Law & the New Urban Agenda: a role for the right to the city?

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Introduction:

In 2015, the United Nations estimated that 54% of the world's population resided in urban areas. By 2050, the U.N. estimates that 2.5 billion people will be added to the world's urban population, bringing the proportion of urban dwellers to 66% of the world's population.[1]

In the context of this urbanization, inequality manifests in a spatial setting. Cities such as Johannesburg, Mumbai, and Rio de Janeiro exemplify this inequality: informal settlements and slums sit side-by-side with gated communities and luxury apartment blocks, and modes of exclusion are perpetuated by a range of actors in the public and private sectors.[2]

Member states of the United Nations finalized a process in October 2016 to recognize this status quo. Human development is beginning to be viewed and understood through a distinctly spatial lens. Previous member state resolutions have largely abstracted themselves from the urban policy sphere,[3] and the Habitat II declaration, agreed upon by member states in Istanbul in 1996, focused principally on a "Habitat Agenda," rather than an "urban agenda."[4]

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[1] U.N., Dep't of Econ. and Soc. Affairs, Population Div., World Urbanization Prospects: The 2014 Revision, Highlights, ST/ESA/Ser.A/352 at 2 (2014).

[2] These modes of exclusion are diffuse, ranging from state policies such as those which forbid informal trade, to gating practices by residents seeking to deal with perceptions of safety in their own community. Although these challenges exist beyond the city, this Article focuses on how these issues manifest spatially given projected rates of urbanization.

[3] *See, e.g.*, G.A. Res. 41/128, The Declaration on the Right to Development (Dec. 4, 1986), which positions the right to development as the entitlement to participate in, contribute to, and enjoy economic, social, cultural, and political development, but does not situate the right within any kind of spatial sphere, let alone within an urban paradigm.

[4] The Habitat Agenda was a central theme of the Istanbul Declaration on Human Settlements (1996), arising out of Habitat II. The focus of the Habitat Agenda was firstly on the importance of shelter, and in this respect was noteworthy for "reaffirming the commitment to the full and progressive realization of the right to adequate housing." *See Id.* ¶ 8. Secondly, it focused on the quality of human settlements which while including many provisions that are similar to that of the New Urban Agenda (see, for example *id.* ¶

Habitat III presented an opportunity in this regard. Habitat III was a conference of member states as convened in October 2016 by the United Nations Conference on Housing and Sustainable Urban Development, otherwise known as U.N. Habitat. Habitat III was the culmination of an extensive preparatory process, which included:

- Three preparatory conferences of member states;
- 22 issue papers on various themes (including Safer Cities, Urban-Rural Linkages, and Smart Cities);
- Four regional meetings (Asia-Pacific, Africa, Europe, and Latin America and the Caribbean);
- Seven thematic meetings (including Intermediate Cities, Public Spaces, and Informal Settlements);
- Ten policy units (including Municipal Finance and Local Fiscal Systems, Urban Services and Technology, and Housing Policies); and
- Engagement with civil society through events such as "Urban Breakfasts," "Urban Walks," "e-discussions," and "Urban Dialogues.[5]"

Habitat III focused attention on the urban environment inhabited by an increasing majority of the world's population, and sought to formulate a common approach to how cities, through a range of tools, can address the challenges and harness the opportunities presented by urbanization.

A key aspect of the Habitat III process was the notion of the right to the city, a "new paradigm that provides an alternative framework to re-think cities and urbanization.[6]"

40(n); ¶ 43(h); ¶ 123(a)) nevertheless focuses on the nature of inhabitants' *dwelling* in the city, rather than how inhabitants are impacted by and influence the *urban process*.

[5] *See generally*, U.N. Conference on Hous. and Sustainable Urban Dev., The Roadmap, https://habitat3.org/the-new-urban-agenda/roadmap. U.N. Habitat is a program of the United Nations mandated with promoting socially and environmentally sustainable towns and cities, and is the focal point for all urbanization and human settlement matters within the U.N. *See* U.N. Habitat, History, Mandate & Role in the UN System http://unhabitat.org/about-us/history-mandate-role-in-the-un-system/.

[6] U.N. Conference on Hous. and Sustainable Urban Dev. (Habitat) III, 1 – Right to the City and Cities for All at 3 (Feb. 29, 2016).

The "Right to the City and Cities for All" was the first of ten policy units set up as part of the preparatory process for Habitat III; both notions were viewed and treated by some member states as instrumental tools in enabling broader aims for cities characterized by inclusivity, equality, and diversity. In the policy document on the Right to the City and Cities for All, intended to guide member states in the inclusion of these concepts in the New Urban Agenda, the drafters of the document focused predominantly on the "Right to the City" which benefitted from a far stronger theoretical foundation than "Cities for All", as well as a history of civil society activism.[7]

The right to the city in the policy document was anchored in three pillars: "Spatially Just Resource Distribution,[8]" "Political Agency,[9]" and "Socio, Economic and Cultural Diversity.[10]" The policy document critiqued the current urban development model as failing "to address the problems of urban poverty and social exclusion that are endemic in many cities today,[11]" and argued that the right to the city was critical to the New Urban Agenda as a way of enhancing and extending "human rights perspectives in their application to cities and human settlements.[12]" In this way, the policy document posited that the right to the city embodied "a shift in the predominant urban pattern in order to

[7] The policy unit consisted of twenty experts (including the author) appointed on the advice of United Nations bodies. They were considered as experts based on their knowledge, policy experience, and/or civil society activism in the right to the city and, to a lesser extent, the notion of "Cities for All." They were sourced from a variety of fields, including academia, government, civil society, and other regional and international bodies, and the appointment process was intended to represent the United Nations system with due regard to regional and gender balances. The experts were obliged to participate in their personal capacities. *See generally*, U.N. Habitat, Papers and Policy Units, https://unhabitat.org/issue-papers-and-policy-units/.

[8] *See supra* note 6, at 6 for the full definition. "Spatially Just Resource Distribution" concerned those resources which are essential to inhabitants' lives in the city. They ranged from accessible and affordable transportation options, to public space and the urban commons.

[9] *See id.* for the full definition. "Political Agency" recognizes that all inhabitants in the city are social and political actors in the (re)making and shaping of their living environments. This process lessens the relatively high control by capital and state elites over decisions regarding the organization and management of the city and its spaces.

[10] *See id*. at 7 for the full definition: Socio, Economic and Cultural Diversity recognizes the contribution of difference and diversity in making and shaping the city, and the need for interventions that foster and value these aspects.

[11] *Id.* at 3.

[12] *Id*.

minimize socio-spatial injustices[13], [and] enhance equity, socio-spatial inclusion, political participation and [provide] a decent life for all inhabitants.[14]"

This Article is structured broadly in three parts. The first part provides an introduction to the right to the city, a concept that is foreign to law principally because it is not a legal right. Rather, the right to the city acts as a political banner under which various claims to the city are made. This part of the Article delves briefly into right to the city theory, and provides three examples which demonstrate what claims to the city may look like.

The second part of the Article asks whether member states should have valorized the right to the city when drafting the New Urban Agenda.[15] This part looks at how the right to the city is recognized in the New Urban Agenda. While in name, the right has received little attention, member states have nevertheless affirmed the right through their commitments. The inclusion of the right to the city in the deliberations of the New Urban Agenda is, however, contentious from a theoretical point of view. This is because its adoption by member states usurps the right to the city's inherently radical scope to enact socio-spatial change. This Article unpacks this controversy, but concludes for a variety of reasons that member states *should* valorize the right to the city.

The third part of the Article argues that there is a role for the law for two reasons. First, from a legislative point of view, the Article looks at the City Statute in Brazil to argue that legislation can play a role in redressing spatial injustices which bring the right to the city to the fore in the first place. Second, from a judicial point of view, the Article examines jurisprudence in South Africa to argue that a spatial reading of legal rights can

[13] The term "spatial injustices" is referred to frequently throughout the article. It derives in part from EDWARD W. SOJA, SEEKING SPATIAL JUSTICE (2010) and DAVID HARVEY, SOCIAL JUSTICE AND THE CITY (1973). It recognizes that social injustices have a distinctly spatial element, and should be read as such in order to understand its rationale and its consequences.
[14] U.N. Habitat, *supra* note 6.
[15] This article takes a broad approach to the notion of valorization. It is used frequently throughout the piece and describes the attempts by some member states, as well as U.N. bodies, to promote the right to the city. It is not intended to convey that all member states supported the right to the city, but rather that the right to the city was on the agenda for discussion at the outset of the Habitat III process.

act both as a way of facilitating and upholding claims to the right to the city, even while also limiting claims to the right to the city.

The Article concludes that the commitments made by member states in the New Urban Agenda are tools to redress spatial injustices, and should not be undervalued.

