DISMANTLING APARTHEID GEOGRAPHY: TRANSFORMATION AND THE LIMITS OF LAW

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INTRODUCTION

> Anyone who travels through our beautiful countryside cannot help but notice that the living conditions of workers who live on farms do not always meet a standard that accords with human dignity.[1]
>
> Everywhere the landless poor flocked to urban areas in search of a better life.[2]

As the Constitutional Court has recognized on several occasions, South Africa remains characterized by racial inequality which is manifested in unequal access to land, housing and related rights. Many South African locations retain the markers of apartheid and are characterized by racial inequality. This article reflects on the contribution of the Constitutional Court to shaping spatial politics in post-apartheid South Africa. In particular, this article interrogates the courts engagement with the odious legacy of apartheid geography which has locked South Africa's cities and rural areas into its racial logic. I argue that this geography has socio-political effects which often go unnoticed in the resolution of legal disputes. This paper problematizes the Court's conceptual avoidance of apartheid geography. In the context of this void, this paper is not intended to be definitive but to disrupt commonly held notions about relationship between law, space and the legal subject.

By apartheid geography I mean the existence of racially identified spaces often accompanied by segregation and an uneven distribution of social goods and public amenities which is skewed in favour of white people. In the urban context, this logic is manifest in cities characterized by a commercial or industrial centre occupied by predominantly white owned businesses and enterprises which are skirted by poorly serviced and overcrowded township areas designed for occupation by an

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[1] Daniels v Scribante 2017 (4) SA 341 (CC) para 111.
[2] Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) para 10.

overwhelmingly black labour force.[3] In the countryside, this logic is apparent in the large numbers of black people who occupy spaces in which they have insecure tenure as labour tenants, farm dwellers and other occupiers of white owned land.

What I refer to as apartheid geography has origins which precede the rise of formal apartheid. In fact, the existence of racially distinct spaces can be traced to the colonial encounter. Much of the legal basis which has produced this phenomenon predates apartheid but adopts a near identical logic which produced harm in equally violent ways.[4] While racial separation was a feature of colonial life this took on a legal force with the enactment of the Natives Land Act, 27 of 1913 which was gave a spatial expression to the ideology of white supremacy on through national policy. Infamously, this act and other measures facilitated the dispossession of black people of their land and its relocation to white farmers and settlers. This Act also confined the African population to woeful conditions in rural reserves which were politically and socially isolated from parts of the country designated for white people. In urban areas the Natives (Urban Areas) Act, 21 of 1923 ensured that racial integration would be strictly controlled and that the settlement patters of black people would be on terms dictated by the white government. This laid the basis of spatial inequality which would be zealously advanced by the National Party through the Group Areas Acts of 1950 and 1966 which ensured that urbanization was within the racist paradigm established by Population Registration Act, 30 of 1950. This produced urban areas which differentiated their users' experiences on the basis of race and ensured that inequality would be reproduced by their very design. For example, this is evident in the long distances between areas designated for black occupation and central business districts, public schools and health care facilities. This is expressed in the large numbers of people with inadequate access to housing which remain overwhelmingly black. Accordingly, apartheid geography is far more than an infrastructural problem – although this is evident in the country's chronic housing shortage.[5] Instead, it is a social condition premised on the reproduction of racial hierarchy's through spatial means which stands in stark contrast to the country's constitutional values which hold out a vision of equality, freedom and dignity.

[3] J J Williams 'South Africa: Urban Transformation' (2000) 17(3) Cities 167.
[4] Emdon 'The Limits of Law: Social Rights and Urban Development' in R Tomlinson et al (eds) Emerging Johannesburg: Perspectives on the Post-Apartheid City (2003) 216
[5] <http://www.statssa.gov.za/?p=11241> Statistics show that 13,6% of South African live in informal dwellings, and 5,5% in traditional dwellings.

While the laws outlined above, and other prices of racist legislation have been repealed and replaced with new legislation in line with the country's non-racial 'transformative' constitutional project,[6] what they have left behind are spaces indelibly marked by the politics of racial oppression. This paper interrogates some of the Constitutional Court's contributions to what is undoubtedly a complex issue implicating both public and private actors. To be sure, dismantling the numerous manifestations apartheid geography cannot be achieved by the mere rendering of legal decisions. However, I focus on the decisions of the apex court in order to understand its normative interventions in light of the country's spatial inequity. I thus assess how the court reads and understands space.

