

## The Key to Dreams: The Law and the Other City

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This other city is the spontaneous city, the refuge of those excluded from the chance of a formal life, it is the precarious city filled with dreams rather than life. <sup>1</sup>

### I. INTRODUCTION<sup>2</sup>

Bogota, like other cities, has problems in providing housing for the lower paid sector. Approximately 20% of families are living in substandard housing<sup>3</sup> (*housing deficit*)/ 15% of families are without housing<sup>5</sup> (*quantitative deficit*),<sup>6</sup> and approximately 5% live in poor quality housing<sup>7</sup> (*qualitative deficit*).<sup>8</sup> Further, approximately 122 persons migrate to the city each day. Fleeing from vio-

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1. Fabio H. Avendano Trivifio & Hernando Carvajalino Bayona, *Vivienda Popular Espontanea: Conceptos de Espacialidad y Progresividad. Reflexiones a Partir de un Estudio de Caso: Bogota, Colombia*, in *CrunAD Y TERRITORIO EsTunros TERRITORIALES* 391, 394 (2003).

2. Our title is taken from the famous 1930's painting *Key to Dreams* by Rene Magritte.

3. Departamento Administrativo Nacional de Estadística, [http://www.dane.gov.co/index.php?option=com\\_content&task=category&sectionid=34&id=573&Itemid=1080](http://www.dane.gov.co/index.php?option=com_content&task=category&sectionid=34&id=573&Itemid=1080) (last visited May 28, 2009) [hereinafter DANE].

4. *Housing deficit* refers to families living in private housing with living conditions which result in both quantitative and qualitative deficits and who therefore require rehousing, improvement, or an extension to their current living quarters. See DEPARTAMENTO ADMINISTRATIVO NACIONAL DE ESTADÍSTICA, CENSO GENERAL 2005: FICHA METODOLÓGICA DEFICIT DE VIVIENDA 2 (2005), [http://www.dane.gov.co/files/investigaciones/boletines/censo/FM\\_deficitvivienda.pdf](http://www.dane.gov.co/files/investigaciones/boletines/censo/FM_deficitvivienda.pdf) [hereinafter FrCHA METODOLÓGICA].

5. DANE, *supra* note 3.

6. *Quantitative deficit* is an estimation of the amount of homes which society needs to build or add to create a one-to-one ratio between adequate homes and families needing accommodation; that is, it is based on a comparison between the number of families needing housing and the number of appropriate homes in existence. See FrCHA METODOLÓGICA, *supra* note 4, at 2.

7. DANE, *supra* note 3.

8. *Qualitative deficit* refers to private homes with substandard living conditions in respect of structure, space and availability of public services and therefore they require improvement or extension of the family homes in which they live. See FrCHA METODOLÓGICA, *supra* note 4, at 3.

lence, they are forced to leave their original homes, therefore causing this deficit to grow at a constant and vertiginous rate. Adding to these displaced persons are those who are continuously pushed out toward the periphery by the urban economy, swelling the numbers of the structurally poor.<sup>9</sup> These are the excluded, those condemned by a city to which they have become invisible, because the law governing Bogota has closed all doors to them. These builders and inhabitants have become members of the *Other City*, one which has grown and become established beyond the boundaries of the official law.

Obviously, there are many neighborhoods that arise from these survival dynamics, and they speak volumes to the real existence of the welfare state and the universality of human rights. They also reveal much about city access and the ineptitude of urban planning and law in ensuring the social and territorial cohesion of a city which, like Bogota, is suffering an enormous and ongoing explosion of its population. Therefore, as we are convinced that the law can only be interpreted through the society experiencing it, and that any analysis of that law must be made from a realistic perspective, we propose to use the story of the Bogota neighborhood of Jerusalen as symptomatic of how the law is suffering from the disease of ineptitude.

## II. JERUSALEN: A DREAM, THE PROMISED LAND

### A. *History of the Neighbourhood*

The Jerusalen neighborhood grew in the midst of Ciudad Bolivar, a large scale government housing project funded by the Inter-american Development Bank (IDB). Over the previous two years, various buildings were completed in Jerusalen, providing housing for over a thousand families. However, operational problems and an unsatisfactory public services infrastructure rendered them uninhabitable.<sup>10</sup>

According to one of the neighborhood's leading figures, part of the motivation behind the project was to seek a profitable return on some privately owned land close to the district authorities,<sup>11</sup> which was not entirely appropriate for urban development. Adja-

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9. See Avendaño Triviño & Carvajalino Bayona, *supra* note 1, at 393.

10. See MARÍA MERCEDES MALDONADO, EL SIGNIFICADO JURÍDICO DEL "DERECHO A LA CIUDAD" 2 (2002) (report given at Lincoln Institute for Land Policy, Curso de Desarrollo Profesional, Mercados Informales: Regularización de la Tenencia de Tierra y Programas de Mejoramiento Urbano en América Latina, Nov. 18-22, 2002).

11. *See id.*

cent to these plots was the Hacienda Casa Blanca (Hacienda), which today has become Bogota's Jerusalem neighborhood. It is characterized by its arid, mountainous terrain, ideal for quarrying, but hardly apt for an urban settlement. Those plots of land which were not sold to the authorities were, according to the aforementioned community leader, informally developed so as to make some use of them. The land was never occupied by violence.