I. What is the right to the city?

French sociologist Henri Lefebvre coined the term the "right to the city" in 1968, describing it as a cry and a demand for a transformed and renewed right to life.[16] Lefebvre envisioned a "bottom-up" approach to the making and shaping of the city and its spaces, in which "[o]nly groups, social classes and class fractions capable of revolutionary initiative can take over and realize to fruition solutions to urban problems.[17]" This solution encompasses a "reconstruction of centrality[18]" of the urban working class, whose appropriation, participation in, and habitation within the city Lefebvre argues has been "destroyed by a strategy of segregation and… the menacing form of centres of decision-making.[19]"

Lefebvre argued in favour of socialist space, in contra-distinction to space produced by processes of capitalism. Lefebvre here talks about space in the abstract, but his argument for socialist space can be transposed to an understanding of the urban environment more generally. "The production of socialist space means the end of the private property and the state's political domination of space, which implies the passage from domination to appropriation and the primacy of use over exchange… a space of differences.[20]" By contract, Lefebvre describes capitalist space as that "where all the elements are exchangeable and thus interchangeable; a police state in which the state tolerates no

[16] HENRI LEFEBVRE, WRITINGS ON CITIES 158 (Eleonore Kofman & Elizabeth Lebas trans., 1996).
[17] *Id.* at 154.
[18] *Id*.
[19] *Id*.
[20] Henri Lefebvre, *Space: Social Product and Use Value*, in STATE, SPACE, WORLD: SELECTED ESSAYS: HENRI LEFEBVRE 192 (JW Freiberg trans.) (Neil Brenner & Stuart Elden eds., 2009).

resistance and no obstacles. Economic space and political space thus converge towards the elimination of all differences.[21]"

David Harvey, a Marxist Geographer at CUNY has made the right to the city more accessible in a contemporary context. In *Rebel Cities*, Harvey demonstrates how cities have become central sites of revolutionary politics locked in a struggle over who controls access to urban resources and who dictates the quality and organization of daily life[22]: "Is it the financiers and developers, or the people?[23]" Harvey looks at Occupy Wall Street's occupation of public space, and challenges the notion of who controls public space:

> In response to the Occupy Wall Street movement, the state, backed by capitalist class power, makes an astonishing claim: that they and only they have the exclusive right to regulate and dispose of public space… They claim they are taking action in the public interest (and cite laws to prove it), but it is we who are the public! Where is "our interest" in all of this?[24]

For Harvey, cities are the sites in which capital surplus is invested, and re-invested to create more surplus. This benefits only those few who control the modes of capital production, and very little is subsequently distributed for the broader public good.[25] This "general dynamic of capitalist accumulation… generates chronic overproduction, surplus real productive capacity, and idle money,[26]" which has tangible impacts for the urban and built environment in the way they act as "a vent of surplus capital.[27]" Writing in 1985, Harvey points to examples of this surplus in the form of the fall of the secondary banks associated with the London property market in 1973, as well as the overproduction of office space in Manhattan, or housing in Detroit.[28] The situation is no different today

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[21] *Id*.
[22] DAVID HARVEY, REBEL CITIES (2012).
[23] *Id*.
[24] *Id.* at 163.
[25] David Harvey, *The Right to the City* 53 New Left Review (2008).
[26] DAVID HARVEY, THE URBANIZATION OF CAPITAL 170 (1985).
[27] *Id.* at 172.
[28] *Id*.

with speculative property markets in cities across the world reducing the availability of well-located and affordable housing stock.

Harvey argues that the state itself is complicit in this manifestation of class inequality, including through the use of institutions such as the law that facilitate and encourage market fundamentalism. The state's essential role is to defend the status quo, an ideology of social harmonization through a veil of balanced growth.

Lawyer and urban planner Peter Marcuse describes the right to the city as "a stronger movement for urban justice … a new kind of urban politics that asserts that everyone, particularly the disenfranchised, not only has a right to the city, but as inhabitants, has a right to shape it, design it, and operationalize it as an urban human rights agenda [sic].[29]"

Geographer and planner Alison Brown argues that the right to the city, from a theoretical point of view, "challenges the role of urban property and capitalism… and lays claim to a completely different vision of city and society, variously termed 'democratic' or 'just,' implying a fundamental rethink of free market economics… [t]he collective right to the city may embrace individual rights… but is not defined by these, and goes further to redefine the relationship between state and citizen.[30]"

The right to the city is used predominantly by marginalized groups to upend the structural inequality inherent in the "fairly rigid series of nested scales that constrain their participation.[31]" These scales are difficult to clearly delineate because of the way marginalization takes place at different levels and actors. The most obvious example may be the actions of a city authority refusing to legalize the presence of street vendors because of the perception held that they contribute to disorder and crime. Less obvious

[29] Peter Marcuse. *Blog #15 – The Right to the City and Occupy: History and Evolution,* PETER MARCUSE'S BLOG (Aug. 2, 2012) (https://pmarcuse.wordpress.com/2012/08/02/blog-15-the-right-to-the-city-and-occupy-history-and-evolution/). *See also* Peter Marcuse, *From Critical Urban Theory to the Right to the City,* 13 CITY 185 (2009).
[30] Alison Brown, *The Right to the City: Road to Rio 2010*, 37 Int'l J. of Urban and Regional Res. 957, 959-60 (2013)
[31] Mark Purcell, Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant, 58 GEOJOURNAL 99, 104 (2004).

examples, however, could include the actions of a low-income community invoking tactics that in different ways seek to privatize public space in the community.[32] These scales are nested because of the pervasive manner in which they entrench a status quo, resistant to change.

An exercise in the right to the city can act as a powerful antidote in reimagining and disrupting these nested scales, agitating change in communities, processes, governance, and spatial imaginaries. This change may however only be incremental in nature, and so the right to the city should rather be seen as an *oeuvre*, "closer to a work of art than to a simple material product.[33]" In this view, the city is made through the production and reproduction of its spaces and its processes by its inhabitants as they stake competing claims to the city.[34] This Article argues that the state plays an important role in claims to the right to the city, principally as a conduit through which these claims gain traction, but also in terms of enacting policies that aim to redress many of the spatial injustices which give rise to the right to the city in the first place.

Some examples of claims demonstrate how the right to the city is asserted by various actors:

- In 2011, the Asociasión de Recicladores de Bogotá (ARB) took the City of Bogotá to court after the City "announced a $1.7 billion (US) public bidding system that would take the role of recycling away from waste pickers who had been doing it for more than 60 years, handing it instead to private companies

[32] *See* Claire Bénit-Gbaffou, *Police-Community Partnerships and Responses to Crime: Lessons from Yeoville and Observatory, Johannesburg*, 17 URBAN FORUM 301, 310-12 (2006). Bénit-Gbaffou conducted research in Yeoville, a low-income suburb of Johannesburg where residents sought to privatize space as a result of a perceived failure on the part of the police to safeguard their community. Although this may very well be an exercise in building a community partnership, as Bénit-Gbaffou notes, it can "also lead to forms of exclusion and uncontrolled violence, such as mob justice, violence against foreigners and vigilantism." *Id.* at 306.
[33] Lefebvre, *supra* note 16, at 101.
[34] *Id.*

[sic].[35]" The ARB was successful in halting the bidding process, leading in 2013 to the Mayor's Office in Bogotá launching a system to pay recyclers for materials collected and transported.

- In November 2015, Make the Road New York established the Flushing Meadows Corona Park Alliance to "ensure the community's voice in future decisions about the park[36]" – a "valuable green space for many thousands of working families.[37]" The group advocates for a more equal allocation of resources in New York's parks, objecting to the fact that "the park only has 18 full-time employees who care for 897 acres, while Central Park employs 291 workers to maintain a smaller area.[38]"

- In Cape Town, Reclaim the City advocates for change under the slogan "Land for People, not for Profit!" As part of its endeavours, in May 2016, it reached a settlement with the City of Cape Town to stay the sale of two vacant properties located in close proximity to the city center.[39] Reclaim the City saw this as critical to ensure alternative use of the parcels to provide opportunities for low-income residents, who historically had been confined to the city's margins.[40] Advocates argued that the City was selling a valuable asset which, rather than contribute to the City's coffers, could be used for much-needed public housing.[41]

The above examples show groups exercising the right to the city as they seek to disrupt the nested scales that characterize the contemporary urban environment in order to allow inhabitants to participate, inhabit, and appropriate the city and its spaces. In Bogotá, this

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[35] Women in Informal Employment Globalization and Organizing, *Columbia's Triumphant Recicladores* (May, 2013), http://wiego.org/sites/wiego.org/files/resources/files/Impact_Colombias_Triumphant_Recicladores.pdf.
[36] *See We're Saving the Lungs of Queens! Protecting Flushing Meadows Corona Park*, MAKE THE ROAD NEW YORK, http://www.maketheroad.org/article.php?ID=4179.
[37] *Id*.
[38] *Id*.
[39] See *Affordable Housing on Inner-City Land*, RECLAIM THE CITY, http://reclaimthecity.org.za/stopthesale-of-tafelberg/.
[40] *Id*.
[41] *Id*.

occurred through demanding compensation for a service conducted in the informal economy that was previously outsourced to a larger service provider – despite the fact that recyclers provided the same service as well. In New York City, this occurred through demanding greater resources from a local authority in place of concentrating the majority of its resources in another park. And in Cape Town, this occurred through demanding from a local authority that well-located land be prioritized for public housing, rather than the default practice of selling the land to the highest bidder.

This section has provided a background to the right to the city, both from a theoretical and practical, activist point of view. The purpose of viewing the latter through the prism of the right to the city is to demonstrate how the right may respond to certain lived realities.

II. Why should member states valorize the right to the city?

This section argues that the right to the city, although not explicitly recognized in the New Urban Agenda, still permeates the document. It also examines whether the right to the city should have been on the agenda in the first place, and why member states should have valorized the right to the city. This will lead into Section III, which looks at how and why this can and should translate into local policy.

