environmental norms. What kind of public policy is appropriate for these settlements that emerged as ‘informal’ decades ago, but currently exhibit multi-layered illegalities? Should the community be left in place, despite the environmental policies? Should there be a soft strategy of gradual and voluntary

\[\text{Figure 8.1} \quad \text{Summer homes on the ‘illegal half’ of Farol settlement in Ria Formosa, an environmentally highly protected area in southern Portugal. Are these informal? © Inês Calor.}\]
phasing-out? Who should bear the costs of replacement housing, if deemed appropriate? Should compensation be paid? Alternatively, is hard-line demolition justified? If so, should demolition be carried out at once or phased according to some priorities? Are there distinguishing criteria, such as long-time owners versus more recent buyers, or permanent residents versus owners of secondary homes?

The state authorities have been (somewhat reluctantly) attempting to enforce demolitions for several years. In practice, this policy has turned out to be partial, seemingly random and based on extraneous variables. The story is still evolving and is far from savoury.

The official criteria were concerned with the right to replacement housing. Fishermen and others who were able to prove this was their permanent residence were eligible for such rehousing – the question remains where and when? Some summer homes have already been demolished. However, residents with means (financial or political) have gained time by accessing the courts to obtain temporary injunctions against demolition. In 2015–2016 an organised group of better-off residents almost succeeded in getting a court order to stop demolition regardless of the priority status of the residents. How did they accomplish that? They recruited a competing public goal – also drawn from the realm of environmental protection. With the support of one of the municipalities, they argued that the demolitions would destroy the preferred habitat of a protected species – chameleons. This species’ habitat, so they argued,
happens to be the backyards of the built-up areas of these islands (see Figures 8.3 and 8.4).

The lower court was indeed convinced and issued injunctions against demolition. However, in April 2016, the Portuguese Supreme Administrative Court determined that the petitioners had no legal standing for species protection and reversed this decision. Meanwhile,
an electoral change in the national government further delayed the enforcement activities. The unexpected consequences of the appeals to the courts were socially unjust and disruptive. Under the canopy of the courts, the enforcement became, de facto, selective. The homes of some poor or less-well-connected households were demolished, leaving a scarred, non-contiguous built-up fabric. However, due to the court interventions, many houses (or homes) remained in place and continued to be used. Because court actions cost money, one can assume that some of the better-off or better-connected have been able to gain many years of vacationing or rental income from paradise.

The overarching dilemma is whether any of the types of noncompliance encapsulated in this story deserve to be regarded as justifiable, and if so, on what grounds? To the best of our knowledge, to date, the chameleons have not yet been consulted.

8.8 In search of criteria for ‘justifiable noncompliance’

Should any of the violations of planning or land laws encountered in our two stories be recognised as justifiable under the rule of law? If so, they could merit waiver of sanctions, changes in enforcement policies or revision of the regulatory planning rules that triggered the violation in the first place. In this section, we seek to identify situations where some aspects of planning regulations or some flaws in enforcement practices can serve as possible grounds for arguing that certain violations of planning laws are indeed justifiable and should serve as the basis for reform. We have identified six types of grounds.

Breach of human rights

The first justification for noncompliance with planning law is, of course, breach of a specific human right, such as the right to adequate housing (variously defined). The violation of the planning or construction regulation is carried out to provide a minimal level of housing that neither the government nor the market offers. In advanced-economy countries, such situations are less frequent than in the Global South. Thus, in the Global North, breach of human rights is likely to apply in unique cases only.

One such example is a case that has reached the highest legal echelons – specifically, the European Court of Human Rights. The case concerned ‘travellers’ (Roma people) in the UK who resided in their
caravans on their privately owned land, but without planning permission. The Court did recognise the Roma community members’ right to their special way of life and the legitimacy of their desire to set up a community caravan site. The Court additionally acknowledged that there were insufficient sites allocated to meet their housing needs in that particular district. However, the Court also addressed the local authority’s argument that it had to consider the negative externalities caused by the caravan site on the environment and the public costs of the necessary infrastructure. The majority (in a split court) ruled that the balance made by the local authority was not unreasonable and that, in this case, there was no breach of the ECHR.

We thus see that, even when breach of a human right is invoked, the courts may still weigh this right against other public interests. Still, an argument for justifiable noncompliance based on human rights is indeed the highest legal norm globally.