In the early 1980s the land was inhabited only by the Hacienda's custodians. Influenced by a group of real estate developers, they began a procedure of adverse possession or squatter's rights to obtain ownership of the land, and the company Sociedad Urbanizadora del Sur was incorporated. The *partners*<sup>12</sup> as the neighborhood settlers referred to them, became *pirate developers*<sup>13</sup> of the Hacienda. They divided the land into plots of 7 x 14m<sup>2</sup>, and by 1982<sup>14</sup> rumor was rife among the most vulnerable of the city's population that in Hacienda Casa Blanca plots were practically being given away.<sup>15</sup> Prices varied, depending on the topographical conditions of the terrain; however, they were undoubtedly much more accessible solutions than those offered under formal market conditions. In effect, sales of some plots were made at allegedly low prices (*allegedly* since the lack of infrastructure made the prices comparatively higher than those for rural land) and others were put on sale for similar prices, or were handed over in exchange for movable property.<sup>16</sup>

The sales of the plots were not made according to the legal formalities required for the sale of real estate, due, among other reasons, to the fact that vendors were not the formal proprietors of

12. The *partners* were engineers, lawyers, property developers, police officers, pirate planners, all covered by a network of intermediaries. *See id.* at 4.

13. This is the name traditionally given to these city agents in Bogota. Their activities are characterized by selling plots which do not have the requisite infrastructure (public services, roads, parks and facilities) for low income families. In general, sales are made without any legal formalities for transfer of the real estate. Thus, the agents promise plots for sale which are not habitable as they have not been properly included in urban planning. Accordingly, it is paradoxical that they are called *developers* when it is precisely what they never do, i.e., urban development of the land.

14. The 1980s were characterized by the continuation of a policy of permissive tolerance of informal processes in terms of housing in Latin America. *See* Julian Salas Serrano, *Pertinencia y Urgencia del Mejoramiento Barrial en Latinoamerica*, in CIUDAD Y TERRITORIO ESTUDIOS TERRITORIALES 73-88, 143 (2005).

15. *See* MALDONADO, *supra* note 10.

16. *See generally* Daniel Bonilla Maldonado, *Pluralismo Jur{dico y Propiedad Extralegal: Clase, Cultura y Derecho en Bogota*, 36 REVISTA DERECHO PRIVADO 207 (2006).

the land. Thus, to *close the sale* of the plots, *promissory sale agreements* were signed once the price of the property had been purchased with money or other goods. These *promissory agreements* were fully valid documents among the neighborhood community and served as proof of purchase of a plot. In support of the validity of these documents, the community organized a property registration system, which established the location of each plot and recorded its legitimate occupant in order to maintain control over the ownership of each plot and avoid any disputes arising from selling the same portion of land over and over to various people.

Although the first problem faced by the residents was a disproportionate police presence and harassment, it was a series of different challenges that ultimately led them to organize as a group, such as the tremendous community effort required to gain access to essential public services. The residents grouped together to arrange the provision of water and to supervise the improvised infrastructure they had installed (hosepipes and tanks), or to provide pack animals to bring gallons of drinking water to the area until the water supply company built a proper tank. When the settlement was granted legal status, main drinking water and sewage networks were set up. The electricity supply was established in a similar manner. The neighborhood became established thanks to a tenacious and exemplary community, to the observance of the internal legal system that spontaneously arose during the process, and due to the success-albeit *partial-in* insisting that the State provide public services to homes.

Although the story of how this neighborhood was structured and established is considered exemplary in terms of the power of community effort and the strength of the alternative legal system which sprang up during the process, this is also true of other cases of spontaneous construction of neighborhoods in Bogota. The coincidence lies specifically in the following aspects: the concentration of a marginalized population in informal settlements, their means of access to the land and to housing, the subhuman conditions of the initial dwellings, uncertainty regarding the official recognition of the district, the precarious nature of urban facilities, and the difficulties of access to the city.

*B. The Path Towards Formality: A Dream Thwarted by the Law*

The Jerusalem neighborhood, like other districts of Bogota, arose and developed on the margins of the legal plans for the city's

formal growth and also outside the legal framework for obtaining and attesting to ownership of property. This may have been the key to the settlers' dream: namely, to remain outside the margins of an official law that was unable to respond to their primary needs. Later, however, when their *Other City* was physically consolidated, they intended to take the steps towards entering the great city via the portals of a law which would finally be required to heed them. However, the reality is rather different, and the story of Jerusalem and its path to legal recognition (still incomplete) has made it quite clear that the law has closed its doors to dreamers.

The extent of the phenomenon of informal urban development in Colombia has led, in recent decades, to the creation of various legal and urban planning mechanisms that have attempted to remedy this situation and offer alternative ways of acting and intervening. On one hand, the local authorities have been authorized to *officially recognize-a* process known as urban legalization-the neighborhoods and districts that have sprung up on the margins of the formal urban growth in cities. Similarly, legal conditions and special administrative and judicial procedures have been put in place to facilitate the security of tenure of this type of housing and formalization of their deeds of title.

This part of the study of the Jerusalem case aims to demonstrate the failure of the offered solutions to have any relevance to the typical legal problems presented by the existence of informal settlements and the mechanisms that these settlements have themselves devised and implemented to address and resolve these difficulties. In order to do so, we propose to tell the story, step by step, of the neighborhood's legal peregrinations on its path to becoming a formal part of Bogota.