(a) Recognition of the right to the city in the New Urban Agenda

The notion of the right to the city has not proved popular with member states for the reasons set out below. As a result, the New Urban Agenda[42] largely disregards the right to the city, preferring to anchor its vision on the concept of "cities for all." The Agenda "note[s] the efforts of some national and local governments to enshrine this vision [of cities for all], referred to as the right to the city, in their legislations, political declarations and charters.[43]" In this way, "cities for all" is equated with the right the city, which is

[42] U.N. Conference on Hous. and Sustainable Urban Dev., Habitat III, *New Urban Agenda* (Sept. 10, 2016).
[43] *Id.* at ¶ 11.

unfortunate given that the right to the city benefits from a historical wealth of knowledge regarding its underlying theory as well as its practical significance in acting as a check on the state and capital vis-à-vis urban development. The idea of cities for all, while often tied to the right to the city is largely devoid of content, pegged to broad notions of inclusivity and diversity.[44] This lends itself to a merely rhetorical application of the New Urban Agenda.

This lack of recognition also contrasts with the final policy document on the Right to the City and Cities for All, which was intended to inform member-states in drafting the New Urban Agenda. The policy document was anchored in the right to the city, using "right to the city" 121 times, while mentioning "cities for all" only ten times.[45] In addressing the right to the city, the policy document noted the failure of an urban development model to "address the problems of urban poverty and social exclusion that are endemic in many cities today.[46]" It suggested that the right to the city, as a new paradigm, could provide an alternative framework in re-thinking cities and urbanization.[47] The document situated the right to the city within a broader human rights framework, encompassing all civil, political, economic, social, cultural, and environment rights as enshrined in various international covenants and conventions, and notes how the right draws on fifty years of experience and debate.[48]

In defining the right to the city, the policy document drew on Brazilian and Ecuadorian law.[49] The document characterized the right to the city as a collective and diffuse right that gives all inhabitants the capacity to access the urban resources, services, goods, and opportunities of city life; that enables effective citizen participation in local policies with

[44] *See* U.N. Conference on Hous. and Sustainable Urban Dev. (Habitat), Ana Sugranyes & Charlotte Mathivet (eds.), Cities for All: Proposals and Experiences Towards the Right to The City (2010), *State of the World's Cities Report* 57 (2010).
[45] U.N. Habitat, *supra* note 6.
[46] *Id.* at 3.
[47] *Id*.
[48] *Id*.
[49] *See*, Art. 2.1, de 10 de Julho 2001, ESTATUTO DA CIDADE [E.CID] de 10.7.2001 (Braz.), (Braz.); ECUADOR CONST. art. 30 -31 (2008).

responsibility; that enables governments to ensure just distribution of resources; and that acknowledges socio-cultural diversity as a source of social enhancement.[50]

The New Urban Agenda nevertheless adopted aspects of the policy document. However, in so doing, the document appears in part unwieldy and contradictory as it seeks to balance various interests. For example, the document calls on member states to avoid gentrification but does not define gentrification or specify how gentrification can be avoided.[51] This anti-gentrification focus conflicts with other commitments in the document, recognizing, for instance, "that housing enhances capital formation,"[52] or calling for the promotion of public spaces to generate increased property values.[53]

The document is peppered with notions of inclusivity and diversity as well as support for marginalized groups.[54] These vague commitments result, to an extent, from the dogmatic insistence by the Russian delegation leading up to Habitat III that there be absolutely no mention of LGBT persons in the New Urban Agenda.[55] This is despite the policy unit recommendations to recognize LGBT persons in particular as actors in the city and to combat discrimination against LGBT persons within a spatial context.[56]

The document is similarly peppered with the commitment to provide basic services to inhabitants. However, the public-private model of service provision, premised on shared profit rather than free service provision, upends the ideological underpinnings of the right to the city.[57] The right to the city rejects the view of basic urban services as something to be provided for at a profit because this excludes those who cannot afford to pay for these services.

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[50] U.N. Habitat, *supra* note 6 at 4.
[51] Habitat III, *supra* note 46 at ¶ 97.
[52] *Id.* at ¶ 46.
[53] *Id.* at ¶ 53.
[54] *Id.* at ¶¶ 25-42.
[55] *See* Gregory Scruggs. *Gay Community Sees New Urban Agenda as Opportunity for Historic Acknowledgement* CITISCOPE (Aug. 31, 2016), http://citiscope.org/habitatIII/news/2016/08/gay-community-sees-new-urban-agenda-opportunity-historic-acknowledgement.
[56] Habitat III, *supra* note 46 at ¶¶ 5, 12, 22 & 26.
[57] *Id.* at ¶ 91.

There are nevertheless positive elements in the New Urban Agenda. The Agenda reaffirms the need to provide access to affordable[58] and well-located housing,[59] calls to prevent "arbitrary" forced evictions,[60] commits to preventing land and real estate speculation.[61] The Agenda further calls for a continuum of land rights, a plurality of tenure types, and promotes increased security of tenure.[62] Member states are encouraged to "promote access to a wide range of affordable, sustainable housing options including rental and other tenure options, as well as cooperative solutions such as co-housing, community land trusts, and other forms of collective tenure, in order to improve the supply of affordable housing.[63]" The Agenda also recognizes the inequality brought about through the spatial organization, accessibility, and design of urban space.[64] There are multiple emphases on the value of public space for a variety of uses.[65]
The Agenda gives both the informal economy[66] and informal settlements limited recognition.[67] Despite this recognition, however, there is a call to "formalize" the

[58] *Id.* at ¶ 14(a).
[59] *Id.* at ¶ 32.
[60] *Id.* at ¶ 31. It is noted that "arbitrary" was added at the Surabaya stage of the negotiations, quite late in the process. It is unclear what is meant by an "arbitrary forced eviction" given that surely all forms of forced evictions are arbitrary given their lack of legal process. It suggests a somewhat macabre interpretation, i.e. that a forced eviction could be allowed if indeed legislation allows for forced evictions because, technically, the forced eviction would not be arbitrary.
[61] *Id.* at ¶ 97.
[62] *Id.* at ¶ 14(b) & ¶ 137. Tenure is best understood from the security which it provides to a tenure holder. "The security derives from the fact that the right of access to and use of the land and property is underwritten by a known set of rules, and that this right is justifiable… This legal framework is taken to include customary and statutory systems… A person or household can be said to have secure tenure when they are protected from involuntary removal from their land or residence, except in exceptional circumstances, and then only by means of a known and agreed legal procedure which itself must be objective, equally applicable, contestable, and independent." *See* Executive Director of the Comm'n. on Human Settlements, *Special Themes: Security of Tenure*, ¶ 27, U.N. Doc. HS/C/18/6, (Nov. 9, 2000).
[63] *Id.* at ¶ 107. This paragraph was amended between the first and the second draft (agreed upon in a Preparatory Committee in Surabaya in July 2016) of the New Urban Agenda to remove the sentence "shifting from a predominantly private ownership model to other rental and tenure options…" This would have been an important addition given the dominance of the system of private property, which has the effect of entrenching spatial marginalization insofar as the affordability of housing is concerned. *See* Harvey, *supra* note 26.
[64] *Id.* at ¶ 25. Previous drafts recognized the need to remove physical, architectural, and legal barriers to public space that should be of free-of-charge. Despite the otherwise positive commitments regarding the importance of public space in cities, the failure to recognize "barriers" to public space is significant because of the way barriers have and continue to be used in a way that denies people the ability to appropriate space. On the importance of public space in the city, see DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE (2003).
[65] *Id.* at ¶¶13, 36, 37, 53, 67, 97, 99, & 100.
[66] *Id.* at ¶¶13 (d), 58 & 59.
[67] *Id.* at ¶¶27, 54, 77, 97, 103 & 107.

informal economy.[68] This is unfortunate as the phrasing, on its own, suggests the informal economy is of little utility in facilitating urban livelihoods. Rather, the phrasing employed could have highlighted the need to extend social and legal protections to those in informal employment; the call to "formalize" suggests a need to eradicate, rather than reform those practices in which informal employment predominates. In the context of slums and informal settlements, there is a call to "prevent" them[69] rather than a call to "acknowledge the prioritization of in situ upgrading" as a way of responding to the "scale of urban poverty" and strengthening "socio-economic and cultural dynamics for safe and sustainable neighbourhoods."[70] This was recognized in the Pretoria Declaration.[71] It represents an attitude towards the urban informality of slums and informal settlements that does not deny the poor living conditions which characterize many of these environments, and which recognizes the injustice of "eradicating" these communities because of the way they respond to a lack of housing in the context of urbanization. The Pretoria approach acknowledges the complexity in which these communities exist, and seeks to understand how best to constructively intervene so as to improve living conditions without disrupting livelihoods and community bonds.[72]

Although many of these commitments are not the "right to the city" in name, and many of the commitments are not as radical or progressive as the right to the city in principle, they nevertheless reflect the claims people bring under the right to the city. These commitments address many of the concerns which bring about the right to the city in the first place. If combined with effective policy and legislation, these commitments could

[68] *Id.* at ¶13 (d).
[69] *Id.* at ¶109.
[70] *See* U.N. Conference on Hous. and Sustainable Urban Dev., (Habitat) III, *Pretoria Declaration on Informal Settlements* at ¶13 (Apr. 8, 2016).
[71] *Id.* The Pretoria Declaration was agreed upon by member states in April 2016. It was one of a number of thematic meetings organized by the UN intended as an opportunity for member states to gain clarity on various themes – including that of slums and informal settlements. The Declaration took a pragmatic approach to informal settlements, which was unique given the nearly universal unfavorable attitude towards urban informality as being undesirable. In respect of the latter point, *see* D. Asher Ghertner, *Rule by Aesthetics: World-Class City Making in Delhi*, *in* WORLDING CITIES: ASIAN EXPERIMENTS AND THE ART OF BEING GLOBAL 279 (Ananya Roy & Aihwa Ong eds., 2011).
[72] On informality in cities, *see* Marie Huchzermeyer, Cities with Slums: From Informal Settlement Eradication to a Right the City in Africa (2011); Ananya Roy, *Urban Informality: Towards an Epistemology of Planning* 71 J. OF THE AM. PLAN. ASS'N., 147 (2005).

provide effective leverage against repressive actions by private actors and the state itself. It is critical to translate these commitments into "tools" so as to give them effect.

