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‘Right to the city’ and the New Urban Agenda: learning from the right to housing

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ABSTRACT
The ‘right to the city’ has influenced the New Urban Agenda and other global and national urban policies. In the process, the meaning has narrowed towards realizing human rights in cities. Pursuing the right to housing in South Africa has established an important duty on the state to ensure universal access to decent accommodation. This has enabled millions of the poorest households to obtain improved habitation, and others to gain protection against forced evictions. However, the single-minded focus on state delivery of mass housing has been unable to keep pace with the rising level of need. It has also neglected the economic requirements of households and is proving to be financially unsustainable. Consequently, the housing right has not lifted many people out of income poverty or created more inclusive cities. A rights-based approach needs to be complemented by collective action and strengthened capabilities to drive progress across a broader agenda than just housing, particularly at the local level where there are major obstacles to change. A purposeful approach to unlocking urban land and collective efforts to spur socioeconomic development are vital.

KEYWORDS right to the city; human rights; affordable housing; collective action; inclusive cities; urban land markets

INTRODUCTION
The ‘right to the city’ was one of the main sticking points in negotiating the New Urban Agenda (NUA) – the new global framework for managing urbanization (Nair, 2016; Scruggs, 2016). Although the more pliable phrase ‘cities for all’ became the overarching vision of the NUA, signatories recognized ‘the efforts of some national and local governments to enshrine this vision, referred to as right to the city, in their legislations, political declarations and charters’ (UN-Habitat, 2016, p. 2). Civil society organizations and selected governments still celebrated the prominence given to the ‘right to the city’. It surpassed previous efforts to integrate the concept into urban policy, including Brazil’s City Statute of 2001, the World Charter for the Right to the City, Mexico’s Charter for the Right to the City and the United Cities and Local Government’s Global Charter-Agenda for Human Rights in the City.

The pursuit of the ‘right to the city’ by policy-makers has been criticized by some observers for diluting its original radical ambitions of urban transformation, and narrowing the focus to human

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Can (housing) rights help to build inclusive cities?

The idea that human rights can reduce poverty and support development has a long pedigree. There is a large literature, especially on the right to housing, that has analyzed the progress achieved in defining and implementing rights in different contexts (Donnelly, 2013; Kolocek, 2017). The emphasis has been at the national level, with far less known about the process of realizing rights within cities. This is especially true for cities in the Global South. Consequently, the opportunities and constraints facing local governments in translating human rights into positive urban outcomes remain underexplored (Brown, 2013; van Lindert & Lettinga, 2014).

This paper contributes to the literature by providing just such an assessment of the strengths and limitations of pursuing the right to housing at city level. Empirically, it draws on South Africa’s (SA) experience of trying to institutionalize and implement a constitutional right to housing over the last two decades, in the context of urban population growth and a serious shortage of affordable accommodation. The paper reveals that a rights-based agenda has yielded partial benefits to a section of the population, offset by persistent poverty and marginalization among non-beneficiaries. These deficiencies are causing increasing discontent, spontaneous protest action and unauthorized land invasions. In essence, an open-ended housing right was translated into a national policy that has been too narrowly conceived to meet the scale of need and to build more inclusive, equitable and functional cities. By putting the onus of responsibility solely on the state, it has neglected collective action and economic issues.

The analysis begins by outlining the research methods. The theoretical section contrasts a radical with a more reformist view of the right to the city, before linking to literature on human rights approaches to development. The longest section discusses SA’s experience of realizing housing rights at national level and in two of its largest cities. The final section distils conclusions and lessons for governments that are committed to realizing rights in cities as part of the NUA.

RESEARCH METHODS

The paper originated in a study of how city housing policies are responding to urbanization pressures, including the rising demands for affordable housing in accessible locations. It included a thorough review of prior research, government reports, local plans and interviews with 24 municipal officials and other stakeholders in the City of Cape Town and eThekwini Metropolitan Municipality (covering the Durban city-region). Cape Town and Durban were selected as cities with reasonably stable administrations and long track records of housing provision. Secondary data on socioeconomic trends were extracted for contextual understanding and media coverage was reviewed for independent commentary. The main municipal documents consulted were the integrated development plans, spatial development frameworks, built environment performance plans, housing plans, integrated human settlements frameworks, and densification and transport
CONCEPTUALIZING RIGHTS TO THE CITY: RADICAL VERSUS REFORMIST VIEWS

The ‘right to the city’ banner has attracted supporters with diverse interests and meanings (Kuy-mulu, 2013; Marcuse, 2009). There is an important distinction between a radical political interpretation implying fundamental systemic change through collective mobilization and a reformist approach aimed at securing specific human rights in cities through legislation and related mechanisms linked mainly to state action.

