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# **Informal Work and the Social Function of the City: A Framework for Legal Reform in the Urban Environment**

Thomas Coggin



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Cover photo: This photo was taken in Troyeville, an inner-city suburb of Johannesburg. The public square is fairly nondescript but users have found a way to make it useful, demonstrating how the urban environment often fulfils a social function in the daily experiences of its inhabitants. Thomas Coggin.

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# Abstract

The New Urban Agenda envisages cities and human settlements that fulfil their social function. But what is a city's "social function"? And how can the urban environment and its resources be re-imagined in such a way that cities and human settlements are able to perform their "social function"? I answer these two questions by examining the livelihoods of informal workers in the urban environment. I first outline the theoretical genesis of the social function of the city, linking it to Léon Duguit's social function of property. I then develop the substantive content of a city's social function as it relates to informal employment in the urban environment. Here, I proceed along two arcs. First, I develop the social function of the city as a usufruct, a symbolic servitude able to challenge the dominance of the property market in blurring the boundaries between public and private spaces, and the notions of order and disorder which permeate the appropriation of this space. Second, I develop the social function of the city within the principle of commoning, a theoretical construct which challenges contemporary and historical urban inequalities by valorizing and prioritizing the everyday making and shaping of the urban environment. Through these two arcs I argue that the structural centrality of property creates the conditions in which informal workers are marginalized in the urban environment and that the social function of the city can offer a strong philosophical beacon around which legal reform of informal worker livelihoods can pivot. In the final section of the paper, I conduct a brief Hohfeldian analysis of the social function of the city, arguing in favour of valorizing a broad continuum of jural relationships that challenge existing rights/duties binaries and which recognize other relationships in the urban environment.

# Introduction

Urban environments are increasingly characterized by glaring wealth inequality. Slums and informal settlements exist within and around islands of comparative wealth and poverty, and large swathes of an urban population service a wealthier population in exchange for little compensation, and generally poor social and legal protections. Major implications of these urban challenges include tenuous urban livelihoods for those in informal employment. In seeking to address informal worker livelihoods as part of a broader project towards realizing equity in the urban environment, the New Urban Agenda — a document signed in October 2016 by member states of the United Nations outlining a joint vision for urban development over the next 20 years — envisages cities and human settlements that fulfil their social function. But what is a city's "social function"? And how can the urban environment and its resources be re-imagined in such a way that cities and human settlements are able to perform their "social function"?

These questions form the central focus of my enquiry and are intended to continue a discussion not only on how the law can be utilized as a tool to protect informal worker livelihoods in the urban environment, but also how law can assist in developing the social function of the city as a theory that gives meaning to the commitments made in the New Urban Agenda. First, in developing the idea of an urban environment holding a "social function", I look at existing literature around the social function of the city and link it to the social function of property. I argue for the need to develop the social function of the city as a constitutional philosophy or principle to guide urban policy and legislation in relation to informal workers.

I then develop the social function of the city along two strands. First, I argue that it should be viewed as a usufruct, a symbolic servitude that through legal reform works to disrupt and challenge existing property relationships in the urban environment that position informal worker livelihoods within a restrictive public/private and an order/disorder dichotomy. Second, I argue that the social function of the city should be viewed through the prism of commoning, a theory derived from the urban commons that places greater emphasis on how users govern, manage, and appropriate space through their daily interactions.

Finally, I conduct a brief Hohfeldian analysis of the social function of the city, arguing in favour of valorizing a broad continuum of rural relationships that challenge existing rights/duties binaries and which recognize other relationships in the urban environment. In doing so, I suggest ways in which the social function of the city can gain practical application.

The idea behind the urban environment holding an innate “social function” is a potentially powerful one, but what does it actually mean? To answer this, I will reference informal work in the urban environment. Over two billion people work informally, according to a 2018 report by the International Labour Office, representing 61.2 per cent of global employment (ILO 2018: 13). This figure varies among the five main regions covered under the study: the vast majority of employment in Africa is informal (at 85.5 per cent), and in Europe and Central Asia, just over a quarter of the population (at 25.1 per cent) is informal. Globally, the bulk of informal employment occurs in rural areas (at 80 per cent), almost double the rate of those living in urban areas (43.7 per cent) (ILO 2018: 20).<sup>1</sup> Despite this lower figure, it is important to situate informal work within processes of urbanization because informal workers often operate at the social and legal periphery of the urban environment, despite their contribution to its broader social and economic fabric.

Throughout the paper I utilize the term “urban environment” as opposed to other “city” monikers due to its all-encompassing nature. Reading the urban as a phenomenon greater than the limitations of a “city” enables an expanded interpretation of human environments that exist beyond traditional city confines, in broadly defined peripheries and across political boundaries. While “urban environment” might introduce a problematic dichotomy between human and non-human environments, or urban and rural environments, I use the term with reference to all areas affected by urbanization processes. The use of the term “social function of the *city*” is simply because this is how the notion has developed in the literature and in common parlance.

I also refer throughout the paper to the social function of the city as a constitutional principle or philosophy. I leave the question of how it can act as a constitutional principle or philosophy open because ultimately the constitutional science within which it operates is dependent on the jurisprudential, political, and urban context in which it applies. The primary focus of the paper is on the substantive content which makes up the social function of the city, and how this content can instigate legal reform in informal worker livelihoods.

The idea behind utilizing the social function of the city to inform this paper came from its recognition in the New Urban Agenda. This document recognizes that the urban environment holds a broader social function. It envisages it as such:

*“We envisage cities and human settlements that... fulfil their social function, including the social and ecological function of land, with a view to progressively achieve the full realization of the right to adequate housing, as a component of the right to an adequate standard of living, without discrimination, universal access to safe and affordable drinking water and sanitation, as well as equal access for all to public goods and quality services in areas such as food security and nutrition, health, education, infrastructure, mobility and transportation, energy, air quality, and livelihoods.”*

New Urban Agenda 2016: Paragraph 13 (a).

The commitments made in the New Urban Agenda are not binding under international law, and there is no expectation that they be translated into domestic law. Nevertheless, the Agenda presented a unique opportunity for member states of the United Nations to clarify a joint vision for the urban environment.

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<sup>1</sup> This data is generated from the harmonization of datasets from national labour force surveys or similar national household surveys from 110+ countries (ILO 2018: 26). It relies on country specific ways of delineating ‘rural’ from ‘urban’ areas.

Through policy-fatigue and the predominance of rhetoric in the Agenda, it faces the risk of being forgotten, but if leveraged also has the potential to facilitate and guide progressive urban policy and legislation. For lawyers, it is critical that legislators and legal practitioners, academics, and advocates consider how to translate the lofty principles of the New Urban Agenda into the law.