(b) Should the right to the city have been on the Agenda in the first place?

The role of the state in facilitating the right to the city is largely unexplored.[73] Instead, the right to the city is largely viewed as beyond the purview of the state, and is conceptualized within an anti-statist framework, *i.e.* that the state is complicit with capital in commodifying the city.[74] As numerous scholars have noted, the valorization of the right to the city within a liberal democratic framework is contrary to the radical nature of the right to the city.

Mehmet Baris Kuymulu, for example, argues that valorization of the right to the city leads to a vortex of rights,[75] implying that an enthusiastic adoption dilutes the original meaning of the right and the power it has to enact socio-spatial change. In this regard, Kuymulu points to the World Urban Forum in 2002 held in Nairobi, which gathered together civil society (*e.g.* not-for-profit organizations, academic institutions) and government officials to discuss "how best to tackle the problems of urbanization so that everyone, rich and poor alike, can fully address their right to the city."[76] He dismisses the spirit of the gathering as running against the radicalism of the right to the city. Kuymulu argues that through the use of recalcitrant and reductionist language and paternalistic formulations of the right to the city, the gathering sought to pander towards market development, while seeking to teach the urban poor how to live in and interact

[73] *See* Alison Brown & Annali Kristiansen, *Urban Policies and the Right to the City: Rights, Responsibilities and Citizenship*, 2 MGMT. SOC. TRANSFORMATIONS 17, 37 (2009), where the authors argue that city governments should define those elements which would encompass a right to the city agenda – "respect for the rule of law; defined citizens' rights and responsibilities; inclusive, pro-poor policies and programmes; opportunities for participation in civic, cultural and political life; cultural pluralism and respect for diversity; shared common visions, and effective urban management."
[74] *See* Mark Purcell, *Possible Worlds: Henri Lefebvre and the Right to the City*, 36 J. URB. AFF. 141, 141 (2013); *see also* Mehmet Bariş Kuymulu, *The Vortex of Rights: "Right to the City" at a Crossroads*, 37 INT'L J. URB. REGIONAL RES. 923, 924 (2013); Margit Mayer, *The "Right to the City" In the Context of Shifting Mottos of Urban Social Movements*, 13 CITY 362, 369 (2009).
[75] Kuymulu, *supra* note 74, at 924.
[76] *Id.* at 932.

with the city.[77] In other words, the gathering did not upset the status quo, but in fact entrenched it, albeit behind a veneer of rights-talk.

Margit Mayer echoes this criticism. She notes how couching the right to the city within an "institutionalist set of rights boils down to claims for inclusion in the current system as it exists; it does not aim at transforming the existing system and in that process, ourselves [sic]."[78] Through the public recognition of the right to the city by governmental and UN institutions, the political stances of varying right to the city movements are not only shifted, but the movements' radical demands are diluted – what she describes as "neoliberalism with a human touch."[79] The result is merely a call for "inclusion in a structurally unequal and exploitative system, [and not] about democratizing cities and their decision-making processes."[80]

Mark Purcell similarly argues that contemporary initiatives aimed at entrenching the right to the city in a statist framework misunderstand the right to the city as merely a "proposed addition to the list of existing liberal-democratic rights."[81] This position has the effect of "training its political attention squarely on the state, since that is the institution that will guarantee any future right to the city."[82] Purcell argues that this understanding mischaracterizes the right to the city, certainly insofar as Lefebvre understood it, which was to initiate "a radical struggle to move *beyond* both the state and capitalism."[83]

Purcell also identifies a problem with embedding the right to the city in a policy or legislative system which may itself have created the conditions of spatial exclusion which gave rise to the right to the city in the first place. The right to the city becomes situated

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[77] *Id.* at 932–934. To illustrate his point regarding the use of recalcitrant and reductionist language, as well as paternalistic formulations of the right to the city, Kuymulu picks only certain aspects of the Forum's report, which detail comments from some of the participants. An important relationship was identified by many between participation and citizenship. "Do you have a right to the city?" asked one participant. "Yes, they do if they stand up and be counted and show they can be responsible." As one speaker pointed out, "we need to teach people how to live in cities." *Id.* at 933.

[78] Mayer, *supra* note 74, at 369.

[79] *Id*. at 369.

[80] *Id.* at 371.

[81] Purcell, *supra* note 74, at 142.

[82] *Id*.

[83] *Id*.

within a particular notion of citizenship which runs counter to what the right to the city actually embodies. As Purcell notes, this citizenship is tied to the sovereign nation state.[84] As a result, this has "led to a hierarchical and nested structure in which national-scale citizenship is the hegemonic form."[85] Purcell argues that the right to the city embodies an articulation of "alternative citizenship outside the Westphalian order,[86] one that can be particularly useful in imagining a new politics through which to resist the current neoliberalization of the global political economy."[87] He sees what he terms the right to the global city[88] as a key form of citizenship that is able to "radically expand and extend the scope of citizens' control over the decisions that affect their material opportunity."[89]

AbdouMaliq Simone holds a similar understanding of the right to the city, and argues that "viewing the right to the city as the right to pursue multiple aspirations ensures that no structure of governance can ever really manage the activation of this right . . . ."[90] At best, urban governance can only guarantee "that the pursuit of aspirations entailed in acting on the right to the city neither harms, injures, nor marginalizes specific residents. But it can be neither the purveyor of a specific aspiration nor the patron of all aspirations."[91]

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[84] Mark Purcell, *Citizenship and the Right to the Global City: Reimagining the Capitalist World Order*, 27 INT'L J. URB. REG'L RES. 564, 571 (2003).
[85] *Id*.
[86] *Id.* at 565. Purcell understood the Westphalian order as one that "imagines one's primary political community to be a nation-state that is embedded in an international system of nation-states, each of which is sovereign with its territory. Because each state is sovereign, a citizen's ultimate political loyalty must be to her nation-state." *Id.*
[87] *Id.* at 579.
[88] *Id.* at 565. Purcell refers to the right to the global city as a theoretical exploration which is able "to imagine and articulate a new form of citizenship based on Lefebvre that has the potential to radically challenge and transform current global political and economic relations." *Id.*
[89] *Id*. To demonstrate how this may work, Purcell utilizes a number of examples. This includes a group in Los Angeles known as the Bus Riders Union, who seek to shift transportation investment from trains, which serve a predominantly white and wealthy ridership, to buses, which serve poorer, "non-white" areas. Purcell's argument is that although they may have the "ability to use their status as voters to pressure their elected representatives (at the local and federal levels) . . . this arrangement does not give inhabitants the right to participate centrally in the decision-making process but rather a diffuse and indirect influence over the people who *do* participate centrally." *Id.* at 580.
[90] AbdouMaliq Simone, *The Right to the City*, 7 INTERVENTIONS 321, 323 (2005).
[91] *Id*.

In addition to this criticism, there are two other reasons which explain why member states should be hesitant to endorse the right to the city. First, the New Urban Agenda involves a negotiated process encompassing 193 member states existing within different social, legal, and political contexts.[92] It is unrealistic to expect consensus on a concept so diverse in its meaning and applicability, with unknown and untrusted rights-based implications, and which doctrinally aims to upend the machinations of the state. Second, the right to the city is inherently academic in nature, and is complicated in its abstract, utopic formulations. It would be difficult to grasp its intricacies within a short negotiating period in which delegations are implored to seek practical solutions to problems that appear more "real" than those the right to the city addresses. The irony in this, of course, is that the problems the right to the city seeks to address are very much *real*. From a member state's perspective, however, the role of local authorities vis-à-vis national government, or the availability of municipal finance and skills appear far more urgent than "softer" commitments to redressing spatial exclusion.

(c) Why member states should valorize the right to the city

Although from a theoretical point of view there is substance to the arguments against the valorization of the right to the city by member states, these arguments fail to take into account the fact that the state, and its processes, are intertwined in claims to the right to the city.

First, city inhabitants use the machinations of the state to enact claims to the right to the city.[93] This is demonstrated in the examples of South African jurisprudence highlighted below.[94] This does not mean that the state grants the right to the city to inhabitants, but

[92] *See* U.N., *Member States,* http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html.
[93] *See also* Marie Huchzermeyer, The Relevance of Henri Lefebvre's "Right to the City" for South African Cities, as Mediated Through Its Application to Urban Reform in Brazil, Paper Presented at the African Association of Planning Schools Conference, Cape Town (Nov. 2014), in which the author argues through a close reading of Henri Lefebvre that the right to the city is not beyond institutionalization within a state- or legal-centric setting.
[94] *See* Section III b. – e., *infra*.

its processes, including the law, facilitate claims to the right to the city.[95] This argument is as much normative as it is reflective of a certain reality, which sees inhabitants using the mechanisms of the state *against* the state.