II LAW'S SPACE: UNDERSTANDING LEGAL GEOGRAPHY

In order to capture the contours of the relationship between space and law and understand its importance to human existence we must properly understand not only the social and political meaning of law but its operation in the context of space. This section draws on the growing literature concerned with legal geography, mapping the theoretical insights of this interdisciplinary approach to the study of law and geography.

A The Politics of Space

Legal geography is premised on a critical and contextual approach to space. In what remains a foundational contribution to the field Henri Lefebvre pioneered an approach to conceptualizing space which escapes the commonplace view, according to which space is merely a natural container in which life takes place.[7] In contrast Lefebvre argues that it is the very processes of life which serve to produce space. Thus, space is not merely inert matter but a living social construct – deliberately created to pursuant to social action. In this view, 'the spatial practice of a society secretes that society's space' in a gradual process.[8] Accordingly, space and time are inextricably linked to social and political practice as Lefebvre asserts:

> Space is not a scientific object removed from ideology or politics; it has always been political and strategic. If space has an air of neutrality and indifference with regard to its contents and

[6] see K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 SAJHR 150; C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 SAJHR 248

[7] Lefebvre La Production de l'espace (1974) (trans D Nicholas-Smith) The Production of Space (1991) 38.

[8] Ibid. 38.

> thus seems to be "purely" formal, the epitome of rational abstraction, it is precisely because it has already been occupied and used, and has already been the focus of past processes ... Space has been shaped and moulded from historical and natural elements, but this has been a political process. Space is political and ideological. It is a product literally filled with ideologies.[9]

Thus, spatial conventions far from being neutral tend to reveal the social relations which produce them while creating or transforming existing social relations. Demystifying the processes which produce space allows us to 'read' and 'decode' it to help us understand the forces that underpin its form. This approach calls us to resist thinking of space as pre-ordained, natural or ahistorical. Instead we can think of social and spatial relations as inextricably linked in an interdependent relationship which is both 'space-forming and space-contingent'.[10]

Importantly, this view illustrates that while people are commonly understood to shape space, they are simultaneously shaped by the spaces they occupy. This occurs as spaces become an expression of social policies. This theory articulates an intuition which was understood by the architects of racial segregation in South Africa under apartheid. At the core of this project is the attempt to use space to define its users lives in key political, economic and social ways. For example, by confining black people to underserviced, overcrowded areas with poor access to health care and education facilities the apartheid state was able to direct the trajectories of their lives restricting access to economic zones, high quality educational institutions within an environment where residents' isolation was compounded by poverty. In this way space effectively determined access to what Galster terms 'opportunity structures' which combined linked with racial ideology to produce unequal outcomes.[11] Space was thus a social tool wielded pursuant to the state's racist objectives. As an instrument of social control South African space served its purpose and continues to differentiate its user's experiences in ways that have yet to be fully explored.

Viewing space as a political and ideological social construct is a key premise in understanding processes of segregation, ghettoization and gentrification. This insight reveals that while space is often understood as apolitical, space is more likely a reflection of social relations which are normalized and given a physical form through the allocation of space. Viewed through this lens,

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[9] H. Lefebvre, "Reflections on the Politics of Space" (1976) 8 *Antipode* 31.
[10] Lefebvre La Production de l'espace (1974) (trans D Nicholas-Smith) The Production of Space (1991) 38., 81.
[11] C Galster 'Polarisation, Place & Race' (1993) 71 North Carolina LR 1422, 1440.

phenomenona such as mass evictions, the rise and fall of property values and the displacement of racial and ethnic groups, are not isolated events but part of a socially driven narrative which Lefebvre termed the production of space. Adopting Lefebvre's view of space as a social product is a fruitful way to begin to unravel the complexities of social life locating it in its proper spatial context. The consequences are nothing short of radical. Previously dead matter is brought to life and shown to be the subject of sustained conflict. In this site of contestation, law and legal processes play a dominant role which warrants concerted interrogation. Indeed, discriminatory laws have been central to the production of South African space from the colonial encounter, to the zenith of apartheid and in the contemporary democratic era. Contemporary struggles for space are waged through the medium of property rights, housing rights, eviction laws, zoning and spatial planning laws, trespass laws, the law of nuisance, administrative laws, and environmental protection laws to name a few.

Viewing space as a social product calls us to resist relying on legal categories and instead assess the totality of what constitutes spatial politics. For instance, while land, housing and environmental rights are often viewed as distinct issues, in the South African context they are regulated by separate pieces of legislation and policies documents. This belies the fact that natural, manufactured and social space are intertwined. I thus consider the different zones urban, rural, public and private under the banner of space which captures the range considerations relevant to each without viewing them as necessarily disparate. I adopt this approach, as the spatial politics of the rural and urban are inextricably linked in the South African context such that we cannot properly understand one without understanding the other. Accordingly, contemporary South African public discourse which is increasingly dominated by contestations over land cannot be separated from questions of environmental justice, housing and access to resources in cities.