## The Social Function of Property

As a starting point, I consider the theoretical bases behind the social function of property. On its own, the social function of property is “not self-defining and invites many interpretations” (Crawford 2011: 1089). Foster & Bonilla (2011: 1005-06), for example, describe the social function of property as “realist in that it is based solely on facts that can be known empirically; [and] socialist in that it stems from basis of solidarity, that is, the interdependence that characterizes society.”<sup>2</sup> Vera, on the other hand, situates the social function of property within a neoliberal paradigm, arguing in part that because legislators and judges do not have the necessary information to allocate resources efficiently, individuals — exercising “the invisible hand of the market” — are “the very best agent to... build up to a strong market and the maximization of the nation’s economic growth and social welfare” (Vera 2006: 13). It is only through this market-oriented approach that “the social function of property rights will certainly have been fulfilled” (Vera 2006: 13).

Crawford connects the social function of property to the concept of “human flourishing”. His goal here is to “breathe new life into the notion of property’s social function, and in the process to identify a solution for the poverty and inequality — social, economic, and environmental — that is characteristic of our era” (Crawford 2011: 1091-2). Crawford utilizes a variety of examples from Latin American and the Caribbean to demonstrate the growing awareness of property’s social function. His understanding of property, however, is very broad, referring not only to “real property”, but also to “its other manifestations: personal, intellectual, bodily, and marital...” (Crawford 2011: 1108). Thus, the examples he provides demonstrate how the “social function of property” is not, actually, of property, but of a broader community. His considerations extend beyond a legal definition of private property, or even of physical space and include, for example, a discussion of the broader community-based merits of loud *merengue* music emanating from a Dominican corner shop in Santo Domingo vis-à-vis the sleeping requirements of immediate neighbours (Crawford 2011: 1111), as well as a campaign in Rio de Janeiro to discourage public urination in the city’s streets as a conscious recognition of “a shared interest in creating more agreeable public spaces” (Crawford 2011: 1126).

The social function of property can trace its origins to the French jurist, Léon Duguit. Writing as part of a broader treatise on the evolving nature of law, Duguit was concerned with understanding how society’s understanding of law in France was changing from that provided for in the Napoleonic Code.<sup>3</sup> Property was merely but one instance of his broader study, which included delictual/tort liability, and labour relations.<sup>4</sup> Duguit argued that the system of property *rights* was evolving naturally from one ruled by an individualistic sense, to one ruled by a *duty* of social interdependence (Duguit 1911: 75). “Private ownership as a *right* is the fundamental element of the entire individualistic system; and it may be justly said that the Napoleonic Code was a Code of property Rights. For it must be substituted the Code of *Work*” (my *emphases*) (Duguit 1911: 78).

<sup>2</sup> Léon Duguit uses variations of these terms to describe “the social basis for a specific rule of law or for objective law.” He described this basis as “both realistic and social: realistic, in that it rests upon the fact of social function observed and proved at first hand; social in that it rests upon the essentials themselves of social life” (Duguit 1911: 75).

<sup>3</sup> Duguit positioned his argument about the evolving state of the law as something purely natural, based more on social fact and observation rather than a political agenda. See Foster & Bonilla, 2011: 1005.

<sup>4</sup> For example, Duguit argued that “[t]he law should prohibit all *dangerous games* where man jeopardizes his life without advantage to society.” By this he meant that certain labour occupations were inherently dangerous. However, because they were “indispensable” to society’s broader “social interests”, the legislator should impose safety measures to protect human life, and “may and even should limit the maximum number of hours of labour per day” (Duguit 1911: 83).

This correlated with Duguit's broader view, that "[t]he individual has no rights; neither has a group of individuals. But each member of society has a certain function to perform, a certain task to fulfil" (Duguit, 1911: 73). When transplanted to the system of property, this meant that the system of property was no longer one of abstract rights; a subjective right of the owner. Rather, "it is the social function of the possessor of wealth" (Duguit, 1911: 134).

If we were to view property as a social function, Duguit would prioritize the value of the property in terms of its use, rather than simply seeing it as the physical manifestation of a right. This would mean that primarily the owner of the property would have the right to use the property, and to benefit from its fruits. But the owner would be prohibited from not using it, from leaving "his lands uncultivated, his city lots unimproved, his houses untenanted and unrepaired, [and] his capital consisting of personal property unproductive" (Duguit 1911: 132).

Despite this focus on the broad social obligations of property, Duguit was very clear that he believed in maintaining a system of private property. Private ownership as an institution should not disappear, he argued. Rather, what should be acknowledged is that "the *legal notion* upon which protection of property is founded is *being modified*" (Duguit 1911: 134). He also did not see his argument as one founded against inequality. He viewed a critique of class relations as simplistic: "[t]he structure of modern society is not so simple. In France in particular, many persons are both capitalists and labourers. It is a crime to preach the struggle of classes; I believe that we are moving not towards the destruction of one class by another, but towards a society where there will be a coordination and a hierarchy of classes" (Duguit 1911: 135).

## The Social Function of the City

Although the two concepts are related, it would appear to do both the social function of the city and the social function of property a disservice were the concepts to be conflated. To be sure, the social function of both "property" and "the city" overlap, but there is a definite need to set out possible meanings because the social function of each will differ according to the particular resource at play. The social function of property continues to valorize a system of private property, whereas the social function of the city presents the opportunity to transcend property and to rethink jural relationships within a broader jural continuum. This is particularly important to do in the context of informal work because the social and legal conditions under which informal workers operate are hamstrung by the system of property and the attending binaries of public/private and order/disorder.

These two binaries exist almost everywhere in the urban environment. The system of private property overlays the urban environment with an invisible grid predicated on rights to property and its concomitant series of permissions and restrictions.<sup>5</sup> These markers — both physical and imagined — shape the appropriation of urban space and are both fixed and malleable depending on how space is negotiated by owners and non-owners alike. Although not necessarily problematic, the binaries can be abused by considerations beyond the scale of everyday uses and users of space because they are inherently susceptible to sustaining systems of domination. For example, as a system grounded in the expansion of land, colonialism relied on carving out parcels of land, vesting ownership in beneficiaries and their legatees who, in turn, propagated the project of colonialism in their use and control of land. Those excluded from this system became objects of disorder that needed to be controlled to maintain "order." Similarly, this

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<sup>5</sup> In her critique of the common law system of private property, Carol Rose argues that the submergence of dominion within property serves to discolor the inherent characteristics of an owned object. The object is no longer characterized as a thing of interest. So, for example, land becomes merely an abstract right registered in a deeds office and the usefulness of land to an individual or broader society becomes irrelevant. In this respect, Rose notes how the system of private property "quite unabashedly refers to property in the language of domination, that ultimate form of objectification... To be sure, there is a transaction of sorts in this reduction to dominion, but it is a pretty one-sided one, in which the *perspective of the claimed thing is entirely ignored*" (my emphasis) (Rose, 1994: 271-2).

duality created a concomitant binary of private and public: order existed within a private sphere, and disorder was associated with the public sphere. Positioned at the intersection of urban planning and a human rights-based framework, the social function of the city has the potential to transcend the dualities of order/disorder and public/private.

