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LAW, SPATIAL PLANNING & THE MAKING OF SOUTH AFRICAN CITIES

Dissertation Submitted by

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in fulfilment of the requirements for a degree

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SUPERVISOR: PROFESSOR MARIUS PIETERSE

DECLARATION

I declare that this dissertation is my own, unaided work. I further declare that this dissertation has never before been submitted for any degree or examination in any university.

Eric Nyembezi Makoni



8 January 2020

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For a Decolonial Lawscape & Love.

ABSTRACT

This dissertation examines the relation between law and spatial planning in the making of contemporary South African cities. Using Johannesburg as unit of analysis, the dissertation demonstrates how, throughout history, law and spatial planning have been appropriated to realise specific political and ideological intentions. It is shown that, from the founding of contemporary South African cities, various legal and planning instruments were at times deployed in the service of creating racially fragmented and unjust cities. This hegemonic colonial project of legalised, racial spatial planning was further crystalised during the apartheid era from 1948 right through to the late 1970s.

Interestingly, the post-apartheid state has similarly turned to the twin-pillars of law and spatial planning as part of its political project of reconstituting the urban political while also striving for the realisation of spatial justice. Given the complicity of law and planning in the making of unjust colonial/apartheid cities, this dissertation asks whether, and to what extent the law and planning have managed to assume new democratic roles of creating 'post-colonial' South African cities defined by spatial justice and socio-economic inclusivity, especially against a political background characterised by the intensification of global capitalism, and its related neoliberal packages.

Drawing on literature pertaining to law's spatial turn as well as decolonial theory, the dissertation employs the notion of *lawscape* to philosophically anchor the investigation. The focus is therefore both on how the law (including, in the post-apartheid lawscape, rights-based litigation) influences the production of social space, and how everyday socio-spatial, political and ideological forces simultaneously shape the form and application of law.

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PART I: INTRODUCTION & CONCEPTUALISATION

CHAPTER 1: THE ANATOMY OF LAWSCAPE

> 'Law' draws lines, constructs insides and outsides, assigns legal meanings to lines, and attaches legal consequences to crossing them. […] Law as 'rules and rights' underpins spatial tactics such as confinement, exclusion, expulsion, and coerced mobility. Law carves life-worlds into innumerable boxes and assembles and reassembles them in ways that structure experiences from the most mundane to the most extra-ordinary. As it does so, it channels power throughout relational worlds, human as well as other-than-human.[1]

***

1.1 INTRODUCTION: MAPPING THE PROBLEM

This dissertation seeks to examine how law and spatial planning shape cities and societies' socio-economic and spatial order. It is presented in this study that law manifests itself spatially, resulting in the creation of specific space(s) and/or geographies. As law is spatialised – and mediated by and/or through power; everyday social relations between people, objects, and ideas, all render law both its dynamic nature, as well as its societal relevance. Law and city (as well as law and space) therefore, is mutually constitutive, and entangled – together forming the lawscape.[2]

The lawscape is 'the fusion between the law and the space of a city, the geographical physicality of the urban in its material ontology on the one hand, and

[1] David Delaney 'Legal Geography I: Constitutivities, Complexities, and Contingencies'. (2015) 39 1 *Progress in Human Geography* at 99.

[2] Andreas Philippopoulos-Mihalopoulos *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge (2015); Andreas Philippopoulos-Mihalopoulos 'Spatial Justice: Law and the Geography of Withdrawal' (2010) 6 3 *International Journal of Law in Context* 201-216; Andreas Philippopoulos-Mihalopoulos 'Critical Autopoiesis and the Materiality of Law' (2014) 27 2 *International Journal for the Semiotics of Law* 389-418; Andreas Philippopoulos-Mihalopoulos 'Withdrawing from Atmosphere: An Ontology of Air Partitioning and Affective Engineering' (2016) 34 1 *Environment and Planning D: Society and Space* 150-167.

the operations of the law within such materiality on the other'.[3] In other words, the *law in the city* (i.e. lawscape) becomes inescapable, as it governs and regulates all human activities. Humans and their activities become saturated and subsumed by and/or in the lawscape in a profound way:

> You have entered the lawscape. Or rather, you never quite left it. Even as you took the lift to this floor, or earlier as you walked down the street, or even earlier as you came out of the underground: it is all lawscape. *An infinite plane where the city is interlaced with the law.* In the lawscape, every surface, smell, colour, taste is regulated by some form of law, be this intellectual property, planning law, environmental law, health and safety regulations, and so on. Law regulates traffic, allows you to cross the road or not, allows you to drive your car, to go to the cinema, to enter the zoo, to stay at your own home. It allows you to switch on your TV, to access the internet or read a newspaper.[4]

This dissertation therefore focuses on the making of the colonial/apartheid, and post-apartheid lawscape. Put differently, it seeks to examine the spatial, and socio-economic effects of law and spatial planning in the making of South African cities in general – and Johannesburg in particular. Also of interest in this research, is how the disciplines and practices of law and planning have been used by the state to establish and foster specific political visions, ideals as well as ideologies such as colonialism, apartheid, and democracy, for instance.

As contemporary South African cities emerged in the late 17th century during the colonial era, law and planning played an integral role in shaping everyday social relations between different races, ethnic groups, and nationalities.[5] In fact, for centuries, the South African lawscape has fundamentally been shaped

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[3] Andreas Philippopoulos-Mihalopoulos 'Spatial Justice in the Lawscape' in Andrea Brighenti, (ed.) *Urban Interstices: The Aesthetics and Politics of the In-Between* (2013) at 87.

[4] Andreas Philippopoulos-Mihalopoulos 'Atmospheres of Law: Senses, Affects, Lawscapes' (2013) 7 *Emotion, Space and Society* at 35 (emphasis added).

[5] Justice M. Ocran, 'The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa' (2015 39(2)) *Akron Law Review* 465-481.

by identity politics.[6] Racial difference in particular has been employed as one of the key socio-spatial, economic, and political organising principle in cities. From the colonial encounter onwards, the intersection between law, spatial planning, and race determined South African cities' socio-spatial milieu.

With the arrival of the Dutch in 1652 in modern-day Cape Town for instance, a foundation was set for racial segregation, as the Dutch East India Company emphasised racial hierarchisation between white 'settlers', and black 'natives'.[7] This practice of racial segregation was reinforced through legislation and planning from the 19th century onwards. In the mining towns of Kimberly and Johannesburg for instance, the colonial state experimented with the legislation of racial segregation. While the enforcement of racial segregation was relatively 'loose' between the 17th and 19th century, this was to change in the 20th century – with the colonial/apartheid state entrenching its segregationist ideology through law and planning.[8]

Racial zoning played an integral role in the creation of South African cities. In many ways, racial zoning allowed for the practice of racial capitalism.[9] As racial capitalism took root in South Africa, racial hierarchisation created racially fractured cities – i.e. the 'zone of being' where the setters lived, and the 'zone of 'nonbeing' where the natives resided. As Fanon posits:

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[6] Ivor Chipkin *Do South Africans Exist? Nationalism, Democracy and the Identity of 'the People'* (2007); Craig Calhoun (ed.) *Social Theory and the Politics of Identity* (1994); John Comaroff, and Jean Comaroff *Ethnicity, Inc.* (2009); Mahmood Mamdani 'When Does a Settler Become a Native? Citizenship and Identity in a Settler Society' (2001) 10 (1) *Pretext: Literacy and Cultural Studies* 63–73; George H. Calpin *There are No South Africans* (1941); Grosfoguel, Ramon 'The Epistemic Decolonial Turn: Beyond Political-Economy Paradigms' (2007) 21(2-3) *Cultural Studies* 211-223.

[7] These terms formed part of the colonial lexicon and defined the everyday politics of the time. See James Blaut *The Colonizer's Model of the World: Geographical and Eurocentric History* (1993).

[8] *Leonard* Thompson *A History of South Africa: From the Earliest Known Human Inhabitation to the Present 4th ed.* (2014).

[9] Saul Dubow *Racial Segregation and the Origins of Apartheid in South Africa, 1919-36* (1989); Johan van der Walt, *Law and Sacrifice: Towards A Post-Apartheid Theory of Law* (2005); Nelson Maldonado-Torres 'On the Coloniality of Being: Contributions to the Development of a Concept' (2007) 21 (2/3) *Cultural Studies* 240-270.

> The zone where the natives live is not complementary to the zone inhabited by the settlers. The two zones are opposed, but not in the service of a higher order. Obedient to the rules of pure Aristotelian logic, they both follow the principle of reciprocal exclusivity. No reconciliation is possible, for of the two terms, one is superfluous. The settler's town is a strongly-built town, all made of stone and steel. It is a brightly-lit town; the streets are covered with asphalt, and the garbage-cans swallow all the leavings, unseen, unknown and hardly thought about. The settler's feet are never visible, except perhaps in the sea; but there you're never too close enough to see them. His feet are protected by strong shoes although the streets of his town are clean and even, with no holes or stones. The settler's town is a well-fed town, an easy-going town; its belly is always full of good things. The settler's town is a town of white people, of foreigners. The town belonging to the colonised people, or at least the native town, the Negro village, the medina, the reservation, is a place of ill fame, peopled by men of evil repute. They are born there, it matters little where or how; they die there. It matters not where, nor how. It is a world without spaciousness; men live on top of each other, and their huts are built on top of each other. The native town is a hungry town, starved of bread, of meat, of shoes, of coal, of light. The native town is a crouching village, a town on its knees, a town wallowing in the mire. It is a town of niggers and dirty Arabs.[10]

As will be shown throughout this dissertation, this distinction between the 'settler town', and the 'native town' was established and maintained throughout the South African history through the enforcement of segregationist laws. For centuries, South Africa urban history was shaped by 'abyssal thinking', with the 'colour line' informing the creation of racially segregated cities.[11] Put differently, the constitution of South African cities was predicated on 'radical difference', i.e. a racist ideology that people of different colour cannot inhabit the same space as equals.

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[10] Frantz Fanon *The Wretched of the Earth,* (translated by Farrington, C.) (Grove Press, New York; 1963) at 81.

[11] Boaventura de Sousa Santos (2007) 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) XXX-1 *Review* 1-66; William E. B. Du Bois *The Souls of Black Folk* (1994 [1903]).

While the extent and consequences of legal and planning instruments in the history of the making of South African cities are apparent;[12] the fact that both these instruments are now employed by the post-apartheid state in the reconstruction of cities remains curious.[13] In fact, a question emerges as to the extent to which the disciplines of law and spatial planning have 'redeemed' themselves, given their involvement in the realisation of colonial and apartheid ideologies of racial zoning and governance.[14]

1.1.1 Research Objectives, Research Question & Methodology

The primary research objectives are twofold: a) to trace the genesis and evolution of cities in South Africa from the colonial times to the present with a focus on the role played by the law and spatial planning and; b) to examine the extent of law and planning's transformational force, particularly in relation to the promotion of spatial justice, and socio-economic rights. As legal and planning instruments were used in the regulation, and spatialisation of racial difference during the colonial and apartheid eras, this research aims to explore their potential in forging new cities, and society in post-apartheid South Africa.

Given the above backdrop, the primary research question is thus framed as follows:

> *If law and spatial planning practices were complicit in the production of racialised and fragmented spaces during the colonial and apartheid era, to what extent (if at all) have these two disciplines/practices contributed to the reconstruction and/or transformation of post-apartheid cities?*

With regard to the methodology, the dissertation takes a longitudinal approach focusing on Johannesburg as a unit of analysis from its founding in the late 19th

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[12] Paul Maylam 'Explaining the Apartheid City: 20 Years of South African Urban Historiography' 1995 21 1 *Journal of Southern African Studies* 19-38.

[13] Johan van der Walt, Law *and Sacrifice: Towards A Post-Apartheid Theory of Law*. (2005).

[14] Alan Mabin, 'Dispossession, Exploitation and Struggle: An Historical Overview of South African Urbanisation', in Dan Smith, (ed.) *The Apartheid City and Beyond: Urbanisation and Social Change in South Africa* (1992) at 16-18.

century to the present. The study is exclusively desk-based and relies on the review and analysis of selected laws, court cases, as well as Johannesburg's strategic planning instruments such as the Integrated Development Plans (IDPs), and Spatial Development Frameworks (SDFs). The examination of the aforementioned documents is complimented by an engagement with academic literature on law and spatial planning.

The primary thesis underpinning this dissertation is that the legal and planning practices and/or processes can be appropriated by the state (and other influential actors within society) as part of *technologies of power*[15] that can be used to either empower and/or disempower various social actors within a given city, and society. As will be demonstrated throughout the dissertation, from the colonial era to the present, various South African governments with disparate political visions employed law and planning as primary instruments for structuring and spatialising everyday political, economic, and social relations between and within different racial groupings.

1.1.2 Contribution to Knowledge

While scholars in the global North such as Philippopoulos-Mihalopoulos have contributed considerably in defining the contours and complexities of law's spatial turn, their contribution remains arguably broad.[16] Similarly, while some cursory work on law's spatial turn has made its way in South Africa's legal and planning scholarship,[17] there has not been a systematic and detailed reflection on the complex anatomy of the lawscape. This dissertation therefore attempts to fill that scholarly gap by tracing the genealogy of the law/city – and law/space interactions from the colonial times to the present.

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[15] Michel Foucault *Discipline and Punish: The Birth of the Prison* (1977).

[16] Philippopoulos-Mihalopoulos op. cit. note 2.

[17] There are however exceptions, for an emergent sophisticated appreciation of the South African lawscape see: Charles Dugmore 'From the 'Devil's Dorp' to 'Fair Dorp': The Transformation of Krugersdorp from a Transient Mining Boomtown into a Stable Settler Town, 1887 to 1905' (2010) 62 2 South African Historical Journal 338-355; Karin van Marle and Isolde de Villiers 'Law and Resistance in the City of Pretoria: Space, History and the Everyday' (2013) 38 1 *Australian Feminist Law Journal* Volume 129-145.

As part of contributing to law's spatial turn, this dissertation appreciates the complex power dynamics inherent in both legal and spatial planning practices and processes. In other words, there is a realisation that both law and planning are not mere apolitical instruments that can be used by various social actors to realise specific development goals of which law and spatial order forms but a part. Instead, law and planning form one of the key technologies of power[18] that can be unleashed to realise specific ideological and political agendas.

By employing a genealogical and historical approach to the understanding of the lawscape as well as the right to the city in South Africa, this dissertation's contributions lies in its attempt to employ an interdisciplinary conceptual lenses in the study of the law and planning, thus moving away from the 'disciplinary decadence'[19] that often results in the treatment of these disciplines as being mutually exclusive. In attempting to break the superficial wall between law and planning therefore, this dissertation contributes to the emergent new critical legal geography as well as spatio-legal philosophy that is steadily taking root in South Africa's legal and planning disciplines.[20]

By employing a longitudinal/historical approach i.e. from 1652 to the present, this dissertation also contributes to the understanding of the complex relationship between settler colonialism, global capitalism, as well as transformative constitutionalism. Also underpinning this genealogical approach is the analysis of how race and racism can be used as an organising principle for structural everyday socio-spatial, economic and political relations in cities.

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[19] Disciplinary Decadence is defined as the reification of a discipline. It is 'the phenomenon of turning away from living thought, which engages reality and recognises its own limitations, to a deontologised or absolute conception of disciplinary life. The discipline becomes, in solipsistic fashion, *the world'*. See Lewis R. Gordon 'Disciplinary Decadence and the Decolonisation of Knowledge' (2014) XXXIX 1 *Africa Development* at 86.

[20] Karin van Marle and Isolde de Villiers 'Law and Resistance in the City of Pretoria: Space, History and the Everyday' (2013) 38 1 *Australian Feminist Law Journal Volume* 129-145; Karin van Marle 'The Spectacle of Post-Apartheid Constitutionalism' (2007) 16 2 *Griffith Law Review* 411-429.

Similarly, the dissertation also highlights how spatial injustices can be overcome through the decolonisation of the mind,[21] and also of the very same legal and planning instruments that were used to craft geographies of inequalities not only in South Africa but also in many other parts of the modern world.

1.1.3 Theoretical Framework

Being located in the interstice between law, and spatial planning, this study is conceptually informed by the literature in critical spatiolegal philosophy, critical legal geography,[22] as well as decolonial theory.[23] Regarding spatio-legal philosophy, I rely especially on the work of Philippopoulos-Mihalopoulos, who provides a uniquely illuminating spatiolegal philosophical prism for appreciating the intersection between law and the city, as well as law and space – referred to as the lawscape.[24]

Critical legal geography examines and appreciate the embeddedness of law in the city, and vice versa. The scholarly contributions of Henri Lefebvre, and David Harvey in particular is engaged with, as these scholars illuminate how social space is produced, as well as how various social classes are engaged in everyday struggles for the right to the city.[25]

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[21] Ngugi wa Thiong'o *Decolonising the Mind: The Politics of Language in African Literature*(1986).

[22] See Irus Braverman, Nicholas Blomley, David Delaney and Alexandre Kedar (eds.) *The Expanding Spaces of Law: A Timely Legal Geography* (2015); Phil Hubbard, Rob Kitchin, Brendan Bartley, and Duncan Fuller *Thinking Geographically: Space, Theory and Contemporary Human Geography* (2002); Gill Valentine and Catherine Harris 'Encounters and (in)tolerance: Perceptions of Legality and the Regulation of Space' (2016) 17 7 *Social and Cultural Geography* 913-932.

[23] Boaventura de Sousa Santos (2002) *Towards a New Legal Common Sense* (2002); Walter D. Mignolo *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (2011); Nelson Maldonado-Torres, *Against War: View from the Underside of Modernity* (2008); Ramon Grosfoguel 'The Epistemic Decolonial Turn: Beyond Political-Economy Paradigms' (2007) 21 2-3 *Cultural Studies*, 211-223.

[24] Philippopoulos-Mihalopoulos op. cit. notes 3 and 4.

[25] Henri Lefebvre, *The production of space* (Donald Nicholson-Smith, Trans.) (1991 [1974]); David Harvey *Rebel Cities: From the Right to the City to the Urban Revolution* (2012).

Decolonial theory allows for a critical reading of the South African lawscape, from its founding in the colonial times, to the present, as it sheds light on the relationship between legal cartography, epistemic cartography, and the spatial ordering of the world. The work of decolonial legal thinkers such as Boaventura de Sousa Santos for instance provide an entry-point to the appreciation of how law, and regulation can be used as both an instrument for both emancipation, and repression; as well as an instrument of violence and appropriation.[26]

1.2 STRUCTURE OF THE DISSERTATION

This dissertation demonstrates how the law and planning intersection (i.e. the lawscape) have for centuries been employed by the state to produce racially fragmented and unjust cities in South Africa. This is illustrated through the examination of the Johannesburg lawscape from its founding in the late 19th century, right through to its reconstruction after the dawn of democracy in 1994.

The dissertation also shows how the radical change in the South African lawscape after 1994 continues to transform post-apartheid cities' political, socio-spatial, and economic milieu. While these transformations are evident, there exist limitations with regard to what law and planning can do to fully address the colonial/apartheid injustices. For one, the persistence of socio-spatial and economic injustices in South African cities continue to fester partly due to the seemingly unrelenting nature of the colonial/apartheid built-form.[27] In other words, the concretised colonial/apartheid spatial form and its logic of racial zoning, continues to shape everyday relations in a post-apartheid cities.

As the post-apartheid state attempted to transform its lawscape, it was also to contend with the intensification of global capitalism in the 1990s – thus being compelled to embrace neoliberal policies, strategies and approaches to

[26] Boaventura de Sousa Santos, 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) XXX -1 *Review* at 54..

[27] Philip Harrison, Graeme Gotz, Alison Todes and Chris Wray (eds.) *Changing Space, Changing City: Johannesburg After Apartheid* (2015); Dan Smith, (ed.) *The Apartheid City and Beyond: Urbanisation and Social Change in South Africa* (1992).

development. Put differently, as South Africa was extricating itself from the centuries-long era of colonial/apartheid, it was immediately plunged into a neoliberal environment. This meant that the state's involvement in development, and its objective of fundamentally transforming all spheres of society, was curtailed and overshadowed by the prioritisation of 'glocal' market forces. So, neoliberalism brought with it its own socio-economically and spatially polarising forces, thus further cementing already existing inequalities in South African cities – through post-apartheid laws, and planning practices – and in some instances, neoliberalism brings some new inequalities of its own.[28] The dissertation therefore demonstrates how specific ideologies are channelled and spatialised through law and planning.

While acknowledging both the potential and limits to law and planning in the making of just and inclusive post-apartheid cities; the dissertation considers how the unfolding post-apartheid rights-based litigation discourse continues to re/construct the post-apartheid South African lawscape. This means that post-apartheid laws have created new avenues for individual, institutions as well as social movements to use the law and planning forums created by law, to struggle for their right to the city. What is also central in the post-apartheid constitutionalism and its notion of justiciable rights, is the power of various non-governmental organisations as well as residents to alter the lawscape by challenging various laws and practices in the courts.

In realising the role of politics, ideologies and urban policies in cementing both historical and current neoliberal-induced inequalities in South African cities; the dissertation argues that post-apartheid law and planning has never quite decolonized. As such, the dissertation argues that the current decolonial wave that is currently shaping South Africa's urban politics, presents a unique opportunity for

[28] Mark Oranje 'Neoliberalism, Shallow Dreaming and the Unyielding Apartheid' In Tuna Tasan-Kok, and Guy Baeten (eds.) *Contradictions of Neoliberal Planning: Cities, Policies, and Politics* (2012).

the post-apartheid lawscape to be decolonised. Such decolonisation is arguably necessary if just cities are ultimately to be realised in South Africa.

Following this introduction, Chapter 2 philosophically anchors the dissertation on the spatial turn in legal, and spatial planning. The chapter demonstrates how the concept of the lawscape allows for a more concerted analysis of how the pillars of law and planning are produced through, and infused by various ideological, and power dynamics across space and time, thus often producing ideology-driven social spaces.

The lawscape as a philosophical framework presented in chapter 2 sets the foundation for Chapter 3, where the colonial and apartheid lawscape is discussed. The chapter provides a macro-narrative on some of the key colonial/apartheid legal instruments that had a bearing on the structure and form of contemporary South African cities. It demonstrates how the ideology of racism that was dominant from the 17th century onwards found its way into law and planning, resulting in the production of racially fragmented colonial and apartheid cities. Chapter 3 also demonstrates how the social construction of race was employed as an organising principle for everyday political, economic, and spatial interaction in colonial and apartheid South Africa. Chapter 4 then presents Johannesburg as a case study and shows how the legal and planning forces discussed in chapter 3 played out in the socio-spatial milieu of Johannesburg.

Chapter 5 then provides a macro-level outline of the unfolding post-apartheid lawscape. It presents the post-apartheid state's efforts at crafting laws and planning instruments geared towards transforming and democratising South African cities. The chapter focuses on at least three things: Firstly, the Constitution and its provisions - how it alters the lawscape generally and forms part of the lawscape itself; secondly, the content of laws that were enacted post-1994 to give effect to the constitutional vision and; thirdly, the impact of court findings in cases brought in an attempt to enforce socio-economic rights in the context of spatial injustice.

Chapter 6 then grounds and localises the discussion presented in the previous chapter by focusing on the effects of post-apartheid laws and planning instruments in the spatial transformation of Johannesburg. Flowing from the realisation of both the potential, and limits of law and planning in creating spatially just, post-apartheid cities – as well as the recognition of the propensities of neoliberal lawscape to entrench historical inequalities, Chapter 7 summarises the findings of the dissertation and suggests areas for further research.

PART II: THEORETICAL ORIENTATION

CHAPTER 2: THEORISING THE LAWSCAPE

> The blindness of theory renders practice invisible or undertheorized, whereas the blindness of practice renders theory irrelevant.[1]
>
> ***
>
> [T]he city is so thick with law that, just like air, the law is not perceived. It becomes 'invisible' […] white noise, thin air. It becomes an atmosphere – there but not there, imperceptible yet all-determining.[2]
>
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2.1 INTRODUCTION: LAWSCAPE & ITS CONTOURS

This chapter seeks to examine some of the critical concepts that demonstrate the relationship between law and spatial planning. These concepts include the following: lawscape; the production of space; the right to the city; modernity/coloniality and abyssal thinking. They stem primarily from the disciplines of law (lawscape), urban planning (the production of space, and the right to the city), as well as decolonial theory (modernity/coloniality, and abyssal thinking). When read contrapuntally, these concepts provide a sound philosophical scaffolding necessary for the analysis of the equally complex lawscape.[3] Moreover, as this study is interdisciplinary in nature, the employment of an 'eclectic' conceptual framework allows for a more multi-focal reading of the interaction between law and spatial planning, and the formation of specific societal relations emerging from such interactions.

What emerges from the analysis of these concepts, is that law and spatial planning practices and processes are both constitutive and reflective of specific power relations within a given city, state, or society. In fact, both law and spatial

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[1] Boaventura Santos de Sousa, *Epistemologies of the South: Justice against Epistemicide* (2014) at 34.

[2] Andreas Philippopoulos-Mihalopoulos 'Atmospheres of law: Senses, affects, lawscapes' (2013) 7 *Emotion, Space and Society* at 36.

[3] Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (2015).

planning reflect the state's efforts to establish and regulate societal order within a given society.[4]

2.2 LAWSCAPE & THE SPATIAL TURN IN LEGAL STUDIES

In the last decade, the 'spatial turn' in legal studies has resulted in the steady growth of academic literature on the relations between law and the city, as well as law and space. This scholarly interest in law and its spatialisation stems in the main from the realisation that the law cannot be read outside the societal relations that it seeks to govern. Commenting on the spatial turn in legal studies, Philippopoulos-Mihalopoulos observes that 'law has moved in a spatial direction, progressively discovering its situatedness, its terrain'.[5] This refers to the spatialisation, and embeddedness of law in everyday societal activities.

Instead of being 'simply a cross-disciplinary adventure that experiments with geographical terminology',[6] the spatial turn in law creates new theoretical and practical possibilities critical for the development of the legal discipline and profession. In fact, the intersection between law and city has resulted in the emergence of critical theories and practices in both the legal and spatial planning fields. Philippopoulos-Mihalopoulos provides significant contributions to the understanding of law and the city. Philippopoulos-Mihalopoulos uses the term 'lawscape' to define the almost inescapable influence of law in informing socio-spatial, economic, political and environmental issues in cities.[7]

The term lawscape refers to the dynamic and complex interrelationship between law and the city (law/city). The law/city therefore, become an inescapable lawscape – i.e. a city-space completely saturated with law to an extent that it is inescapable. The law therefore, permeates all facets of everyday life. Like power,

[4] See Oren Yiftachel 'The Dark Side of Modernism: Planning as Control of Control of an Ethnic Minority' In Sophie Watson, and Katherine Gibson (eds.) *Postmodern Cities and Spaces* (1994).
[5] Andreas Philippopoulos-Mihalopoulos *Spatial Justice: Body, Lawscape, Atmosphere* (2015) at 2.
[6] Ibid at 2.
[7] Ibid.

law operates through varied technologies that are both visible and invisible.[8] Even the minutest of everyday human relations are regulated by both visible and invisible law. As Philippopoulos-Mihalopoulos outlines:

> Even the simplest acts are controlled to a greater or lesser extent by some legal agreement, limitation or prescribed direction, whether this is in the public or private space. The fact for example that one goes to the bathroom, this sacrosanct of private spaces, is regulated by legal provisions of water procurement, building regulations with regards to the material and placement of pipes, legal ownership of sewers and regulations on waste disposal, planning relation of the bathroom space to the rest of the home in the sense of where it is and what provisions have been made for emergencies, the kind of wall paint and other materials used, and so on. Perhaps less metaphorically than it might sound, the law is spread on pavements, covers the walls of buildings, opens and closes windows, lets you dress in a certain way (and not other), eat in a certain way, smell, touch or listen to certain things, touch other people in a certain way (and not other), sleep in a certain space, move in a certain way, stay still in a certain way.[9]

Contributing to the understanding of lawscape as part of the spatial turn in legal studies, some critical legal scholars assert that there is a need for a theory of law and geography that interpret the symbiotic relationship between these two disciplines.[10] Such an interdisciplinary approach to law and the city is likely to result in a nuanced understanding of the lawscape. As Butler posits:

> This approach combines an awareness of the indeterminacy of legal discourse with critical geographic insights about the heterogeneity of social space. Accordingly, law and space are both conceptualised as indeterminate but mutually constitutive.[11]

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[8] Philippopoulos-Mihalopoulos op. cit. note 5.
[9] Philippopoulos-Mihalopoulos op. cit. note 2 at 35.
[10] Nicholas Blomley *Unsettling the City: Urban Land and the Politics of Property* (2004).
[11] Chris Butler 'Critical Legal Studies and the Politics of Space' (2009) 18 3 *Social & Legal Studies* at 317.

Blomely's concept of critical legal geography allows for a genealogical study of the evolution of cities, as well as the influence of law in the regulation of everyday social, economic, political, and institutional relations and processes within a given lawscape. Thus, '[l]aw and space actively shape and constitute society, while being themselves continuously socially produced'.[12]

Contributing to the discussion of the spatial turn in legal studies, Blank and Rosen-Zvi highlight the influence of law and society movement in legal theory from the 1960s, onwards. Throughout these decades, various laws have been enacted and implemented particularly in the fields of property development and ownership, land-use, as well as other regulations governing the ordering of space in the built environment.[13] Blank and Rosen-Zvi identified at least three modes of influence in which law impacts spatial relations:

> First, it [i.e. the law] can explicitly prohibit or mandate certain spatial formations. Second, it can incentivize or discourage various spatial formations. Third, it can leave the exact spatial configuration to the free will of individuals and groups, by setting an area as spatially unregulated.[14]

The fact that the law can 'explicitly prohibit or mandate certain spatial formations' is important, as it relates to its influence in city-making processes. As will be made evident in the chapters that follow, law was used in colonial, apartheid and post-apartheid South Africa to shape the spatial form of cities and regions. In the same breath, colonial and apartheid laws simultaneously incentivised and discouraged various spatial formations, leading to the establishment of spatially and racially fragmented cities. Moreover, law's 'relinquishing' of planning issues to the free will of individuals and groups is evinced by the level of power wielded by private developers, as they continue to shape cities' socio-spatial form.[15]

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[12] Sarah Blandy and David Sibley 'Law, Boundaries and the Production of Space' (2010) 19(3) *Social & Legal Studies*) at 278.
[13] Yishai Blank and Issachar Rosen-Zvi 'The Spatial Turn in Legal Theory' (2010) 10(1) *Hagar Studies in Culture, Polity and Identities* at 39.
[14] Ibid at 40.
[15] David Harvey *The Enigma of Capital and the Crises of Capitalism* (2010).

Apart from the explicit effects of law in spatial formations cited above, 'the state uses the law to encourage people to construct the space in a way that would fit various goals it might wish to accomplish. Tax and spending law is the high road for this mode'.[16] This mode of legal regulation is intrinsically linked to the logic of the market, where the state provides tax breaks, subsidised land and cheap mortgages for instance leading people to 'behave in ways that are compatible with its spatial policies'.[17]

In instances where the state refrains from spatial regulation, and also where it lacks the capacity to intervene as is the case in some parts of the global South, 'illegal' planning' ensues. In other words, the suspension of spatial regulation, which in essence means lack of formal public planning, results in the emergence of ad hoc and/or poor planning practices accompanied by lack and/or inadequate provision of basic services and commodities such as clean water, electricity and housing. All these aforementioned legal modes of influence on the city therefore shape what some scholars have referred to as the production of space.[18]

2.3 LAW & THE PRODUCTION OF SPACE

As Philippopoulos-Mihalopoulos's concept of lawscape attempts to capture the almost omnipresence of law in the city (or the inescapability of the lawscape), there has been a realisation in the fields of legal studies, urban planning and critical legal geography that social space can be, and is, produced, particularly in this age of global capitalism. This idea of social space as a 'product' was first championed by Henri Lefebvre. For Lefebvre, there exist a 'spatial triad' that comprises of: the conceived space (the realm of the imagination, the mental space); the perceived space (i.e. the physical space) and the lived space (a lived experience emanating from one's use of senses to determine the conceived and the physical space).[19]

[16] Blank and Rosen-Zvi op. cit. note 13 at 41.
[17] Blank and Rosen-Zvi op. cit. note 13 at 42.
[18] Henri Lefebvre *The production of space* (1991 [1974]).
[19] Ibid.

Lefebvre's definition of social space therefore, shifts from viewing space as a mere territory and/or a container.

From a critical legal geography and urban planning perspective, Lefebvre's spatial triad has proved to be useful in explaining the relationship between the imagination, ideas, and ideologies about cities on one hand, and the formulation, realisation and experience of those ideas in the physical world.[20] As will be outlined in the chapters that follow, the 'tragic imagination'[21] of colonial city planning emanated from the equally tragic logic of racial segregation between the colonisers and the colonised. Throughout the colonial and apartheid era in South Africa, law and planning practices were imbued with segregationist ideologies that found spatial expression in cities.[22]

What can also be drawn from Lefebvre's concept of spatial triad, is that law and spatial planning are power-ladden practices that are reflective of the dominant state ideology. In most instances the state, as well as other private institutions, and individuals with economic and political power, have the tendency to influence how the socio-spatial and economic resources are structured and distributed within a given city or region. In fact, viewing the city as a social space – i.e. a product shaped by everyday human in/actions reveal the city's susceptibility to manipulation through the use of tools and mechanisms aimed at creating and/or maintaining a particular status quo.[23] Law and spatial planning therefore, form an integral part of the arsenal used to structure societal relations.

The influence of law and spatial planning in the making of cities is enhanced by these disciplines' influence in the re/distribution of resources, basic services, as well as socio-economic opportunities. In outlining the symbiotic relationship

[20]Jana Carp '"Ground-Truthing": Representations of Social Space: Using Lefebvre's Conceptual Triad' (2008) 28 *Journal of Planning Education and Research* 129-142.
[21] Rowan Williams *The Tragic Imagination: The Literary Agenda* (2016).
[22]Jennifer Robinson *The Power of Apartheid: State, Power and Space in South African Cities* (1996).
[23] Ibid.

between law and space, or the lawscape, Philippopoulos-Mihalopoulos observes that:

> Law and space cannot be separated from each other. They are constantly conditioned by each other, allowing one to emerge from within its connection to the other. Yet, this connection is paradoxical, interfolding and excessive. It is not a connection of dialectical interdependence but […] a 'folding' of one into the other, a connection of non-causal enveloping that allows each one to emerge depending on the conditions.[24]

In a colonial setting therefore, the colonial lawscape is fundamentally shaped by racism and racial segregation. As Fanon posits, there existed in the colony, the settler town, and the native town.[25] What distinguished these spaces from each other was the fact that the former was designed to be a space of modernity – a zone of being, regulated by law and order. The latter, however, was the space of coloniality – a zone of non-being, characterised by systemic violence, and appropriation.[26] The following section attempts to unpack the colonial lawscape, and how it was informed by the logic of modernity/coloniality inherent in modern law and planning practices and processes.

2.4 MODERNITY/COLONIALITY & THE DARK SIDE OF LAW & PLANNING

There exist various moments in modern history where legal and urban planning instruments were nefariously applied, particularly by the state. The Jewish holocaust in Europe,[27] colonialism in Africa, India and Latin America and apartheid in South Africa[28] exemplify some of the most gruesome state-led projects that

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[24] Philippopoulos-Mihalopoulos op. cit. note 5 at 4.

[25] Frantz Fanon *The Wretched of the Earth* (1963).

[26] Boaventura de Sousa Santos 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) XXX 1 *Review* 1-66.

[27] Oren Yiftachel 'Social Control, Urban Planning and the Ethno-Class Relations: Mizrahi Jews in Israel's "Development Towns"' (2000) 20 2 *International Journal of Urban and Regional Research* 418-438.

[28] On the brutality of the colonial project in Africa see Aime Cesaire *Discourse on Colonialism* (2000); Frantz Fanon *The Wretched of the Earth* (1963); On Latin America see Walter Mignolo *Local Histories/Global Designs: Coloniality, Subaltern Knowledges and Border Thinking* (2000).

employed law and urban planning as tools for realising brutal and divisive objectives.

Allmendinger and Gunder aver that 'there is now a long tradition which argues that planning is not a universal and progressive force for good'.[29] Allmendinger and Gunder's assertion is informed by their post-modernist reading of urban planning as a two-edged sword, with both a redemptive and a destructive side. The redemptive aspects of urban planning appeal to the 'signifiers of the discipline'. These include the 'enlightenment-orientated perspectives of rationality, equity, social and environmental justice'.[30] These scholars observe for instance how:

> …most enlightened planning has some adverse effects, at least for some groups in our finite world […] and even planning's dark side may well present some benefits for certain groups; otherwise, why act to produce such an outcome?[31]

Yiftachel has also written extensively on both the progressive and repressive aspects of urban planning.[32] He posits that the defining elements of urban planning are evinced by the employment of this practices 'in creating a stratified and segregated national space which reinforced and reproduced social inequalities and polarisation'. The effects of the dark side of planning and the subsequent sociospatial fragmentation are evident globally.

