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From Housing to City: On the Possibilities of the Right to the City in South Africa and India

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ABSTRACT: India and South Africa face a housing crisis where millions of people are either homeless or live in grossly inadequate conditions exposed to the elements of nature and severe health and nutrition risks. The crisis affects people from vulnerable races, castes, religious communities and other disadvantaged groups more severely than others. This paper argues that (i) this crisis has a spatial context which is manifested in the production of grossly inegalitarian cities that has pushed these disadvantaged groups to the margins, and (ii) homelessness and underserved housing is not natural but a consequence of a history of state actions through laws, regulations and even judicial orders. The paper focuses on the notion of the 'right to the city'. Initially, an attempt is made to provide some content to this right which, I argue, could be understood in terms of (i) access to amenities in a city like schools, hospitals, market etc.; (ii) the right to be a participant in the decisions of the city; and (iii) the right to appropriate the opportunities and advantages of a city. While neither South Africa nor India recognises this right explicitly, both have a fertile constitutional jurisprudence on the right to housing. The paper takes housing jurisprudence as its point of departure and analyses the judgments of the Constitutional Court of South Africa and the courts in India from a 'right to the city' perspective. The analysis requires placing housing within a broader sociological and historical context and touches on the aspects of access, participation and appropriation. I argue that we should focus not only meeting the welfare-needs of disadvantaged groups but also on their wider citizenship-based claims to play a part in the cities in which they live which, importantly, also provides a response to historical injustices in both societies.

KEYWORDS: right to housing, right to the city, participation, corrective justice, India, South Africa

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I INTRODUCTION

'It is harder in 2013 to reverse the apartheid geographies than it was in 1994', claims the State of South African Cities Report,[1] pointing to a crisis that is as fundamental as it is comprehensive. Further, the report notes that unlike the Global North, urbanisation in African cities is characterised not by industrialisation, but by the 'urbanisation of poverty'[2] where the failure of the cities to provide a structural transformation to match the economic and demographic changes has left millions of denizens and migrants vulnerable and powerless.

The United Nations had estimated that over 100 million people have no place to live and over one billion people are living in grossly inadequate conditions.[3] In addition to this, the alarming increase in global eviction rates[4] around the financial crisis and other risks that evicted and homeless people are exposed to, we are looking at a crisis that is not only restricted to housing but is a product of grossly inegalitarian cities. This is exemplified by spatial inequalities visible in the differentiated patterns of housing. The poor and vulnerable are pushed to the underserved margins of the cities which makes access to resources unequal. While the growth of suburbs shifted the centre of the city itself, it left the existing dwellers who had settled and built their lives around serving the needs of previous city centres, helpless and disenfranchised as economic opportunities shifted to new centres. As will be explained, it would be incorrect to regard spatial inequalities as natural and inevitable, but an impoverishment actively brought upon by the policies of the state, and often aided by the judiciary.[5] The crisis of housing, eviction and locational inequalities, along with the laws that criminalise the homeless, reveal an important anomaly – denial of private shelter and exclusion from public space – that compels a deeper look into the processes that constitute a 'city'.[6]

[1] The State of South African Cities Report (2016) 48, available at http://www.socr.co.za/wp-content/uploads/2016/06/SoCR16-Main-Report-online.pdf.

[2] Ibid 24. The urbanisation of poverty is characterised by the lack of structural transformation of cities and consequent denials of a number of inter-connected human rights to the urban poor who characteristically reside in the margins of the town in underserviced housing. G Piel 'The Urbanization of Poverty Worldwide' (1997) 40 *Challenge* 58. Also, M Ravallion, S Chen, & P Sangraula 'New Evidence on Urbanisation of Global Poverty' (2007) 33 *Population and Development Review* 667: 'The negative externalities of geographically concentrated poverty and irreversibilities resulting from the costs of migration, which can mean that migrants to urban areas cannot easily return to their former standard of living in rural areas' means that urbanization, rather than being a harbinger of growth, is an 'unwelcome forebear of new sources of poverty.'

[3] Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, 2, UN Doc. E/CN.4/2005/48.

[4] S Soederberg 'Eviction: A Global Capitalist Phenomena' (2018) 49 *Development & Change* 286. In addition to this, studies have explored the link between eviction rates and suicide, where an evictee is over four times more likely to commit suicide than others, even if other suicidogenic factors are controlled. Also, Y Rojas & S Stenberg 'Eviction and Suicide: A Follow-up Study of Almost 22000 Swedish Households in Wake of Global Financial Crisis' (2016) 70 *Epidemiol Community Health* 409.

[5] G Bhan '"This is no longer the city I once knew": Evictions, the Urban Poor and the Right to the City in Millennial Delhi' (2009) 21 *Environment & Urbanization* 127.

[6] D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 8–9.

Despite being on the legal agenda at both global and national levels,[7] the right to housing has only recently become subject to normative analysis in academic literature.[8] While situating access to adequate housing in the landscape of the city has been a niche area of the urban studies and legal geography scholarship,[9] constitutional lawyers and comparativists have also not had much to say about this.[10] For nations with commonalities in their histories that enabled migration of constitutional ideas, there is little dedicated comparative study on the right to housing in India and South Africa, though there are individual contributions in adopting the right to the city framework to understand the adequacy of housing rights.[11] Curiously, India has formally opposed the inclusion of the right to the city in the draft New Urban Agenda (that will define the way in which cities worldwide are shaped over the next two decades)[12] even as India aspires to build 100 new 'smart cities'. This is partly due to the imperfect understanding of the legal meaning and implication of this right which distinguishes itself from other rights in its people-centric approach and partly as a result of a genuine scepticism about the democratic potential of this right amidst the need for rapid economic growth. This is in stark contrast with Latin American nations, for example, that have given legal recognition to this right.

The right to the city includes issues relating to access, opportunity, participation, and capability to exercise ones membership in the city. However, given that it has been invoked frequently in the contexts of evictions, displacement, homelessness, locational disparities and spatial justice, housing rights become an integral component of this right. Of course, one need not reside in the precise jurisdictions of a city to access it. While this right is still somewhat amorphous, part II of this article will try to provide a working conception of this right. This part (I) has two objectives. First, it describes the housing crisis that faces both the nations. Second, it explains the role of the state in bringing about that crisis, and this connection makes the linkages between the housing rights and the right to the city more explicit. It debunks the idea that the existing arrangements of the Indian and South African cities are natural. However,

[7] S Leckie 'The UN Committee on Economic, Social and Cultural Rights and Right to Adequate Housing, Towards an Appropriate Approach' (1989) 11 *Human Rights Quarterly* 522.

[8] K Adams 'Do we Need a Right to Housing?' (2009) 9 *Nevada Law Journal* 275. While Adams ultimately defends using the 'rights' framework to housing, he also notes the challenges that conception provides. See also B Goodchild 'Implementing the Right to Housing in France: Strengthening or Fragmenting the Welfare State?' (2003) 20 *Housing, Theory & Society'*86. See also, A Hudson 'Equity, Individualisation and Social Justice: Towards a New Law of the Home' in A Hudson (Ed) *New Perspectives on Property Law, Human Rights and the Home* (2004) 1. Hudson situates the individual's right to housing in private law of equity, trust, property law, and family law etc. using David Miller's theory of social justice that understands it in terms of rights, needs and desserts.

[9] J Gilderbloom *Invisible City: Poverty, Housing and New Urbanism* (2008); N Blomley, D Delaney & R Ford *Legal Geographies Reader: Law, Power and Space* (2001).

[10] L Weinstein & X Ren 'The Changing Right to the City: Urban Renewal and Housing Rights in Globalising Shanghai and Mumbai' (2009) 8 *City & Community* 407 is a comparative study, yet it concentrates primarily on regulations and policy instead of legislations and judgments.

[11] For the South African perspective, see I Turok and & A Scheba '"Right to the City" and the New Urban Agenda: Learning from the Right to Housing' (2018) *Territory, Politics and Governance*; T Coggin & M Pieterse 'Rights and the City – An Exploration of Interaction Between Socio-economic Rights and the City' (2012) 23 *Urban Forum* 257. From the Indian perspective, see M Zérah et al 'Right to the City and Urban Citizenship in the Indian Context' in *Urban Policies and the Right to the City in India: Rights, Responsibilities and Citizenship* (2011), available at http://unesdoc.unesco.org/images/0021/002146/214602e.pdf.

[12] See, 'Habitat III and Draft New Urban Agenda: The Contentious Clause' (3 September 2016), available at https://indianexpress.com/article/india/india-news-india/habitat-iii-and-draft-new-urban-agenda-right-to-city-3010794/.

given that this right to the city has not really found judicial recognition in either India or South Africa,[13] part III of the article begins with a detailed comparison of the right to housing in South Africa and India. The aim is to analyse the extent to which it is possible to find an implicit recognition of the right to the city through the interpretation of the right to housing in these jurisdictions. A regressive judicial order on the right to housing would also put fetters on the right to the city. Finally, this article concludes by taking stock of the developments that the courts of both the nations have made towards recognising a right to the city and the challenges that lie ahead for these two nations in their pursuit of creating smart and world class cities.

II CONCEPTUALISING THE RIGHT TO THE CITY

David Harvey, poignantly says,[14]

> The Right to the City is far more than the individual liberty to access urban resources: it is a right to change ourselves by changing the city. It is, moreover, a common rather than an individual right since this transformation inevitably depends upon the exercise of collective power to reshape the process of urbanization. The freedom to make and remake our cities and ourselves is … one of the most precious yet most neglected of our human rights.

The statement suggests two possible conceptions of this right, incremental and transformative. The incremental approach suggests that the right to the city is essentially a bundle of rights to access various amenities and resources a city has to offer. The transformative approach, on the other hand, makes the right to the city an existential and citizenship-based claim entailing consequences for an urban democracy in the light of significant changes in the general governance of the cities.[15] Succinctly put, the incremental approach defines it as a collection of rights *in* the city. The transformative approach takes this right to be larger than the sum of its parts.[16]

For understanding the transformative approach, Lefebvre is helpful. He saw this right as a cry and a demand of the inhabitants for 'sharing in the fullness of the urban life.'[17] He conceptualised the city as *oeuvre* or work in progress whose inhabitants not only make claims for inhabiting the city but also for appropriating the experience it has to offer and participating in the evolving forms of city life and cityscapes.[18] The transformative approach thus entails two types of rights:[19] (i) the right to participate (which includes exercising one's franchise and

[13] Interestingly, the High Court of Delhi recently engaged with the concept of the right to the city in a case pertaining to the eviction of 5 000 families of slum dwellers, the Jhuggi-Jhopri Colony of Delhi. *Ajay Maken v Union of India*, W.P. (C) 11616 of 2015, decided on March 18, 2019 ('*Ajay Maken*').

[14] D Harvey 'The Right to the City' in *Social Justice and the City* (Rev ed, 2009) 315.

[15] Surveying the literature on the right to the city and urban governance, Mark Purcell outlines three major shifts in urban governance which has increased the disenfranchisement of city people and denied them opportunities to appropriate the amenities and experience a city offers. These shifts are: (i) rescaling of urban governance; (ii) policy reorientation in favour of competition over redistribution; and (iii) transfer of several state functions to non-state or quasi-state body in shift of attitude from government to governance. M Purcell 'Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitants' (2002) 58 *GeoJournal* 99, 100–101.

[16] UNESCO – Right to City in the Indian Context, 2–3. The authors of this paper preferred to call the incremental approach as reformist and the transformative approach as radical. However, I believe that 'incremental' and 'transformative' better captures the core motivation informing the divide.

[17] H Lefebvre 'Right to the City' in E Kofman & E Lebas *Writings on Cities* (trans 1996). Also, Coggin & Pieterse (note 11 above) 259–260.

[18] Ibid.