B Mapping the law

The influence of Lefebvre on legal geography has been to encourage scholars to consider law and geography as co-constitutive. Viewing space as a social product illustrates the manner in which space, law and society are related. This shows that 'law and space actively shape and constitute society, while being themselves continually socially produced'.[12] This co-constitutive view of law, society and space has been the growth of critical legal geography. Once recognized this interaction

[12] S Blandy and D Sibley, 'Law, boundaries and the production of space' *Social & Legal Studies* 19 (3). (2010). 278.

challenged legal geographers to think different about both law and space. As Blomley asserts, 'by reading the legal in terms of the spatial and the spatial in terms of the legal, our understanding of both "space" and "law" may be changed'.[13]

Once we view space as living we can engage in a method of legal analysis drawn from critical legal geography. This school of thought is related to critical legal projects which view law as a discourse of power. In line with this approach our analysis is not 'confined to a doctrinal analysis of legal reasoning set out in the text of the cases' law report or judgment'.[14] Instead, the analysis goes beyond the text and seeks to locate the law in its social context – mapping the law onto its place in everyday life. This means expanding the notion of what is relevant in legal analysis to include questions about the spatial location of litigants, the milieu they occupy and the other markers: political, economic and social which constitute their identities and determine their social positioning. This wider view seeks to capture a broader range of situational influences operative in the resolution of legal disputes. This approach resonates with the 'call to context' issued by John Calmore, who argues that: 'traditional legal analysis and advocacy are too often plagued by the tendency to extrapolate issues from their history and the broader social and normative contexts that bear so heavily on them'.[15] This view recognizes that legal disputes are rarely 'just legal problems' but ought to understood in their context in which race, class and space intersect to produce outcomes which cannot be reduced to either of these axes of inequality acting independently.

At the core of the critical legal geographic approach is an attempt to denaturalize and problematize the operation of legal arrangements which have gained the appearance of irrefutable truth. This reveals that seemingly even neutral legal moves are underpinned by *particular* spatial imaginaries: articulated and unspoken spatial visions motivating actions of interpretation and delimitation. This requires that we view law as nested within a range of relationships in which the role of law is but one strand in a complex web of experiences. Thus, legal geographers engage with different 'ways of knowing the world' in order to capture the range of experiences which arise at the interface of law and society.[16] This approach resists the reification of law and reveals that beneath law's magisterial appearance lie numerous sites of contestation. These contestations are often shrouded in silence as

[13] N Blomley, D Delaney and RT Ford (2001). *The Legal Geographies Reader: Law, Power, And Space*. (2001) xvii.
[14] L bennet and A Layard 'Legal Geography: Becoming Spatial Detectives': Geography Compass 9:7 (2015) 421.
[15] JO. Calmore, A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty, 67. *Fordham LR* 1927 (1999). 1927
[16] L bennet and A Layard 'Legal Geography: Becoming Spatial Detectives': Geography Compass 9:7 (2015): 412

positive legal texts become the dominant expressions of socio-legal reality.[17] In order to escape this shortcoming, legal geography is concerned not only with what is contained in legal texts which addresses space but the numerous instances when consideration of space is absent from legal discourse.[18] Thus rather than beginning with the word, critical legal geography calls us to *locate* the law.

This way of thinking about law can be traced to the 'spatial turn' in the social sciences which inspired legal scholars and social geographers to examine the relationship between law and space more critically. Early scholarship in critical legal geography observed that while law was everywhere, law's operation was not cognizant of *where* it operated. This lacuna is explored by several scholars. For example, Blomley and Bakan argue that:

> "the legal mentality is curiously acontextual, such that legal relations and obligations are frequently thought of by the courts and other legal agencies as existing in a purely conceptual space, with little recognition of their spatial heterogeneity or the local material contexts within which law is understood and contested".[19]

Similarly, in the context of political boundaries Richard Ford has argued:

> "There is no self-conscious legal conception of political space. Most legal and political theory focuses almost exclusively on the relationship between individuals and the state. Judges, policymakers, and scholars analogize decentralized governments and associations either to individuals when considered vis-a-vis centralized government, or to the state, when considered vis-a-vis their members, but consider the development, population and demarcation of space to be irrelevant. *Space is implicitly understood to be the inert context in which, or the deadened material over which, legal disputes take place"*.[20]

[17] C Smart Feminism and the Power of Law (1989) 11
[18] L bennet and A Layard 'Legal Geography: Becoming Spatial Detectives': Geography Compass 9:7 (2015): 413
[19] NK Blomley and JC Bakan, pacing Out: Towards a Critical Geography of Law 30 Osgoode Hall Law Journal (1992), 661-690.
[20] RT Ford 'The Boundaries of Race: Political Geography in Legal Analysis' (1994) 107(8) Harvard LR 1857 (emphasis added).