Cole, for instance, reveals the complicity of urban planning practices in the making of Jewish ghettoes in Europe.[33] There also exist detailed accounts of the spatial divisions in cities such as Jerusalem, where religious differences are also spatialised through enforcement of legal and urban planning instruments.[34] In the case of the Jewish Holocaust in Budapest, the creation of concentration camps,

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[29] Phil Allmendinger and Michael Gunder 'Applying Lacanian Insight and a Dash of Derridean Deconstruction to Planning's 'Dark Side'' (2005) 4 1 *Planning Theory* 87–112.
[30] Ibid at 88.
[31] Ibid at 88.
[32] Yiftachel op. cit. note 26.
[33] Tim Cole (2011) *Traces of the Holocaust: Journeying in and Out of the Ghettos*, (2011).
[34] Salem Thawaba Jerusalem City: Transforming and Segregating Urban Fabric' (2011)10 *African and Asian Studies* 121-142.

and the unleashing of state violence towards the Jews, is one example of how power was exerted through legal and planning mechanisms.[35] Writing on the application of the 'spatial solution' to the 'Jewish question' in Budapest, Hungary, Cole asserts that, from 1944 onwards 'a series of territorial solutions were planned and implemented for the Budapest "Jews". These amounted to a thoroughgoing remapping of the city along racialized lines, with the separation of the "Jewish and "non-Jewish" space'.[36]

Similarly, from the 17th century onwards colonial India saw the formulation of laws and 'spatial solutions' to the 'native question' that justified genocidal violence, land dispossessions, and the other similar projects aimed at dehumanising the colonised subjects.[37] In Africa, the spatial imagining of colonial cities was defined by racialised genocidal violence. Scholars like Fanon, and Kipfer among others, highlight the 'dark side' of planning in the production of space in colonial Africa.[38] Writing on colonial Algeria, Fanon explicitly outlines how the colonial space was characterised by divisions or compartmentalisation, with race being used as a distinctive marker of difference between the coloniser and the colonised.[39]

Reading Fanon with decolonial scholars such as Walter Mignolo for instance; the settler's imagining and ordering of the colonial city portrays the manifestation of the dialectic of modernity/coloniality.[40] Mignolo traces the genesis of European modernity to the Enlightenment era. European modernity was predicated on rationality, reason and the broader project of emancipation and civilisation. At the centre of modernity is the triumph of rationality, specifically for

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[35] Tim Cole *Holocaust City: The Making of a Jewish Ghetto* (2003).

[36] Ibid at 191.

[37] Eric Beverley 'Colonial Urbanism and South Asian Cities' (2011) 36 *4 Social History* 483-497.

[38] See Stefan Kipfer 'Fanon and Space: Colonisation, Urbanisation, and Literation from the colonial to the Global City' (2007) 25 *Environment and Planning D: Society and Space* 701-726.

[39] Fanon op. cit. note 24 above.

[40] Walter D. Mignolo 'Delinking: The Rhetoric of Modernity, the logic of Coloniality and the Grammar of De-coloniality' (2007) 21(2-3) *Cultural Studies* 449-514.

the European subject and this subject's break-away from the primordial symbols and dogma that limited its individualism – such as religion for instance.[41]

Relating Mignolo's definition of modernity to this research; it is worth noting that the disciplines and practices of philosophy, law and urban planning were viewed as central to the realisation of European enlightenment and civilisation. Writing of the Aristotelian notion of citizenship for instance, Hill avers that: '[t]he notion of the city was a key element in the development of Western thought on freedom, the individual, and civility'.[42]

Whereas the project of modernity is celebrated for its civilising characteristics, decolonial scholars observe that modernity has a 'darker side' referred to as coloniality.[43] According to Maldonado-Torres, there is a distinction between coloniality, and colonialism:

> Coloniality is different from colonialism. Colonialism denotes a political and economic relation in which the sovereignty of a nation or a people rests on the power of another nation, which makes such nation an empire. Coloniality, instead, refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labor, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus, coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of peoples, in aspirations of self, and so many other aspects of our modern experience. In a way, as modern subjects we breath coloniality all the time and every day.[44]

Coloniality therefore refers to the prevalence of 'colonial situations'[45] after the dismantling of the physical administrative institutions of colonialism. As Grosfoguel posits:

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[41] Ibid at 453.
[42] Dilys M. Hill (1994) Citizens and Cities: Urban Policy in the 1990s (1994) at 11.
[43] Nelson Maldonado-Torres 'Outline of the Ten Theses on Coloniality and Decoloniality' (2016).
[44] Nelson Maldonado-Torres 'On the Coloniality of Being' (2007) 21(2) *Cultural Studies* at 243.
[45] Ramon Grosfoguel 'The Epistemic Decolonial Turn: Beyond Political-Economy Paradigms' (2007 21(2-3) *Cultural Studies* 211-223.

> Coloniality is not equivalent to colonialism. It is not derivative from, or antecedent to, modernity. Coloniality and modernity constitute two sides of a single coin. The same way as the European industrial revolution was achieved on the shoulders of the coerced forms of labor in the periphery, the new identities, rights, laws, and institutions of modernity such as nation-states, citizenship and democracy were formed in a process of colonial interaction with, and domination/exploitation of, non-Western people.[46]

Coloniality is characterised by the racialised exclusions and genocidal violence, epistemicides, slavery, colonialism and other atrocities that defined European expansion into the so-called new world from the 16th century onwards.[47] In other words, the logic of coloniality is entangled with the 'rhetoric of modernity' – and the two constitute two sides of the same coin.[48] An example of a spatial/temporal manifestation of modernity/coloniality is evinced by the fact that at the time Europe was going through its industrial revolution, Africa and other countries in the Global South were experiencing colonialism.[49]

2.4.1 Unpacking the Decolonial Turn

Realising the dark side of modernity, and its use of law, spatial planning and other technologies of power[50] in the reproduction of coloniality some scholars from the global South have called for the decolonisation of knowledge, power, being and nature. For decolonial theorists, there exist a colonial matrix of power that continually reproduces global coloniality.[51]

The term global coloniality refers to the socio-spatial and economic marginalisation of millions of people through the 'othering' of their knowledge

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[46] Ramon Grosfoguel 'A Decolonial Approach to Political-Economy: Transmodernity, Border thinking and Global Coloniality' (2009) 6 *Kult* at 21.
[47] Anibal Quijano 'Coloniality and Modernity/Rationality' (2007) 21 (2-3) *Cultural Studies* 168-178.
[48] Walter D. Mignolo 'Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of De-Coloniality' (2007) 21(2-3) *Cultural Studies* at 464.
[49] Grosfoguel op. cit. note 46 at 21..
[50] Michel Foucault *Discipline and Punish: The Birth of the Prison* (1977).
[51] Grosfoguel op. cit. note 46 at 21.

systems and their way of life at a global scale. As Grosfoguel observes, global coloniality is a result of the dominance of Western-centric conceptions of being that prioritise racism, patriarchy, sexism, heterosexuality and other markers of difference. Any idea and/or manifestation of being that falls outside the ambit of Western-defined modernity and civility is rendered barbaric, and thus relegated to the realm of alterity.[52]

The recent resurgence of epistemologies from the global South[53] therefore, marks what has been termed a 'decolonial turn'.[54] The decolonial turn is predicated on deliberate efforts to unmask and dismantle coloniality.[55] It is imperative therefore for the fields of law and spatial planning to embrace and/or engage with the decolonial turn, as it is likely to result in the decolonisation of law and cities. A decolonial reading of the everyday practices of law and space in the making and/or evolution of cities in the Global South and in South Africa specifically, could also contribute to the curbing of the (re)production of racialised spaces.

Critical legal scholars such as Boaventura de Sousa Santos have employed a decolonial thinking paradigm as a philosophical and analytic framework that can be used to explain the prevalence of uneven development in the world.[56] Santos views the modern world system as characterised by what he terms 'abyssal thinking', where both visible and invisible abyssal lines structure and cartographically map the world system. These abyssal lines according to Santos, produce 'this side of the line' (the zones of being) and the 'other side of the line' (the zones of non-being). For Santos;

> The invisible distinctions are established through radical lines that divide social reality into two realms; the realm of "this side of the line" and the realm of the "other

[52] Quijano op. cit. note 47 at 168.
[53] Boaventura de Sousa Santos *Epistemologies of the South: Justice Against Epistemicide* (2014).
[54] Nelson Maldonado-Torres 'Thinking Through the Decolonial Turn: Post-Continental Interventions in Theory, Philosophy, and Critique—An Introduction' (2011) *Transmodernity: Journal of Peripheral Cultural Production of Luso-Hispanic World* 1-25.
[55] Ngugi wa Thiong'o *Globalectics: Theory and the Politics of Knowing* (2012).
[56] Boaventura de Sousa Santos 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) XXX -1 *Review* 1-66.

> side of the line". The division is such that "the other side of the line" vanishes as reality, becomes nonexistent, and is indeed produced as nonexistent. Nonexistent means not existing in any relevant or comprehensible way of being. Whatever is produced as nonexistent is radically excluded because it lies beyond the realm of what the accepted conception of inclusion considers to be its other. What most fundamentally characterizes abyssal thinking is thus the impossibility of co-presence of the two sides of the line. To the extent that it prevails, this side of the line only prevails by exhausting the field of relevant reality. Beyond it there is only nonexistence, invisibility, non-dialectical absence.[57]

As a critical legal scholar, Santos is concerned with the legal and human rights implications of these metaphorical and real sociospatial and geopolitical divisions in society.[58] He explicates how people on this side of the line (or the zone of being to use Fanon's term) are governed by the principles of (and tensions inherent in) regulation and emancipation. On the contrary, for those on the other side of the line (the Fanonian zones of non-being), violence and appropriation are the defining modes of governance.[59] The other side of the abyssal line therefore is defined by what Maldonado-Torres termed the non-ethic of war, where coloniality of being and its hallmarks of poverty and death are forever present.[60]

Santos' concept on post-abyssal thinking is important in this study as it illuminates contemporary social realities from a different philosophical, and geospatial positionality. To move beyond abyssal thinking, Santos envisions a post-abyssal world that can be realised through what he terms the ecologies of knowledges. This is a prompt and deliberate epistemological rupture that strives to 'provincialise' the Western world by dispelling and dislocating the dominance of Western-centric knowledge as the only 'Truth' – and the only relevant knowledge in the world – while simultaneously privileging and centring knowledges that have been pushed by the West to the supposed 'barbaric' margins. Reading Santos's

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[57] Santos op. cit. note 56 at 1.

[58] Boaventura de Sousa Santos *Toward a New Legal Common Sense: Law, globalization, and emancipation* (2002).

[59] Santos op. cit. note 56 at 54.

[60] Maldonado-Torres op. cit. note 44 at 251.

thesis with Mignolo; the former's call for the creation of 'ecology of knowledges'[61] forms part of what Mignolo refers to 'epistemic disobedience'.[62]

2.4.2 The Potential of the Decolonial Turn in Law & Planning

The decolonial turn (and the quest for a decolonial condition, i.e. decoloniality) in law and planning therefore, allows for the unmasking of the darker side of law, and planning, with the intention of dismantling the colonial matrix of power defining these instruments of spatial ordering.[63] By employing a decolonial perspective to legal studies, Santos is able to acknowledge the existence of 'pluri-legal'[64] knowledges and systems existing in society. The realisation of pluri-legal knowledges and systems marks a shift from the restrictive 'legal/illegal' dichotomy that currently dominants the legal milieu, creating possibilities for accepting other legal realities beyond this traditional legal/illegal straitjacket.

Outlining his point on the salience of pluri-legality, Santos observes that 'modern knowledge and modern law represent the most accomplished manifestations of abyssal thinking'.[65]

> This central dichotomy [of legality/illegality] leaves out a whole social territory where the dichotomy would be unthinkable as an organizing principle, that is, the territory of the lawless, the a-legal, the non-legal, and even the legal or illegal according to non-officially recognised law.[66]

If law and planning were to be approached from a decolonial perspective, issues of formality and informality in land-use, housing, and trading for instance, would require a new thinking and/or approach. A decolonial approach to legal reason and planning is therefore likely to contribute to equitable redistribution of commodities

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[61] Santos op. cit. note 56 at 67.
[62] Walter D. Mignolo, 'Epistemic Disobedience and the Decolonial Option: A Manifesto' (2011) 1(2) *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World* at 44.
[63] Quijano op. cit. note 47 at 168.
[64] Santos op. cit. note 56 at 68.
[65] Santos op. cit. note 56 at 3.
[66] Santos op. cit. note 56 at 4-5.

and opportunities in the city, thus gesturing towards the realisation of the ideals of social and spatial justice. The quest for social and spatial justice in the city has been championed by Henri Lefebvre, David Harvey and others as 'the right to the city'.[67] The subsection that follows attempts to outline some of the key tenets of social justice and the right to the city.

2.5 SOCIAL JUSTICE & THE QUEST FOR A JUST LAWSCAPE

As decolonial theory prioritises the creation of a world characterised by a shared, common and equal humanity, social justice can be said to form an integral part of that 'post-abyssal' world.[68] Various theorists have contributed to the development of the concept of social justice. Nancy Fraser's conceptualisation of social justice, for instance, strives to transcend the limits of both the politics of redistribution, and the politics of recognition.[69]

According to Fraser, the quest for social justice must be approached in the first instance by the realisation that the injustices and unrecognition continue to prevail in all of the world's cities and regions. For Fraser, social justice is a quest for both redistribution of socio-economic resources (politics of distribution), as well as the recognition of difference (politics of recognition).[70] The politics of redistribution assumes that the plight of the socio-economically marginalised people can be addressed through the restructuring of the economy, and the subsequent redistribution of socio-economic gains. On the other hand, the politics of recognition is aimed at promoting cultural value and recognition of all peoples, irrespective of their sexuality, gender, race, age, and nationality. Fraser's conception of social justice therefore privileges the pursuit of both redistribution of socio-economic resources and opportunities, as well as the recognition of

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[67] David Harvey *Rebel Cities: From the Right to the City to the Urban Revolution* (2012).

[68] Santos op. cit. note 57 at 43. For a discussion on post-abyssal law, see Boaventura de Sousa Santos 'The Resilience of Abyssal Exclusion in Our Society: Towards a Post-Abyssal Law' (2017) *Tilburg Law Review* 237-258.

[69] Nancy Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' (1996).

[70] Ibid at 5.

difference. While redistribution's relevance rests on its emphasis on the promotion of equitable access to socio-economic resources, recognition allows for an epistemological transcendence beyond the tyranny of global racial hierarchisation.

When read from a decolonial perspective, Fraser's conception of social justice endeavours to dismantle global coloniality.[71] Global coloniality is framed by what Santos refers to as 'radical difference',[72] i.e. the global hierarchisation in modern societies predicated on the privileging of male/heterosexual/patriarchal/sexist/Christian conceptions of being-in-the-world. Those peoples falling outside the aforementioned categories (i.e. gays and lesbians, women, and people of colour for instance) are *not recognised*, as they are labelled as 'dispensable and bare lives'.[73] Unrecognition therefore is intrinsically linked to 'dispensability', 'radical absence', 'nonexistence', and 'non/sub-humanity'.[74]

Fraser's conception of social justice therefore, allows for the appreciation of the potential role that law and planning can play in fostering the creation of inclusive lawscapes – i.e. laws and cities that allow for all urban inhabitants to have access to socio-economic resources, as well as recognition. Beyond the politics of distribution and recognition, Fraser's social justice framework dovetails with Harvey's concept of the right to the city, as well as the concept of spatial justice as advanced by various legal philosophers.[75].

2.5.1 Social Justice, Space & the Right to the City

Harvey presents the concept of social justice in the city as concerned with the evaluation of distribution of wealth, income, education, job opportunities, as well

[71] Grosfoguel op. cit. note 46 at 22.
[72] Santos op. cit. note 56 at 5.
[73]Walter D. Mignolo 'Dispensable and Bare Lives: Coloniality and the Hidden Political/Economic Agenda of Modernity' (2009) VII (2) *Human Architecture: Journal of the Sociology of Self-Knowledge* at 69.
[74] Boaventura de Sousa Santos 'The resilience of Abyssal Exclusion in Our Society: Towards a Post-Abyssal Law' (2017) 22 *Tilburg Law Review* 237-258.
[75] Harvey op. cit. note 67.

as other related socio-economic factors.[76] Harvey's attempt to 'spatialise' and/or add a 'territorial' aspect to social justice is commendable, as it brings to the fore the significance of space (and territoriality) in the analysis of everyday socio-spatial, economic and political dynamics in contemporary capitalist societies.[77]

Most importantly, Harvey's expansion of Henri Lefebvre's concept of the right to the city has allowed for a more accessible appreciation and utilisation of this concept, particularly within the fields of urban planning, geography, and recently, law.[78] Following Lefebvre, Harvey identifies and provides an analysis of the socio-economic injustices inherent in capitalist societies.[79] The right to the city therefore, is 'a cry for help and sustenance by oppressed peoples in desperate times'.[80] It is a 'revolutionary cry and a demand' for meaningful participation in all city-making processes – it is a 'right to *The Production of Space*'.[81] As the right to the city is about the production of space as cited by Harvey – it means that all of the city's inhabitants have the responsibility to have ideas on, as well as contributions to the spatial ordering of everyday life in the city. In other words, the right to the city attempts to forge an inclusive (and ultimately global) urban citizenship predicated primarily on the inhabitation of the city.

Following Lefebvre and other left-leaning urban theorists, Harvey views the city as a revolutionary space where rights are contested between different social classes. For Harvey, 'the urban [continues to be] an incubator of revolutionary ideas, ideals, and movements'. It is not surprising therefore that some legal and urban planning scholars, as well as social movements, have appropriated the right to the city concept as both a rallying cry for social justice, social-economic rights, spatial justice and an epistemological platform for imagining an ideal 'just city'.[82]

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[76] Harvey op. cit. note 67.
[77] Fraser op. cit. note 69.
[78] Henri Lefebvre *The Survival of Capitalism: Reproduction of the Relations of Production* (Translated by Bryant, F.) (1973/1976).
[79] Harvey op. cit. note 67.
[80] Harvey op. cit. note 67 at xiii.
[81] Harvey op. cit. note 67 at xv.
[82] Susan S. Fainstein 'The Just City' (2014) 18 1 *International Journal of Urban Sciences* 1-18.

The quest for the right to the city and social justice can therefore be viewed as a response to the growing sociospatial, economic and environmental challenges induced by the darker side of capitalist globalisation. According to Harvey:

> These days it is not hard to enumerate all manner of urban discontents and anxieties, as well as excitements, in the midst of even more rapid urban transformations. Yet we somehow seem to lack the stomach for systemic critique. The maelstrom of change overwhelms us even as obvious questions loom. What, for example, are we to make of the immense concentrations of wealth, privilege, and consumerism in almost all the cities of the world in the midst of what the United Nations depicts as an exploding "planet of slums"?[83]

The right to the city therefore, is a collective right whose roots can be traced not only in activities of social movements globally, but also in the insurgent responses of the majority of marginalised people to the everyday realities of poverty, income inequality and environmental degradation that characterise contemporary global capitalism:

> We live in an era when ideals of human rights have moved center-stage both politically and ethically. A lot of political energy is put into promoting, protecting, and articulating their significance in the construction of a better world. For the most part, the concepts circulating are individualistic and property-based and, as such, do nothing to challenge hegemonic liberal and neoliberal market logics, or neoliberal modes of legality and state action. We live in a world, after all, where the rights of private property and the profit rate trump all other notions of rights one can think of.[84]

Harvey compares these claims for the right to the city with other similar claims for collective rights such as the 1960s Civil Rights movements where minority groups (such as women, people of colour and gay people) were

[83] Harvey op. cit. note 67 at 4.
[84] Harvey op. cit. note 67 at 1.

challenging the capitalist/patriarchal/sexist/homophobic status quo in the United States:

> The right to the city is, therefore, far more than a right of individual or group access to the resources that the city embodies: *It is a right to change and reinvent the city more after our heart's desires. It is, moreover, a collective rather than an individual right, since reinventing the city inevitably depends upon the exercise of a collective power over the processes of urbanisation*. The freedom to make and remake ourselves and our cities is […] one of the most precious yet neglected of our human rights.[85]

The right to the city concept therefore, provides a solid conceptual anchor critical for the analysis of how the processes of urbanisation play out in an era of intensified global capitalism. In this era, relations between capital and labour, and/or the propertied classes and the socio-economically marginalised, are continually strained by deepening societal inequalities.[86]

Through the implementation of neoliberal legislation and policies, in spatial planning, the capitalist lawscape has in some instances reinforced and/or produced socio-spatial disparities in cities. In this regard, neoliberal cities become contested spaces where private developers, city administrators, social movements, and individual city-dwellers are often pitted against each other as they all incessantly vie for the realisation of their vision of city development. The right to the city therefore, can be viewed as concept that can be appropriated not only by the urban poor, but also by the middle and upper classes.[87]

In presenting the right to the city as a 'cry and a demand' for an ideal, just city therefore, Harvey is equally cognisant of this concept's potential and limitations. Harvey views the right to the city as 'an empty signifier full of immanent

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[85] Harvey op. cit. note 67 at 4 (emphasis added).

[86] Neil Brenner 'The Urban Question as a Scale Question: Reflections on Henri Lefebvre, Urban Theory and the Politics of Scale' 2000 24 2 *International Journal of Urban and Regional Research* 361-378.

[87] Marius Pieterse *Rights-based Litigation, Urban Governance and Social Justice in South Africa* (2017).

but not transcendent possibilities'.[88] In other words, as an empty signifier, it can be appropriated and utilised by various social actors that have a vested interest in the everyday socio-spatial, economic, political and environmental factors defining a particular city. Depending on what individuals and/or a collective that appropriate the concept require, the right to the city can be used for reformist, as well as for revolutionary purposes.

In the last two decades or so, various scholars have contributed to the expansion of the right to the city concept by applying it as a framework for analysing contemporary cities and the complex politics and socio-spatial processes defining it.[89] From a socio-legal perspective for instance, Mitchell illuminates how the anti-homeless laws in the United States of America perpetuate an exclusionary form of urbanism. Specifically, Mitchell highlights how San Francisco and Seattle's anti-homeless laws are 'indicative of a whole tenor of the war against homeless people that cities are waging in the name of global competitiveness'.[90] As these cities strive for global competitiveness, the rights of the homelessness and the poor become severely limited, and their actions gravely 'criminalised'. This criminalisation of poverty is done through the application of stringent regulations and bylaws that govern the everyday use of both private and public spaces for instance. With regard to the latter, Waldron observes the following:

> Now one question we face as a society – a broad question of justice and social policy – is whether we are willing to tolerate an economic system in which large numbers of people are homeless. Since the answer is evidently "Yes", the question that remains is whether we are willing to allow those who are in this predicament to act as free agents, looking after their own needs, in public spaces – the only space available to them. It is a deeply frightening fact about the modern United

[88] Harvey op. cit. note 67 at 136.
[89] Don Mitchell *The Right to the City: Social Justice and the Fight for Social Justice* (2003).
[90] Ibid at 161.

> States that those who have homes and jobs are willing to answer "yes" to the first question and "no" to the second.[91]

Waldron's observation is not only confined to the United States. Instead, like global capitalism that fuels it, the criminalisation of poverty, homelessness, and informality has become global. As such, the urban poor's struggles for equitable redistribution of amenities and opportunities, as well as recognition of difference, has also become global. This is evinced by the urban poor's quest for the re-articulating and enactment of the right to the city, as well as legal rights.

2.6 LEGAL RIGHTS & THE RIGHT TO THE CITY

In recent years, various legal scholars have engaged with the idea of the right to the city, as part of law's spatial turn.[92] Pieterse for instance observes that the right to the city's appeal rests on its emphasis on physical habitation as constitutive of urban citizenship. In other words, the right to the city's bottom-up, flexible, at times insurgent approaches to socio-economic rights, and urban citizenship, has rendered it a useful concept in the analysis of law and the city.

While the right to the city's 'insurgency, spontaneity and an unbridled' nature is 'tempting to romanticise', there is a need for more structured legal rights that can balance the claims made as part of the right to the city. Indeed, legal rights may seem to be relatively restrictive, as they are geared towards maintaining law and order, as well as the state's sovereignty. However, legal rights' promotion of the institutional integrity, and subsequent predictability and stability of urban governance structures is imperative for the realisation of democratic values of all urban citizens. As Pieterse avers:

> Legal rights have unequivocally shown themselves to be well suited to the balancing of competing interests, the maintenance of law and order and the pursuit of communal aspirations in a fair, open and transparent manner. Through the power of law, legal rights and the processes that vindicate them can shape space

[91] Jeremy Waldron 'Homelessness and the Issue of Freedom' (1991) 39 *UCLA Law Review* 295-324.

[92] Pieterse op. cit. note 87 at 24.

– physically, politically, socially and in the imagination – in ways that promote dignity, tolerance, participation, diversity and human flourishing.[93]

In the case of post 1994 South Africa for instance, legal rights are entrenched in the Constitution of 1996, and therefore dove-tail considerably with the claims for the right to the city. The Constitution of 1996 also guarantees the justiciability of socio-economic rights, i.e. the rights to access water, housing, health care services and education, as well as constitutional guarantees of a substantive right to equality.[94] These justiciable rights can contribute to the fostering of spatial justice, as they give people legal avenues to demand a change in the lawscape. The balancing (and disciplining) of the right to the city, with justiciable legal rights therefore, allows for the maintenance of law and order in the city, while ensuring that disparate social groups' claims to the city are met in a relatively democratic manner.

One of the legal avenues that are used by urban inhabitants to claim legal rights, and the right to the city, is rights-based litigation. Litigation provides urban citizens from disparate social classes to seek relief through the courts. While this legal avenue has its limitations (as to the extent of the courts' reach in terms of providing relief to litigants, for instance) it is potentially one of the most democratic platforms for negotiating for 'polycentric' legal rights, and other related socio-economic claims to the city.[95]

2.7 REFLECTIONS

This chapter presented that lawscape is produced as law and the city entangle, and mutually merge. In its production, the lawscape is fundamentally shaped by various everyday practices, ideas, ideologies, as well as competing claims from the city's inhabitants. The notion of lawscape therefore is important as it demonstrates how the law structures, orders, and regulates all human (and non-human) activities in the city. As the law strives to maintain order in the city, it

[93] Pieterse op. cit. note 87 at 207.
[94] Pieterse op. cit. note 87 at 257.
[95] Pieterse op. cit. note 87 at 21.

embodies power that can be used to create a particular lawscape. In this regard, law becomes instrumental in the process of socio-spatial, economic and political relations. Moreover, the lawscape is constituted not only by legislation and policy, but also by litigation. In other words, as various social actors engage and navigate through the lawscape, their agency in appropriating the law as an instrument of realising specific socio-economic, environmental and political aspirations contributes to the making of the lawscape.

The chapter also demonstrated how social space is produced in the age of neoliberalism and intensified global capitalism. Using the right to the city as a conceptual framework, the discussion illuminated how various social classes within the city struggle to stake their varied claims in city, while defining the city's socio-spatial, political, and economic milieu. For Harvey, and Lefebvre, the right to the city is a cry and a demand, particularly mostly from the poor that find themselves having to negotiate, and subvert the detrimental effects of neoliberal policies in cities. The right to the city therefore attempts to redefine the concepts of democracy, identity, and urban citizenship, by expanding the definition of these concepts, with the intention of creating new avenues of belonging and being in the city. It was also presented in this chapter that while the right to the city forms an integral part of the spatial turn in legal studies; there exist a need to for them to be reconciled with justiciable legal rights, as the legal rights provide the needed legislative stability, and predictability necessary for the realisation of spatial justice, and inclusive democracy in cities.

As part of appreciating the formation of contemporary lawscape, and claims to the city, a decolonial epistemic perspective was employed to unmask the 'dark side' of both law and planning. Decolonial theory's relevance for this chapter rests in the fact that it introduces some concepts that critically expose the various abyssal lines that separate contemporary cities and societies in two, i.e. between zones of being and zones of nonbeing. As such decolonial theory provides a critical lens that allows for the appreciation of how law and planning can contribute to the

imagining and realisation of a post-abyssal world, were the pursuit of common humanity and human rights, is the norm, and not the exception.[96]

[96] Santos op. cit. note 56 at 43.

PART III: THE COLONIAL/APARTHEID LAWSCAPE IN URBAN SOUTH AFRICA

CHAPTER 3: THE COLONIAL/APARTHEID LAWSCAPE

> Urban historical writing over the last decade has steadily revealed the wide range of laws through which urban segregation could be implemented. While some measures were obviously and directly segregationist, others were more indirect, bringing segregation through the back door – via housing, public health or planning legislation.[1]

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> Segregation was a phase, the highest stage, in the evolution of white supremacy.[2]

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3.1 INTRODUCTION: LEGISLATING SOCIAL CONSTRUCTS

This chapter provides a historical narrative of the intersection between law, spatial planning practices and racial hierarchisation in the making of South Africa's colonial/apartheid cities.[3] Drawing from the philosophical/analytic framework of lawscape detailed in chapter 2, this chapter also demonstrates that the colonial/apartheid project was predicated and hinged on a complex body of legislation, as well as spatial planning practices, that produced geographies of gross socio-spatial, and economic inequalities. From the mid-17th century onwards, the formulation and subsequent implementation of various pieces of legislation resulted in the 'compartmentalisation' of space[4] primarily on racial lines,

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[1] Paul Maylam 'Explaining the Apartheid City: 20 Years of South African Urban Historiography' 1995 21 1 *Journal of Southern African Studies* at 27.

[2] John W. Cell *The Highest State of White Supremacy: The Origins of Segregation in South Africa and the American South* (1982) at 3.

[3] The (/) in 'colonial/apartheid' is used to denote a continuation in these two systems of racial oppression. For colonialism and apartheid were both predicated on racial hierarchisation and discrimination.

[4] Franz Fanon *The Wretched of the Earth* (1963); Stefan Kipfer 'Fanon and Space: Colonisation, Urbanisation, and Literation from the colonial to the Global City' (2007) 25 *Environment and Planning D: Society and Space* 701-726.

leading in the production of racially segregated, and spatially fractured South African cities.[5]

Apart from tracing the contours of the colonial/apartheid lawscape, this chapter seeks to show how the interaction between law and city-making processes enabled and/or hindered the promotion of social as well as spatial justice. Guiding this discussion therefore, are the following questions: who had the right to the colonial/apartheid city? To what extent did law shape urban South Africa's socio-spatial form as well as the everyday societal interactions therein? Throughout this chapter, the concepts of the lawscape, the right to the city, and modernity/coloniality discussed in chapter 2, act as a conceptual bedrock where issues of access to, as well as belonging in the colonial/apartheid city are discussed.

This chapter therefore periodises some of the key historical events, as well as laws that had a bearing on the making of contemporary South African cities. First, it provides an outline of the production of colonial lawscape, focusing on the colonial encounter between 1652 to 1909 just before the formation of the Union of South Africa. It was in this epoch that the primary spatial template of South African cities was imagined and established; with law and planning used to segregate them from the outset, at two levels. First, early cities were built for white people and as spaces inhabited fully only by them. Black (meaning all 'non-whites') people were 'planned out' of the cities, as they were viewed as inherently rural. Inside cities those black people needed for labour were either treated as sojourners who were expected to leave the city after work or placed in temporary residence dorms.

Thereafter, the discussion focuses on the evolution of South African cities from 1910 to 1947, i.e. during the Union years. In the Union years, South African cities grew in terms of population size, and economic as well as infrastructural sophistication. It was also in this era that law was used to actively enforce racial

[5] For a detailed outline on the making of South Africa's apartheid cities see David M. Smith, (ed.) *The Apartheid City and Beyond: Urbanisation and Social Change in South Africa* (2005).

segregation, as actual laws regulating lives in cities were enacted for the first time. Then, the apartheid laws and related spatial planning practices that unfolded from 1948 right through to 1978 (i.e. early apartheid) are outlined. It was in this era that the urban colonial socio-spatial, political and economic template, was refined and systematically realised through a complex legal and planning framework. Lastly, the chapter focuses on the years leading to the dismantling of apartheid, i.e. from 1979 to 1993. This era is important for the understanding of the transformation of the South African lawscape for a number of reasons. For one, it was in this epoch that various apartheid laws were repealed, thereby creating space for the reimagining of a post-apartheid society.

3.2 LAW, SEGREGATION & SPATIAL PLANNING

While law and planning were conceived as modernising instruments critical for creating towns and cities with all the needed basic services such as water, sanitation, electricity and housing – there existed instances where these noble professions were used in the service of realising spatial fragmentation. In other words, there exist evidence at a global level suggesting how law and planning have contributed in varying degrees to spatial segregation.[6] In those unfortunate instances, the application of legal and planning instruments in fragmenting cities and societies at large relied primarily on racist ideologies and imaginings as well as racial hierarchisation. As outlined in the previous chapter, colonialism and its use of race as both an ideology and an organising principle for socio-spatial, economic and political engineering in the colonies, resulted in the creation of racially segregated cities and regions.[7] From the 15th century onwards therefore, racial segregation became simultaneously, 'a conscious policy, a process (by definition never completed), a system, and an ideology'.[8]

[6] Cell op. cit. note 2 at 3.

[7] Racial hierarchisation also meant that even those people defined as 'Black' i.e. Africans, Indians and coloureds were treated differently by the colonial/apartheid state. Indians and Coloureds for instance enjoyed relatively more rights during colonial/apartheid than Africans.

[8] Cell op. cit. note 2 at 2.

Colin Bundy, for instance, asserts that segregation formed part of a transition towards capitalist modes of production and governance. Bundy also highlights how segregation is historically linked to land dispossession.[9] As a result, most societies transitioning from an agrarian to a capitalist mode of governance in political, social and economic terms, were characterised by disparate forms of accumulation through dispossession. This accumulation through dispossession was often accompanied by genocidal violence, spatial fragmentation and the subsequent radicalisation of racial, class, gender and ethnic differences.

It is thus less surprising that in most Western countries, segregationist strategies were often employed to marginalise minority communities. The spatial structure of cities in Western countries still bear witness to the deliberate ghettoisation of black and Hispanic minority groups, for example. It was through colonialism and other related systems of oppression that racial segregation was practised in most colonies of the global South.[10]

In the making of colonial cities in South Africa, racism justified racial hierarchisation and socio-spatial segregation.[11] John W. Cell points out how from the 15th century onwards, white racism fuelled segregation in South Africa. In this country, colour prejudice 'was imported in the minds and psyches of the earliest European settlers'.[12] Colonial South African cities were therefore 'cut in two' between the zones of being, and the zones of nonbeing.[13] What was also apparent in colonial urban South Africa is that the ideology of segregation permeated

[9] Colin Bundy 'Land, Law and Power: Forced Removals in Historical Context' Christina Murray and Catherine O'Regan (eds.) *No Place to Rest: Forced Removals and the Law in South Africa* (1990).
[10] Sako Musterd and Wim Ostendorf (eds.) *Urban Segregation and the Welfare State* (1998); Sako Musterd and Marielle de Winter 'Conditions for Spatial Segregation: Some European Perspectives' (1998) 22(4) *International Journal of Urban and Regional Research* 665-673.
[11] David T. Goldberg, *The Threat of Race: Reflections on Racial Neoliberalism* (2009); Goldberg, David T. *Are We All Postracial Yet: Debating Race* (Cambridge, Polity Press; 2015).
[12] Cell op. cit. note 2 at 3.
[13] Fanon op. cit. note 4.

beyond the spatial separation of population groups. Its impact also shaped the realms of political, social, economic and psychological life. As Cell aptly avers:

> Segregation is at the same time an interlocking system of economic institutions, social practices and customs, political power, law, and ideology, all of which function both as means and as ends in one group's efforts to keep another (or others) in their place within a society that is actually becoming unified. Both the structure and the dynamics of segregation are thus paradoxical. Social patterns and economic trends appear to run in opposite directions. To its members such a society may appear to be normal, logically and permanently divided. But if the groups that compose it were truly separate, if they really lived their lives apart, if the economy and society were indeed plural or dual, there would be no need for segregation.[14]

Though a social construct, racial segregation in colonial South African cities sought to deliberately foreclose a range of rights, opportunities, and facilities for subordinated groups. As Cell puts it: 'In a segregated society, there exist job restrictions and unequal wages; inferior housing, education, transportation, health, and social services; prejudiced courts and police forces; reduced or nonexistent political rights.'[15]

These forms of exclusion cited above defined colonial and apartheid South Africa. In a racially segregated society such as colonial/apartheid South Africa, the dominant white group's monopoly over the political institutions of the state – and the technologies of control such as law and planning, formed an integral part of socio-spatial ordering.[16] The dominant group also had a stronghold over armed forces, as well as organs of the state responsible for the promulgation and enforcement of laws aimed at promoting racial segregation.

As legal and spatial planning are predominantly state-led processes and practices; these instruments were used to serve the ideological interest of the

[14] Cell op. cit. note 2 at 3.
[15] Cell op. cit. note 2 at 14.
[16] Cell op. cit. note 2 at 14.

state.[17] So, from the mid-18th century to the mid-1980s, South Africa witnessed a radical socio-spatial and economic engineering, predicated on a racialised application of a complex body of legislation and spatial planning instruments.[18] As law and spatial practices are by their ontological nature dictated by the logic of maintaining societal order; their co-optation and/or complicity in the furthering of the colonial/apartheid state's segregationist ideology was almost inevitable. In colonial and apartheid South Africa, the power of the law in the subjectification of both the dominant and subordinate groups cannot be doubted. In that colonial/apartheid epoch, the law was applied in disciplining and controlling the subjugated black majority, at the same time keeping the dominant white groups in check.[19]

In explaining the influence of state power with regard to segregation, Cell highlights how segregation was sometimes 'carried out under the façade of constitutionality'.[20] As was the case in colonial/apartheid South Africa: 'Courts, legislatures, elections, investigating commissions, perhaps even opposition parties had the appearance and to some extent the reality of impartiality'.[21] In some instances therefore, the law was used to crystallise and reaffirm the hegemony of the white dominant groups. Also forming part of the crystallisation of hegemony in a segregated society was the spasmodic unleashing of sanctioned state violence.[22] Such violence was deliberately used to demonstrate the state's power over both the dominant and the subordinate groups. In the case of the former, the demonstration of state violence reaffirmed power and privilege. For the oppressed

[17] Jennifer Robinson *The Power of Apartheid: State, Power and Space in South African Cities* (1996).
[18] For a detailed analysis of the constitution of the apartheid legal architecture see Johan van der Walt, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005).
[19] Robinson op. cit. note 17.
[20] Cell op. cit. note 2 at 19.
[21] Cell op. cit. note 2 at 19.
[22] Fanon op. cit. note 4 at 27-84. In chapter 1 of the *Wretched of the Earth*, Fanon explicates how the colonial state used violence as a mode of governance, spatial segregation and control.

however, it established, maintained and perpetuated varied conditions of perpetual nervousness and precarity.