[19] Purcell (note 15 above) 102–103.

agency in important collective decisions of urban life, and not merely participation in the state's decision-making); and (ii) the right to appropriate what the city has to offer (which not only includes the right of the inhabitants to physically access, occupy and use the urban space but also a right to 'produce' the urban space that meets the needs of the inhabitant). For Lefebvre, therefore, the use value of the city must trump the exchange value that commodifies it. A city viewed from the exchange value perspective appears as site for accumulation where private property rights trump other social concerns of existence. Contrarily, the use value perspective does not deny the importance of property rights but questions their primordiality over other concerns such as shelter, food and livelihood. It sees the city as a site of inhabitation instead. Prioritising use-value, thus, resists the preferential treatment of property rights of owners and emphasises the use-rights of the inhabitants. This radical conception may sometimes be disconcerting, for we are unsure what kind of city it would produce.[20]

A Concretising the right

The right to the city is a complex right. It combines legal and moral, formal and substantive, and individual and collective rights. Coggin and Pieterse argue that the right to the city is not reducible to a 'legal notion of a right, being something fairly stable, clear and precise, that can be consistently and predictably invoked, interpreted and enforced.'[21] The chaotic nature of this right makes it difficult for constitution-framers, legislators and policy-makers to lay out a definitive content of this right.[22] This paragraph briefly surveys how this right has been enunciated in legal instruments like legislation, charters and judgments, so as to arrive at a working conception of it. The World Charter for the Right to the City[23] provides a helpful elucidation of the normative content of this right. It defines the right to the city as 'the equitable usufruct of cities within the principles of sustainability, democracy, equity, and social justice.'[24] Further, the Charter states that this right is a collective right of all the inhabitants of the city, particularly the vulnerable and marginal groups. It enables the inhabitants to 'achieve full exercise of the right to free self-determination and an adequate standard of living.'[25] The Charter also states that the right to the city 'is interdependent of all internationally recognised and integrally conceived human rights.' The World Charter, echoing Lefebvre, highlights citizens' right to participate and appropriate. Not only does it provide for progressive realisation of all human rights including the right to clean environment,[26] it also stresses the democratic

[20] Ibid 100, 103.

[21] Coggin & Pieterse (note 11 above) 262.

[22] There have been recent attempts to lay down a constitutionally or legislatively protected right to the city. For example, the recently adopted Constitution of Mexico City in art 12 defines right to city as 'the full use and the full and equitable enjoyment the city, founded on principles of social justice, democracy, participation, equality, sustainability, respect for cultural diversity, nature and the environment.' Drawing from Lefebvre, the 2001 City Statute of Brazil, in recognising the social function of the city prioritises the 'use value of the city' over the exchange value. It also emphasises the democratic city management which is defined as 'a path to plan, produce, operate and govern cities subject to social control and participation.' The commentary is available at http://www.citiesalliance.org/node/1947.

[23] World Charter for the Right to the City (2005), available at http://www.righttothecityplatform.org.br/download/publicacoes/World%20Charter%20for%20the%20Right%20to%20the%20City.pdf .

[24] Ibid art I(2).

[25] Ibid.

[26] Ibid art I(6).

governance[27] of the city and the priority of its social function. The social function prioritises the use-value of the city over its exchange value by guaranteeing citizens the full usufruct of its resources and subordinating individual property rights.[28]

The European Charter on Human Rights in the City[29] lists principles and rights involved in the governance of cities. It provides for six principles, namely, (i) equal rights and non-discrimination;[30] (ii) effectiveness of public service;[31] (iii) transparency;[32] (iv) subsidiarity;[33] (v) solidarity;[34] and (vi) international municipal cooperation.[35] Based on these principles, the European Charter lays down the rights of the citizens. The right to the city provides inhabitants with conditions that allow them a sense of fulfilment from a 'social, political and ecological point of view, while assuming (their) solidarity duties'. It also lists, the 'right to political participation', where the residents not only have the right to represent, but also to access public spaces for meetings and gatherings and freedom of forming associations, expression and demonstration. It also provides that citizens should have the right to municipal social protection policies to be provided on a non-commercial basis.[36] The European Charter also provides for the right to 'harmonious and sustainable urban planning', which entails citizens' involvement for orderly development of cities that respects environment and heritage.

Both the European and the World Charter emphasise pluralism, non-discrimination and solidarity, and enjoin the state to enact suitable laws and policies towards realizing all the constituents of the right to the city. In fact, the 2001 City Statute of Brazil also emphasises the same principles. It provides instruments to the municipality for various forms of social intervention for free use of private property, tenure regularisation for informal properties, and stimulating urban development with redistribution of collective benefits of urbanisation. It secures the right to participate by mandating urban housing democratisation, legal aid and protection to vulnerable groups and creating avenues for referenda and plebiscites for popular decision-making.[37] Like the Charters, the City Statute also emphasises environmentally sensitive urbanisation. Following this law, the Brazilian Government established a Ministry for Cities.

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[27] Ibid art II(1).

[28] Ibid.

[29] The European Charter for Safeguarding the Human Rights in the City (2010)('European Charter'), available at https://ajuntament.barcelona.cat/oficina-no-discriminacio/sites/default/files/Carta%20Europea%20GB.pdf.

[30] The European Charter obligates local authorities to ensure that the rights under the Charter are equally available to all the residents of the city, without discrimination (ibid 4).

[31] The local authorities should ensure effective public service is adapted to people's needs. It should assess its service and also prevent situations of discrimination (ibid 4).

[32] Local authorities should publish their principles and the minutes of meetings in accessible manner so that people are aware of their rights and duties (ibid 4).

[33] The aim of this principle, the European Charter says is 'to ensure public services are accountable to the authority closest to ordinary citizens and, therefore, more effective.' (Ibid 4).

[34] The local authorities should work together with citizen organisation to foster solidarity networks among their inhabitants. (Ibid 5).

[35] This principle helps in sharing of knowledge among different municipal corporations across globe as far as possible. (Ibid 6).

[36] Other rights listed in the European Charter include, right to education, health, work, leisure, culture, decent housing, privacy and protection of family life (Ibid 6–12).

[37] 'The City Statute of Brazil: A Commentary' 95 ('Global Platform'), available at https://www.ifrc.org/docs/idrl/945EN.pdf.

The Global Platform for the Right to the City also provides a useful matrix to understand this right.[38] It identifies 'spatially just resource distribution, political agency (particularly for women and other marginalised groups) and socio-cultural diversity' as important pillars of this right. It lists the following components of this right: 'a city with inclusive economies, cultural diversity, quality public spaces, enhanced political participation, gender equality, inclusive citizenship, free of discrimination and sustainable.'[39] The document calls it a collective and diffused right,[40] like the right to environment and culture. This right not only includes intra-generational equity but also inter-generational equity. It views the city as commons, meaning 'all the inhabitants should have the capacity to equally access the urban resources, services, goods and opportunities of city life; and participate in the making of the city.'[41] This again reinforces and clarifies the transformational as well as access-based incremental aspects of the right to the city. It clarifies the transformational component by elucidating the right to participate in and appropriate the advantages of city.[42]

It could be observed that the incremental (right to access urban amenities) and transformative approaches complement one another.[43] The transformative agenda appeals to social and political movements from below while the incremental approach takes cognisance of institutional improvements required to enhance access to urban amenities. While the right to the city aggregates several existing human rights, it also adds an important dimension of spatiality[44] as it insists on the need to implement these rights and principles in 'cities and human settlements from an interdependent, interrelated and indivisible approach.'[45]

The Delhi High Court in a recent case concerning the forced eviction of 5000 slum dwellers endorsed the 'common good' conception of the city proclaimed by the World Charter.[46] It held that in the context of a right to housing and shelter it was important to note the growing recognition of the right to the city which in turn acknowledges the contribution of slum dwellers in the social and economic life of the city. The right to the city would regard it as important that the slum dwellers have the right to make use of the resources and opportunities of a city life. The right is violated when a healthy urban life of some citizens comes at the expense of indignities and deplorable conditions in which a large number of slum dwellers live. This reinforces the spatiality of injustices in the cityscapes.

[38] What's the Right to the City? Inputs for the New Urban Agenda, available at http://www.righttothecityplatform.org.br/download/publicacoes/what-R2C_digital-1.pdf.

[39] Ibid 2.

[40] Ibid 3.

[41] Ibid.

[42] Ibid 3, 9.

[43] UNESCO – Right to City in the Indian Context, 3.

[44] For explanation of the concepts of space and spatiality, see D Massey 'Philosophy and Politics of Space and Spatiality: some consideration' (1999) 87 *Geographische Zeitschrift* 1. Massey conceptualises 'space' as always a product of interrelations which is then predicated upon the existence of plurality: 'space' is constantly in the process of becoming through the material processes that are necessarily embedded in it (at 2). This enables us to change ourselves by changing the city, as Harvey says (Harvey note 14 above). The upshot of this is that, according to Massey at 3 '(there is) a parallel between the manner of conceptualising space and the manner of conceptualising entities/identities (such as political subjects) but also space is from the beginning integral to the constitution of those political subjectivities.' Given the dimensions of interrelations, plurality and becoming, Massey argues that space has always had an element of unpredictability or chaos (at 8–9). This, perhaps also makes the right to the city, as Coggin & Pieterse (note 11 above) argue, chaotic.

[45] Global Platform (note 38 above) 6–7.

[46] *Ajay Maken* (note 13 above).

The above discussion suggests a certain consensus that could help us formulate the initial content of the right to the city. A reasonable recognition of the right to the city would guarantee the right to self-determination and to participate in the decisions of the city and ensure access to amenities and advantages of the city on a non-discriminatory basis, besides creating inclusive and sustainable cities. As it includes the existing human rights within the context of spatial justice, the right to the city exemplifies the indivisibility and inter-dependence of human rights. The constitutions that encapsulate such integratedness could enable a robust construction of this right.[47] The constituents of the right to the city are exercised in the context of spatiality. The space and the diverse people that constitute it co-exist. The inhabitants not only relate with each other, they also define their relationship with the space they inhabit, which provides them finite resources and opportunities for their functioning. Hence, the idea of what it means to live in a certain city is a constantly evolving one, depending upon where the people stood with respect to each other and their city. These rights are therefore exercised both collectively and relationally. Further, the evolving nature of the urban space requires that the meaning of these rights require constant re-examination and in the light of the history and sociology of a space, these rights should also be interpreted purposively.[48]

Nonetheless, one generally accesses the city through one's house and/or en route to one's work (broadly construed).[49] In fact, in *Ajay Maken*, the court calls the right to the city an 'extension of the right to housing'. Therefore, the following paragraph discusses the relationship between the city and the housing.

B The right to the city and the right to housing

The genesis of the right to the city movement, the 1871 Paris Commune, emphasised residence as the basis for urban citizenship and was fundamentally moved by a crisis of habitation that raised issues of citizen participation, and a more equitable control of urban infrastructure, especially housing.[50] Holston notes that urban citizenship as the ground for the right to the city has reappeared relatively recently, not in Europe, but rather with the 'intense urbanisation of the Global South.' One feature of this urbanisation is the persistent housing crisis.

The Special Rapporteur on the Right to Adequate Housing notes – 'Housing is the basis of stability and security for an individual or family. The centre of our social, emotional and sometimes economic lives, a home should be a sanctuary; a place to live in peace, security and

[47] Coggin & Pieterse (note 11 above) 262.

[48] See, A Barak 'Purposive Interpretation in Law' (2005). Barak uses Gadamers's work on Hermeneutics to explain purposive interpretation. He rejects the synchronic approach of legal formalism and emphasises the historical-evolutionary and contextual meaning of law. This makes the purposive approach more suitable to interpreting the right to the city. A sociological and historical understanding of the context preceding and prevailing when the law was enacted could serve to determine the purpose behind the enactment.

[49] This 'partitioned' view of city as a defined and contained place is resisted by Massey (note 44 above at 8). This would mean that one's right to the city begins not only upon entering the jurisdictions of the city but from before. This alludes to Lefebvre's idea of city that is lived and experienced (see, Purcell note 15 above). This means that the locations of centre and periphery need to be read more critically.

[50] J Holston 'Housing Crises, Right to the City and Citizenship' in E Murphy & N Hourani (eds) *The Housing Question: Tensions, Continuities and Contingencies in the Modernist City* (2013) 255, 259. Holston writes: 'In the case of the city, the right to housing is one of the substantive aspects of urban citizenship, part of the bundle of rights that belong to urban citizens.'

dignity.'[51] The Special Rapporteur prioritises the use value of housing over the exchange value, by explaining it as a right over a commodity. It is emphasised by juxtaposing forced eviction and uprooting of people from their communities with making space for luxury living and corporate real estate investments. This has made even basic housing in cities unaffordable for millions of people.[52] This article takes the housing right as the point of departure to discuss the more ambitious right to the city. Insofar as housing rights are concerned, drawing from the above analysis, the right to the city dimension includes questions of affordability in the context of finance deployed as a proportion of income and debt towards housing,[53] public participation in urban governance including the questions of (re)settlement and displacement,[54] barriers to access and mobility, non-discrimination in housing, and access to amenities and transport, among other things.