A second example – with a more successful decision – is a case heard by Israel’s High Court of Justice. It, too, concerned ‘travellers’ (Bedouin Arab–Israelis), some of whom still pursue a semi-nomadic tribal way of life in the Negev Desert. To get to school each day, the children of these families had to cross a creek, which was dry most of the year but dangerous to cross during winter flash-floods. The authorities commenced the application process for obtaining the necessary building permit to construct a footbridge, but the procedures took time. The petitioners argued immediate danger. The High Court ordered the Ministry of Infrastructure to construct a bridge immediately, without awaiting planning permission. In this unusual decision, the Court relied on its inherent authority to bypass the legislation when necessary, to ensure justice. (The same High Court, however, in other petitions, did not halt the demolition of illegally constructed makeshift homes and instead accepted the government’s position that the families had been offered alternative housing in community settings, which they refused.)

A third example is of noncompliance that is potentially justified under the right to housing. The informal settlement community of Cova da Moura in Portugal can be regarded as a Global South incision into the Global North (see Figures 8.5 and 8.6). Most of its 5,000 inhabitants are immigrants from Cape Verde, Angola and other Portuguese-speaking former African countries. The self-built settlement has grown over the past 40 years through squatting on a large, once-agricultural, vacant plot of private land (originally, remote from Lisbon). As can be seen in Figures 8.5 and 8.6, the neighbourhood, though entirely illegal, does receive public services today and looks liveable. Its location is now
Figure 8.5  Cova da Moura squatter settlement, Amadora, Portugal. Mostly inhabited by immigrants from Portugal’s African colonies. © Ines Calor.

Figure 8.6  Cova da Moura squatter settlement, Amadora, Portugal. © Ines Calor.
close to the Lisbon metro/transportation network, where property values are high. The owners argue that their development plan was denied back in the 1980s due to the administration’s inability to provide alternative housing for this community. The national and local authorities have not yet reached an agreement with the landowners about compensation, land exchange or expropriation.49

In view of the special social circumstances and governmental failure to provide alternative housing, there may be room to argue that this case constitutes justified noncompliance on the basis of the right to adequate housing. However, the fact that it sits in a Global North context means that the landowners’ rights must be handled through the regular rule of law, and the issue of how to find large resources for compensation or land exchange remains.

Crisis situations and legal voids due to major regime transitions

The second category of justifiable situations of noncompliance relates to crisis situations or major geopolitical disruptions of the rule of law. Crises include disasters, when emergency rules and behaviour set the law aside, and we do not address these situations here. Global North countries have experienced other types of crises that may affect compliance with planning laws. Geopolitical upheavals, for example, have caused large-scale migration with which the normal legal regime cannot cope.50

Major political–legal regime changes can leave a large legal void during the subsequent transition phase. However, such situations do not universally merit a sweeping classification of all violations as ‘justifiable’. We will give two examples.

First, we revisit Portugal, where two crisis-related processes overlapped. The Portugal of the 1960s – then one of the poorest countries in Western Europe – went through a deep economic transition. This entailed migration from rural to urban areas (but neither on the scale of, nor with the economic desperation of, rural-to-urban migrants in developing countries). Many developers subdivided land and sold plots unofficially. This practice, known as clandestine allotment (see Figure 8.7) has led migrants to build hundreds of thousands of homes (mostly on the outskirts of Lisbon) with no building permits, no environmental consideration, and no allocation of land for public infrastructure. The practice continued with renewed force after the end of the dictatorship in 1974, during a period of political and governmental democratic transition. There has never been an official count, but Cardoso estimates that between 1960 and 1969 about 100,000 houses were built illegally,
and that between 1970 and 1981 the number grew exponentially, to 300,000.\textsuperscript{51} Enforcement was obviously lax.

Although basic planning law had been on the books all this time, the transition period was characterised by weak governance.\textsuperscript{52} Breach of planning law was quite tempting, economically, and the owners of the buildings were of various socio-economic groups and housing levels. How should these infringements be regarded today? Tagging them ‘informal’ without distinction will not lead to good public policies. Instead, a rigorous application of criteria is needed, alongside an assessment of alternative modes of enforcement, sanctions or legalisation.