There also exist(ed) moments in history when the legal and planning practices' modernist, technical preoccupation with law and order were unfortunately captured and used for realising racial segregation. In such unfortunate moments of fatal imagination, the racist state would employ its bureaucratic machinery, as well as the use of brute force, as administered by the police, and/or the army to carry out its divisive policies of racial and ethnic segregation. Writing on the production of colonial cities for instance, Fanon outlined how the colonial state relied on the army and the police to exert violence in native towns with the aim of enforcing discipline and social control.[23]

> The colonial world is a world cut in two. The dividing line, the frontiers are shown by barracks and police stations. In the colonies it is the policeman and the soldier who are the official, instituted go-betweens, the spokesmen of the settler and his rule of oppression.[24]

Similarly, Santos highlights how both state and international law at times maintain segregation (defined by what he termed an 'abyssal line') between areas inhabited by dominant groups and those occupied by the oppressed.[25] As the law dictates what is legal and what is illegal – when misappropriated, its employment in the service of racial segregation result in the criminalisation of all activities deemed to undermine the ideology of segregation. At the height of white supremacy in South Africa for instance, most activities of a social, economic, religious and political nature were regulated by a corpus of legal statutes enforced by a highly bureaucratised public service, and the armed forces.[26]

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[23] Fanon op. cit. note 4.
[24] Fanon op. cit. note 4 at 35-36.
[25] Boaventura de Sousa Santos 'On Modes of Production of Law and Social Power' (1985) 13 *International Journal of the Sociology of Law* 299-336.
[26] Karen Miller *Public Sector Reform Governance in South Africa* (2005).

3.3 RACIAL SEGREGATION & LAW IN URBAN SOUTH AFRICA

In the making of contemporary South African cities and regions, the colonial encounter was characterised by a gradual racialisation of social relations between the native populations and European settlers.[27] Some scholars identify at least three phases that defined this colonial encounter, and the development of urban policy and planning in early South African cities. The first phase was the settler-colonial period marked by the arrival of Jan Van Riebeeck in 1652 until just after the formation of the Union in 1910.[28] The second phase was marked by the promulgation of the Native Land Act 27 of 1913, and the Native (Urban Areas) Act 21 of 1923. While the former Act marked the beginning of accumulation of land by settlers through the dispossession of the natives, the later 'marked the beginning of the conscious nationwide pursuit of urban segregation'.[29]

The third phase was the apartheid era that began with the ascendance of the National Party into power in 1948, right through to its demise from the late 1970s to 1993. Throughout the apartheid era, a plethora of legislation were passed and implemented to foster the segregation of people's political, spatial, social, and cultural life. In delineating these epochs in the development of colonial/apartheid urban policies, Anthony Lemon points out that:

> These legislative landmarks provide convenient boundaries, but there are strong threads of continuity between the three phases – so strong, indeed, that they are likely to exert a profound influence even on the post-apartheid city which begun to emerge since 1979.[30]

Following Lemon's periodization of segregation in early South African cities, the following sections provide an outline of the evolution and crystallisation of racial segregation. Focus is given to a selected key legislation that played an integral part in shaping contemporary South African lawscape.

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[27] Leonard Thompson *A History of South Africa* (4th edition) (2014).
[28] Anthony Lemon (ed.) *Homes Apart: South Africa's Segregated Cities* (1991) at 1.
[29] Ibid at 1.
[30] Ibid at 1.

3.3.1 Law & Segregation in the Pre-Union Years – 1652-1909

In tracing the roots of racial segregation in the land that was later on to be called South Africa, the arrival of Jan van Riebeeck in 1652 and the Dutch East India company is of historical significance. For the colonial encounter between van Riebeeck, the Dutch East India Company and the local African people was from the outset marked by conflicts over natural resources, particularly land and livestock. Moreover, the seeds of racial segregation were sown in that era. As Leonard Thompson highlights: 'By the time van Riebeeck handed over the command to his successor in 1662, the colony had become a complex, racially stratified society'.[31] Using race, and racial hierarchisation as a socio-spatial, political, and economic organising principle, European settlers went on to subjugate the native populations in South Africa.[32] It is this colonial subjugation and dehumanisation of native populations in early South Africa that set a path for the segregationist systems of colonialism and apartheid.

In fact, the colonial wars that characterised the colonial encounter saw the gradual displacement of native Africans, as well as the souring of everyday social relations between the colonisers and the colonised. Glaser for instance, states that the 'racially-based master-servant hierarchies' that emerged during the colonial conquest 'were the first of numerous that would form a central feature of the South African social order through to the late twentieth century and likely beyond'.[33]

From the late 17th century onwards, white minority groups began setting up extractive colonial institutions and enterprises whose success was predicated on racial capitalism. As Anthony Lemon points out, racial stratification set a firm ground for white control. Davenport also state that the intensification of segregation dates back to the mid-1850s:

> A 100 years before group areas the Port Elizabeth municipality tried to enforce urban apartheid, issuing regulations in 1855 requiring blacks to live in the Native

[31] Thompson op. cit. note 27 above at 33.
[32] Daryl Glaser *Politics and Society in South Africa* (2001) at 7.
[33] Ibid at 8.

> Strangers' Location if not housed by their employers or owning their own property.[34]

The creation of the Native Strangers' Land in Port Elizabeth of the mid-19th century also stemmed from 'a colonial expression of the idea […] that black people were essentially aliens in urban areas'.[35] The mid-19th century also witnessed the creation of locations and 'Native Villages' for black as well as coloured people in East London, Cradock, Graaf-Reinet and Grahamstown.[36] In the late 19th century, cities in the Boer republics of Transvaal and Orange Free State are said to have been practicing what might be termed loose forms of urban segregation.[37] African and Indian locations were also created throughout Kimberley, Johannesburg, and Durban.

In one case study, Parnell highlights how Transvaal segregated the Malay and the African populations:

> In as early as 1893, only seven years after the founding of Johannesburg, the Transvaal Republican Government dispatched instructions to all Magistrates to establish "Coolie" locations for Asiatics. Two years later, this mandate was extended and 460 stands were allocated for use as a Malay Location.[38]

Similarly, the anti-Indian sentiments expressed by some members of the white population groups in Durban resulted in the residential segregation of Indians in the late 1870s.[39] Cape Town was also not spared from racial segregation. The existence of coloured, African and other population groups at the heart of this

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[34] Maylam op. cit. note 1 at 22.
[35] Maylam op. cit. note 1 at 22.
[36] Maylam op. cit. note 1 at 23.
[37] Rodney T.H. Davenport, *The Beginnings of Urban Segregation in South Africa* (1971).
[38] Susan Parnell 'Sanitation, Segregation and the Native (Urban Areas) Act: African Exclusion from Johannesburg's Malay Location, 1897-1925' (1991) 17 3 *Journal of Historical Geography* at 272.
[39] Maynard W. Swanson 'The Asiatic Menace: Creating Segregation in Durban, 1870-1900' (1983) 16 3 *The International Journal of African Historical Studies* 401- 421.

expanding colonial settlement raised alarm for white settlers who saw other races as posing a health threat.

The colonial encounter that unfolded from the mid-17th century onwards in South Africa therefore, was characterised by not only by racial segregation, but also by brutal land dispossession and the subsequent proletarianisation of Africans as they were forced to form part of the emergent capitalist system, as landless labourers.[40] In all this, law played a critical role in legitimising and regulating 'racially charged social relations in a nascent capitalist society. Commenting on the role of the law in relation to power and property in capitalist societies, Bundy avers that:

> Law is not neutral: it reflects existing interests and the distribution of power in any society. The law in nineteenth and twentieth century South Africa favoured the propertied and employing classes.[41]

So, being biased in favour of the propertied white race, law in colonial South Africa played a critical role not only in the racial hierarchisation of peoples in cities – it also created and legitimated skewed socio-spatial, economic, and political relations whose effects were to be felt long after the demise of the colonial/apartheid project.

3.3.2 The Union Years – 1910-1947

The years following the formation of the Union of South Africa in 1910 was characterised by the consolidation of white power and the subsequent crystallisation of racial segregation.[42] As Muller points out:

> The Union government of South Africa further developed the British institution of segregation through the enactment of a plethora of racist laws that suppressed

[40] Timothy S. Phakathi, 'Worker Agency in Colonial, Apartheid and Post- Apartheid Gold Mining Workplace Regimes' (2012) 39 132 *Review of African Political Economy* at 282.
[41] Colin Bundy 'Land, Law and Power: Forced Removals in Historical Context'. Murray, Christina and O'Regan, Catherine (eds.) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) at 5.
[42] A. J. Christopher 'From Flint to Soweto: Reflections on the Colonial Origins of the Apartheid City' (1983) 15 2 *Area* 145-149.

> and exploited black people with greater vigour than any other government that had preceded it.[43]

These 'racist laws' enacted during the Union years also fundamentally shaped both the urban and rural land tenure system in favour of the white population.

The Natives Land Act 27 of 1913 was crafted with the objective of legislating land ownership patterns in South Africa. As outlined in its preamble, the Natives Land Act sought: 'To make further provision as to the purchase and leasing of land by Natives and other Persons in the several parts of the Union and for other purposes in connection with the ownership and occupation of Land by Natives and other Persons'. In section 1(1)(a-b) the Act further outlined the following:

> 1.(1) From and after the commencement of this Act, land outside the scheduled native areas shall […] be subjected to the following provisions, that is to say:
>
> (a) native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude thereover: and
> (b) a person other than a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a native of any such land or of any right thereto, interest therein, or service thereover.

Section 2 of the Natives Land Act also mandated that a commission be set up to enquire and report on 'what areas should be set apart as areas within which natives shall not be permitted to acquire or hire land or interests in land'. The commission was also to decide on the 'areas within which persons other than natives shall not be permitted to acquire or hire land or interests in land'[44]. The Act therefore set a solid legislative foundation that not only fractured the South African society along racial lines, but also dictated the socio-spatial and economic architecture that was to define South Africa cities, and regions for centuries to come. The Act's reach and impact therefore 'raises important questions about the relationship between

[43] Gustav Muller 'The Legal-Historical Context of Urban Forced Evictions in South Africa' (2013) 19 2 *Fundamina* at 370.
[44] Section 2(a-b).

law and social process, and the extent to which legislation causes or reflects social change'.[45] As Beinart and Delius recently observed, Natives Land Act was an example of 'the segregationist and racist legislation that fixed discriminatory foundations in South African law'.[46]

Whereas land dispossession had already taken place between the 17th and 19th century in South Africa, the Natives Land Act recognised and entrenched racially skewed land ownership patterns.[47] It recommended that only 7 to 8 percent of the Union of South Africa's land be set aside as African reserves, and this number was increased to 11.7 percent in 1936. One of the most detrimental effects of the Act is that it restricted Africans from buying or leasing land outside reserves from people who were not Africans. This marked the beginning of the legislation of racial zoning – a process that was to be crystallised in the late 1940s, with the advent of apartheid.

Life in African reserves created as a result of the implementation of the Natives Land Act, was 'hellish'.[48] Most of the land that constituted the African reserves was arid and not suitable for neither cropping nor human habitation. Thompson observes that as the population of Africans in reserves grew:

> […] streams and waterholes were drying up, and soil erosion was spreading. In the years that followed, the African reserves continued to deteriorate. The state network of railways and roads served the white farmers but neglected the reserves, and the government provided massive assistance to white farmers but scarcely any to Africans.[49]

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[45] William Beinart and Peter Delius 'The Historical Context and Legacy of the Natives Land Act of 1913' 2014 40 4 *Journal of Southern African Studies* at 668.
[46]Ibid at 667.
[47] Ibid at 669.
[48] On the 'hellish existence' brought forth by coloniality, see Nelson Maldonado-Torres 'On the Coloniality of Being: Contributions to the Development of a Concept' (2007) 21 2-3 *Cultural Studies* at 255.
[49] Thompson op. cit. note 27 at 164.

In many ways, the Natives Land Act created conditions for the creation of 'two separate legal zones, one coinciding with the […] bantustans, the other with the 87 percent of the country that the Land Acts set aside for white ownership'.[50]

The legacy and implications of these two distinctive legal zones remain apparent to this day. Reflecting on the Natives Land Act of 1913, as well as other plethora of other discriminatory legislation that followed, Claassens observes that:

> The highly exploitative and functional articulation between the maintenance of white wealth at the centre and black poverty in the bantustans was naturalised by a rhetoric of customary identity that reinforced dichotomies between modern and traditional, advanced and backward, civilised and savage. Neither pole reflected a 'natural' state of affairs; both depended on the brutal enforcement of a range of discriminatory laws, at the centre of which were the Land Acts.[51]

The socio-spatial and economic difficulties that defined the reserves had a direct impact on the morphology of nascent colonial South African cities. This is primarily because the Natives Land Act played a pivotal role in manufacturing land scarcity and/or crisis for Africans, who found themselves crowded in reserves and thus forced to move to cities that were 'white men's creation' and thus not designed for black habitation – at least not permanently.[52]

Apart from the Natives Land Act, there also existed early legislation that were presented as anti-slum and anti-crowding planning instruments. These included the Public Health Act 36 of 1919, and the Public Housing Act 35 of 1920. The Public Health Act for instance outlined various mechanisms on how local authorities were to deal with the prevention and suppression of communicable diseases in emerging colonial industrial cities.[53]

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[50] Aninka Claassens, 'Denying Ownership and Equal Citizenship: Continuities in the State's Use of Law and 'Custom', 1913–2013' (2014) 40 4 *Journal of Southern African Studies* at 761.
[51] Ibid at 765.
[52] Alan Mabin and Dan Smit 'Reconstructing South Africa's Cities? The Making of Urban Planning 1900-2000' (1997) 12 2 *Planning Perspectives* at 194.
[53] See specifically Chapters II – VI of the Public Health Act.

The Public Health Act also comprised of town planning principles that sought to prevent the proliferation of slums and other related socio-spatial, and political 'nuisances' related to slum-dwellings. The Act for instance 'deemed to be nuisances […] Any dwellings or premises which is or are of such construction or in such a state or so situated or so dirty or so verminous as to be injurious or dangerous to health or which is or are liable to favour the spread of any infectious disease'.[54] It further gave local authorities, the power to do 'the inspection of land, dwellings, public buildings, factories and trade premises, and for securing the keeping of the same clean and free from nuisance and so as not to endanger the health of the inmates or public health'.[55] This was an attempt to not only avoid the spread of diseases, but also to prevent overcrowding.

The Public Health Act's objectives of maintaining hygienic urban spaces, while seemingly rational from a town planning perspective were influenced by the colonial thinking of the time, that racialised diseases. Maylam observes how this Act contributed to 'sanitation syndrome' discourse, as it 'increasingly viewed disease in racial terms and promoted segregation as one solution to urban health problems - problems that were perceived to arise out of the overcrowded and insanitary living conditions of urban Africans'.[56] Parnell highlights how 'in the first half of the 20th century, both health and housing legislation were used to secure the racial division of urban space because regulations on African urban settlement were incomplete, ineffective and ignored'.[57]

Moreover, some urban historians observe that the Public Health Act, as well as the Public Housing Acts played an instrumental role in tackling the looming social, economic and political challenges posed by the growing white working as well as poor class. Through the use of these Acts, the state was able to clear slums in emerging industrial cities, establishing in their place white residential areas

[54] Section 122(a).
[55] Section 132(a-b).
[56] Maylam, op. cit. note 1 at 27.
[57] Susan Parnell 'Creating Racial Privilege: The Origins of South African Public Health and Town Planning Legislation' 1993 3 *Journal of Southern African Studies* at 471.

where standards of living were ‘respectable’.[58] Also as part of creating white privilege in the 1920s, the nascent white state used the Public Health Act and the Housing Act to provide welfare programmes as well as job reservations for the growing white population. While this legislation empowered whites in early 1920s South African cities through colonial planning, and other related welfare programmes; black population groups where ‘planned out’ of these ‘white’ cities. As Parnell posits:

> [The state] responded to the challenges of urban poverty by invoking colonial legislation to contain slum development only after insanitary conditions manifested themselves among the colonial or white community. More significantly town planning regulations were only ever applied to Africans as a means of removing them from living quarters within the 'white' city. Africans were excluded from those parts of the city where effective planning was implemented, but similar controls were not applied to African locations. Segregation involved the racial division of urban residential land. It was achieved by the introduction of separate and unequal administration of white and black areas.

While the Public Health Act and the Public Housing Act were presented as ‘anti-slum legislation’, their impact was far-reaching insofar as the creation of contemporary South African cities was concerned. For one, the clearing of slums in the Union meant that on one hand, the state was able to plan for white populations, and crafting a ‘unified white identity’ that was critical for the survival of this minority group in South Africa.[59] Moreover, this legislation played a role in discouraging the formation of a multi-racial working-class consciousness that would have emerged as a result of both black and white population living together in slums. So, racial segregation through legislation was also important for the cementing of racial capitalism that was taking root in various industrial towns of South Africa.

[58] Parnell op. cit. note 57 at 471.
[59] Ibid.

The overtly racist Natives (Urban Areas) Act 21 of 1923 (Urban Areas Act) was promulgated to curb and regulate the urbanisation of Africans into towns, and cities.[60] Africans' rapid urbanisation compelled the state to provide 'native' locations (if only temporarily as per the recommendations of the Stallard Commission). As outlined in its preamble, the Act sought to achieve the following objectives:

> To provide improved conditions of residence for natives in or near urban areas and the better administration of native affairs in such areas; for the registration and better control of contracts of service with natives in certain areas and the regulation of the ingress of natives into and their residence in such areas; for the exemption of coloured persons from the operation of pass laws; for the restriction and regulation of the possession and use of kaffir beer and other intoxicating liquor by natives in certain areas and for other accidental purposes.

In achieving the aforementioned objectives, Urban Areas Act gave powers to local authorities to:

> define, set apart and lay out one or more areas of land for the occupation, residence and other reasonable requirements of natives, either as extensions of any area already set apart for that purpose or as separate areas. any land so defined and set apart is hereafter called a location.[61]

The Urban Areas Act also mandated 'every employer of more than twenty-five natives […] and any employer of natives on work of a temporary nature within the urban area to provide or hire accommodation for the natives in his employment in a location or native hostel'.[62] While at face-value this Act necessitated the housing of black people in urban areas, it played an integral role in the spatial fragmentation of South African cities, as it set the principles and guidelines for racial zoning. The Act's insistence on the extension and/or creation of locations on

[60] Muller op. cit. note 43.
[61] Section 1(1)(a)
[62] Section 1(1)(e)

the margins of the city for instance, was in line with the segregationist colonial policies of the time.

Also in line with the Natives Land Act of 1913, section 4(1) of Urban Areas Act stipulated that 'no person other than a native or a company the interest wherein is held exclusively by the natives shall enter into any agreement or transaction for the acquisition of any lot or premises situate in a native village or location'. This Act therefore deliberately prohibited the formation of racially integrated communities. Instead, it cemented the foundation for racial segregation that was to define South Africa's urban milieu for generations.

Apart from confining black people to reside and trade only in locations, native villages, and native hostels, the Act also ensured that black cheap labour was available 'for mines and industrial purposes' through the declaration of 'proclaimed areas' authorised by local authorities.[63] In establishing these proclaimed areas (i.e. locations, native villages, and native hostels), the state was also able to put stringent surveillance and control mechanisms over black lives, primarily through law, and planning.[64]

The economic consequences of the Urban Areas Act were as dire as its regulation of urbanisation, housing, and mobility of Africans in urban areas. One of the examples of the negative economic effects of this Act is its emphasis on the state's control of the brewing and selling of native beer, in a bid to raise revenue. From the outset therefore, the location of native locations in the outskirts of urban areas, and the curtailment of meaningful socio-economic development created unequal economies between these locations and the white urban areas.[65]

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[63] Section 12.

[64] Fassil Demissie 'Controlling and 'Civilising the Natives' through Architecture and Town Planning in South Africa' (2004) 10 4 *Social Identities: Journal for the Study of Race, Nation and Culture* 483-507.

[65] Alan Mabin 'Dispossession, Exploitation and Struggle: An Historical Overview of South African Urbanisation', In Smith, David M. (ed.) *The Apartheid City and Beyond: Urbanisation and Social Change in South Africa* (1992) at 12-24.

The notorious Black Administration Act 38 of 1927 also had a negative effect on South Africa's spatial form. Section 5(1)(b) of the Black Administration Act in particular granted the government to carry out forced removals of 'black tribes' from the land they occupied.[66] The Act read as follows:

> The Governor-General may whenever he deems it expedient in the general public interest, order the removal of any tribe or portion thereof or any Native from any place to any other place within the Union upon such conditions as he may determine: Provided that the case of a tribe objecting to such removal, no such order shall be given unless a resolution approving of the removal has been adopted by both Houses of Parliament.[67]

The Black Administration Act was amended several times, giving more powers to the state to forcibly remove and displace millions of black people across South Africa. The apartheid government later used this Act to justify the clearance of 'black spots' i.e. pockets of land located in areas zoned for white population groups.

Similarly, the Slums Act Clearance 53 of 1934 legislated the demolition of Black neighbourhoods, particularly those located in inner cities, regarded as overcrowded and insanitary. This Act saw the forced removals of Africans and coloured populations to create space for white working-class housing schemes, at the same time making prime land available for white business interests.

The Natives Laws Amendment Act 46 of 1937 on the other hand, prohibited black people from buying land from whites, except when permitted by the state. Also in line with the Urban Areas Act of 1923, and the Slum Clearance Act of 1934, the Natives Laws Amendment Act was aimed at regulating the urbanisation of black people. This meant that 'surplus' people that could not be absorbed by the existing job market were expelled from the cities, to the native reserves.

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[66] G. Marcus 'Section 5 of the 1927 Black Administration Act', In Christina Murray and Catherine O'Regan (eds.) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) at 18.
[67] Ibid at 18.

The primary objective of the aforementioned legislation was to create racially segregated white residential areas that could both attract and retain European migrants that had a growing economic, and political interest in South Africa. This process of creating early white cities meant that jobs had to be reserved for poor whites, and multiracial slums cleared for the establishment of respectable white neighbourhoods. The Union had to prioritise the poor whites issue, as a way of curtailing a multi-racial working class/poor political consciousness. Such a unity would have threatened not only the unity of white people within a fragile Union – it could have resulted in the breakdown of the very foundations of racial capitalism; an economic system heavily depended on cheap, exploitative labour, as well as racially segregated socio-spatial and political ordering.[68] The law, as well as planning was instrumental in creating this racially stratified socio-spatial, and economic system:

> Military might was used to dispossess Africans of their land and then the law was used to give the acquisition a cosmetic legitimation. Those who lost their land, however, were not protected by the same law for it was designed to look after the interests of the winners and not the losers. Indeed, the law was used insistently and constantly to inflict fear and compliance into the losers. Once the Africans had lost their land, their movements were controlled by a pass system to ensure that they did not trespass where they once lived. To avoid trespass they had to work. If they managed to avoid those pressures then they were taxed in cash which often could only be obtained from wage employment. Once Africans were forced into wage employment, laws were passed to make it illegal for them to break their contracts and to leave work before they had completed their set tasks.[69]

The creation of early white cities therefore, resulted in the planning out of black population groups that where viewed as sojourners in these white cities. This planning out of black people meant that colonial city planning legislation and practices were loosely and/or never applied in black locations. This resulted in the

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[68] Lis Lange *White, Poor and Angry: White Working Class Families in Johannesburg* (2003).
[69] Victor Leonard Allen *The History of Black Mineworkers in South Africa* Volume 1 (2005) at 192.

emergence of racially bifurcated, and unevenly developed colonial cities. Whereas the local administrators and planners applied town planning principles in the creation of white neighbourhoods, the black townships were barely planned for, and basic urban infrastructure and services were scantily provided. From the outset therefore, South African colonial cities were envisaged as racial cities. This resulted in the entrenching of socio-spatial and economic injustices. So, while the white residences and areas of work and play assumed and/or aspired towards European city development and planning, while black areas morphed into dormitory zones for housing cheap labour.[70]

3.3.3 The Early Apartheid Years – 1948-1978

The ascendency of the apartheid regime in 1948 and the subsequent consolidation of Afrikaner nationalism, resulted in the intensification of colonial racial segregation. Throughout the apartheid era, a plethora of racial laws with a divisive spatial effect where promulgated and implemented with varying degrees of success.[71] In fact, the main objectives of the apartheid laws were to cement racial segregation as was envisioned in the National Party's manifesto, that read as follows:

> Aware of the problems connected with the influx of Bantu into the urban areas the National Party pledges itself to safeguard the European character of the urban centres and to provide strong and effective measures to ensure personal safety and the protection of property in a peaceful way of life. Separate residential areas will be allotted to the Bantu in urban areas and congestion and slums will be prevented. The Bantu in the urban areas should be regarded as migratory citizens not entitled to political or social rights equal to those of the Whites.[72]

[70] Parnell op. cit. note 57.

[71] A number of natives related colonial laws were amended under the Natives Laws Amendment Act 54 of 1952 to give effect to the National Party's ideology of racial segregation. These included the Native Labour Regulation Act 15 of 1911, the Natives Land Act of 1913, the Native Administration Act of 38 of 1927, and the Natives (Urban Areas) Consolidation Act of 1945.

[72] National Party *Apartheid: The NP's 1947 Manifesto* (1947).

The Group Areas Act 41 of 1950 in particular had 'more far-reaching effects than any previous legislation on racial segregation'.[73] The objective of the Act was to establish 'group areas' for the exclusive occupation all of South Africa's races. The Group Areas Act therefore expressed that people in South Africa be categorised as white, coloured, Indians, and natives. The white group for instance was one 'in which shall be included any person who in appearance, obviously is, or who is generally accepted as a white person, other than a person who although in appearance obviously a white person, is generally accepted as a coloured person'.[74]

The Group Areas Act also mandated the Governor-General to 'declare' specific areas for specific groups as defined in section 2(1)(a-c). This meant that certain residential, business, and entertainment areas were to be set aside for specific groups. This involved the reshuffling of people as they were relegated to their group areas. As group areas were racially defined, the racial hierarchisation that characterised the colonial cities meant that the provision of social amenities, as well as economic opportunities was to be unequal, with white groups being favoured.[75] As Lemon and Williams observed:

> Such disparities are an almost inevitable consequence of the nature and evolution of South African urban society. The concept of towns as essentially created by and for Whites has not encouraged the provision of services for other groups.[76]

The principle of race-zoning that underpinned the Group Areas Act and other related legislation denied the forging of a shared South African identity.[77] Reflecting on the effects of racial zoning in South Africa, Lemon avers that while the housing conditions and segregation prompted by the Group Areas Act and other related pieces of legislation can be quantified; the 'human damage inflicted

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[73] Anthony Lemon and Owen Williams *Apartheid: A Geography of Separation* (1976) at 72.
[74] Section 2(1)(a).
[75] Lemon and Williams op. cit. note 73 at 80.
[76] Lemon and Williams op. cit. note 73 at 80.
[77] Ivor Chipkin *Do South Africans Exist? Nationalism, Democracy and the Identity of 'the People'* (2007).

by race zoning is immeasurable'.[78] The Group Areas therefore was one of the laws that consolidated the segregationist legislation that existed in urban South Africa from the late 19th century.

The Prevention of Illegal Squatting Act 52 of 1951 formed part of 'a co-ordinated legislative framework'[79] aimed at stemming the urbanisation (or influx) of black people to white urban areas. The Act therefore strived to ensure that no person shall:

> (a) enter upon or into without lawful reason, or remain on or in any land or building without the permission of the owner or the lawful occupier of such land or building whether such land is enclosed or not;
> (b) enter upon or into without lawful reason, or remain on or in any native location, native village or other areas set aside or demarcated under the laws relating to the administration of native affairs, without the permission of the local authority or person having due and legal control of such native location, village or area, whether such location, village or area is enclosed or not.[80]

As part of enforcing its implementation, punitive mechanisms were included in Prevention of Illegal Squatting Act for those persons that contravened its racial segregatory objectives.[81]

The Reservation of Separate Amenities Act 49 of 1953 on the other hand, cemented the 'group areas thinking' through its objective of providing 'for the reservation of pubic premises and vehicles or portions thereof for the exclusive use of persons of a particular race or class'.[82] The Act specified that public premises included 'any land, enclosure, building, structure, hall, room, office or

[78] Lemon op. cit. note 27 at 11.
[79] Muller op. cit. note 43. Muller also outlines that this restrictive coordinated framework of laws also included the Black Laws Amendment Act (No. 54) of 1952, that amended section 10 of the Black (Urban Areas) Consolidation Act that restricted the presence of black people in urban areas.
[80] Section 1(a-b).
[81] Section 2.
[82] Reservation of Separate Amenities Act, Preamble.

convenience to which the public has access, whether on the payment of an admission fee or not but does not include a public road or street'.[83] This meant that any person of any racially group who did not comply with these 'micro-apartheids' was guilty of an offence, and therefore liable to a specified fine and/or imprisonment. The brutal application of the Reservation of Separate Amenities Act and all related divisive legislation was not only especially demeaning for black people, it also profoundly alienated residents of different racial groups, in the process limiting possibilities of the creation of a shared South African identity.

There also existed during apartheid district-specific laws that were passed at national level, nobly the Natives Resettlement Act 19 of 1954. This Act sought to 'provide for the removal of natives from any area in the magisterial district of Johannesburg or any adjoining magisterial district and their settlement elsewhere'. Under this Act, the Natives Resettlement Board (the board) was empowered to relocate natives, as and when deemed appropriate by the state. According to this Act:

> The board may, by notice in writing addressed or delivered to any native residing in a specific area, or posted up at or near the main entrance to the premises occupied by him, require that native to vacate the premises in which he resides, together with the members of his household, and to remove all property belonging to him or any member of his household from those premises […].[84]

While the Natives Resettlement Act was promulgated specifically for Johannesburg, its objectives reflected the dominant separatist logic of apartheid and its brutal effects on South Africa's socio-spatial, and economic milieu.

The housing of Black people during the apartheid era was not so much about creating sustainable human settlement as was the case in 'white' cities. Black townships were in fact created as dormitories for housing cheap labour.

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[83] Ibid Section 1.

[84] Section 25. The effects of this Act on Johannesburg will be discussed in the following chapter.

Black housing was also about the surveillance and control of natives, as it was also about monitoring their movement, through pass laws. As Demissie avers:

> As a particular architectural discourse, 'native housing' and 'township' were not just simply an architectural drawing or a plan, which described the configuration of a building or a neighbourhood. Rather it was part of a web of practice embedded within the evolving apartheid spatial strategy to control the social and geographic mobility of African workers and their families.[85]

The apartheid state also established a highly effective bureaucratic machinery whose primary purpose was to realise the implementation of racial laws, and regulations. As part of the racial segregation-oriented legal framework, the apartheid state crafted the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters of 1968. These regulations only applied in Bantu residential areas and were aimed at controlling the urbanisation and settlement of black people in urban areas.[86] The regulations further limited the spatial and socio-economic mobility of black people.[87]

3.3.4 Apartheid's Dying Years – 1978-1993

Despite the effort by the apartheid state to create an effectively segregated South African society, there existed a number of social, economic and political forces that pointed to the imminent demise of the apartheid regime. From an economic perspective, the isolation of apartheid South from the rest of the world posed a threat for existing economic industries that needed to expand their markets. At a social level, the policy of separate development predicated on the regulation of African urbanisation into white cities, had been largely successful. Despite the regulation of their movement, Africans lived legally or illegally in urban areas sometimes 'in numbers which exceeded that of the white population'. Moreover, the costs of maintaining racially segregated facilities, as well as costs associated

[85] Demissie op. cit. note 64 at 483.
[86] Chapter 1. Section 2(1).
[87] Chapter 2.

with forced removals, all began to take a toll on the apartheid economy from the late 1970s onwards.[88]

Apart from the fact most white and black people in South Africa were fatigued by the 'absurdity of social engineering on racial lines, laced with the manifest tragedy of apartheid'[89] they faced every day, townships such as Soweto were becoming more 'ungovernable' from 1976 onwards, posing a threat to the apartheid regime.[90] The political consciousness in black townships in the mid-1970s was also bolstered by the emergence of various anti-colonial struggles across the African continent. Moreover, the pressing economic hardships resulting from poor wages, deteriorating social conditions in townships, as well as the burden of influx control and other related legislation that curtailed mobility, all contributed to the imminent demise of apartheid. The idea of creating self-sustained homelands/Bantustans had also failed, given the lack of political legitimacy of these reservoirs of cheap black labour, as well as their lack of meaningful economic base. All these factors resulted in the National Party experimenting with various legislative and policy reforms as part of its 'last stand'.[91]

From 1978 onwards, the apartheid state devised a 'programmatic reform strategy' that formed part of a broader Total National Strategy.[92] At the centre of the reform strategy was an attempt at reforming the subordinate socio-economic status of black people in the country. Part of these reforms included the recommendations from various commissions that: black people's permanent status in white South Africa be recognised; the recommendations from various commissions that black trade unions be granted full recognition; the job reservations policy be phased out and; the maintenance of segregated facilities be waived.[93] These recommendations were well-captured in the Twelve-Point Plan,

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[88] Chris Alden Apartheid's Last Stand: The Rise and Fall of the South African Security State (1996) at 20-21.
[89] Ibid at 21.
[90] William Sales 'A Black Scholar Interview: Making South Africa Ungovernable ANC Strategy for the '80s'' 1984 15 6 *The Black Scholar* 2-14.
[91] Alden op. cit. note 88.
[92] Alden op. cit. note 88 at 51.
[93] Alden op. cit. note 88 at 54-55.

that formed the blue-print for the reform of apartheid from 1979 to 1986. Some of the points outlined in the blue-print of apartheid reform include:

1. Recognition and acceptance of the existence of multi-nationalism and of minorities in the Republic of South Africa.
2. The acceptance of vertical differentiation with built-in principle of self-determination at as many levels as possible.
3. The establishment of constitutional structures by the Black peoples to make possible the highest degree of self-government for them in States that have been consolidated as far as is practicable.
4. The division of powers amongst South African whites. The South African Coloureds and the South African Indians, with a system of consultation and co-responsibility so far as common interests are concerned.
5. Acceptance of the principle that where at all possible each population group should have its own schools and live in its own community as a fundamental requirement for social contentment … The preparedness to consult as equals on matters of common interest with a sound balance between the rights of the individual and those of the community.
6. The removal of hurtful, unnecessary discriminatory measures.
7. The recognition of economic interdependence and the properly planned utilisation of our manpower.[94]

While the remaining five points deal with apartheid South Africa's foreign policy, the points listed above area the basis of the domestic reform efforts as proposed by the apartheid state in 1978. Instead of progressively reforming the state, the Twelve-Point Plan sought to cement the existing socio-spatial, economic and political setup, while also trying to appease the black majority by promising minor reforms in urban policy, as set out in points six and seven. The Twelve-Point Plan therefore was a betrayal of the shift in the political project of segregation. Faced with the inevitability of multi-racialism, and the imminent demise of apartheid, the apartheid state attempted to shift its governance strategy toward a 'separate but equal' approach.

[94] Alden op. cit. note 88 at 80-81.

Following these reform-oriented points, the state repealed a number of laws. In 1986, it repealed the Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 (i.e. pass laws that compelled all Africans above the age of sixteen years to carry 'reference books' or passbooks). The Prohibition of Mixed Marriages Act 55 of 1949 was repealed in 1986; the Separate Amenities Act 49 of 1953, repealed in 1990; the Bantu Education Act 47 of 1953, repealed in 1991; the Group Areas Act repealed in 1991; and the Bantu Homelands Citizenship Act 26 of 1970 (that regarded all Africans as citizens of homelands, and thus 'aliens' in South Africa) repealed in 1994.[95]

Apart from repealing some of its laws, the apartheid state passed other reform-oriented legislation that guided the governing of black township properties. These include the Black Communities Development Act 4 of 1984; the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (Conversion Act) and; the Upgrading of Land Tenure Act 112 of 1991. The Black Communities Act's aim of 'promoting the viability, development and autonomy of black communities'[96] for instance attest to the continued logic of apartheid, where black communities' development was viewed as being separate from that of white cities. Similarly, the conversion of certain rights that black people had in townships into leaseholds as per the Conversion Act, served to legitimate the dormitory status and economic backwardness of townships.

Instead of marking a break with the past, the Twelve-Point Plan as well as the subsequent repealing of some laws, and the introduction of softer reform policies on black urbanization, were all an attempt by the apartheid state to dig-in and maintain the socio-spatial and economic status quo. The efforts to improve black townships and to develop them economically while giving black people rights there, was aimed at cementing the apartheid space economy. There was a cynical and racially charged assumption that providing slightly expanding social and economic rights for black people would make them stay in townships, never to

[95] Baruch Hirson *Apartheid Laws & Regulations: Introduced and Rescinded: A Shot Summary* (1995).
[96] Chapter 4(a-d).

venture in white neighbourhoods. These reforms did not succeed to turn the democratisation tide that was sweeping through South Africa and the rest of the African continent.

Following the repealing of apartheid laws in the 1980s, South African cities witnessed rapid urbanisation, with Black people from within and outside South Africa's borders moving into former white neighbourhoods. In this momentary 'Gramscian interregnum' period when apartheid laws were suspended, and new democratic laws were yet to be enacted, the urbanisation of poverty into former white neighbourhoods, particularly inner-city areas and their surrounds, led to the emergence of various sociospatial processes. For one, the suspension of law opened up city spaces to new interpretations and uses of urban spaces. Pavement areas became spaces of informal trading, abandoned buildings were hijacked by slumlords, and populated mostly by poor migrants who in search of new opportunities in the city. It was also in the late 1980s that cities such as Johannesburg experienced capital flight, resulting in the decay and debilitation of the inner-city. In this epoch, most South African cities also saw unprecedented sprawl, with white capital and residents decentralising away from decaying inner-cities.[97]

Despite these social issues and their spatial consequences, the demise of apartheid marked the beginning of a new era for South Africa. As law and planning had created a racial lawscape, these instruments were to be used to redeem racial cities by transforming into inclusive urban spaces characterised by human rights for all, and spatial justice. Indeed, as the spectre of apartheid was losing grip, there existed instances where law and litigation were beginning to play an integral role in resisting the racial lawscape.[98]

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[97] Pieterse Rights-based Litigation (2017) at 11; Also see Martin J. Murray *City of Extremes: The Spatial Politics of Johannesburg* (2011).

[98] See for instance *Dadoo v Krugersdorp Municipality* 1920 AD 530 and *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A).