Second, the right to the city does have a role in the New Urban Agenda. The right acted as a directive voice, informing the ethos behind the Agenda. Despite the negative elements highlighted above, there were positive aspects to the Agenda, which were influenced by certain member states that believed in an approach to urban development which aims to redress many of the spatial injustices brought under the right to the city.[96]

Third, the positive elements in the Agenda informed by the right to the city have the potential to be translated into domestic policy.[97] The commitments are available for inhabitants to advocate for certain action based on the commitments made by member states. The non-binding nature of the commitments mean that they may remain purely

[95] In this regard, *see* Brown & Kristiansen, *supra* note 73, who argue in a report produced for UNESCO that it is possible to translate the right to the city into urban policies. They proceed to outline a number of policies from around the world and view these through their understanding of the right to the city, which prioritizes an urban politics of the inhabitant and of communities, and which sees politics negotiated at the urban scale. The authors see the concept as being founded on the "intrinsic value of human rights, which acts as a 'vehicle for urban change," and in which "citizens can define their needs" while allowing "others the same right." They observe a range of policies and commitments at local, national, regional, and international levels which indicate an adherence to these principles in varying respects. Policy examples include an "Open Door Participation" process in Lokossa, Benin, which involved the mayor and town hall officials holding for several days an open door session for residents. Another example includes an urban revitalization plan in Santiago de Compostela, Spain, which among other endeavours "sought to maintain social diversity, and to preserve public spaces as places of meeting, culture, and relationship." They point to the Human Rights City Project in Eugene, Oregon, as an example of how human rights can be made a central part of every city program. The three instances Brown and Kristiansen point out are not particularly significant, and should be treated with caution insofar as they may be viewed as an outcome-centric, tick-boxing approach to codifying the right to the city. But the examples nevertheless demonstrate state policies that attempt to facilitate the practice of claiming a right to the city in various forms.

[96] *See* Gregory Scruggs, *Historic Consensus Reached On "Right to the City" in New Urban Agenda,* CITISCOPE, Sept. 9, 2016, http://citiscope.org/habitatIII/news/2016/09/historic-consensus-reached-right-city-new-urban-agenda; Ada Colau, *After Habitat III: A Stronger Urban Future Must Be Based On the Right to the City*, GUARDIAN Oct. 20, 2016, https://www.theguardian.com/cities/2016/oct/20/habitat-3-right-city-concrete-policies-ada-colau.

[97] This argument is made with a fair sense of cynicism based on the findings of the Habitat Commitment Project and the Global Urban Futures Team. This report assessed the impact of the commitments made under Habitat II. The findings show that "in the 20 years since Habitat II, progress towards meeting the goals set forth in the Istanbul Declaration has been in many ways disappointing . . . most countries are still underperforming in meeting the commitments agreed upon twenty years ago." *See* THE GLOBAL URBAN FUTURES PROJECT, THE HABITAT COMMITMENT PROJECT 48 (2016), available at: https://www.globalurbanfutures.org/publications-articles.

rhetorical, but they nevertheless continue to act as a touchstone, if not a guideline, for urban advocacy as well as for cooperation between inhabitants and the state.

The last point is particularly important for advocacy organizations that attempt to improve the livelihoods of their members. For example, Women in Informal Employment: Global and Organizing (WIEGO) works to empower workers in the informal economy and, in so doing, to secure informal livelihoods.[98] WIEGO has been involved in the Habitat III process, taking part in three of the ten policy units, and organizing five side events at the actual Habitat III conference, where the New Urban Agenda is expected to be passed by member states.[99] WIEGO has used the right to the city as a central banner under which it has advocated for the rights of informal workers. The commitments made as a result – which are now at least on a rhetorical level shared between WIEGO members and any particular local authority – can now inform a joint approach to addressing the real and daily challenges WIEGO members face.

Fourth, the valorization of the right to the city by member states contributes to a discussion around spatial justice. Although this discussion is between member states, instead of between states and their inhabitants, the alternative is that there is little to no discussion about how injustice manifests itself spatially, or about how the state itself contributes to spatial injustice, or about how this injustice brings about claims to the right to the city in the first place. Again, this is not to say that the right to the city should be granted by the state, but currently the state and its mechanisms can and do play an important role in unseating spatial exclusion.

Fifth, the valorization of the right to the city will not dilute its content principally because this content is organic in nature – made by and through the daily contested interactions of inhabitants and, as such, is ever-evolving in its meaning. The presence of the right to the city in the New Urban Agenda, and those urban practices which bring it into play in the first place (such as, for example, gentrification) mean that any claim to the right to the

[98] *See* WIEGO, *What We Do*, http://www.wiego.org/wiego/what-we-do.
[99] *See* WIEGO, *Habitat III*, http://wiego.org/cities/habitat-iii.

city holds a certain legitimacy. This is because the state has recognized that there is a claim to the right to the city, and understands that numerous practices should be mitigated or avoided because of how they infringe on that right.

III. The role of the law

Having clarified that there is a role for the state in facilitating claims to the right to the city, this section hones in on the role of the law – either in legislation or in jurisprudence. It is important to see the law as a tool through which spatial injustices (which bring about the right to the city in the first place) are redressed through positive measures, such as legislation. Law can also be used to stake a claim to the right to the city, as in the case of the judiciary.

This section is divided into five parts: property, public space, evictions, housing, and water. These aspects of the city influence the quality of inhabitants' lives in the city. The way in which the law treats these elements can either serve to deny the right to the city, or can facilitate a city characterized by spatial justice – which, in turn, fulfills the vision embodied in the right to the city.

(a) Property: the Brazilian City Statute

One of the core practices which brings about claims to the right to the city, and which right to the city theorists point to as going to the heart of spatial exclusion, is the system of urban property. Nicholas Blomley argues that it is necessary to understand property in territorial terms, as doing so recognizes that its assumptions hold a "crucial grammar for many of the most consequential relations for social and political life . . . ."[100] This grammar has an impact on urban space, and circumscribes inhabitants' relationship with each other, and the city itself. As Blomley notes, "[a]s we walk through the city, for

[100] *See* Nicholas Blomley, *The Territory of Property*, 40 PROGRESS HUM. GEOGRAPHY 593 (2016).

example, we navigate an intricate space of refusals and permissions, predicated on various forms of property."[101]

In his work on evictions, Stuart Wilson, a lawyer at the Socio-Economic Rights Institute of South Africa, categorizes the normative assumptions historically underlying the system of property law in South Africa as "simple – a landowner was in law entitled to an eviction order if he could prove his ownership and the fact of occupation of the land by the occupier [sic]."[102] This meant it was relatively easy to obtain an eviction order, based purely on title, without consideration of what an eviction may mean for the unlawful occupier's housing needs.

Professor Rashmi Dyal-Chand questions the underpinnings of contemporary property law, arguing that its thematic foundations have shifted from the notion of sharing to that of exclusion.[103] She argues that "both property theory and property practice appear to rely on this view as a presumptive means of enhancing property's role as a stable basis for market transactions. Property theory does so by emphasizing title as the first-order decision in property law."[104]

In an urban setting, this focus on title veils how urban land is actually being used. It means that a parcel of well-located urban land can remain empty for so long as the owner wishes. It has the potential of fuelling real estate speculation, in which an owner hopes that market forces, and not her own development, will increase the value of the land. The cumulative effect of this speculation leads to rising rental prices. The prefacing of title means in addition that the owner can determine what she wishes to do with the land, regardless of what possibility the land may hold in addressing challenges facing the city, such as acting as a site for affordable housing. The city becomes controlled by the property market, and an inhabitant's access to space and proximity to services are

[101] *Id.* at 594.
[102] *See* Stuart Wilson, *Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality*, 126 S. AFR. L.J. 270, 270 (2009).
[103] *See* Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647, 650 (2013).
[104] *Id*.

determined by her ability to afford higher property prices, or the rent that follows. This is not a city of equality, but one that becomes overwhelmed by the interests of capital.

It is for this reason that the Brazilian City Statute[105] is a powerful expression of the right to the city. The Statute emerged from two sets of substantive processes of political mobilization and negotiation. First, the enactment of the 1988 Federal Constitution, which recognized in articles 182 and 183 a range of collective rights within a spatial environment.[106] Second, the adoption of the Statute itself in 2001 gave greater substantive meaning to what these collective rights mean in practice. The Statute is aimed at establishing standards of public order and social interests, regulating the use of urban property for the collective good, and providing for the safety and well-being of citizens and the environment.[107]

The City Statute's regulation of the use of urban property falls into four broad themes. These themes "loosen the hold of an individualized conception of property [sic]"[108] and emphasize instead a function of property that is less about entitlement and more so about the use of the land upon which property is situated, and whether the use of this land fulfils the right to the city. First, the City Statute prioritizes the productive use of land. This is premised on a call to avoid both the "improper use of real estate"[109] and the "speculative retention of urban real estate, resulting in its underutilisation or non-utilisation."[110] The Statute provides three mechanisms to ensure land is used productively:

1. Local authorities are empowered to determine the compulsory parcelling, building, or use of unbuilt, under-utilized, or un-utilized urban land.[111] If such a

[105] Decreto No. 10.257, 2001, Diário Oficial da União [D.O.U] (Brazil Federal Law no. 10.257).
[106] *See* Edesio Fernandes, *Constructing the "Right to the City" in Brazil*, 16 SOC. LEGAL STUD. 201, 211 (2007) ("the right to urban planning; the social right to housing; the right to environmental preservation; the right to capture surplus value; and the right to the regularization of informal settlements.").
[107] *See generally* City Statute.
[108] *See* Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT'L L. 435, 459 (2016).
[109] *See* City Statute art. 2, § VI(a).
[110] *Id.* § 6(e).
[111] *Id.* art. 5.