Another example, on a much larger scale, relates to the collapse of the Soviet Union and the entire East European bloc of regimes in 1989–1991, which created nothing less than a legal abyss. Pre-collapse, in top-down government actions, planning law was either non-existent or irrelevant. As the new planning laws that today exist in most of these countries were still being drafted or in their infancy, during this time most East European countries experienced a high number of violations of their embryonic planning laws.\textsuperscript{53}

In such crisis situations, the rule of law in planning is weak – laws and regulations may be vague or not yet familiar to the public. Enforcement of planning law, as a low-priority arm of government, is likely to be very fragile. Noncompliance might be based on genuine ignorance, on dire need, or – let us not forget – also on opportunities to make large profits.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure87.jpg}
\caption{Houses illegally built in ‘clandestine allotments’ – a prevalent phenomenon in Portugal in the 1960s–1980s. © Ines Calor.}
\end{figure}
Many of these cases are indeed candidates for classification as justifiable noncompliance. They may merit interim measures of incorporation into the legal regime, either through a special amnesty, through retrospective adjustment of plans and regulations or through an official, openly declared non-enforcement policy for a prescribed period. Unfortunately, all too often, cases where noncompliance may have been justifiable are left in legal limbo for many years. Such situations could be prey to selective enforcement by the authorities – a weapon in the service of neighbour disputes – or could inhibit smooth market transactions in housing or businesses. In the meantime, indecision and inaction in cases of justifiable noncompliance jeopardise the personal, social and property security that citizens deserve.

Intractable planning policies: Doomed to failure

Planning law empowers planning regulations, and regulations expect compliance from citizens and enforcement from the authorities. However, regulations – and indeed any public policy – may have intrinsic limitations. In their classic text on the implementation of policy, Mazmanian and Sabatier present a set of preconditions for successful implementation. A primary precondition is tractability: the degree of behavioural change sought by any regulation – especially a regulatory one – should be reasonably achievable. Here is an example translated into the planning regulatory context: where modern planning regulations, especially concerning residential areas, clash head-to-head with deeply rooted traditional modes of family or community living, large-scale noncompliance should be expected. If governments try to enforce the regulations with a tough hand, they will engender serious socio-political conflicts. When massive noncompliance persists for a long time despite government attempts to increase awareness through enforcement and education, this may be an indicator that the regulation is intractable and noncompliance is justified.

An example of intractability is the failure of Israeli planning law to regulate development in Arab–Israeli villages and small towns. Figure 8.8 depicts a typical development pattern for such towns. The land is privately and legally owned and passed within the family only through parental allocation or inheritance. Planners, trained to seek urban compactness, rationalise roads and services, and conserve agricultural land, gallantly insist on good, sustainable planning, and draft regulations to achieve that. However, the deeply entrenched forces of family tradition are more powerful. Each new household will usually build its
home wherever the family happens to own a plot of land, regardless of its location or the availability of infrastructure and public services. In the absence of a real land market, there is no premium for density with good access to infrastructure and services.\textsuperscript{55} Many elected local government officials naturally identify with their voters, despite the implications of sprawl for the local budget.

After 70 years of failed attempts to engender compliance, it would appear the Israeli government has not yet come to the realisation that the attempt to change land-related behavioural norms through modern planning regulations will not succeed. This policy is intractable. Thus, tens of thousands of homes and many businesses remain officially illegal, with thousands of demolition orders yet to be carried out. This gap is a source of constant conflict and tension between Israel’s Arab citizens and the national government, and has been appropriately tagged by Nurit Alfasi as ‘Doomed to Informality’.\textsuperscript{56} We argue that such situations where regulations are intrinsically intractable could be regarded as cases of justifiable noncompliance. One appropriate approach here would be retroactive full legalisation in most cases. Future planning policies should aspire to be as hands-off as possible.
When does regulation provide an essential underpinning for good planning policies, and when is it clearly overregulation that is not only unnecessary, but detrimental to the ostensible public purpose? If planning controls are excessive, there are likely to be negative impacts of many sorts, including an increase in noncompliance.

The line differentiating overregulation and good regulation is, of course, contextual. A prominent candidate for being regarded as overregulation in some contexts is design control of architectural style. We are not referring to historic preservation or major landmarks, but to regular homes or small shops. Design control might include the compulsory use of a certain colour on a building, restrictions on the style of roof permitted, limitations on decorative materials or compulsory design of shop signage. In some jurisdictions, design control is legally permitted. In other jurisdictions, it is not allowed because it is regarded as overregulation (and, in some jurisdictions, also as infringement on freedom of expression). Design control is susceptible to noncompliance, especially if the public architect’s taste does not resonate with local building traditions or is not welcome by the residents. If enforcement agencies do not regard such factors as a priority, and residents do not submit complaints against their neighbours, violations may run rampant.