Lefebvre’s ‘right to the city’

In Henri Lefebvre’s original meaning, the concept is ‘like a cry and demand’ and should be understood as a collective right over urban space within a larger struggle to transform social and economic relations and concentrated power structures (Lefebvre, 1992, 1996). The city is a space of political engagement above all, and the ‘right to the city’ entails an argument for not being excluded or displaced, and especially for ‘full political participation in the making of the city’ (Mitchell & Villanueva, 2010, p. 668). The idea of collective struggle over urban space is famously explained by David Harvey as follows:

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 a collective power to reshape the process of urbanization. The freedom to make and remake our cities and ourselves is, I want to argue, one of the most precious yet most neglected of our human rights. (Harvey, 2008, p. 23)

This is not about realizing particular rights, such as access to housing or water, but ‘embodies a political claim that encompasses multiple rights’ (Marcuse, 2009, p. 193). The three most important claims relate to habitation (to live in the city and use its facilities), appropriation (to take full advantage of its economic opportunities) and participation (to influence its form and operation) (Lefebvre, 1996; Purcell, 2014). These represent a challenge to private property rights and serve as mechanisms for struggling against the dominance of private capital and market values over urban land. Thus, Lefebvre saw the ‘right to the city’ as part of a project to dismantle the existing economic and political system because of its inherent exploitative and exclusionary character, and its failure to give ordinary people a proper stake in the city. He believed that equitable cities require transforming the fundamental structures of society into a quite different, fairer system (Harvey, 2008; Marcuse, 2009; Purcell, 2014). Capitalism was seen as the main obstacle to just and inclusive urban development because it is fundamentally extractive in character and inhibits the state from taking the bold redistributive actions required to overcome urban poverty, inequality and exclusion.

The reformist human rights approach

The concept has been taken up by policy campaigners and civil society organizations in a more gradualist, pragmatic manner in recent years. This shift echoes Brown’s (2013) argument that ‘if the process of struggle is to achieve substantive change, it has to move beyond opposition’ and ‘to be effective the right to the city, though initiated by social actors, has to be underpinned by legal and regulatory reform’ (p. 962). A reformist agenda aims to create the institutional conditions to improve the lives of citizens on the assumption that the broader economic and social system can be enhanced in meaningful ways through rational discussion and compromise. A key
objective is to capacitate the local state as a development agent to pursue human rights (Parnell & Pieterse, 2010; van Lindert & Lettinga, 2014). This idea resembles human rights approaches to development more generally, as explained below.

Human rights methods are founded on the fundamental moral belief that everyone has specific rights simply because they are human (Donnelly, 2013). In other words, every individual is entitled to universal basic needs or capabilities which are essential in life. They can be ‘understood as moral statements about human beings, specifying what they ought to have access to’ (Fitzpatrick, Bengtsson, & Watts, 2014, p. 449, original emphasis). Rights can be thought of as providing the scaffolding, or legal foundation, of policies to improve the human condition and reduce people’s vulnerability to harm. While human rights focus on the individual, they are always relational and thus underpin rules for determining social relationships in a society (King, 2000).

The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights are the most significant treaties that reflect global agreements on what basic human rights people are entitled to. Adequate housing is one of the most fundamental because of its impact on human dignity, security, health, well-being and access to livelihoods. Therefore, realizing the right to housing is widely considered to be a cornerstone of human development and a political priority (Kolocek, 2017; Leckie, 1989).

While most governments agree on the list of human rights, their exact meaning and scope depend on the particular political and economic circumstances. The content also evolves over time through case law in domestic and international courts, reflecting complex negotiations over trade-offs with other interests and rights (Fitzpatrick et al., 2014; Kolocek, 2017). The right to housing is similarly affected. The Committee on Economic, Social and Cultural Rights (CESCR) has devised comprehensive guidelines on the core elements of adequate housing, which include security of tenure, availability of services, physical materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy (CESCR, 1991, para. 8). Precise standards remain to be specified for each element in particular contexts (Kolocek, 2017).

The power of human rights lies in their ability to create legally enforceable claims. They empower people to ‘demand justice as a right, not as charity’ (UNDP, 1998, paras 173–174). The progressive potential of human rights thus stems from their check on political power and opportunity to exercise state accountability (Hickey & Mitlin, 2009; Vandenhole & Gready, 2014). The state is obliged to respect, protect and fulfil human rights through appropriate legislative and administrative measures. These implementation mechanisms include raising sufficient tax revenues from those who can afford to pay and allocating sufficient funds to achieve these rights. Clearly, this depends on the state having the political will and wherewithal to meet these obligations, which depends on wider economic and social conditions.

Human rights claims are not equally enforceable. There is an important distinction between legal rights, which can be pursued by individual citizens in domestic courts, and programmatic rights, which express goals agreed upon by political actors. This partly reflects whether the court or the political process is more suitable to negotiate the issues concerned. In most countries housing is defined as a programmatic right rather than a legal right. In situations where it is a legal right, it is often limited to the provision of emergency accommodation for people who would otherwise be homeless (Fitzpatrick et al., 2007).

**Challenges of realizing human rights**

Although human rights have been formalized in many international treaties and national constitutions, the achievements in practice often fall short of expectations. There is considerable evidence of a disjuncture between the rhetoric and reality of human rights implementation around the world (Donnelly, 2013; Kolocek, 2017). Adopting human rights does not, by itself, enable citizens to make legitimate claims and ensure that governments meet their responsibilities. Davy and Pellissery (2013) argue that human rights are only realized when formal claims are
fulfilled by state obligations. Human rights scholars tend to approach the attainment of rights from a legal perspective, assuming that the law and legal structures have the necessary power to solve the problems (Vandenhole & Gready, 2014).