The social function of the city is codified in Article 182 of the Brazilian Constitution (1988):

*“The urban development policy carried out by the municipal government, according to general guidelines set forth in the law, is aimed at ordaining the full development of the social function of the city and ensuring the well-being of its inhabitants.”*

Oliveira and Carvalho describe the social function of the city as “a new urban ethics aimed at valuing the environment, culture, citizenship, human rights. It covers the full exercise of the right to the city, while combatting the causes of poverty, protecting the environment and human rights, reducing social inequality and improving quality of life” (Oliveira & Carvalho 2003: 64). For Gurgel e Silva, this means that the social function of the city is “umbilically linked to environmental issues, and could not be different, since it is essentially aimed at performing the most effective balance between the well-being of the human being and the development of the regionalized society in its developed polis and the environment” (Gurgel e Silva date unknown).

Stecca describes the social function of the city “as a fundamental right that must be recognized as a political priority in public decisions, acting as ‘the vector of disruption’ against the exercise of public power which is lenient towards real estate speculation, the obstruction of the right to housing, and the marginalization of the unwanted” (Stecca 2016 [Google translation]). Quinto Jr. argues that the social function of the city means “the city must contemplate all its inhabitants and not only those who are in the formal market of capitalist production of the city” (Quinto Jr. 2003 [Google translation]).

## Building Up the Normative Content of the Social Function of the City

In this section, I set forth my own normative understanding of the social function of the city. My hypothesis is as follows: The social function of the city acts as a constitutional principle or philosophy that necessarily must inform the interpretation of existing legal rights and relationships in the law around informal work in the urban environment.

The social function of the city conceives of the city within two principle constructs: first, as a usufruct, a symbolic servitude that through legal reform works to disrupt and challenge existing property relationships in the urban environment that position informal worker livelihoods within a restrictive public/private and an order/disorder dichotomy; and, second, as a theory that reflects the process of commoning, a construct derived from the urban commons but which places greater emphasis on how users govern, manage, and appropriate space through their daily interactions.

In the context of urban livelihoods, the purpose of the social function of the city is to a) expose and challenge ingrained property norms which work to deny social and legal protections to informal workers and b) to instigate the use of positive legal measures that act as a systemic redress of laws and policies harmful to informal workers. This requires analytically clear and deliberate reasoning about law’s impact on informal workers, and lateral thinking about how the law can be utilized in this endeavour.

In so doing, I respond to Ananya Roy's argument that informality is produced by the state deciding through its policy and legal apparatus who is outside or inside the juridical order (2005: 149). Roy is concerned here with the intersection between informality and urban planning, but her arguments are equally applicable to informal work in the urban environment. Roy argues that:

*“[t]he planning and legal apparatus of the state has the power to determine when to enact this suspension [‘outside the law’], to determine what is informal and what is not, and to determine which forms of informality will thrive and which will disappear. State power is reproduced through the capacity to construct and reconstruct categories of legitimacy and illegitimacy...”*

2005: 149.

Thinking about the social function of the city as embodying a usufruct and the commons is not about “curing” informality through a more extensive articulation of “order”, but rather about redressing “the more fundamental issue at stake... that of wealth distribution and unequal property ownership, of what sorts of markets are at work in our cities and how they shape or limit affordability. In this sense, the study of informality provides an important lesson for planners in the tricky dilemmas of social justice” (Roy 2005: 155).

### **(a) The Urban Environment as a Usufruct**

The World Charter on the Right to the City positions the social function of the city and its resources as a usufruct (World Charter 2000: 2.1). A usufruct is a legal concept inherited from Roman law which acts as a servitude giving someone the right to reap the fruits of things belonging to others, “without destroying or wasting the subject over which such rights extend” (Law 2015). Signed in 2000 as part of the First World Assembly of Urban Inhabitants, the World Charter represents the efforts of social organizations and movements from 35 countries to articulate a collective ideal for the foundation and construction of “democratic, inclusive, educative, livable, sustainable, productive, and safe cities.”

The World Charter situates Duguit's social function of the city within a broader mesh of private propertied interests. It does not disregard the system of private property, but similar to Duguit argues that its value must be put to the good of the urban environment and its inhabitants. It calls on cities to promulgate adequate legislation, mechanisms, and sanctions to ensure private properties are not deserted, unused, underused, or unoccupied, places the collective social and cultural interest above property rights and speculative interests, and calls for real estate speculation to be inhibited (World Charter 2000: 2.3-2.5).

Conceptualizing the social function of the city as a usufruct is powerful for two reasons: first, it articulates its role as a philosophical tool able to challenge dominant property dynamics in the urban environment and, second, in so doing, it disrupts the binary of order and disorder in the urban environment which work towards structuring informal worker livelihoods. These dynamics work beyond the system of property and in ways which systemically include and exclude people from access to resources, both physical and metaphysical.

It may seem peculiar to link property dynamics to informal work. However, this linkage exists because of the way the system of private property structures our use and governance of the urban environment and work is, in general, a key component of how we interact with the urban environment. Our experiences are shaped by the social and legal conditions of the work we do, and it is a critical avenue through which we are able to live a productive and full life. In entangling the urban environment, the system of private property structures the quality of the work we do. This has a particularly pernicious effect on informal work because of the way it has been pushed to a social and legal periphery.

For example, in linking private property with market economics, David Harvey argues that “property market booms and busts are inextricably intertwined with speculative financial flows, and these booms and busts have serious consequences for the macroeconomy in general, as well as all manner of externality effects upon resource depletion and environmental degradation” (Harvey 2012: 34). The property market in Dubai demonstrates Harvey’s point. Dubai resembles a citywide simulation game played by property developers and real estate financiers. It is characterized by rampant market speculation to the point where the urban environment becomes an exercise in the manipulation of numbers and percentages, finessed by glossy marketing and even glossier city landscapes.

However, the property market in Dubai is heavily dependent on the availability of cheap migrant labour (Buckley 2012: 251). In her research, Buckley explains how “low- and semi-skilled Indian construction workers are typically located near the bottom of the occupational, class-based and ethno-national hierarchies that operate in the city” (Buckley 2012: 255). As a photo essay by Ghaith Abdul-Ahad demonstrates, the working conditions in which construction workers live and work are precarious, with workers bussed in and out of construction sites to labour camps, where living conditions are poor (Abdul-Ahad 2008). The affordability of a cohort of migrant construction labourers becomes as critical to the property market as the price of construction materials. Indeed, in the maelstrom of what Harvey terms “feral capitalism” (Harvey 2012: 156), migrant workers *become* construction materials, resources that are deployed in the speculative game of capital surplus accumulation. Property, and property rights, are at the nucleus of this game, revealing a fractured urban environment in which urban resources are trapped and funnelled for the benefit of an urban elite, despite the contribution of a broader urban population, including informal workers.