Figures 8.9 and 8.10 show an example of overregulation of fences. The original style imposed by the statutory design specification was apparently not appealing to home owners and, over time, almost all replaced them with new designs (often using costly materials). Under the letter of the Israeli planning law at the time (revised since), all violations of planning law were deemed to be of identical severity, and any distinctions would be made in practice by enforcement priorities and the courts. Quite reasonably, the city’s small enforcement unit did not give high priority to such minor violations, which were never legalised formally. Even though this was (and still is) an upper–middle- or high-income neighbourhood, only a few neighbours ever complained about each other. Today, the non-enforcement policy remains, and so does the legally ambiguous situation. In our opinion, the neighbourhood looks much better than it would have with the uniformly designed fences.

The relevance of overregulation to our discussion here is that it is prone to misuse through the legal system. Leaving overregulation intact while not enforcing violations may be convenient for the enforcement administration and the courts. However, dormant enforcement powers are not a ‘sleeping beauty’. They might be harnessed for selective
enforcement in intergroup or interpersonal conflicts. Regulation without a clear public purpose is not likely to promote social justice in the city. It is planners’ duty not to remain complacent, and to review regulations on an ongoing basis, while learning from experiences of noncompliance. In the

Figure 8.9  An upper–middle-income neighbourhood, Netanya, Israel. One of the few fences in the original obligatory design still standing. © Rachelle Alterman.

Figure 8.10  Next door – an example of an individually replaced fence, without a permit and noncompliant with the obligatory design. © Rachelle Alterman.
context of this chapter, we argue that overregulation and concomitant nonenforcement may be one of the justifications for noncompliance.

Lethargic, negligent or unjust enforcement

As a low-priority and under-funded government function, enforcement agencies sometimes adopt a hands-off policy, not only in cases of acknowledged overregulation, but simply because they have been negligent in enforcement in the past. Now that noncompliance has become so widespread, enforcement would cause too much political or physical turmoil. What should governments do?

Many OECD member countries – notably Italy, Greece and Turkey – face violations of planning laws on a huge national scale. These violations amassed over decades and now cover major parts of the urban and rural population. They do not correlate with poverty or with the needs of specific cultural groups: they can be found in rich and poor neighbourhoods, in commercial areas, in resort areas and so on.

From time to time, governments attempt to bring such widely spread violations into the rule of law. Mass demolition is, of course, out of the question. A few countries have taken the extreme legal step of adopting an official planning amnesty. Amnesties may differ greatly from country to country in their legal and financial impacts. In Greece, a recent amnesty involved payment of high fees to the national coffers (reflecting Greece’s economic bankruptcy and the European policy of replenishing the national coffers). In some countries, such as Italy and Turkey, amnesties have been repeated several times – a phenomenon that does not bode well for the general rule of law.

Where enforcement has been negligent as a government function, the authorities should be accountable and individual noncompliance could be justified. This means that planning regulations should be amended to legalise the violations. If the noncompliance is physically reversible without demolition or major costs to individuals, planners should consider the use of incentives.

Noncompliance serves a public purpose, but planning fails to re-evaluate existing regulations

We now return to illegal accessory dwelling units, as in our hypothetical story. Such units can take on quite inventive physical forms. Figure 8.11 shows an illegal, well-hidden backyard staircase leading to an illegal accessory dwelling unit on the second floor. Figure 8.12 shows a garage
Figure 8.11  Illegal stairs in the backyard of a single-family (detached) home. Access to an illegally partitioned accessory housing unit, rented out. Location undisclosed. © Rachelle Alterman.

Figure 8.12  Garage illegally extended and converted into an accessory housing unit. Upper–middle-income neighbourhood in Netanya, Israel © Rachelle Alterman.
unabashedly turned into an accessory unit. The total number of such illegal units in Global North countries is estimated to be in the millions.\textsuperscript{50} They are found not only in single-family homes (that is, detached properties), but also in partitioned apartments. They are reported in the US, Canada, Australia and Israel,\textsuperscript{61} but are probably spread widely across the globe. Some such units are located in low-income neighbourhoods, such as in our hypothetical story, where they provide affordable housing plus additional rental income to the owners. But many accessory units are found in well-off neighbourhoods.

Accessory housing is an example of situations where illegal practices, in fact, serve to adjust static planning regulations to new public policy goals. When many of the suburban American or Canadian neighbourhoods were originally approved, the housing affordability issue was less acute. Furthermore, the households may initially have had, on average, more inhabitants, as there were fewer ‘empty nesters’ at that point in the life cycle of the neighbourhood. Today, accessory units are recognised as inherently more affordable than the main housing units in the same zone. They also contribute to urban densification, with much lower public investment in infrastructure and services than in new housing.