3.4 REFLECTIONS

This chapter outlined the processes underpinning the making of colonial/apartheid lawscape. Using South Africa as case study, it became apparent that the colonial logic of city-making was deeply steeped in and informed by racial difference. While the colonial state's project of racial segregation was loosely administered between the 17th and the late 19th century, it became more elaborate from the 20the century onwards with the promulgation of racially determined segregationist laws. Unlike the sanitation syndrome and the subsequent forced removals that were used to justify racial segregation in the name of hygiene and town planning, the mid-1920 urban South Africa saw the establishment of a solid legislative framework designed to spatially segregate towns and cities.

The colonial project of racial segregation through law and planning was further bolstered by the ascendency of the National Party in 1948. While the apartheid regime did not initiate racial zoning, it amplified it by creating a range of legislation and planning policies geared towards racial segregation. The colonial/apartheid lawscape therefore, created geographies of inequalities in urban South Africa. These geographies were marked by uneven development, with law and planning used to realise racially-determined objectives of creating a white privileged class, and a sea of cheap black labour to work in white-owned industries, and homes. Thus, during the apartheid era:

> The network of laws became so complex that it was virtually impossible for Africans to avoid breaking them. As [Africans] proceeded through the various stages of the labour market they stepped from one state of illegality to another. Living outside the law became a way of everyday life thus paradoxically weakening the effectiveness of the law as an instrument of social control. The authorities, in effect, criminalised the whole of the African population and created in the minds of white people an equation between blacks and law-breaking which has persisted throughout the twentieth century. The belief that all Africans are potential criminals

was built into the dominant South African ideology. Whites even believed it without even working out its logistics.[99]

As the apartheid state was trying to reform itself, the entrenched segregationist lawscape and the apartheid political leadership's determination to maintain the racially skewed status quo, saw the cementing of colonial/apartheid spatial arrangements. In other words, the reforms of the 1980s were geared towards coercing black people to accept the racially designed colonial/apartheid townships as their 'natural' spaces of habitation. The 'separate but equal' approach to development that the Pretoria administration was proposing through its Twelve-Point-Plan therefore marked the last effort by the apartheid regime to hold on to power.

[99] Victor Leonard Allen *The History of Black Mineworkers in South Africa* Volume 1 (2005) at 192.

CHAPTER 4: THE MAKING OF COLONIAL/APARTHEID JOHANNESBURG

> [R]ace directly gave rise to the space Johannesburg would become, its peculiarities, contours, and form. Space became both a social and a racial relationship, one that was additionally inherent to the notion of property.[1]

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4.1 INTRODUCTION: A RACIAL CITY IMAGINED

This chapter outlines some of the effects that colonial/apartheid laws, and spatial planning practices had on the making of Johannesburg. It is presented in this chapter that colonial/apartheid Johannesburg's lawscape has radically shaped a complex interaction between race, and space, resulting in the racialisation and spatialisation of difference. As this nascent city was taking shape in the late 19th century, its early foundations were predicated, in the main, on racial capitalism. This meant that Johannesburg's socio-spatial, economic, and political milieu was to be informed by the dictates of capitalism and its reliance on racial segregation, and the re/production of radical difference.

The law/planning/race interface in the making of Johannesburg was not without its complexities and contradictions. The discovery of gold fields in the Witwatersrand region (the Rand), marked the beginning of racial capitalism in South Africa. This was a racialised economic system that was dependent on the exploitation of cheap African labour to work in the mines and industries. Ironically, however, the segregationist ideas of the time attempted to spatially separate that source of cheap labour (i.e. Blacks) and their townships from the mines and factories where their labour was needed.[2] This was perpetuated by the Stallardist myth that 'Africans in particular were perceived to be temporary sojourners' in

[1] Achille Mbembe 'Aesthetics of Superfluity' (2004) 16 3 *Public Culture* at 380.
[2] Anthony Lemon (ed.) *Homes Apart: South Africa's Segregated Cities* (1991).

colonial/apartheid Johannesburg. It is in these socio-economic and spatial complexities and paradoxes that Johannesburg's socio-spatial order was forged. As Maylan aptly posits:

> Much of state urban policy in [Johannesburg had] been directed towards attaining the unattainable: the securing of labour-power without labourers. Out of this fundamental contradiction has arisen many further contradictions, conflicts and struggles.[3]

Against this backdrop, it is presented in this chapter that there were at least three socio-spatial and economic forces that had a bearing on the making of Johannesburg as a 'racial city'.[4] These include the emergence of a racial capitalism with the discovery of gold in the Witwatersrand, and the subsequent industrial revolution that shaped Johannesburg's urban form, as well as socio-spatial relations between (and within) disparate racial groups; the colonial/apartheid state's obsession with the 'poor whites question', as well as the 'native question' that resulted in the intensification of residential segregation and; the use of racialised legal and spatial planning instruments, i.e. legislated racial zoning as instruments for socio-spatial engineering and urban governance.[5] Moreover, it is also presented that the disciplines and practices of law and urban planning were 'captured' by the colonial and apartheid governments to serve and/or realise the objectives of racial segregation. [6]

An examination of the unfolding of the Johannesburg lawscape from the late 19th century to the present also allows for the foregrounding of discussions on issues of identity-formation as well as access to socio-economic rights in South African cities. Put differently, the pervasive nature of lawscape in colonial/apartheid

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[3] Paul Maylan 'The Rise and Decline of Urban Apartheid in South Africa' (1990) 89 354 *African Affairs* at 57.

[4] Mbembe op. cit. note 1 at 380.

[5] Lis Lange *White, Poor and Angry: White Working Class Families in Johannesburg* (2003).

[6] Nancy Leong 'Racial Capitalism' (2013) 123 8 *Harvard Law Review* 2151-2226; Alan Mabin and Dan Smit 'Reconstructing South Africa's Cities? The Making of Urban Planning 1900-2000' (1997) 12 2 *Planning Perspectives* 193-223.

Johannesburg simultaneously produced and shaped everyday social, economic and political interactions within and between different population groups.

4.2 LAW, RACIAL CAPITALISM & THE MAKING OF JOHANNESBURG

A reflection on Johannesburg's history points to the dominance of the gold mining industry, the subsequent emergence of racial capitalism and its effect on the city's socio-spatial order. 'Racial capitalism [is] the process of deriving social and economic value from the racial identity of another person'.[7] From its proclamation as a mining town in 1886, Johannesburg experimented with divergent legislation and development that had a bearing on race relations, labour relations and other related factors inherent in an emergent capitalist system.[8]

From the outset, the application of loose and yet detrimental forms of racial segregation in the mines had a major influence on the spatial configuration of Johannesburg.[9] Innes notes that the discovery and extraction of gold in Johannesburg was spatially 'formative' as it resulted in the establishment of 'capitalist relations of production which were to be the basis of subsequent growth in the industry itself, but also in conditioning the form of evolution of wider social relations in the country'.[10]

The capitalist relations of production in early Johannesburg were predicated on the emphasis on racial differentiation. This meant that black and white mine workers were treated differently, with the latter enjoying preferential treatment through the employment of 'civilised labour' policies.[11] Black mine workers on the other hand were subjected to various forms of social injustices, including working for longer hours for lower wages. Commenting on the wage disparities between

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[7] Leong op. cit. note 6 above at 2153.

[8] Keith S.O. Beavon *The Making and Shaping of the City* (2004); Rand Pioneers Incorporated *Seventh Annual Report, 1908-1909* (Johannesburg; 1909).

[9] Martin Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001); Maylam, Paul 'The Rise and Decline of Urban Apartheid in South Africa'. (1990) 89 354 *African Affairs* 57-84.

[10] Duncan Innes *Anglo American and the Rise of Modern South Africa* (1984) at 69.

[11] Muriel Horrell, *Legal and Race Relations: A Summary of the Main South African Laws Which Affect Race Relationships* (1971).

black and white workers in the early 20th century Johannesburg, Mkhize asserts that:

> Most [African mine workers] were proletarianised by the wage labour system and the appalling living conditions and working conditions on the Witwatersrand. Despite the fact that the number of Africans living in the area was estimated to have increased from 55,765 in 1904 to 115,120 in 1921, their wages in the 1920s – an average of two shillings per shift – had remained virtually constant for a decade … In contrast to Africans, white mine workers earned an average of 20 shillings per shift.[12]

These wage disparities therefore attest to the manner in which the colour-line[13] was entrenched in Johannesburg mines. While the mine owners were boasting 'a weekly output of £750 000 worth of raw gold'[14] from Johannesburg alone, both white and black mine workers were developing lung diseases such as phthisis and pneumonia. So, the form of capitalism that emerged in late 19th century Johannesburg was both class, and race-based.[15] This is evinced by the introduction of implementation of laws aimed at reinforcing the colour-bar in mines. The Mines and Works Act of 1911 for instance excluded black people from 'the supervision and operation of all boilers, engines and machinery as well as being refused certificates of competency for the jobs of engine drivers, underground engine drivers and miners'.[16]

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[12] Khwezi Mkhize 'Fables of Death: Law, Race and Representations of the African Mine Workers in Umteteleli Wa Bantu in the 1920s' (2010) 22 2 *Current Writing: Text and reception in Southern Africa* at 23.

[13] Elaine N. Katz 'Revisiting the Origins of the Industrial Colour Bar in the Witwatersrand Gold Mining Industry, 1891-1899' (2010) 25 1 *Journal of Southern African Studies* 73-97; Tshidiso Maloka ''White Death' and African Disease: Silicosis on the Witwatersrand Gold Mines' (2009) 34 1 *South African Historical Journal* 249-254.

[14] Sol T. Plaatjie (1982 [1916], cited in Khwezi Mkhize 'Fables of Death: Law, Race and Representations of the African Mine Workers in Umteteleli Wa Bantu in the 1920s' (2010) 22 2 *Current Writing: Text and reception in Southern Africa* at 19.

[15] Lange op. cit. note 5.

[16] Mkhize op. cit. note 12 at 23.

The African mine worker of the late 19th century Johannesburg therefore cast a precarious figure whose abject disenfranchisement and limited rights to citizenship, attest to the complicity of law and planning in the realisation of segregationist ideologies of the time.[17] While the law provided a structure of coercion for African mine workers, the planning technique of racial zoning saw the realisation of segregated residential areas, with black mine workers packed and crowded in single-sex barracks and/or compounds.[18]

It was also in the gold mines of the Witwatersrand that the system of single-sex compounds (introduced earlier in Kimberly) was refined.[19] The living conditions in the African compounds were appalling and dehumanising. Some urban historians credit the prevalence of the migrant labour system and the subsequent fracturing of the African family structure to the introduction of single-sex compounds. For this system compelled mostly young African men to leave their families in the reserves for long periods of time, thus straining the African familial and social fabric.[20]

African mine workers' lives in hostels were also regulated by a plethora of legislation.[21] As discussed in the previous chapter, the Native Labour Regulation Act of 1911 laid down the conditions for the recruitment of African labour and the provision of minimum accommodation, while also seeking to protect employers (including those in the mines) 'against breach of contract by Africans, which was made a criminal offence'.[22] As such, the Act saw the appointment of Native Labour

[17] Tshidiso Maloka ''White Death' and African Disease: Silicosis on the Witwatersrand Gold Mines' (2009) 34 1 *South African Historical Journal* 249-254.
[18] Hugh Macmillan 'Mining, Housing and Welfare in South Africa and Zambia: An Historical Perspective' (2012) 30 4 *Journal of Contemporary African Studies* 539-550.
[19] Paul Maylan 'The Rise and Decline of Urban Apartheid in South Africa' (1990) 89 354 *African Affairs* at 57.
[20] Alan Morris 'Race Relations and Racism in a Racially Diverse Inner-City Neighbourhood: A Case Study of Hillbrow, Johannesburg' (1999) 4 *Journal of Southern African Studies* 667-694.
[21] Leonard Thompson *A History of South Africa* (2014).
[22] Horrell op. cit. note 11 at 7.

Inspectors whose responsibilities included the policing of African mine workers in Johannesburg.[23]

Thus, the mining industry as well as other related sectors such as manufacturing, necessitated the emergence of racial capitalism in colonial Johannesburg, and South Africa at large. Where racial capitalism thrived as was the case in Johannesburg from the 20th century onwards, law and planning structured everyday relations between capital and labour. Moreover, '[th]e mining industry was a key driver in the increasing levels of urban segregation, and provided the template for the socio-spatial engineering'.[24]

4.2.1 Law & Planning in Colonial Johannesburg 1886-1947

The emergence of Johannesburg as a mining town in 1886 was complex. Between 1886 and 1899 Johannesburg was controlled by three different administrations whose vision of this nascent town was yet to be fully imagined and realised. Moreover, the outbreak of the South African War between 1899-1902 interrupted the administrative trajectory of the town. When Johannesburg's first town council was installed in 1901, there existed various administrative, financial and socio-economic challenges that were to fundamentally shape the future of this town. For one, the development of the city's administrative capacity, as well as the urban infrastructure, was slow. These challenges were compounded by the 'dire financial straits' that the town faced as a result of the unpredictability of the mining sector. As these challenges were unfolding, early Johannesburg was experiencing a relatively high population growth, with people coming from various parts of the country and the world to partake in the gold-rush.[25]

Johannesburg's rapidly expanding population resulted in the shortage of affordable accommodation, particularly for poor white and black workers. Consequently, in the 1890s, the town was characterised by 'insanitary areas, slum

[23] Mkhize op. cit. note 12.
[24] Philip Harrison and Tanya Zack 'The Power of Mining: The Fall of Gold and Rise of Johannesburg' (2012) 30 4 *Journal of Contemporary African Studies* at 559.
[25] Lange op. cit. note 5 at 39.

conditions and a lack of appropriate accommodation' inhabited by workers of all races.[26] As most of these workers were employed in the mines located in city, they were compelled to reside in areas adjacent to work. As such various working-class neighbourhoods emerged. These included Marshallstown south of the inner city, Ferreirastown on the western side of the city, Fordsburg to the west, Brickfields-Burghersdorp near Braamfontein and Vrededorp, which was a predominantly Afrikaner neighbourhood.[27] Lis Lange observes how the character of these early Johannesburg neighbourhoods were influenced by the type, and price of accommodation, proximity to work, as well as the urban amenities provided:

> Johannesburg central, which comprised the area limited by the railway line in the north, Commissioner Street in the South, the Gas Works in the west and End Street in the East, had the greatest concentration of buildings and population in the city. The mixture of residential and commercial buildings – domestic residences interspersed with shops, banks and offices – created a space were classes, races and nationalities could mix, colonial bourgeoisie with the popular classes, Boer with Briton, and whites with blacks.[28]

One of the factors that also had an influence on the socio-spatial character of Johannesburg in its formative years is land ownership patterns. The economic influence of the miner-owners allowed them to purchase and own most of the land where these new neighbourhoods were located. These land-owners engaged in land speculation practices, resulting in accommodation being expensive for poorly paid workers. The influence that the mine-owners and the Chamber of Mines had on land, as well as related taxes, limited the city council's powers to intervene in the provision of affordable housing for the poor and the working class.[29]

While most of Johannesburg's early neighbourhoods were multiracial in character, the dominance of segregationist ideologies, as well as the sanitation syndrome that had taken root in Britain and some parts of Europe in the 18th-19th

[26] Ibid at 39-40.
[27] Ibid at 50-52
[28] Ibid at 50-51
[29] Ibid at 52.

century found its way to Johannesburg through various British-born administrators, medical health officers and town planners. For these bureaucrats, the scarcity of housing in Johannesburg was read and interpreted through racially-jaundiced eyes. In other words, they understood the housing scarcity issue, as well as the poor whites condition 'in the context of a colonial society where racial hierarchy constituted the basis for political and social domination'.[30]

This colonial logic was infused in apparently non-racial laws and planning practices, creating a framework for the racial segregation of Johannesburg. Indeed, urban historians confirm that slum-like conditions in areas such as Brickfields-Burghersdorp, Marshallstown, and Vrededorp were posing a health hazard.[31] However, the racialisation of diseases and other related social ills (i.e. the assumption that diseases were prevalent in these slums due to racial mixing) demonstrated the dominance of racist thinking that emanated from Social Darwinism.[32] As the Johannesburg Town Council was dealing with the slum conditions through slum-clearance, street-clearance projects, the opening of arterial roads and the development of a public transport system, it allowed the colonial logic of racial zoning and hierarchisation to gravely infuse these noble development initiatives. By the mid-1920s the Public Health and Housing Acts had set in motion the process of removing both whites and 'non-whites' from the slums. However, the council-subsidised houses were built for the former in well-located land, while the latter were relocated to racially designated locations on the outskirts of the city.[33]

What also shaped Johannesburg's sociospatial milieu from 1907 to 1922 was the growth of the white working class and the subsequent housing shortage whose solution seemed to be elusive for the city's administrators. This was evinced by a series of commissions of enquiry set up in this era to deal with white poverty

[30] Ibid at 56.
[31] Ibid at 77.
[32] Ibid at 59.
[33] Susan Parnell 'Creating Racial Privilege: The Origins of South African Public Health and Town Planning Legislation' 1993 3 *Journal of Southern African Studies* 471-488.

in general, and the white working class without adequate housing in particular.[34] Concerned about the insanitary conditions that most poor whites lived in, as well as racial mixing, miscegenation, and criminality (such as prostitution and illicit beer-brewing and selling), the city's administrators and planners turned to public health legislation and town planning for solutions. As Lange points out:

> After the proclamation of the Union 1910 'public health and town planning became the tools of a new wave of social engineering that was especially targeted at averting the mixing between black and white population in whichever form it took place.[35]

So, in dealing with racially-mixed slum conditions where '[i]n the back you have Hottentots and in the front the lowest class of whites who are living on liquor selling and prostitution'[36] for example, the Johannesburg City Council designed a battery of segregationist laws that saw Johannesburg being decidedly divided on racial lines. Racial zoning meant that the colonial state and the Johannesburg local authorities was to legally control African urbanisation through law, while at the same time using racial zoning to create locations for natives. The Stallard Commission of 1921 provided a solid reference point for the need for racial zoning, and the position of Africans in the 'white city' of Johannesburg.[37] One of the Commission's recommendations is outlined below:

> We consider that the history of the races, especially having regard to South African history, shows that the commingling of black and white is undesirable. The native should only be allowed to enter urban areas, which are essentially the white man's

[34] See Lange op. cit. note 5 at 82-83 on Commissions of Enquiry i.e. the Report of the Transvaal Indigency Commission of 1906, and Commission of Enquiry into Assaults on Women of 1913).
[35] Lange op. cit. note 5 at 81.
[36] Lange op. cit. note 5 at 82.
[37] See Ivan Evans *Bureaucracy and Race: Native Administration in South Africa* (1997) at 32 on the Stallard Commission.

> creation, when he is willing to enter and to administer to the needs of the white man, and should depart from there when he ceases to so minister.[38]

The influence of 'Stallardism'[39] in the Johannesburg Council's policy-making processes saw the enforcement of pass laws as part of influx control. Moreover, it led to the Council's preoccupation with the clearance of slums in the inner city and the subsequent forced removal of Africans to the newly created south-western native locations of Klipspruit and Orlando from 1904 onwards.[40]

As outlined in the previous chapter, 'sanitation syndrome' justified Johannesburg Council's involvement in the clearance of slums and the subsequent forced removal of people from slums to areas located on the outskirts of the city. As early as 1901, this 'hygienist' agenda of 'sanitising' urban spaces as embedded in and realised through application of public health law, resulted in the clearance of slums such as the Coolie Location and Kaffir Location viewed by the Johannesburg Council to be seedbeds for diseases, crime, and other activities undesirable and immoral practices.[41] The outbreak of a plague in Coolie Location justified the City's segregationist policy as it saw the forced removals of poor whites, Indians, Coloureds and Africans from that area. As Evans asserts:

> Residential segregation along racial lines was thus presented as a scientifically grounded defense against the spread of diseases, and medical discourse about the transmission of diseases from black to white bodies served as the idiom through which whites expressed their strong anxieties about racial propinquity in the Union's urban areas.[42]

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[38] Fatten Robert *Black Consciousness in South Africa: The Dialectics of Ideological Resistance to White Supremacy* (1986) at 50.
[39] Evans op. cit. note 37 at 31.
[40] Paul Maylam 'Explaining the Apartheid City: 20 Years of South African Urban Historiography' (1995) 21 1 *Journal of Southern African Studies* 19-38.
[41] Eddie Koch (1983) 'Without Visible Means of Subsistence: Slumyard Culture in Johannesburg, 1918–1940' In Belinda Bozzoli *Town and Countryside in the Transvaal: Capitalist Penetration and Popular Response* (1983).
[42] Evans op. cit. note 39 at 32.

The forced removals that commenced in the early 20th century as a result of the public health laws therefore marked the beginning of a series of spatial displacements and marginalisation, particularly of the so called 'non-white' population groups in Johannesburg. From a spatial planning perspective, the removal of what was then termed 'surplus people' to racially designated zones set a spatial template that was to be cemented by the apartheid administration from 1948 onwards. As the displacement of black population group was taking place, the state enabled the urbanisation of white population groups to the northern and eastern parts of the city.[43]

Moreover, after the Anglo-Boer War new residential areas were built for some poor whites, particularly Afrikaners that were moving in large numbers from rural areas to towns.[44] From a socio-economic rights perspective, the white areas benefitted tremendously from the investments made by the Johannesburg City Council as part of the provision of physical infrastructure as well as basic services.[45] The African townships on the other hand were not given much attention. Commenting on these disparities, Keith Beavon observes that:

> Thus, the so-called non-white people of Johannesburg were marginalised at the very moment that its 'full' citizens were to begin experiencing the considerable benefits deriving from an essentially British form of government and town planning ideas. Between 1903 and 1906 £3.5 million was spent on capital works that included sanitation, sewerage, roads, storm-water drainage, water supply, electric tramways, and electric lighting almost exclusively in areas occupied by white people.[46]

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[43] Colin Bundy 'Land, Law and Power: Forced Removals in Historical Context'. Christina Murray and Catherine O'Regan (eds.) *No Place to Rest: Forced Removals and the Law in South Africa* (1990); Platzky, Laurine and Walker, Cherryl *The Surplus People: Forced Removals in South Africa* (1985).

[44] Susan Parnell *Johannesburg's Slums and Racial Segregation in South Africa, 1910 – 1937* (1993).

[45] Beavon op. cit. note 8.

[46] Beavon op. cit. note 8 at 72.

It is evident from this statement that the advantaging of white population groups and the promotion of their access to full citizenship in early Johannesburg formed an integral part of the colonial state's commitment towards the upliftment of poor white people.[47] This meant that poor whites were strategically located in Johannesburg, with access to better amenities and services. Furthermore, the entrenchment of Stallardism and its prioritisation of radical difference between racial groups saw the fracturing of Johannesburg's spatial form, as well as everyday social, economic, and political relations.

From the early 1920s onwards, the colonial state and the Johannesburg City Council increased efforts in regulating and enforcing residential segregation.[48] As discussed in the previous chapter, various legislation were put in place as part of simultaneously providing some form of housing for Africans, while at the same time curbing their 'influx' and permanent habitation in white cities. The idea of building racially segregated residential estates in the 1920 was not new. As indicated above, the forced removals and subsequent building of native townships south-west of the city was also informed by the logic of racial segregation.

This practice of racial zoning in Johannesburg also penetrated the private housing market. Beavon observes how in the late 19th century private property developers in the Witwatersrand area inserted 'racial exclusion clauses in suburban property title deeds'.[49] The exclusionary clauses in some title deeds were worded as follows:

> This erf (plot) or any portion thereof shall not be transferred, leased or in any other manner assigned or disposed of to any Asiatic, African Native, Cape Malay or any person who is manifestly a 'Coloured' person, as also any partnership or Company (whether incorporated or otherwise) in which the management or control is directly or indirectly held or vested in any such person. Nor may any such person other

[47] Lange op. cit. note 5.
[48] Lange op. cit. note 5.
[49] Beavon op. cit. note 8 at 255.

than the domestic servants of the registered owner or his tenant reside on this erf on in any other manner occupy the same.[50]

These practices were intensified by the promulgation of the Native (Urban Areas) Act of 1923; its amendment in 1930 and; the Slum Clearance Act of 1934 discussed in the previous chapter. This Act is one of the key legal instruments that cemented residential segregation in colonial Johannesburg.[51] It gave local authorities such as Johannesburg the responsibility of providing segregated areas for African residence.[52] As a means of raising revenue for establishing black locations, local authorities were mandated to establish Native advisory boards and Native revenue accounts.[53] This Act was employed by the Johannesburg Council to remove what was dubbed 'surplus persons'[54] (i.e. the unemployed and thus undesirables) from the area under its jurisdiction – an agenda that most of its white residents had been tabling since 1913.

While this Act was set on fragmenting Johannesburg along racial lines, one of its provisions - that alternative accommodation be found prior to removal of persons - presented a challenge for the Council. The number of Africans in Johannesburg surpassed the number of houses the Council could provide. With the amendment of the Act in 1930 however, the Johannesburg Council was able to continue with its notorious project of forced removals without the burden of providing alternative accommodation.

Apart from the Native (Urban Areas) Act, the Slum Act of 1934 was one of the legal instruments that enabled the Johannesburg Council to realise its project of racial zoning.[55] While this Act was designed for the clearance of slums in Johannesburg, it was appropriated and used by segregationists for advancing

[50] Beavon op. cit. note 7 at 225.
[51] Ivan Evans *Bureaucracy and Race: Native Administration in South Africa* (1997).
[52] Keith Beavon, op. cit. note 7 at 97.
[53] See Section 7 of the Native (Urban Areas) Act.
[54] Paul Maylam 'The Rise and Decline of Urban Apartheid in South Africa' (1990) 89 354 *African Affairs* at 63.
[55] Beavon op. cit. note 7.

residential segregation. By evoking this Act, the city was able to rezone some properties from residential to commercial, thus being legally justified in its act of forcibly evicting people. Beavon provides examples of how New Doornfontein was rezoned from a residential to an industrial area, resulting in the eviction of coloured and Indian residents from that area. This is an example of how town planning was used to justify racial segregation. In most instances, physical buffers such as industries as well as, in later years, freeways were established in the colonial era to separate black townships such as Soweto and Alexandra from white neighbourhoods.[56]

The implementation of these segregatory laws led to the spatial fragmentation of Johannesburg way before apartheid in 1948. Resulting from the implementation of these legislation, Africans, Coloured, and Indian population groups were relegated to the margins of the city. In the case of Africans in particular, their displacement from the inner-city was followed by the establishment of native locations south-west of the city – an area later to be called Soweto.[57] These native locations were nothing but dormitories and/or urban reserves for housing cheap labour.[58]

Commenting on the spatial location of black locations in Johannesburg, Maylam observes how African locations of Klipspruit, Kliptown, and the Western Native Township were all located 'not far from the town sanitary tip, the refuse dump, and slaughter poles'.[59] On the other hand, white suburbs to the north and east of the city were characterised by wide, leafy avenues, large houses and all other amenities critical for the realisation of socio-economic rights.[60]

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[56] Anthony Lemon (ed.) *Homes Apart: South Africa's Segregated Cities* (1991).
[57] Philip Bonner and Lauren Segal *Soweto: A History* (1998).
[58] Nigel Mandy *A City divide: Johannesburg and Soweto* (South Africa, Macmillan; 1984).
[59] Paul Maylam 'The Rise and Decline of Urban Apartheid in South Africa' (1990) 89 354 *African Affairs* at 63.
[60] Alan Mabin (2014) 'In the Forest of Transformation: Johannesburg's Northern Suburbs' In Philip Harrison, Graeme Gotz, Alison Todes, and Chris Wray (eds.) *Changing Space, Changing City: Johannesburg After Apartheid* (2015).

Notwithstanding the colonial government's intention to racially segregate cities through law, total segregation was not realised. This is primarily because there was a growing demand in Johannesburg for cheap labour to work in white-owned mines, factories and houses.[61] However, this colonial lawscape set a solid framework for the intensification of racial socio-spatial engineering that was to be realised with the ascendance of the National Party and its apartheid laws from 1948 onwards.

4.2.2 Johannesburg in 'High-Apartheid' Years 1948-1978

With the National Party assuming power in 1948, the legal and urban planning instruments' segregatory roles were refined and intensified. At the heart of the apartheid regime was an attempt to realise the recommendation of the Stallard Commission that presented the notion that black people were to be perceived as temporary sojourners in white Johannesburg. As such, there was an increase in the enforcement of pass laws, and the expansion of townships for Africans, Coloureds and Indians, all with the aim of controlling the urbanisation of Africans.[62]

As discussed in the previous chapter, one of the most notorious pieces of legislation designed for the realisation of urban apartheid was the Group Areas Act of 1950. Using the racial categories outlined in the Population Registration Act 30 of 1950 (i.e. Whites, Coloureds, Indians, and Africans), the Group Areas Act strived for a comprehensive urban segregation.[63] The effects of the Group Areas Act in Johannesburg were dire, even for Coloured and Indian population groups that were hitherto relatively shielded from the effects of the Urban Areas Act of 1923. As Mabin postulates:

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[61] Mbembe op. cit. note 1 at 380.

[62] Alan Mabin and Dan Smit 'Reconstructing South Africa's Cities? The Making of Urban Planning 1900-2000' (1997) 12 2 *Planning Perspectives* 193-223; Christopher, A.J. 'Spatial Variations in the Application of Residential Segregation in South African Cities' (1989) 20 *Geoforum* 253-267.

[63] Alan Mabin 'Comprehensive Segregation: The Origins of the Group Areas Act and its Planning Apparatuses' (1992) 18 2 *Journal of Southern African Studies* at 405.

> [T]he Group Areas Act at least potentially extended compulsory general segregation to 'Coloureds'; centralised control over racial segregation, effectively undermining municipal autonomy; laid the basis for long range, wide-scale land allocation planning; opened the way to greatly expanded (though of course strictly segregated) public housing provision especially for the poorer sections of the urban population; provided for retroactive segregation; and massively interfered with concepts of property rights generally.[64]

The 'problems and pains' unleashed by the Group Areas Act in Johannesburg included 'social dislocation, division of families and the constant process of reclassification'.[65]

As the Group Areas Act was driven by the central government, it resulted in the centralisation of urban planning activities, in the process weakening Johannesburg's role in urban planning. The central state's intervention in planning also led to the intensification of racial zoning (both residential and commercial) and the application of urban and regional planning principles and practices towards the realisation of apartheid's separatist ideology. Mabin and Smit observe that from the 1950s onwards, there existed an entanglement between planning for racial zoning – and the application of general urban planning practices. So, urban planning's principal quest for efficiency and order was 'captured' in the service of racial segregation.[66]

Regarding the effects of the Group Areas Act on property rights; 'non-whites' that had enjoyed varying degrees of tenurial rights in Johannesburg, particularly in the native western areas, and in the inner-city, were forcibly relocated by the state to racially and ethnically zoned 'group areas'. These forced removals were undertaken to make land available for the creation of new settlements specifically particularly for poor whites. Moreover, as part of the apartheid state's project of comprehensive residential segregation, the Group

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[64] Ibid at 405.
[65] A.J. Christopher 'Changing Patterns of Group-Area Proclamations in South Africa, 1950-1989'. (1991) 10 3 *Political Geography Quarterly* at 241.
[66] Ibid.

Areas Act intensified the destruction of racially-mixed settlements, referred to as 'grey areas' and/or 'black spots'.[67] For apartheid town and regional planners, the Group Areas Act conflated the technical requirements demanded of the profession (i.e. effective land-use planning), with the state's demand for racial zoning.[68] As Christopher observes:

> In drawing up the plans for [Johannesburg] a number of significant features are apparent. First, the reservation of the city centres and the inner suburban areas as White group areas. Second, the highly restrictive areal extent of the land proclaimed for occupation by the Asian and Coloured populations. Third, the attempt to create single sectoral blocks for each of the groups with access to land for future extension on the town's margins.[69]

These three objectives of the Group Areas Act rendered its application cumbersome. However, through the state's dedication to the segregationist project, various legal mechanisms and structures (such as the Group Areas Board) were put in place to implement the provisions of the Act in Johannesburg. The Group Areas Act allowed for the 'wholesale movement of population from one area to another as new town plans were drawn up with a reorganization of the Black, Coloured and Asian areas [as] a feature of the policy of apartheid'.[70] Perhaps it is worth outlining some of the examples depicting the detrimental effects that the Group Areas Act had with regard to the fracturing of Johannesburg's spatial form, and the perpetuation of social suffering for those affected by this legislation.

a) Cosmopolitanism Deferred? A Brief Reflection on Sophiatown

The narratives on the rise and fall of Sophiatown has continued to capture the attention of various authors and social commentators.[71] Founded in 1905 by

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[67] A.J. Christopher, 'Spatial Variations in the Application of Residential Segregation in South African Cities' (1989) 20 *Geoforum* 253-267.
[68] Alan Mabin *Doom at One Stroke of a Pen: Planning and Group Areas, 1935 – 1955* (1990).
[69] Christopher op. cit. note 65 243.
[70] Christopher op. cit. note 65 243.
[71] David Goodhew *Respectability and Resistance: A History of Sophiatown* (2004); Thomas P. Chapman 'Spatial Justice and the Western Areas of Johannesburg' 74 1 *African Studies* 76-97; Philip Bonner and Lauren Segal *Soweto: A History* (1998).

Herman Tobiansky, this township that comprised of at least 237 hectares of land was located in what was later to be called the Western Areas. Sophiatown was presented by Tobiansky as a 'freehold' township. This meant that all races including Africans, Asians, and Coloured people, could own property in Sophiatown.[72] This rendered Sophiatown and its neighbouring townships, Newclare, and the Western Native Township (collectively referred to as the Western Areas) a unique space, where possibilities for an emergent cosmopolitanism was taking root.

While the narrative of Sophiatown has revolved around its vibrant culture and multicultural nature, its existence amidst Johannesburg of the early 20th century meant that it was to be met with contempt particularly from the state, and some sections of the white community that had begun to buy into the Stallardist (i.e. segregationist) ideas of Johannesburg as a 'white city'. In fact, Knevel points out how in as early as 1907, about ninety-nine of the one hundred white residents of Sophiatown petitioned against the selling of land to Africans and Coloured people.[73] Given the dominance of the segregationist idea of racial zoning that was cemented by the Urban Areas Act of 1923 and the Slums Act, Sophiatown did not enjoy any meaningful infrastructural investment and development from the state. As such, it was 'a hard place for an urban lifestyle. It lacked amenities and was situated next to a smelly municipal dump for night soil, waste and animal carcasses'.[74] From a planning perspective, the marginalisation of Sophiatown became apparent after 1903 when 'the new Johannesburg city council spent large sums of money on sanitation, sewerage, roads, storm-water drainage, water supply, electric tramways and electric lighting in the city, but not in Sophiatown'.[75] This neglect of Sophiatown and also stemmed from the fact that it was associated with poor Afrikaners and other people of limited means, i.e. the so-called Kaffirs' and 'Coolies'.

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[72] Goodhew op. cit. note 71 at 2.
[73] Paul Knevel 'Sophiatown as a Lieu de Memoire' 74 1 *African Studies* at 55
[74] Ibid at 54.
[75] Ibid at 54.

Sophiatown's impoverished status relative to the leafy suburb of Parktown for instance, was further compounded by the rise in crime, gangsterism and, overcrowding as a result of the mushrooming of backyard shacks from the 1930s onwards. This eroded the 'respectability' aspirations of the minute black, Coloured and Asian middleclass that resided in Sophiatown.[76] In fact, these slum-like conditions that prevailed in Sophiatown fed into the City Council's (and a significant number of its white constituency, particularly the poor Afrikaners) calling for the relocation of Africans, Asians, and Coloured from this township.[77] For the poor white Afrikaners in Sophiatown who were opposed to Tobiansky's idea of extending freehold to other races from the outset, the removal of these other races from this township was to present them not only with council housing, but also with economic opportunities as they would not have to compete with Asians, and Africans.

The 'anti-native' sentiments of the poor Afrikaners residing in Sophiatown intensified from the from the 1940s onwards. Most importantly, the ascendency of the National Party into power in 1948 augmented the poor Afrikaners' position on the removal of Africans, Asians and Coloureds. Consequently, from 1955 onwards, the notorious removals ensued in Sophiatown. This saw the majority of Africans being forcibly relocated to Meadowlands, Soweto. As for the Coloured people, they also faced the brunt of forced removals, thus finding themselves displaced to Eldorado Park, with the Indians relocated to Lenasia, and the Chinese relocated to central Johannesburg.[78]

In initiating the forced removals, the central state and the Johannesburg City Council hid behind a petition signed by some white residents of Newlands, Westdene, Melville, Florida, and Maraisburg in 1950. These white residents 'demanded that the central government force the Johannesburg City Council to remove what they perceived to be the 'black spots' in the western suburbs that

[76] Goodhew op. cit. note 71 at 21.
[77] Knevel op. cit. note 73 at 55.
[78] Can Themba 'Requiem for Sophiatown' *Africa South* (2006).

were at odds with the policy of apartheid'.[79] After purchasing Meadowlands from the Johannesburg Council, the central government placed it under the Native Resettlement Board (NRB). Following this move, the central government embarked on an extensive project of building houses in Meadowlands, Diepkloof, and other parts of Soweto, in preparation for the forced removals that were to ensue in 1955. Beavon observes how:

> At the crack of dawn on 9 February 1955, the 150 Sophiatown families scheduled for the first wave of removals woke to find an armada of 86 military trucks and a detachment of some 2000 police waiting for them. In a procedure reminiscent of the Nazi period each person to be removed was 'screened' to ascertain their legal entitlement to be in Johannesburg.[80]

By the close of 1960, at least 60 000 people were forcibly removed from Sophiatown. In implementing these forced removals, the apartheid central government as well as the Johannesburg City Council allocated at least sixteen million pounds to African housing between 1949 and 1955.[81] This financial commitment, as well as the use of brute force demonstrates the state's resolve in realising its segregationist agenda.