Following its establishment, Jerusalem's first urban recognition came in 1989<sup>17</sup> through a procedure of urban legalization resulting from the provisions of an agreement of the City Council-Agreement 1 of 1986-decreeing the legal status of over 250 neighborhoods of a similar origin. That regulation contained a legal recourse that was to be repeated in subsequent provisions, namely the creation of a window of time for conversion from informal to *legal*. A date is determined by which time the neighborhood should have become established and consolidated in order for

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17. See generally Resolución No. 489 of 1989 of Bogota Administrative Department of District Planning, Por la cual se Reglamenta el Desarrollo Incompleto Denominado: JERUSALEN, El Registro Distrital No. 584, Nov. 10, 1989 (Colom.).

it to be recognized as such. In effect, it was agreed that the neighborhoods established prior to entry into force of this agreement would be officially recognized; that is, neighborhoods established prior to February 12, 1986.<sup>18</sup>

The purpose of the act of recognition or urban legalization-Resolucion 489 of 1989-was to "officially recognize the existence and order the incorporation of the Jerusalem development in the official plans of the special district of Bogota."<sup>19</sup> Further, this act determined the structure of public and private areas of the neighborhood based on the existing reality, adopted an urban plan that would define and create the boundaries of public and private areas, and established that "areas for public use indicated in the approved plans shall always be used for that specific purpose."<sup>20</sup> In addition, the act was concerned with the general state of the precarious existing infrastructure in terms of energy provisions, water supply and sewage. Accordingly, it set up the bodies responsible for their improvement and defined architectural regulations for private plots resulting from the legalization process. Finally, the act indicated that the resolution "does not cover any right to tenure of land, the only effects this has on public law or urban legal nature of the area is in the improvement of public and communal services and regulations on the physical planning of the sector."<sup>21</sup>

Only on the basis of this recognition was Jerusalem incorporated as a definite part of the city in the official zoning of Bogota. As a result, its inhabitants were able to *legalize* the buildings constructed in the neighborhood. Thus, the procedure for legalizing these buildings could only be initiated following urban legalization that recognized the existence of the neighborhood, thus making state law applicable to what goes on in its territory. This means that urban legalization of the settlement does not assume legalization of private buildings, nor does it resolve the problem of the precarious nature of the tenure of the homes built. Conse-

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18. The reference to a cut-off date has been one of the constants in this type of regulation. The intention is not to encourage spontaneous construction of neighborhoods. However, the reiterated use of this regulation has led some to maintain that these measures provide a stimulus to the phenomenon of spontaneous settlements. We consider in any case that these regulations do not generate a *call effect* which does not promote the creation of irregular settlements, but simply responds to a social reality which to date has not been assumed by more general and serious housing policies. *Id.*

19. *Id.*

20. *Id.* at art. 9, para. 2.

21. *Id.* at art. 30.

quently, the neighborhood has been included in Bogota's official plans, while its inhabitants and constructions continue to remain on the margins of the city and formal law fails to offer them any guarantees with respect to their right to a home.

In short, the urban legalization procedure is almost exclusively a response to the need to legally protect public investments required in neighborhood improvement programs, such as paving roads, installing permanent water and sewage networks, and the provision of public facilities. Until a neighborhood is officially recognized, public investment is not legally possible, as this would require investing public money in what are formally private assets. Nevertheless, the act of legalization does nothing to resolve the ownership of assets destined for public use.

The situation following urban legalization is as follows: on one hand state law accepts the existence of the neighborhood plots of land; however, conversely, it continues to turn a blind eye to the buildings constructed on them as a result of the progressive housing developments. Further, the act of legalization declares the public use of those neighborhood areas that are to be used by the community and in which the State will intervene as lender and guarantor of public services (public services and supplies to homes, social services, education, recreation, health, etc.). Surprisingly, the district did not acquire those plots, so although they are destined for public use, they continue to be privately owned assets. This results in a decidedly schizophrenic system. In effect, the procedure for legalizing the Jerusalem neighborhood is an example of the incomplete, inconsistent, and precarious nature of the formulas available for addressing the problems common to spontaneous popular housing settlements.

With respect to the problem of the precarious nature of tenure of the homes, as indicated in Resolucion 489 of 1989<sup>22</sup> and other national regulations that have regulated this issue, legalization does not assume any pronouncement on the rights of occupants to the built-on lots. As a result, the Resolucion is not a definitive guarantee of the security of families' tenure of their homes. Given that the *pirate developers* could not transfer ownership to the occupants, with the result that the occupants are merely possessors who will only be able to acquire firm tenure of the property through the passage of time by means of adverse possession or

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22. Resoluci6n No. 489 of 1989 of Bogota Administrative Department of District Planning, Por la cual se Reglamenta el Desarrollo Incompleto Denominado: JERUSALEN, El Registro Distrital No. 584, Nov. 10, 1989 (Colom.).

squatter's rights.<sup>23</sup>

Given this state of affairs, the problem of unstable tenure is reduced to one of irregularity of the ownership of the occupants and the solution needs to be found by means of specific procedures. In order to consolidate ownership of the homes, special terms have been created for adverse possession,<sup>24</sup> administrative procedures,<sup>25</sup> and facilities for pursuing the judicial procedure leading to declaration of ownership<sup>26</sup> or special processes when the neighborhoods were located on land belonging to local authorities or to the State.<sup>27</sup>

All these options and solutions are exclusively designed to ensure the security of tenure of the homes through individual private ownership, leaving aside other possible alternative solutions by means of alternative systems of land and building tenure.<sup>28</sup> On this point, Colombian law is found to be at its least innovative as it continues to insist on individual private property as the only

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23. Pursuant to the Colombian Civil Code, adverse possession is an original means of acquiring ownership or property of things which occur or are consolidated over the passage of time, provided that there are deeds of ownership for the possessor. For the property's ownership to be remedied, a title deed is required as a prerequisite for registration of the property. Therefore, the acquisition needs to be declared before a judge or a notary. These procedures result in legal instruments, a court judgment, or a notarial deed, which provide ownership of the goods that are the object of the proceedings. *Coo. Crv. arts. 2527-34 (Colom.)*.

