



The Right to Public Space

Gregory Smithsimon

Many of the commonly defended human rights (freedom of expression, of assembly, of information, of movement, etc.) depend on the availability of physical public space. Their absence, especially in the suburbs, routinely hinders the rights of citizens. For this reason, Gregory Smithsimon argues for a formal right to public space.

At the center of virtually every major protest movement in recent years has been a central public space. Anti-Mubarak protesters filled Tahrir Square in Egypt, just as anti-government protesters in Ukraine filled Independence Square. *Indignados* took over Madrid's Puerta del Sol a few months before Occupy Wall Street took over Liberty Plaza in New York City, and each protest spread to new plazas in new cities. The importance of public spaces for social movements is not a recent phenomenon, as the 1989 protests associated with Beijing's Tiananmen Square or the Argentinean group Mothers of the Plaza de Mayo both demonstrate.

While each of these movements grew to significance in a central, symbolic public space, increasing numbers of people around the world have little access to such public spaces, using privately owned spaces for activities that once took place in public. From Calgary to Johannesburg, people shop in privately owned malls rather than market streets. From the suburbs of Shanghai to Las Vegas, they live in suburban developments that lack sidewalks or parks. And from New York to Santiago, they gather and eat lunch in plazas that are privately owned annexes to office buildings rather than public squares. Particularly in suburbs, there may be no public space. Elsewhere on the neoliberal landscape, spaces that filled the traditional functions of the public square have been privatized, encouraging owners and the state to claim that people no longer have free-speech rights there.

Public space is fundamental to the exercise of US civil liberties and internationally recognized human rights

The rights in the United Nations' Universal Declaration of Human Rights¹ depend, practically, on having public spaces in which to exercise them, including the right to work (whether traveling to work, setting up shop on the sidewalk, lining up as a day laborer, or advertising one's services), the right to form and join trade unions, freedom of conscience and religion (whether men praying on the sidewalk outside an overflowing mosque, the faithful street preaching and evangelizing, or observers publicly displaying their affiliation through what they wear) and the right to rest and leisure.

Today, international organizations explicitly recognize this dependence of basic rights on public space. Thus UN Women (United Nations Entity for Gender Equality and the Empowerment of

¹ See: www.un.org/en/documents/udhr.

Women) advocates improving women's safety by "creating safe public spaces."² UNESCO promotes the social integration of migrants with "inclusion through access to public space."³ The UN Human Settlements Programme drafted a resolution on "sustainable urban development through access to quality urban public spaces."⁴ In each case, these UN entities see public space as necessary for achieving core aspects of their human-rights development agenda.

Other efforts go farther towards public space as a right in itself, and not just a means to other rights. In the World Charter on the Right to the City,⁵ UNESCO and UN Habitat lay out the *right to the city*, which to a significant degree coincides with the right to public space. Article 1 includes the right to organize, gather, and manifest one's opinion, as well as the right to establish and affiliate unions, the right to information, political participation, and peaceful coexistence. Article 1 also includes respect for minorities.

The Threat to Public Space: Rights Against Privatization

Because some of our most fundamental rights are necessarily embedded in public space, when governments seek to curtail our rights in public space there is often quick, strong, popular opposition. Thus people around the world denounced the Ukrainian government's efforts to curtail protest in January 2014. Government efforts to exert greater control over behavior in public space in the UK around the same time were met with international opposition. Russian efforts to censor speech and expression (either by rock bands or gays and lesbians) were criticized around the world. But when private entities exert similar control by privatizing public space, the response is far less dependable. In part, the privatization of public space benefits from a semantic sleight of hand: if the functions of a public square are subsumed in a privately owned space, then mustn't the space no longer be public, and the activity no longer protected? This is a mistake that observers and jurists have made many times. For instance, in *Pruneyard v. Robins* (1980), a landmark US Supreme Court case, the justices ruled that the US Constitution does not give people the right to hand out anti-war literature in a mall because they could still do so on the publicly owned "Main Street."

The problem is that, in many places, no true publicly owned alternative exists. In most of the United States the commercial Main Street is long gone. The local privately owned mall has taken on the commercial and social roles of Main Street, and many people can go through their day, driving from place to place, without ever spending time in space that meets the Supreme Court's standard of a "public forum." Free-speech rights must be recognized even in privately owned public spaces if they are not to perish.

If governments and private companies have denied disenfranchised people the right to occupy space, public space is also susceptible to fears and panics, so that the middle class sometimes eliminates their own public spaces to protect themselves from the disenfranchised. Suburbs without public spaces, or global elites who live in guarded, walled, privatized privilege surrender their public spaces to exclude anyone less fortunate.

Implications of a Right to Public Space

While the right to public space has not been formally recognized, it can already be identified as a "penumbra," an implied right, such as the right to privacy, that is not specifically articulated, but implicit and necessary in the exercise of other rights. Just as the Supreme Court found that other

² See: www.unwomen.org/en/what-we-do/ending-violence-against-women/creating-safe-public-spaces.

³ See: www.unesco.org/new/en/social-and-human-sciences/themes/urban-development/migrants-inclusion-in-cities/good-practices/inclusion-through-access-to-public-space.

⁴ See: www.unhabitat.org/downloads/docs/9771_1_593694.pdf.

⁵ Available online at the following address: http://portal.unesco.org/shs/en/files/8218/112653091412005_-_World_Charter_Right_to_City_May_051.doc/2005+-+World+Charter+Right+to+City+May+051.doc.

amendments demonstrate a right to privacy, existing rights create a penumbra that provides the right to public space. Thus US courts have recognized that when there is no public space in which to practice basic rights, private space must be made available. When agricultural workers live on the same property on which they work, union organizers have the right to come on to privately owned farms to discuss unionization, because otherwise the workers and the organizers would have no meaningful right to free association (Greenhouse 1992). But in our suburbanized, auto-centric nation of privately owned shopping malls, citizens do not enjoy free-speech rights in places like malls, even if there is no available publicly owned space to gather in.