Yet, human rights litigation is only really effective under certain conditions and in conjunction with wider institutional and societal changes (Vandenhole & Gready, 2014). A legal approach may be a necessary first step, but frequently insufficient on its own to sustain and deepen progress over time. Litigation is expensive and therefore access to legal recourse is inaccessible to most groups. It does not usually generate collective action among multiple stakeholders to reshape outcomes on the ground. It tends to react to events and can contribute to the ‘juridification of welfare’ (Dean, 2014). Social demands for change can become highly technical and disempowering as accountability and decision-making shift from the everyday arena of citizen–government relationships to the esoteric legal system (Fitzpatrick et al., 2014).

Realizing human rights requires that formal declarations are followed through by a suite of actions that build capable state and other institutions to implement agreed policies, principles and court decisions (Parnell & Pieterse, 2010; Vandenhole & Gready, 2014). The legal system cannot be relied upon to overcome the problems caused by inadequate technical capacity, limited financial resources and resistance from vested interests (Hickey & Mitlin, 2009; Kolocek, 2017; Leckie, 1989). Litigation can lead to civil society movements creating expectations among citizens that are never delivered because insufficient attention is given to ‘how’ they can be achieved. Communities may also come to regard rights as pure entitlements without needing to get actively involved in their attainment. Putting full responsibility on the state is common in the human rights perspective, but it risks dissatisfaction and confrontation if state capacity is constrained or opposed by powerful social and economic forces.

Davy and Pellissery (2013) argue that the enjoyment of human rights requires the fulfilment of two interrelated elements: individual claims and state obligations. We suggest that two additional dimensions ought to be factored in – collective action and location (Figure 1). Collective effort foregrounds the role of civil society actors, including empowered community-based organizations and social movements in pursuing human rights through their own initiatives and by maintaining pressure on the state and other sectors of society. Location is relevant because human rights are usually realized or denied in particular geographical contexts. ‘The right to the city’ recognizes how places enable or disable various human capabilities and freedoms: economic advancement is the main reason people seek access to the city and resist displacement. The location of housing is crucial because of its fixed, place-bound character, which impacts on many aspects of people’s

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Figure 1. The four dimensions of human rights enjoyment.
lives. These include access to jobs, public services, social networks, personal safety and sense of belonging. Efforts to realize human rights therefore need to be embedded in spatial structures and social relationships to be effective. The operation of the urban land market is particularly significant in both respects.

HUMAN RIGHTS IN SOUTH AFRICA: ACCESS TO HOUSING AND PROTECTION AGAINST EVICTIONS

Human rights play a prominent role in SA law and politics. The 1996 Constitution was acclaimed internationally for its commitment to transform the lives of people who had been oppressed for centuries (de Vos, 2001; Langford, Cousins, Dugard, & Madlingozi, 2013; Liebenberg, 2010). Under Apartheid, blacks were denied the most basic rights and forcibly excluded from cities. The constitution sought to prevent such atrocities and injustices from ever happening again. Its main purpose was to heal the divisions of the past and gradually build a more equal society based on democratic values and social justice. This was to be achieved by including a range of judicially enforceable socioeconomic rights. Section 26(1) of the Bill of Rights states that ‘Everyone has the right to have access to adequate housing’ (RSA, 1996). Section 26(2) says ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right’. Section 26(3) protects citizens from arbitrary evictions and homelessness. The constitution also defined housing as a concurrent function of national and provincial government, but not local government. This has had unintended consequences, discussed below.

Formalizing the housing right received widespread support because of the history of severe housing neglect and dispossession, although disagreements soon emerged about what it entailed, including timeframes, eligibility, standards, and attitudes to informality and evictions (SPII, 2014; Strauss & Liebenberg, 2014). There have been many court cases as a result. Indeed, the right to housing has become the most frequently litigated socioeconomic right in the country (SERI, 2013). Landmark court decisions such as Grootboom, Olivia Road, Blue Moonlight and Joe Slovo have generated a complex jurisprudence that gives substance to the right. The government has also approved many laws, policies and duties that inform the provision of housing and the process of evictions. The court cases have had far-reaching implications for the obligations of all spheres of government (de Vos, 2001; Dugard, Clark, Tissington, & Wilson, 2016; Pottie, 2004; SAHRC, 2015).

The Constitutional Court’s decision (in Grootboom) that no eviction should result in homelessness was a watershed. An eviction must be ‘just and equitable’ and cannot proceed without the state providing alternative accommodation to those ‘with no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations’. This decision required the government to amend its housing policy and introduce an Emergency Housing Programme for people in dire straits. This took several years to come about and the result is still heavily criticized as inadequate in various respects (Cirolia, 2014).