In effecting these forced removals in Sophiatown, the apartheid state used the proverbial carrot and stick approach – with the anti-slums, and Group Areas legislation being the stick, and the promise of better housing in Meadowlands and other similar native neighbourhoods in Soweto being used to lure particularly the poor tenants who have been disgruntled by the paying of exorbitant rentals to landlords. Goodhew observes how the state's promise of better housing in Meadowlands – with tarred roads, water, electricity and sewerage, as well as the granting of permission for beer-brewing, appealed to most people residing in Sophiatown, particularly poor tenants.[82]

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[79] Beavon op. cit. note 7 at 131.
[80] Beavon op. cit. note 7 at 132.
[81] Goodhew op. cit. note 73 at 151.
[82] Goodhew op. cit. note 73 at 152.

While these houses built by the apartheid government in Meadowlands were small, they were deemed to be a relatively better option particularly for the majority of poor people that had been living in overcrowded conditions. As for the landlords, (i.e. those that owned property in Sophiatown), forced removals meant loss of property, and other related income generation avenues. It is no surprise therefore that it was the property owners 'who offered the most stubborn resistance, until last'.[83] Some property owners are said to have attempted to mount a legal challenge against the expropriation of their property but to no avail.

So, at the beginning of the 1960s Sophiatown was razed to the ground. Its complex history of cultural vibrancy, crime, violence, beer-brewing, political activism, and all other traits that represented an emergent multiracial cosmopolitan lifestyle was turned to ashes. In its place, the state embarked on a project of providing housing to the poor whites. From the ashes of Sophiatown, Triomf (i.e. meaning triumph) emerged. This new white settlement marked the triumph of Afrikaner nationalism, and the realisation of the colonial/apartheid project of racial zoning.

As Africans were forcibly removed from Sophiatown to Meadowlands and Diepkloof, the Coloureds to Westbury and later Eldorado Park and the Indians to Lenasia – the apartheid law and racial planning had triumphed. However, these forced removals meant that on one hand, the rich socio-cultural vibrancy, as well as the crime and political activism that had defined Sophiatown, was to emerge in Soweto. As Goodhew posits; '[r]emovals should be seen as a key stage in a process of protest and reform stretching from the squatter movements of the mid-1940s Johannesburg to the finishing touches put to Soweto in the 1960s', right through to the collapse of apartheid from the late 1970s to the early 1990s.[84]

b) Bounded Spaces: The Making of Soweto & Alexandra

Within the township, community was felt not only as something 'imagined' or 'symbolically constructed', but as something which a much-hated ruling class driven

[83] Goodhew op. cit. note 73 at 153.
[84] Goodhew op. cit. note 73 at 153.

> increasingly by a desire to segregate and control had physically constructed. 'They' drew the boundaries that confined the people; 'they' laid out streets within; 'they' designed most houses, flats and hostels; and the physical connections of this huddled community to all the major amenities of life were determined by 'them'. Space was thus both a physical and an experiential reality which daily reminded its inhabitants of their subordination.[85]

This quote by Belinda Bozzoli encapsulates how black townships of Soweto and Alexandra (and other black townships) were imagined, and created by the colonial/apartheid state. The narrative on the making of Soweto and Alexandra as 'bounded spaces'[86] therefore cannot be extricated from the 'native question', i.e. the colonial/apartheid state's preoccupation with regulating the influx of Africans into the 'white city'.[87] While these black townships have a disparate history, their narratives dove-tail, as they were both meant to serve as dormitory spaces for housing cheap African labour.

Soweto emerged as a result of the state's attempt to segregate Johannesburg through housing. By forcibly removing Africans from the inner-city settlements and slums to the periphery of the city, the colonial/apartheid state was able to have control over this cheap labour. Soweto therefore became in the main, a dormitory township, and a reservoir of cheap labour to be used by in the white mines, factories and, homes.

Soweto also came into being as a result of the colonial laws and planning practices aimed at racially segregating Johannesburg from the close of the 19th century onwards. Its genesis can be traced back to 1904 when Africans were forcibly removed from the inner-city slum in present-day Newtown area, after an outbreak of bubonic plague.[88] In responding to this outbreak (and also owing to

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[85] Belinda Bozzoli *Theatres of Struggle and the End of Apartheid* (2004) at 22.

[86] Ibid at 21. For Bozzoli, the black township is a bounded space in the sense that it forced black people to live in legally, politically and socially restricted boundaries. So, the township resembled 'bounded and prison-like stalags'.

[87] See Alan Mabin and Dan Smit 'Reconstructing South Africa's Cities? The Making of Urban Planning 1900-2000' (1997) 12 2 *Planning Perspectives* 193-223.

[88] Will Carr *Soweto: Its Creation, Life and Decline* (1990) at 11.

the ‘sanitation syndrome’ that was prevalent at the time), the Johannesburg City Council moved Africans to a municipally-owned farm of Klipspruit.[89] This settlement later became the nucleus of a massive African township, i.e. Soweto.

The establishment of Klipspruit (later to be called Pimville) was precarious from the outset. For one the residents’ tenancy was on a monthly basis, with a specified rental paid to the City Council. This was in line with the colonial state’s assumption that Africans could not be permanent residents in a ‘white city’. Apart from the precarity of tenure faced by the African inhabitants, no town planning was done for this location. Instead of providing decent housing, the City Council permitted Klipspruit residents to erect their own shelter, with no regard for any town planning principles and building standards. Moreover, the location lacked any social amenities, as well as bulk infrastructure such as water, electricity and, sanitation.[90] Notwithstanding its precarious beginnings, Klipspruit (as well as its neighbouring location of Kliptown) marked the beginning of the ‘planning out’ of Africans and other ‘non-whites’ from well-located land to the periphery of the city.

In adhering to the dictates of the Public Health Act of 1919, the Urban Areas Act of 1923 and racial zoning, Soweto became an ‘urban reserve’ where most Africans forcibly removed from the inner-city, as well as other areas proclaimed for white occupation, were located. Using these pieces of legislation as a guide, the Johannesburg City Council embarked on a massive housing programme for Africans. This resulted in the formation of Orlando township in 1932. By the 1950s, Orlando had a population of over 97 000 people, though no basic amenities and services were provided for this growing township. As Gorodnov observes, in the 1950s, Orlando ‘had one clinic, one cinema and even one public telephone; nothing more for nearly 100 000 inhabitants. Most of the houses were on unnamed streets and were unnumbered’.[91]

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[89] Valentin Gorodnov *Soweto: Life and Struggles of a South African Township* (1988) at 29.
[90] Ibid.
[91] Ibid at 30-31.

Relative to the white suburbs to the north, Orlando and other neighbourhoods that constitute Soweto were not established to support any meaningful economic activities. Instead, they served as dormitories for housing cheap black labour. Moreover, housing provision, being one of the key town planning functions was used as a mechanism for surveillance and control of the black population group. From the 1930s to the 1950s, Soweto saw the erection of numerous 'match box' houses made of relatively cheap material. However, given the rapid urbanisation of Africans, these houses were not adequate – as such, various squatter camps mushroomed in Soweto.[92]

The apartheid central government also built single-sex hostels in areas such as Dube and Jabulani between 1950 and 1960, to house migrant workers.[93] The conditions in these hostels were appalling and not suited for human habitation. It was also in these hostels that ethnic identities were cemented, politicised and radicalised. Moreover, the establishment of single-sex hostels amidst townships pitted Africans against each other. There emerged a growing resentment between hostel dwellers and township dwellers that later manifested as violent ethnic clashes in the 1980s. Such ethnic polarisation was also spatially mirrored in Soweto suburbs, that remain ethnically zoned to this day.[94]

> Naledi, Mapetla, Tladi, Moletsane, and Phiri were developed for Sesotho and Setswana-speaking people; Chiawelo for the Tsonga and Venda; and Dlamini, Zola, Zondi, Jabulani and Emdeni for isiXhosa and isiZulu speakers. The hostels were also ethnically divide.[95]

The Urban Areas Act also facilitated the economic marginalisation of the African population in Soweto. The Act limited the economic activities and businesses in the township. Africans in Soweto were prohibited by the Act from

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[92] Ibid.

[93] Philip Bonner and Lauren Segal *Soweto: A History* (1998).

[94] Philip Harrison and Kirsten Harrison (2014) 'Soweto: A Study in Socio-spatial Differentiation' In Philip Harrison, Graeme Gotz, Alison Todes, and Chris Wray, (eds.) *Changing Space, Changing City: Johannesburg After Apartheid* (2015).

[95] Ibid at 296.

owning laundries, pharmacies, bookshops, drapers and outfitters until the late 1970s – even lawyers and doctors where prohibited from operating from their homes.[96] This systematic marginalisation of Africans from any meaningful participation in the economy had long-term consequences for township residents.

In the 1950s, the apartheid state entrenched the socio-spatial, economic and political marginalisation of Africans through its implementation of the Group Areas Act as well as other related segregationist legislation discussed in the previous chapter. This was done through the proclamation of Johannesburg as a white city, and the subsequent removal of 'grey spots'. As demonstrated in the Sophiatown (and the Western Areas) case discussed above, the apartheid state was meticulous in enforcing its segregationist laws, under the guise of slum eradication, and town planning.

The creation of Soweto therefore, was a culmination of a coalescence of segregationist laws, and related planning practices. As highlighted above, the colonial/apartheid state was willing to spend billions of rands in buying land for the development of African housing, to further its objective of realising spatial segregation. As such, legal and planning instruments were employed as administrative strategies for controlling the natives, with housing playing an integral role.[97]

The spatial design of Soweto was also framed in such a manner that it was physically separated from the white city through various physical buffer zones such as mines, industrial districts and, freeways.[98] For the town planners and policymakers of the time:

> [It was] necessary by law that there should be a buffer strip at least five-hundred-yard-wide between any location and the town it serves… Nothing must be erected on the buffer strip – not even a pair of football goal-posts. It must mark that

[96] Beavon op. cit. note 7.
[97] Jennifer Robinson, 'Administrative Strategies and Political Power in South Africa's Black Townships 1930-1960' (1991) 2 2 *Urban Forum* 63-77.
[98] Gorodnov op. cit. note 89 at 60.

> tremendous and vital distinction between civilisation and barbarism upon which the doctrine of white supremacy rests. No one of either race may linger on that strip of land, for in that way it might become a meeting-place. It is, in exact and literal terms, a no-man's land: and it is meant to be just that… Sometimes, with the older locations, tall iron fences were erected and gave the impression not only of a kind of imprisonment but if a fortification, as though the location were totally alien to the life around it and had to be defended at all costs from any contact with it'.[99]

The buffering of Soweto (and other Black townships) rendered these spaces a Fanonian zone of non-being, i.e. spaces of alterity were human beings were reduced to basic market-determined identities[100]

Indeed, there emerged in colonial/apartheid Soweto vibrant cultural, religious, and political identities that traversed the colonial/apartheid-determined script. However, the colonial/apartheid lawscape literally concretised Soweto's marginal socio-spatial, and economic position. This was done through its position on the outskirts of the city; and the dominance of monotonous matchbox houses that still exist to this day. Moreover, given the dormitory status of this township, most of Sowetans still continue to travel long distances to work in the former white Johannesburg. Efforts by the post-apartheid state to create a 'township economy' has proved to be futile, as the colonial/apartheid lawscape remains entrenched.

Like Sophiatown, and Soweto, Alexandra (known to its residents as Alex, or Gomorrah, after the biblical 'sin city') – has a very complex and textured history. Its history was fundamentally shaped by the segregationist colonial/apartheid laws discussed in the previous chapter. Founded in 1912, a year prior to the enactment of the Natives Land Act of 1913; Alex was a freehold township that enjoyed a considerable degree of multiracialism, particularly in the first two decades of its existence.[101]

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[99] Gorodnov op. cit. note 89 at 60.
[100] Frantz Fanon *The Wretched of the Earth* (1963).
[101] Phil Bonner and Noor Nieftagodien *Alexandra: A History* (2008) at 17.

Without reiterating Alex's history, suffice to mention that its proximity to white neighbourhoods meant that it was always a target for imminent forced removals.[102] The Urban Areas Act of 1923 saw Alexandra experiencing a massive influx of people that were being forcible removed from Johannesburg's slums. This rapid influx of people led to 'inconceivable overcrowding' and the subsequent mushrooming of informal housing structures. These dire conditions were compounded by the absence of electricity, sanitation facilities, and other related amenities.[103]

The uninhabitable conditions of Alex are well-articulated by Bozzoli who observes that while this township began as freehold with relatively large yards; hyper-urbanisation and the subsequent demand for housing compelled land owners to build backyard shacks in their properties. This congestion was further compounded by the random erection of informal dwellings in and around formal housing. The early 20th century Alexandra therefore resembled the Fanonian zone of nonbeing:

> Tin, cardboard and wooden shacks are interspersed between the houses. The streets in normal times belong to everyone. People sit in doorways, meander along the streets, congregate on corners, hawk fruits and vegetables on what pass for pavements, and pass the time together. Many are visibly poor. Clothing is ragged. Goats, cows and hens wander the streets. Dust is not easy to avoid. The collection of rubbish is clearly not part of life. It blows around.[104]

In the late 1970s, at least 75 000 people are said to have lived upon 358 hectares of land, in about 4000 houses surrounded by a sea of shacks, flats and three hostels. The hellish conditions in this 'bounded space' was to contribute to the growing socio-economic, and political grievances that the residents of Alex had against the colonial/apartheid state.[105]

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[102] Bozzoli op. cit. note 85.
[103] Gorodnov op. cit. note 89 at 42.
[104] Bozzoli op. cit. note 85 at 20.
[105] Bozzoli op. cit. note 85 at 20.

From the early 1950s onwards, as part of realising the objectives of the Group Areas Act, the apartheid government embarked on a project of evicting thousands of Alexandrans as part of its solution of decongesting the township. Some of the people removed from Alex where relocated to Soweto – further congesting the latter. These removals however did not yield expected results, as people in Alex were able to successfully mobilise against the state. Moreover, there existed a range of influential political formations and social movements in this township that resisted against the state's efforts of razing Alex to the ground.[106]

Like in most African townships, there was no elaborate town planning for the growing population of Alex. What the colonial/apartheid state emphasised however, was the erection of cheaply built houses, as well as 'barracks-style' single-sex hostels. In fact, the apartheid state had planned to turn Alex into a 'ghetto township inhabited exclusively by "singles" living in barracks-type hostels'.[107] While this plan did not fully materialise, it is indicative of the project of using segregationist laws and planning to control and subjugate Africans.

Whereas Alex was not spatially located in the margins of the city such as Soweto and while it was not razed to the ground like Sophiatown, the colonial/apartheid lawscape ensured that it was socio-economically and politically marginalised. Notwithstanding the material poverty experienced by most Alex's residents, this township is also known as a symbol of political resistance against the colonial/apartheid state. Apart from once being a home to most anti-apartheid stalwarts (including Nelson Mandela and Walter Sisulu), Alex's ordinary residents engaged in various strategies and tactics as a means of fighting against the repressive system. These included several bus boycotts, as well as numerous resistances against forced removals.[108]

These shared experiences of everyday social suffering, as well as resistance against the state's brutal laws, all contributed to the forging of a common township socio-political identity that allowed for the residents of Alex to collectively rise

[106] Bonner and Nieftagodien op. cit. note 101 at 125.
[107] Gorodnov op. cit. note 89 at 53.
[108] Bonner and Nieftagodien op. cit. note 101.

against state from the early 1980s onwards. What is also worth noting in the case of Alexandra (and other townships inhabited by 'non-whites') is that the rudimentary planning that resulted in people being crammed in small spaces, also created a fertile ground for the emergence of new cultures, and identities.[109]

c) A Garden Township: The Making of Parktown & White Suburbia

Unlike the native townships discussed above, white suburbs were meticulously planned by the colonial/apartheid state. A glimpse at Parktown suggests that from the outset it was planned for the Randlords and other wealthy individuals that were benefitting from Johannesburg's industrialisation. Founded in 1893, this affluent suburb was meant to be a 'garden township' comprising of one-acre plots.[110] The spatial location of Parktown was also planned in such a manner that it shielded the wealthy from the inner-city's noise, and dust from the mines.

> The town was never silent – there was the incessant thud of the battery stamps of the mines, 24 hours a day. A thick film of fine yellow dust from the mine dumps blew onto all the buildings and the verandas and could not be wiped away. By day it was hot and noisy with the rumble of horse carts and the cries and whistles of street traders.[111]

Distancing themselves from the inner-city, Johannesburg's wealthy class moved to Parktown whose location was 'high up on a plateau' with magnificent views that traced the 'undiluted hills and valleys as far as the Magaliesberg'.

The lifestyle led by mostly the English-speaking Randlords in Parktown resembled that of the aristocrats of Europe. The realisation of Parktown as a garden township was made also made possible by the abundance of cheap African labour. As Callinicos points out: 'Gardens burgeoned and blossomed, blessed by an abundance of cheap African labour. Small armies of blacks fetched soil and

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[109] Bozzoli op. cit. note 85 at 26.
[110] Luli Callinicos *Who Built Jozi? Discovering Memory at Wits Junction* (2012) at 26.
[111] Ibid at 26.

carried away rocks. Rows of young trees marked off the broad street frontages. Terraces, lawns, shrubberies and rose gardens were laid out'.[112]

Unlike the native townships of Sophiatown, Soweto, and Alexandra, Parktown was well-planned for. Its road networks, water and electricity infrastructure was also provided, allowing the wealthy whites to live a comfortable life. The planning laws of the time also permitted Parktown residents to experiment with different architectural designs, rendering the suburb a unique aesthetic feel and a sense of individuality.

Though most of Parktown's mansions were demolished by the state from the early 1960s onwards, to make way for other developments, its land development trend marked the beginning of suburbanisation to the north of Johannesburg.[113] Westcliff, Saxonwold, Parktown North, Parkview, Parkhurst and other related 'Parks' were established. The northern suburbs of Johannesburg therefore began to symbolise white capital and affluence. As these neighbourhoods expanded during the colonial/apartheid era, the state facilitated this white suburbanisation by forcibly removing 'non-whites' to racially designated townships. So, the process of white suburbanisation cannot be divorced from that of black ghettoisation. As Mabin points out:

> Confinement of most urban black residence to townships reduced demand for land elsewhere, and preserved large tracts 'on the other side of the tracks' (or valley, mining belt or industrial area) for the suburbs. In this sense the townships were vitally necessary for the development of Johannesburg-style suburbia. In a sense, they appear to have allowed suburbs to grow on one side of the city, while something else happened on the other.[114]

In examining the superior physical infrastructure of the northern suburbs, it is also apparent that the colonial/apartheid state 'was central to the creation of a physical

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[112] Ibid at 28.

[113] See Callinicos op. cit. note 110 at 154-155. The state demolished some of the mansions in Parktown to make way for the building of the Johannesburg hospital, Park Lane Clinic, as well as duplex flats.

[114] Alan Mabin 'In the Forest of Transformation: Johannesburg's Northern Suburbs' Philip Harrison, Graeme Gotz, Alison Todes, and Chris Wray (eds.) *Changing Space, Changing City: Johannesburg After Apartheid* (2015) at 404.

environment of highways, houses, schools and infrastructure'.[115] These facilities were in the main reserved for white people. While some Africans worked and resided in the 'white city' as domestic workers, their use of amenities in the suburbs was limited by their relatively poor socio-economic status. So '[h]ierarchy and language, walking and driving, meant that encounters between white and black in the suburbs remained mostly ephemeral (with obvious possibilities for transgression, too)'.[116]

The emergence of Parktown and other northern suburbs attest to the (discriminatory) power of capital, law, and planning to create sustainable human settlements. As these white suburbs emerged and expanded as spaces of affluence, black ghettos such as Soweto and Alex also emerged and expanded, as spaces of alterity. Both these spaces, different as they are in terms of infrastructural endowment, were created through the implementation of segregationist laws and town planning practices. This shows that law and planning can empower and disempower specific social groupings.

The creation of white suburbia through segregatory laws and planning practices also resulted in the formation of uniquely white identities. In other words, just like in the bounded spaces of townships, white suburbs were also bounded by their boundaries, resulting in their residents forging cultural practices informed by nostalgia of places elsewhere. The 'Parks' for instance were planned to mimic European cities. This robbed these white cities of the cultural diversity that would have emerged from multiracialism. Indeed, unlike townships where most white people dared not to tread as it 'represented the heart of darkness, the unknown, the unclean'[117] – Africans, Coloureds and Indians were no strangers to white neighbourhoods. For many worked there as domestic servants, gardeners and

[115] Ibid at 403.
[116] Ibid at 403.
[117] Bozzoli op. cit. note 85 at 31.

maids. However, statutory racial zoning robbed both black and white people of the cultural dynamism that would have been brought forth by cosmopolitanism.[118]

4.2.3 Johannesburg as Apartheid Dismantles 1979-1993

The townships that the colonial/apartheid in Johannesburg built for people that were not white, contributed immensely to the struggle against and subsequent dismantling of apartheid. While the apartheid government under John Vorster and P.W Botha attempted to reform apartheid through the repealing of various influx control laws, as well as the introduction of legislation aimed at winning the black populace over, from the 1970s onwards; various internal and external socio-economic and political forces coalesced, leading to the dismantling of apartheid.

Internally, most of the townships in Johannesburg had intensified their struggles against apartheid, with the intention of making the state ungovernable. The Soweto Uprising of June 16, 1976 in particular, marked a turning point not only in Johannesburg townships, but in South Africa at large. Instead of embarking on peaceful boycotts and protests, people in the townships intensified their demand for the dismantling of apartheid. As Soweto Uprising fever swept through Alexandra, various political formations (including the African National Congress (ANC)) mobilised people to protest against apartheid and all that it stood for.

The Six Day War of 1986 that occurred in Alexandra for instance, was not only a response of the community to the tear-gassing of mourners after a funeral of a youth. It was in fact a fight against the socio-economic, and political deprivation that this community had endured from its inception.[119] In many ways, Johannesburg's townships became 'theatres of struggle' against the socio-economic and political injustices brought forth by the apartheid laws and planning practices.[120]

The apartheid government's repealing of influx control, as well as the relaxing of the enforcement of the Group Areas Act in the mid-1980s proved to be

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[118] Walter D. Mignolo 'The Many Faces of Cosmo-polis: Border Thinking and Critical Cosmopolitanism' 12 3 *Public culture* 721-748.
[119] Bozzoli op. cit. note 85 at 67.
[120] Bozzoli op. cit. note 85.

insufficient to reverse the revolutionary urban tide that had engulfed the city. Being part of the Botha administration's Twelve-Point-Plan, these reforms were not only piece-meal – they actually fanned the oppressed people's desire for a complete reconstitution of the social, economic, spatial and political milieu.[121]

While the repealing of 'little apartheid' laws, as well influx control laws was significant, it came a little too late for the apartheid government. This is primarily because, despite the restrictive objectives of these segregatory laws, Johannesburg was never truly segregated in the true sense of the word. As Alden avers, 'the purported objectives of separate development, that of stemming the tide of African migrants to the cities, had been largely unsuccessful. Despite the most vigilante of efforts by the government, Africans resided – either legally or illegally – in all of South Africa's urban Areas in numbers which exceeded that of the white population'.[122] Even at the height of apartheid, white Johannesburg was known to have 'locations in the sky'. These were rooms located on the top floors of white people's high-rise buildings, occupied by black domestic workers.[123]

What the repealing of apartheid laws achieved however, was that it intensified the 'greying' of Johannesburg, as most Africans, Coloureds, and Indians were able to move to some of the former white areas without contravening any laws. The inner-city and its surrounds (i.e. Hillbrow, Berea, Yeoville) witnessed the earliest wave of intense urbanisation. From the mid-1980s, Johannesburg's spatial milieu was witnessing some transformation that was yet to be effected politically. This wave or urbanisation intensified from 1993 onwards, after the fall of apartheid.

From the mid 1980s to the early 1990s, Johannesburg (and South Africa at large) was experiencing a 'Gramscian interregnum'[124] – i.e. a precarious and delicate societal transition where everything was hanging in the balance – when

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[121] Chris Alden *Apartheid's Last Stand: The Rise and Fall of the South African Security State* (1996) at 80-81.
[122] Ibid at 21.
[123] C. Mather 'Residential Segregation and Johannesburg's 'Locations in the Sky'' (1987) 69 2 *South African Geographical Journal* 119-28.
[124] Antonio Gramsci (ed.) *Selections from the Prison Notes* (1971).

the old apartheid system was dying and a new democratic system lurking on the horizon, promising to be born. In this interregnum, there existed varied policy challenges stemming from the simultaneous enervation with the old system and its injustices, and the anxieties and hope for the reconstitution of the urban political and socio-spatial context.

One of the challenges that unfolded during this interregnum, is that the 'greying' of Johannesburg was met with suspicion by some white population groups that resided in the city-centre and its surrounds. This led to some of them retreating to the northern suburbs that had been experiencing rapid expansion since the mid-1970s. As whites vacated the CBD in large numbers, they rented out or abandoned most buildings that were then immediately occupied by the Africans, Indians, Coloured, and migrants from the rest of the continent. The high levels of unemployment, and subsequent poverty experienced by most of these new inner-city residents, coupled with the absence of a concrete urban governance and urbanisation policy on the part of the Johannesburg City Council all contributed to the drastic decline of the inner-city.[125]

The repealing of apartheid legislation that had governed the city's urbanisation processes for over six decades, meant that between 1980 and 1993, there existed a 'legislative void' that was to be exploited by various social actors. In other words, as apartheid laws were withdrawn or relaxed, various criminal activities emerged in the city. These included the 'hijacking' of buildings and the infringement of various land-use regulations, particularly those related to informal trading, and housing. For example, the inner-city pavements and walkways were turned to trading spaces by the poor urban dwellers, building apartments became overcrowded as they were neglected and/or abandoned by their white owners, and neighbourhoods such as Hillbrow and surrounds became the unofficial 'red-light district' of South Africa. These were some of the morbid symptoms that defined

[125] Martin J. Murray *City of Extremes: The Spatial Politics of Johannesburg* (2011).

Johannesburg's interregnum. The decline of Johannesburg inner-city was to continue almost two decades into the post-apartheid era.

As the apartheid edifice was being dismantled from above - i.e. with the state's desperate attempt at reforming it through the repealing of most of its laws – and from below, with ordinary people in townships, as well as other white people that had grown to sympathise with the political cause of the oppressed; the reconstitution of the colonial/apartheid lawscape was imminent. As the new political dawn was looming, it became apparent that Johannesburg's socio-spatial form as well as the racially skewed economic arrangements entrenched by the colonial/apartheid state for over a century would not dissipate instantaneously.

However, there was a realisation on the part of various post-apartheid architects that the law, litigation as well as planning were to play an integral role in reconstitution Johannesburg's socio-spatial, and economic milieu. In fact, the influential role of law and litigation in reconstituting South Africa's lawscape was for instance made apparent in the S v Govender case.[126] In this case, an Indian resident who had lived in a white-designated neighbourhood managed to use litigation to successfully resist her eviction. The court held that the state could not evict non-whites without providing alternative accommodation for them. This case was to act as an importance reference for future cases related to housing in post-apartheid South Africa.[127]

The prioritisation of constitutional reform, that culminated in the drafting of the Interim Constitution of 1993, and the Bill of Rights also attest to the law's critical role in the quest for spatial justice and transformation at large.[128] So, over and above the political negotiations that were taking place from 1985 to 1993, law and planning were to play a central role in the transformation of the urban milieu. But

[126] *S v. Govender, 1982. Decision of the Transvaal Supreme Court* 1986 (3) SA 969 (T).
[127] See Pieterse at Rights-Based Litigation at 10. Also refer to *In re Dube, 1979. Natal Division of the Supreme Court* 1979 (3) SA 820 (N*)* and its implications for a changing lawscape.
[128] Richard Spitz and Matthew Chaskalson *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (2000).

first, these instruments were to be 'redeemed', given their complicity (unintended or otherwise) in the spatialisation of segregationist ideologies for over a century.[129]

4.3 REFLECTIONS

Thus, colonial/apartheid Johannesburg's socio-spatial and economic milieu was crystalised through a plethora of racially divisive legislation and planning processes and practices. The colonial imagining and myth of Johannesburg as 'European city in Africa' resulted in various laws being formulated and implemented in the service of realising this racial ideology. As highlighted above, racial capitalism and its emphasis on the racial superiority of whites, and the inferiority of Black people, saw Johannesburg being bifurcated along racial lines. Racial zoning also symbolised the racially skewed socio-spatial and economic inequalities – with the white race and class emerging as this nascent city's 'aristocracy'.[130]

Also underscoring the creation of Johannesburg as a racial city was the state's drive towards empowering the poor whites, particularly the Afrikaners that had been displaced from the rural areas after the Anglo-Boer war. The state was therefore adamant in using the rhetoric of the sanitation syndrome to forcibly remove black people from strategically located and racially mixed slums and townships, to the periphery of the city. This deliberate use of law and planning to empower the poor white in the 20th century, attests to the influence that legal and planning instruments have to fundamentally empower the poor. The only unfortunate aspect of the planning legislation in early Johannesburg however, was that it was primarily influenced by racial politics, as well as racism.

The racial planning as a tragic imagination of colonialism and apartheid therefore foreclosed any possibilities for the creation of Johannesburg as a truly cosmopolitan city, defined by racially mixed spaces. What emerged from the late 19th century onwards, was a city cast in a rigid mould or racial segregation. The

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[129] Heinz Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2001).

[130] Susan Parnell 'Creating Racial Privilege: The Origins of South African Public Health and Town Planning Legislation' 1993 3 *Journal of Southern African Studies* 471-488.

pass laws, as well as the land laws discussed above for instance, led to the destruction of places such as Sophiatown for instance, whose cosmopolitan nature would have resulted in the creation of Johannesburg as a culturally vibrant melting pot.

While the colonial/apartheid laws were aimed to create a purely white city, the logic of racial capitalism, and its reliance on cheap black labour meant that Johannesburg was never truly segregated – at least not to the degree envisaged by its colonial/apartheid architects. In other words, while the presence of black people was highly regulated by law, and their habitation of the white city systematically monitored, their limited presence in the city meant that Johannesburg was to be a contested space for centuries to come. This reflection does not in any way suggest that black people were welcome as equal citizens in colonial/apartheid Johannesburg. What is being suggested however, is that even the colonial/apartheid lawscape and its rigidity was continually challenged by the marginalised from the late 19th century onwards. The challenging of the colonial/apartheid lawscape intensified after the repealing of the colonial/apartheid laws in the late 1970s onwards. In fact, it can be argued that black people's struggles for their rights to inhabit Johannesburg as equal citizens led to the collapse of the apartheid regime from the late 1970s onwards.

PART VI: THE POST-APARTHEID LAWSCAPE UNFOLDING

CHAPTER 5: TOWARDS A POST-APARTHEID LAWSCAPE

> With the successful conclusion of the constitutional negotiations of 1992 and 1993, we South Africans embarked on an experiment that placed particular emphasis on the legal system, and accorded especial responsibility to the legal profession. It was an experiment of massive proportions: a commitment to legal regulation as the framework for social development, and for the resolution of conflicting social claims …The successful endorsement of the constitutional experiment by the parties at Codesa and Kempton Park is in many circles regarded as a "miracle". But at this stage, it is no more than an experiment.[1]

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5.1 INTRODUCTION: OF PRECIOUS & PRECARIOUS DEVELOPMENT[2]

Having established the role played by law, and spatial planning in the imagining and realisation of the colonial/apartheid project of establishing a racially segregated South Africa, this chapter seeks to outline some of the efforts made by the post-apartheid state to promote spatial justice, and thus to reconstitute the lawscape. From the late 1980s onwards, various legal scholars and policy makers began to deliberate on the potentially new role that was to be played by law and planning in the remaking of a 'new' South African society founded on democratic values and principles. Interestingly, in imagining a new society, the very same instruments that had contributed in the making of a colonial/apartheid lawscape, i.e. law and planning, were viewed as having the potential to undo the injustices of the past. As Edwin Cameron observed, post-1994 South Africa had emerged from 'oppression by law', and yet it found itself seeking 'liberation through law'.[3] So, these two instruments of societal engineering where to be the antidote to the very socio-spatial, economic, and political challenges they initially created.

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[1] Edwin Cameron 'Our Legal System: Precious and Precarious', cited in Catherine Jenkins, 'Transitional Justice: Lessons from South Africa?' In Catherine Jenkins, and Max du Plessis, (eds.) Law, Nation-Building & Transformation (2014) at 1.

[2] Ibid at 1.

[3] Catherine Jenkins 'Transitional Justice: Lessons from South Africa?' In Catherine Jenkins, and Max du Plessis (eds.) Law, Nation-Building & Transformation (2014) at 27.

Given the 'experimental' nature of the South African transition and its reliance on the legal system, the role of law, and spatial planning in the remaking of post-apartheid South Africa was to be a 'precious and precarious'[4]. Its preciousness rests on the 1993 Interim Constitution and the 1996 Constitution's promise of equality and human dignity. This is particularly evinced by these legal instruments' entrenchment of equal rights for all South Africans and the legal protection of all people residing within this polity's boundaries. Moreover, the embedding of socio-economic rights in the Bill of Rights of the 1996 Constitution attest to South Africa's attempt to use the law as an instrument for fostering social as well as spatial justice. So, the transformation of a colonial/apartheid lawscape to a democratic one rests largely on the law, and specifically on the Constitution and its 'transformative' potential.[5]

On the other hand, the precariousness and fragility of the post-apartheid reconstruction project has been marked by the challenges of realising the constitutional obligations of promoting human rights, equality, and dignity in cities that were historically built and fashioned on racial and ethnic segregation, as well as patriarchy. As the colonial/apartheid state literary 'concretised' racial spatial segregation through its physical architecture and the built environment at large (as well as the socio-psychological engineering related to over a century of racial segregation), the remaking of a post-apartheid city-scape and lawscape was not to be without its challenges. For the post-apartheid reconstitution project was not and could not have been accompanied by the complete destruction of the colonial/apartheid physical infrastructure (and the erasure of the memories of racial segregation and its brutality) for instance. This raises challenges of building a just city on the foundations of 'concretised differences'.

[4] Jenkins op. cit. note 1 at 1.

[5] On transformation and constitutional democracy, see Johan van der Walt, 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 1 *Fundamina* 1-47.

This chapter therefore outlines some of the challenges and opportunities faced by the post-apartheid state as it engages in the reconstitution of the colonial/apartheid lawscape.

5.2 THE CONSTITUTION & ITS VISION FOR POST-APARTHEID LAWSCAPE

For many legal scholars, the 1993 Interim Constitution, and the 1996 Constitution embody the promise of a new society founded on the ideals of non-racism, non-sexism and equality.[6] Being the supreme law of the land, the post-apartheid Constitution strives to be transformational and thus relevant to the country's developmental agenda. As outlined in the postscript of the 1993 Constitution:

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co- existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. [...] The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

The envisioning of the Constitution as a 'bridge' that was to allow South Africans to move from a divided apartheid society to a new, united one was echoed in the 1996 Constitution, the preamble of which outlines that:

> We the people of South Africa […] adopt this Constitution as the supreme law of the Republic so as to - [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [i]mprove the quality of life of all citizens and free the potential of each person; and [b]uild a

[6] Ibid.

united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Dubbed transformative constitutionalism, this hope in the potential of the legal system at large, and the Constitution in particular in contributing to the delivery South Africa from its dark history towards a united, and prosperous future has been a point of discussion for various legal scholars. Karl Klare's seminal article on 'Legal Culture and Transformative Constitutionalism' in particular, presents South Africa's 1996 Constitution as being almost revolutionary in the sense that it transcends a liberal and technical reading of law, while simultaneously emphasising a shift in legal culture.[7] These sentiments are also echoed by Pius Langa who defines transformative constitutionalism first as a quest for 'a social and economic revolution' and, second, as a drive towards 'the transformation of a legal culture'.[8]

The socio-economic transformation and socio-spatial justice envisaged through the Constitution is predicated on the need for urgent societal transformation in the face of seemingly unrelenting effects of the legacy of apartheid and its systematic marginalisation of millions of people. Put differently, transformative constitutionalism is viewed as a potential antidote to the grave effects of the history of centuries of racialised sociospatial engineering predicated on land dispossession, racial planning and the systematic marginalisation of millions of Black people. It is also a realisation that the abolition of apartheid and the dawn of constitutional democracy was to be 'accompanied by a shift in the existing patterns of wealth distribution to reverse specific injustices and to rectify the general maldistribution of property'.[9]

The need for the transformation of legal culture and legal tradition, on the other hand, stems from the necessity to shift from the apartheid legal culture that

[7] Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 1 *South African Journal on Human Rights* 146-188.
[8] Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* at 353.
[9] van der Walt op. cit. note 5 at 2.

viewed law in an ahistorical, apolitical, and yet scientific and technical manner, thus creating the assumption that 'The Law' is universal and reflexive – and as such, in no need of radical change. The transformation of legal culture therefore is expected to change the context, as well as the manner and approach in which law and planning are imagined and implemented in a post-apartheid setting. In other words, efforts to transform legal culture stems from the realisation that: '"The Law" is not an extraneous and autonomous framework within which judges can be restricted; it is an intellectual and cultural artefact that judges themselves create through their interpretation of legislation and the common-law tradition'.[10]

Marius Pieterse also contributes to the debate on transformative constitutionalism by highlighting the potential of a constitution-centred approach to development, particularly in the realisation of socio-economic rights. He however warns against the simplicity and potential danger of 'bridge' metaphor that suggests transition to be a linear move from the dark past to a bright future, as it were.

> […] to view the transition described here as a finite journey with fixed starting and end points is overly simplistic – rather, what must take place is a complex metamorphosis where elements of 'old' and 'new' are interlocked in an ongoing process of redefinition. Exactly how the end product of this metamorphosis should look and when, if ever, it will be achieved must necessarily remain uncertain and dependent on the outcomes of this continuous interaction, but should simultaneously not be conceived as so vague as to preclude meaningful and deliberate participation in the process.[11]

Though not a linear process, transformative constitutionalism allows for the appreciation of the post-apartheid Constitution as an instrument for promoting societal order and stability, while pressing for a meaningful transformation of everyday socio-spatial and economic relations in a post-apartheid society. This

[10] van der Walt op. cit. note 5 at 11.
[11] Marius Pieterse 'What Do We Mean When We Talk About Transformative Constitutionalism' 2004 20 *SA Publiekreg/Public Law* at 159.

involves the dismantling of the 'old' status quo as created in the colonial/apartheid era, while formulating and implementing laws and policies that are in line with the Constitution's objectives of creating an equal society.