piece of land is identified, the owner shall be notified by the local authority in terms of Article 5 to develop the land within a minimum of two years, or alternatively shall be given a minimum of one year to transfer title of the land to the local authority.[112]

2. The Statute makes it economically unviable to keep land in an undeveloped state and to speculate on real estate through the imposition of a progressive property tax (the "IPTU"). This tax is assessed after the deadline imposed by Article 5, and can be increased over a five year period up to a maximum of 15% of the value of the land.[113]

3. If land remains undeveloped, Article 8 gives the local authority the power to expropriate the land and compensate the owner with public debt bonds. According to Ana Maria Furbino Bretas Barros, who wrote an English commentary on the City Statute, this form of expropriation is a particular modality targeted at property for urban purposes.[114] Public debt bonds are payable to the owner over a period of ten years,[115] and the calculation of compensation does not take into account expected yields, foregone profit, and compensatory interest.[116] The value of the compensation does not even take into account the market value of the particular property. Rather, the base value is taken from the IPTU calculation, minus any increase occasioned by public works undertaken in the area where the property is located, after the notification is issued under Article 5.[117] This real value "is in line with the guidance on fair distribution of the benefits of urbanization expressed in Article 2 of the City

[112] *Id.* art. 5, § 4.
[113] *Id.* art. 7, § 1.
[114] Ana Maria Furbino Bretas Barros et al., *Commentary on the City Statute*, *in* Cities Alliance, The City Statute of Brazil: A Commentary 91, 99 (2010).
[115] City Statute art. 5.
[116] *Id.* art. 8, clause II(2).
[117] Barros, *supra* note 114, at 99.

Statute,"[118] and is theoretically cheaper to execute than compensation based on market value.

The three points above illustrate the way in which the City Statute refuses to allow property uses to go unchecked. The Statute retains the system of property, but exercises a tight noose around how property affects urban land use.

Second, the City Statute grants a certain level of public control over the property market. The Statute gives municipalities the Right of Pre-emption over sales of urban property between private parties.[119] This right operates in specially established areas determined in the municipality's master plan, which also demarcates the period the right remains in force. This can be no longer than five years, but is renewable from one year after termination of the initial period.[120] Article 26 provides that the right can only apply for specific purposes, which include the execution of social housing programs and projects, the establishment of a land reserve stock, and the creation of public leisure spaces and green areas.[121]

The third theme in the Statute is an inherent privileging of use over title. This occurs particularly through Article 9 and the *Usucapiao* right over urban property.[122] This right of adverse possession provides that if someone has possession of an urban area or building covering an area up to 250 square meters for an uninterrupted and unopposed period of five years as her family home, then dominium is established over the property, even if she is not the owner.[123] If these conditions are met, the Statute confers title over the property to her.

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[118] These include, for example, "the right to sustainable cities, understood as the right to urban land, housing, environmental sanitation, urban infrastructure, transportation and public services," as well as the "fair distribution of the costs and benefits resulting from the urbanization process." City Statute art. 2, §§ 1, 4.
[119] *Id.* art. 25.
[120] *Id.* art. 25, § 1.
[121] *Id.* art. 26.
[122] *Id.* art. 9.
[123] *Id.* art. 9, § 3.

The fourth theme of the Statute is its recognition of a continuum of land rights. The Statute's explicit use of surface rights expands the traditional understanding of land rights beyond merely being a system of real rights registered to one particular person. The Statute's utilization of surface rights is predominantly limited to publicly-owned land, and enables a municipal authority to grant a surface right to someone on land that nevertheless still belongs to the public. Article 21 provides that this can be granted for a specified or unspecified time, through a public deed registered in the deeds registry office. It can be transferred to third parties,[124] as well as to successors in the event of death.[125]

According to Barros *et al*, its innovation lies in the fact that it can "prevent the property [from] being acquired by someone who intends to use it for [a] purpose [other] than that for which the right has been given . . . thereby avoiding eviction of the residents and occupation of the property by wealthier people."[126]

The four themes above are clearly reflective of the manner in which the right to the city is able to regulate the dominance of the property market and its impact on spatial exclusion.[127] The narrative[128] running throughout the City Statute is not necessarily anti-property, but it is pro-land; it views land as key to unlocking opportunities for greater access to the city and its spaces. It goes beyond this too. For example, the City Statute has brought about greater and more meaningful participation in municipal plans and budgets, although it is beyond the scope of this piece to examine this.[129] But the regulation of property is an important step forward because of the way it transforms the city from merely an abstract network of real rights in property, to a lively network of

[124] *Id.* art. 21, § 4.
[125] *Id.* art. 21, § 5.
[126] Barros, *supra* note 114, at 103.
[127] For a case study on Niteròi, see Abigail Friendly, *The Right to the City: Theory and Practice in Brazil* 14 PLANNING THEORY & PRACTICE 158, 166–73 (2013).
[128] See Fernandes, *supra* note 106, at 211–15 for a discussion around the ten-year legislative process leading up to the adoption of the City Statute.
[129] For more information regarding the impact of the City Statute on other areas of urban life, see Marcelo Lopes de Souza, *The Brazilian Way of Conquering the Right to the City*, 37 DISP – PLANNING REV. 25 (2001) for a discussion on participatory budgeting in Porto Alegre. See also Jessica Budds & Paulo Teixeira, *Ensuring the Right to the City: Pro-Poor Housing, Urban Development and Tenure Legalization in São Paulo, Brazil* 17 HOUSING & CITIZENSHIP 89 (2005) for a discussion of participation, informal settlement upgrading, housing provision, and city center regeneration.

spaces, processes, relationships, and other more tangible connections. The regulation of property works against a status quo in which, as Harvey argues, "quality of life becomes a commodity, as [does] the city itself . . . . Under these conditions, ideals of urban identity, citizenship and belonging – already threated by the spreading malaise of a neoliberal ethic – become much harder to sustain."[130]

(b) Public space – V&A Waterfront

The following four parts of this Article look at South African jurisprudence. Specifically, these sections examine how litigants in South Africa[131] have utilized the judiciary[132] to stake claims to the right to the city. The right to the city is not a legally recognized right in South Africa, and litigants do not necessarily see their claims as flowing from the right. However, the rationale behind these claims embodies the right to the city for two reasons. First, these claims reflect the desire by inhabitants to utilize the judiciary, the bill of rights, and the law to remake and shape the city. Second, these claims reflect a particular mode of political participation that, despite existing with a statist and legal framework, acts as a lever against the exercise of power by other actors in the city.

This section examines how litigants in South Africa have attempted to use these justiciable rights in both an interdependent and an independent manner to effectively stake a claim to the right to the city. The following four cases were heard across an array of jurisdictions within South Africa at both a high court and an appellate court level. Courts have provided both generous and very limited interpretations of these claims.

[130] Harvey, *supra* note 22.
[131] See Gautam Bhan, *"This Is No Longer the City I Once Knew": Evictions, the Urban Poor and the Right to the City in Millennial Delhi*, 21 ENV'T & URBANIZATION 127 (2009) for a discussion on the impact of the judiciary's decisions on the urban poor in Delhi in cases dealing with eviction.
[132] For the purposes of providing context, it is noted that the judiciary in South Africa consists of the Constitutional Court as the highest court in the country, holding national jurisdiction. This is followed by the Supreme Court of Appeal, which despite being a court of appeal is still below that of the Constitutional Court in terms of its jurisdictional hierarchy; it also holds national jurisdiction. Below the Supreme Court of Appeal lie numerous High Courts, which have jurisdiction over set areas. All three levels of these courts have the power to hear constitutional matters under which a claim to the right to the city is likely to be brought.

These claims to the right to the city are exerted through the prism of the South African Constitution. This is an inherently transformative document, aimed at redressing the material and political injustices of the country's apartheid past. It recognizes first-generation civil and political rights, in addition to second-generation socio-economic rights. Civil and political rights, such as dignity[133] and life,[134] are also used in interpreting disputes and giving context to other interdependent and inter-related rights.[135] Socio-economic rights include housing,[136] health care services,[137] sufficient food and water,[138] and social security.[139]

In *V&A Waterfront,*[140] a private company operating a "public" shopping mall[141] on its own private property sought to confirm an interim order barring the respondents from accessing the property. The respondents begged for money from patrons at the shopping mall. The shopping mall argued that the respondents abused tenants, employees, and