In a subsequent prominent case (Blue Moonlight) the Constitutional Court established that the primary duty of providing alternative accommodation lies with the state, specifically the local municipality, even if those evicted occupy private land. Municipalities are now obliged to plan for emergency housing because of the duty to prevent homelessness. In practice, this is often not achieved and people who occupy private and public property are still regularly evicted and have their structures demolished without a court order or any safety net provided. Civil society organizations and lawyers acting on behalf of the victims lack the capacity to challenge most of these cases.

Another duty prescribed by the courts (Olivia Road) is for municipalities to consult the people affected by evictions so they have some say in the outcome. This entails ‘meaningful engagement’
at collective and individual levels before evictions are undertaken. In practice, it remains unclear how this is supposed to be achieved and who can ensure it happens, so it often appears to be perfunctory and does not alter the outcome.

In the *Joe Slovo* case, the Constitutional Court set requirements for temporary residential units (TRU), which effectively defined a minimum content for alternative accommodation (Dugard et al., 2016). However, it also endorsed households being relocated to the urban periphery! In situations where evictions are not feasible because of the sheer number of people occupying the land, the Western Cape High Court recently decided that the state should purchase or expropriate the land on which the squatters live. The court recognized that this infringed on the landowner’s right to property, which had to be balanced against the occupants’ right to housing (Furlong, 2017). This was an important decision, the full implications of which remain uncertain.

The *Grootboom* case also established that the state is obliged ‘to devise and implement within its available resources a comprehensive and coordinated programme progressively to realize the right of access to adequate housing’ (SERI, 2013). While the court recognized practical limitations on what the government can do, the law is vague about what ‘reasonable’ means, i.e., what measures, timeframes and financial commitments are appropriate (Dugard et al., 2016). Internationally, the CESCR had proposed a ‘minimum core obligation’ that should be met by every government. However, the Constitutional Court and government rejected this idea, suggesting instead a framework of standards to test programmes for their reasonableness (SAHRC, 2015; SPII, 2015). In principle, this offered a more flexible approach.

In practice, the cornerstone of the housing right soon became a national programme of mass housing for the poor as outlined in the 1994 housing white paper.³ State provision of free basic dwelling units captured the public imagination, especially among the millions living in overcrowded, insecure and squalid conditions. It offered them a sense of dignity and stability that they had been denied, and seemed like the simplest technical solution to the problem as it was within the government’s direct control to deliver. It was also important to offer something better than the ‘site-and-services’ schemes favoured by the previous government. The dream of free housing has been the guiding principle ever since, with the result that over 3 million formal dwellings have been built – a credible achievement in numerical terms and widely celebrated within government (StatsSA, 2016b; The Presidency, 2014).

**IMPLEMENTING HOUSING RIGHTS: CHALLENGES WITH NATIONAL POLICY**

National interpretation of the right to housing

Looked at in more detail, the single-minded focus on building Reconstruction and Development Programme/Breaking New Ground (RDP/BNG) houses has had contradictory effects for people and places. Crucially, the programme has been unable to keep pace with rising need, especially in the major cities. Consequently, the housing shortfall has risen by about 50% from 1.4 million to 2.1 million over the same period (Tomlinson, 2015). According to Dawson and McLaren (2014), ‘the Constitutional provision promising everyone access to adequate housing stands in stark contrast to the pervasive realities of housing backlogs … and the substantial unmet demand for well-located, low-cost housing in urban centres’ (p. 91). The emphasis on quantitative delivery has fostered a bureaucratic machine that is unresponsive to local conditions (Pottie, 2004; Turok, 2016). The public cost has been estimated at about US$30 billion in today’s prices, and 13% of the current national budget (StatsSA, 2016a, 2016b). This excludes the cost of the associated land and infrastructure.

The administrative burden of sustaining the programme and meeting rising expectations about the specification of each house has led to falling rates of delivery, escalating costs, inferior construction and widespread mismanagement (Patel, 2015; SAHRC, 2015). A recent government
review provided damning evidence of these problems and raised serious doubts about the programme’s affordability and sustainability (National Treasury, 2015). There are more and more eligible households on the waiting lists and average waiting times now exceed 10 years in the cities (Savage, 2014). There are also rising numbers of vulnerable households who earn too much to qualify for a RDP/BNG house, but not enough – or are too saddled with debt – to obtain bank loans to buy their own homes or to enter the private rental market. The right to housing has meant very little to this growing section of the population.

The housing programme’s focus on building freestanding units within a fixed price has forced contractors to economize on the land costs. This has produced dormitory settlements on the urban outskirts, inaccessible to jobs and amenities (SACN, 2016; Turok, 2016). Schools, healthcare and other facilities often take years to materialize within these places. Consequently, the policy has ‘unwittingly … reinforced apartheid geography’ (NPC, 2012, p. 268). A uniform physical solution has been provided to a problem with essentially economic foundations (low affordability), and the multiple facets of viable urban settlements have been ignored. The living conditions of beneficiaries have improved through personal safety, privacy and basic services, but there have been detrimental effects in reinforcing social segregation, imposing costly travel patterns and making it even harder for people to access livelihoods or generate their own incomes (SACN, 2016; SAHRC, 2015; Tomlinson, 2015).