In terms of international law, art 11 of the ICESCR enjoins state parties to recognise the right to an adequate standard of living which includes food, clothing and housing and continuous improvements in living conditions. General Comment No. 4 expands the content of the right to housing to include 'the right to live somewhere in secure, peace and dignity.'[55] Despite the inherent contextuality of 'adequate housing', the General Comment has established certain baseline factors[56] such as legal security of tenure; availability of infrastructure and amenities; affordability; habitability;[57] accessibility (particularly from the standpoint of disadvantaged groups); location[58] and cultural adequacy.[59] General Comment No 4 underlines the indivisibility and integrity of civil and political rights and socio-economic rights and mandates the state parties to ensure that certain provisions are immediately secured (particularly those which require the state to exercise a duty of avoidance and encourage self-help practices among people).[60] While the significance of housing among other human rights, some of which may

[51] Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, available at https://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx.

[52] Ibid. The Special Rapporteur notes, 'In developing economies, often informal settlements or long existing neighbourhoods located in 'prime land' are subject to evictions and displacement to make way for speculative investment. Residents are often rendered homeless, replaced by luxury housing that often stands vacant.'

[53] C Berger 'Beyond Homelessness: An Entitlement to Housing' (1991) 45 *University Miami Law Review* 315, 316–317). See also, CESCR General Comment No. 4 – The Right to Adequate Housing: Article 11(1) of the Convention, E/1992/23 (66th Session, 1991)('General Comment No. 4'). Even the general comment notes that 'personal or household financial costs associated with housing should be at such level that attainment and satisfaction of other basic needs are not threatened or compromised.' (Para 8) In the same vein, tenants should be protected from exorbitant rent levels.

[54] AK Vaddiraju 'Urban Governance and the Right to the City' (2016) 51 *Economic & Political Weekly* 21.

[55] General Comment No. 4 (note 53 above) 2–3.

[56] See also, General Comment No. 3: The Nature of States Parties' Obligations (art 2, para 1 of the Covenant), 14 December 1990, E/1991/23. The Covenant must be interpreted to establish 'minimum core' obligation for every socio-economic right that the state parties must endeavour to achieve. However, even the 'minimum core' is context- dependent. General Comment No 3 only seems to enjoin the state to establish certain baseline obligations with respect to rights listed in the Covenant.

[57] See, WHO *Health Principles of Housing* (1989), available at http://apps.who.int/iris/handle/10665/39847. Housing is adequate when it promotes the physical and mental wellbeing of its inhabitants.

[58] Housing should be located where the residents can access livelihood, health care, schools, child care and other social facilities.

[59] Modern technologies of housing should be culturally sensitive and the provision of housing facilities should ensure that the expression of cultural identity is promoted and not sacrificed.

[60] General Comment No. 4 (note 53 above) 4–5.

pertain to the right to city, is acknowledged, the approach adopted in the General Comment No 4 remains state-centric, even as it briefly alludes to the 'duty of avoidance'. The right to the city envisages horizontality[61] in the enjoyment of these rights. Under the right to participate in and appropriate the 'usufructs of the city',[62] as discussed in the previous paragraph, there is a clear recognition of individual and collective agency and responsibility.[63] The state-centric approach does not appreciate the need for direct participation of people in the major decisions regarding their location and engagement with the city, including the right to housing.[64] The stories of displacement and resettlement that arise during developmental projects, including the creation of new urban and business spaces, re-inforce scepticism about the approach that relies wholly on a state dispensation.[65] The right to the city calls for understanding the relationship between the right to participate and the right to appropriate as well as the incremental and transformational approaches, discussed above. In a sense, the right to the city is, as Baxi notes, a 'right to struggle for maintaining critical social solidarities.'[66]

The paragraphs above have laid the groundwork for the content of the right to the city through its philosophy and legal recognition, and provided justifications for starting with the right to housing. The following paragraphs contextualise the above discussion. I start with

[61] Horizontality changes the conventional understanding where human rights laws placed duties on the state to protect and fulfil the human rights of individuals. Under this understanding human rights are vertically aligned. Under the horizontal conception, the private members as well as corporations have obligations to protect and fulfil the human rights of fellow members. See, JH Knox 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1.

[62] The 'usufructs of the city' would mean the resources and other advantages made available by the city for the use and benefit of its inhabitants. They could include amenities, a city life, social and economic opportunities, neighbourhood, access to schools and hospitals, etc.

[63] The idea of agency and responsibility in the right to the city, as expounded in Lefebvre (note 17 above), Harvey (note 14 above), Purcell (note 15 above) and Massey (note 44 above) can be understood as coming from the existentialist philosophical tradition. For example, see JP Sartre *Existentialism is Humanism* (1977).

[64] One example of perils of state-centric approach is noted by Chris de Wet in the context of development-based displacement, 'when it comes to upholding the rights of resettled people vis-à-vis their government, the state is both player and referee', C de Wet 'Economic Development and Population Displacement: Can Everybody Win?' (2001) 36 *Economic & Political Weekly* 4637, 4640–4641. The need for democratic participation is stressed in failed resettlement projects: 'The result is that resettlement, which should involve the planned movement of people in such a way that provision is made for sustainable livelihoods in the new area, tends to be reduced to simple relocation, that is, the actual movement of people, whereafter they are largely left to fend for themselves.' (4641). Bhan notes similar issues with a state-centric approach when displacement of people can be more internal to the city, especially when people in informal housing are moved from one settled part of the city to re-settle in another (Bhan note 5 above).

[65] See also *Shantistar Builders v Narayan Khimalal Totame*, (1990) 1 SCC 520 ('*Shantistar Builders*'). Here the members of poorer sections of the society challenged the permission granted by the Government of Maharashtra, exempting the land under the Urban Land Ceilings Act in the favour of a builder on the condition that he use it to make 17 000 tenements for the poorer section. The builders had sought to increase the price of these houses. In Mumbai the government sought to remove slums and allot the vacant land to private builders for construction of multi-storeyed tenements while allotting some of these apartments to families that lived in slums in that area. Gradually, the private builders were given further exemptions that allowed them to increase the prices on these houses given the ever-increasing demand for houses in Mumbai city. Weinstein & Ren (note 10 above) posit that critical social solidarities among citizens and civil society have ensured that the government was challenged whenever it sought to remove slum dwellers. Emphasising their scepticism with a state-centric approach, they contend that democratic participation ensured that the government was forced to provide alternate housing or was at least challenged in Mumbai, unlike Shanghai.

[66] *Ajay Maken* (note 13 above) 52–53.

a brief discussion on the crisis of habitation in India and South Africa before proceeding with evaluating the extent to which there is constitutional recognition of the right to the city through housing rights.

C The crisis of habitation

The Supreme Court of India, observing the crisis of homelessness, noted that the 'destitute in urban areas continue to suffer without shelters.' Further, '[in spite] of the availability of funds and a clear mechanism through which to disburse them, we see an extremely unsatisfactory state of affairs on the ground.' This is despite the 'continuous monitoring of the matter' by the court itself.[67] The court went on to constitute a committee to provide recommendations to the central and state governments to ensure at least temporary shelters for the urban homeless. The 2011 Census of India puts the number of homeless people at 1.77 million people,[68] while civil society experts believe that this is a gross underestimation. They peg the number at around three million.[69] Consider that in 2017, over 1 600 people died in India due to exposure during extreme weather conditions.[70] They lived not in 'buildings or census houses' but 'in the open on roadside, pavements, in Hume pipes, under flyovers and staircases, or in the open in places of worship, *mandaps*, railway platforms, etc.'[71] The absence of a dedicated constitutional provision and moreover a national-level framework law effectuating housing rights has been a matter of concern.[72] The Universal Periodic Report Review noted that the national urban housing shortage was projected at 34 million units in 2011. It notes the failures of policies in ensuring security of tenure, proper resettlement, prevention from forced eviction, and coping with frequently occurring disasters. The review noted with concern that housing deficits need to be tackled at a structural level, and the 'smart cities' project should not result in forced evictions and segregation. Yet, it was reported that in 2017 government authorities demolished over 53700 homes and evicted around 260 000 people for reasons such as 'city beautification', 'slum-free city', organizing mega-events, and 'development' projects. The report says that in most cases, 'the state has not provided resettlement; where provided, resettlement is largely inadequate. Forced evictions are thus contributing to a rise in homelessness.'[73]

[67] *ER Kumar v Union of India*, W.P. (Civil) no. 55/2003 (Judgment delivered on 11 November 2016).

[68] 'The Human Rights to Adequate Housing and Land in India: Report to the United Nations Human Rights Council for India's Third Universal Periodic Review', Joint Stakeholders' Report submitted by Housing and Land Rights Network 6, available at https://www.upr-info.org/sites/default/files/document/india/session_27_-_may_2017/js16_upr27_ind_e_main.pdf.

[69] Ibid.

[70] 'Over 1600 died in India due to extreme weather conditions in 2016' (16 January 2017), available at https://www.hindustantimes.com/india-news/over-1-600-killed-due-to-extreme-weather-patterns-in-2016/story-ZXToWjowatrEYk81af2V4H.html .

[71] Definition of 'houseless households' according to Census 2011, available at http://censusindia.gov.in/Data_Products/Data_Highlights/Data_Highlights_link/concepts_def_hh.pdf.

[72] Factsheet - Universal Periodic Report 2017 – India, 3rd Cycle: Right to Adequate Housing, available at https://www.upr-info.org/sites/default/files/document/india/session_27_-_may_2017/wghr_india_2017_-_full_set_fact-sheets.pdf.

[73] 'Forced Eviction in India 2017: An Alarming National Crisis', available at http://hlrn.org.in/documents/Forced_Evictions_2017.pdf.

Unlike India, South Africa provides a constitutional guarantee in the form of a 'right to access to adequate housing.'[74] Yet, the South African Human Rights Commission notes that 'the country continues to face significant challenges in providing access to adequate housing to poor and vulnerable persons.'[75] The Census suggests that even though the percentage of people under 'informal dwelling' has declined over time, the absolute number has increased and stands in excess of two million.[76] The South African Human Rights Commission laments that existing policies fail to adequately address the concerns of a variety of people, although 'mechanisms are available for ensuring that even the most destitute of individuals are accommodated, their needs are not adequately addressed.'[77]

While homelessness, as discussed above, is a critical concern in both places, Berger also draws attention to a much more widespread phenomenon he calls 'housing indigency', which concerns grossly unmet housing needs.[78] Homelessness and housing indigency make people vulnerable not only to the elements of nature, they are also susceptible to health and nutrition risks.[79] They lack access to the 'basket of goods' necessary to meet accepted standards of living that disables them from participating in social and political life of a city and, in that sense, they become disenfranchised.[80] 'When one can no longer inhabit a public space, have one's possessions and shanty towns (home, by some definitions) burned or bulldozed, be arrested for one's status rather than a crime (hence signalling a loss of civil rights), and only exercise political power with extreme difficulty, one cannot be said to be a citizen.'[81] Homeless persons are also rendered powerless as they are excluded from democratic decision-making processes of the city that produces such exclusionary laws and regulations. In that sense, they are merely the recipients of decisions with a rather limited voice in the politics that would ultimately determine their destinies.[82] This powerlessness is not an individual problem, but a politico-economic one.[83] It is felt in the politico-economic process underway in both India and South Africa, which has influenced not only the consumption habits of people, but also the spatial patterns of their cities. These countries are witnessing a burgeoning consumption-oriented

[74] Section 26 of the Constitution of South Africa declares a universal right of access to adequate housing. It sets up a baseline against forcible evictions while it mandates the government to progressively realise this right through legislative and other measures.

[75] *The South African Human Rights Commission Investigative Hearing Report: Access to Housing, Local Governance and Service Delivery*, 9 (2015)('SAHRC Report').

[76] Community Survey 2016, Statistics South Africa, available at http://cs2016.statssa.gov.za.

[77] SAHRC Report (note 75 above) 10.

[78] Berger (note 53 above) 316–317. In fact, in 1990 the UN noted that while there are about 100 million homeless people worldwide, the population of those inadequately housed could be over a billion.

[79] Given that there are overlapping causes for hunger and homelessness (including lack of affordable housing), unemployment and poverty, it is likely that they would tend to have similar socio-economic profiles as well. The WHO *Health Principles of Housing* (1989) lists eleven basic principles that establish a relationship between housing environment and health of inhabitants.

[80] T Walsh & C Klease 'Down and Out? Homelessness and Citizenship' (2004) 10 *Australian Journal of Human Rights* 77, 80. The article uses TH Marshall's citizenship theory. It keeps 'equality of status' at the centre to argue that homeless people, due to denial of material goods and access to social and political life (basket of goods), experience a sub-citizen existence. It departs from the formal-legal idea of citizenship to a more social-functional concept and includes all things that community members expect the government to secure – forming the basis of an implied social contract (Ibid 81).

[81] K Arnold *Homelessness, Citizenship, and Identity: The Uncanniness of Late Modernity* (2004) 1–2.

