Six Theses Concerning the Right to the City and Access to Justice

The Role of Public Defender's Offices

Horacio Corti[1]

Good afternoon. To begin with, I would like to apologize for not speaking English correctly. I will follow a simple text that I prepared for today, and I will try to ensure that you understand me.

Objectives of the presentation.

Goal 16 of the 2030 Agenda includes "provid[ing] access to justice for all." In similar terms, clause 16.3, which expands upon goal 16, provides for "ensur[ing] equal access to justice for all." [2] The distinct relationship between "access to justice" and equality and non-discrimination principles (which is, in turn, the subject of goal 10) is apparent.

Separately, Goal 11 refers to cities, which must be inclusive, safe, resilient and sustainable.

In this brief presentation, I will set forth the following propositions:

1) International human rights law provides the basic framework for understanding the millennium development goals.
2) Social exclusion is one of the central characteristics of contemporary social structures.
3) The most strategic way to advance the principle of equality today is through the development of a right to social inclusion.
4) The best way to focus on urban problems is through the right to the city.
5) Public defenders' offices are an effective institutional tool to ensure access to justice for all with respect to urban affairs.
6) It is necessary to formulate a series of principles about access to justice with respect to the city, which must be part of a binding regional agreement.

1. **International human rights law.**

We know that one of the characteristics of international law is its fragmentation.[3] This means that, in contrast to national law, there is no hierarchical normative structure in the international legal order.

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[1] Ph.D. in Law, Faculty of Law, UBA. General Public Defender of the Autonomus City of Buenos Aires.

[2] ONU A/RES/70/1, "*Transforming our world: the 2030 Agenda for Sustainable Development.*"

[3] Report of the International Law Committee Study Group developed by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682.

Nevertheless, international human rights law has a preeminent place. Indeed, many of its norms, including the principle of equality, are considered to be part of the *jus cogens*[4].

This preeminence has led to the use of the term, the "constitutionalization of international human rights law." [5] This means that:

1) The rules of international human rights law acquire (or tend to acquire) *prima facie* the character of superior norms,
2) Their content is similar to one of the pillars of modern national Constitutions: bills of rights;
3) Declarations and conventions are interpreted by international human rights bodies (the Inter-American Court of Human Rights, the European Court of Human Rights, among others) as living instruments, as is the case with judicial interpretations of national Constitutions.

The Introduction to the Declaration that sets forth the millennium development goals explicitly states that it is "grounded in the Universal Declaration of Human Rights" and "international human rights treaties" (paragraph 10).

First thesis: the millennium development goals fit conceptually within the international human rights framework.

2. Social exclusion.

Let us take a moment to observe an empirical detail. Contemporary societies (particularly those in Latin America) are characterized by profound inequalities.

These inequalities are structural, deeply rooted and persistent.

The very 2030 Agenda acknowledges that "there are rising inequalities within and among countries" (paragraph 14).

In contrast to what occurred during the so-called "thirty glorious years" following the Second World War, which were characterized by the social contract, a reduction of inequality and upward social mobility, there was a shift in the political paradigm starting in the 1970's. That change has led, with different nuances in each society, to deepening social inequalities.

Social exclusion is the typical way of characterizing that new social structure.

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[4] Inter-American Court of Human Rights. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC 18/03, September 17, 2003. Series A No. 18.

[5] See, for example, Hanan Qazbir, *L'internationalisation du droit constitutionnel*, Dalloz, 2015

The novelty of social exclusion with respect to prior forms of exploitation or dominance has been clearly articulated by Pope Francis in a number of documents. Thus, in his exhortation *Evangelii Gaudium,* he affirmed that "what is at stake is no longer simply about the phenomenon of exploitation and oppression, but rather something new: exclusion affects, at its root one´s membership in the society in which one lives…those who are excluded …are scraps, disposable." His expression "culture of waste" is telling. [6] In addition, it makes clear that we live in a culture based on social exclusion.

Second thesis, of an empirical nature: contemporary culture is based on a new socio-political structure favoring exclusion.

3. The right to social inclusion

This current reality challenges jurists to rethink institutions. I believe that the best way to do so is through the right to social inclusion.

Every person has a right to form part of society on the same terms as their peers.

I believe that this right has been recognized in various contemporary legal documents. For example, the European Union's Charter of Fundamental Rights states that in order to "fight social exclusion," it recognizes a set of rights. [7] The Constitution of the City of Buenos Aires is drafted in similar terms. [8]

That "macro right" includes traditional rights (that is civil, political and social rights) as well as traditional principles (such as equality), which have been reinterpreted in light of societies based on exclusion.

This means, for example, that many legal cases concerning particular rights (such as education, health or housing) must also be seen as cases concerning the right to social inclusion. There is not just a right to housing; rather, that right must be guaranteed as a mechanism to obtain social inclusion.