24. Law 9 of 1989 determined a reduction in the terms of adverse possession for socially subsidized housing. The extraordinary prescription changed from twenty to five years and the ordinary from ten to three years. *See Law No. 9 of 1989, Reforma Urbana, Diario Oficial No. 38650, Jan. 11, 1989, at 1 (Colom.)*.

25. Law 1183 of 2008 established the possibility of carrying out a special administrative procedure before a notary for the declaration of ownership of subsidized social housing. Prior to this law the only alternative to formalize the property was a process of declaration of ownership head before an ordinary judge. *See Law No. 1183 of 2008, Por Medio de la cual se Asignan unas Funciones a los Notarios, Diario Oficial No. 46871, Jan. 14, 1989, at 1 (Colom.)*.

26. Law 9 of 1989 permitted court claims for declaration of ownership solutions for social subsidized housing in which claimants could lodge the claim against an indeterminate person should they be unaware of the name of the registered proprietor or where the property registry provides no clues on the land or proprietor. *See Law No. 9 of 1989, Reforma Urbana, Diario Oficial No. 38650, Jan. 11, 1989, at 1 (Colom.)*.

27. Although it was not typical to informal development in Bogota, in some other districts of the country this phenomenon occurred mainly on plots of publicly owned land. For this type of situation, Law 9 of 1989 established the possibility that such land was the object of free assignment to the families which had occupied them. *See id.*

28. It is interesting to cite the figure of the *collective acquisition through prescription* established in Article 10 of the Brazilian Cities Statute. It consists of the possibility that all occupants in a settlement may claim property of the overall land in the settlement, with each family being a proprietor of a portion of the overall terrain. *See Lei No. 10.257, de 10 de julho de 2001, D.O.U. de 11.07.2001, at art.10 (Brazil)*.

option or means of ensuring the regularization and security of tenure.

With regard to public areas, legalization is not sufficient for an effective declaration of public property on precarious and insufficient areas that the community has designated for roads, neighborhood facilities, or green spaces. Despite the fact that these areas of terrain are allocated for public use, it is equally true that they formally remain the private property of their original owners.<sup>29</sup> Occupants of the plots designated for homes may adversely possess property over which the owners have effectively lost control and possession. This is not the case with public areas. It is not legally possible for the community to gain ownership through adverse possession, which would effectively include using and enjoying the asset, because the City as an institution would ultimately retain public ownership. As a result, such areas frequently remain in a kind of limbo where they are regarded as private property that has been officially designated for communal use.

In the case of Jerusalem this situation is particularly dramatic. The discussion on the ownership of areas designed for communal use and the formulas for their effective transfer to the public domain has had a marked effect on this main contention. In fact, four years after the act of legalization to which we referred earlier, the legalization was contested by the heirs of the former owners of the Hacienda Casa Blanca. The owners, ignorant of the principals of property law, challenged the legalization-in particular the communal use of "public spaces"-on the ground that their due process rights were infringed when they were not included in the process of urban legalization. The lower court delivered a judgment in favor of the heirs. In 2000 the Consejo de Estado overturned the lower court and held the judgment invalid.<sup>30</sup>

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29. "Through the legalisation processes these plots were destined for public use without this meaning that they had become public property. That is, although these plots were subject to administrative wishes to designate them for public use for the common benefit of the inhabitants, and effectively they are used by the population as zones of public use, and although this use enables them to frame them within the definition of public space as defined in Article 5 of Law 9 of 1989, it is also true, however, that the ownership of this property is not headed by legal entities of a public nature but still remains in the private domain . . . . Ultimately, this means that the expansion of private urban developments generated a considerable number of properties designated for public use which nevertheless remained in the private domain." MINISTERIO DE AMBIENTE, VIVIENDA Y DESARROLLO TERRITORIAL, *Guía Metodológica: Mecanismos de Recuperación del Espacio Público* 29 (2005).

30. Case No. 5070, Nov. 9, 2000, [Council of State, First Section] (Colom.).

Despite the fact that in this case the claimants were seeking financial compensation, the Consejo de Estado awarded nonmonetary damages. The court ordered the city authorities to initiate new legalization proceedings in which all of the interested parties to the claim could be involved from the outset. As a result, the legalization procedure had to be repeated and culminated in the issue of a new legalization act in October 2002.<sup>31</sup> Between November 2000, when the Consejo de Estado rendered its judgment, and the new legalization act's entry into force in April 2003, the neighborhood once more ceased to exist as far as official plans and public investment in infrastructure were concerned. Work still pending as part of the rehabilitation procedure was suspended.

In order to resolve the situation and to be in compliance with the provisions of the Consejo de Estado's judgment, the District Planning Administration Department in Bogota (DAPD) in Bogota initiated a new procedure involving the heirs. However, the legalization act was not the cause preventing them from enjoying and making use of their land; the permissive attitude of the owners for over ten years could be interpreted as conduct which tolerated this adverse occupation.

This new legalization act became final on April 7, 2003. In a decision dismissing the appeal, the Mayor of Bogota refused to give the proprietors compensation, reasoning that the act of legalization had not been detrimental to them since, with or without the act of legalization, they had already lost their use and enjoyment of the property as a result of the continuous possession by the community of squatters since 1989.<sup>32</sup>

The judgments upholding the new legalization process were also contested by the proprietors. Although the case has not yet become final in first instance, the corresponding Court considered that the right to private property had been infringed upon and decided that the proprietors should be awarded the right to maintain legal title to their property. The mechanism for accomplishing this consisted of the city government—either through direct negotiation or via expropriation—acquiring those sectors of the neighborhood indicated in the act of legalization as public property, and "following the legalization order consequentially pass to

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31. *See generally* Resolución No. 0349 of 2002 of Bogota Administrative Department of District Planning, Por la cual se Legaliza el Desarrollo Jerusalen, perteneciente a la Localidad No. 19 de Ciudad Bolivar, Oct. 1, 2002 (Colom.).