Following this line of critique Bartel et al argue: 'that law does not transcend place, but is still dependent on it, is not a truth generally acknowledge by law's servants and scholars'.[21] Given the obvious importance of space in human relations, this non-recognition warrants further inquiry.

Legal geographers have observed that while legal disputes are located in specific spatial contexts, the resolution of these disputes rarely consider this. For example, property laws operate at a highly conceptual level completely ignoring the spaces in which they are invoked. A review of the law on housing and spatial use reveals a similarly abstract approach to spatial relations which is inconsiderate of the users' context. Instead, these laws are couched in neutral language, presumably to enhance the law's semblance of impartiality. This conceals the fact that these laws are shaped by particular interests and must be deployed in particular places. The dominant legal method relies on abstract articulations which are presented as neutral and natural. Thus, ownership is ownership – it comprises a bundle of rights; the right to alienate, encumber, destroy and others. Occasionally, this may involve some duties such as those owed to other owners. Precluded from consideration by abstract concepts such as ownership and possession are material considerations about where, in what context spatially, social and politically these concepts are invoked. Thus, how ownership came to be held – through conquest, discriminatory law, or unequal enjoyment of economic systems – is rarely an issue for legal consideration. Instead, these legal concepts crystalize particular spatial imaginaries and prevent contestation by alternate views. The non-recognition of geography has serious implications for both law and space. By casting space as inert context, the law obscures the processes behind the production of space. The absence of a legal register for space means spatial politics do not form part of the law's system of knowledge in the ordinary course. Instead, many spatial concerns, such as urban land use and desegregation, form competing discourses of disqualified knowledge; marginalised from legal discourse per se but regulated through site specific rules such as hawking, housing and property laws.

Given the powerful impact of spatial engineering in South Africa's racist history this shortcoming is concerning. The absence of a method for considering space in traditional legal analysis serves as catalyst for critical legal geography's inquiry into the operation of law.

C The indivisibility of space and law

[21] R Bartel, N graham, S Jackson *Legal Geography: an Australian perspective* (2013) 349.

I have discussed space, law and society as distinct in order to illustrate the dominant divisions of labour which shape our thinking on these issues. This is, of course, not how life takes place. The work of critical legal geography is to weave together the seemingly separate discourses to make sense of their interconnectedness. I follow Blomley who argues: 'law and geography do not name discrete factors that shape some third pre-legal, aspatial entity called society. Rather the legal and the spatial are, in significant ways, aspects of each other'.[22] He points to the powerful role of both law and space in creating social ordering frames at their intersections. These splices identify 'instances or moments where legally informed decisions and actions *take place* [in the sense of both of the occurrence of a legal performative (an event) *and* of being spatially located and embodied]. They are locally enacted encodings, which weave together spatial and legal meanings'.[23]

Splices operate as frames which become naturalized and considered expressions of some common-sense idea. Blomley illustrates the interconnectedness of slices arguing that while some orderings are apparently based on the discourse of law such as 'citizen' and 'these are simultaneously bound to spatial frames in ways that are mutually dependent. These 'splices' reflect the convergence of legal and spatial orderings which have been naturalized such that they lose their links to the discourse of law and space and appear instead as inert and pre-existing. For instance, 'a legal category such as 'citizen' is meaningless without the spatial category 'territory'[24] similarly, the term 'refugee' is considered as a legal categorization but at its core it reflects a spatial dislocation. However, the tendency to dislocate these frames has resulted in them being understood as neutral legal categories. This has important consequences as Blomley argues:

> "A splice can appear simply part of the order of things, and thus non-negotiable. In so doing, splices can have a number of effects. Put bluntly, they to construct the world in ways that systemically favour the powerful: employers, men, whites, property owners".[25]

Thus, these splices encourage particular ways of thinking which legitimate spatial distinctions in governance and regulation. By marking a space as distinct, it can then be afforded different treatment not permitted in a neighbouring distinct area. Thus, people at the literal and figurative margins of society endure violence which has been naturalized and expected. Take for example a