Andre van der Walt highlights how transformative constitutionalism as a complex process is not necessarily defined by an absolute starting and ending point. In this process, the Constitution forms a central part of the 'development algorithm of post-apartheid South African law'.[12] For van der Walt, this development algorithm of law is characterised by a number of principles:

> (a) There is just one system of law. (b) It is shaped by the Constitution, which is the supreme law. (c) All law, including the common law and legislation, derives its force from the Constitution and is subject to constitutional control via the courts. (d) Rights or freedoms that are recognised or conferred by common law, customary law or legislation are protected to the extent that they are consistent with the Constitution and in so far as they promote the spirit, purport and objects of the Bill of Rights. (e) The function of the legislature is to enact laws that give effect to the provisions of the Constitution, especially the rights in the Bill of Rights. (f) The job of the executive and administration is to formulate policy and implement programmes to promote the constitutional goals. (g) The task of the courts is to interpret legislation and, in the absence of legislation, to develop the common law and customary law, so as to promote the spirit, purport and objects of the Bill of Rights. (h) If possible, existing law should be brought into line with the spirit, purport and objects of the Bill of Rights through either interpretation of legislation or development of the common law and customary law.[13]

This supremacy of the constitution is clearly outlined in section 1(c) of the 1996 Constitution. There also exist various provisions of the Constitution that seek to realise the state's transformative and developmental agenda. These include section 1(a-b) that strives to promote '[h]uman dignity, the achievement of equality

[12] Andre J. van der Walt *Property and Constitution* (2012) at 23.
[13] Ibid.

and the advancement of human rights and freedoms; [n]on-racialism and non-sexism'. This provision is enhanced by section 9(2-3) that guarantee everyone the right to full enjoyment of all rights and freedoms and the right to be protected against any discrimination on the grounds of race, sex, colour, culture and birth, among other 'makers of difference'. The rights to human dignity and to life are also guaranteed in sections 10 and 11 respectively.

Sections 25, 26, and 27 are also important insofar as the transformation of South Africa's socio-spatial milieu is concerned. Section 25(1) for instance states that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'. When read in isolation, this clause seems to preserve the status quo by guaranteeing protection for those that benefitted from the empowerment initiatives of the colonial/apartheid era to keep their property. However, when read with section 25(2)(a-b), there exist legal grounds for the expropriation of property 'for a public purpose or in the public interest; and subject to compensation'. Moreover, section 25(3)-(8) sets the conditions for land reform, restitution as well as compensation. These constitutional provisions are central as they are at the heart of the current debates on land reform, land restitution, and property rights.[14]

These debates on land restitution and redistribution are likely to influence policies and strategies related to urban land reform and development. Moreover, these debates are also bound to inform major cities' approach to the ever-pressing need for housing in the face of rapid urbanisation, growing levels of unemployment, and poverty. As various parties within government and society at large are grappling with the necessity for the review of section 25 of the Constitution, the future role of municipal planning, and private sector involvement in land

[14] Tembeka Ngcukaitobi *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018).

development hangs on the balance. Such debates point to both the preciousness, as well as the precariousness of transformative constitutionalism.

As part of the formulation of the post-apartheid lawscape, sections 26 and 27 of the constitution outline justiciable socio-economic rights, making the South African 1996 Constitution one of the most progressive ones in the world. Section 26(1) guarantees 'everyone' 'the right to have access to adequate housing'. Section 26(2) states that the state 'must take reasonable legislative and other measures, within its available resource, to achieve the progressive realisation' of the right to access to adequate housing. The phrase 'reasonable legislative and other measures' is key as it also include measures such as Integrated Development Plans (IDPs) and other policies and planning measures, at all levels of government. These planning policies must all adhere to the constitutional notion of reasonableness, and must all be geared towards progressive realisation of the right within available resources. This constitutional provision has enabled citizens (particularly the urban poor) to hold the state accountable insofar as adequate housing provision is concerned. Moreover, the state has been able to allocate its available resources to prioritise the incremental realisation of this right. This has contributed to the continued altering of the post-apartheid lawscape.[15]

The provision on the right to access to adequate housing is supported by section 26(3) stating that no one 'may be evicted from their home, or have their home demolished without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.' While this provision protects both the propertied class and those that find themselves compelled to unlawfully occupy both private or public property, it continues to define urban politics and governance. As will be noted later in this chapter, both the wealthy and

[15] Nico Steytler and Jaap de Visser *Local Government Law of South Africa* (2007); Marius Pieterse 'Development, the Right to the City and the Legal and Constitutional Responsibilities of Local Government in South Africa' (2014) 131 *South African Law Journal* 149-177.

poor have used this anti-eviction provision as a legal basis for staking their claim to the post-apartheid city. Similarly, section 27(a-c) that guarantee the rights to have ‘healthcare services, including reproductive health care; sufficient food and water; and social security’, provide a legal avenue for various social groups to turn to the law, and the courts, in their quest for spatial and social justice.

While the national, provincial and local government spheres of government have the responsibility of ensuring the realisation of socio-economic rights and societal transformation, more responsibilities rest on the local government sphere whose developmental mandate is clearly set out in the Constitution. Section 152(1)(a-d) outlines the objectives of local authorities as follows: ‘[t]o provide democratic and accountable government for local communities; [t]o ensure the provision of services to communities in a sustainable manner; [t]o promote social and economic development; [t]o provide a safe and healthy environment’. Part B of schedules 4 and 5 of the Constitution also delineate the roles and functions of local municipalities. These include the provision of electricity and gas, municipal public health services, municipal public transport, municipal planning, local amenities, refuse removal, and street trading among others.

In guiding municipalities as they strive to realise their developmental objectives, section 153(a) of the constitution stipulates that all municipalities must ‘structure and manage [their] administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community’. This provision sets the tone for the formulation of other related legislation aimed at strengthening the developmental role of municipalities in pursuing spatial justice, socio-economic development, and integrated development planning.

The constitutional provisions discussed above have contributed to the development of a municipal planning system in post-apartheid South Africa. These provisions, as well as other related local government laws and policies, have guided municipalities in their realisation of their developmental mandate. Apart from the provision of bulk services such as water and electricity services, post-

apartheid municipal planning has been geared towards the promotion of spatial justice, social justice, and inclusive economic development. While local government performance has been uneven, there is no doubt that this sphere of government continues to positively alter the lawscape. In many ways, the post-apartheid legislative framework, and planning system has created new avenues that allow for the deepening of local democracy. This has been done through the establishment of various municipal-level multi-stakeholder participation forums. In some instances, rights-based litigation has been used by various urban residents to claim or contest for a range of justiciable rights in the city.[16]

5.3 CRAFTING A POST-APARTHEID LAWSCAPE?

While the 1996 Constitution is the supreme law of the land, a plethora of legislation was promulgated to realise the post-apartheid government's developmental priorities. Most of these laws are explicitly aimed at achieving the constitutional objectives discussed earlier. With regard to the promotion of spatial justice, and socio-economic rights in particular, there exist legislation that can collectively (and yet loosely) be referred to as planning law. For Jeannie van Wyk, planning law is interdisciplinary, as it straddles between constitutional law, property law and environmental law.[17] Informed by transformative constitutionalism, post-1994 planning law attempts to create an integrated planning system predicated on democratic values and ethos.[18]

What is interesting to note about post-apartheid planning in South Africa, is that even after the repealing of the Group Areas Act, the post-apartheid government continued (in some instances at least) to use planning ordinances that were formulated before 1994. These included ordinances for former white areas namely, the Natal Town Planning Ordinance 27 of 1949; the Orange Free State Townships Ordinance 9 of 1969; the Cape Town Land Use Planning Ordinance 15

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[16] Thomas Coggin and Marius Pieterse 'Rights and the City: An Exploration of the Interaction Between Socio-economic Rights and the City' (2012) 23 *Urban Forum* at 257.

[17] Jeannie van Wyk *Planning Law: Principles and Procedures of Land-Use Management* (2008) at 49.

[18] Jeannie van Wyk and Mark Oranje 'The Post-1994 South African Spatial Planning System and Bill of Rights: A Meaningful and Mutually Beneficial Fit?' (2013) 0 0 *Planning Theory* 1-21.

of 1985; and the Transvaal Town Planning and Townships Ordinance 15 of 1986. The former black townships on the other hand, continued to be regulated by the Black Communities Development Act of 1984, and later on by the Less Formal Townships Establishment Act 113 of 1991.

The abovementioned planning ordinances were in use even after the reconfiguration of South Africa provinces in 1994 – only to be superseded by SPLUMA in 2013.[19] This meant that for over two decades, post-apartheid South Africa did not have a coherent, integrated planning legislation. Moreover, the use of these old-order planning legislation in a post-apartheid setting meant that, initially, at least, planners and cities had to try and realise the spatial justice goals of the Constitution with tools that were not designed for achieving spatial justice. This might have contributed to the complexity faced by the post-apartheid state in realising its vision for spatial transformation and inclusive development. As will be outlined in the subsection that follows, however, despite the persistence of the legacy of apartheid legacy in cities, the post-apartheid state continues to formulate and implement laws aimed at realising the constitutional vision of creating promoting spatial justice.

5.3.1 Post-1994 Legislation & Spatial Justice

The reconstitution of the apartheid space economy through legal and planning instruments has continued to define the post-apartheid state's developmental agenda. As such, various laws and policies aimed at reversing the apartheid space economy are being implemented by all three spheres of government. These include the Development Facilitation Act 67 of 1995 (DFA); the Housing Act 107 of 1997; the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998; the Municipal Systems Act 32 of 2000 and; the Spatial Planning and Land-Use Management Act 16 of 2013 (SPLUMA). This subsection will provide a brief discussion on these legislative instruments, with the intention of assessing the

[19] In fact, some municipalities continue to use these apartheid era ordinances as the implementation of SPLUMA (to be discussed below) remains a challenge.

extent to which their objectives are aligned with the constitutional vision of promoting spatial justice and inclusive development.

The Development Facilitation Act (DFA) ushered a new planning ethos informed by the post-1994 government's ambitious programme of socio-spatial and economic transformation, i.e. the Reconstruction and Development Programme (RDP).[20]At the heart of the DFA was the promotion of efficiency in the development of land in both urban and rural areas. This Act also sought to 'introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land'.[21] It also laid down the general principles governing land development in the country. The DFA also aimed at promoting security of tenure. All these objectives related to land development as well as land tenure were aimed at realising the constitutional vision of undoing the skewed land ownership and land development practices that characterised the colonial/apartheid era.

The DFA's attempt at forging integrated development planning was well-outlined in section 2(b) where the Act sought to guide the administration of any physical planning, transport planning, zoning schemes and any other related strategic land development and management plans. The DFA also outlined the general integrated development planning. As stated in section 3(1)(1-viii), this Act outlined that policy, administrative practice and laws should promote efficient and integrated land development in that they

> promote the integration of the social, economic, institutional and physical aspects of land development; promote integrated land development in rural and urban areas in support of each other; promote the availability of residential and employment opportunities in close proximity to or integrated with each other; optimise the use of existing resources including such resources relating to agriculture, land, minerals, bulk infrastructure, roads, transportation and social facilities; promote a diverse combination of land uses also at the level of individual erven or subdivisions of land; discourage the phenomenon of "urban sprawl" in

[20] African National Congress *The Reconstruction and Development Programme* (1994).
[21] Development Facilitation Act No. 67 of 1995, Preamble.

> urban areas and contribute to the development of more compact towns and cities; contribute to the correction of the historically distorted spatial patterns of settlements in the Republic and to the optimum use of existing infrastructure in excess of current needs and; encourage environmentally sustainable land development practices and processes.

These principles of land development were intended to shift from the apartheid legal culture that emphasised racial segregation, spatial fragmentation, towards a more democratic and inclusive planning regime. These DFA principles of land development were also aligned with the objectives of the Bill of Rights, notably the progressive realisation of social rights and spatial justice.

One of the most significant proposals brought forth by the DFA were the Land Development Objectives (LDOs). The LDOs were local-level strategic plans whose primary purpose was to foster spatial restructuring through spatially integrating fragmented urban spaces. This spatial restructuring was to be done through the creation of integrated public transport systems, as well as the provision of water, electricity, and education facilities. Given the spatial fragmentation that resulted from racial zoning, the LDOs were also meant to stitch the urban fabric by promoting the development of compact cities. Compact cities were to allow for a more integrated and cost-efficient approach to the delivery of bulk infrastructure and other related urban amenities. All these LDO land development guidelines were guided by principles of environmental planning and sustainable development.[22]

The LDOs can be said to have been the first local development strategies that guided municipal planning in an era of transition.[23] With regard to housing provision for instance, municipalities were guided by LDOs with regard to the number of housing units, sites or other facilities planned for, as well as the rate at which the production or delivery of such units, sites or facilities will increase during

[22] Section 28(1)(b)(i-viii).

[23]Pieter van Rensburg, James Cattanach, Kevin Wall 'The Formulation of Land Development Objectives' 1998 9 1 *Urban Forum* 121-130.

a period in future.[24] The DFA therefore played a significant role in facilitating the government's Reconstruction and Development Programme (RDP), particularly with regard to low-cost housing provision (dubbed RDP housing) and physical infrastructure development.[25]

While the government has been lauded in some circles for its RDP housing programmes that has seen it housing millions of South Africans; there exist criticisms over these houses' poor-quality, as well as their location on the outskirts of major cities.[26] Notwithstanding these criticisms, the LDOs played an integral role in guiding planning, including the implementation of RDP housing programme, that has immensely transformed the post-apartheid city-scape. While the DFA was later repealed, it sought to realise the constitutional goal of spatial transformation. Its enforcement of the LDOs at local level guided municipal planning, allowing this sphere of government to realise its constitutional mandate of promoting social and economic development, as set out in sections 152 and 153 of the 1996 Constitution.

Apart from the DFA, one of the early pieces of legislation that has continued to shape the post-apartheid spatial form is the 1997 Housing Act. The primary objective of this Act is to realise section 26 of the 1996 Constitution that guarantees everyone the right to have access to adequate housing. With the purport of fostering spatial justice and transformation through the provision of sustainable human settlements, the Act mandates all three spheres of government to 'give priority to the needs of the poor in respect of housing development' and to 'ensure that housing development provides as wide a choice of housing and tenure options as is reasonably possible'. The Act also mandates the government to provide housing that is economically, fiscally, socially and financially affordable and sustainable, and is based on integrated development planning principles.[27]

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[24] Section 28(d)(i-iii).
[25] African National Congress op. cit. note 21.
[26] Sarah Charlton *State Ambitions and Peoples' Practices. An Exploration of RDP Housing in Johannesburg* (University of Sheffield; 2013).
[27] Section 2(1)(a, c)(i-iv).

In line with the constitutional vision of creating an integrated and non-racial society, one of the primary objectives of the Housing Act is to foster social cohesion through housing provision. This is done through the prioritisation of housing programmes that contribute to the process of racial, social, economic and physical integration' in both urban and rural areas. This legislative intervention is an antithesis of the colonial/apartheid housing laws that deliberately encouraged racial zoning.

The Housing Act also mandates the formulation of a National Housing Code;[28] the powers and responsibilities of all three spheres of government regarding housing provision;[29] while outlining funding mechanisms to support housing development.[30] Section 9(1)(i-iii) of the Act states that every municipality must work in collaboration with the national and provincial government to ensure that 'the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis; conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed; services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economical and efficient'. These provisions of the Housing Act give effect to section 26 of the Constitution and continually shape the post-apartheid lawscape, as various inhabitants of the city have used them to claim their legal rights specifically, and the right to the city, broadly.

With the guidance of this Act, as well as the related constitutional provisions discussed above, the state has managed to provide millions of housing units particularly to the poor. While housing provision remains inadequate, given the growing housing backlogs and the proliferation of informal settlements particularly in South Africa's major cities, the Housing Act has undoubtedly contributed to the transformation of the spatial structure of cities.

One of the consequences of inadequate housing, homelessness, unemployment, and poverty in post-apartheid cities, has been the unlawful

[28] Section 4.
[29] Sections 7 and 8.
[30] Sections 11 and 12.

occupation of both state, and privately-owned land, particularly by the poor. Instead of dealing with this practice in a heavy-handed manner, as was the case during the colonial/apartheid times; the post-apartheid government formulated the Prevention of Illegal Eviction and Unlawful Occupation of Land Act of 1998 (i.e. the PIE Act). Apart from repealing the notorious Prevention of Illegal Squatting Act of 1951, the PIE Act protects both land-owners as well as unlawful land occupiers. It does so by providing specific procedures for the eviction of unlawful occupiers, thus protecting the vulnerable social groups particularly the elderly, women, children, disabled persons.[31]

The PIE Act gives effect to the sections 25(1) and 26(3) in the sense that it protects property owners from instances that may result in them losing their private property. Similarly, the Act protects the rights of those persons who might have unlawfully occupied land or abandoned buildings. As this Act seeks to balance the interests of the propertied classes and the vulnerable ones, it reconfigures the socio-spatial relations in cities in various ways. For one, while the property owners may evict unlawful occupiers, they have to follow legal procedures as outlined in the Act. This gives the vulnerable an opportunity to express their reasons of unlawfully occupying the land, in court. The balancing of rights is well-captured in section 5(1)(a-c) of the PIE Act, where it states that:

> The owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that –
> (a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
> (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and;
> (c) there is no other effective remedy available.

[31] PIE ACT, Preamble.

As these provisions apply to both state- and privately-owned land, the courts have had to balance the demands of unlawful occupiers and property owners, while protecting the constitutional rights of both parties. This balancing act has also contributed to an increase in rights-based litigation, resulting in the courts playing a considerable role in matters that shape cities' socio-spatial dynamics and development planning at large.[32]

Realising that the establishment of sustainable human settlements is dependent on the coordination of stakeholders from various sectors of community, the post-apartheid state has adopted an integrated development planning approach. This means that municipalities in particular have to develop integrated development plans, and spatial development frameworks that allow for effective spatial planning, and efficient use of financial and human resources, while creating platforms for public engagement. The Municipal Systems Act 32 of 2000 (henceforth, the Systems Act) was formulated to guide municipal development planning at local level. The Systems Act is geared towards fostering the role of local authorities as they attempt to fulfil their developmental mandate.

The Systems Act's objectives include the provision for 'the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all'. The Systems Act also 'provide for community participation', while establishing to a framework for 'the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government'.[33]

In many ways, the Systems Act embodies and echoes the spirit and intent of the Bill of Rights, as well as sections 152 and 153 of the Constitution. This is primary because it emphasises the developmental functions of cities and

[32] Stuart Wilson 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (2009) 126 *South African Law Journal* 270 – 290. A discussion on rights-based litigation and its effects on spatial justice will be outlined in detail in chapter 6.
[33] Municipal Systems Act, Preamble.

municipalities in promoting social justice through efficient service delivery and effective municipal planning and governance. The Systems Act emphasises the importance of multi-stakeholder participation and consultation in all development planning processes.[34] The Municipal Systems Act also encourages integrated development planning:

> 23. (1) A municipality must undertake developmentally-oriented planning so as to ensure that it –
>
> a) strives to achieve the objects of local government set out in section 152 of the Constitution;
> b) give effect to its developmental duties as required by section 153 of the Constitution; and
> c) together with other organs of the state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27, and 29 of the Constitution.

The Systems Act also mandates all local, district and metropolitan municipalities to prepare Integrated Development Plans (IDPs).

> 25. (1) Each municipal council must, within a prescribed period after the start of its elected term, adopt a single, inclusive and strategic plan for the development of the municipality which—-
>
> a) links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality:
> b) aligns the resources and capacity of the municipality with the implementation of the plan:
> c) forms the policy framework and general basis on which annual budgets must be based.

The Act also provides a detailed outline as well processes guiding the formulation of IDPs.[35] From its promulgation therefore, the Systems Act did not only shape the future of municipal planning and budgeting. Its application also depicts overt role

[34] Sections 16 and 17.
[35] Sections 26-30.

played by law in shaping municipal planning systems, and processes. In other words, the Act became the bedrock of municipal planning law, as it allowed for the constitutional aspirations of a developmental local government, as stipulated in section 152 of the Constitution, to percolate through and inform planning instruments.

Notwithstanding the Systems Act's clarity of purpose with regard municipal planning, the making of post-apartheid integrated development planning system has not been without its challenges. The first generation IDPs (i.e. IDPs formulated between 2000-2010) for instance were often dubbed as 'wish-lists' as they were found wanting in substance and strategy.[36] In other words, these initial IDPs were either over-ambitious in their articulation of municipal development objectives, or they were met with lack of human capacity and funding. These shortcomings were reflected in uneven delivery of services across various municipalities.[37]

Despite the challenges related to its implementation, the Systems Act remains one of the linchpins anchoring South Africa's municipal planning processes. For municipal planning remains legally-binding, and financial accountability in the case of municipal leaders and officials is guarded by the Systems Act. Moreover, the inclusion of mandated community participation in municipal planning attests to the government's commitment to the realisation of bottom-up-led approaches to planning. The Systems Act's multi-sectoral approach to development, and its legislation of multi-stakeholder participation resonates with the idea of the right to the city as it strives to realise the constitutional vision of spatial transformation.[38]

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[36] Udesh Pillay, Richard Tomlinson, and Jacques Du Toit, (eds.) *Democracy and Delivery: Urban Policy in South Africa* (2006). Also see Marius Pieterse, 'Development, the Rights to the City and the Legal and Constitutional Responsibilities of Local Government in South Africa'. (2014) 131 *The South African Law Journal* 149-177.

[37] Integrated Development Plans will be discussed in detail in chapter 6.

[38] Steytler and de Visser op. cit. note 15.

The Spatial Planning and Land-Use Management Act 16 of 2013 (SPLUMA) is punted as the most progressive of the post-apartheid planning laws.[39] This Act is the first post-apartheid planning piece of legislation 'that creates an overarching framework for spatial planning, policy and land use management for the entire country, including rural and informal settlements'.[40] As outlined in its preamble, SPLUMA is also envisaged to 'provide a framework for spatial planning and land use management' and 'to provide for the inclusive, developmental, equitable and efficient spatial planning at the different spheres of government'. This Act also details the preparation, as well as the legal status of Spatial Development Frameworks (SDFs) across local, provincial, and national spheres of government.[41]

Informed by the constitutional objectives of redressing the injustices of the past and building an inclusive society, SPLUMA outlines five key development principles. These include the principle of spatial justice; the principle of spatial sustainability; the principle of efficiency; the principle of spatial resilience and; the principle of good administration.[42] The principle of spatial justice seeks to 'redress' all past spatial and other development imbalances 'through improved access to and use of land'.[43] Also forming part of the realisation of spatial justice through SPLUMA, is the formulation of Spatial Development Frameworks (SDFs) that attempt to address the challenges of informal settlements in urban areas, as well as rural poverty. SPLUMA also aims for the use of spatial planning mechanisms such as land-use schemes, to enable disadvantaged communities to access land.[44] Spatial justice as a development principle is critical for this study, as it demonstrates how law and planning can be used to achieve the public interest

[39] See Nel Verna, 'Spluma, Zoning and Effective Land Use Management in South Africa' (2016) 27 1 *Urban Forum* 79-92.
[40] Ibid.
[41] Section 4.
[42] Section 7(a-e).
[43] Section 7(a)(i).
[44] Section 7(a)(iii).

through the reconstitution of everyday socio-spatial, economic and, institutional processes and activities.

The SPLUMA principle of spatial sustainability, on the other hand, emphasises that land development be effected within the fiscal, institutional and administrative means of the state'. This development principle relates, and gives effect to, sections 26(2) and 27(2) of the Constitution that emphasise that the state 'must take reasonable legislative and other measures, within its available resources' to achieve the progressive realisation of social rights. So, as the state endeavours to realise spatial justice, it does that by providing adequate fiscal institutional and administrative means, that support all planning tools, policies and strategies aimed at transforming South Africa's socio-spatial, and economic milieu.[45]

This principle of spatial sustainability also emphasises the protection of the natural environment, while promoting land development specifically in previously disadvantaged areas such as townships.[46] Spatial sustainability is also supported by the SLPUMA principle of efficiency. The latter states that land development should optimise the use of existing resources and infrastructure.[47] Moreover, the principles of spatial resilience and good administration are aimed at promoting the 'flexibility' in spatial planning to allow for innovative development planning and land-use management.[48]

Apart from its comprehensive outline of spatial planning objectives, and supporting institutional mechanisms (such as planning tribunals), SPLUMA is set to dictate all land development and land-use management imperatives across South Africa. This means that all planning laws that were enacted during the apartheid era, such as those planning ordinances discussed above, are all

[45] Nel Verna, 'Spluma, Zoning and Effective Land Use Management in South Africa' (2016) 27 1 *Urban Forum* 79-92.
[46] Section 7(b)(i-vii).
[47] Section 7(c)(i).
[48] SPLUMA, Section 7(d-e).

repealed. SPLUMA therefore marks a new legislative regime in post-apartheid planning law, as it envisages to create a harmonised, intergovernmental planning system predicated on the constitutional vision of societal transformation.

Having been enacted in 2013, the implementation of SPLUMA objectives in all spheres of government remains a challenge. Part of the challenge stems from the fact that departments responsible for spatial planning are yet to align their financial/budgeting processes, as well as institutional instruments to cater for the holistic application of this Act.[49] Moreover, given the disparate development trends in South African planning, with some municipalities and provinces still lagging behind in their spatial planning, the implementation of SPLUMA is likely to be uneven, at first at least. Notwithstanding, in principle SPLUMA promises to be a progressive legal instrument that can contribute to the realisation of spatial justice, social cohesion and inclusive development in South Africa.[50]

5.3.2 Planning Policy Post-1994

Apart from the legislation discussed above, there exist are measures such as policies and strategies aimed at realising the constitutional vision of spatial transformation and nation-building in South Africa. Some of the development-oriented policies aimed at fostering spatial justice include the Reconstruction and Development Programme (RDP), the National Development Plan (NDP), and the Integrated Urban Development Framework (IUDF).

Adopted in 1994 as one of the foundational policy frameworks geared towards realising the constitutional vision of a democratic and equal society, the RDP's primary objective was to act as a blue-print for socio-economic and spatial transformation. As such, the RDP was predicated on at least six principles, notably; integration and sustainability; people-driven development; peace and security; nation-building; meeting basic needs and building infrastructure and;

[49] Nic Laubscher, Lizette Hoffman, Ernst Drewes and Jan Nysschen *SPLUMA: A Practical Guide* (2016).
[50] Anthony Barnes and Verna Nel 'Putting Spatial Resilience into Practice' 2017 28 2 *Urban Forum* at 219.

democratisation.[51] These key principles were meant to inform the post-apartheid state's economic development framework, the fiscal policy and budgeting framework, as well as public sector restructuring. While the people-centred RDP policy was later on replaced by more neoliberal one, its foundational principles continue to find articulation in most of the government's developmental policies and programmes geared towards the realisation of socio-economic rights and spatial justice.

The NDP strategic policy document on the other hand was adopted by Cabinet in 2014. Its primary objective is to provide a mid-term multi-pronged developmental roadmap for the state, and its developmental partners. The NDP therefore sets the developmental vision of the state – a vision that is informed by the Constitution. Chapter 4 of the NDP, for instance, emphasises the need to maintain expand the country's economic infrastructure particularly electricity, water, transport and telecommunication to support socio-economic growth. This developmental goal stems from the fact that 'many households are too poor to pay the costs of services; some municipalities are poorly managed or have limited human and financial resources to deliver services; in other municipalities, there is not adequate bulk infrastructure to supply all households with electricity and water [and]; unrestrained use by some households leaves others with nothing'.[52] After highlighting some of these challenges, the NDP presents various policy interventions and project proposals aimed at equitably distributing electricity, water, transport and telecommunication services to all South Africans. These include creating 'workable urban transit solutions' such as increasing investment in public transport and resolving existing public transport policy issues; investing in water infrastructure, and renewable energy sources.

Chapter 8 of the NDP, aptly entitled 'Transforming human settlements and the national space economy', responds directly to the spatial injustices faced by the post-apartheid state. Apart from outlining the planning legacy of

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[51] *White Paper on Reconstruction and Development* No. 23 of 1994. See Section 1.3.

[52] National Planning Commission *National Development Plan: Our Future – Make It Work* (2012) at 161.

colonialism/apartheid in urban and rural settlements, the chapter also articulates some concrete policy interventions and programmes geared towards transforming human settlements and the national space economy. It begins by acknowledging the need to 'respond systematically, to entrenched spatial patterns across all geographic scales that exacerbate social inequality and economic inefficiency'. Part of the response to this legacy of socio-spatial, and economic inequality is planning that 'will be guided by a set of normative principles to create spaces that are liveable, equitable, sustainable, resilient and efficient, and support economic opportunities and social cohesion'.[53]

In addressing the constitutional rights to access to housing, the chapter emphasises the role that housing provision can play in mending the apartheid space economy. Moreover, it outlines how the state will continually review its housing policies in order to 'ensure that the delivery of housing is to be used to restructure towns and cities and strengthen the livelihoods of prospects of households. In drafting this chapter, the National Planning Commission (NPC) also attempted to align sustainable human settlements to sections 24, 26 and 27 of the Constitution. Some of the strategies identified in addressing spatial injustice include responding systematically to the entrenched spatial patterns in both urban and rural areas; implementing catalytic development interventions to achieve spatial transformation; balancing the demands for spatial equity, economic competiveness, and environmental sustainability. [54]

Chapter 8 also proposes four overarching principles for spatial development that are aimed at addressing urban and rural spatial inefficiencies. These development principles also form the foundation of SPLUMA. They include spatial justice, spatial sustainability, spatial resilience, spatial quality, and spatial efficiency. As discussed above, these principles strive to realise socio-spatial and economic transformation in South Africa. In realising the principle of spatial justice, the NDP outlines the 'accommodation conundrum' faced by the state, i.e. the challenge of housing millions of people in an economic environment that restricts

[53] Ibid at 259.
[54] Ibid at 259-260.

cities and towns' capacity to produce more employment opportunities. Whereas the government has delivered over 3.2 million subsidised housing units; expanded access water to at least 97.7 per cent, with 82 per cent having access to sanitation and 75 per cent having access to electricity, the housing conundrum still affects the poor in both urban and rural areas.[55]

As also outlined in chapter 8 of the NDP, the state's Breaking New Ground housing policy revised in 2004 has not succeeded to fully tackle the housing challenge. For one, the programme has often resulted in 'poor-quality [housing] units; uniform and monotonous settlements on the urban edge; the concentration of the very poor in new ghettoes; and poor-quality residential environments without the necessary social facilities and supportive infrastructure'.[56] These challenges, according to the NPC, are a testament to the post-apartheid housing policy that has unwittingly reinforced the apartheid geography.

As part of its recommendations, the NPC stressed the need for all municipalities to reform the current planning system by eliminating inefficiencies in administrative procedures (such as zoning applications), while adhering to set turnaround times in decision-making. In chapter 8, the NPC also recommended that all municipalities should have 'an explicit spatial restructuring strategy' that is linked to Integrated Development Plans (IDPs) and Spatial Development Frameworks (SDFs).[57] The NDP also highlights the need for programmes and strategies that address townships, as well as informal settlements upgrading. In realising these spatial restructuring targets at a national level, the NPC proposed the formulation of a National Spatial Framework (NSF). The NSF is envisaged to provide strategic direction for spatial restructuring, through the provision of principles that guide spatial planning imperatives at provincial and municipal levels.[58]

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[55] Ibid at 268.
[56] Ibid at 268.
[57] Ibid at 288-290.
[58] Ibid at 278.

While chapter 8 responds directly to the demands for spatial justice and socio-economic development, chapter 13 of the NDP acknowledges the need for creating a capable state. The capable state is defined by the existence of sound government institutions, a professional public service, as well as economically competitive cities that can drive spatial transformation and inclusive development.[59] In fact, the NDP in its entirety is meant to respond to various demands of the development state. In this regard, it contributes to the realisation of the constitutional vision of building a new society predicated on democratic values and a shared future.

As outlined above, one of the major tasks faced by the post-apartheid government was the provision of affordable housing to millions of poor people as expressed in the 1996 Constitution and the Housing Act of 1997. To implement this constitutional imperative, the Department of Housing (now Department of Human Settlements) formulated a National Housing Code in 2000 (later to be revised in 2009). The Housing Code is a housing-related policy that outlines the key policy principles, guidelines and norms and standards that apply to government's housing assistance programmes.[60] The Housing Code is aimed at simplifying and fast-tracking the implementation of housing projects across the country.

The Housing Code provides detailed information on informal settlements upgrading. This programme is aimed at providing support to households that comply with the Department of Human Settlement's (the department) Housing Subsidy Scheme, households headed by minors, persons who are first-time home-owners and other vulnerable groups. The codes also stipulate the criteria for the provision of social and economic facilities such as medical care facilities, community halls, taxi ranks, sports facilities and informal trading facilities.

The Code further outlines the details of a housing program that assists people in emergency circumstances. These include people who would have been

[59] Ibid at 408.

[60] Department of Human Settlements *The National Housing Code: A Simplified Guide to the National Housing Code* (2009).

relocated as a result of informal settlements upgrading and/or as part of natural disasters relief. The Housing Code also provides policy guidelines and norms and standards related to the provision of social housing. Through its development partners such as the social Housing Regulatory Authority, as well as provincial and local authorities, the Department of Human Settlements facilitates the provision of affordable social housing to the vulnerable groups as part of promoting security of tenure.[61]

The Housing Code has played an instrumental role in the implementation of the Comprehensive Plan for the Development of Sustainable Human Settlements, otherwise known as 'Breaking New Ground' (BNG). The BNG policy was formulated in 2004 with the objectives of fast-tacking sustainable housing provision and realising the constitutional mandate of promoting access to affordable housing. The BNG marked a shift from the provision of housing to sustainable human settlements. This means that there was a realisation within government that housing provision was not just about providing a housing structure – it was also about providing all the other social facilities and amenities that allow people to lead a meaningful life. Central in the BNG policy is the progressive eradication of settlements, the promotion of densification, supporting urban renewal and inner-city regeneration, acquisition of well-located private land for housing development, development of social and economic infrastructure and; provision of support to municipalities as they implement various housing programmes.[62]

While well-intentioned, the BNG policy has been a subject of discussion amongst some scholars who opine that it does not provide meaningful direction with regard to low-cost housing. The continued growth of informal settlements, as well as the eviction of the poor as part of urban regeneration for instance, has been cited as symbolising this policy's weakness with regard to promoting housing

[61] Ibid section 5.
[62] Pillay and Tomlinson op. cit. note 36 at 313.

provision.[63] While this scholarly analysis and critique of housing policy is founded, there is also evidence suggesting that the post-apartheid government's efforts have continued to restructure the South Africa's spatial milieu. The recent twenty-year review of the state for instance point to the fact that:

> Over the past 20 years, about 2. 8 million completed houses and units, and just over 876 774 serviced sites, have been delivered, allowing approximately 12.5 million people access to accommodation and a fixed asset; About 353 666 rental units of the previous government were transferred into the ownership of tenants; There have been three major iconic restitution projects of communities that were forcibly removed from the inner city, District Six, Cato Manor and Lady Selbourne, have been reintegrated with new housing into the metropolitan centres; More than 10 739 communities in 968 towns and cities across the country have benefitted from the national housing programmes. This indicates the extent of the interface between communities and government, and each of the 3.7 million households.[64]

These figures demonstrate the continued efforts made by the state to foster spatial justice in post-apartheid South Africa. While the implementation of the development-oriented laws and policies is not perfect, the role that these instruments play in shaping South Africa's lawscape and realising the constitutional vision is apparent.

In an endeavour to promote spatial justice, the state also recently formulated the Integrated Urban Development Framework (IUDF) in 2016. Subtitled 'a new deal for South African cities and towns', the IUDF's primary objective is spatial transformation. This urban-oriented policy document is aimed at fostering sustainable growth model of compact, connected and coordinated cities and towns. This transformative objective is underpinned by four strategic

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[63] Marie Huchzermeyer 'Housing Rights in South Africa: Invasions, Evictions, the Media, and the Courts in the Cases of Grootboom, Alexandra, and Bredell' (2003) 14 1 *Urban Forum* 80-107.

[64] Presidency *Twenty Year Review: South Africa – 1994-2014 – Background Paper: Sustainable Human Settlements* (2015) at 28.

goals namely spatial integration; inclusion in and access to economic opportunities, economic growth and good urban governance.[65]

These strategic objectives seek to realise nine policy leavers namely; integrated and urban planning and management; integrated transport and mobility; integrated sustainable human settlements; integrated urban infrastructure; efficient land governance and management; inclusive economic development; empowered active communities; efficient urban governance and; sustainable finances.[66] Viewed together, these policy levers are geared towards promoting spatial justice through socio-spatial transformation.

The IUDF begins by highlighting how South Africa's cities and towns were shaped by the apartheid legacy of legislated racial segregation. This legacy resulted in the entrenchment of deep class-based segregation, exacerbated by spatial inequality and the concentration of poverty in urban areas. The IUDF also predicates its objective of spatial integration on the fact that to this day, most towns and cities in South Africa are characterised by relatively poor physical infrastructure, particularly the ones related to transportation and communication. Moreover, a rise in urbanisation trends, coupled with poverty and unemployment has resulted in higher demands for housing, water, electricity and other related urban amenities.[67] These urban inefficiencies stem from, among other factors, the insufficient usage of spatial planning tools in towns and cities. In other words, most urban municipalities struggle to realise their constitutional mandate of promoting socio-economic development, and spatial transformation as set out in section 152 of the Constitution and in the Systems Act.