In this way, the right to housing also implicates access to public services and to urban social integration.

Democratic practice leads, as Claude Lefort indicated, to a continuous process of regenerating new rights.

Third thesis: it is possible to recognize the existence, in comparative constitutional law, of a genuine "macro right" to social inclusion.

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[6] https://w2.vatican.va/content/francesco/es/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html.

7 See article 34 of the Charter of Fundamental Rights of the European Union

8 See article 17 of the Constitution of the City of Buenos Aires

4. The right to the city.

The right to the city is a category that arose from the sphere of political philosophy towards the end of the seventies in the last century. As is commonly known, its main proponent was Henri Lefebvre, who forged the concept while the social and political mobilization of French May was occurring.[9]

That concept was then elaborated upon by geographers, sociologists and urban studies scholars. In Anglo-Saxon literature, the work of David Harvey is the most prominent and in the Latin context, Jordi Borja´s.

The right to the city went from the political sphere to legal practice, particularly in Latin American societies. It is an interesting case of the migration of ideas: from political philosophy to law, from Europe to Latin America.

In 2001, Brazil passed its City statute, which incorporates the Right to the City. Ecuador did the same in 2008, this time at a constitutional level.

At the same time, social movements opposed to globalization were able to agree upon the World Charter for the Right to the City.

As we know, the New Urban Agenda that was approved at the Habitat III Conference included a passing mention of this issue, highlighting the efforts of some governments to recognize the right to the city in their legal texts. That reference would later be reiterated by the Human Rights Council in its Resolution 35/24 from 2017.

The New Urban Agenda failed to meet many expectations. On the one hand, its reference to the right to the City is marginal. On the other, it failed to include a casual explanation for enormous contemporary social and urban inequalities. Those shortcomings motivated the drafting of a critical manifesto by the Alternative Forum, which was simultaneously being held at FLACSO-Ecuador. [10]

Nevertheless, one must consider that many generic declarations in international human rights law were the base upon which subsequent, more solid legal conventions were premised. For example, we can point to the historical evolution from the Universal Declaration of Human Rights, in 1948 (which was originally a non-binding

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[9] Developed in greater depth in: Horacio Corti – Jordi Borja, *The Right to the City: political victory and juridical renovation,* Editorial Jusbaires, Buenos Aires, 2018. In the appendix to that text, one can find the following documents: *Resolution Nº 71/256 "The New Urban Agenda",* approved by the United Nations General Assembly in 2016; *Resolution Nº 35/24 "Human Rights in Cities and Human Settlements"*, approved by the United Nations General Assembly in 2017; *World Charter on the Right to the City*, approved by the Social Forum of the Americas in Quito (2004), the Urban Social Forum, in Barcelona (2004) and the World Social Forum, in Porto Alegre (2005); *Quito Manifesto*, approved during the United Nations Alternative H3 Forum, held at FLACSO Ecuador, in 2016; *Agreement on the Urbanization of Shanty Towns. Ten Points about socio-urban integration in informal settlements*; *Preliminary Document from the City of Buenos Aires Public Defender's Office: public defense and urban social justice*; 2017 *Survey of homeless individuals; Law N. 14449 from the Province of Buenos Aires; Law N. 5798 in the City of Buenos Aires.*

[10] The text is published in the appendix to the text that I published along with Jordi Borja, cited above.

declaration) to the two Covenants that became effective in the seventies. Today, in addition, that Declaration has acquired legal status.

I will now discuss the meaning of the right to the City.

The right to the city requires one to think about the city as an integrated whole from a human rights perspective. If we consider classic legal texts about urbanism, what is in play is the relationship between the public interest, on the one hand, and rights to property and economic liberties, on the other. There is a State that must safeguard the common good and economic interests that are infringed upon (or restricted) in light of the public interest. Placing the right to city at the center [of that discussion] requires a radical change of perspective [or Copernican gift] because it means attributing a right to the City to all of its residents. There is not only a bilateral relationship between the State as protector of the common good and property owners and business people whose private rights are infringed upon, but also a collective relationship between a city government and the totality of its inhabitants. The concept is, in and of itself, democratizing, insofar as it incorporates "the people" into urban legal issues.

In simple terms: urban law concerns all of us who live in the city. Therein lies its controversial character, since many actors would prefer to have only bilateral relationships with the State without legitimizing the legal intervention of the entire community. Recognizing the right to the city leads to transforming the inhabitants of the City into both individual and collective legal subjects (according to the case at hand), imbued with the legal authority to act.

Just as is recognized in the World Charter on the Right to the City, this right, of a collective nature, is defined as the "equitable usufruct of cities within the principles of sustainability, democracy and social justice" (Art. I.1).