32. After which appeals were lodged against Resolución 0394, concluding in the dismissal of the appeal by the city's mayor.

the administration of the Capital District which would make the property right of those who had acquired it under law ineffectual."<sup>33</sup> To date, the conflict still remains unresolved. The city has not defined any specific solution and the neighborhood continues to remain hostage to a schizophrenic legal system. There are areas for public use that are privately owned, and plots and houses that are recognized in Bogota's official plans with uncertain tenure, inhabited by absent citizens marginalized and without any legal rights to their dwellings.

To summarize, the regulations that have historically defined the conditions of the urban legalization process continue to hold that the act of legalization makes no pronouncement on the property rights in conflict. To restrict the scope of urban legalization to a mere formality does nothing to contribute to clarifying or resolving the ownership problem. Tenure of homes and access to the city is hardly commensurate with the significance of a declaration of this nature.

It is true that the recognition and weight given to urban legislation is an administrative declaration with considerable symbolic efficacy.<sup>34</sup> On one hand it enables the investment of public funds, and on the other it accepts the existence of the neighborhood or sector, incorporating it in the official maps of the city. On the official map of the city it shows an urban section with areas dedicated to communal use, as well as plots of land for private use with a high degree of established homes. This sends an eloquent message and a successful one for the community which has fought tirelessly, not only to build its houses, but to make the step from informal to formal housing rights; that is, to gain the attention of the local authorities by formally becoming a part of the city. It is in this respect that its symbolic scope is belied by the precariousness of its legal effects in conflicts regarding ownership of the land and effective access to the city.

Given this state of affairs, and more than 25 years after the initial occupation of this sector, Jerusalem's official recognition as part of the city continues to remain hanging in the balance. Despite the fact that homes have already been established, that the majority of the streets are paved, that urban facilities exist and that some occupants now have individual property deeds, the official existence of the neighborhood as part of the city has still

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33. Case No. 5070, Nov. 9, 2000, [Council of State, First Section] (Colom.).

34. See generally MAURICIO GARCÍA VILLEGAS, LA EFICACIA SIMBÓLICA DEL DERECHO: EXAMEN DE SITUACIONES COLOMBIANAS (1993).

not been resolved. Therefore there remains a deep-seated alienation of the city's inhabitants who continue to be denied citizenship status and instead are treated as an *underclass*. They are condemned within and by a city that cannot integrate them, because the law governing the city has consistently closed its doors to them. In this way social divisions are perpetuated, and urban planning law continues to be distanced from what should be one of its prime objectives, namely, to ensure territorial consistency and cohesion in order to guarantee peaceful coexistence by management of an urban center which consults and practices social justice.

### III. GAPS IN THE LAW AND THE OTHER CITY

Although the case of Jerusalem is paradigmatic from a perspective of legal pluralism and the organization of community self management, it is also true that, above all, it serves as an example of the territorial fracturing of the city and social exclusion caused by segregation.<sup>35</sup>

Segregation, which is apparent from the history and situation of Jerusalem, is the result of two cracks or gaps in the law which destroy the underwritten logic of the welfare state at two different moments; one prior to the establishment of the spontaneous settlement, and the other at a later date. The first crack appears as the direct cause of the existence of irregular settlements. The second arises with the impossibility of integrating those settlements into the formal city. The first of these failures is due to the absence of an urban planning policy which includes in its objectives the promotion and guarantee of the right to housing and protection of other constitutional rights, such as equal opportunities in the labour market, access to education, health and children's recreation. The second failure lies in the ineptitude evident in the legal formulas for urban legalization employed to convert the inhabitants of a "legalized" neighborhood into citizens.

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35. Similarly to Juli Ponce Sole, we consider segregation as the action and/or result of the separation of the population within the city, according to criteria responding to the social and economic, ethnic or racial characteristics or any other features, which generally coincide with characteristics which could be deemed discriminatory. See Juli Ponce Sole, Profesor Titular de Derecho Administrativo, Universidad de Barcelona, La legalidad urbanística tendente a hacer efectivos diversos derechos constitucionales y, en especial, el derecho a la vivienda. ¿Una "nueva ciencia del derecho urbanístico" más allá de la protección del derecho de propiedad y del desarrollo económico?, Talk Presented at the III Congreso de Asociación Española de Profesores de Derecho Administrativo (Feb. 8, 2008).

These two legal failures have a common cause: the bare notion of a right to housing derived from a partial understanding of the constitutional text.<sup>36</sup> The Corte Constitucional, in Article 93 of the Constitución Política de Colombia, has referred to international human rights treaties ratified by Colombia, in particular the International Covenant on Civil and Political Rights (ICCPR) and the interpretations made of this treaty by its authorized body, the United Nations Committee on Economic Social and Cultural Rights.<sup>37</sup> In General Comment 4, the Committee explained the scope of each of the elements that make up the right to adequate housing.<sup>38</sup> The Court has made use of this general comment on numerous occasions in order to establish the constitutional content of the law, unreservedly adopting<sup>39</sup> all the components which the Committee itself articulated.

Nevertheless, this is where the gap exists and where the resulting vacuum then spreads to the rest of the legal system. The Corte Constitucional, in its task of determining the constitutional content of the right to housing, has left it bare in that in pursuit of its objective, it has completely ignored the components that provide most guarantees of *legal security of tenure* and *place*. In effect, not one of the judgments in which the Corte Constitucional addresses the legal problems on the right to housing has emphasized that security of tenure should also be guaranteed to "informal settlements, including occupation of land or property."<sup>40</sup> Nor has it made use of the fact that the element *place* assumes the location of housing in an urban medium in order to be able to exercise other constitutional rights, an element which in the most advanced European doctrine has been identified with the right to the city.<sup>41</sup>

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36. CONSTITUCION POLITICA DE COLOMBIA art. 51 (1991) (recognizing the right to appropriate housing).