[22]N Blomley from "what?": to "so what?": Legal Geography in Retrospect in J Holder and C Harrison eds (2003) *Law and Geography* 29.
[23] L bennet and A Layard 'Legal Geography: Becoming Spatial Detectives': Geography Compass 9:7 (2015): 410
[24] N Blomley from "what?": to "so what?": Legal Geography in Retrospect in J Holder and C Harrison eds (2003) *Law and Geography* 30.
[25] Ibid 30.

commonplace splice in South Africa; the unlawful occupier. This category simultaneously refers to a legal status and a spatial displacement which combined to produce results not attributable to either. Being in unlawful occupation entails limited legal rights within a space which is not one's own. This creates a spatio-legal precariousness which once naturalized legitimates the ethical distinctions made against unlawful occupiers and provides 'justification' for their (mis)treatment. If we overlay the social, political and economic effects of race in the context of South Africa's racialised space this splice begins to resemble those worst of under apartheid. In fact, the jurisprudence reveals these continuities as those racialised transgressors of spatial laws who occupied spaces after the collapse of influx control become 'unlawful occupiers' in the post-apartheid era.[26] Once characterised as such the socio-spatial dimensions of this phenomenon are replaced by a legal category. By weaving together the various social legal and spatial complexities we arrive at an understanding which is concerned with far more than rights a person enjoys in property but a picture of reality which escapes conventional legal theory.

III THE CONSTITUTIONAL COURT AND SPACE

While there are a range of registers and discourses available in the resolution of social and spatial contestation in the polis, it is the discourse of law which occupies a dominant role. This is the case in South Africa's constitutional democracy which affirms the constitution as the supreme law.[27] Accordingly, the interpretations given to rights by the judiciary occupy a key place in the politics of space. South Africa's democracy is premised on the supremacy of the Constitution and the Courts are vested with the power to make authoritative interpretations of the not only general provisions but the meaning of fundamental rights. This means that while the content of legal rights and duties may be debated in public discourse, parliamentary and academic circles, authoritative interpretations are reserved for the superior courts, and the Constitutional Court plays a decisive role. In this environment which privileges positive law, I adopt the view of law as a social construct in order to highlight the fact that things could be different and that there are no preordained legal norms which are beyond critique. In this view, law is a contested system of knowledge which is a site of power struggles. Legal geography is not merely a theoretical issue but one which has practical outcomes. To illustrate the shortcomings of this approach I will consider some key decisions of the Constitutional Court in the context of South Africa's spatial relations. These decisions involve the interpretation of

[26] See City of Johannesburg v Rand Properties (Pty) Ltd and others 2007 (6) SA 417 (SCA) where the occupiers were there since 1986 in some cases.
[27] The Constitution of the Republic of South Africa (1996) section, 1(c).

socio-economic and have attracted much attention,[28] however, I want to view them through the lens of critical legal geography and recast them as being part of the production of space by shaping law and policy and creating dominant representations of space.

Splicing is a useful tool to weave together the composite experiences which occur at the intersection law, society and space. Viewing legal cases through this lens reveals insights not ordinarily apparent in convention legal theory. Adopting this methodology I propose another way of seeing one of the Constitutional Court's space related judgments. In Mazibuko v City of Johannesburg, the Constitutional Court was confronted with the country's historically produced legacy of racial segregation and the associated underdevelopment of black spaces. By all accounts this is case is concerned with the right to water, however, adopting a critical legal geographic approach we can locate this judgment in its socio-spatial context revealing the geographic assumptions which underpin it.

Here several residents from Phiri, a black township in Soweto brought a claim challenging the city of Johannesburg's Free Basic Water policy on the basis that it failed to meet the constitutional guarantee of a right to have access to sufficient water. The challenge was premised on the argument that the impugned policy failed to provide the applicants with sufficient water in the context given the particular needs of the affected community. In particular, the applicants pointed to the reality of overcrowding and multifamily residence in spaces originally designated for single family use, a direct result of apartheid's discriminatory spatial project. The applicants further alleged that the limits placed on their water usage were racially discriminatory in comparison to white neighbourhoods where the meters were not installed. Here we see the contemporary effects of not only racial capitalism which condemns many people such as the applicants to structural unemployment but apartheid spatial planning.