In this way, the system of property works towards creating an urban landscape of order and disorder. These dynamics emerge because of the way in which the legal institutionalization of rights to private property produces space, especially material, physical space (Mitchell 2003: 28). But, because space is reduced to a series of legal rights, it becomes “abstract space” (Mitchell 2003: 28-9), socially produced not through its actual use but through the system of real rights which work to “hedge in space, bound it off, and restrict its usage” (Mitchell 2003: 33).

The social function of the city thus requires a careful look at how spaces are governed, managed, used, and owned. Viewing space through the lens of a private property construct frontloads private property rights above other non-property interests and structures these interests along a continuum of order and disorder. Those interests attached to private property are framed as a component of order; they are imbued with legitimacy because they are enclosed within the bounds of control. Other interests, however, that exist beyond the grid of private property are viewed more as a product of disorder in the urban environment.

Informal workers, in their appropriation of public space, are frequently positioned at the core of disorder in the urban environment. This can be seen in a Colombian case concerning waste recyclers in the city of Bogotá. When the local authority announced a USD1.7 billion public bidding system that “would take the role of recycling away from the waste pickers who had been doing it for more than 60 years and hand it instead to private companies” (WIEGO 2013), *Asociación de Recicladores de Bogotá (ARB)*, a group of waste recyclers in Bogotá, challenged the decision.

The Colombian Constitutional Court categorized waste pickers as a “disadvantaged group”. Here, they invoked the work of Iris Marion Young in noting how waste pickers as a group: a) are a social group; b) have been in a situation of prolonged subordination; and c) have had their political power as a group severely limited due to socioeconomic conditions (ARB, 2011: Para. 2.1.3).

Recognizing waste pickers as a disadvantaged group allowed the Court to consider the material conditions under which waste pickers operated in Bogotá. The enquiry was not about whether waste pickers as a group should be treated equally, but rather whether, in light of the socio-economic circumstances under

which waste pickers operated, positive measures were required to elevate waste pickers to a position of equality with other actors in the urban environment, including “formal” service providers.

To quote the Court:

*“In fact, because historical aspects such as discrimination based on gender, race or social class, have led to different possibilities of satisfying the rights of individuals, it has become clear that society, like the State, must adopt measures so that these disadvantaged groups can reach the material conditions that allow them to be able to effectively exercise – in equal conditions – the rights of which they are holders.”*

ARB 2011: 2.1.1. (Google Translation)

The Court then noted the important work waste recyclers do for the environment — prolonging the useful life of sanitary landfills and preserving and protecting the environment for the benefit of both current and future generations (ARB 2011: Para 2.1.7). Despite this, their services were poorly compensated for because of a bias towards more formal recycling operations, which monopolize the market. The Court here noted that recyclers are only paid 5 per cent of what the industry generates, and attempts have been made to remove their operations, threatening their economic livelihoods (ARB 2011: Para 2.1.6). The Court also noted how they are also the subject of “so-called ‘social cleaning’, persecuted and murdered, an example of which is the case of public knowledge of the bodies of 40 waste pickers found at the Free University of Barranquilla in 1992...” (ARB 2011: Para 2.1.6).

In light of its reasoning above, the Court mandated that “real inclusion of the recycling population” would involve the adoption of measures that favour cooperative associations and which not only allow for state-based employment of waste recyclers, but also that supports waste recycling as a form of entrepreneurship” (ARB 2011: Para 2.2.8). Further, positive measures should be implemented that facilitate the participation of waste recyclers in bidding processes (ARB 2011: Para 2.2.8).

By legitimizing waste recyclers, the court recalibrated the divide between order and disorder in the urban environment, where “formal” service providers represent order and where waste recyclers, because they exist beyond the state and its apparatus, represent disorder. There is no obvious linkage made with the system of property law, but the court nevertheless unsettles a particular ordering of the urban environment: By validating waste recyclers as existing urban actors, integral to the functioning of the city, the court questioned the idea that “order” and “disorder” are fixed concepts bestowed upon urban actors by law or policy. Instead, the court positioned their approach based on actual uses and users of the city, and how “order” was facilitated through daily use.

Consider another example, which demonstrates a second binary that the social function of the city has the potential to transcend: public and private. In delineating space according to an invisible grid of property rights, the system of private property engineers a falsified public/private duality. In so doing, it cloaks what may actually be a fairly permeable distinction (between “public” and private property) with a veneer of authority, which itself may be subject to selective enforcement. So, for example, a shopping mall may legally be private property, but in practice may perform a different role for the broader populace given its *de facto* public role in a particular urban environment. The owner of the shopping mall may indeed be content with this more public role until, that is, s/he isn’t — in which case, the space suddenly becomes private. A right of access to private property may, in many instances, be acceptable (for example, one’s home). But in many urban contexts today, the rules of private property extend to many more spaces than simply a home. In fact, they extend to spaces which through their use constitute a public forum.

This scenario transpired in the case of *V&A Waterfront v. Police Commissioner, Western Cape*. The Victoria & Alfred Waterfront is an upscale shopping mall in Cape Town. The Western Cape High Court noted that

legally the land is privately owned, but interfaces with the public realm in various ways. It contains a number of public roads, a police charge office, a post office, and is the only way to access Robben Island, a symbolic place of memory for many South Africans.

In *V&A Waterfront*, the owners of the shopping mall sought to obtain a permanent order barring the entry of two “vagrants”, who appeared to use the public nature of the mall to beg for money. The shopping mall accused the two individuals concerned of being abusive towards its tenants and employees, as well as their patrons. This included addressing young visitors to the shopping mall in a vulgar and intimidating manner, making rude sexual comments to a female security guard and grabbing her breasts, and disturbing clients at restaurants, becoming violent and abusive (*V&A Waterfront* 2003). The Court largely accepted these allegations, and the only issue was whether the shopping mall had the power to exclude the applicants.

We can see in *V&A Waterfront* how courts have attempted to grapple with understanding the social function of the city when confronted with cases concerning the dichotomy between public and private space. On the one hand, Judge Desai acknowledged that the shopping mall was a private property, even though it was “private property of a particular kind” (*V&A Waterfront*, 2003) because of its public facilities.

However, the judge found this did not mean the shopping mall held “an unqualified right to exclude anyone from the property... As a consequence of its location, size and composition, it is for all practical purposes a suburb of Cape Town... These factors limit or qualify the owner’s right to exclude” (*V&A Waterfront* 2003).