Having outlined some of the challenges faced by post-apartheid cities and towns, the IUDF proposes a sustainable urbanisation model that prioritises the role that transportation planning can play in realising spatial transformation. In addition to transport, the IUDF also identifies job creation and housing as the three key

[65]Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) at 8.
[66] Ibid at 9.
[67] Ibid at 30.

elements that can contribute to spatial transformation. In realising spatial justice, the IUDF proposes the following: 'reducing travel costs and distances; preventing further development of housing in marginal areas; preventing further development of housing in marginal places; increasing urban densities to reduce sprawl; improving public transport and the coordination between transport modes; shifting jobs and investment towards dense peripheral townships; making cities and human settlements inclusive, safe, resilient and sustainable; and; developing and implementing holistic disaster risk management at all levels'.[68]

All these aforementioned proposals are geared towards assisting municipalities to effectively plan for both current and future urbanisation trends. As part of planning for smart cities, the IUDF is aimed at promoting compact cities that allow for the use of smart transport systems, smart energy, as well as smart physical infrastructure. The smart cities model forms part of the fourth industrial revolution, where cities are expected to be driven by information and communications technologies that better advance people's lives, while protecting the natural capital, at the same time leveraging on technology to foster competitiveness as a local and global scale. The IUDF vision therefore attempts to create '[l]iveable, safe, resource-efficient cities and towns that are socially integrated, economically inclusive and globally competitive, where residents actively participate in urban life'.[69] This vision is well-aligned the constitutional mandate that calls for all municipalities to be developmental, innovative, and responsive to the demands of all residents.

From a planning perspective, the IUDF highlights some of the challenges faced by cities and towns as they attempt to transform their spatial form. The challenges include weak planning and coordination within government, as well as poor state-private sector coordination, weak intergovernmental relations structures

[68] Ibid at 37.
[69] Ibid at 38.

that in turn results in poor utilisation of resources and weak long-term planning (defined for instance by the five-year IDPs, a time-frame that is not enough to effectively deal with issues of infrastructure expansion) as well as integrated transport planning. Poor urban management, as well as delays in the processing of spatial planning procedures, that in turn frustrate development.[70]

In responding to these urban challenges, the IUDF envisages the alignment of spatial, sectoral and strategic plans across all three spheres of government. It also recommends the improvement of the quality of municipal spatial plans; the alignment of land-use and human settlement planning to transport planning and the strengthening of municipalities' institutional and human capacity to implement SPLUMA. All these interventions are expected to result in the creation of smart, compact cities characterised by a well-networked transport network, as well as sustainable human settlements.[71]

As the IUDF is aimed at effectively planning for urbanisation, it also outlines some of the challenges faced by post-apartheid cities in the area of housing provision. These include the escalating demand for serviced shelter; shortage of well-located public land for settlement development; skewed residential property market; as well as the persistence of poor spatial planning in townships and informal settlements. In addressing these housing-related issues, the IUDF aims to accelerate the upgrading of informal settlements; promote densification, including providing support for 'back-yarding' and; prioritising inner-city regeneration[72].

The IUDF also outlines its strategies on improving the efficiency on land governance and management; integrated urban infrastructure, as well as developing mechanisms for promoting inclusive economic development in cities and towns, while ensuring that these spaces have sound fiscal frameworks. All these initiatives are expected to promote spatial transformation, and integration. While it is still early to assess the socio-spatial, and economic effects of the IUDF,

[70] Ibid at 45.
[71] Ibid at 47-48.
[72] Ibid at 63-65.

its strategic thrust promises to contribute to the transformation of South Africa's lawscape.

5.3.3 Constitutional Rights-Based Litigation Post-1994

The justiciability of constitutional rights in post-apartheid South Africa has contributed to the reconstitution of the lawscape.[73] The fact that the courts continue to play an integral role in the realisation of spatial justice in cities, allows for the testing of the state's legislation and policies against the constitutional demands for a more spatially just society. This section provides a brief discussion on some of the socio-economic rights cases that have contributed to the altering of the lawscape in post-apartheid cities. Instead of providing a detail summary of the cases, the discussion attempts to draw-out some key points and court decisions that have a bearing on urban spatial transformation.

The case of *Government of the Republic of South* Africa *v Grootboom* has been cited as one of the most ground-breaking socio-economic rights cases in post-apartheid South Africa.[74] In 2000, 510 children and 390 adults (including Irene Grootboom) were evicted from a privately-owned piece of land. Following this eviction and destruction of their shack dwellings, they occupied temporary dwellings on the Wallacedene sports field in Oostenberg, Western Cape. Through their legal representative, the evicted parties evoked section 26(1) of the Constitution that guarantees everyone the right to have access to adequate housing; section 26(2) that obliges that state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right and; section 26(3) that states that 'no one may be evicted

[73] This section does not provide a detailed discussion/critique of the case-law but it merely uses these cases as an illustration of how socio-economic rights adjudication has affected the post-apartheid lawscape. For a detailed discussion and critique of these cases see Marius Pieterse *Rights-Based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg* (2017); Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds.) *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press; 2013).

[74] *Government of the Republic of South Africa v. Grootboom 2001(1) SA 46 (CC).*

from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances; and section 28(1)(c) of the Constitution which states that children have the right to shelter.

Grootboom brought to bear the socio-spatial injustices faced by the poor in post-apartheid cities, as a result of the colonial/apartheid legacy of skewed land ownership and uneven development. As outlined in the case, most people that find themselves living in shacks such as Grootboom, are victims of low-paced housing delivery and unemployment. The prevalence of these injustices therefore attest to the 'harsh realities that the Constitution's promise of dignity and equality for all remains for many a distant dream'.[75]

From a spatial justice perspective, Grootboom becomes important as it demonstrates how the courts evaluate the reasonableness of legislative and other measures geared towards realising the constitutional vision of spatial justice such as, in this case, housing policy and spatial planning. The Constitutional Court also details what constitutes reasonable legislative and other measures by emphasizing the role that all three spheres of government have to play in the provision of adequate housing. A reasonable housing programme therefore must be defined by clearly allocated responsibilities, while being supported by 'the appropriate financial and human resources'.[76]

> The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

[75] *Grootboom* para. 2.
[76] *Grootboom* para. 39.

Such interpretation of section 26 is important as it also extends the notion of 'reasonableness' to the formulation and implementation of strategic planning policies and instruments such as IDPs, all aimed at socio-spatial and economic transformation.[77] Apart from outlining the importance of reasonableness, with the capacity of the state or institutions tasked with the responsibility of implementing programmes aimed at realising socioeconomic rights (such as housing in this instance); the court also emphasises the need for a programme to be historically anchored, that is, it should take into account the colonial/apartheid injustices. Moreover, a reasonable programme must have a wide-reach, as one 'that excludes a significant segment of society cannot be said to be reasonable'.[78] This inclusive approach to the realisation of rights by the courts, attest to the significant role that this institution, and the law at large can play in redressing socio-spatial injustices, thus transforming the lawscape for the better.

While acknowledging the obligations of the state in realising justiciable rights, the court emphasises the 'progressive realisation' of those rights 'within available resources'. In other words, the state is expected to reasonably implement programmes that are commensurate with its available legal, administrative, operational and financial, resources.[79] This means that communities cannot expect the realise all rights immediately. Instead, there is a need to balance the demands for certain rights based on the capability of the state, and related institutions to provide.[80] This notion of progressive realisation of rights within available resources, is reasonable. However, there exist instances where the poor express their desperation for basic urban amenities through unlawful land invasions (as was the case in Grootboom) and service delivery protests that are often accompanied by violence. The balancing of progressive realisation of rights, within

[77] *Grootboom* para. 42.
[78] *Grootboom* para. 43.
[79] *Grootboom* para. 45.
[80] See Chapter 13 of the *National Development Plan* on 'Building a Capable and Developmental State' at 407-443.

available means therefore, continues to be tested particularly in major cities were demands for housing and other justiciable rights are continually growing.

Over and above housing provision, *Grootboom* emphasises the state's obligation to provide other related socio-economic rights such as health-care, sufficient food and water, as well as social security to the poor.[81] While these socio-economic rights can only be realised progressively, and within available means; the state is mandated to formulate and implement coherent, and coordinated programmes that are in line with the constitutional vision of promoting spatial justice. *Grootboom* therefore did not only contribute to the transformation of the Western Cape housing policy and approach. It also brought to the fore the notions of reasonableness, particularly in the realisation of legislative and other measures related to societal transformation – and ultimately the reconstitution of the lawscape.

In *President of the Republic of South Africa v. Modderklip Boerdery* (Modderklip) the court also played a critical role in altering property relations between land owners and the unlawful land occupiers.[82] In May 2000, about 400 people from Daveyton township in Benoni on the East Rand illegally occupied Modderklip farm, were they erected 50 informal dwellings. The Benoni City Council then alerted Modderklip of the unlawful occupation and advised it to institute eviction proceedings as per the PIE Act. When Modderklip delayed acting decisively, by October 2000 the informal settlement, now called Gabon, had expanded to 18 000 peoples, with approximately 4000 residential units.

Without reiterating the findings of the court, *Modderklip* is significant as it took into account the historical facts that led to the invasions, namely the skewed land ownership patterns as well as poverty and unemployment. Moreover, the Supreme Court of Appeal emphasised the state's role in honouring both private property rights, while protecting the rights of vulnerable occupiers. The *Modderklip*

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[81] *Grootboom* para. 93.

[82] *Modder East Squatters v. Modderklip Boerdery; President of the RSA v. Modderklip Boerdery 2004 (8) BCLR 821 (SCA).*

case is therefore an example of how rights-based litigation in post-apartheid South Africa continues to alter the lawscape, resulting in negotiated socio-spatial change. While the tenure security of unlawful occupiers in this remains precarious, the landless people were given a legal avenue (as well as protection) to stake their legal rights. Similarly, the case demonstrates how even the landowners are protected by law as per the dictates of section 25(1) and (2) of the constitution. Thus, the case displays how the courts continue to maintain societal stability, through changing its legal culture and practices to realise the constitutional transformative demands as set out in the Bill of Rights. In the same vein, its significance also rests on the fact that it demonstrates that the exercise of private property rights should accommodate and not violate the right to housing.[83]

The issue of reasonableness of legislative and other measures was also raised in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* (*Olivia Road*).[84] In this case, at least 400 people faced possible evictions by the City of Johannesburg from the inner-city buildings that they had illegally occupied. These evictions formed part of the City's urban renewal programme aimed at ridding the city of 'bad buildings' as well as unlawful occupiers therein. In dealing with this matter, the Constitutional Court questioned the reasonableness of the City's urban renewal programme that was threatening the eviction of not only the occupiers of Olivia road, but also hundreds of thousands of people that inhabited the inner-city's debilitated buildings.[85]

As was the case in *Grootboom* (i.e. in relation to the unreasonableness of the state's housing policy); the court argued that the City's urban renewal programme failed the reasonableness test as it did not prioritise the 'possibility, even the probability, that people would become homeless as a direct result of their

[83] See Wilson op. cit. note 32; Also see the subsequent Constitutional Court judgment in the matter, reported as *President of the Republic of South Africa* v. *Modderklip Boerdery* 2005 (5) SA 3 (CC).
[84] *Occupiers of 51 Olivia Road, Berea Township* v. *City of Johannesburg* 2008 (3) SA 208 (CC).
[85] *Olivia Road* para. 8.

eviction'.[86] In other words, the forced removal of people from the inner-city was unconstitutional as it contravened a plethora of rights. This intervention by the courts attests to its continued attempt to promote spatial justice by protecting the most vulnerable within society as per the dictates of the Constitution.

What is also central in the *Olivia Road* judgment is the court's promotion of the principle of meaningful engagement between the state (the City) and the occupiers. According to the court, engagement 'has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process'.[87] This emphasis on engagement between the City and the occupiers allows for both parties to reach some consensus, particularly given the fact that the City can only progressively realise the occupiers' rights within its available resources.[88] By indicating that it prefers housing disputes in this context to be solved through meaningful engagement the court is also endorsing bottom-up/participatory approach to city-making, allowing for the inclusion of the poor in devising solutions to their own housing needs. [89]

The court's bid to foster meaningful engagement was in line with the principles of participatory democracy as espoused by the 1996 Constitution. Moreover, its stance reinforced the duties of the state to be developmental without being 'draconian' as it applied its policies and strategies. In other words, through this judgment the judges managed to reaffirm their roles as fair adjudicators, particularly for the vulnerable groups in society. From a spatial transformation perspective therefore, *Olivia Road* indicates that the courts, and the law play a central role in the negotiation of the reconfiguration of the post-apartheid cityscape. So, spatial justice becomes a product of mutual engagement between disparate groups and institutions, including the state. While the City's urban renewal programme continues to this day, this case's emphasis on mutual engagement, as

[86] *Olivia Road* para. 13.
[87] *Olivia Road* para. 15.
[88] *Olivia Road* Para. 18.
[89] *Olivia Road* para. 28.

well as the reasonableness of legislative and other measures aimed at spatial transformation, continues to shape the city's approach to development-oriented programmes. Moreover, the case gave the occupiers a sense of belonging not only in the city, but as visible human beings, with rights.[90]

In the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* (2012) (*Blue Moonlight*) case, the role of private developers in shaping the post-apartheid cityscape was deliberated by the courts.[91] Without detailing the facts of the case; the court was tasked to decide on the fate of at least 86 poor people that had unlawfully occupied the commercial property of Blue Moonlight, Berea Johannesburg. At the same time, the court was expected to decide on the rights of the owner of the property (as per section 25(1) on the Constitution), and the obligation of the City of Johannesburg to provide housing for the occupiers in the event of them being evicted.

Following *Grootboom* and *Olivia road*, the Constitutional Court was able to locate the occupiers' unlawful occupation of private property within a framework of historical socio-spatial injustices.[92] In other words, the court foregrounded the role of the constitution in improving the lives of all South Africans, particularly the socio-economically vulnerable. The court therefore was faced with the task of deciding whether the occupiers be evicted to allow Blue Moonlight to redevelop the property as per its initial intentions when it purchased it. The eviction of the unlawful occupiers was to pose an obligation for the City to provide them with some form of

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[90] *Olivia Road* will be discussed again in chapter 6. For a detailed discussion see Pieterse op. cit. note 73 at 51; Lilian Chenwi 'A New Approach to Remedies in Socioeconomic Rights Adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others'* (2009) 2 1 Constitutional Court Review 371-393; Sandra Liebenberg 'Toward an Equality-Promoting Interpretation of Socio-Economic Rights in South Africa: Insights from The Egalitarian Liberal Tradition' (2015) 132 2 *South African Law Journal* 411-437.

[91] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* (2012) (CC). The Supreme Court of Appeal judgement emphasised the private owners' rights to property, and this was further reiterated in the Constitutional Court judgment discussed here. For the Supreme Court of Appeal discussion and critique see Kate Tissington and Stuart Wilson 'SCA Upholds Rights of Urban Poor in Blue Moonlight Judgment' (2011) 12 *ESR Review: Economic and Social Rights in South Africa* 3-6.

[92] *Blue Moonlight* para. 2.

temporary emergency accommodation as per the constitution, and its housing policies. Failure on the part of the City to provide the occupiers with some form of shelter would have brought its housing policy under scrutiny, particularly as in as far as dealing with evictions from private land is concerned.[93]

While the court emphasised that Blue Moonlight's rights to property be protected, it also highlighted the risk of homelessness that was to imminently befall the occupiers in the event of them being evicted. The court therefore argued that when a private developer purchase land for commercial purposes, and 'is aware of the presence of occupiers over a long period of time', the private developer must be patient to 'consider the possibility of having to endure the occupation for some time'.[94] In this case therefore, the court outlined that the private owner 's 'rights to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.

There exist instances where the courts use the law to limit the private developers' influence in shaping the city's socio-spatial structure. As demonstrated in *Blue Moonlight*, the private developers are expected by the courts to exercise their rights and conduct themselves in ways that do not exacerbate homelessness. Similarly, the poor courts, and the law also affords the poor to exercise their rights. In its judgment, the court concluded that while Blue Moonlight was entitled to an eviction order; the City's housing policy was found to be unreasonable and unconstitutional as it did not cater to provide temporary relief to those people facing imminent evictions from privately-owned land.[95] As such, evictions could only take place, as long as they do not render the poor homeless. This case is yet another example of how law is used to influence specific socio-spatial outcome, guided in by the principles of transformative constitutionalism.[96]

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[93] See Gerard S. Dickinson 'Blue Moonlight Rising: Evictions, Alternative Accommodation and a Comparative Perspective on Affordable Housing Solutions in Johannesburg' (2011) 27 3 *South African Journal on Human Rights* 466-495.

[94] *Blue Moonlight* para 40.

[95] *Blue Moonlight* para. 96 & 97.

[96] Pieterse op. cit. note 73 at 68-72.

Post-apartheid rights-based litigation and its quest for spatial justice has been expanded to encompass the domain of urban mobility and safety, as indicated in the *Rail Commuters Action Group v. Transnet* (*Rail Commuters Action Group*) case for instance.[97] This judgment begins by outlining the effects of racial spatial planning not only on Western cape's spatial form, but also on commuting patterns. One of the legacies of racial spatial planning is the fractured transport network that has seen Black people using unsafe modes of public transport while commuting from home to work.[98] These spatial injustices are compounded by the fact that some of these Black commuters have died while using metro-rail trains. This contravenes the commuters' constitutional right to safety, and life.[99]

The applicants therefore appealed to the court to seek relief from the spate of crime related to the lack of safety in Metrorail commuter trains. The court was therefore to decide on whether the transport departments and state-owned enterprises responsible for public rail commuting were obliged to provide for safety and security of commuter Metrorail trains in the Western Cape.[100] The court reached a decision that it was the responsibility of Metrorail and the department of transport to ensure that reasonable measures were taken to provide for the security of rail commuters whilst they were making use of rail transport services. This ruling was significant as it exposed and acknowledged the spatial injustices that characterised the public transport system, were people's lives are in constant danger. Moreover, it highlighted the importance of law, and spatial planning in creating integrated human settlements predicated on promoting the principles inclusive spatial planning, namely safety, convenience and health. An integrated urban mobility network in particular plays an integral role in mending the colonial/apartheid spatial form that continues to reproduce spatial injustices.[101]

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[97] *Rail Commuters Action Group v. Transnet t/a Metrorail* 2005 (2) SA 359 (CC).

[98] *Rail Commuters Action Group* at para. 8.

[99] See sections 10, 11, and 12 of the Bill of Rights.

[100] *Rail Commuters Action Group* at para. 61.

[101] Thomas Coggin and Marius Pieterse 'A Right to Transport? Moving Towards a Rights-Based Approach to Mobility in the City' 2015 31 2 *South African Journal on Human Rights* 294-314.

The courts' role in facilitating spatial justice is also evinced by its attempts to use the law to protect the homeless. In *Diepsloot Residents' and Landowners' Association* v. *Administrator* (*Diepsloot*), the Transvaal court ruled in favour of the establishment of Diepsloot township for the poor.[102] As this low-cost township establishment was to take place in a piece of land adjacent to the wealthy white suburb, the landowners association vehemently rejected the City's proposal. In a classical 'not-in-my-backyard' fashion, the landowners' association's primary grounds for rejecting the proposed development was that such development was likely to cause nuisance, and crime, and thus negatively impact the value of their property. In the spirit of spatial reconstruction however, the court supported the proclamation and establishment of Diepsloot as a low-income township.[103]

Another similar case where the Constitutional Court ruled in favour of the displaced poor people was the *Minister of Public Works* v. *Kyalami Ridge Environmental Association* (*Kyalami Ridge*).[104] In 2001, after the heavy rains had destroyed homes in Alexandra townships, the state identified a piece of land to erect at least 200 houses for some of these flood victims. The land identified for this proposed transit camp was adjacent to an affluent northern suburb, Kyalami. Upon learning of the news of the proposed transit camp, the Kyalami residents rejected it, citing various environmental concerns, as well as the fact that they were not properly consulted about the proposed development. The court however maintained that the flood victims had a right to housing as per section 26(1) of the constitution, as well as other measures related to disaster management. Like *Diepsloo*t, *Kyalami Ridge* attests to the role played by the right-based litigation in not only transforming the spatial milieu of post-apartheid cities. It also demonstrates the constitutional commitment towards protecting the rights and human dignity of all South Africans irrespective of their socio-economic class.

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[102] *Diepsloot Residents' and Landowners' Association* v. *Administrator, Transvaal*. Decision of the Appellate Division of the Supreme Court (1994) (3) SA 336 (AD).

[103] See also Pieterse op. cit. note 73 at 160.

[104] *Minister of Public Works* v. *Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

Similarly, in *Port Elizabeth Municipality v. Various Occupiers*, the Constitutional Court's role in promoting spatial justice, and the poor's right to the city was made apparent.[105] In this case, the inhabitants on an informal settlement resisted being evicted by the Port Elizabeth Municipality from the land they had occupied, to an unspecified area in Walmer township. From the court's perspective, the municipality's insistence on evicting people without providing alternative accommodation was unconstitutional. These cases demonstrate how, as part of its reconstitution of the cityscape, litigation sometimes strives to tip the scales in favour of the poor and vulnerable groups in society. Undoubtedly, these kinds of decisions mark a radical shift in post-apartheid legal culture, as such outcomes would have been almost impossible to achieve under apartheid when private property rights ruled supreme.[106]

Thus, there exist a number of cases depicting the contribution made by right-based litigation in the promoting spatial justice in post-apartheid cities.[107] The cases demonstrate the courts' and the law's attempt to restructure the apartheid space economy, with the intention of creating a post-apartheid lawscape. While most of the poor people cannot afford to utilise this avenue as a means of claiming their rights; those that have managed to do so have greatly benefited from the law, and the courts' interventions. Similarly, the middle and upper-class residents have also turned to rights-based litigation as a means of protecting their interests, as well as their property. However, the courts have often taken care to enforce their

[105] *Port Elizabeth Municipality* v. *Various Occupiers* 2005 (1) SA 217 (CC).

[106] On the transformation of legal culture, see Johan van der Walt 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 1 *Fundamina* 1-47; Mark Oranje and Stephen Berrisford 'Planning Law Reform and Change in Post-Apartheid South Africa' In Thomas Hartmann and Barrie Needham (eds.) *Planning by Law and Property Rights Reconsidered* at 55–70.

[107] In the case of promoting spatial justice in post-apartheid cities, also see *Pretoria City Council v. Walker* 1998 (2) SA 363 (CC).

rights only to the extent that this contributes to, and does not frustrate broader dictates of spatial justice, such as in Diepsloot and Kyalami Ridge.[108]

As various social groups claim for different rights (or for the same rights, for different reasons) the constitution has provided a sound adjudicative foundation for balancing these competing interests. Similarly, the role of the state (and its urban planners), as well as private developers is continually challenged, partly by law, and by the disparate rights-based claims from different communities, towards fostering a spatially just society.

5.4 REFLECTIONS

Thus, the transformative intent of the post-apartheid legal and planning measures cannot be doubted. The 1993 and the 1996 Constitutions in particular have contributed immensely in the transformation of South Africa's lawscape. This is evinced by the introduction of a plethora of legislation as well as policy measures all aimed at realising the constitutional vision of creating an inclusive society. As discussed above, all the legislative and policy measures are development-oriented, and they mandate all three spheres of government to formulate and implement programmes and projects aimed at realising spatial justice.

While the use of old apartheid planning ordinances was an impediment to the state's inclusive and integrated planning efforts; the introduction of the Systems Act of 2000, as well as SPLUMA provided a sound legislative framework that has continued to guide spatial planning in all three spheres of government. SPLUMA in particular has repealed all old planning legislation, and its objectives of transforming South Africa's space economy is backed by an equally sound intergovernmental institutional framework, as well as a detailed approach to spatial plan-making processes. Though it has only been five years after the promulgation of SPLUMA, its objectives of spatial transformation, predicated on the principles of spatial justice, and spatial resilience, is likely to contribute to the realisation of the constitutional vision.

[108] Pieterse op. cit. note 73 at 160.

Similarly, the NDP, as well as the IUDF are critical policy measures that continue to shape spatial planning thinking and approaches. Being a multi-sectoral vision, the NDP strives to be holistic in its approach to development planning. Its vision of creating sustainable human settlements in particular, has influenced various government departments tasked with the mandate of delivering houses and basic urban amenities. Moreover, as national blueprint for development, the NDP is the first of its kind in post-apartheid South Africa, as it attempts to chart a constitutionally driven developmental agenda, backed by sound financial planning, and political will.

Also flowing from the development-oriented legislation, are policies such as the IDPs and IUDF that are all aimed at providing strategic programmes critical for democratic municipal planning. As will be explicated in the next chapter, the implementation of these policies remains uneven. However, their contribution to the transformation of the South African society after 1994 is evident. Through these post-apartheid legislation and policies, the South African lawscape continues to be transformed albeit at varied paces.

Apart from the legislative and policy measures, rights-based litigation has contributed immensely in the transformation of post-apartheid society. As highlighted in the socio-economic rights discussed above, the courts have presented themselves as an avenue where all South Africans can claim their legal rights. Indeed, there exist some challenges with regard to the limited number of poor people in particular that have access to the courts. However, in the last two decades, the courts have demonstrated a significant transformation in terms of their legal culture. Unlike the apartheid legal culture that was predicated on racial planning and, arbitrary forced removals for instance; the post-1994 legal culture is driven by democratic principles that privilege reasonableness, mutual engagement, as well as co-production of cities. These transformative principles and practices defining the post-apartheid era are premised on a high level of historical consciousness insofar as the adjudication of socio-economic rights is concerned. Though the legacy of colonial/apartheid remains evident, the post-apartheid legislative and policy measures, as well as rights-based litigation act as

an antidote purposefully designed to create a new, constitutionally-driven lawscape.

CHAPTER 6: 'NEW JOHANNESBURG' & THE RECONSTITUTION OF THE LAWSCAPE

> The end of apartheid raises anew the question of how to inhabit the city. For blacks, especially, making oneself at home in the city takes on a peculiar urgency, if only because it has been the dominant site of their exclusion from modernity.[1]

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6.1 INTRODUCTION: KWA-NDONGA ZIYADUMA[2]

Following the discussion in chapter 5 on the potentially transformative role of legal and planning instruments in the reimagining and reconstruction of a post-apartheid society; this chapter zooms on Johannesburg as a unit of analysis, in an attempt to ascertain the extent at which these legal and planning instruments have contributed to the promotion of socio-spatial justice and urban governance. In many ways, post-1994 Johannesburg is a microcosm of post-apartheid society, as it is a site where multiple forms of transformations, as well as continuities continue to unfold.

The chapter begins by focusing on the manifestation of law and planning in various parts of the city, notably the inner-city; the affluent suburbs and; the townships as well as informal settlements. As all these geographies of inequalities formed an integral part of the colonial/apartheid lawscape, this section is interested in how the post-apartheid laws, policies, and planning practices have transformed these spaces – if at all.

Thereafter, the chapter outlines some of the efforts made by the Johannesburg Metropolitan Council (the City) in its attempt to realise its developmental mandate. This discussion is premised on the appreciation of

[1] Achille Mbembe 'Aesthetics of Superfluity' (2004) 16 3 *Public Culture* at 393.

[2] KwaNdonga ziyaduma is a Nguni term and colloquial name given to Johannesburg by its residents, and it literally means 'a place where walls tremble'.

various socio-spatial, economic, political and institutional forces that continue to influence and/or shape the city's urban governance approach. The chapter also outlines how the City uses the Integrated Development Plans (IDPs), as one of the key policy instruments of urban governance, and spatial transformation.

6.2 JOHANNESBURG AFTER APARTHEID

The repealing of Group Areas Act and other influx control laws from the late 1970s onwards meant that Africans, Indians, and Coloured people could leave their 'racial zones' and move to the former 'white cities' such as Johannesburg. As discussed in the previous chapter, this era was marked by unprecedented levels of urbanisation, particularly from the townships, the homelands, as well as from the rest of the African continent. This process of urbanisation has continued to define post-1994 Johannesburg's socio-spatial, and economic milieu. From an urban governance perspective, the City had to contend with the demands for housing, job opportunities, as well as basic services from various social groups that continued to claim their right to this city.[3]

Various transformative forces continually unfold in Johannesburg, as the City and its diverse inhabitants engage in everyday politics of moulding this colonial/apartheid city's lawscape into a democratic, post-apartheid one. These forces are marked by the emergence of new cosmopolitan spaces and neighbourhoods, as well as projects aimed at promoting mobility within the city. In the same vein, there exist some historical socio-spatial and economic factors that limit or resist these envisaged changes. These forces of colonial/apartheid socio-spatial continuities are embedded in Johannesburg's spatial form and built environment. The existence of stratified neighbourhoods (now marked long racial, and class lines), the uneven delivery of housing, water, electricity, and other related basic services and the spatialised economic and social injustices all attest

[3] For a detailed engagement with governance issues in Johannesburg, see Jo Beall, Owen Crankshaw and Susan Parnell *Uniting a Divided City: Governance and Social Exclusion in Johannesburg* (2002).

to the fact that Johannesburg's spatial transformation remains an unfinished project.

6.2.1 The Inner-City: Crime, Grime & Withdrawal

The narrative of post-apartheid Johannesburg's 'traditional' Central Business District, (the CBD, or the inner-city) has been characterised by the trope of urbanisation of poverty, crime and grime that became prevalent from the mid-1980s onwards. As stated above, Johannesburg was one of the first post-apartheid cities to experience 'greying', i.e. deracialisation after the repealing of apartheid influx control laws. The CBD and its surrounding neighbourhoods, i.e. Hillbrow, Berea, Yeoville, Marshalltown, Bertrams, and Doornfontein in particular, witnessed an 'influx' of Africans, Coloureds, and Indian population groups.[4]

The decay of the inner-city and the subsequent decentralisation of businesses and white residential areas to the north of the city from the 1980s onwards, meant that the inner-city and its surrounds were never to be truly multiracial in character. As Tomlinson and other urban scholars point out:

> Just when blacks were able to imagine Johannesburg as also belonging to them, and thus to imagine themselves as city dwellers […] whites fled and took with them their retail businesses, insurance companies, and stock exchange. The "shell" they left to the poorer black population. A multiracial Johannesburg was quickly taken off the agenda.[5]

As the dream of a multi-racial inner city dissipated, so did the aspirations of many black people who 'believed that once state apartheid was no more, Johannesburg would thrive – the new government would ensure this – and they could move there and live well'.[6] For the post-apartheid Johannesburg was to contend with governing an urban space that was in a transitional turmoil. The City was yet to

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[4] Alan Morris 'Race Relations and Racism in a Racially Diverse Inner City Neighbourhood: A Case Study of Hillbrow, Johannesburg' (1999) 25 4 *Journal of Southern African Studies* 667-694.

[5] Richard Tomlinson, Robert A. Beauregard, Lindsay Bremner, and Xolela Mangcu (eds.) *Emerging Johannesburg: Perspectives on the Postapartheid City* (2003) at xiii.

[6] Ibid at xiii.

restructure and democratise its institutions, that were to implement new laws and policies that were to take over a decade to make any meaningful changes in socio-spatial, and economic terms. This meant that the inner-city, at least in the first decade after the demise of apartheid, manifested morbid signs of urbanisation of poverty, debilitation and/or abandonment of commercial and residential buildings; poverty and high levels of unemployment.

Beavon also cites other economic factors that had a bearing on the relocation of businesses to the north of the city. These include the relative affordability of retail/office space in Sandton and issues related to crime and grime that was on the rise in the inner-city.[7] The use of pedestrian walkways as trading spaces, littering, and a general sense of urban decay, all contributed to the abandoning of the inner-city and its surrounding neighbourhoods.

> In 1994 a survey of some 700 formal businesses in the old and decaying CBD of Johannesburg revealed the very great and growing concerns of business people with security issues and crime. In addition, negative views on the proliferation of informal trading on the pavements of the downtown and on the growing accumulation of litter and grime was also brought to the fore.[8]

The relocation of the Johannesburg Stock Exchange from Diagonal Street downtown Johannesburg to Maude Street in Sandton in 2000 symbolised the latter as the new economic hub of the city, focusing on high-end retail products and services. This shift was followed by 'a growing flood of law firms and individual advocates who poured into Sandton Central from Innes Chambers and Schreiner Chambers'[9] in the old CBD. This decentralisation of prominent businesses to the north of the city had a bearing on the spatial form as well as the social makeup of both the inner-city and Sandton Central. In the case of Sandton, billions of rands were poured into the city as a part of infrastructure investment. So, while Sandton

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[7] Keith Beavon and Pauline Larsen 'Sandton Central, 1969-2013: From Open Veld to New CBD?' In Philip Harrison, Graeme Gotz, Alison Todes and Chris Wray, (eds.) *Changing Space, Changing City: Johannesburg After Apartheid* (2015) at 370.
[8] Ibid at 380.
[9] Ibid at 382.

was industrialising, the inner-city was experiencing rapid economic decline. Post-apartheid Johannesburg's sociospatial relations therefore can be defined the processes of 'influx and withdrawal'[10]:

> This pattern of *influx and withdrawal* is a general feature of group life in post-apartheid South Africa. Desegregation has typically involved blacks moving into spaces that were previously reserved for whites; with whites leaving the newly integrated spaces for exclusive enclaves. At a macro level of analysis, this similar pattern can be observed in the racial movements into and from suburbs to fortified enclaves and security villages.[11]

The persistence of unemployment and poverty in Johannesburg, coupled with the decay of most buildings in the CBD, has contributed to the housing crisis in the city, a phenomenon that affects primarily the poor. While some have of the poor inhabitants have managed to reside in backyard shacks in established townships and informal settlements scatters on the edges of the City, others have resorted to illegally occupy debilitated buildings in the inner-city.[12] These unlawful occupations have been met by both the City and private property developers with disdain, resulting in threats and realities of forced removals.[13]

Using the language of urban regeneration, the City and private property developers continually threaten to displace thousands of poor people from the CBD to make way for 'orderly', 'lawful' and profitable development. In many ways, the rhetoric of urban regeneration used by the City and the subsequent attempts at forcibly evicting the urban poor from hijacked buildings, is reminiscent of the sanitation syndrome of the colonial times that saw city administrators forcibly removing people from the inner-city in the name of promoting hygiene.[14]

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[10] Kevin Durrheim 'Socio-spatial Practice and Racial Representations in a Changing South Africa' (2005) 35 3 *South African Journal of Psychology* at 456.
[11] Ibid at 456 (emphasis added).
[12] See Martin Murray *City of Extremes: The Spatial Politics of Johannesburg* (2011).
[13] Marius Pieterse *Rights-Based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg* (2017) at 63.
[14] Faranak Miraftab 'Insurgent Planning Situating Radical in the Global South' (2009) 8 1 *Planning Theory* 32-50.

Notwithstanding, while the poor's initial responses to forced evictions has been direct action, the last decade has seen some of them turning to the courts in an attempt to claim their rights to inhabit the city. Rights-based litigation therefore, has presented an avenue that can be utilised by those that can afford, to stake their claim in the city.

While the narrative of the post-apartheid inner city has evoked the image of this space as the new 'heart of darkness', there exist new socio-spatial, and economic forces that arguably alter this space's lawscape in a positive way. For one, the post-1994 inner-city Johannesburg presents itself as the heart of new African cosmopolitanism, with new 'ethnoburbs' (i.e. spaces of ethnic clustering) defining the city's spatial milieu.[15] These ethnoburbs also comprise of people from numerous African, as well as Asian countries such as Pakistan and India. This African cosmopolitanism from below, has been characterised by the burgeoning of primarily informal economic activities. So, while the 1980s inner-city Johannesburg and its surrounds saw the withdrawal of primarily white residents and their businesses, it also witnessed an increase in the number of African people, and black-owned businesses.[16]

While the growth of informal businesses in inner-city Johannesburg can be lauded, this informality spread to other spatial practices as well, notably in the areas of housing, and trading. Faced with the challenge of debilitating, and/or abandoned buildings, Johannesburg's inner-city attracted the urban poor, as well as 'slum lords' who unlawfully occupied these buildings. Moreover, some of the city's pavements and walkways were transformed by street hawkers into spaces of informal trading. While these informal spatial practices have been viewed by critical urban scholars as forming part of 'insurgent planning',[17] the City, its urban

[15] Philip Harrison, Khangelani Moyo and Yan Yang 'Phantoms of the Past, Spectres of the Present: Chinese Space in Johannesburg In Philip Harrison, Graeme Gotz, Alison Todes, and Chris Wray (eds.) *Changing Space, Changing City: Johannesburg After Apartheid* (2015) at 520.

[16] Martin Murray *Taming the Disorderly City: The Spatial Landscape of Johannesburg after Apartheid* (2008).

[17] Faranak Miraftab 'Insurgent Planning Situating Radical in the Global South' (2009) 8 1 *Planning Theory* 32-50.

planners, and the private developers have viewed these practices with disdain, as they are seen as going against the principles of legal town planning – i.e. spatial order and hygiene.[18]

In fact, the inner-city Johannesburg, as well as Hillbrow, Berea, and Yeoville, have continually challenged the traditional 'Eurocentric' conceptions of urbanism, (i.e. the spatial, socio-economic and political practices of inhabiting the city). What is emerging in these spaces, are alternative ways of inhabiting the city, that often run against the City and private developers' vision of the city. In many ways, the inner-city and its surrounds, have become a contested space where the urban poor's ways of living and survival strategies, are often pitted against those of the City, and the private developers. It is less wonder therefore, that a significant number of rights-based litigation cases are about properties in the inner-city. In reading the inner-city lawscape therefore, it becomes apparent that the idea of the urban poor people as 'social infrastructure' with complex survival networks (defined as the right to the city), has to be reconciled with legal-rights.[19]

6.2.2 The Affluent Suburbs

Post-apartheid Johannesburg's affluent suburbs have for the most part maintained their privileged socio-spatial, and economic status. From 1994 onwards, Johannesburg's northern suburbs witnessed some massive investments in infrastructure developments, with new residential areas, malls, and commercial complexes mushrooming. These neighbourhoods' demographics have also experienced some considerable levels of transformation, resulting from the movement of black middle-upper-classes to formerly white residential areas.

Also characterising these affluent suburbs has been the mushrooming of 'security estates' i.e. gated communities, and private cities (particularly in the 'new

[18] Murray op. cit. note 16.