It is an indictment that less than 10% of beneficiaries are believed to have moved above the poverty line by getting jobs, renting out space or starting home-based enterprises (CDS, 2015). The value of most houses has remained below their construction cost, rather than becoming assets that give households financial security and independence (CDS, 2015). Many have been forced to sell their homes prematurely for a fraction of their cost and make other living arrangements because of their poor location or inability to afford the ongoing service charges and property upkeep (Bradlow, Bolnick, & Shearing, 2011; Charlton, 2018; SACN, 2014). A range of accommodation options could have been provided for households in different circumstances, with an emphasis on creating places that help people to generate incomes, that facilitate economic mobility and that appreciate in value over time. Measures could also have been introduced to recover at least part of the cost to enable the process to be replicated and scaled-up.

In short, the preferred approach to institutionalization contradicts important attributes of the right to housing as defined by the CESCR or common sense. Many citizens have ended up with a more habitable dwelling, but confined to places that are more disabling than enabling because they are far from opportunities and services. About 1 million RDP/BNG households still have no title deeds to their houses because the contractors failed to follow the government’s own planning, building and land registration procedures (National Treasury, 2018). Compelled to expedite delivery, some of the 14 steps required to issue a title deed were bypassed. This prevents households from using their properties as collateral or selling them legally to realize their asset and move elsewhere.

Reinterpreting the right: from housing to human settlements?

Many of these concerns became apparent within a few years of the new policy (Public Service Commission, 2003). In 2004, the government responded by promising a paradigm shift from a narrow housing agenda focused on giving people ownership of a physical asset towards ‘sustainable human settlements’, signalled by BNG. This was supposed to devote greater emphasis to the quality and location of housing. Reference was made to ‘spatial transformation’ and using well-located land to raise residential densities (SACN, 2016). The right to housing was to be reframed as demand-driven in order to respond to people’s diverse needs and preferences, including those requiring assistance but not chronically poor (SACN, 2014). There would be multiple solutions to enable people to get ahead as their economic and family circumstances changed. The new funding streams included the Integrated Residential Development Programme, Upgrading of Informal
Settlements Programme (UISP), Financed-Linked Individual Subsidy Programme and Social Housing Programme.

The BNG promised to strengthen the roles of local government and the private sector in housing provision. Municipalities would be given more responsibilities to coordinate housing with transport and land-use decisions. In practice, this devolution process stalled because of political resistance from provincial authorities and ministerial doubts about the capacity of local authorities to deliver at sufficient scale (Tomlinson, 2015; Turok, 2016). Municipalities have therefore been denied the control over resources necessary to respond to the housing problems they face and to start shifting prevailing settlement patterns.

The BNG recognized the economic and social functions of housing, but most of its proposals have simply not been implemented, causing a mismatch between housing policy and practice. Despite some design adjustments and experimentation in the major cities, the same basic approach of supplying mass housing in incomplete neighbourhoods continues (Amin & Cirolia, 2018; SACN, 2016). Consequently, many unemployed and destitute citizens are confined to modest dwelling units in unfavourable environments on the urban periphery (CDS, 2015). Many other people have not received any benefit at all from the right to housing and are forced to rent or buy rudimentary structures in informal settlements and other people’s backyards, where there is intense competition for living space and other scarce resources. Their struggles to survive and frustrations at the lack of affordable housing boil over with increasing frequency into violent community protests and land grabs.

The government remains indifferent to informality, with a ‘high level of ambivalence towards informal settlements across spheres of government, and the capacity and implementation mechanisms … are still poorly developed locally’ (NPC, 2012, p. 244). Implementation of the UISP has been very patchy, so official recognition of most informal settlements has been slow. The government’s preferred solution involves interim services (shared taps, portable toilets, basic electricity connections and refuse collection), followed in due course by relocating shack dwellers to new formal RDP/BNG units elsewhere (Cirolia, Drimie, Gorgens, Donk, & Smit, 2017). In situ upgrading is unpopular partly because engaging with existing communities and landowners tends to be more complicated than issuing contracts for new housing projects. Onerous environmental and planning laws also frustrate the process of consolidating haphazard settlement layouts and retrofitting the infrastructure (Greyling & Berrisford, 2016). There is no national support for the provision of serviced stands that would enable people to build their own homes, in line with what they can afford.

Interestingly, the character of many RDP/BNG townships has been transformed within a few years of construction as a result of large-scale backyard settlement (Turok & Borel-Saladin, 2016). Residential intensification of these areas has been driven by the agency and ingenuity of poor households raising income from renting out structures in their backyards, recognizing the general shortage of land for housing. It is ironic that the RDP/BNG settlements that were built in such a neat and orderly manner specifically to counteract informality are rapidly becoming informal and irregular themselves. There are positive aspects of backyarding, but also adverse effects that are more serious than the eyesore politicians worry most about, including overloaded sewers, electricity failures, heightened fire risks and breakdowns in other public services that were designed to accommodate a much smaller population.