In resolving the dispute, the court invoked a particularly decontextualized reasonableness analysis finding that the policy fell within the bounds of reasonableness and as such was compliant with the right to sufficient water.[29] Of interest in this work is the manner in which the Constitutional Court views space. The court adopts a historical framing strategy in viewing space, exploring the influence

[28] Malcolm Langford et al *Socio-Economic Rights in South Africa: Symbols or Substance?* (2013); Christopher Mbazira *Litigating Socio-Economic Rights in South Africa: A choice between corrective and distributive justice* (2009).
[29] Murray Wesson *Reasonableness in Retreat? The Judgment of The South African Constitutional Court in Mazibuko v City of Johannesburg* 11(2) Human Rights Law Review 390, 405 (2011).

of apartheid on the applicants' claims in the briefest of terms early on in the judgment. The court frames the spatial context thus:

> Apartheid urban planning did not permit black people to live in the same urban areas as white people. Soweto was developed in accordance with this appalling racist policy. It is home to approximately a million people. Phiri, where the applicants live, is one of the oldest areas in Soweto. Most of the houses in Phiri are brick yet generally the people who live in Phiri are poor.[30]

Here the court is prepared to acknowledge the racially discriminatory nature behind the production of Soweto and Phiri in particular. This framing is couched in historical terms, adopting a temporal lens rather than a spatial one the Court paints apartheid geography as a thing of the past. This obscures the social production of space which is shaped by even repealed discriminatory laws such that although formal apartheid has ended, the deleterious effects of racialized spaces are reproduced in contemporary spatial relations. Also evident in this paragraph is the court's preference for a class-based frame. Interestingly, in this case where racial discrimination was raised as a substantive ground for consideration, race or more precisely being a black inhabitant of racialized space is not given much consideration by the court, instead the court prefers to frame the applicants as the 'poor', 'vulnerable' or 'desperate'.[31]

In this case, the court was compelled to give further consideration to apartheid's racist policy as it had to address the issue of unfair discrimination on the grounds of race as it was explicitly raised by the applicants. The adverse effects of the historical framing of spatial disadvantage are evident. The Court held that there was no racial discrimination on the part of the municipality by choosing to impose pre-paid water meters on black residents of Soweto only and not imposing similar measures on the city's more white suburbs or other 'areas with poor black residents'. The court thus dismiss the claim of discrimination because 'it is not clear that the applicants have established that the policy impacted more adversely on black and poor customers given that other deemed consumption areas where poor black customers reside were not targeted.' The inquiry into discrimination also reveals other aspects of court's framing of the applicants:

[30] *Mazibuko And Others v City Of Johannesburg* 2010 (4) SA 1 (CC) para 10

[31] The judgement contains at least 35 instances in which the Phiri community is referred to as 'poor'; while other references to the community in question or others similarly situated speaks of them being the 'desperate'; 'vulnerable'; or those most in need.

> To determine whether the discrimination was unfair it is necessary to look at the group affected, the purpose of the law and the interests affected. *In this case, the group affected are people living in Soweto who have been the target of severe unfair discrimination in the past'*.[32]

By locating apartheid discrimination as a historical aberration confined to a particular point in time the court is able to characterize the applicants as the targets of *past* unfair discrimination. This interpretation effectively confines apartheid geography's racial effects to the historical archive ignoring contemporary manifestations of apartheid's racial logic. Importantly, this creates a 'legal truth' in which race-based spatial disadvantage has ceased to exist through the elimination of discriminatory law's. What this view obscures is the production of space is not solely driven by law and is being reproduced despite neutral laws. Adopting this views casts space as neutral while effectively allowing spatial inequities to persist.

While the court adopts a frame of the applicants as poor occupants of a historically disadvantaged space weaving in insight from legal geography has the potential to enhance the accuracy of the applicant's characterization. Overlaying a social view of space as a social axis of discrimination we can understand the applicants as subjects not only of class based disadvantage but racial and spatial disadvantage.

The judicial interpretation of the right to adequate housing contained in section 26 of Constitution came into to sharp focus in the landmark *Grootboom* judgment.[33] This case concerned a claim for access to adequate housing by Mrs Grootboom and other residents of Wallacedene, an informal squatter settlement on the outskirts of the Cape Metropolitan area. The settlement was, in the main, comprised of households with little or no income; resident upon a site with no access to running water and sanitation. Following their eviction from the privately-owned land on which they had taken refuge, the residents were rendered homeless and subsequently applied to the court for access to basic shelter or housing.[34] After the High Court granted an order for access to housing based on the rights of the child, the state lodged an appeal. In the Constitutional Court, the case turned on the appropriate approach to the provision of access to adequate housing.