[82] I Young 'Five Faces of Oppression' in *Justice and Politics of Difference* (1990) 39.

[83] Arnold (note 81 above) 2.

middle class and an expanding market. Even as the market is presented as a panacea for several socio-economic problems that have historically gripped these states, the obsessive focus on the market and middle class has rendered the people with unmet housing needs invisible within the dominant political culture and public spaces. Fernandes calls this 'invisibilisation' a result of deliberate political choices – the 'politics of forgetting'.[84] The politics of forgetting is manifested in laws that criminalise begging, squatting and panning, and regulations that spatially reorganise the city into zones and push the poor away to the peripheries. These state actions targeted at the poor render their basic subsistence and existence precarious without the authorities making any effort to reach out and engage with them. This exclusion and denial of agency, Arnold argues, has an identity dimension as well.[85]

A clear example of the kind of politico-economic decision-making discussed above, is the recent trend of building 'smart' or 'world class' cities. This idea is presented as a new twenty-first century utopia that would integrate the urban with digital planning, and solve the problems of urbanization and sustainability.[86] However, the SAHRC notes that this 'world class city' narrative has resulted in preference for private investments in the land situated close to the economic hub over the needs of the poor, thus shifting them to the outskirts of the city, removed from access to economic opportunities.[87] In India, the 'smart city' plan is being canvassed with much vigour. It envisages significant foreign and private investments. It requires deliberation as to how this metamorphosis affects the dynamics and demographics of a city, and how the disadvantaged areas shall be included in the decision-making on the distribution of access to the resources of such cities.

To summarise, the claim of people with unmet housing needs, invoke issues of both economic and national identity manifested in an extreme form of marginalization and a feeling of uprootedness that renders them distant from the politico-economic mainstream. Moreover, the urban space is patterned by different social categories. The rich and poor neighbourhoods are located distinctly apart. Within a neighbourhood there are dominant races and castes. 'The divisions in urban space are seen to both reflect and reinforce existing social and structural divisions in society.'[88] These social boundaries are objectified in social difference, manifested

[84] L Fernandes 'Politics of Forgetting: Class Politics, State Power and the Restructuring of Urban Spaces in India' (2004) 41 *Urban Studies* 2415.

[85] Arnold (note 81 above) 2–4. Arnold argues that homeless persons are subject to stereotypes and ideological constructs. As a matter of economic identity, 'homelessness represents the extreme case of this economic marginalization and thus is worth exploring for what it tells us about political economic norms, the status of democracy, and the deployment of prerogative power in the modern nation-state.' (Ibid 3) As a matter of political identity, Arnold argues that homelessness is an experience of uprootedness. It results in such asymmetric power dynamics that homeless persons experience exclusion from the modern nation-state. (Ibid) The brute power of state that is unleashed on homeless persons through laws, zoning regulations and prerogatives for cleaning a city emphasises their 'othering' and disenfranchisement. (Ibid 6).

[86] A Datta 'New Urban Utopias of Post-Colonial India: Entrepreneurial Urbanization in Dholera Smart City, Gujarat' (2015) 5 *Dialogues in Human Geography* 3. Analysing the disjuncture between the speed in investments and the persistent local protests, Datta argues that the fault-lines of Dholera, the first Indian smart city, are 'built into its utopian imaginings, which *prioritises urbanization as a business model rather than a model of social justice*.' (emphasis supplied). This reflects prioritising of exchange value over the use-value of the city and a dilution of the social function of the city emphasised by the World Charter and several other documents and reports on the right to the city discussed above.

[87] SAHRC Report (note 75 above) 9.

[88] L Joseph 'Finding Space beyond Variables: An Analytical review of Urban Space and Social Inequalities' 32-38, available at https://escholarship.org/content/qt3tz160nq/qt3tz160nq.pdf.

in unequal access to and distribution of resources, amenities and other usufructs of the city.[89] The right to the city, therefore, is not only a redistributive demand for shelter and access to amenities, but alongside it, it is a substantive recognition-based claim for citizenship. This claim addresses not only the immediate loss, but is rooted firmly in the discursive processes of history, where the dominant groups through the legal and political apparatus have determined the location and access of the disadvantaged groups in and to the city.

D The right to the city and history

While Lefebvre saw industrialization and the advent of capitalism as the point of departure in his analysis of cityscape,[90] the more recent works credit it to the rise of global capitalism and emerging discourses on modern, clean and smart cities.[91] The turn from cities seen from their 'use value' to the instruments of 'exchange value' heralded by industrialization found impetus in the rise of global capitalism. Harvey notes that this shift has not only created new infrastructure, but also effected a radical transformation in lifestyles and a strong affinity for property rights.[92] Illustrating the material social change that urbanization brought in South Africa, Alan Mabin notes that '[the] pressures of land loss, military exigency and a growing commercialization of exchange relationships rendered both individuals and whole communities susceptible to involvement in the growing wage-labour economy of the towns by the 1850s.'[93] Further, as the imperial state expanded, most people were deprived of independent control of what they saw as *their* land, even as they lived there, as they inevitably sent one or more of their family members to participate in the urban economy. The land, divided into reserved and non-reserved lands, saw the African population falling through the cracks and settle as squatters or tenants. While this phenomenon was observed most glaringly in the non-reserved parts, it was also visible in the reserved areas.[94] Modernity brought 'betterment' of agricultural communities and exclusivity which created a large landless population that inevitably stayed in miserable settlements and sent their members to take part again in the urban economy. The inadequate urban policy and unfulfilled promise of housing, along with apartheid ideology, resulted in mass and brutal evictions and racialised zoning. These overcrowded settlements suffered from a shortage of resources, denial of access to healthcare and widespread unemployment. Further, laws like the Prevention of Illegal Squatting Act made the very existence of an African landless population a crime. Therefore, Dhiru Soni states that '[the] housing question in South Africa, especially for blacks, pervades their very existence: who they are, what they are, and where they

[89] Ibid at 32.

[90] Lefebvre (note 17 above) 66–85.

[91] Harvey (note 14 above); Fernandes (note 84 above); A Sugranyes & C Mathivet (eds) *Cities for All: Proposal and Experiences towards the Right to the City* (2010).

[92] Harvey (note 14 above) 319.

[93] A Mabin *Dispossession, Exploitation and Struggle: an Historical Overview of South African Urbanization* in DM Smith (ed) *The Apartheid City and Beyond: Urbanisation and Social Change in South Africa* (1992) 13. Mabin notes that migration from villages to towns pre-dates colonization. However, with the growth and exploitation of the diamond industry presided over by imperial forces, the cityscape and social relations, particularly around Kimberley changed rapidly and drastically.

[94] Ibid. 14–15.

stay… Housing, therefore, becomes an indicator and a potent symbol of the shifting power relations between classes and within different sectors of capital.'[95]

Indian cities have historically been segregated along the lines of caste and religion, which were reinforced by colonialism.[96] Despite being seen as emancipatory spaces of opportunities for Dalits, whose influx into the cities has grown by more than 40 per cent between 2005 and 2015,[97] the urban localities tend to arrange themselves along caste and religious lines. Jodhka, in his field study on Dalit entrepreneurship notes that since most of them started with limited means, they ran small grocery shops which were located in Dalit residential areas. Since people in town knew about their Dalit origin, they would not provide them with space in their shops for rent, despite the constitutional promise of the abolition of untouchability.[98] In fact, a relatively recent study shows that identity-based spatial exclusion is still rampant even in the big Indian cities.[99] The trends of rising spatial exclusion is not limited to caste but also relates to religious minorities, particularly Muslims, in medium to large cities saddled with histories of communal violence.[100] Discussing the exclusion of Muslim women from access to a city life, Sameera Khan says that this is closely linked to the exclusion of Muslims as a whole from the mainstream cultural, political and social fabric of Mumbai, including access to mixed housing.[101] Further, she observes that while Muslims have historically lived in community-based enclaves in Mumbai, the communal riots of 1992–1993 pushed a sizeable number of them, particularly the poorer ones, who had lived in mixed housing to these enclaves. The spatial reorganization was followed by relative barring of Muslims from economic and business ties in the heterogeneous parts of the city. This experience has parallels with the experiences of Dalits as well. The ghettoization of minorities and vulnerable groups ranges from stark to subtle, but their ability to participate in the everyday production of the city and appropriate

[95] D Soni 'Apartheid State and Black Housing Struggle' in DM Smith (ed.) *The Apartheid City and Beyond: Urbanisation and Social Change in South Africa* (1992) 52.

[96] P Heller & P Mukopadhyay 'State-produced Inequality in an Indian City' (2015) 672 *SEMINAR* 51, 52.

[97] N Sahoo 'A Tale of Three Cities: India's Exclusionary Urbanisation' (2016), available at https://www.orfonline.org/wp-content/uploads/2016/09/ORF_IssueBrief_156.pdf.

[98] S Jodhka 'Dalits in Business: Self Employed Scheduled Castes in North West India', (2010) 45 *Economic & Political Weekly* 41, 43–44. The post-1991 economic policy entailed growth of private sector and the retreat of the state from most economic activities. While the Scheduled Castes (Dalits) benefitted from quotas in public employment, there are no quotas in the private sector. There were Dalit entrepreneurs before 1991 too, but the new economic policy compelled them to look for jobs in the private sector or self-employ themselves to participate in the urban economy. Thus, significant numbers of Dalits migrated from rural areas towards the urban areas. However, the spatial distribution of residences manifested in caste-based ghettos and colonies. Migration also helped a small number of them to 'hide' their caste identities, yet where people knew of Dalit origins of a family, the identity itself became barrier to entrepreneurial opportunities in terms of finding a place to start a business.

[99] P Sidhwani 'Spatial Inequalities in Big Indian Cities' (2015) 50 *Economic & Political Weekly* 55.

[100] Sahoo (note 97 above) 2.

[101] S Khan 'Negotiating the Mohalla: Exclusion, Identity and Muslim Women in Mumbai' (2007) 42 *Economic & Political Weekly* 1527. Mohallas are the interior neighbourhoods of a city dominated by a community. The question Khan explores is whether living in these Mohallas dominated by their own community (Muslims) has a bearing on women's spatial mobility. Drawing from an historical and ethnographical study, Khan invites us to look at intersections of class, gender and religion to have a more holistic understanding of this exclusion. The article also notes the role of 1992–1993 communal riots in ghettoization of Muslims. These patterns of social inequality mapped onto the spatial inequalities could be seen in other important cities of India too. See R Susewind 'Muslims in Indian Cities: Degrees of Segregation and the Elusive Ghetto' (2017) 49 *Environment & Planning* 1286.

its advantages is severely constrained, which reinforces the confluence of identity-related issues with issues of access and distributive justice. Besides the caste and religious identities, the economically weaker sections of society also reside in cluttered housing or slums, generally in the peripheral or the neglected interior of the city. Given the irregular and informal state of their housing, they are often subjected to evictions and displacement under the guise of law and planning. The residential clustering, whether in the form of ghettos, enclaves or slums, blends with another urban group because different ascribed and acquired identities may overlap: for example, religious minorities, backward castes (ascribed) and economically backward (acquired) identities could overlap.[102] Jaffrelot and Gayer, studying the ghettoization of Muslims in India, outline the following characteristics to determine a ghetto: (i) element of *social/political constraint* in the housing options of a given population, (ii) class and caste *diversity* which regroups individuals on the basis of ascribed identities, (iii) the *neglect* of these localities by the state authorities; (iv) *estrangement* of these localities and their residents from the rest of the city due to lack of transport, jobs and access to public spaces; and (v) a subjective *sense of closure* these residents feel from the objective patterns of estrangement from the city, to study the residential clustering in major cities of India.[103] In crucial ways, this spatial relegation, therefore, is both an outcome as well as a cause for the denial of the right to participate in and the right to appropriate the advantages of the city.

The experiences of both nations suggest that unequal distribution of housing, transport, water, sewage and such amenities necessary to access the city is not residual, but is produced through state actions.[104] Heller and Mukopadhyay, writing in the Indian context, list several state actions such as deliberate under-planning of residential spaces that creates extreme dependence on local political power-wielders. As a result, provision of basic housing and attached amenities to access the city is ad hoc and subject to significant transaction costs. The public investments at the cost of demolition of several such unauthorised colonies often benefit the richer population through investment in specific transportation accompanied with the neglect of others.[105] Thus, 'the state first crafts a legal and regulatory framework to impact the poor disproportionately; it then builds on this framework to restrict quality service delivery to a small group of citizens and finally, it perpetuates these differences by making investments that primarily benefit the better-off.'[106] Heller and Mukopadhyay believe that this represents not only a denial of basic human capabilities, but importantly, the negotiated existence has a deleterious effect on local democracy; and the gross spatial inequality in delivery of basic entitlements may possibly cause the excluded settlements to harden into ghettos.[107]

[102] Susewind argues that it is not only the place of residence, but multi-level structural processes whereby people are selected, thrust and maintained in these locations, and the culture they develop therein, that is critical for studying urban marginality. This suggests the inextricability of history and sociology for studying the right to the city. (Ibid 1288–1289).