In coming to this decision, Judge Desai placed private property interests within a broader matrix of non-proprietary interests. This was important to do because it focused the analysis on the use of the space rather than the bundle of rights attached to the space. Judge Desai’s reasoning was influenced here by both South Africa’s Bill of Rights and the historical spatial context which permeates the appropriation of space in Cape Town today. Said Desai:

*“I have, in any event, grave reservations about the constitutional validity of [a begging] prohibition. The issue of begging frequently raises a direct tension between the right to life and property rights. In that event, the property rights must give way to some extent. The rights to life and dignity are the most important of all human rights. By committing ourselves to a society founded on the recognition of human rights we are required to value those rights above all others. Furthermore, the right to life encompasses more than ‘mere animal existence’. It includes the right to livelihood.”*

*V&A Waterfront* 2003 (original references omitted)

Desai added further on in the judgment that “in light of the unfortunate recent history of this country where millions of people were denied access to towns, cities and other public places, the practices of excluding people from parts of a city, albeit for limited periods, may appear repugnant and not pass constitutional muster” (*V&A Waterfront*, 2003).

Despite the above reasoning, Judge Desai found that the shopping mall could indeed exclude people from its private property, but not on a permanent basis, and only after a request had been made to leave the premises. The judge could have gone further in the case, bringing in to the order some of his misgivings about denying the respondents a right to livelihood through the prohibition of begging at the shopping mall. Here, the judge could have analyzed the broader, contemporary spatial environment of Cape Town, where private shopping malls are one of the few spaces in which diverse publics interact. This means that necessarily private shopping malls (especially when they interface more readily with the public realm) are spaces that facilitate urban informal livelihoods, such as begging. An order more attuned to the social function of the city would recognize this specifically, and even affirm the rights of the two individuals concerned to earn a livelihood through begging.

This section has demonstrated the usefulness of viewing the social function of the city as encompassing a usufruct over the urban environment. The usufruct neither works in favour of any one person, nor does it embody a legal “right.” Rather, as a component of the social function of the city, a usufruct challenges underlying structural inequalities present in the city that centre around the system of private property and its attending binaries of public/private and order/disorder.

### **(b) The Urban Environment as a process of Commoning**

This paper turns now to considering how the social function of the city gains meaning as a process of commoning. A commoning framework represents the second way in which the social function of the city can operate as a constitutional principle or philosophy able to restructure informal worker livelihoods in the urban environment. In this section, I sketch out theory around the commons and commoning, and thereafter link it to informal work.

An urban commons is concerned fundamentally with validating existing users and uses of the city, and understanding how in their daily interactions with one another, urban actors seek to govern and manage common urban resources. Thus, an idealized version of an urban commons would seem to transcend abstract legal and policy articulations of “formal” and “informal”.

A purely commons approach, made famous through Garrett Hardin and Elinor Ostrom’s debate, is concerned with how common resources can be managed so as to avoid the so-called free-rider problem. Here, the urban environment consists of inherently rivalrous relationships, an “open access good subject to the same kinds of rivalry, or contestation, and congestion that needs to be managed to avoid the kinds of problems or tragedies that beset any other commons” (Foster & Iaione 2016: 288).

For Garrett Hardin, the system of private property provides the antidote to this rivalry. He argued that the commons (upon which lies the premise of social interdependence) is only really possible “under conditions of low-population density” (Hardin 1998: 3), and that “in a world that is limited... Freedom in a commons brings ruin to all” (Hardin 1998: 3). Hardin’s solution is to advocate for the system of private property because “If everyone would only restrain himself, all would be well...” (Hardin 1998: 214).

Elinor Ostrom critiques Hardin’s approach, arguing that it ignores the structural makeup of the system of private property that renders it susceptible to abuse by more powerful actors who stand to gain from access to resources partly because of their ability to “block efforts by the less powerful to change the rules of the game” (Ostrom 1998: 110). She also notes the problem with privatizing commons as a solution:

*“... [This] tells us nothing about how the bundle of rights is to be defined, how the various attributes of the goods involved will be measured, who will pay for the costs of excluding nonowners from access, how conflicts over rights will be adjudicated, or how the residual interests of the rights-holders in the resource system itself will be organized.”*

Ostrom 1998: 110

Foster is similarly concerned with the management of the urban commons and its aversion to the free-rider, which she argues emerges from “regulatory slippage” — “a marked decline in the enforcement of these standards [such as rules regulating the use of parks] and/or the increasing tolerance of noncompliance with these standards by users of a given public space” (Foster 2011: 67). She then offers some examples of urban collective management regimes (such as Business Improvement Districts) which — overseen by

a government-enabling role — allow for the collective management of the urban commons (Foster 2011: 91-110).<sup>6</sup>

As Kornberger and Borch observe, however, the Hardin-Ostrom debate is problematic because “it focuses on the difference between appropriate use and illegitimate abuse as something that can be policed” (2015: 8). In reflecting on this debate, Harvey argues that the commons should not be construed as “a particular kind of thing, asset, or even social process” (Harvey 2012: 73). Instead, he argues that the collective use of resources should be viewed through the process of commoning, which shifts the focus of the commons towards how shared resources are used in *producing* a common, rather than assuming the *a priori* existence of a common which needs to be managed so as to avoid the free-rider problem.

Viewing the process of commoning as a component of the social function of the city is useful because it validates how everyday use and users negotiate the management, governance, use, and appropriation of space. Commoning entails a recognition that space is not neutral; that it has meaning informed by a spatialized history and a contemporary context. In this way, commoning moves beyond a formal articulation of space as mediated and/or presented by the law or policy in favour of a grounded reality, and advocates for the collective management of space.

As Harvey argues, the collective management of space must come about through a “polycentric governance system... [which] does not mask something very different” (Harvey 2012: 81). Harvey does not specify what this polycentric governance model would look like, but he is clear that existing models remain dominated by an urban elite. A commoning framework would, at a minimum, embrace a governance structure in which the perspectives of multiple actors and interests are placed on the table, and where certain group-based interests are elevated above others because of a history of systemic spatial marginalization. This would, however, go beyond providing for mere stakeholder participation processes and include, for example, recognizing labour unions and worker organizations that are able to challenge politically the actions of employers and the state.

This is a difficult task to accomplish because many urban environments today — particularly in developing economies — are characterized by a legacy of historic marginalization, including that of colonialism. This has important ramifications for informality in general. In his research on Israel and Palestine, Oren Yiftachel positions colonial power relations as central to the creation of informality in the way it sets up a hierarchy focused on an expansion of dominant interests, the exploitation of marginalized groups, and coerced segregation (Yiftachel 2009: 90). Colonialism and its attending legal order sets up a particular structure of inclusion and exclusion, order and disorder. Informal work sits at the bottom periphery of this hierarchical structure, and the legacy of colonialism means not only a reticence towards extending social and legal protections to informal workers, but a continued portrayal of informal work as disorderly and illegal. Thus, when this legal order is challenged, laws should not be treated in an ahistorical manner but in a context which, true to the process of commoning, seek to understand how space is governed or appropriated on an everyday basis. A historical approach assists in understanding the current systemic inequalities permeating this spatial arrangement.