[133] *Id.* § 10.
[134] *Id.* § 11.
[135] Bilchitz provides examples to build up, in part, a "right" to electricity through its interdependency with legally recognized rights: "… socio-economic rights, whilst guaranteeing survival interests, are also concerned with enabling individuals to live decent lives. What constitutes a decent life cannot be considered in the abstract alone but must of necessity have regard to [sic] modern conditions of life . . . electricity can be seen to be of importance for a number of reasons: First, it helps to realise other basic rights, such as the right to food, through its importance in cooking and refrigeration. Second, it provides lighting which individuals require for intellectual activity, security, social engagement, education activities and simply to function. Third, it provides important sources of entertainment, such as television, which also perform educative function and are regarding as sign of social status. In South Africa today, thus, electricity plays a crucial part in realising other rights as well as enabling individuals to attain a decent or adequate level of well-being." *See* David Bilchitz, *Citizenship and Community: Exploring the Right to Receive Basic Municipal Services in Joseph* 3 (1) CONST. CT. REV. 45, 54-55 (2010). Coggin & Pieterse recognize the interdependency of rights when they argue for the recognition of the rights-based components inherent in the provision of public transport in South Africa: "But over and above constituting a constitutionally significant end in itself, public transport arguably forms an integral component of the practice and enjoyment of several other rights in the Bill of Rights. Apart from lending a particular spatial dimension to the constitutional notion of substantive equality… the provision of transport gives effect to the positive dimensions of the right to freedom of movement in s 21() of the Constitution." *See* Thomas Coggin & Marius Pieterse, *A Right to Transport? Moving Towards a Rights-Based Approach to Mobility in the City* 31 S. AFR. J. HUM. RTS. 294, 302 (2012).
[136] S. AFR. CONST., 1996 § 26.
[137] *Id.* § 27 (1)(a).
[138] *Id.* § 27 (1)(b).
[139] *Id.* § 27 (1)(c).
[140] *Victoria & Alfred Waterfront v. Police Commissioner Western Cape* 2004 (4) SA 444 (C).
[141] Although located on private land, the shopping mall nevertheless contained a number of public amenities, including a police charge office, a post office, public roads, and the only public access point to Robben Island.

patrons. Seeking to confirm the interim order, the shopping mall sought an injunction prohibiting begging altogether on the property.[142]

When reviewing the case for the final interim order, the Cape High Court took a radical approach that accords substantively with the right to the city. First, it upended the traditional understanding of property law providing the right to exclude those who are not wanted. The court found exclusion from private property that provides access to public amenities particularly problematic. The court's reasoning is especially important in light of South Africa's historical and contemporary spatial context, which continues to exclude those deemed undesirable by a propertied elite. The actions of the V&A Waterfront are merely one example of this exclusion.[143] The court noted that in the socio-economic context of Cape Town, "the issue of begging frequently raises a direct tension between the right to life and property rights."[144] In light of this, the court determined that "property rights must give way to some extent."[145]

Second, the court recognized the conceptual underpinnings of the right to the city by linking urban space with the rights to life and dignity. "The rights to life and dignity are the most important of all human rights. By committing ourselves to a society founded on the recognition of human rights we are required to value those rights above all others."[146]

The court's reasoning in *V&A Waterfront* reflects the right to the city for three reasons. First, the court prioritized the use value of property over its exchange value. The entitlements inherent in the shopping mall's ownership of its private property were subordinated to the competing rights to life and dignity.[147] This questioning and redress of private property dominance is exactly what the right to the city seeks.

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[142] *V&A Waterfront* at 447A–E.
[143] *See* Andy Clarno & Martin Murray, P*olicing in Johannesburg After Apartheid*, 39 SOC. DYNAMICS: J. AFR. STUD. 210 (2013); Teresa Dirsuweit & Alex Wafer, *Scale, Governance and The Maintenance of Privileged Control: The Case of Road Closures in Johannesburg's Northern Suburbs*, 17 URB. F. 327 (2006) (regarding the race-based implications of private security and gating practices on non-propertied individuals accessing those spaces closed off to them).
[144] *V&A Waterfront*, at 448D-E.
[145] *Id*.
[146] *Id*.
[147] *Id.*

Second, in deconstructing the shopping mall's real right in private property the court valued the role of public space to the city. The right to the city also emphasizes public use over private ownership, both upending the entrenched and often debilitating grid of private property, and recognizing the role of public space in facilitating difference.[148] This recognition is important because it acknowledges the city as a site of diverse experiences and lived realities, and acts "as a fundamentally *constitutive* force in the formation of relations, meanings and identities [sic]."[149]

Third, the court recognized the link between private property and livelihoods.[150] Private property should not necessarily be a bar to earning an economic livelihood, particularly where private property also has public characteristics, and where facilitating an economic livelihood within private property is key to an inhabitant's right to life and dignity.

(c) Evictions – Blue Moonlight

In *Blue Moonlight*,[151] the Constitutional Court held that a lawful eviction under the Prevention of Illegal Evictions and Unlawful Occupation Act ("PIE")[152] cannot take place if the eviction would lead to homelessness and contravene the right of access to adequate housing.[153] The case involved a dilapidated building in the Johannesburg inner city purchased in 2004 by Blue Moonlight, a company intending to redevelop the building.[154] In 2005, Blue Moonlight attempted to evict the occupants. The occupants opposed the eviction on the basis that it would render them homeless, and so applied to

[148] On the value of public space, see generally Antonia Layard, *Shopping in the Public Realm: A Law of Place* 37 (3) J. L. SOC'Y 412 (2010); Don Mitchell, *The Annihilation of Space By Law: The Roots and Implications of Anti-Homeless Laws in the United States* 29 (3) ANTIPODE 303 (1997); DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE (2003).
[149] Junxi Qian, *Public Space in Non-Western Contexts: Practices of Publicness and the Socio-Spatial Entanglement* 8 (11) GEOGRAPHY COMPASS 834, 834 (2014).
[150] *V&A Waterfront*, at 448D–E.
[151] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties* 39 (Pty) Ltd 2012 (2) SA 104 (CC).
[152] Prevention of Illegal Evictions and Unlawful Occupation Act of 1998.
[153] S. AFR. CONST., 1996 § 26.
[154] *Blue Moonlight* at para. 8.

join the City of Johannesburg in proceedings arguing that Blue Moonlight had a constitutional and statutory duty to provide emergency alternative housing.[155]

The court in *Blue Moonlight* sought to balance the right not to be arbitrarily deprived of property[156] with the right of access to adequate housing. The court did not dismiss the system of private property completely, instead noting the importance of constitutional protection against arbitrary deprivation given South Africa's history of forced removals and land annexation committed against the country's black population.[157] At the same time, however, the court decided to subjugate property rights to other rights in the Constitution, as had the court in *V&A Waterfront*:

> It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of the occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted … An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.[158]

The court's reasoning in *Blue Moonlight* is interesting because of how it seeks to balance competing visions of the right to the city. On the one hand, there is a de-emphasis on private property, evinced by subjecting it to other considerations such as housing.[159] On the other hand, the court is not completely dismissive of private property. Owners are merely told "to be somewhat patient"[160] – not to abandon their property altogether. This is important because it recognizes that there are different visions of the city that need to be accommodated, and it could perhaps be argued that the owner seeking to evict unlawful occupiers is as much entitled to a right to the city as those seeking to avoid homelessness. This will not be the case in all evictions, but it may be in the instance of a poorer landowner who is dependent on rental income to sustain her own economic

[155] *Id.* at para. 11.
[156] S. AFR. CONST., 1996 §25 (1).
[157] *Blue Moonlight* at para. 34.
[158] *Id.* at para. 40.
[159] *Id.*
[160] *Id.*

livelihood. Similarly, this logic may apply beyond the scope of land and housing and include, for example, an informal trader arbitrarily deprived of her moveable property by a city authority intent on "cleaning up" the city.

Blue Moonlight, however, is reflective primarily of the right to the city because of the way it allows unlawful occupiers to argue for particular conceptions of what the right to housing means in the context of evictions – here, that an eviction is only lawful to the point where it does not result in homelessness irrespective of whether the eviction order is sought by the City or a private property owner.[161]

(d) Housing - Grootboom

Grootboom[162] was the Constitutional Court's first attempt to deal with Section 26 of the Constitution. It involved a challenge by Irene Grootboom and other respondents who had been evicted from their informal homes on private land. As a result, they became homeless (this case was heard eleven years before *Blue Moonlight*), and approached the Cape High Court for an order requiring the government to provide them with adequate basic shelter or housing until such time as they were able to secure more permanent accommodations.[163]

Although the case was not brought specifically as a claim to the right to the city, many of the demands made by the claimants reflect the right to the city, specifically the element of habitation. At the heart of the issue of constitutional interpretation lies the "minimum core" behind the right of access to adequate housing, which may be described as minimum essential levels of each of the rights derived from the International Covenant of Economic, Social, & Cultural Rights.[164] The *amici curiae* argued applying Section 26 (1)

[161] *Id.* at para 95.
[162] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC).
[163] *Id.* at para. 13.
[164] International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 171, para. 10, gen. comment 3 (1990).

meant applying South Africa's commitments under the Covenant.[165] "Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of educations, is *prima facie*, failing to discharge its obligations under the Covenant."[166]

The Constitutional Court however refused to specify what a minimum core would entail, given the vast disparities in housing needs by many South Africans.[167] Instead, the Court opted for the more deferential standard of reasonableness, allowing the state's policy to stand if deemed "reasonable."[168] Therefore, Irene Grootboom could not expect to claim shelter or housing "immediately upon demand,"[169] but could expect the governing authority to "devise, fund, implement and supervise measures to provide relief to those in desperate need."[170]

Grootboom exemplifies a claim that is reflective of the right to the city, but which ultimately is unrealized because of constraints placed on state resources. Arguably, this does not fulfil the right to the city, in which housing is a key component given its ability to facilitate inhabitants' livelihoods. As the former UN Special Rapporteur on Housing notes, "housing is crucial for the creation of the sense of belonging to the city and for the very concept of *place*. It is no over-statement to say that to be deprived of access to adequate housing is to be deprived of the very possibility to be part of and to enjoy city life [sic]."[171] A right to the city advocate may argue that there is no space for "reasonableness" in delineating the extent of the right to adequate housing. She may ask:

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[165] *Amici Curiae* briefs were submitted by the South African Human Rights Commission and the Community Law Centre of the University of the Western Cape. The *Amici* sought to incorporate the minimum core obligation in developing section 26 (1) of the Constitution. *See* Grootboom, *supra* note 173, at para. 17.
[166] *Id*.
[167] *Grootboom* at paras. 32–33.
[168] *See id.* at paras. 41–44, where the Court elaborates on its understanding of reasonableness.
[169] *Id.* at para. 95. There is a tragic irony in the fact that Irene Grootboom died seven years after the judgment was delivered still without a home. *See* P. Joubert, *Grootboom Dies Homeless and Penniless*, MAIL & GUARDIAN (2008), https://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless.
[170] *Grootboom* at para. 96.
[171] R. Place Rolnik, *Inhabitance and Citizenship: The Right to Housing and the Right to the City in the Contemporary Urban World* 14 (3) INT'L J. HOUSING POL'Y 293, 295 (2014).

whose standard of reasonableness is used to determine this? What considerations are taken into account when determining the reasonableness of a housing policy – should it apply, for example, only to freestanding homes on the margins of a city, or homes centrally located near opportunities, mobility, and services? And does reasonableness not merely entrench a status quo which sees a substantial majority of people without access to adequate housing?