The right to the City is a political concept (later translated into operative legal terms), which means that the city belongs to everyone and that it is made by all. A controversial proposition, since the dominant consensus holds that the City does not belong to all on the same terms" is not the same for all (and is made by few actors).

Now then, social exclusion, which is a characteristic of society, is inscribed within urban life as segregation. Social exclusion and residential segregation are two sides of a single phenomenon.

I believe that it is strategic to apply a conceptual parallel between the right to social inclusion and the right to the city, as a legal manifestation of social justice. They are two "macro rights" that permit one to interpret the interdependent pair of rights from two complementary perspectives: social exclusion and residential segregation.

Fourth thesis: the right to the city is a "macro right" that reflects the right to social inclusion in the urban sphere.

5. Public defenders' offices (which also incorporate legal aid services in Latin America)

It is clear that unequal societies, which generate deprivations of rights, make access to justice almost impossible for those seeking to vindicate those rights.

Supplementary institutional mechanisms are necessary to guarantee access to justice.

And such access is particularly crucial when political systems do not themselves safeguard those rights.

The classic liberal system entails ensuring access to courts when rights are violated.

Public defenders' offices (which in Latin America include what are known in the United States as legal aid services) are one of the institutional routes designed to guarantee access to justice to people and communities without economic resources in comparative law.

The General Assembly of the Organization of American States has outlined the role of public defenders' offices in our countries in numerous resolutions, and has indicated that their tasks "constitute a fundamental component of strengthening access to justice and consolidating democracy."[11]

I consider this model to be more effective than its alternative in comparative law: the provision of government subsidies to private lawyers who provide defense services in individual cases. The reason for this is the following: the possibility of implementing public policy concerning legal defense services. This means setting general strategies, organizing technical support teams, generating a permanent institutional culture, facilitating effective access to justice through the decentralization of services, and disseminating information about rights in society at large.

The Buenos Aires City Constitution provides for public defense services in its text, and its public defenders have the same institutional rank as other magistrates (judges and prosecutors). [12]

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[11] See Resolutions: OAS. AG/RES. 2656 (XLI-O/11) 1. *Guarantees for access to justice: the role of official public defenders*. (2011). See, in parallel: OAS. AG/RES. 2714 (XLII-O/12); OAS. AG/RES. 2821 (XLIV-O/14); OAS. AG/RES. 2887 (XLVI-O/16).

[12] See: Horacio Corti, Axel Eljatib and Javier Telias, "Commentary to articles 124, 125 and 126" in Marcela Basterra (Dir.), *Annotated Constitution of the City of Buenos Aires*, Editorial Jusbaires, 2017.

In this way, every person who lacks economic resources may receive assistance from the public defender in order to vindicate his or her rights, and in particular his or her social rights, before the government administration and before the courts.

There is already enormous experience in this regard, for example, with respect to the right to housing and the right to the city. [13]

I will only provide two examples. One is individual, the other collective.

The Public Defender's Office provides assistance to a large number of individuals living on the streets, typically called "the homeless." There is a long history of litigation, produced by the dearth of protection provided by the existing legal regime in the last several decades[14].

It is noteworthy that the first decision issued by the Supreme Court of Argentina about the right to housing concerned a case from the city of Buenos Aires, in which a mother and her disabled child were represented by the Public Defender´s Office. [15]

In that case, the Court highlighted that the City did not adequately protect the rights of those people.

There are also class actions, which make visible the legal force of the right to the city. Thus, the Public Defender´s Office represents an entire community that lives in an informal settlement and that seeks to vindicate its right to live in the city on equal terms as the rest of the neighbors in the formal city.

The community demands its right to urban social integration; that is its right to the re-urbanization of informal settlements.

The informal settlements are communities that have been growing over long periods of time and that are of a precarious nature. The buildings are precarious, its inhabitants live in overcrowded conditions, there is no regular access to public services, there is no urban organization, there are difficulties in accessing healthcare and education, and there are high levels of environmental pollution, among other factors.

In light of the political system's unresponsiveness in this regard, residents brought forth numerous lawsuits demanding the right to urban social integration.

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[13] See: *Economic, Social and Cultural Rights in the City of Buenos Aires*. *The Role of the Public Ministry of Defense concerning their enforceability,* City Buenos Aires Public Defender's Institutional Journal, second edition, July 2016

[14] See: Horacio Corti (ed.), *The Right to Housing. Summary of Case Law*., Editorial Jusbaires, Buenos Aires, 2017.

[15] Supreme Court of Argentina, "*Q. C., S. Y. c/ Gobierno de la Ciudad Autónoma de Buenos Aires s/ amparo", (24/04/2012)*. I produced a reflection on this decision in: *Models of judicial control on financial restrictions in comparative law: the jurisprudence of the Supreme Court of Argentina about the right to housing* (manuscript submitted for publication).