The following two cases demonstrate how the social function of the city can operate as a principled or philosophical touchpoint in exposing the legacy of colonially-inherited law in today’s urban environment, but also how these very laws continue to be used as a tool against informal worker livelihoods. The social function of the city, however, can also act as a principle or philosophy in guiding a reform of laws affecting informal worker livelihoods towards the pursuit of substantive equality.

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<sup>6</sup> In a later article, Foster and Iaione amend this position, moving away (somewhat) from Hardin’s tragedy to a position which holds that in some circumstances, “the commons is less a description of the resource and its characteristics and more of a normative claim to the resource. In these situations, the claim is to open up (or to re-open) access to a good — i.e. to recognize the community’s right to access and to use a resource which might otherwise be under exclusive private or public control — on account of the social value or utility that such access would generate or produce for the community” (Foster & Iaione 2016: 288).

The first case is that of *Makwickana v. eThikweni Municipality and others*. The applicant in this case was a street trader in the South African city of Durban who sold sandals. He had a permit to operate in terms of the local by-laws and had been operating since 1996. Makwicana<sup>7</sup> left his stall one morning to attend to other business, leaving his assistant in charge of the table. At midday, his assistant went to the nearby supermarket for some lunch. No one was left to man the table, but his assistant entrusted Makwicana's trading permit with his neighbour. Makwicana arrived back a short time later to find a police officer confiscating some of his stock and issuing him a fine. The police officer contended that Makwicana was trading without a permit, despite his neighbour holding the permit, and despite Makwicana producing the permit during the confiscation process. Despite this, the officer issued the fine, and impounded some of the goods. However, it was unclear which stock the officer had confiscated, and subsequent searches at municipal storage facilities revealed the items to be lost.

As such, Makwicana sued the Durban municipality for the loss of his stock. He also challenged the by-law itself, arguing that the removal and impoundment of the trading goods of a trader who fails to produce a license to trade is too broad a power, and is often subject to abuse in its implementation. This abuse was in full display at the time of the police operation. For example, it is questionable why only some of Makwicana's stock was confiscated if the officer believed the entire operation was illegal.

Judge Pillay of the Kwazulu-Natal High Court, Durban, understood the applicant's experience as one that typifies the abuse that street traders suffer at the hands of state officials (*Makwickana* 2015: Para 30). Her analysis was influenced by an historical and contemporary contextualization of the facts.

From a contemporary perspective, Pillay considered how the law applied in the daily, lived experiences of street traders, and assessed the effectiveness of the law in this light. Concomitantly, the judge provided relatively specific instances of how street vendor law in Durban should be reformed. For example, she noted:

*“Street traders are required to be at their stands for three to five days in a week according to an arbitrary rule of the first respondent [the municipality]. Being away also means loss of income. The meagre income they generate goes to sustaining their large families. Employing legal assistance is not realistic. Reform of the dispute system design in the informal sector should take this into account.”*

*Makwickana* 2015: Para 87

From a historical perspective, Pillay J considered how the movement, employment, and education of black Africans were circumscribed by law in ways which sought to cement the power of the apartheid state, and the subjugation of the majority black population. This meant that there were few to no opportunities for black people to participate meaningfully in the broader South African economy. Their roles were relegated to providing low-cost labour in servitude to white capital. This manifested in various ways. For example, section 2 (1) of the Natives (Abolition of Passes and Co-Ordination of Documents) Act required Africans to carry “passbooks”, which specified their race, ethnic group, and employment status. These had to be carried at all times, and in terms of section 10 (2) could be demanded by a police officer at any time (failing which resulted in imprisonment). Section 8 (1) of the Act had the effect of ensuring that the only occasion an African could enter into a “white” area was if he/she was employed there. In sketching out the history of spatial apartheid, Pillay J relied on an article by Caroline Skinner, in which she cited a newspaper article from 1973 which demonstrated how apartheid legislation had an especially pernicious impact on street trading:

*“For example, in 1966 the Daily News reported that ‘485 people have been charged in less than six months with illegal street trading’, and in 1973 it described police as ‘fighting*

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<sup>7</sup> While court documents incorrectly indicate “Makwickana,” the correct spelling of the name is Makwicana.

*a battle' against illegal hawkers and quoted Durban's Chief Licensing Officer as saying that 'in terms of Government legislation no Africans are allowed to trade in white urban areas unless they are employees of a white person.'"*

Skinner 2008: 231.

The legacy of this control continues to exist today in post-apartheid South Africa, and although the law may now be racially neutral, the practice of the law often continues to be exercised on a racial basis, and in favour of minority capital interests. Judge Pillay recognized this explicitly:

*"Street traders are such because of their socio-economic status. Not only Africans and other black people are street traders. White street traders may also be discriminated on the ground of their socio-economic status. Facially the By-law is racially neutral. However, apartheid layered poverty over race. The degree of coincidence or intersectionality of race with socio-economic status results in the greatest impact being on Africans. As the population group with the largest component of poor people the impact is deeper and more expansive than on any other race group... Street traders are such because their socio-economic status or race or both are barriers to better opportunities. Effectively, the impoundment provisions compound their historical disadvantages."*

*Makwickana*, 2015: Paras 115, 124.<sup>8</sup>

As such, Judge Pillay declared unlawful those parts of the by-law providing for the impoundment of goods for trading without a license. Her contextual analysis above — which runs throughout the judgment — informed her analysis of why the provisions in question were unlawful, which included that the offence for trading without a permit was overbroad because it only provided for an absolute prohibition against trading, rather than a lesser offence arising from mere non-compliance with legal formalities (*Makwickana* 2015: Para 56).<sup>9</sup>

In her contextual analysis, we can see Judge Pillay considering what the social function of the post-apartheid city should look like. This is not an urban environment hamstrung by legal formalities and order, but one in which law and its implementation facilitate and protect employment opportunities that primarily aim to redress the inequality of South Africa's past and present. Judge Pillay does not merely declare particular provisions of the by-law invalid, but in couching her remedial actions in the language of "reform" enjoins a larger project of street vendor policy and legal reform.