In an era in which privatizing government functions has been popular—in which, for instance, governments have sold or leased ownership or control of public utilities, public services, public stadiums, even public park management to private companies and private nonprofit entities, often “private” space is merely public space a government has sold to the highest bidder. In such cases, the public’s rights should not disappear simply because a government prefers for a space to be managed by a private company rather than civil servants. In other situations, financially strapped governments have found ways to create public goods with incentives to private actors. Thus most US cities, and many outside the US, have “bonus plaza” programs, in which private developers are allowed to build larger, taller, more profitable buildings in exchange for providing public-space plazas at street level (Whyte 1988). In New York, that deal requires owners to keep the plazas open for everyone to use—although most of those plazas were empty or woefully underused until Occupy Wall Street discovered the possibilities of such bonus plazas, and inspired a flurry of Occupy events that made use of privately owned public spaces. (Intriguingly, since the spaces had rarely been used, there were few rules governing them, a situation that ended up working in favor of the occupiers (Smithsimon 2012).) Private owners often receive considerable financial benefits in exchange for providing a publicly accessible space; the *quid pro quo* nature of the exchange between the public and the private owner justifies the public’s expectation that the space should truly be public.

This is why, beyond protecting speech in malls and quasi-public plazas, we should protect public space itself. Zoning regulations should reasonably require that every community have meaningful public space—a space central enough so that people actually gather, engage in commerce, work, travel, socialize, and speak out. A government that claims to guarantee rights to speech, expression, assembly, and association but provides no space in which to do so makes a hollow promise to its citizens.

Since access to privately owned public spaces (like malls) must be provided if a community has no public space, private property owners ought not to oppose the construction of parks, public squares, and publicly owned Main Streets. These public spaces would free them of the obligation to allow free speech and assembly activities on their property.

A Positive Right to Public Space

The right to public space is a type that is unknown in the US, a positive right. The US Bill of Rights is limited to negative rights, restrictions on government actions: government cannot censor, establish religion, search without a warrant, invade privacy, imprison without charge. But there are no affirmative rights—things that the citizens have a right to and which the government must provide. However, all 16 countries that rank higher than the US in education have a right to education, but in the US that right appears only in some state constitutions. (Compare that with, say, Bolivia: “Every person has the right to receive an education at all levels.” Many countries even grant the right to a free higher education.) Dozens of countries provide a right to health care (Croatia: “Everyone shall be guaranteed the right to health care.” Even Iraq: “Every citizen has the right to health care. The state shall maintain public health and provide the means of prevention and

treatment by building different types of hospitals and health institutions.”⁶). Over 150 countries already recognize some form of a right to movement; some formulations capture part of the right to the city and the right to access public space. Even when it remains implicit, the right to the city seems already undeniable given existing rights.

Before the right to public space might be adopted as the 28th Amendment to the US Constitution, it could fit naturally into international frameworks that already consider the right to the city, and could be invaluable to countries that are sprouting US-style suburbs.

Rights Beyond the State

The importance of public space and the range of ways that privatization—often promoted as a more economical or more efficient than publicly owned public spaces—limits our rights are too often overlooked. There is clearly a place for private interests in the public sphere. But private interests also infringe on people’s ability to use public space. Recognizing our right to public space can be a counterforce to privatization and allow us to protect human rights in fuller, more meaningful way.

Bibliography

Constitute, the website of the Comparative Constitutions Project (CCP) (<http://comparativeconstitutionsproject.org>). Consulted 10 March 2015, URL: www.constituteproject.org.

Greenhouse, Linda. 1992. “Supreme Court Roundup; Limits Placed on Union Organizers on Employers’ Property”, *New York Times*, 28 January. Available online at the following URL: www.nytimes.com/1992/01/28/us/supreme-court-roundup-limits-placed-on-union-organizers-on-employers-property.html.

Smithsimon, Gregory. 2012. “A Stiff Clarifying Test Is in Order: Occupy and Negotiating Rights in Public Space”, in Shiffman, Ronald, Bell, Rick, Brown, Lance Jay and Elizabeth, Lynne (eds.), *Beyond Zuccotti Park: Freedom of Assembly and the Occupation of Public Space*, New York: New Village Press.

Whyte, William H. 1988. *City: Rediscovering the Center*, New York: Doubleday.

Gregory Smithsimon is associate professor of sociology at Brooklyn College, City University of New York. He is the author of *September 12: Community and Neighborhood Recovery at Ground Zero* (New York: New York University Press, 2011), about the role of public space in redevelopment conflicts in Lower Manhattan after September 11, 2001. He is also the author, with Benjamin Shepard, of *The Beach Beneath the Streets: Contesting New York City’s Public Spaces* (New York: State University of New York Press, 2011), on protest movements and New York’s privately owned public spaces. He is currently completing *Liberty Road: African-American Middle-Class Suburbs Between Civil Rights and Neoliberalism*, a study of how suburban space reframes political conflicts for middle-class African Americans.

To quote this article:

Gregory Smithsimon, “The Right to Public Space”, *Metropolitiques*, 10 March 2015. URL: <http://www.metropolitiques.eu/The-Right-to-Public-Space.html>.

⁶ My thanks to the invaluable Constitute Project (www.constituteproject.org), which allows searching by topic to see how constitutions around the world protect a given right.