37. Corte Constitucional [CC], Sentencia [S.] No. C-936/03, demanda de inconstitucionalidad, 15 Oct. 2003 (Colom.); Corte Constitucional [CC], Sentencia [S.] No. T-1318/05, acción de tutela instaurada, 14 Dec. 2005 (Colom.); Corte Constitucional [CC], Sentencia [S.] No. T-403/06, acción de tutela instaurada, 25 May 2006 (Colom.); Corte Constitucional [CC], Sentencia [S.] No. T-585/06, acción de tutela instaurada, 27 July 2006 (Colom.).

38. U.N. Com. on Econ. Soc. and Cultural Rights [CESCR], *General Comment No. 4 on the right to adequate housing*, ¶ 17, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter CESCR].

39. See CONSTITUCION POLITICA DE COLOMBIA arts. 93-94 (1991).

40. CESCR, *supra* note 38, at ¶ 8(a).

41. Defined in the European Charter for the Safeguarding of Human Rights in the City as "a collective space which belongs to all those who live in it, who have the right to find there the conditions for their political, social and ecological fulfilment, at the

Thus, returning to the cracks in the law, the absence of an urban planning policy which includes in its objectives the promotion and guarantee of the right to housing and protection of other constitutional rights, would probably be resolved more easily if we were able to rely on developed case law expressly concerned with the inclusion of an adequate urban medium or habitat in the right to housing. In effect, some clarity on this component of housing would be an assumption of express recognition of the link between the city and housing. This would permit the inclusion of this right and the State's obligations to protect this right within the mechanisms of urban law, with the final consequence decreasing the importance of the market as a "natural" regulator of the real estate sector. This would be a case of urban management that, in accordance with the traditional economics-based view of the right to housing, would aim to reduce the quantitative deficit of housing,<sup>42</sup> but that would also, in its role as regulator of the city as a system, ensure social mixing by adequately locating the protected housing and the public facilities. The objective is to ensure that all those have the right to an adequate urban medium, in order to implement their other constitutional rights, which would permit territorial consistency and avoid exclusion processes or social break up.<sup>43</sup>

We assume that an urban planning system that incorporates such characteristics would exclude practices that generated urban segregation and discrimination in the use of land. This includes, for example, "the segregated location of specific facilities, segregated location of subsidised housing or the absence or insufficiency of housing in respect of the existing needs."<sup>44</sup> Even if it were only partial, while always observing the principle of non-regressivity,<sup>45</sup> urban management such as that proposed would enable consistent policies providing guarantees of the right to housing to be implemented in accordance with equally distributed charges, in terms of the territorial location of the city's inhab-

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same time assuming duties of solidarity." European Charter for the Safeguarding of Human Rights, art. 1, ¶ 1, May 18, 2000.

42. Which, obviously, does not assume providing every family with ownership of a home, as some have attempted to allege (in order to detract from validity of the right and make it seem merely absurd). See CENTRE ON HOUSING RIGHTS AND EVICTIONS, COMMON MYTHS ABOUT HOUSING RIGHTS ¶ 4 (2006), [http://www.cohre.org/view\\_page.php?page\\_id=86](http://www.cohre.org/view_page.php?page_id=86).

43. Ponce Sole, *supra* note 35.

44. *Id.* at 1 (translated by author).

45. To which urban planning policies would be subject, provided that they are related to any element of the right to housing.

itants. This peaceful coexistence would be ensured if the guarantee of the constitutional content of the right to housing were to become the main, prioritized strategy of urban planning.

We say *partial*, because we do not believe that an immediate, absolute, stable solution is feasible for a city that receives a daily influx of immigrants<sup>46</sup> and is thus in constant need of emergency housing. It would not be sensible to maintain that the city's management and provision of housing through various forms of tenure would be sufficient in the short and medium term to overcome the problems of territorial and social cohesion in Bogota. Thus, even in the event that urban planning were to make the turnaround we propose, there would still be a considerable period of time during which we would continue to see how the city would grow in a spontaneous manner as informal settlements spring up, geographically segregated, in which the most vulnerable members of our society seek refuge (namely, the homeless and those displaced by violence). Therefore it is imperative to repair the second chink in the law mentioned above: the ineptitude of available legal formulas for urban legalization in enabling residents of a *legalized* neighborhood to become citizens. These residents must be integrated in the system of guarantees and rights enjoyed by the majority, as persons officially recognized and protected under formal law.

This problem could also be resolved by express recognition of the specific elements of the right to housing mentioned above. Obviously, the State's obligation to ensure legal security of tenure, even in irregular settlements, is clear from the text of the Committee on Economic Social and Cultural Rights General Comment 4.47 The manner in which it repeatedly goes unheeded by legal professionals and judges is astonishing. Jerusalem is a prime example of how the legalization process fails to address the vital problem of security of tenure in the neighborhood's housing.

A formula that takes the rights of the inhabitants of Jerusalem seriously would need to include a response to the precarious situation of the owners. Rather than leaving them to their own devices and obliging them to undergo protracted legal proceedings involving adverse possession on the lands that they had acquired in good faith, and on which they had provided their own

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46. According to the Consultoria para los Derechos Humanos y el Desplazamiento [CODHES], in 2007 44,791 displaced persons arrived in Bogota fleeing violence. That is, approximately 122 daily or 5 every hour. See CODHES, Departamentos de Llegada, [http://www.codhes.org/index.php?option=com\\_docman&task=cat\\_view&gid=55&Itemid=51](http://www.codhes.org/index.php?option=com_docman&task=cat_view&gid=55&Itemid=51) (last visited Mar. 31, 2009).