The second case is from Malawi. In *Gwanda v S* (2017), the High Court of Malawi was tasked with the constitutionality of Section 184 of the Penal Code, which created the offence of being a "rogue and vagabond". The definitions of a rogue and vagabond include "every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself" (Malawian Penal Code, s. 184 (1)(b)), and "every person found ... under such circumstances so as to lead to the conclusion

<sup>8</sup> It is useful here to compare Pillay's judgment in *Makwickana* with the South African Constitutional Court's decision *South African Informal Traders Forum v City of Johannesburg in 2014*, which, from a legality (rather than a more substantive, principled) perspective, declared unlawful the City of Johannesburg's Operation "Clean Sweep" against street vendors. Pieterse notes in this regard: "the understandable elevation of the legality principle in SAITF and related case law serves to obscure, and arguably entrench, the complicity of the law and attendant regulatory frameworks in producing 'illegality', by unquestioningly endorsing various legal restrictions on trade. As a result, much as it has enhanced the observance of the rule of law and has indirectly softened the impact of trade regulation in Johannesburg by increasing the opportunities for legal trade, the SAITF judgment has done little to guide the City towards adopting a more enabling regulatory framework that departs from the premise that livelihood-generating practices are generally legitimate and constitutive of human dignity." See Pieterse 2017: 14.

<sup>9</sup> In this respect, she notes that "... non-compliance with the legal formalities of street trading such as trading without producing a permit are not such immediate threats. There is no justification for impounding the goods of street traders for non-compliance with the legal formalities of street trading." See *Makwickana* 2015: Para 131.

that such person is there for an illegal or disorderly purpose” (Malawian Penal Code, s. 184 (1)(c)). A successful prosecution would render an accused guilty of a misdemeanor and hold them liable for imprisonment for up to 18 months.

The case arose when the applicant, who is a street vendor who sells plastic bags to fishmongers operating on Lake Malawi, was arrested at 4 a.m. in Blantyre while carrying his produce to his trading location. The police officers who stopped him did not believe his story, and arrested him. According to a subsequent interview with Gwanda in the Malawian newspaper, *The Nation*, his captors suspected he was an armed robber who had just ransacked a nearby University of Malawi college (Kamiyala 2017). He was released on bail three nights after his arrest and charged with the offence of being a rogue and vagabond.

The High Court ruled the provision unconstitutional because of its application in an arbitrary manner. The reasoning here is tepid, however, with the court noting “it is tempting to say that rogue and vagabond law is useful in the promotion of law and order and security...” and that the decision to invalidate the law should “not be misinterpreted to mean that the Court has tied the hands of the police and given license to criminal elements who ravage our country...” (*Gwanda*, 2017). The High Court continues to position the urban environment within a binary of order and disorder. Instead of questioning the philosophical underpinnings of the rogue and vagabond law and its impact on contemporary urban and spatial arrangements in Malawi, the High Court argues that a law which indirectly targets street vendors is acceptable provided it is implemented in a fair manner.

It is only in a separate concurring opinion that the High Court considers the more substantive impacts of the law. Here, Judge Ntaba contemplates the English origins of the offence, noting how it “discriminated against the poor and included their marking as paupers onto clothes or branding rogues, vagabonds and slaves, using a ‘R’, ‘V’, or ‘S’ tattooed on the skin with a hot iron...” (*Gwanda* 2017: 4.2). However, Judge Ntaba’s overall analysis remains couched in the legalities of the offence, and her historical analysis of the rogue and vagabond law is not linked to the post-colonial urban condition in Malawi.

This is unfortunate because it fails to question the underlying power dynamics which may be at play in the urban environment. Blomley writes about property, but his point is relevant to struggles over the urban environment: “Property is both the point of these struggles and the medium. Struggles over the meanings and moralities of property have been central. Law, in this sense, must be conceived not simply as an instrument of colonial domination but as a means through which colonialism itself has been produced... However, the tendency has been to ignore or underplay the role of the city in colonial dispossession” (Blomley 2004: 109-10).

The *Gwanda* majority could have taken its jurisprudential cue from *ARB*, the Colombian case discussed above, in the way it indirectly endorsed a commoning approach to the making and shaping of the city. To accomplish this, the court invoked the legal principle of substantive equality, provided for in Article 13 of the Colombian Constitution. This principle requires the adoption of equality measures that are real, effective, and adopted specifically in favour of discriminated or marginalized groups (*ARB* 2011: 2.1.1). Substantive equality must be seen as a critical legal component of any policy, legislative, or judicial approach to contestation in the urban environment because of its underlying component of societal redress: understanding the systemic nature of the relationships under which urban actors and interests operate and working towards an equality of outcome in facilitating these dependences, rather than a situation which posits mere formal equality. In utilizing substantive equality, the court in *ARB* sought to undo the systemic nature of the inequality borne by the waste pickers within the broader urban environment. By bringing waste pickers within the fold of urban service provision in Bogotá, it gave meaning to the social function of the city as valorizing existing uses and users of the city.

# Translating the Social Function of the City into Claims and Correlatives

As a constitutional philosophy or principle, the social function of the city offers policymakers, legislators and advocates an opportunity to motivate for legal reform in protecting informal worker livelihoods. The arguments in this paper offered two strands of thought for giving substantive content to the social function of the city: the first characterizes the urban environment as a usufruct that works towards disrupting a private/public and an order/disorder binary. The second considers the urban environment through the process of commoning, which works towards positioning the making and shaping of the urban environment as a product of the daily interactions of its inhabitants.

In order for this content to gain application in a legal and governance framework, it will be important to translate the social function of the city into a continuum of legal entitlements, with clear jural correlatives. These need to both challenge and question existing jural relationships that serve to structure the urban environment in ways that are harmful to informal worker livelihoods, favour entrenched interests, and which go beyond rigid jural boundaries that do not reflect the ways in which users structure the governance and management of urban space.

Here it is useful to bear in mind a Hohfeldian analysis of jural relationships both because of the potential it offers for recognizing a plurality of relationships along a legal continuum, and because the analysis inherently questions the assumptions or structuring devices that underlie existing jural relationships.

Hohfeld (1913), an American jurist writing in the early 20<sup>th</sup> century, argued for a clarification of common legal relationships, such as rights and duties. For Hohfeld, the reduction of all relationships into this binary was too narrow in scope: it failed to present a more complex gambit of jural relationships, and subsumed or masked existing jural relationships (Hohfeld 1913: 28-29).

Hohfeld's argument has particular relevance for informality in general because of the way in which informality exists at the periphery of a legal or policy framework. Informality is often framed as a manifestation of its own accord: that the material and legal conditions which characterize informality are the very conditions that produce informality. If articulated within a clear continuum of jural relationships, the social function of the city offers an effective tool with which to challenge a strict public/private and order/disorder binary, and valorize hitherto unrecognized legal relationships.

Hohfeld positioned jural relationships along a series of legal entitlements and correlatives (1913: 30). These were:

<b>Entitlement</b>	Right	Privilege	Power	Immunity
<b>Correlative</b>	Duty	No-Right	Liability	Disability <sup>10</sup>

These relationships were not structured according to any particular hierarchy, and the content of each was a question of justice or policy. In this way, Hohfeld offered a legal science; a way of thinking about the law, and how it operates.