Elsewhere, initiatives by social housing companies and private developers to refurbish dilapidated inner-city buildings in Johannesburg and other metros have been stymied by the jurisprudence on evictions (Mtshiyo, 2017). The housing right trumps the right of property owners to vacant possession (Nevin, 2018). Owners wanting to upgrade or redevelop their run-down premises face prohibitive obligations to find alternative accommodation for all the occupiers, or persuade the cash-strapped municipality to do so. Planned renewal projects that would have transformed the squalid conditions and provided additional accommodation have been shelved.
in the resulting stalemate (Nevin, 2018). A process of local negotiation to resolve these disputes could arguably have yielded a more constructive outcome than litigation.

Summing up, all the attributes of adequate housing specified by the CESCR have been recognized on paper in SA. However, there is a disjuncture with what transpires in reality. National programmes are out of touch with the dynamic situation on the ground and people’s everyday problems and experiences. As a result, citizens’ enjoyment of the right to housing is partial at best and they have been forced into all kinds of adaptive strategies to cope with financial hardship. Households still living in makeshift structures have had almost no support from the state. Some of them have been protected from forced evictions, but with the perverse effect of frustrating investment in more and better homes. The legalistic approach has put the onus of responsibility on one arm of the state and confounded broader-based arrangements, pragmatic deal-making and partnerships between municipalities, developers and groups of residents.

THE HOUSING CRISIS IN THE CITIES

Cape Town and eThekwini are the second and third largest metros and under increasing strain to accommodate expanding populations which are mostly very poor. Between 1996 and 2016, Cape Town’s population grew by 60% from 2.5 million to 4.0 million. The population of eThekwini is growing more slowly because its economy is weaker, but there is still considerable movement from the rural hinterland towards the urban core. The dire shortage of affordable housing in both cities causes social discontent and unrest within and between communities. The municipalities face difficult dilemmas, such as preventing land occupations while meeting their legal obligations to citizens desperate for somewhere to live (SAHRC, 2015; StatsSA, 2016a). Their responses are variable because conditions in their areas are so dissimilar and so dynamic, and because they lack the powers and resources to act in a more concerted manner.

The housing backlog in both metros has grown to approximately 400,000 households over the last 20 years. These comprise people occupying informal settlements and backyard dwellings, those living with relatives in overcrowded conditions, and others in former migrant worker hostels which have become very run down. There are more people in backyards in Cape Town than in Durban, and fewer in hostels. Land is more constrained in Cape Town, forcing population densities higher and complicating the upgrading of informal settlements. The demand for well-located land from affluent households and businesses is also higher in Cape Town because it is more prosperous. This drives property prices higher, induces the involuntary displacement of poorer households from the urban core and adds to the cost of state-subsidized housing. Yet, the buoyancy of the property market also raises the possibility of negotiating inclusionary housing by persuading developers to set aside a proportion of new dwellings and/or land for lower income households. The contrast between the cities indicates immediate difficulties in implementing the uniform national housing policy.

Disjointed responses

Both metros recognize the need for decent, accessible housing for their growing populations. eThekwini (2015b) describes the current reality as ‘segregation of people and activities which has resulted in a mismatch between workers and jobs’ (p. 140). Cape Town acknowledges the need to ‘Promote a range of size, type and cost of housing opportunities, in appropriate locations … with good access to economic opportunities, public transport and social facilities’ (City of Cape Town, 2012, p. 69). Their plans recognize that housing is much more than physical shelter and can support economic advancement and community well-being. They endorse the principle of compact and connected built environments, with increasing emphasis on transit-oriented development to mitigate segregation by densifying neighbourhoods along public transport routes (City of Cape Town, 2015a, 2015b; eThekwini Municipality, 2013, 2015a).
Yet, officials also admitted that progress on the ground has lagged far behind. They referred repeatedly to policy inconsistencies across government and inadequate resources for well-located affordable housing. The RDP/BNG programme is the biggest impediment to integrated development because of its formulaic approach (CDS, 2015; National Treasury, 2015). No fewer than 70% of all houses currently committed or under construction in Cape Town are RDP/BNG units (City of Cape Town, 2015a). Officials complain that the national department continues to prioritize quantitative delivery above everything else, despite the patent failure of this programme to keep pace with the rising level of need. Each unit costs municipalities more to build than the housing subsidy they receive. The burden on ratepayers escalates over time because few RDP/BNG households end up paying rates (CDS, 2015). Both metros aspire to mixed-income, mixed-use projects on brownfield/infill sites, but building on greenfields is simpler and cheaper in direct project costs (City of Cape Town, 2015a, 2015b; eThekwini Municipality, 2015a). Most new public and private housing is constructed on the periphery, thereby fuelling the separation of housing from other land uses.

Realizing that they cannot keep pace with the growing backlog, both municipalities see the logic in upgrading informal settlements and have supported some initiatives to do so. However, they face many obstacles which national policy does little to resolve. Some occupied sites are unsuitable for long-term habitation because of poor drainage or other problems. Identifying alternative sites is difficult because of the shortage of developable land and the lack of state funding to provide serviced sites for self-building. Uncertainties about the future of shack settlements causes insecurity for the affected communities and discourages investment. Many of these places are controversial – neighbouring communities fear the impact on their property values and use whatever legal procedures and loopholes they can to resist state initiatives to regularize or formalize them. Cumbersome state regulations relating to the process of developing land complicate the upgrading task and lead to inordinate delays.