The court in *Grootboom* painted a disapproving picture of colonial and apartheid law and policy which served to produced situations such as faced by Mrs Grootboom and her community. The

[32] *Mazibuko And Others v City of Johannesburg* 2010 (4) SA 1 (CC) para 150. (Emphasis Added).
[33] *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46. (CC)
[34] *Ibid.* Para 4.

court was unequivocal in asserting the public origins of the applicants' plight arguing that: 'the cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas'.[35] Here the court was seemingly prepared to engage directly with the country's history of racialized spatial inequality and segregation. The judgment's reference to apartheid and the racialized nature of property relations in the country gestures towards a historical and contextual reading of the facts. However, in the judgments the setting out of apartheid's spatial logic is as a historical context and is done in the briefest of terms taking up a single paragraph.[36] In that brief paragraph the racialized nature of the apartheid influx controls and the resultant racialized housing policy are shown to have largely impacted upon the Western Cape's African and Coloured populations.

Outside of this brief contextualizing paragraph, there is simply no further direct mention of the impact or role of apartheid geography in shaping the applicants' circumstances. This judgment deploys reference to apartheid space as a historical marker which serves little purpose in the final analysis instead it is mere context for a decision which is premised on the reasonableness of the state's response to its socio-economic obligations. With apartheid spatial relations established as a background context, the court moves to locate poverty alleviation as the central issue to be addressed. While the court clearly takes notice of race and space these two strands are not woven into the legal analysis. Instead the discourse of space is cast as a background relevant in the past but not the present. This historicises space and encourages us to consider law separately from space. This sets apartheid geography in stone as natural ignoring that it is being reproduced by these contemporary spatial arrangements and discourses which fail to respond .

The question of addressing the country's legacy of segregation and spatially expressed racism came to the fore again in the *Port Elizabeth Municipality* judgment wherein the court was called to elucidate the application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). This case concerned the eviction of 68 people who were unlawful occupation of vacant land within the jurisdiction of Port Elizabeth municipality.[37] In response to a petition signed by 1600 people, including the owners of the settled land, the Port Elizabeth municipality sought an order evicting the unlawful occupiers. The court was called on to decide whether the previous courts were justified in their finding that the occupiers could be evicted. The Constitutional Court reversed

[35] *Ibid.* Para 6.
[36] *Ibid.* Para 6.
[37] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

the orders of the courts a quo and found that in the circumstances, the granting of an eviction order would not be just and equitable. This important judgment gave substance to the provisions of the PIE Act and informed the approach that courts would adopt in numerous subsequent decisions.

The PIE Act requires a highly contextualized and specific analysis of the interests of the not only the landowner but those who face eviction. The court underscored this approach by contrasting it with the PIE Act's apartheid era predecessor; the Prevention of Illegal Squatting Act 52 of 1951 (PISA) which as the name suggests, sought to restrict the rights of non-owners in relation to land. In contrast to the brutal operation of PISA the PIE Act contemplates a system where the unlawful squatters enjoy a measure of security of tenure despite lacking ownership.[38] Accordingly the court argues: 'the former depersonalized processes that took no account of the life circumstances of those being expelled were replaced by humanized procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualized treatment with special consideration for the most vulnerable'.[39]

The court's historical and contextual interpretation of the provisions of the PIE marked a move towards reading the totality of facts, including the tracing current problems, such as homelessness, to their origins in historic spatial laws and policies. The court defined factors for consideration in the assessment of justice and equity as required by the PIE Act. These include the circumstances of the occupation of the land, the period the unlawful occupier and his or her family have been on the land, the availability of suitable alternative accommodation or land and the approach to be taken in '*considering all the relevant circumstances*, including the rights and needs of the elderly, children, disabled persons and households headed by women'.[40]

While the court recognizes that the legislative framework mandates the consideration of *all* relevant factors, arguing that: 'It is clear both from the open-ended way in which they are framed and from the width of decision-making involved in the concept of what is just and equitable, that the court has a very wide mandate and must give due consideration to all circumstances that might be relevant'. Thus, the court argues 'the particular vulnerability of occupiers referred to in section 4 (the

[38] S Wilson, *Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality*' 126(2) *SALJ*. 271, 280 (2009).
[39] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) S. A. 217 (CC), 13.
[40] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of (1998) (emphasis added).

elderly, children, disabled persons and households headed by women) could constitute a relevant circumstance under section 6'.[41]