[103] As quoted in, Susewind (note 101 above) 1289–1290.

[104] Heller & Mukopadhyay (note 96 above) 52. While the authors restrict their study to Delhi, there are reasons to believe that their findings would be true for many other medium to large cities in India.

[105] Ibid 52–54. See also, P Heller, P Mukopadhyay, S Banda et al, 'Exclusion, Informality, and Predation in the Cities of Delhi: An Overview of the Cities of Delhi Project' (2015), available at https://www.patrickheller.com/uploads/1/5/3/7/15377686/cities_of_delhi-overview.pdf.

[106] Ibid at 54.

[107] Ibid. Additionally, the socio-economic profiling of such colonies and communities would suggest that they primarily house the historically underserved population groups including Dalits, Muslims and migrant labourers.

Part II has sought to provide a broad understanding of the right to the city and has suggested why the issue of homelessness and housing indigency could be understood from a wider right to the city framework. It has also argued that an inherently dynamic notion of the right to the city would study the sociological and historical process which uncovers the role of the state in marginalization of disadvantaged groups to the peripheries of the city, denying them access to amenities, opportunities and advantages offered by a city. Part III will trace the housing rights jurisprudence of South Africa and India, and analyse them from the perspective of the right to the city.

III FROM HOUSING TO CITY: CONSTITUTIONAL RECOGNITION OF A RIGHT

Though neither country recognises the right to the city in their constitutions, both nations engage in robust constitutional jurisprudence in the domain of civil-political and socio-economic rights that provide important steps towards recognition of this right.

A South African position

The South African Constitution contains a range of human rights, including civil and political rights, socio-economic rights and collective rights, partly aimed at correcting the wrongs of apartheid. The Constitution also enshrines the right to property. However, this right can be restricted for land reforms and redistribution to correct past racial discrimination.[108] The Constitution holds the values of dignity, equality and non-discrimination to be central. If the right to the city is considered an ensemble of various rights that would enable a resident to enjoy access to various amenities of the city in a non-discriminatory manner, the Constitution has the resources effectively to recognise it. The right to the city has other features as well which could be recognised within the South African framework, such as democratic participation, use of public transport, priority of the use value of a city over its exchange value, and regarding the city as a common good.

The South African constitutional jurisprudence appears to adopt a more sympathetic approach to the right to housing in comparison to India.[109] For example, in the *Grootboom* case, the Constitutional Court noted that the causes of unmet housing needs that compelled people to occupy land lay in the apartheid regime. Noting the state complicity, the Court described the way in which the state had engendered an 'apartheid cycle', which 'was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals.'[110] Inevitably, people had to live in appalling conditions on the encroached lands. The post-apartheid state too failed to provide them with reasonable housing despite being waitlisted for seven years. Hence, people chose self-help over waiting for the allocated low-cost housing by the state.

[108] Constitution of the Republic of South Africa, 1996 s 25.

[109] A Pillay 'Revisiting the Indian Experience of Economic and Social Rights Adjudication: The Need for Principled Approach to Judicial Activism and Restraint' (2014) 63 *International & Comparative Law Quarterly* 385, 390–391.

[110] *Government of Republic of South Africa v Grootboom* [2000] ZACC 19, 2000 (1) SA 46 (CC)('*Grootboom*')(per Yacoob J.)

Section 26(2) of the Constitution requires the government to 'take *reasonable* legislative and other measures, within its available resources, to achieve the progressive realization of this right [to housing].'[111] The *Grootboom* case, based on the right to housing, was significant from a norm-making perspective. The Court disapproved self-help over state provision, yet it was sympathetic to the situation of the occupiers.[112] The judgment emphasised the indivisibility and inter-relatedness of rights and interpreted the constitutional text by keeping the context central. Further, it explained the test of reasonableness to include an evaluation of the validity of state action such that 'housing problems [are considered] in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme.'[113] The Court proceeded to analyse the housing policy from this reasonableness perspective and held that while considering reasonableness, it 'will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.'[114] This perspective accepts a range of measures are possible to meet the constitutional obligations. 'The programme must be balanced and flexible' and '[should] attend to housing crises and to short, medium and long term needs.'[115] It would be *ex-facie* unreasonable if the programme ignores '[those] whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril'.[116] The programme must be context-sensitive and subject to continuous review and the availability of resources should be considered in determining the reasonableness of any programme.

While the Court found the government's programme reasonable with respect to attending to medium and long term needs, it declared the policy inadequate because 'no provision was made for relief to the categories of people in desperate need.'[117] Further, it emphasised a humane approach towards eviction, particularly for people with desperate needs. The Court admonished the agencies for the inhumanity with which the evictions were carried out where the residents' possessions were not only removed but burnt and destroyed, and held that an eviction programme must uphold the values of equality and dignity.[118] Irene Grootboom, however, died destitute and homeless despite a favourable judgment. This suggests that a favourable judgment may not translate into reality if it is not adequately followed up. Yet, the judgment has some important outcomes for developing jurisprudence on the right to the city. The judgment suggests that balanced regional growth, especially in the rural areas, is necessary to arrest uncontrollable migration into urban areas and prevent housing crisis. Further, it noted state complicity in allowing the informal settlement in New Rust to swell. Importantly, the Court extended the scope of the right to housing from merely shelter to also include provision of essential services.

[111] Emphasis added. The similar language of 'reasonable measures' can be seen in s 25(5) (access to land); s 27 (right of access to healthcare, food, water and social security); Section 29 (right to basic education).

[112] *Grootboom* (note 110 above) paras 59, 80–81.

[113] Ibid at para 43.

[114] Ibid at para 41.

[115] Ibid at para 43.

[116] Ibid at para 44.

[117] Ibid at paras 64–65.

[118] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC)('*Port Elizabeth Municipality*')(Sachs J emphasises the historical shift from Prevention of Illegal Squatting Act No. 52 of 1951 to the Prevention of Illegal Eviction and Unlawful Occupation of Land Act No. 19 of 1998 (PIE Act)).

Another feature of the South African jurisprudence is its emphasis on the social purpose and the use value of property in the balancing property rights with other interests of distributive and corrective justice.[119] In the *Port Elizabeth Municipality* case, 68 people, including 23 children, had occupied 23 shacks that they had erected on privately owned, albeit undeveloped, land for several years. Upon receiving a petition signed by 1 600 people, the Municipality ordered their eviction. This situation pitted the property rights of a few against the basic necessity needs of many. Interestingly, the occupiers had acceded to leave the land if they were given alternative housing and reasonable notice. When it was proposed that they be relocated to another township, Walmer, they refused to go as Walmer was unsavoury, over-crowded and crime-ridden. Since the Municipality was already working on a housing development programme, it argued that providing an alternative space to the occupiers would amount to 'queue-jumping'.[120]

The Court responded that the motivation of the occupiers (whether they intended to jump the queue), the duration for which they had been staying and the existence of alternative arrangements (among other factors) should be considered before passing eviction orders. Accordingly, it called for agencies to be 'far more cautious in evicting well-settled families with strong local ties, than persons who have recently moved on to land and erected their shelters there.'[121] The Court added another layer of security by mandating that people must not be punished for not complying with eviction orders unless the eviction order is also a judicial one.[122] Margaret Radin categorises private property in terms of its relationship with its owner/possessor into personal and fungible.[123] While personal property is one that is 'bound up' with the person, fungible property is held only instrumentally. Therefore, when a person has resided on a property for sufficiently long, one is considered 'entrenched' in that property. The well-settled families with local ties have invested their personhood in that informal housing as it bonded with their personhood. Those who moved relatively recently, on the other hand, are not similarly entrenched. Hence, even though their shacks are important to them, the law could regard them as fungible homes. With the effluxion of time, a fungible item could become personal without changing hands, as 'people and things become intertwined gradually'.[124] It is argued that the entrenchment of a well-settled family is not confined to their individual self and dwelling but through local ties and navigation; these are entrenched in the city too. In line with the classification maintained in this article, the *personal* tends to impact on the use value,

[119] Ibid at para 15. The PIE Act, Sachs J explains recognises this balance as well as difference in eviction proceedings brought by a private land-owner and municipality.

[120] This argument seems to be consonant with the reasoning of the Court in the *Grootboom* case (note 110 above).

[121] Ibid at para 27.

[122] Ibid at paras 49–50.

[123] M Radin 'Property and Personhood' (1982) 34 *Stanford Law Review* 957. It is not suggested that 'fungible property is unrelated to personhood, but simply that distinctions are sometimes warranted depending upon the character and strength of connection.' For example, a home is generally *personal*, while vacant plots appear more *fungible*. One reason could be necessity, but it is also true that one feels her home as a place for self-expression, comfort and security. Dispossessing someone of a 'personal' property calls for greater caution, as it attacks subject's person and dignity.

[124] Ibid 987, 1009–1010.

while *fungible* lies in the realm of exchange-value of property and city.[125] The Court noted that neither the owner nor the Municipality needed the land for any immediate productive use (or, in Radin's terms, relatively fungible).[126] Yet, given that the government is expected to both ensure that an owner's property rights are protected and the basic needs of the occupiers are met, the Court required all the interested parties and the Municipality to meaningfully engage and arrive at an acceptable solution.

The rule of 'meaningful engagement' was a judicial innovation from the Court in the case of the Olivia Road occupiers.[127] In *Olivia Road*, the City of Johannesburg sought to evict a number of impoverished occupiers of the buildings that were deemed structurally unsafe. The City argued that the occupation constituted a threat to the health and safety of the occupiers themselves. The Court passed an interim order directing the City and occupiers to 'engage with each other meaningfully… in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.'[128] The Court ordered the parties to report the results of the engagement, the substance of which shall be considered in further orders or judgment. The parties arrived at a comprehensive settlement which made their eviction conditional on providing alternative accommodation, which in turn was held conditional on providing a suitable permanent housing solution in consultation with the occupiers concerned. Liebenberg argues that, while the 'meaningful engagement' order exhibited key elements of deliberative democracy, which facilitated a participatory and contextualised solution to the problem of safety and pressing need for shelter for many people,[129] the Court failed to answer the more systemic question raised by the occupiers – whether the City had put in place a reasonable plan for the permanent housing of the occupiers and other similarly situated 69 000 inhabitants of the inner city.[130] The Court hoped (like

[125] The personal/fungible classification is not always apposite. For people who recently moved into a place, may not have done so with the intent of mere instrumental use of the property. Yet, in the context of the right to the city, 'entrenchment', a factor of time, could itself suggest a presumption for treating older settlements as personal as opposed to newer shacks. Radin says, 'A person cannot be fully a person without a sense of continuity of self over time. To maintain that sense of continuity ... one must have an ongoing relationship with the external environment, consisting of both "things" and other people.' (Ibid 1004).

[126] *Port Elizabeth Municipality* (note 118 above) at para 59.

[127] *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* [2008] ZACC 1, 2008 (3) SA 208 (CC)('*Olivia Road*'). (The Court held that 'larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement.' The engagement must be in good faith and 'people in need of housing must not be regarded as a disempowered mass.' (Para 20). In *Olivia Road* the Constitutional Court rejected the view of the Supreme Court of Appeals that the duty to act on the part of the City and the right to housing of the occupiers of unsafe buildings are not reciprocal and that these cases only peripherally raise the questions of constitutional obligations of the state organs. The concept of 'meaningful engagement' developed in this case, respects people's right to participate in the decisions pertaining to their relation with their housing, neighbourhood and rehabilitation, prior to eviction. Contrast this with a minimalist and formal notion of hearing seen in the judgments of the Indian Supreme Court. In more recent times the Supreme Court has, by interpreting them as licencees, put further limitations on the rights of the inhabitants. U Ramanathan 'Illegality and the Urban Poor' (2006) 41 *Economic & Political Weekly* 3193, 3195.

[128] *Olivia Road* (note 127 above) para 5.

[129] S Liebenberg 'Engaging the Paradoxes of the Universal and Particular in the Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement' (2012) 12 *African Human Rights Law Journal* 1, 17.

[130] Ibid at 18.