Another example is depicted in Figure 8.13. Garages are a notorious source of violations of planning law for a variety of ingenious purposes (not only accessory housing units). The picture shows a car parked on a

\textbf{Figure 8.13} Fake, inaccessible garage door. The underground space designated for a garage has been illegally merged with the main house. Location undisclosed. © Rachelle Alterman.
driveway that should lead to an underground garage, but the flattened driveway leads nowhere. The extra floor space has been annexed to the main house. According to the planning regulations in that jurisdiction, the use of an underground garage area for any other purpose is clearly illegal. Any extra floor area in this upper-middle-income area is quite lucrative. This violation is easy to spot from the local road, but has not been stopped. Could it be that addressing such violations is assigned a low priority because the underground garage regulations no longer make sense? Planning policy today seeks to minimise the number of parking places per household, to reduce reliance on private car ownership and encourage greater use of public transport.

In both the accessory-housing and the garage-annexation scenarios, the violation actually resonates quite well with broader planning policies today. Perhaps this recognition – whether explicitly articulated or unspoken – partially explains why the enforcement agencies prefer to turn a blind eye to the increase in accessory units or to the elimination of a built-in parking space.

Are these types of noncompliance justifiable? Probably not, because grabbing by stealth contradicts the pillars of the rule of law – transparency and equality. But this type of violation does point to the serious discrepancies between frozen planning regulations and dynamic urban needs. An enforcement policy of turning a blind eye is not a valid policy. Responsibility should sit back with the planners and decision-makers whose duty should have been to proactively review current planning regulations and deregulate where merited. In the contexts described here, noncompliance should have been foreseen and either strongly sanctioned to overcome human temptation, or the regulation should have been officially relaxed.

8.9 Collating the criteria for justifiable noncompliance in the Global North context

While well-reasoned criteria are a necessary condition for enabling justifiable noncompliance to coexist with the rule of law, this condition alone is not sufficient. Broader changes in the conceptual and institutional interrelationship between planning, planning law and enforcement policies are needed. In this section, we propose criteria for justifiability of noncompliance and share some thoughts about broader legal and institutional reforms.
Our criteria for distinguishing between unjustified violations and justifiable noncompliance have been distilled from our hypothetical case, the real-life story of the Farol settlement, and our wider research experience. The proposed criteria are tentative and need further theoretical grounding and research.

If justifiable noncompliance is defined too broadly, parts of the foundations of planning law will erode away. Planning laws have many faults – but we need them more than ever to meet today’s challenges of urbanisation, sustainability and social justice. On the other hand, if the criteria are too narrow, they will not enable further progress towards more socially responsive and just planning and enforcement. Part of enhancing social justice entails paying much more attention to the phenomena surrounding noncompliance with planning regulations.

We propose six criteria; to be regarded as justifiable noncompliance in the Global North context, violations of planning laws should fulfil at least one. The legal or policy arguments may be stronger if two or more criteria are at play. The criteria are:

a) **Basic human needs or rights are unmet under the planning regulations.**
Enforcing compliance with planning law will not enable disadvantaged or socially constrained households to have minimally adequate housing or livelihoods in the area relevant for their socio-cultural needs. At the same time, the violations do not entail serious negative externalities that cannot be reasonably contained without jeopardising the equivalent rights of other groups. A reasonable and socio-culturally sensitive policy balance would indicate that noncompliance is justified.

b) **Crisis situations or extreme regime transitions create a legal void.**
Since the 1990s, many countries that are today members of the OECD have undergone a major crisis or extreme regime change that has left a void in planning law. In the interim, even though there may have been laws on the books or in the making, there were significant ambiguities in the law or its enforcement. These situations call for concerted thinking about interim policies that will avoid tagging major populations as legal offenders and a large number of structures as illegal.

c) **The planning law or regulations are predicated on intractable objectives.**
Sometimes, planners or governments imagine that planning regulations can achieve deeper changes in behaviour than is realistically feasible. Regulations may be intractable when they clash with deeply entrenched
social structures or economic capacity, leading to extensive noncompliance. If planning laws and regulations clearly do not serve the society in question, and no trade-offs are perceived by citizens, noncompliance could be justifiable unless it compromises the interests or values of other groups or the general public good.

d) **There is overregulation or random regulation without a clear public purpose.**

Violations of minor regulations that have no perceivable purpose can be viewed as justifiable if they have no major externalities and are not at the expense of others. One indicator is that the enforcement agencies themselves regard these violations as low-priority and do not spend resources on enforcement.