In addition, weak community organization and suspicion of the state tend to undermine constructive engagement. Municipalities lack the experienced intermediaries to work with local residents and negotiate with gatekeepers to gain their trust and approval to install essential services and public spaces for pedestrian and vehicular circulation. Lack of community buy-in results in negligence and periodic vandalism of the installed facilities. City politicians worry that upgrading will legitimize land grabs and prompt further in-migration by indigent people from rural areas. They are also concerned that the recent evictions jurisprudence may have perverse consequences in incentivizing the owners of marginal land to encourage squatting, hoping they will receive generous compensation. Put simply, national policies are too narrowly conceived and remote from conditions on the ground to help shape constructive outcomes.

There are similar challenges facing backyard housing, so progress has also been slow and piecemeal. There is a national policy vacuum on backyarding, hence no guidelines or funding available to support upgrading and regularization. Yet, backyarding plays a growing role in the supply of low cost, rental accommodation in both cities. There are signs of creativity and innovation emerging in the form of small-scale developers of two- and three-storey flatted buildings subdivided into small separately occupied units rented out to households. These structures are superior to shacks in many ways, but because backyarding is unregulated and unsupported, there are some risks to the health and safety of residents and to overloaded public infrastructure. Both cities are struggling to balance the diverse interests involved and find a path through the legal and regulatory quagmire. Cape Town has shown more interest than other cities with several pilot projects to extend basic services to backyard tenants on council property, recognizing that their rights are currently being denied.6 In the absence of a national policy on backyarding, other city departments are inclined to enforce the existing building and planning regulations by threatening to demolish backyard extensions that do not comply.
Both metros own migrant hostels that are severely overcrowded and pose serious health risks. Residents echo the general frustration that their right to better housing is ignored. Although both municipalities have initiated projects to upgrade some of these buildings, their budgets are limited (Phakathi, 2014). Cape Town’s Community Residential Units make up only 2% of the total currently committed or under construction (City of Cape Town, 2015a).

Officials recognize that social rented housing offers considerable potential to improve upward mobility for tenants with reasonable job prospects and to restructure the urban form through well-positioned accommodation. There have been several valuable projects undertaken, but social housing constitutes only 3% of all housing committed or under construction (City of Cape Town, 2015a, p. 39). The city gave a novel undertaking recently to partner with social housing institutions to build affordable units at 11 publicly owned sites in and around the inner-city (Deklerk, 2017). This is a notable departure from past practice and reflects the growing pressure from local social movements to counter continuing segregation, gentrification and displacement of the poor.

There are even fewer social housing projects in the pipeline in eThekwini. The paucity of national funding is mainly to blame, along with the outdated level of the social housing subsidy, which renders most projects unviable.

Periodic disasters affect informal settlements, including devastating shack fires and flooding. One response has been to create temporary relocation areas (TRAs). This follows the court cases mentioned above that insisted that temporary housing is provided for people in emergencies. Households are allocated a small unit made of corrugated zinc sheets, plastic taps and shared ablutions. TRAs are meant to be stopgaps, although officials admit that they become permanent because there is no alternative. Cape Town’s first two TRAs at Blikkiesdorp and Wolverivier have been heavily criticized for their remote locations and sense of hopelessness (Ndifuna Ukwazi, 2015; van der Merwe, 2015). Where people do not need to be relocated after disasters, they are typically given replacement building materials, blankets and food parcels.

In summary, the inflexible national housing regime means that both metros struggle to address their diverse problems effectively or equitably. Selected groups gain some benefits from acquiring new homes, but many others remain impatient and aggrieved because there is little or no support forthcoming for them. Citizens are suspicious that the decisions about which people and places benefit from state housing are arbitrary and unfair, rather than just and transparent. The metros’ options are severely constrained, which undermines trust and confidence in government as a whole. It is all too apparent that national, provincial, and local policies and practices are poorly aligned and failing to deal with the situation.

CONCLUSIONS: PITFALLS IN CONCEPTION AND EXECUTION

The state’s commitment in the 1990s to provide free houses to poor adults has remained the guiding principle behind its approach to the right to housing. This promise has continued to be popular with potential beneficiaries on the assumption that state actions are benevolent. Meanwhile, conditions have deteriorated in the major cities, with intensified pressure on land and demands for affordable housing that outstrip the capacity of the established model to deliver. A range of other forms of provision have emerged more or less spontaneously, such as rented backyard dwellings. People forced to wait a decade or more for a free house have also demonstrated a willingness to accept incremental solutions, such as serviced sites for self-building (Paton, 2018).