47. See generally CESCR, *supra* note 38.

housing, the State should have offered accessible housing to those on the margins of the labor market, the city's new poor, and those fleeing from violence who were displaced from their original homes.

Providing solutions to the problem of the precarious nature of their tenure would need to be assumed within legalization mechanisms. This is so not only because the State has an obligation deriving from the right to housing to ensure *security of tenure*, but also because the principle of administrative efficacy implies resolving state-governed matters with as little bureaucracy as possible and with minimum investment of resources. This principle does not address the problem of the public services to which the neighborhood settlers are entitled. Instead it is left to the courts or other administrative procedures-at considerable cost to the State-to resolve individually and separately the other rights of access to public services and facilities.

However, in addition the authorities and legislation are positively linked by the force of constitutional rights, so that there is no margin of discretion for determining that the right to security of tenure is NOT protected. In this same sense it is important to emphasize that the combination of the right to housing and the principle of material equality requires the State to design positive action to remove the obstacles preventing the segregated population from accessing the most effective resources in order to ensure the tenure of their homes.

Furthermore, as we saw in the case of Jerusalem, the acts of urban legalization do not resolve the problem of public areas. These acts fail to comply with the State duty to ensure that homes are established in an adequate urban medium, the basic elements of which are the existence of a public area that permits social engagement, the right to freedom of movement, the right to access adequate public services, and children's right to recreation, to name just a few. The case of Jerusalem is also paradigmatic on this point, as it shows that the formula for making some spaces available for public use, while continuing to maintain them as private property, generates a legal instability on communal use which characterizes this land.

In effect, if the land destined for public use continues to be private property, the sole remaining vestige of this tenure that is reserved by the owners is the option to petition courts as legitimate interested parties. This assumes that those proprietors *sui generis* possess a type of power of impediment in respect of the

communal use, as has been proved time after time in the case under study here. Given these circumstances, the public authorities have clearly abandoned their duty to ensure the element of *place* in the right to housing. There do not appear to be any reasons that the authority could sustain to the contrary. The physical and legal instability of public areas prevents the right to housing to be fully implemented. Of course it implies denial of the right to the city . . . including the *right* to a marginalized city, which is indeed a miserable state of affairs.

Finally, the mechanisms for urban legalization do not take into account the relation between the right to housing and the constitutional principle of solidarity which, in terms of territory, is manifested in the principle of territorial cohesion. That is, an expression of solidarity at a geographic level presupposes a degree of balance between various areas of a territory.<sup>48</sup> In effect, as may be seen from the manner in which Jerusalem was dealt with, the legal instruments established for formalizing the city status do not include any device for remedying the territorial and social breach caused by the geographical segregation of the neighborhood and the concentration of poverty and instability among its inhabitants.

In this context, the right to housing and its element of *place* is again extremely relevant, because a city location means a more or less balanced assumption of drawbacks and benefits. Due to the geographic and social segregation of Jerusalem, its inhabitants are subject to disadvantages which are disproportionate compared to the benefits of their situation. From a perspective of territorial distributive justice, the remedies available for compensating or correcting the disproportionate disadvantages suffered by segregated urban communities, should attempt to bring about changes in the situation which would ensure that the perspectives of those more underprivileged inhabitants were as advantageous as possible.<sup>49</sup> In other words, the instruments of public law for redistributing wealth should make use of compensation as a means of remedying the shortcomings caused by the urban territorial fracture and the social marginalization which accompanies that segregation.

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48. Juli Ponce Sole, *Prólogo* to PADRAICKENNA, *Los DERECHOS A LA VIVIENDA Y LOS DERECHOS HUMANOS* 22 (2006).

49. *See generally* DAVID HARVEY, *URBANISMO Y DESIGUALDAD social* (1977); JULI PONCE SOLE, *DERECHO URBANÍSTICO, VIVIENDA Y COHESIÓN SOCIAL Y TERRITORIAL* (2006).

For members of a legalized popular neighborhood such as Jerusalem, gaining physical access to the services offered by the formal city that is located far from the neighborhood is likely to be beyond their financial capabilities. Due to the costs and time involved in travelling, the *policy makers* could at least evaluate the pros and cons of a stop gap solution which basically would resemble the results which-without any prior planning-are being achieved in some neighborhoods of Bogota. We refer to the option of being "segregated but equal," which is a rather dubious model for territorial consistency. This implies renouncing any attempts at social cohesion and attempting to cover the needs of the population within each area of the city. This strategy would sacrifice any social contact between different types of people, yet it would encourage an urban scenario which would offer its inhabitants sufficient resources to enable them to face life with fewer disadvantages in respect of the more privileged inhabitants of the city. A model with these characteristics would presuppose that both the higher income residents, as well as the most disadvantaged, would have access to a good education, health centers in an adequate state, properly equipped both materially and professionally, public areas in optimum conditions, and well stocked libraries each in their sector of the city, thus compromising the idea of the city as we know it today.<sup>50</sup>

In defense of the "segregated but equal" model it could be said that although it means less personal interaction and a lesser degree of coexistence and social relations in public areas (which although this transfers some effects of segregation to schools and probably leads to accentuating a "fear of the unknown"), it would appear to be a possible means of fulfilling the State duty to ensure peaceful coexistence. Additionally, it would go some way to approaching the constitutional value of social justice in a city environment. If at least this one option were considered in the process of urban legalization, there would no doubt still be other criticisms to make of the system. The fact is that the legal formulas for official recognition of informal neighborhoods simply do not consider any measure-neither that of promoting a social mix nor a segregationist model-for remedying the prejudicial distribution of disadvantages in the processes of occupying territory in the city. In fact, the existing legal forms appear to be designed for land devoid of people, and thus places where no conflicts of rights exist.