e) **Enforcement is negligent or clearly unjust.**

The enforcement agencies do not monitor the violations, and these become too rampant to be feasibly enforced. Alternatively, enforcement is selective and unjust. This could arise from intentional discrimination, but could also be an unintended outcome of lethargic, negligent monitoring and enforcement.

f) **Noncompliance serves a new public purpose, but planning fails to re-evaluate existing regulations.**

Planning regulations sometimes create undesirable path dependency. Existing regulation may constrain the capacity to serve new public needs, whereas the noncompliant initiatives do serve them. If the enforcement agencies knowingly close their eyes to large-scale violations of planning regulations, this could signal that the noncompliant actions are justifiable. This type of situation indicates negligence or failure by planning authorities to re-evaluate the existing regulations and find ways to accommodate the new public purpose.

Would any of these criteria be sufficient to justify the violations in either our hypothetical or the real-life stories? The application of the criteria will rarely be easy, because each would depend on specific factors, and would encounter different constellations of competing considerations. In each jurisdiction, there are likely to be relevant prior court decisions that will construct the span of justifications. We leave it to readers to try to simulate the situation and the dilemmas they may encounter in their neighbourhood.

The criteria are all intended to apply to noncompliance after the fact. It would be much better, of course, if planning could anticipate
noncompliance and be proactive in advance. But planners today are barely cognisant of the implications of the regulations they draft with good intentions, which have the potential to turn some individuals into offenders and render them subject to onerous sanctions. This chapter is therefore intended to provoke deeper thinking in planning theory and planning law about their interrelationships.

8.10 A new instrument: Noncompliance impact assessment

The fact that noncompliance with planning law and regulations may sometimes be justified means that planners and lawyers alike should take a hard look at the patterns and degrees of noncompliance. These hold information that should be highly valued and serve as feedback for reviewing both planning and the law. Such rethinking should include the potential for deeper conceptual and institutional changes to minimise the need to justify noncompliance. Indeed, noncompliance is the untapped goldmine of feedback for assessing the adequacy of planning regulations. Such evaluation should include deeper conceptual and institutional changes to minimise the need to justify noncompliance after the fact. Special attention should be paid to the linchpin that should have connected all of these functions: enforcement. As we have seen throughout this chapter, this linchpin is weak, and requires an in-depth review of its functions as part of planning regulation.

We would like to see awareness of noncompliance incorporated not only for ex-post evaluation, but also deep within forward planning. For this, we propose a new instrument: noncompliance impact assessment. This instrument calls on planners engaged in forward planning to prepare scenarios of different degrees and types of violations anticipated by alternative planning regulations. These scenarios should serve during the regular planning process as part of the evaluation of alternatives. After approval of the planning policies and regulations, these scenarios should fortify the connection between the enforcement unit and the planning unit and should feed into proactive revisions of plans and regulations on an ongoing basis.

8.11 Conclusions

In the Global North, the land and planning-law systems usually work reasonably well (no legal system is without its flaws). Therefore, while
the term ‘informality’ may be useful for describing human behaviour and initiatives when legal norms are dysfunctional or remote, this term is unhelpful in the context of a reasonably well-functioning legal system, including planning law and regulations. Planning law is here to stay. In this chapter, we have argued that, in the Global North context, the use of the loose concept of ‘informality’ should be replaced by the narrower term ‘justifiable noncompliance’.

To help us identify situations where noncompliance may be potentially justifiable within the rule of law, we have attempted to simulate reality through an unfolding hypothetical case story, a complex real-life story and many simpler examples drawn from our past research. From these elements we have distilled an initial set of criteria for determining when noncompliance with planning regulations might be recognised as compatible with the rule of law. In some situations, noncompliance should even lead to better planning policies.

Beyond justifying noncompliance, planning theory and law should devote more thinking to how to minimise planning-law violations, through more responsive planning and closer linkages with the enforcement function. We lament the sharp disconnection between planning theory and planning law, as if they resided in parallel worlds and each needed the other to function well but were separated, both institutionally and conceptually. We hope this chapter has contributed somewhat towards bringing the two worlds closer together.

Notes

4. In this chapter, we use the terms ‘planning regulations’, ‘regulatory planning’ and ‘development control’ interchangeably.


25. See an example from one of London’s boroughs: https://www.croydon.gov.uk/planningandregeneration/building-control/unauthorised (last accessed 30 July 2019).


39. Currently, under UN reorganisation in 2019, the future of that unit’s role is uncertain.