<sup>10</sup>Hohfeld maintained the rights/duties binary as valid, but only in its strictest sense. He positioned a legal privilege as being the opposite of a duty, and the correlative of a "no-right". Thus, if the law has granted me a privilege over a particular resource, for example, you are under a duty to respect that privilege, and you hold "no-right" in respect of that resource. Hohfeld positioned a legal power as the opposite of a disability, and the correlative of a liability. Thus, if the law granted me the power to act in a particular way against you, you are "disabled" from curtailing that power and, instead, are under a liability to respect that power. He positioned a legal immunity as the opposite of a liability, and the correlative of a disability. If the law granted me immunity from a particular act, you are disabled from tampering with that immunity, and I am not liable for that act.

But even beyond this contribution, through his articulation of jural relationships Hohfeld demonstrated how the legal system as a whole prefaces all legal relations along a narrow rights/duties binary. This means that many other relations remain invisible to the law, are placed in an inferior position relevant to the rights/duties binary, or are completely delegitimized as a non-legal relationship. As Hohfeld argues:

*“[i]t is difficult to see, however, why, as between X and Y, the “privilege + no-right” situation is not just as real a jural relation as the precisely opposite “duty + right” relation between any two parties. Perhaps the habit of recognizing exclusively the latter as a jural relation springs more or less from the traditional tendency to think of the law as consisting of “commands,” or imperative rules. This, however, seems fallacious. A rule of law that permits is just as real as a rule of law that forbids; and, similarly, saying that the law permits a given act to X as between himself and Y predicates just as genuine a legal relation as saying that the law forbids a certain act to X as between himself and Y”.*

Hohfeld 1913: fn 59.

Although not the focus of the paper, I now turn to present three examples of how the normative content of the social function of the city can find application within a broadened continuum of jural relationships.

First, a rights/duties binary prioritizes an absolute view of property and works towards delineating the urban environment into further boundaries of public/private and order/disorder. Thinking of the social function of the city as a usufruct may, as an example, require the law to recognize trading in space — *any* space — as a legal privilege, regardless of ownership. This would mean that no one has a right over another to claim a space exclusively, and where the governance of space is determined collectively by actual usage rather than purely an exchange-based appropriation of space. In the same way that a usufruct works, the usage of this space is maintained for the benefit of present and future generations of the urban environment, as opposed to that of an urban elite.

The second way in which a usufruct may prioritize a plurality of jural relationships in the urban environment is in terms of sharing and redistributing resources equally. The law may provide that employees of a company have a right to stock options after a certain number of years of employment or it may require that employers are under a duty to extend social protections to all workers. Similar to how a usufruct captures the value of land for the benefit of present and future users of the land, the social function of the city recognizes the value inherent in the urban environment and that it can and should be shared and redistributed.

And third, through its recognition of everyday users and uses in the urban environment, commoning can similarly inform a plurality of hitherto unrecognized jural relationships. A city's historical context may mean that some users are granted privileges to certain resources as a way of redressing the imbalances of the past. For example, a person who has traded in a particular physical space without force, without secrecy, and without permission may, after a certain number of years, have gained a privilege to trade, meaning that no one has a right to take that privilege away. This is, in fact, not a particularly radical proposition to make. The Latin legal maxim *nec vi, nec clam, nec precario* (“without force, without secrecy, without permission”) grants this privilege. The rationale here is use-based: if the owner of the land is not using the land, and someone else is, that person should receive preference. In the same way, if a trader has used a space for a period of time, commoning would entail the law acknowledging that use through the granting of a legal privilege and would do so particularly as a tool to redress a historic discrimination against street traders as a group.

## Conclusion

In this paper, I have sought to develop two theoretical foundations of the social function of the city. In doing so, I have differentiated the social function of the city from the social function of property, an important exercise in avoiding a conflation of the two concepts and in articulating a unique role for the social function of the city to redress a broad set of inequalities in the urban environment. I have focused, in particular, on inequalities that manifest around informal work in the urban environment and have positioned the system of private property as one of the primary culprits in this regard. As such, my articulation of the social function of the city as embodying a usufruct and of the process of commoning would serve to disrupt the structuring devices inherent in the system of private property. I have referred to urban theory and case law to demonstrate my point.

My use of case law is deliberate. As a way of staking a claim in the urban environment, informal workers have looked to the judiciary to establish, safeguard, and implement their livelihoods. This has created a bodywork of jurisprudence around the world which, predominantly, has affirmed informal worker rights. The judiciary has been a key interface between informal workers and the state, and the law has been a critical instrument for informal workers in claiming a political citizenship. As Joshi notes, based on a conversation with a national executive member from the National Association of Street Vendors India (NASVI), “despite all the political support that they have received... it was only the Court which treated street vendors like citizens” (Joshi 2018: 17). Without realizing it, courts have involved themselves in a project that gives substantive content to the social function of the city. It is thus important for other functionaries of the state to take heed of what courts are saying about informal worker livelihoods, and similarly important for judges to recognize the role they play in implementing the New Urban Agenda.

If, however, the social function of the city is to gain practical meaning, it will be important to translate its normative content through recognizing a plurality of jural relationships. In the final section of the paper, I presented a Hohfeldian analysis of the social function of the city to suggest a more technical approach to how this can take place. This may require fairly radical steps in the face of an entrenched, exchange-based rights/duties binary that characterizes the urban environment and which predicates a subsequent structuring of space along notions of order/disorder and public/private. However, as the Latin legal maxim *nec vi, nec clam, nec precario* demonstrates, conceptualizing the urban environment as a site of use-based interests is not that alien to legal orders. Thus, neither is the social function of the city.

Urban environments today sit at the juncture of a dangerous crossroads. Nationalist fervour and wealth inequality threaten to destabilize what seems to be increasingly a fragile peace. Essentialist binaries and an intolerance for ambiguity seem to pervade our interactions with one another. And a culture of rampant consumerism creates an illusion of shared prosperity for some, while leaving behind a cohort of affordable labour upon which consumerism relies.

The social function of the city acts as a constitutional philosophy or principle that, at the very least, has the potential of arresting the velocity of these individualistic pursuits in favour of something more communitarian. Taken to its full potential, the social function of the city presents a way of reforming the urban environment as a space of shared resources, which are used and managed through the daily experiences of its users.

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**About WIEGO:** Women in Informal Employment: Globalizing and Organizing is a global research-policy-action network that seeks to improve the status of the working poor, especially women, in the informal economy. WIEGO builds alliances with, and draws its membership from, three constituencies: membership-based organizations of informal workers, researchers and statisticians working on the informal economy, and professionals from development agencies interested in the informal economy. WIEGO pursues its objectives by helping to build and strengthen networks of informal worker organizations; undertaking policy analysis, statistical research and data analysis on the informal economy; providing policy advice and convening policy dialogues on the informal economy; and documenting and disseminating good practice in support of the informal workforce. For more information visit: [www.wiego.org](http://www.wiego.org).