Olga Tellis[131] in India, discussed below) that the City would carry out the consultation in good faith. Given the vague rules of engagement, Liebenberg says that 'there is a real danger that meaningful engagement as an adjudicatory strategy may descend into an unprincipled, normatively empty process of local dispute settlement' if appropriate regulatory measures and resource allocations are not undertaken.[132]

In the case of the *Joe Slovo* evictions,[133] for example, even as the Court assumed greater control by fixing baselines for alternative housing and obligating the parties to negotiate the details of the time and circumstances of relocation, the Court effectively condoned the top-down heavy-handed negotiation carried out by the government.[134] *Joe Slovo*, like *Shantistar Builders*[135] in India (discussed later), is a tale of broken promises. When the residents in Joe Slovo were asked to relocate to Delft to facilitate an *in situ* major housing development, they were promised that 70 per cent of those relocated would be given low-cost housing in Joe Slovo itself. The first phase of the project did not give effect to the promise and subsequently the rentals were pitched far higher than initially envisaged. The emphasis was placed on 'bonded housing' ie, market rate for housing purchased through a mortgage. Even though the Court determined the baselines for alternate housing, ordered relocation of 70 per cent of evictees and directed the parties to engage on the matters of detail, the order should not be regarded as a substitute for a well-structured and regulated process of engagement laid down in law. Notably, in *Joe Slovo*, the Court also said that the utilitarian gains of housing development projects could outweigh the minor defects of engagement. This treatment of 'meaningful engagement' is quite different from *Olivia Road*, which conceptualised it as a mechanism that (a) treated people facing evictions as active participants rather than 'disempowered mass', and (b) respected the democratic mandate and the institutional expertise of the legislature and the executive.[136] With *Joe Slovo*, it seems that the role of 'meaningful engagement' has been limited to only procedural compliance which could be subservient to other factors in determining the validity of state action,[137] even though it was clear that the process was flawed in terms of lack of people's participation in formulation of the scheme. Dugard, in fact, opines that by avoiding the questions of location in the alternative accommodation plans and the failure to provide for housing for poor in the inner city housing plans in determining the validity of the City's

[131] *Olga Tellis v Bombay Municipal Corporation*, (1985) 3 SCC 545 ('*Olga Tellis*').

[132] Ibid at 19. For example, in *Mamba v Minister of Social Development* CCT 65/08, the government sought to dismantle the refugee camps built in the wake of xenophobic violence. The Government interpreted meaningful engagement minimally, though ordered in the same terms as *Olivia Road* (note 127 above), and went ahead with the dismantling the settlement. This case emphasises the need for a structured long term process of engagement. See, B Ray 'Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy, (2010) 9 *Washington University Global Studies Law Review* 399, 404–408.

[133] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*, [2009] ZACC 16, 2010 (3) SA 454 (CC).

[134] S Liebenberg 'Joe Slovo evictions: Vulnerable Community Feels the Law from the Top-down', available at https://docs.escr-net.org/usr_doc/Liebenberg_-_Joe_Slovo_eviction-_Vulnerable_community_feels_the_law_from_the_top_down.pdf. Also, Ray (note 132 above) 408–412.

[135] *Shantistar Builders* (note 65 above).

[136] A Pillay 'Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10 *I-CON* 732.

[137] There seems to be confusion among judges whether the engagement in *Joe Slovo* amounted to what O'Regan J described as 'meaningful engagement'. The question for her was whether absence of such engagement was enough to deem the project as unreasonable. Sachs J. believed that there was meaningful engagement but that is only one of the factors to be considered to determine the reasonableness of state action. (Ibid 744–745).

housing policy, the Court side-stepped the core issues in *Olivia Road*.[138] While, 'meaningful engagement' is a welcome innovation, Dugard believes '[it] does not provide poor people with any concrete protections against eviction, nor does it help to delineate the right to housing.'[139]

In another case, engaging with the rhetoric of creating clean and orderly cities to justify the eviction of informal traders, the Court held that while these objectives are laudable, they cannot be achieved by 'flagrant disregard' for the rights of people.[140] Yet, it restricted the application of its judgment to only the lawful occupiers of the space and allowed the City to 'use all lawful means to combat illegal trading and other criminal conduct'[141] even though this could severely impact other inter-related constitutional rights such as right to dignity, freedom of trade and socio-economic rights of children. Pieterse notes that the Court, with its eye on only the immediate issues of legal compliance, side-stepped more profound contemplation of the constitutional rights of traders.[142] A 'right to the city' based inquiry may have been helpful here in situating the inter-linked constitutional rights of trade, livelihood, housing and the rights of dependent members of family, in the broader framework of citizenship claims animated by notions of access and participation in the production of the urban space. Pieterse notes that due to its narrow focus on ordinary legal compliance, the Court order 'at best fails to disturb and at worst insulates the manner in which the notion of legality itself contributes to the marginalisation and exclusion of vulnerable residents in South Africa's post-apartheid cities.'[143]

Interestingly, in *Yolanda Daniels* the Court abandoned the narrow focus on ordinary legal compliance and drew on the histories of dispossession and confinement in colonial and apartheid regimes to draw linkages between recognising the legal security of tenure and the value of human dignity cherished by the Constitution.[144] The study of historical context then informed the purposive interpretation of Extension of Security of Tenure Act 62 of 1997 (ESTA) to rule that an occupier has the right to carry out necessary improvements to make the shelter habitable.[145] De-emphasising the private property rights, the Court held that it was empowered to impose positive obligations on a private person vis-à-vis the occupier. It considered the nature, history and the purpose of the right, and whether adopting a hands-off approach vis-à-vis a private person would effectively negate that right.[146] Lastly, the Court

[138] J Dugard 'Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice' (2008) 24 *South African Journal on Human Rights* 214, 237.

[139] Ibid 238.

[140] *South African Informal Traders Forum v City of Johannesburg* [2014] ZACC 8, 214 (4) SA 371.

[141] Ibid. For the historical account of negotiated existence of informal traders and City administration, see M Pieterse *Rights, Regulations and Bureaucratic Impact: The Impact of Human Rights Litigation on the Regulation of Informal Trade in Johannesburg*, available at http://www.scielo.org.za/pdf/pelj/v20n1/04.pdf. Pieterse critiques the false dichotomy between legality and illegality in informal street trade adopted by earlier policies of the City; and thereafter a complete erosion of the distinction when the City found irregularities in the grant of permits under earlier policies such that every informal trader, including the permit-holders, was removed under 'Operation Clean Sweep'. He criticises the assumptions behind equating the informal traders with dirt to be eradicated from the city.

[142] Pieterse (note 141 above) 13–14. Pieterse notes that the order of the Court did not stop the blitz approach of the City but it appeared to be more careful in ensuring that it acted within the bounds of its by-laws. The eviction of informal traders on the intersections, for example, went unchallenged as it complied with the ordinary laws of the City.

[143] Ibid 22–23.

[144] *Daniels v Scribante* [2017] ZACC 13, 2017 (4) SA 341 (CC)('*Yolanda Daniels*').

[145] Ibid at paras 14–22.

[146] Ibid at para 39.

suggested that meaningful engagement could help balance the owner's rights over the property and those of the occupier.[147]

The Court interpreted the right to housing by keeping in view the socio-historical contexts of the housing indigency. It was prepared to give a more expansive meaning to housing than merely shelter and called for a more humane and dialogic approach to eviction keeping the values of dignity and equality at the centre. Further, the Court, through 'meaningful engagement' has entrenched the need for stakeholder participation in deciding on eviction, the timelines, as well as rehabilitation. The Court has also been prepared to de-emphasise the private property rights of a few in the interest of the use rights of large groups of impoverished people. Yet, the lack of clarity on the substantive content and absence of regulatory safeguards threaten to rob 'meaningful engagement' of its purpose to ensure people participate on the decisions of their (dis)location in their City.

B Indian position

Contrary to the South African Constitution, the Indian Constitution has most of the socio-economic rights in itse non-justiciable Part IV called the 'Directive Principles of the State Policy'. However, the underlying objective of the Constitution is to give effect to a social revolution in India. Post 1978, the judiciary also emerged as an equal stakeholder in this revolution. The Supreme Court of India through a series of judgments relaxed the *locus standi* rules and democratised the access to justice through Public Interest Litigations (PIL). It interpreted fundamental rights liberally to strengthen anti-discrimination law and underscore the indivisibility of civil-political and socio-economic rights while providing more substance to the 'right to life' enshrined in Article 21 of the Constitution.[148] In *Francis Coraile Mullin*, Bhagwati J. famously observed:[149]

> By the term 'life' as here used something more is meant than mere animal existence.…the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings.

The Supreme Court then proceeded to read the right to elementary education,[150] health,[151] food, clean environment, shelter and livelihood, as well as access to justice[152] within the conspectus of the right to life. The harmony between the directive principles and fundamental rights has also been held to be a part of the unalterable basic structure of the Constitution.[153]

[147] Ibid at para 62.

[148] For a comprehensive overview of judicial activism in India, see S Sathe 'Judicial Activism: The Indian Experience' (2001) 6 *Washington University Journal of Law & Policy* 29, 43–63.

[149] *Francis Coraile Mullin v The Administrator, Union Territory of Delhi*, (1981) 1 SCC 608, 618–619.

[150] *Unnikrishnan v State of Andhra Pradesh*, (1993) 1 SCC 645.

[151] *Paschim Banga Khet Mazdoor Samity v State of West Bengal*, (1996) 4 SCC 37.

[152] *Hussainara Khatoon v State of Bihar*, (1980) 1 SCC 81.

[153] *Minerva Mills v Union of India*, AIR 1980 SC 1789.

The basic structure doctrine, developed by the Supreme Court,[154] holds that the Constitution has certain essential features which cannot be amended. These features are not contained in specific provisions but pervade its overall scheme (eg rule of law, democratic governance, independence of judiciary, separation of powers, federalism, secularism etc.). By interpreting the harmony between the directive principles and fundamental rights as part of the basic structure, the Court reinforced the indivisibility of and interdependence between the civil and political rights and the socio-economic rights.

In the *Olga Tellis* case, a PIL was filed after the Maharashtra Government and the Bombay Municipal Corporation (BMC) decided that slum and pavement dwellers who lived in various parts of the city in deplorable conditions should be forcibly evicted. They were to be either deported to their place of origin or removed to places on the exterior of Mumbai. Pursuing that order, some pavement dwellings had been demolished when the petition was filed before the Supreme Court. The petitioners contended: (i) evicting a pavement dweller from his *habitat*[155] amounts to depriving him or her of their right to a livelihood which is guaranteed by Article 21; (ii) the order violates their right to residence and occupation covered under Article 19; (iii) the procedure under the BMC regulations regarding eviction as arbitrary inasmuch as it dispenses with any duty to provide notice; and (iv) it violates the constitutional spirit to classify the pavement dwellers as 'trespassers' because they have been forced to take up inadequate housing due to economic compulsions. The petitioners requested the court to determine the scope of the concept of 'property' in a welfare state given the constitutional mandate that property should serve the common good.

The court, recognising the harmony of directive principles and fundamental rights, observed that in light of the constitutional mandates for securing the common good, equitable distribution of wealth and material resources, and adequate means of livelihood,[156] it was important to read livelihood within the scope of Article 21. Drawing linkages among the rights to livelihood, shelter and life, the court held that the pavement dwellers 'choose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding for their slender means. To lose the pavement or the slum is to lose the job… [and consequently] the deprivation of life.'[157] The court, stopping short of striking the BMC regulation down, held that even if the regulation authorised the Commissioner to dispense with notice, it should be read as an exception and not the rule and only in exceptional circumstances could the Commissioner dispense with notice. Curiously, the court felt that the opportunity granted to the petitioners to make their arguments before the court effaced any need for a post-decisional hearing from the Commissioner. On the question of property rights, the court held that encroaching public property is an unauthorised use and technically, a 'trespass'. Yet, given the circumstances of helplessness in which the poor people end up residing in such informal clusters, it does not amount to a criminal act. The court directed

[154] *Kesavananda Bharati v State of Kerala*, (1973) 4 SCC 225. (This was an historic case decided on April 24, 1973. 13 judges of the Supreme Court decided on the constitutionality of certain constitutional amendments and on the question of limits on the amending powers of the Parliament. By a majority of 7:6, the Court held that while Parliament could amend any part of the Constitution, it cannot amend certain basic features of the constitution such as democratic form of government, rule of law, separation of powers, federalism, etc.).

[155] Emphasis added. It is interesting that the petitioners, in their arguments use the word 'habitat' as it conveys a wider import than merely a static residence.

[156] Constitution of the Republic of India, 1950 Article 39.