In the court's enumeration of relevant considerations race and space are conspicuously absent from the list and the necessary implication is that race and space are not legally relevant considerations under the Act save as an introduction to its legislative history. This effectively downplays the salience of race in the ordering of South African spatial relations. Indeed, the judgment's engagement with racialized space is limited to the contextualizing paragraphs where the court is unequivocal in condemning the racialized history of spatial apartheid in urban areas. Once this historical context has been established the court reverts to the now familiar class-based analysis which emphasizes the unlawful occupier's poverty, need and vulnerability. Thus in the final analysis the court reaches its conclusion based on: 'the lengthy period during which the occupiers have lived on the land in question, the fact that there is no evidence that either the Municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need'.[42] Absent from this remedy is any meaningful race-consciousness or an appreciation of the power of geography in creating the defendants' conditions. This produces a decision which is laudable for halting the occupiers' violent eviction but fails to engage directly with the post-apartheid justice project. Thus, while the court moved to explicitly recognize the importance of race in shaping the problem, at least the historically, it failed incorporate a meaningful form of race consciousness into its resolution. Instead, the court prefers to emphasize the importance of considering the unlawful occupiers' (dis)ability, gender and class positioning. This trend encourages applicants to plead cases with reference to their poverty in terms that are divorced from race or space.

Recently the constitutional court was called on to consider another aspect of apartheid geography's contemporary manifestations. In *Daniels v Scribante* the legal question before the court was whether an occupier in terms of the Extension of Security of Tenure Act 62 of 1997 was entitled to effect improvements to their dwelling without the owner's consent. This case reached the court on appeal after both the Land Claims Court and The Supreme Court of Appeal had denied the existence of

[41] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) S. A. 217 (CC) 30.
[42] Ibid. para 59.

such right, in fact no such right exists in the text of the Act. The Court drew on the right to dignity and found that dignity was linked to security of tenure such that making basic improvements to a home in order to bring it to a standard befitting of a dignified life. In interpreting the relevant provisions the court departs from the black letter law and adopts a historical interpretation. The court delves into the production of space showing that the rural context in which this case occurs has been shaped by apartheid geography.[43] This case marks a departure from the approach to space evident in the judgments discussed above. In this case the manifestations of apartheid geography are explicitly named. The Court outlines the racial and spatial policies which produced the applicant's predicament. Importantly, this allows the court to read the entire socio-spatial context and not merely the legal text as the prior courts had done. This moves the analysis away from black letter law to considering the racial and spatial power dynamics which underpin the case's spatial context. This enriched view of law, space and society (including the race and gender based discrimination) allows the court to reach a conclusion which would be unsupported by a mere reading of law.

I have selected and briefly sketched these judgments due to their importance in the cannon of post-apartheid spatial jurisprudence. What I seek to highlight in these judgments is that while mentioning space in the South African context is almost unavoidable, the recognition of space has yet to form part of the resolution of the majority cases. Evident in the judicial approach to race in these cases is a tendency which at least takes notice of the claimants' race and space in deciding the case. However, this is often amounts to 'noticing but not considering', the full extent of the subjects' subordination. This approach subtly downplays part of the subjects' plight by not examining the social realities in which it is located. 'This technical approach permits court to describe, to accommodate, and then to ignore issues of subordination. This deflection from the substantive to the methodological is significant. Because the technique appears purely procedural, its normative, substantive impact is hidden'.[44] Evident in the judgments discussed above is some reference to race and space, this is inevitable in the socio-political South African context. However, the treatment of racialized space in the cases above falls short of an engagement designed to remediate the effects of racial classification, segregation and domination. Thus, while some categories such as disability and gender are rightly recognize as imposing particular burdens on the legal subject, space has yet to be recognized as meaningful in judicial analysis. In my view the law's nonrecognition of the historical and contemporary manifestations of spatial inequality produces harm while courts are seemingly

[43] *Daniels v Scribante* 2017 (4) SA 341 (CC) paras 13 - 58.
[44] *Id.* 17.

trying to right wrongs. For example, by casting legal subjects merely as 'unlawful occupiers' legal analysis fails to recognize the spatial as a key determinant of the subjects' history, social origin and identity. By failing to capture the importance of space in legal terms, spatial justice projects limit their potential. A more context driven analysis to law and space is required to adequately capture the harm faced by the subjects of racialized space. Ultimately, this is a critique of a theoretical tradition, long dominant in the social sciences, of treating context as a container in which – but not because of which – important things happen'.[45]

IV CONCLUSION

This paper has sought to introduce critical spatial theory into legal discourse. The aim is to move legal discourse towards a critical legal theory of space which is grounded in the subjects' actual socio-legal experiences. This moves the discourse towards a thicker mode of legal analysis, which comes closer to reflecting everyday life. This, I argue will allow for better remedies and produce beneficial results for law and policy on space.

[45] R Enos *The Space Between Us: Social Geography and Politics* (2017), 78.