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50. For a more detailed analysis of the risks of any urban segregation see Ponce Sole, *supra* note 35.

The total disengagement of urban legalization with the social reality of the regularized settlements shifts the blame onto and abandons those suffering the privations of so-called *social misfortune*, which conversely should be compensated as a logical consequence of the valid Welfare State. The constitutional principle of solidarity, and more specifically, the right to equality, does not claim to ensure an identical situation at arrival points, but rather requires the state to ensure equal opportunities for all.<sup>51</sup> As a result, legalization mechanisms would need to include positive actions,<sup>52</sup> and invest in supplementary resources to overcome the particular difficulties of the physical and social medium.

Seen from this perspective, the case history of Jerusalem is a visible indication of a malaise affecting the relations of the law and the city, of the deficiency of law (at least Colombian law) in its requirement to guarantee social cohesion in urban areas. Or, to put it another way, the legal formulas proposed by the Colombian system for addressing the problem of social exclusion resulting from the city's growth are inadequate.

#### IV. THE LESSON OF JERUSALEN

Jerusalem is a reflection of problems that are rooted in the welfare state of law. In general, any informal settlement of popular housing is a kind of metastasis of the "ineptitude of the State to procure that which is constitutionally promised but politically unprotected, i.e., the right to housing and a decent life for all."<sup>53</sup> There are three main causes of this ineptitude, namely the almost exclusive attention paid to protection and development of private property, the lack of connection between urban planning, organization of land and housing, and the incomplete and skewed perception of the right to housing, in which quantitative aspects are deemed to be paramount.<sup>54</sup>

The adjustment of urban law to the reality of the city occurs mainly through connecting the right to housing with the public duties of land organization. The effective implementation of all the elements of the right to housing ensures territorial cohesion

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51. See generally GERALD PRSARELLO, *Los DERECHOS SOCIALES Y SUS GARANTÍAS: ELEMENTOS PARA UNA RECONSTRUCCIÓN* (2007).

52. On affirmative action in urban development law see PoNCE SOLI, *supra* note 49 (quoting Thomas Kirszbaum, *La Discrimination Positive Territoriale: de L'egalite des Chances ala Mixte Urbaine*, 111 *PouvoirRS* 101 (2004)).

53. Avendano Triviiiio & Carvajalino Bayona, *supra* note 1, at 391-420.

54. PoNCE SOLI, *supra* note 49, at 26 (the author identifies these three elements as structural problems of Spanish urban development law.).

of the city, avoiding urban models of exclusion and social disintegration.

The disassociation of the solutions proposed by urban law and the right to housing generates the problems described in this work. Of special concern is the ineptitude of the urban legalization mechanisms for resolving problems of the inequality and disadvantage of segregated settlements, because this would perpetuate urban disintegration insofar as territorial cohesion, as in any other manifestation of the principle of solidarity may only be given in a context of equality.<sup>55</sup>

The present reality of Jerusalem is unfortunately a mark of the failure of the mechanisms of urban legalization as instruments for overcoming disadvantages and therefore as devices for the entry of informal cities into the formal city, which is seen as a social and territorially consistent system.

## V. THE DATA SPEAKS FOR ITSELF

In 2001, Jerusalem had approximately 75,000 inhabitants, approximately 70,600 of whom live in stratum one and around 4,400 in stratum two.<sup>56</sup> The neighborhood has approximately 15,800 homes.<sup>57</sup> Therefore, it has a high population density, with approximately 100 homes per hectare. This neighborhood, like all spontaneous settlements, has a concentration of population with very poor resources, and many inhabitants experience critical levels of poverty.<sup>58</sup> The majority obtain their income from an informal economic system, and a scant 7% work in the formal sector or in small family businesses, workshops and business premises in the neighborhood, located in living units for mixed use generating one or two temporary jobs paid as piecework.<sup>59</sup> Studies by the Alcaldía Mayor (City Council) of Bogotá have found that due to lack of funds for studying, and the stigmatization suffered by young people seen as delinquents and drug addicts, the inhabitants are unable to join the formal labor market, thus increasing the spiral of exclusion and misery.

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55. See Gabriel Real Ferrer, *La Solidaridad en el Derecho Administrativo*, 161 REVISTA DE ADMINISTRACION PUBLICA 123, 161 (2003).

56. ALCALDÍA MAYOR DE BOGOTÁ: CAJA DE VIVIENDA POPULAR, PROYECTO DE MEJORAMIENTO INTEGRAL DE BARRIOS – PROYECTO SUR CON BOGOTÁ sec. 5.2.4 (2004).

57. *Id.* at sec. 5.2.4.2.

58. *Id.* at sec. 5.2.4.3. Over 50% of its inhabitants earn less than the minimum salary, and only 10% earn between one and two minimum salaries, amounts which, in any case, are not sufficient to subsist.

59. *Id.*

Thus the lesson of Jerusalem is clearly a desperate one: the neighborhood of Jerusalem is an example of vitality, solidarity, resistance and otherness. Yet it is also a snapshot of the social dysfunction prevalent in Bogota, and a key illustration of the misery of an urban planning law which, disassociated as it is from the right to housing, merely serves as a guardian of differences and a protector of privilege. The dreams of the other city, as key to social justice, make no impression on the Law. Jerusalem is a living graffiti on the walls of a fractured city: *the law knows nothing of dreams.*