[157] *Olga Tellis* (note 131 above) 575.

however, that based on the undertaking of the government, the slum and pavement dwellers identified before 1976 should be resettled in a nearby suburb, without making it a condition for eviction. Those households that had been staying in slums for a long time and had carried out significant improvements should not be evicted unless their land was to be acquired for public purposes, in which case they should be properly re-settled. Ultimately the court directed the BMC to allow the pavement dwellers to stay in their shacks till the month after the end of the monsoon season.

The broad significance of this case lies in the recognition of the right against summary eviction and a legitimate claim for resettlement.[158] Interestingly, the petitioners had also led evidence to establish that the burgeoning slums and pavement dwellings in Mumbai are a direct result of unplanned urbanization and state complicity. Yet, *Olga Tellis* offers scant support for the right to housing.[159] In fact, the court explicitly held that the state is under no positive obligation to provide shelter and livelihood to people.[160] By not striking down the regulation, the court accepted that dwellings could be demolished without notice and people may be evicted without a commitment for resettlement.[161] The judgment effectively renders the right to housing conditional. It can often be used to justify eviction if formal compliance with the requirements of due notice are met.[162]

In *Shantistar Builders*, the petitioners were living in slums on a public land. They were removed from there on condition that the government had tenements built on the same land and sold them at low prices to the families who were evicted. When the state government permitted the builders to increase the prices of these tenements in the exercise of its extra-ordinary powers under land ceiling laws, the petitioners challenged the permission. The Supreme Court observed that '[with] the increase of population and the shift of the rural masses to urban areas over the decades the ratio of poor people without houses in the urban areas has rapidly increased.'[163] Further, it said, '[in] recent years on account of erosion of the value of the rupee, rampant prevalence of black money and dearth of urban land, the value of such land has gone up sky-high. It has become impossible for any member of the weaker sections to have residential accommodation anywhere and much less in urban areas.'[164] The court held that '[because] reasonable residence is an indispensable necessity ... [it is] included in 'life' in Article 21.'[165] The exemptions provided by a beneficial law such as the ceiling law that should be monitored to ensure that the law was exercised for the benefit of the poorer

[158] However, see *Narmada Bachao Andolan v Union of India*, (2000) 10 SCC 664.

[159] Pillay (note 109 above) at 390–391.

[160] Ibid at 391.

[161] Ibid.

[162] M Khosla 'Making Social Rights Conditional: Lessons from India' (2010) 10 *I-CON* 739. Khosla notes, '*Olga Tellis* provides for no individualised right to shelter, as well as no right that the state take reasonable measures to provide for shelter. The focus is on ensuring that a proper procedure for eviction is followed.' (Ibid 747) '[The] Court's focus was not on how a person's right would have been satisfied if the state had not acted.' (749). Following, *Olga Tellis* (note 131 above) the Supreme Court in *Ahmedabad Municipal Corporation v Nawab Khan*, (1997) 11 SCC 121 ordered that people residing in temporary hutments in certain streets of Ahmedabad could be removed after a due notice, if they were not eligible beneficiaries of existing government schemes. However, the Delhi High Court in *Ajay Maken* (note 13 above) considered *Olga Tellis* as precedent for the right to housing and livelihood.

[163] Ibid at 527–528.

[164] Ibid at 529.

[165] Ibid.

communities. Even here, the court gave a restricted interpretation of the right to housing by only providing for 'reasonable housing'. Importantly, it did not obligate the state to provide alternative accommodation in the event of forcible eviction.

As the Indian Government embraced the new economic policy of liberalization and privatization, the judiciary also changed its notion of 'public interest' and its perspective on slums and slum-dwellers.[166] The PIL which allowed procedural departures in the interest of justice, now functioned almost like a 'slum-demolition machine'.[167] With the rising middle class, consumerism and institutionalisation of these ethics and aesthetics in creating 'world class' cities, the urban poor were now seen as 'trespassers' and slums were seen as 'dirty', 'out of place', a 'nuisance'[168] and 'large areas of public land usurped for private use free of cost.'[169] Bhuwania argues that 'it is the PIL with the kind of power it vests in judges which actually enables them to act on such biases and that too with a free hand in a most expansive manner, unconstrained by technicalities and rules of adjudication, and on such flimsy evidence as random photographs.'[170] These PILs were deployed to order a city-level clean-up of Delhi's street vendors, beggars and cycle-rickshaw drivers' but principally the city's slums were at the receiving end of the court's 'wrath' which ousted over a million people from the city.[171] In the Supreme Court, such biases found their way into a PIL against the municipal garbage waste disposal practices in Indian cities, when Justice Kirpal turned the case towards an unrelated issue of slums in Delhi, blaming them for the solid-waste management problem of the city. It resulted in an infamous outburst by Justice Kirpal in the *Almita Patel* case:[172]

> Establishment or creating of slums, it seems, appears to be good business and is well organised... The promise of free land, at the taxpayers cost, in place of a jhuggi [shack], is a proposal which attracts more land grabbers. Rewarding an encroacher on public land with free alternate site is like giving a reward to a pickpocket.

In the same judgment, the court ordered the Delhi Government to provide land for disposing of the city waste to the Municipal Corporation for free. This judgment marks a moment where (i) illegality was singled out as a trait of a slum-dweller and (ii) cleaning-up of the city and making it world-class assumed priority.[173] This obfuscates the fact of continuous under-provisioning of houses for over four million slum dwellers of Delhi. At the turn of the twenty-first century, the Planning Commission noted that about 90 per cent of the shortage

[166] Ramanathan (note 127 above) 3194.

[167] A Bhuwania 'Public Interest Litigation as a Slum Demolition Machine' (2016) *Projections: The MIT Journal of Planning* 67. Bhuwania chronicles the PIL filed in the Delhi High Court from 1998 to 2011, to argue how the judiciary took liberties with procedural relaxation afforded with PIL to facilitate slum clearance in Delhi.

[168] A Ghertner 'Nuisance Talk and Propriety of Property: Middle Class Discourses on Slum-Free Delhi, (2011) *Antipode* 1, 2, 7–8. Ghertner argues that 'nuisance talk' depicts slums as illegal environments. It reworked the public/private divide that inserts the codes of civility once restricted to home or neighbourhood into the core of public life. Further, it justified the privatization of public lands and urban restructuring (at 3). 'While couched in the language of danger and insalubrity, … nuisance talk often betrayed more of a concern with property value and the quality of [private life]' (at 8). For example, the rich people's assertion of retaining the 'posh' value of their colonies by opposing densification and slum clusters, imports the private property concepts of 'exclusivity' into the public realm.

[169] *Almitra Patel v Union of India*, (2000) 2 SCC 679. (*'Almitra Patel'*).

[170] Bhuwania (note 167 above) 69–70.

[171] Ibid. 71–72.

[172] *Almitra Patel* (note 169 above) 685.

[173] Ramanathan (note 127 above) 3195.

of urban housing in India pertained to urban poor and was attributable to non-provisioning of houses to slum-dwellers. Meanwhile, a number of structures that were constructed by the state agencies that had earlier not been provided for in the Master Plan of Delhi (a document mapping planned development of Delhi and a reference point for un/authorised constructions in the region), a procedural breach was identified and corrected. Some of these constructions replaced the existing slums, for example, on the banks of the Yamuna River.[174]

In *Olga Tellis*, the petitioner argued that an important reason for the emergence of slums in metropolitan cities like Mumbai has been that the master plans of these cities have not been followed. The population was unevenly distributed because of severely imbalanced regional distribution of job opportunities. Consequently, poor people keep coming back to the city even after they were evicted.[175] Yet, the apex court neither strengthened the rule of notice, nor made it mandatory for the state to provide alternative housing as a condition precedent for eviction. At the turn of the millennium, the courts regularly directed the government to carry out eviction as expeditiously as possible without needing to provide any substitute accommodation and due process.[176] The High Court of Delhi in one petition identified the 'public interest' involved in the safety and hygiene concerns of the residents. The court said:[177]

> After all, these residential colonies were developed first. The slums have been created afterwards which is the cause of nuisance and brooding [sic] ground of so many ills. The welfare, health, maintenance of law and order, safety and sanitation of these residents cannot be sacrificed ... in the name of social justice to the slum dwellers.

A decade later, the High Court extended the argument further and held that 'the rights of the honest citizens… cannot be made subservient to the rights of encroachers', which prioritises protection of private property rights as a matter of public interest.'[178] This makes the recent judgment in *Ajay Maken* remarkable.[179] This was a PIL where the railway officials (the land where 5 000 slum-dwellers had been residing for over two decades was held by the government agency, Railways), and police had demolished the slums to forcibly remove the residents, leaving them without any shelter in extreme weather. Disregarding the rules laid down in *Sudama Singh*,[180] the Railways had neither surveyed the location nor provided any advance notice to the residents. The Delhi High Court called the demolition drive a 'human tragedy' and observed that '[the] right to housing is a bundle of rights not limited to a bare shelter over one's head. It included the other rights to life viz. the right to livelihood, right to

[174] Ibid.

[175] *Olga Tellis* (note 131 above) 563–564.

[176] Ibid, 3195–3196. Space precludes discussion of each of these judgments of the Delhi and other High Court as well as Supreme Court. Bhan (note 5 above), Bhuwania (note 167 above) and Pillay (note 109 above) critique several judgments of High Courts and the Supreme Court that presided over forcible evictions and demolition of slums.

[177] *Pitampura Sudhar Samiti v Government of National Capital Territory of Delhi*, W.P. (c) No. 4215 of 1995 (Decided on September 27, 2002, High Court of Delhi).

[178] Ghertner (note 168 above) 18–19.

[179] However, it also highlights a discontinuous and rather unprincipled approach to judicial activism in India. Pillay (note 109 above) suggests that genuine efforts towards engaging with the executive by the South African Constitutional Court in the enforcement of the socio-economic rights is a model worth considering.

[180] *Sudama Singh v Government of Delhi*, 2010 (168) DLT 218 ('*Sudama Singh*'). Given the anti-slum trend of judgments from the High Court of Delhi (See, Bhuwania (note 167 above), Bhan (note 5 above) and Ghertner (note 168 above)) the human-rights oriented approach of *Sudama Singh* seemed an outlier. The High Court, by following *Sudama Singh* in *Ajay Maken* (note 13 above) fortified it as a precedent.

health, right to education and right to food, including right to clean drinking water, sewerage facilities and transport facilities.' Further, it held that slum-dwellers should not be seen as illegal occupants of land, whether public or private, but as 'rights bearers whose full panoply of constitutional guarantees require recognition, protection and enforcement.' Emphasising the need for due process, the court directed the state agencies to complete the survey and consult the dwellers. As far as possible *in situ* rehabilitation should be preferred. If that is not feasible, then whenever the agencies are in a position to rehabilitate the dwellers elsewhere, they should be given adequate time to make arrangements to move to the relocation site.[181] These orders that called for engaging with the slum-dwellers before evicting them can be seen as an instance of judicial activism.

In India, the slum demolition and evictions are carried out under the Slum Areas (Improvement and Clearance) Act, 1956 which provides wide discretion to the government for declaring an area as 'slum' and ordering its clearance.[182] Different state governments have made context-specific amendments to this law. For example, in Maharashtra, the Maharashtra Slum Area (Improvement and Removal and Redevelopment) (Amendment) Act, 1995 establishes the Slum Rehabilitation Authority (SRA). These authorities are bureaucratic in their structure and do not contain any mandate to conduct consultation or engagement with the occupiers and owners of these lands. Although the Development Control Regulations of Greater Mumbai 1997 require that 70 per cent of slum dwellers must consent to the slum rehabilitation scheme before the government declares the land as a 'slum' and puts it up for redevelopment, given the extent of housing indigency in Maharashtra, it may be argued that these authorities have not been sufficiently effective.[183] Indeed, in a recent judgment[184] the Supreme Court recognised the plight of 800 slum dwellers in Santa Cruz (Mumbai) who were incidentally the owners of the land (under a consent decree Wadia Trust, the original owner, had transferred the title to slum-dwellers' cooperative society[185]) but had been embroiled in litigation among the rival builders and the SRA. Consequently, the slum dwellers had been denied permanent housing on their own land for over three decades. The court invoked its discretionary powers under Article 142 of the Constitution given the peculiarities of this case. It directed the SRA to ensure that fresh bids were invited and the project was completed in a time-bound manner. The SRA was required to evaluate the plans of every bidder and put the most beneficial plan in its opinion on voting before the slum-dwellers. Given the lack of agency to participate in the development of the plans, the slum-dwellers, although made part of the consultation, had limited say. The

[181] *Ajay Maken* (note 13 above) 103. In *Sudama Singh* (note 180 above), the Delhi High Court made evictions conditional upon providing alternative accommodation. It borrowed insights from South African jurisprudence and held that a 'meaningful consultation' must be held with the slum-dwellers. Further, the Delhi Legal Service Authorities should organise periodic camps in slums to generate awareness about the rights of slum-dwellers.