One of the major pitfalls of SA’s right to housing has been the way it has been conceived. It has been defined in relative isolation, rather than as an integral part of a package of rights. The physical structure of the house has been singled out for special attention, ignoring the value derived from its setting, including access to livelihoods and amenities from well-located land. The housing right has been awarded to individual households devoid of their social circumstances and spatial context. There has been no expectation placed on people themselves, their communities or other
stakeholders outside the state (such as private sector employers) to make a contribution. There has also been no recognition that households have diverse characteristics, and that housing typologies should vary in different parts of the city. Focusing on the physical structure has tended to treat the symptoms of the affordable housing problem, rather than tackling the underlying causes in terms of both demand and supply. These omissions are consistent with a welfare approach that compensates people in need for failures of the system, rather than a developmental approach that helps to improve their circumstances over time. They raise serious question marks about the long-term viability of the housing model. Indeed, the negative repercussions of ignoring economic fundamentals became all too apparent in the conditions of austerity surrounding the 2018 national budget, when the housing allocation was one of the hardest hit by cutbacks (National Treasury, 2018).

Other pitfalls relate to the way the housing right has been executed and institutionalized. These constraints have inhibited the ability of key agencies to adapt state powers and resources to the changing circumstances on the ground. First, the narrow focus on mass housing designed and implemented in a government silo has not been part of a wider strategy to reduce poverty and to improve urban development. The single-minded delivery of stand-alone housing has essentially disregarded the economy and the need for destitute households to generate an income in order to survive. The emphasis on building top structures has also neglected positive action to address the skewed distribution of urban land, which remains a stark symbol of historic dispossession and racialized inequality. Very little has been done to use surplus state-owned land for low-income housing or to acquire or expropriate under-used private land for this purpose.

Second, the locus of power and decision-making has been highly centralized and top down, making it very difficult for local authorities to take responsibility for solving these problems and to integrate housing into more comprehensive place-making endeavours. Building liveable, inclusive and well-functioning neighbourhoods and cities depends on raising residential densities in appropriate locations, promoting social diversity and encouraging mixed land uses, rather than mechanical delivery of large numbers of standardized dwelling units in dormitory settlements detached from places of work, study and recreation.

Third, the state-centred approach to housing supply has precluded a role for other actors and institutions, including drawing on the agency of people themselves, joint actions with community-based organizations and collaboration with the banks, housebuilders and other private sector bodies. The sense of entitlement has encouraged passivity and protest, rather than enabling active citizenship and collective effort. Statist methods forsake local knowledge of physical and social conditions and community ownership of new public facilities. Legalistic, state-centred approaches have also done little to forge conversations and constructive engagement between neighbouring communities to strengthen tolerance, mutual understanding and social trust. Homelessness, squallid housing and informal settlements are not just government problems – they have wide-ranging affects.

Fourth, the housing model has been essentially static and out of sync with the needs of poor households for mobility in their struggles to get by and survive (Charlton, 2018). The policy has barely changed, except for some belated updating of its technical aspects and subsidy values. Key features of tenure, location, density and diversity have not evolved or adapted to shifting conditions. There has been little apparent learning and reflection over time, despite the consistent external criticism. The policy has also failed to respond to emerging pressures and opportunities, such as the growth of backyard renting and occupation of derelict buildings. The official response to repeated waves of land invasion and community conflict has been vague promises to accelerate delivery of RDP/BNG houses.

Alternative solutions to these problems are not straightforward. Yet some elements of a better way forward emerge from this critique. Several of them resonate with a ‘right to the city’ approach more than a human rights approach. For instance, housing needs to be conceived of and institutionalized in relation to other household necessities – for employment, urban amenities and well-
located land. Collective action within and beyond the state is required to overcome political resistance to low income housing and to harness the energy and ideas of different actors in providing solutions, including emerging and established housing developers, financial institutions and employers. This would stimulate more creativity in housing supply and a wider range of options for people with different needs, including social rented housing, self-provisioning and different forms of co-production. Shifting from a state-centred approach towards a more enabling role is another reform required to marshal additional resources and institutional capabilities into housing production. A more coordinated and collaborative approach would need many of the existing administrative procedures and regulations to be simplified and streamlined.

**DISCLOSURE STATEMENT**

No potential conflict of interest was reported by the authors.

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**NOTES**

1. Latin American countries, supported by civil society organizations, pressed for ‘the right to the city’ as the new governance approach, arguing that this would create cities that are just, equitable and accessible to all (Godoy, 2016a, 2016b). The European Union, the United States, Russia, Japan and India resisted this because of the ambiguity of the phrase and concerns it would lead to unrealistic legal claims on governments by urban residents, including undocumented immigrants and others with no legal status at present (Nair, 2016).


3. The qualifying criteria for receiving these ‘Reconstruction and Development Programme/Breaking New Ground’ (RDP/BNG) houses included having a monthly household income below R3500, SA citizenship, aged over 21 years, and being married or living with a partner or having dependants. This covered the majority of the adult population.

4. A new amendment bill to the Prevention of Illegal Eviction Act drafted in 2006 would change the situation in favour of the property owner by making evictions of unlawful occupiers easier. However, the bill is highly contested and is still awaiting cabinet approval (Nevin, 2018).

5. The City of Cape Town estimates that it will take over 70 years to remove the housing backlog using the traditional housing approach.

6. This will be a slow process considering that there are approximately 45,000 backyarders on council property and many more on private property.

**REFERENCES**