These questions are not easy to answer, and it is perhaps a failing of the right to the city that it does not seek to understand how claims to the right to the city can legitimately be limited. This is unfortunate given that claims to the right to the city do not always result in the desired outcome, but may be subject to other equally urgent demands. However, this dichotomy points as much to the importance of law in balancing competing claims as it does to the need for truly meaningful participation in setting out the priorities of a governance framework.

(e) Water - Mazibuko

Mazibuko dealt with the inequality of access to water in South Africa. "In 1994, it was estimated that 12 million people (approximately a quarter of the population) did not have access to water. By the end of 2006, this number had shrunk to 8 million, with 3.3 million of that number having no access to basic water supply at all."[172] The issue in this case was the interpretation of Section 27 (1) (b) of the Constitution, which grants everyone the right to have access to sufficient water, as well as Section 3 of the Water Services Act. The latter gives greater meaning to the constitutional provision by providing that every public service authority which provides water must take reasonable measures to realize these rights. Regulation 3 of the Water Services Act Regulations goes even further by prescribing a minimum threshold for water provision – specifically, it provided for a minimum quantity of potable water of 25 litres per person per day, or six kilolitres per household per month based on a household of eight people.

[172] *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC).

Lindiwe Mazibuko and four other applicants asserted that the City of Johannesburg's water provision policy did not provide for sufficient amounts of water to create a "dignified human existence in compliance with section 27 of the Constitution."[173] The policy meant, for example, that a stand[174] of twenty people (as was the case with the applicants) had to share the free allocation of six kilolitres; once this had been exhausted, the water was cut off. Part of the policy included the installation of a pre-paid water system, wherein residents could only access water beyond the free allocation if they had paid in advance. This pre-paid system was an attempt by the City to avoid non-payments on accounts due, and existed in poorer, predominantly black areas of the city; in comparison, wealthier, predominantly white areas did not have the system.[175]

The litigation was seen as an extension of other political moves to challenge the City's policy, including participating in consultations concerning the roll-out of the project and direct activism. This was hampered after the City obtained a "wide-ranging interdict"[176] curtailing this activism. "With this avenue of protest effectively closed off, the community turned to the option of rights-based litigation as a tactic … In doing so, they turned part of the struggle into legal mobilization – understood as the point at which a "desire or want is translated into a demand as an assertion of one's rights.'"[177] In the High Court, the applicants successfully claimed an amount of 50 litres per person per day; on appeal to the Supreme Court of Appeal, the applicants were similarly successful, but the court found they were only entitled to a free allocation of 42 litres per person per day.[178]

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[173] *Id.* at para. 27.
[174] A "stand" may be understood within the traditional property paradigm, also known as a lot, plot, or erf. However, it may also be understood in an extra-legal sense, and thus could include an informal settlement dwelling located unlawfully on private property, or a piece of land held communally and allocated to households based on an understanding agreed upon among members of the community.
[175] *See* Jackie Dugard & Malcolm Langford, *Art or Science? Synthesizing Lessons from Public Interest Litigation from the Dangers of Legal Determinism*, 27 S. AFR. J. HUM. RTS. 39, 42–45 (2011).
[176] *Id.* at 43.
[177] *Id.* (quoting Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 (3) AM. POL. SCI. REV. 690, 700 (1983)).
[178] In arriving at these amounts, Danchin notes that the High Court adopted the World Health Organization's Guidelines on Domestic Water Quality, Service Level and Heath, as well as an expert opinion of Dr. Peter Gleick, president of the Pacific Institute for Studies in Development, Environment and Security in Oakland, California. The Supreme Court of Appeal followed the expert testimony of a South African civil engineer with expertise in the development and transformation of water supply and sanitation

The Constitutional Court, however, took a far more deferential approach to the issue, applying the same reasonableness standard as in *Grootboom*, to rule that all the government was required to do was "to explain the choices it has made."[179] The fact that a minimum threshold of free water had already been set at a legislative level – at 25 litres per person per day – was sufficient to satisfy the Court that the policy was reasonable.

Mazibuko is an interesting case to conclude this sub-section because of how it represents both how the courts can be used as tools to stake a claim to the right to the city, and how they can conversely deny claims. The important element is the rights-based system which is able to balance competing demands in an overall fair manner, while retaining a sense of legitimacy when functioning as a mode of political citizenship. In this regard, *Mazibuko* is merely one example of how litigants have used the judicial process in South Africa as part of a broader political strategy to enact change, even if unsuccessfully.[180]

Viewing the right to the city through a legal lens is useful first because it shows how litigants can and do use the law to make and shape the city, and thus claim the right to the city. Second, it demonstrates how the right to the city can find tangible meaning through the development of existing rights. The right to the city gives legally-recognized rights a spatial dimension and assists in the development and understanding of the legal right. Legal rights themselves provide tangible meaning to the right to the city, and provide a judicial home for the right to the city, a foundation which in turn is able to strengthen the actual claim itself. In this way, we can understand the right to the city as an umbrella under which rights-based claims take place in a spatial setting.[181]

IV. Conclusion

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in South Africa. *See* Peter Danchin, *A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case,* EURO. J. INT'L L.: TALK! (2010).

[179] *Mazibuko* at para. 71.

[180] *See* STEVEN BUDLENDER ET. AL, PUBLIC INTEREST LITIGATION AND SOCIAL CHANGE IN SOUTH AFRICA: STRATEGIES, TACTICS AND LESSONS (2014).

[181] See also Thomas Coggin & Marius Pieterse, *Rights and the City: An Exploration of the Interaction Between Socio-Economic Rights and the City*, 23 URB. F. 257 (2012); Coggin & Pieterse, *supra* note **Error! Bookmark not defined.**, at 294.

This Article examined initiatives by states, their processes, and governance in facilitating claims to the right to the city. The Article looked first at the New Urban Agenda, an initiative by member states of the United Nations to reimagine the urban. It examined how elements of the right to the city can be seen within the New Urban Agenda and looked at arguments for why the right should not have been on the agenda. Ultimately the inclusion of the right could have acted as an important rallying call to perambulate the agenda. Nevertheless, its lack of recognition does not spell the death of the right to the city. On the contrary, the commitments member states have made aim to redress those negative actions which bring the right to the city to the fore in the first place.[182]

Second, the Article looked at aspects of the City Statute in Brazil as a way of showing how spatial injustices which bring about the right to the city can be redressed through legislation. Although the Article did not look at how or whether this translated into practice, from a legislative perspective the Statute clearly has the power to enact change. The Statute upends the traditional underpinnings of property law with instruments that prioritize the use value, rather than the exchange value, of land. This domestic example of a legislated right to the city shows that the commitments of the New Urban Agenda can mean something tangible; that the Agenda can go beyond developmental rhetoric and act as a tool which people can, and do, draw on in staking a claim to the right to the city.

The Article examined four cases in South Africa to show the usefulness of justiciable rights which litigants can actually use in staking a claim to the right to the city. Although sometimes unsuccessful, the existence of these rights within the framework of a transformative constitution, a strong public interest legal and activist sector, and a diverse judiciary facilitate a dialogue in which the complexities and competing visions of the city can be fleshed out and balanced.

In concluding, Purcell's caution is noteworthy regarding the attempt by global organizations like UN Habitat and UNESCO to conceptualize the right to the city merely

[182] *See* discussion *supra* Part II.

as part of a broader human rights framework.[183] This conceptualization may subvert the radical nature of the right, and encourages citizens to settle for simply "claiming more access to and control over the existing capitalist city, a biggest slice of the existing pie."[184] This does not do justice to the right to the city because it fails "to go beyond the existing city, to cultivate the urban so that it can grow and spread."[185]

Despite the aforementioned word of caution, the commitments made under the New Urban Agenda undoubtedly present a global effort towards making cities just, inclusive, and equal. These commitments present the opportunity for inhabitants to stake a claim in the city, challenging abuses of power by both private and public actors, redressing practices of spatial marginalization, claiming services and spaces for their economic livelihoods, and giving people a greater voice in the making and shaping of the city. In other words – to use those commitments made by member states in the New Urban Agenda in staking a claim to the right to the city.

[183] Purcell, *supra* note 74, at 141. Certainly, the fact that member states disregarded the terminology of the "right to the city" suggests a preoccupation with a sense of "unimaginative realism," which he argues (and I agree) "reinforces the existing hierarchies of power because it fails to challenge them." *See id.* at 151.
[184] *Id.* at 150.
[185] *Id*.