[182] Slum Areas Act s 3, 4 & 9. Section 6 provides that the expenses for maintenance and repair of slums shall be borne by the occupiers who have little agency in deciding improvement or demolition.

[183] O Tellis 'Thirty Years after a Landmark Supreme Court Verdict, Slum Dwellers' Rights are Still Ignored' (21 December 2015), available at https://scroll.in/article/776655/thirty-years-after-a-landmark-supreme-court-verdict-slum-dwellers-rights-are-still-ignored.

[184] *Susme Builders Pvt. Ltd. v Chief Executive Officer, Slum Rehabilitation Authority*, (2018) 2 SCC 230. The court notes: 'There are many powerful persons involved, be they builders, promoters and even those slum dwellers who have managed to become office bearers of the society of slum dwellers.' (Ibid at 239.)

[185] The earlier Development Control Regulations of Greater Mumbai, 1991 required that 70 per cent of slum-dwellers should form a registered cooperative society before the Slum Areas Act could be invoked. These regulations were amended in 1997 to mandate consent from 70 per cent slum-dwellers instead.

court order meant that they would only be offered limited plans to choose from rather than ensuring their participation in the planning itself. This judgment lacks the crucial aspect of participation critical to the right to the city that the rule of 'meaningful engagement' seeks to do in the judgments of the South African Constitutional Court. The High Court of Delhi, nonetheless, has recently engaged with South African jurisprudence on the right to housing.

In *Sudama Singh*,[186] people living in various slum clusters of Delhi for several years petitioned the High Court. They argued that demolition of their houses without relocation and rehabilitation was against the policy and the Constitution. The Government argued that the demolition was legal as these clusters were on the 'right to way'.[187] The court said that the slums were a result of an unbalanced growth where people in rural areas were forced to migrate to cities due to pressure on agricultural land and lack of employment opportunities. In cities, the formal accommodation is prohibitively expensive and formal employment is unavailable.[188] The High Court drew from the judgments of the South African Constitutional Court in the *Grootboom*, *Olivia Road* and *Joe Slovo* cases to direct that the state agencies undertake a careful survey to identify the slum dwellers. The agencies should 'meaningfully engage' with those who are being evicted and provide basic civic amenities at the site of relocation. While the judgment is laudable, it fails to specify any structure for and terms of 'meaningful engagement'. Liebenberg's apprehension in the South African context applies with even more force to the Indian context, given the general disregard of procedures in public interest litigation. Drawing from *Sudama Singh* and the South African jurisprudence, the Delhi High Court facilitated 'meaningful engagement' of various stakeholders and civil society members in *Ajay Maken*.[189] The court noted that the right to housing is much wider than a right to basic shelter. It is against this backdrop that the court opined that there is a need to recognise the emerging concept of the right to the city. It noted that after the *Sudama Singh* judgment and the contempt petition following, the new 2015 policy and the 2016 protocol included the terms of the judgment and acknowledged that the right to housing includes the rights to life, education, healthcare, livelihood, food and water, clean environment and public transport. Thus, the constituent features of the right to the city are recognised by the 2015 policy, the court opined.

It must be acknowledged that both *Sudama Singh* and *Ajay Maken* are the exceptions rather than the rule. It highlights the worrying inconsistency among the Indian courts on the issue of housing rights. This impedes the development of any solid jurisprudence on housing rights. Very few judgments in India have actually engaged with historical and other factors behind such unequal cities. This also hides the complicity of the state and makes informal housing in slums and ghettos appear natural and chosen. The *Grootboom* and *Yolanda Daniels* judgments from the South African Constitutional courts provide good examples of using historical and sociological

[186] *Sudama Singh* (note 180 above).

[187] The petitioners contended that even those houses that were beyond the area marked for the widened road were demolished and, in most cases, people did not deliberately set up their shacks on the areas marked for roads. In fact, a lot of them had migrated to Delhi even before there were roads in that area. No earlier policy provided for any exceptions to rehabilitation such as the 'right to way'.

[188] Law Commission of India Report 138 Legislative Protection for Slum and Pavement Dwellers (1990)('Law Commission of India Report').

[189] While 'meaningful engagement' under the auspices of the High Court was successful in *Ajay Maken* (note 13 above) the lack of regulatory mechanism and allocation of funds, and an absence of any clear structure could derail such engagement. The 2015 policy refers to holding awareness camps and consultation with the slum-dwellers during the survey.

perspectives for a purposive interpretation of law. Such perspectives would help the courts to interpret the deeper purpose of these enactments not only from a point of view concerned with the welfare of individuals but importantly from a sense of corrective justice that the state owes to the marginalised races, castes, religious communities and other disadvantaged groups.

IV CONCLUSION

The limited sample of judgments reveals a tendency to give a broader interpretation to the right to housing. The courts of South Africa and India have both recognised the right to health, food and sanitation as aspects of the right to housing. In some cases, a nexus has been drawn between the right to livelihood and housing as well. This recognition is underpinned by the value of human dignity and equality that informs the constitutional interpretation in both India and South Africa.

It is noteworthy though that the suggestions of linkages with the right to the city are largely confined to demands of the pavement or slum dwellers to either stay in the city or be relocated and rehabilitated with adequate amenities and livelihood. The courts, as mentioned before, have held that housing rights are inter-related with other constitutional rights and the same extends to the dependent members as well. Predominantly, the concerns around housing have largely to do with the infrastructure and habitability aspects. Primarily, therefore, the emphasis has been on expansion of the instrumental elements of the right to the city that focuses on access to the facilities and amenities that a city offers.

On the transformational element of this right, the emphasis is on the democratic right of every citizen to participate and have a stake in the decisions of the city, and the right to appropriate the advantages of a city. The South African Constitutional Court has mandated that before conducting evictions, the state agencies should strive for 'meaningful engagement' with the potential evictees to ensure their participation in relocation and rehabilitation plans. However, ambiguity exists on the matter of its contours and details. The lack of regulatory safeguards around engagement is also a concern, and is perhaps the reason for an uneven application of the concept. In contrast, the Indian apex court has mandated neither rehabilitation nor any systematic due process and notice before eviction. It has only been discussed in a few judgments of the Delhi High Court and there too the issues of ambiguity and lack of regulatory safeguards persist. These sporadic judgments only highlight the inconsistencies in housing rights jurisprudence in India.

Notwithstanding certain advancements in the housing rights jurisprudence, we are far from anchoring the right to the city in constitutional law in a way that effectively prioritises the rights to appropriation and participation of people in shaping *their* city. The law has, at times, legitimised violence both in its enactment and enforcement. This has left the urban poor at the mercy of powerful interest groups who use legal instruments to categorise slums as 'illegal' and dispossess its dwellers of any right to residence. They are then forced to agree to

a 'resettlement scheme' in the fringes of the city.[190] In India, this violence is enacted through statutes, executive orders and zoning regulations passed under the aegis of the central and the state governments. Further, the judicial insensitivity that labels slums as 'encroachment' or 'pickpocketing' of urban public lands[191] has legitimised dispossession. The judgments are not informed by an analysis of the historical and sociological processes which, along with the complicity of the state, provide an explanation for the alarming levels of urban poverty and slums. An understanding based on the 'right to the city' would provide that nuance.

In India, the Supreme Court has never ruled that providing alternative housing and resettlement should be a condition precedent for any eviction plan. Thus, we see insensitivity and the violence of forced eviction legitimised through court orders on matters of 'public interest'. The executive in some states, through their policies, have partly incorporated the conditional requirement of an eviction plan but even then, as seen in *Ajay Maken*, they permit arbitrary exceptions. At times, the courts have adopted language that prioritises property rights over the sustenance and livelihood of the slum-dwellers. The 138th Report of the Law Commission of India has emphasised the need for a statutory provision protecting the rights of the slum and pavement dwellers, particularly because the existing statutes give a wide discretion to the executive to identify and clear slums without an obligation to provide alternative accommodation. The Report noted that such a law should ensure that local authorities do not withhold essential services and civic amenities to the occupiers and should provide them with at least two months' notice before eviction. The Commission recommended that central legislation[192] be enacted to provide that 'slum dwellers shall not be evicted without providing to them alternative accommodation' and such accommodation should be within a short distance from where the slum-dwellers are to be evicted which allows them to access the city, as far as possible, in the same way as before. To this, one may also add the need for a structured and monitored engagement process to ensure participation of all the stakeholders to arrive at a fair settlement. However, given that there has not been any action on the recommendations of the Law Commission, it is difficult to be optimistic.

The South African Constitutional Court has been far more sensitive to the rights of occupiers, and the prospects for enshrining the right to the city in its jurisprudence on housing appears to be more positive. The de-emphasis of private property rights and entrenchment of the concept of 'meaningful engagement' does provide a voice for a poor occupier in the processes of (re)location. At the same time, the engagement with the social history behind the dispossession of land by black people and consequent insecure tenure, such as occurred

[190] A Dutta *The Myth of Resettlement in Delhi* (2013, May 21), available at https://www.opendemocracy.net/opensecurity/ayona-datta/myth-of-resettlement-in-delhi. This widespread and coercive dislocation of people was stark in the organisation of Commonwealth Games in Delhi and FIFA Soccer Cup in South Africa. See, 'In preparation for World Cup, the poor in Cape Town are Being Relocated (June 11, 2010), available at http://www.washingtonpost.com/wp-dyn/content/article/2010/06/10/AR2010061002060.html?noredirect=on. Also 'Life in 'Tin Can Town' for South Africans evicted ahead of World Cup' (1 April 2010), available at https://www.theguardian.com/world/2010/apr/01/south-africa-world-cup-blikkiesdorp.

[191] *Almitra Patel* (note 169 above).

[192] Law Commission of India Report (note 188 above) 25–29.

in *Yolanda Daniels*,[193] has provided the Court with justification for expanding the beneficial scope of s 25(6) of the Constitution, or ESTA not only as a part of corrective justice but also to enable people to renew their citizenship in the city. While *Yolanda Daniels* was only about a plea by an ESTA tenant to carry out certain essential improvements, the Court aided by a socio-historical perspective, could see a wider right-to-city implication to justify the improvement.[194] Importantly, this also helps us subject the existing arrangement of property rights to critical inquiry.

The task of developing the content of the right to the city remains a challenge, and comparative studies can help us conceptualise this right in a manner that it not only remains a rallying slogan for influencing the politics of the state, but a legal tool to enforce important claims. The legal-normative work carried out in parts of Latin America and the World Charter on the Right to the City provide important insights for both the nations that can be supported by the value of human dignity in constitutional interpretation. Of course, the right to the city should at the least be consistent with the dynamism of the city itself. As Purcell argues, 'the right to the city is not a panacea. It must be seen not as a completed solution to current problems, but as an opening to a new urban politics.'[195] This means that elements of the right may be enshrined in constitutional law, but it is also a framework that should not be rendered entirely rigid through legal doctrine but allow the space for politics as well.

Lastly, the efforts to make cities world-class, beautiful, and slum-free, the modern cities have turned out to be brutal exclusionary projects. They have not only prioritised the exchange value over the use value, but also limited the access to an urban life and its opportunities for impoverished people who literally fight for their location in the wider socio-economic structure. A principled recognition of the right to the city could ensure that these smart cities are also just, fair and sustainable.

[193] *Yolanda Daniels* (note 144 above, at para 14). The Court, for example, notes, 'Dispossession of land was central to colonialism and apartheid. It first took place through the barrel of the gun and "trickery". This commenced as soon as white settlement began, with the Khoi and San people being the first victims. This was followed by "an array of laws" dating from the early days of colonisation. The most infamous is the Native Land Act (subsequently renamed the Black Land Act). Mr Sol Plaatje, one of the early, notable heroes in the struggle for freedom in South Africa who lived during the time this Act was passed, says of it, 'Awaking on Friday morning June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth'…. Apartheid sought to divest all African people of their South African citizenship.'

[194] The Court observed: 'If you deny an occupier the right to make improvements to the dwelling, you take away its habitability. And if you take away habitability, that may lead to her or his departure. That in turn may take away the very essence of an occupier's way of life. Most aspects of people's lives are often ordered around where they live. Bell says '[a] tenant who fears loss of an interest as vital as his home may forego associations or actions that are a normal part of self-determination and self-expression.' (Ibid para 25).

[195] Purcell (note 15 above) 99.