It is interesting to note that a number of these legal claims, which had historically been rejected in the courts by local governments, have been received favorably by the current administration, which has recognized the right to urbanization in a number of informal settlements in the city. This decision has opened up a new stage in the city, in which the challenge arises in ensuring compliance with the agreements between the neighbors from the informal settlements and the government.

Fifth thesis: public defenders' offices play a strategic role in guaranteeing access to justice for all.

6. Principles of access to urban justice

The Buenos Aires City Public Defender's Office participated in the United Nations Conference on Housing and Sustainable Urban Development -Habitat III- in Quito.

Two interesting facts to highlight here. First, the absence of references to access to justice in the preparatory texts and in the approved Agenda. Second, the absence of judicial institutions and public defender's offices among the multiple actors that participated in the Conference, in addition to representatives from the States themselves.

Our presence in Habitat III set out precisely as its objective generating awareness about the importance of both issues: access to justice and public institutions dedicated to the defense of rights.

Building upon the base of concrete experience in litigation, we prepared a document, the focus of which consisted in formulating a series of Principles about access to justice in urban affairs, grounded in the right to the City[16].

Among other principles, we proposed the following:

1. Justiciability: *The Right to the City and its implicit rights are justiciable before the Administration, the courts of justice and the universal, community and regional human rights organisms.*
2. Preliminary injunctive relief*: Procedural systems must provide for preliminary injunctive relief (judicial and administrative) that preclude damages or interrupt their commission, according to the circumstances of each case.*
3. Right to participation: *Access to justice includes the possibility of broad and substantive participation in the administrative procedures that affect urban*

[16] See: *The Right to the City. There is no citizenship without urban social justice, Derecho a la Ciudad. Sin Justicia Social Urbana no hay ciudadanía,* City Buenos Aires Public Defender's Institutional Journal, Year 6, Number 10, September 2016.

life and the Right to the City in a substantive way, in whatever legal or administrative form that may take. The opinions expressed in public hearings must be explicitly acknowledged by the convening authorities.

4. Procedural standing: *Standing grounds must be broad, given the collective nature of the right and of the goods that are protected. The right to participate of those potentially affected must be guaranteed.*
5. Urban due process: *Urban due process includes the following rights: a) access to justice without economic restrictions or discrimination; b) to be heard by an impartial and independent judge; c) to have a public attorney provided at no expense; d) to obtain an adequate and expeditious preliminary injunction; e) to offer proof, the cost of which must be borne by the defendant in case of indigence; f) to have a decision issued in a fair timeframe; g) the right to appeal an unfavorable decision; h) the faithful and efficient implementation of a decision, without administrative and/or budgetary obstacles.*
6. Interpretation: *The principle of interpretation in dubio pro urban social justice applies, this means that any norm must be interpreted in the light most favorable to urban social justice. The national or international norm which most furthers urban social justice must apply.*
7. High urban impact: *In cases of high urban impact, legal procedures must include: a) public access to all information about the process, guaranteed transparency and adequate technology; b) the realization of public hearings; c) the presentation of experts and of civil society as amici.*
8. Public Defenders' Offices: *All people and communities must be provided with adequate legal representation: (access to courts, a fair process and effective assistance of counsel) through public defenders' offices.*
9. Institutional guarantees: *Public defenders' offices must be independent, autonomous and have sufficient financial resources to fulfill their obligations to provide for legal representation.*
10. Access to public information: *Public defenders' offices can request reports concerning the Right to the City in order to ensure transparency, access to justice and urban social due process. In case it is necessary, the State must generate the required information.*

As we can see, these propositions are clear and precise and allow the right to the city to become operational.

Currently, together with other institutions in Latin America, we are working to reach a Binding Regional Agreement in our region about the right to the City. And one of its chapters in our opinion must concern to access to justice.

Sixth thesis: it is necessary to recognize the right to the City in a binding regional agreement, which must include precise legal rules about access to justice and about public defenders' offices.

7. In summary:

1) The right to the city is a strategic legal tool to think about urban problems today in light of international human rights law.
2) The right to the city manifests, with respect to urban life, the right to social inclusion. In the face of social exclusion and urban segregation, we apply the right to social inclusion and the right to the city.
3) Access to justice is an essential component of guaranteeing the exercise of the right to the city.
4) Public defenders' offices are an effective institutional mechanism to ensure that people who lack economic means can access the legal system.
5) This vision permits, as Dworkin would say, the most accurate reading of the 2030 Agenda´s Goals, especially Goal 11 (referring to cities) and goal 16 (referring to access to justice).

Thank you very much. I am available to answer questions now.