[19] AbdouMaliq Simone 'People as Infrastructure: Intersecting Fragments in Johannesburg' (2004) 16 3 *Public Culture* 407-429; Pieterse op. cit. note 13 at 1.

north' i.e. Sunninghill, Steyn City, and the surrounding neighbourhoods).[20] These upper/middle class neighbourhoods emerged as a result of the growth of the middle-class and the subsequent realities and perceptions of the rise in crime in Johannesburg.[21] A glimpse at the 'exclusionary' prices of these residential properties north of Johannesburg, as well as areas immediate South of the old CBD for instance, suggests that while the movement of all peoples in the city is no longer hindered by apartheid laws, market forces have continued to perpetuate 'class apartheid'.[22]

From 1994, the concentration of upper/middle-class residential and commercial properties north of Johannesburg has been accompanied by an increase in large-scale capital investment in related urban amenities such as malls, private hospitals, boutique cafes and other markers of modernity, rendering these spaces relatively more comfortable and safer for those fortunate and affluent enough to inhabit them. This predominantly private sector-led property development has also been instrumental in stimulating economic growth in those areas. Moreover, it has compelled the City to invest extensively in the provision of public infrastructure and basic services such as roads, water, electricity and sanitation. As these affluent areas are the primary contributors to the City's coffers through the payment of rates and taxes, they remain primary sites for all forms of investment.[23]

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[20] Karina Landman and Willem Badenhorst 'Gated Communities and Spatial Transformation in Greater Johannesburg' In Philip Harrison, Graeme Gotz, Alison Todes, and Chris Wray (eds.) *Changing Space, Changing City: Johannesburg After Apartheid* (2015); Karina Landman and Martin Schonteich 'Urban fortresses: Gated Communities as a Reaction to Crime' (2002) 11 4 *African Security Review* 71-84; Charlotte Lemanski 'Residential Responses to Fear (Of Crime Plus) in Two Cape Town Suburbs: Implications for the Post-Apartheid City' (2006) 18 6 *Journal of International Development* 787–802.

[21]Lindsay Bremner, 'Bounded Spaces: Demographic Anxieties in Post-Apartheid Johannesburg' (2004) 10 4 *Social Identities* 455-468.

[22] Jeremy Seekings, *Race, class and Inequality in the South African City* (2010); See www.privateproperty.co.za for the property listings and the relatively exorbitant prices in some of Johannesburg's northern suburbs, for example.

[23] See Mbembe op. cit. note 1 at 394-400 and his description of the affluent northern Johannesburg's superfluity and crass materialism.

The role played by private sector developers in shaping post-apartheid Johannesburg's spatial form as evinced by large-scale investments in residential and commercial property, attest to the dominance of market-led neoliberal planning. In fact, in Johannesburg the neoliberalisation of social, economic and political processes permeates urban development, and planning.[24] The rapid expansion of private sector-led development in Johannesburg's suburb has viewed by some as symbolising a neoliberal turn in planning, that in turn has reduced city planners into 'agents of neoliberal urbanism'.[25]

While the private developers' influence on the transformation of Johannesburg's spatial milieu might be viewed with scepticism, these developments point to the contested nature of contemporary urban spaces in an era of intensified globalisation. Put differently, Johannesburg's wealthy residents (who now happen to be from different racial groups) also have a claim to legal rights in the city. These 'privileged struggles' of Johannesburg's wealthy residents therefore are often defined by their attempts to protect themselves from the realities as well as perceptions of crime in the city.[26] As part of this some of the wealthy residents have turned to the courts claim assert their legal rights. While some of the cases presented before the courts are driven by the 'Not in My Backyard' attitude (i.e. NIMBYism), most of the case are related to protection of private property, as well as the maintaining of a particular spatial character in these

[24] Tuna Tasan-Kok, 'Introduction: Contradictions of Neoliberal Urban planning' In Tuna Tasan-Kok and Guy Baeten (eds.) *Contradictions of Neoliberal Planning: Cities, Policies, and Politics* (2012).

[25] Ibid.

[26] Pieterse op. cit. note 13 at 144-166. Also see Leslie Moran 'The Safety and Dangers of Enclosed Communities: Space, Social Justice and the Emotions' (2006) 21 1 SA *Publiekreg/SA Public Law* 72-94 on the role of fear and its contribution to the phenomenon of enclaving and gating. Fear of crime contributes to the emergence of the 'architecture of fear' where buildings, public spaces and streets are closed off, thus resulting in the erosion of 'street democracy'. On street democracy and the potential role of planning law in re-imagining the lawscape, see Wessel le Roux 'Planning Law, Crime Control and the Spatial Dynamics of Post-Apartheid Street Democracy' 2006) 21 1 SA *Publiekreg/SA Public Law* 25-50.

wealthy neighbourhoods. The legal contestations between the wealthy and the urban poor in Johannesburg therefore, are primarily about the form that city's spatial, socio-economic, and environmental milieu should take. As both parties' legal rights are guaranteed by the constitution, the courts play an integral role in balancing these parties demands, and claims to the city.

6.2.3 Townships & Informal Settlements

Like the inner-city and the former white suburbs, Johannesburg's townships in the post-apartheid era have experienced both changes and continuities. With regard to the continuities (from apartheid that is), townships such as Soweto and Alexandra are still characterised by the colonial/apartheid physical infrastructure, especially with regard to the monotonous housing designs. Moreover, the ethnoburbs that were created during the colonial/apartheid times (i.e. sections for isiZulu, and Setswana speaking people), still hold, albeit loosely. Relative to the northern suburbs, most of the African, Coloured, and Indian suburbs remain characterised by high levels of poverty and unemployment.[27] Part of these townships' economic deprivation stems from the historical fact that they were created and planned for as residential areas with little or no mixed development envisaged. This partly explains why the majority of people residing in townships work outside these spaces. With the current 'township economy' being characterised by Spazas, hair salons, car-washes, Shisanyamas, and other related informal activities, most townships have arguably retained their 'dormitory' feel.

In the imaginations of many South Africans, Johannesburg's post-apartheid townships therefore symbolise spaces of poverty and crime. These sentiments have been exacerbated by high levels of unemployment in areas such as Soweto, Alexandra, and Diepsloot. In the case of Alexandra for instance, the mushrooming of informal settlements, as well as backyarding, coupled with overcrowding, dirty streets and lack of sanitation facilities, all contribute to the negative image that

[27] Philip Harrison and Kirsten Harrison 'Soweto: A Study in Socio-spatial Differentiation' In Philip Harrison, Graeme Gotz, Alison Todes and Chris Wray (eds.) *Changing Space, Changing City: Johannesburg After Apartheid* (2014) at 298-304.

some of Johannesburg's townships still carry.[28] For some of its residents, Alexandra represents the biblical sin city of Gomorrah – a colloquial name used by some in reference to this place.

Notwithstanding the socio-economic challenges faced by most of Johannesburg's townships, these spaces have been prioritised by the City and province as in need of serious investment. In the case of Alexandra for instance, the government invested on a multi-billion-rand presidential renewal project, i.e. the Alexandra Renewal Project (ARP) initiated in 2001, with the intention of providing decent housing and basic services to thousands of informal settlement dwellers.[29] According to the Johannesburg Development Agency,

> In the project's first phase in 2001, 11 000 residents were moved from the flood-prone banks of the Jukskei River to Bramfischerville, in Soweto, and to Diepsloot, north of Randburg. During this phase, which ended in 2004, several housing projects were completed, including building 880 houses in River Park, 181 houses in Extension 8, 1400 units in Extension 7, 520 rented rooms on the East Bank, 52 RDP flats in Marlboro, 350 social housing units in Old Alexandra and 298 hostel rooms converted in Old Alexandra.[30]

While ARP was well-intentioned, most of Alex's residents were dissatisfied with the outcomes of the programme, citing lack of adequate public consultation, and corruption.[31] Despite the billions of rands spent by the government to 'renew' Alexandra, this township remains overpopulated, with thousands off its residents living in backyard shacks and informal settlements.

Soweto has also witnessed a considerable level of spatial transformation in the last two decades. From 1994 Soweto saw the establishment of new

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[28] For a detailed account on the history of Alexandra, see Phil Bonner and Noor Nieftagodien *Alexandra: A History* (2008).

[29] Philip Harrison, Alison Todes, Vanessa Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) at 67.

[30] http://www.jda.org.za/index.php/whatwedo/151-news-2014/june/1544-alexandra-renewal-project-improving-residents-lives.

[31] Harrison, Todes and Watson op. cit. note 29 at 67.

neighbourhoods as part of the Reconstruction and development Programme (RDP). These new 'townships' included Bram Fischerville, Thulani, Slovoville, Matholesville, Tshepisong, and Leratong Village. These areas were developed primarily to house people relocated from various informal settlements and backyard shacks in Johannesburg.[32] Some of these new neighbourhoods in Soweto however, 'took the form of site-and-service schemes and were barely distinguishable from the shack settlements as their top structures were informal.[33]

Apart from the housing projects, the Baralink Regeneration Project, and its location on the eastern edge of Diepkloof, and surrounding Soweto's largest transport interchange, explicitly attempted to promote spatial integration. This project that began in 1999 envisioned Baralink as the 'Gateway to Soweto', with a mixed development consisting of residential, medical, commercial, and office facilities. Moreover, the 2010 FIFA World Cup also resulted in the City of Johannesburg investing in infrastructure development in Soweto. These included the upgrading of stadiums, and the development of the Rea Vaya Bus Rapid Transit (BRT) public transport system. As part of 'consumer citizenship', Soweto witnessed the establishment of Maponya and Jabulani malls, as well as the Soweto Theatre.[34] All these developments, and other related private sector initiatives (such as restaurants and pubs), contributed to the transformation of Soweto. Staying true to Johannesburg's paradoxical development trends, these investments in Soweto's physical infrastructure, co-exist with the prevalence of abject poverty and unemployment for thousands of this township's residents.

Apart from the colonial/apartheid cities described above, post-apartheid Johannesburg has been also created its own 'apartheid-style' townships, notably Diepsloot, north of the city. Diepsloot was founded in 1995 as a transit camp (later to be a permanent home) for evictees that had been moved from Alex, Honeydew and Zevenfontein informal settlements. This transit camp later exploded into being one of the most impoverished post-apartheid townships in Johannesburg. Again,

[32] Harrison and Harrison op. cit. note 27 at 299.
[33] Harrison and Harrison op. cit. note 27 at 299.
[34] Harrison and Harrison op. cit. note 27 at 300-304.

the untold poverty of Diepsloot is characterised by high levels of unemployment, housing shortages, and gangster-related crimes.[35]

In most of Johannesburg's townships, the post-apartheid state's free public housing program (i.e. the RDP housing) has unwittingly reproduced and/or reinforced the apartheid planning logic by building RDP houses on the periphery of the city. These RDP housing, and their monotonous architectural designs are a commonplace in Soweto, Alex, Diepsloot and other townships in Johannesburg; and they have in many ways reinforced spatial inequalities in concrete. Commenting on these 'new ghettoes of the poor' that are predominantly a product of state investment, Philip Harrison states that these dispersed settlement patterns significantly raise the costs of infrastructure- development for service delivery. Moreover, the long distances that the poor have to commute from home to work entrenches their poverty.[36]

Remarking on the post-apartheid housing policies and practices in townships such as Soweto, Alex, and Diepsloot, Huchzermeyer points out that:

> In South Africa, much post-1994 low-income housing has been developed on land that was purchased in the 1990s by apartheid government for township development in accordance with its segregationist policies. Thus, many apartheid urban plans have been implemented unquestioningly by post-apartheid government. Reinforcing the same urban pattern, the cheapest tracts of developable land recently purchased for low-income developments have been those adjacent to or beyond existing townships. Housing delivery in these locations ignores the social, environmental and longer term economic consequences of inadequate access.[37]

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[35] Catherine Cross 'Qualitative Assessment of the Diepsloot Economy' In Sandeep Mahajan (ed.) Economics of African Townships: Special Focus on Diepsloot (2014) at 143-178.

[36] Kate Philip 'A History of Townships in South Africa' In Sandeep Mahajan (ed.) *Economics of African Townships: Special Focus on Diepsloot* (2014) at 42.

[37] Marie Huchzermeyer 'Addressing Segregation through Housing Policy and Finance' In Philip Harrison, Marie Huchzermeyer and Mzwanele Mayekiso (eds.) *Confronting Fragmentation: Housing and Urban Development in a Democratic Society* (2003) at 212.

In post-apartheid Johannesburg, townships, backyard shacks and, informal settlements have continued to be spaces of alterity that confine most black people in a vicious cycle of poverty. In many ways, Alan Mabin's statement about urban black residents remains relevant to this day:

> The confinement of most urban black residence to townships reduce[s] demand for land elsewhere, and preserve[s] large tracts 'on the other side of the tracks' (or valley, mining belt or industrial area) for the suburbs. In this sense, the townships [remain] vitally necessary for the development of Johannesburg's affluent suburbs. Townships therefore, [allow] suburbs to grow on one side of the city, while something else happened on the other.[38]

The Coloured and Indian townships of Eldorado Park, and Lenasia respectively, also bear the scars of colonial and apartheid planning. These townships continue to experience high levels of housing shortages, unemployment, and drug-related crimes. The infill projects aimed at addressing the housing shortage crisis in these areas, has resulted in development proposals that reinforce apartheid-style planning. Breaking the mould in township housing provision poses a challenge for the City, as most of the land parcels that could be used for compacting (the already congested) townships are not developable due to various geotechnical issues.[39]

As Johannesburg's spatial transformation is underway, the seemingly unrelenting legacy of apartheid panning continues to have a hold these townships. While the state is investing billions of rands as part of promoting socio-spatial, and economic development, the pace of spatial transformation has been relatively slow, particularly for millions of Johannesburg's poor residents. As the City strives to deliver basic services such as water, and electricity, housing shortages remain amidst rapid urbanisation, unemployment, and poverty. It is less wonder why most of the so-called service delivery protests, xenophobic forms of violence as well as

[38] Alan Mabin 'In the Forest of Transformation: Johannesburg's Northern Suburbs' in Philip Harrison, Graeme Gotz, Alison Todes, and Chris Wray, (eds.) *Changing Space, Changing City: Johannesburg After Apartheid* (2015) at 404.

[39] Own observation based on one infill project I was a part of in Eldorado Park May 2018.

looting of (usually foreign-owned) shops, take place in these townships. These protests partly stem from the rising levels of frustration harboured by the poor, as they cannot fully enjoy socio-economic rights.[40]

Despite all the aforementioned socio-economic and spatial injustices characterising most of Johannesburg's townships and informal settlements, there exist some forms of survival strategies that are predominantly informal. Moreover, post-apartheid Johannesburg has also experienced an upsurge in cultural industries, with music in particular contributing to the positive sentiments about these townships. Furthermore, most people residing in townships have transformed these spaces into homes, as they have networks, jobs, families, as well as emotional ties. Defined as '*Kasinomics*', life in post-apartheid townships is characterised by cultural vibrancy, entrepreneurship, innovation and resilience.[41]

6.3 URBAN GOVERNANCE IN POST-APARTHEID JOHANNESBURG

In responding to its constitutional mandate of being 'developmental', post-1994 Johannesburg underwent a process of institutional restructuring, and transformation. In this regard, the City was guided by the principles Bill of Rights and the local government-related clauses of the 1996 Constitution, the White Paper on Local government and its emphasis on a developmental local government, the Municipal Systems Act and the Municipal Structures Act – all discussed in the previous chapter.

There also existed other strategic plans that contributed to the broader institutional restructuring of the City, notably the iGoli 2002, and iGoli 2010.[42] The iGoli 2002 for instance informed the City's internal restructuring, by guiding a complete overhaul of Johannesburg's governance structure. Through this plan, the city established a core administration comprising of various departments; eleven

[40] Antina von Schnitzler *Democracy's Infrastructure: Techno-Politics and Protest After Apartheid* (2016).
[41] GG Alcock *Kasinomics: African Informal Economies and the People Who Inhabit Them* (2015).
[42] www.joburg.org.za

regional administrations, as well as other municipal-owned service delivery entities (utilities, and agencies). The city-owned and funded utilities include City Power, Johannesburg Water and Pikitup. As part of the corporatisation drive of the early 1990s, the City also saw the establishment of a range of corporatised agencies such as: the Johannesburg Development Agency (JDA), Johannesburg Social Housing Company (JOSHCO), Johannesburg Property Company (JPC), Metro Trading, Metrobus, Johannesburg Zoo, Johannesburg Civic Theatre, and Johannesburg Fresh Produce Market.[43]

These city-owned entities have continued to transform the city's socio-spatial and economic milieu. The Johannesburg Development Agency (JDA) for instance, has implemented a significant number of infrastructure-related projects, all aimed at restitching the city's spatial form. Some of the programmes championed by the JDA include the Corridors of Freedom. This programme takes transport-oriented development approach to promote mixed-use development in the city. Through this programme, the City envisages to create a transport links between hither spatially segregated areas such as Soweto and the CBD; Alexandra and Sandton for instance.[44]

In an endeavour to integrate the city through spatial planning, the Corridors of Freedom programme as implemented by the JDA also seeks to create: '[s]afe neighbourhoods designed for cycling and walking, with sufficient facilities and attractive street conditions; [m]ixed-use developments where residential areas, office parks, shops, schools and other public services are close together, stimulating economic activity and creating opportunities for emerging entrepreneurs; [r]ich and poor, black and white living side by side - housing options provided cover a range of types - including rental accommodation - and prices'.[45]

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[43] City of Johannesburg Metropolitan Municipality *Reflecting on a Solid Foundation: Building Developmental Local Government 2000-2005* (2006).

[44] www.jda.org.za

[45] http://www.jda.org.za/index.php/whatwedo/programmes/the-big-idea.

Through the JDA, the City has also managed to implement a relatively successful Bus Rapid Transit system (BRT) called *Rea Vaya*. This BRT system has also contributed to the integration of the city's hitherto disjointed spaces, while allowing for ease of mobility amongst the urban poor. Moreover, various inner-city projects such as the upgrading Park Station precinct, as well as the Constitution Hill precinct, have all contributed to spatial transformation in Johannesburg. With regard to township development, the JDA has been involved in the upgrading of the Jabulani node, as well as Orland East, in Soweto.

Similarly, JOSHCO has played an integral role in developing and providing affordable social rental housing to millions of Johannesburg's residents.[46] This entity's housing projects have contributed to the City's broader housing development programme, thus enabling the City to realise its constitutional mandate as outlined in sections 152 and 153. Moreover, entities such as City Power, Joburg Water, and Pikitup all contribute the realisation of the City's governance and provision of basic services. Notwithstanding the challenges faced by some of the entities in delivering services, suffice to state that they have contributed to socio-spatial and economic transformation of Johannesburg.[47]

The corporatisation of basic services therefore, (particularly of water, electricity, and waste removal) in Johannesburg formed part of the City's governance strategy aimed at optimally delivering these basic services, while making boosting the city's finances that were in dire straits in the early 2000s. Part of the City's financial woes are said to have stemmed from the following interrelated factors:

> A tradition of an expenditure-led, incremental budgeting, without any rigorous review of expenditure needs, or of the benefit incidence of expenditure, and the assumption that resources will always be there to meet expenditure needs; Simultaneously, a huge, pent-up demand from previously disadvantaged

[46] www.joshco.co.za

[47] https://mg.co.za/article/2012-09-05-joburg-billing-crisis-playing-politics

> communities for improved (or even basic) levels of service, leading to unsustainable levels of capital spending in the initial post-apartheid period; A high level of staffing, with relatively low productivity and with a powerful trade union opposed to fundamental change; A failure to address the problem of the very low levels of revenue collection in the former black areas inherited from the central government, together with declining collection rates in other areas in the immediate post-apartheid period; The failure to recognise the seriousness of the revenue situation because the accounting system gave a false sense of security about the levels of revenues being collected; budgeting [that] continued to be on the basis of 100 percent revenue collection.[48]

These urban governance-related challenges unfolded at a moment when various sectors within the city were expecting even delivery of basic urban amenities and bulk infrastructure services, particularly housing, water, electricity, and sanitation facilities. The City had a mammoth task of balancing these demands for social and spatial justice, from both the wealthy and the poor classes, while at the same time negotiating the demands of being economically viable, and relevant at both local and global level.

From a planning perspective, post-1994 Johannesburg was expected to re-stitch the fractured apartheid spatial structure through the implementation of pro-poor projects, of which the construction of RDP houses formed an integral part. This re-stitching of the cityscape was however thwarted by the high costs of well-located land for low-cost housing. So, the City found itself erecting houses on the margins of the city, where land was relatively cheaper and large enough for the envisaged massive low-cost housing programmes. The development of low-cost housing on the periphery unwittingly contributed to the socio-spatial marginalisation of the poor.[49]

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[48] Jo Beall, Owen Crankshaw and Susan Parnell *Uniting a Divided City: Governance and Social Exclusion in Johannesburg* (2002) at 93.

[49] Marie Huchzermeyer *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (2004).

The hyper-urbanisation of poverty that had begun in the mid 1980s also meant that the City was to find strategies of housing the urban poor, including new migrants from within and without the South African borders. In the same vein, the City had to regenerate the inner-city as part of its urban renewal programme. This urban regeneration aimed at rehabilitating 'bad buildings' however, meant that the City had to contend with the dilemma of having to forcibly remove unlawful occupiers inhabiting these unsafe and unhygienic buildings. However, given the new constitutional dispensation, where arbitrary evictions are unconstitutional, the City often found itself at loggerheads with the law, and the courts, on housing as well as other socio-economic rights related matters.

All these urban governance-related challenges form part of the City's attempt at creating a new lawscape, in a global environment that compels cities to be both economically competitive, and socio-spatially redistributive. Put differently, in implementing pro-poor strategies, while embracing a pro-growth development approach, the City has to continually navigate through the tight-rope of service various proverbial masters, with competing demands.[50] This balancing act in governance is also evinced by the City's branding drive aimed at creating a 'world-class African city'. While well-intentioned, the attainment of this vision has proved to be a challenge for the City, given the deeply entrenched socio-spatial and economic inequalities characterising its neighbourhoods. Notwithstanding, the City has put in place various legislative and policy measures aimed at balancing its pro-poor, and pro-growth development strategies. One of the key policy measures include the City's Integrated Development Plans (IDPs), and their related Spatial Development Frameworks (SDFs).

6.4 INTEGRATED DEVELOPMENT PLANNING IN JOHANNESBURG

As per the Municipal Systems Act of 2000, the City is mandated to formulate IDPs and the related SDFs. IDPs are five-year plans designed to guide all municipal

[50] Mark Oranje (2012) 'Neoliberalism, Shallow Dreaming and the Unyielding Apartheid' In Tuna Tasan-Kok, and Guy Baeten (eds.) *Contradictions of Neoliberal Planning: Cities, Policies, and Politics* (2012).

planning processes, while SDFs inform the former with regard to the spatial effects of proposed development programmes. These planning instrument inform the municipalities' budgeting processes, as well as the identification and implementation of development-oriented projects. As legally binding plans, the IDPs get a considerable level of political and financial support from all three spheres of government, as part of the intergovernmental relations and planning process.[51] It also acts as a tool for harnessing intergovernmental planning efforts across all three spheres of government.[52]

From the early 2000s, the Johannesburg IDPs were aimed at achieving the following objectives: provision of infrastructure; household and community services; land-use regulation and planning; housing and township establishment; development planning and local economic development; environmental and healthcare, and public health; local safety and security.[53] This means that IDPs were envisaged as key instruments central in the reconstitution of Johannesburg's space economy:[54]

> [The IDP embody] the core purpose of local government and guides all aspects of revenue-raising and service-delivery activities interaction with the citizenry and institutional organisation […] The IDP is thus the gearing mechanism through which national constitutional obligations are matched with the autonomous prioritisation of locally generated development agendas.[55]

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[51] Philip Harrison, Alison Todes and Vanessa Watson *Planning and Transformation: Learning from the Past Experience* (2008).

[52] Tony Binns and Etienne Nel 'Devolving Development: Integrated Development Planning and Developmental Local Government in Post-Apartheid South Africa' (2002) 35 8 *Regional Studies* 921-932; Philip Harrison 'Integrated Development Plans and Third Way Politics' In Udesh Pillay, Richard Tomlinson and Jacques du Toit (eds.) *Democracy and Delivery: Urban Policy in South Africa* (2006).

[53] Gustav Visser 'Social Justice, Integrated Development planning and Post-Apartheid Urban Reconstruction' (2000) 38 10 *Urban Studies* 1673-1699.

[54] South African Cities Network (SACN) *The Space Economy: An Important Consideration in Spatial Development Planning* (2013); Christian Rogerson 'Restructuring the Post-Apartheid Space Economy (1998) 32 2 *Regional Studies* 187-197.

[55] Visser op. cit. note 53 at 1680.

Johannesburg's first attempt at drafting 'a fully-fledged Integrated Development Plan', [56] was through its compilation of the City Development Plan (CDP) in 2001/02, later to be termed the Joburg 2030. As a long-term economic development strategy, the Joburg 2030 attempted to establish a foundation for the city's annual business planning as well as performance management processes. As part of place-making, the city also used the Joburg 2030 formulation process as an opportunity for anchoring its shared, long-term vision – i.e. an 'African World-Class City'.[57] The Joburg 2030 was in the main an economic development strategy whose strength rested in its in-depth analysis of the city's local economy.[58] The strategy also identified a number of challenges hindering the city's socio-economic development.

An analysis of the Joburg 2030 attests to this plan's privileging of the economic development.[59] Joburg 2030s economic determinism however was balanced with a pro-poor development slant, as evinced by the prioritisation of inclusive socio-economic development.[60] The balancing of pro-growth and pro-poor strategies however proved to be a challenge for the City. For a pro-growth strategy meant that the city had to put in place 'world-class' infrastructure in an effort to lure potential investors at both local and international level; while meeting the demands of millions of its poor inhabitants who expected 'free' and quality basic services and commodities such as water, electricity, sanitation, and housing.[61] So, while the Joburg 2030 plan attempted to chart a sound developmental path, the extent of its success in promoting economic development programmes however, remains contentious.

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[56] City of Johannesburg op. cit. note 43 at 56.
[57] City of Johannesburg op. cit. note 43 at 57.
[58] www.joburg.org.za
[59] City of Johannesburg *Joburg 2030* (2003).
[60] Christian Rogerson 'Towards the World-Class African City: Planning Local Economic Development in Johannesburg' (2004) 34 4 *Africa Insight* 12-21.
[61] Jackie Dugard 'Urban Basic Services in South Africa: Rights, Reality and Resistance' In Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds.) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2013) at 275-309.

The formulation of Johannesburg's Integrated Development Plans from 2003 to 2010 proved to be simultaneously experimental and ambitious. The 2003/2004 IDP for instance attempted to address almost all the challenges faced by the City. In other words, the IDP was envisaged to deal with issues related to the economy, skills, housing, electricity, roads, storm water, waste management, parks and cemeteries, and safety and security.[62] This was a deliberate attempt to create a multi-sectoral plan that was to respond to the developmental needs of the City, while complying with the Municipal Systems Act of 2000.

In the 2003/2004, an attempt was made to establish 'city plans' that were linked to various core administrative duties, such as finance and economic development, development planning, transportation, environment, housing and the functions of the city's development agencies and utilities. Efforts were also made to link the objectives of the city plans to the budgets, as well as the SDF, at the same time outlining institutional arrangements, and a performance management system.[63]

Although Johannesburg's mandate of promoting socio-economic development and social justice was clearly outlined in its plans in as early as 2003, challenges loomed, particularly with regard to service delivery.[64] These service delivery related challenges stemmed in part from the City's lack of institutional and financial capacity and capability to deliver on its newly formulated developmental mandate. This was accompanied by the presence of inexperienced personnel in newly formulated posts who were yet to fully grasp the legislation as well as processes related to development planning.[65]

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[62] City of Johannesburg *Integrated Development Plan 2003/2004* (2003).

[63] Alison Todes 'Urban Growth and Strategic Spatial Planning in Johannesburg, South Africa' (2012) 29 *Cities* 158-165.

[64] Susan Parnell and Jenny Robinson 'Development and Urban Policy: Johannesburg's City Development Strategy' (2006) 43 2 *Urban Studies* 337–355; Udesh Pillay 'Urban Policy in Post-Apartheid South Africa: Context, Evolution and Future Directions' (2008) 19 *Urban Forum* 109–132.

[65] Firoz Khan *Developmental Local Government and Local Economic Development: Combining Macro and Micro Institutions of Development* (1998) at 10.

Like most cities in transition, Johannesburg was yet to establish a new organisational culture built on democratic principles of inclusiveness, racial harmony and gender-sensitivity, as espoused in the Bill of Rights and other related legislation. The process of rebuilding the city's organisational culture proved to be a daunting one, particularly in the first decade after the dawn of democracy.[66]

While the 2003/2004 IDP was ambitious in its articulation of the City's developmental trajectory, its implementation was fundamentally upset by a financial crisis that stretched from 1990 to 2000. There exist various reasons behind Johannesburg's financial woes in the early years of democracy. These included 'a long-standing practice of high spending based upon high standards of provision for a minority of the population'.[67] Moreover, the city was expected to assume new responsibilities of providing basic services to all of its inhabitants irrespective of race, class, sexual orientation, and nationality. Some of the challenges faced by the City as it attempted to implement its IDP in the mid- 2000s included the following:

> A tradition of an expenditure-led, incremental budgeting, without any rigorous review of expenditure needs, or of the benefit incidence of expenditure, and the assumption that resources will always be there to meet expenditure needs; Simultaneously, a huge, pent-up demand from previously disadvantaged communities for improved (or even basic) levels of service, leading to unsustainable levels of capital spending in the initial post-apartheid period; A high level of staffing, with relatively low productivity and with a powerful trade union opposed to fundamental change; A failure to address the problem of the very low levels of revenue collection in the former black areas inherited from the central government, together with declining collection rates in other areas in the immediate post-apartheid period; The failure to recognise the seriousness of the revenue situation because the accounting system gave a false sense of security about the

[66] Jo Beall, Owen Crankshaw and Susan Parnell *Uniting a Divided City: Governance and Social Exclusion in Johannesburg* (2003).
[67] Ibid at 93.

> levels of revenues being collected; budgeting continued to be on the basis of 100 percent revenue collection.[68]

Apart from the issues outlined above, the early IDPs proved to be relatively poor from a content and strategy perspective. These IDPs were blamed for being 'wish-lists' that uncritically outlined 'unfunded mandates', thus being 'weak' and devoid of meaningful strategy.[69] The weakness of IDPs as strategic planning instruments was compounded by the fact that the City was hamstrung by lack of sound financial and performance management systems. At the same time, the City was struggling financially to fund some of the projects critical for effecting meaningful urban reconstruction. So, the issue of 'unfunded mandates' also negatively affected the implementation of the City's projects as identified in its IDPs. Commenting on the challenges faced by local municipalities such as Johannesburg in the first decade of democracy, Firoz Khan outlines that:

> Policies are made in a hurry, often under intense external pressure, new legislatures are inexperienced, and inundated with massive amounts of new legislation; the executive bureaucracy are hamstrung by weak staff, poor information and logistical support; and inadequate procedures and lack of clarity concerning clear relations between governmental departments.[70]

From 2010 onwards however, the City's 'second generation' IDPs and SDFs demonstrated a considerable level of sophistication.[71] In other words, the City attempted to formulate urban plans that were reasonably 'credible' in the sense that they were anchored on sound budgetary and performance management systems, with a strong spatial reference.[72] Moreover, influences from international

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[68] Ibid at 93.
[69] Udesh Pillay, Richard Tomlinson and Jacques du Toit (eds.) *Democracy and Delivery: Urban Policy in South Africa* (2006).
[70] Khan op. cit. note 65 at 10.
[71] Policy Coordination & Advisory Services (PCAS) *Harmonising and Aligning: The National Spatial Development Perspective, Provincial Growth and Development Strategies and Municipal Integrated Development Plans* (2004).
[72] City of Johannesburg *Integrated Development Plan 2016/2021* (2016).

urban planning discourses on strategic spatial planning, spatial integration, and smart cities, were steadily finding their way into Johannesburg's urban planning approach and discourse.[73] These new ideas on city planning were in the main underscored by the principles of collaborative planning and the promotion of social justice. So, attempts were made to include as many development stakeholders as possible in the IDP-making processes, with the aim of strengthening the City's integrated development planning system.

The City's 2016/2021 IDP in particular demonstrates some of the aforementioned global urban planning trends. In realising its developmental objectives, the City's most recent IDP identifies at least ten strategic objectives that prove to be in line with the global urban agenda, these include fostering economic growth, job creation, investment attraction and poverty reduction; informal economy, and SMME support; green and blue economy; transforming sustainable human settlements; smart city and innovation; financial sustainability; environmental sustainability and climate change; building safer communities; social cohesion community building and engaged citizenry; repositioning Joburg in the global arena and; good governance.[74] A glimpse at these strategic priorities reflect the City's commitment towards utilising the IDP policy to balance the developmental needs and expectations of various stakeholders and/or inhabitants. As the City grapples with issues of informality, poverty and housing for the poor, it also strives to reposition itself in the global arena through the employment of smart growth strategies predicated on innovation and environmental integrity.

What also renders the City's 2016/2012 IDP relatively sound and credible, is the fact that all its developmental projects and programmes are spatially anchored through the Spatial Development Framework 2040.[75] Moreover,

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[73] Andreas Faludi 'The Performance of Spatial Planning' (2000) 15 4 *Planning Practice & Research* 299-318; Patsy Healey 'Civic Engagement, Spatial Planning and Democracy as a Way of Life' (2008) 9 3 *Planning Theory & Practice* 379–414; Sharon Biermann 'Planning Support Systems in a Multi-Dualistic Spatial Planning Context' (2011) 18 4 Journal *of Urban Technology* 5–37.

[74] City of Johannesburg op. cit. note 72 at 6.

[75] City of Johannesburg *Spatial Development Framework 2040* (2016).

SPLUMA has cemented the role of SDFs as it provides clear guidelines on their formulation and implementation across all three spheres of government.[76] The SDF is important as it spatially guides the City's capital investment, thus allowing for a more integrated approach to development planning. In the SDF, 'priority transformation areas' are also identified. These include, strengthening the metropolitan core (i.e. the traditional CBD); developing Corridors of Freedom; addressing marginalisation through prioritising poorer areas; addressing informal settlement challenges; as well as identifying 'a hierarchy of nodes' critical for economic growth.[77]

In addition to the IDPs and SDFs, there exist a number of sector plans and growth and development plans all aimed at promoting socio-spatial integration and economic development in the City.[78] Over the last two decades, efforts have been made to ensure that all these sector-specific plans find are aligned to the IDPs and the SDFs. Moreover, emphasis has been put on the vertical alignment between the City's planning instruments and other related planning instruments at provincial and national level. Such an alignment however has proved to be a challenge given the institutional complexities within and between all three spheres of government.[79]

The IDP's developmental objectives are also bolsters by the Built Environment Performance Plan (BEPP). The BEPP's formulation and implementation is mandated by the Division of Revenue Act 3 of 2016 (DORA). As a long-term, outcomes based strategic plan, BEPP's primary objective is to foster spatial integration and transformation in the City. It does so by indicating how the City utilises its capital financing and grants from national government. These grants include; the Integrated City Development Grant; the Urban Settlement Development Grant; the Human Settlement Development Grant; the Public

[76] Nic Laubscher, Lizette Hoffman, Ernst Drewes and Jan Nysschen *SPLUMA: A Practical Guide* (2016).
[77] City of Johannesburg op. cit. note 72 at 94.
[78] City of Johannesburg Metropolitan Municipality *Joburg 2040: Growth and Development Strategy* (2017).
[79] PCAS op. cit. note 71.

Transport Infrastructure Grant and; the Neighbourhood Development Partnership Grant.[80]

Johannesburg's strategic spatial planning instruments such as the IDPs, the SDFs, the BEPP, and the Growth and Development Strategy 2040 (GDS) – are all aimed at transforming the City's spatial, and socio-economic milieu. While these legally binding planning instruments clearly articulate the City's developmental vision, their implementation is yet to benefits all of the City's inhabitants. While some residents enjoy high quality of life, others continue to battle with the challenges of unemployment, poverty, and homelessness.[81]

Notwithstanding their shortcomings, these planning policy instruments continue to play an integral role in guiding the City's financial, planning, and governance processes. Moreover, the involvement of various stakeholders in the IDP review platforms, and discussion forums, has resulted in the embedding of the culture of public-participation in plan-making, and implementation processes. Indeed, as the City's IDPs and their related Spatial Development Frameworks (SDFs) have been evolving over the last decade and a half, some concerns have been raised over their role, and efficiency in reconstructing the city. What is certain however, is that IDPs are one of the key post-apartheid municipal planning policy measures that embody the constitutional objective of spatial transformation. The fact that both IDPs and SDFs are legally binding planning instruments (as per the Systems Act, and SPLUMA respectively), provided them with the needed credence to shape municipalities transformational mandate. Put differently, post-apartheid laws now compel city governments to manage cities in a financially sound, and developmental, and accountable manner.[82]

[80] Department of National Treasury *City of Johannesburg Built Environment Performance Plan 2016/17* (2016) at 6.
[81] Pillay, Tomlinson and du Toit op. cit. note 69.
[82] Nico Steytler and Jaap de Visser *Local Government Law of South Africa* (2007).

6.5 ALTERING THE LAWSCAPE THROUGH RIGHTS-BASED LITIGATION

The terrain of right-based litigation has continually been shaped by various social actors in post-apartheid Johannesburg. This has been particularly so in the housing jurisprudence, where private landowners, the poor, and the state revert to law, and the courts to claim their legal rights and the right to the city. In many ways, rights-based litigation has contributed to the altering of the post-1994 Johannesburg's lawscape. Moreover, through rights-based litigation, the state's transformative laws and the related legal culture is continually tested. The relevance of rights-based litigation as vehicle for claiming legal rights, and the right to the city has been discussed in chapter 5. In this section, attention is given to some of the cases that demonstrate the effects of rights-based litigation on Johannesburg's spatial transformation. To this end, *Olivia Road*, *Blue Moonlight*, and *South African Informal Traders Forum* v. *City of Johannesburg*[83] (*SAITF*) cases are discussed, with the intention of ascertaining their possible contribution to Johannesburg's governance approach.

As discussed in chapter 5, *Olivia Road* becomes important particularly from a 'meaningful engagement', as well as 'reasonableness' perspective.[84] As the Constitutional Court deliberated on the constitutionality of evicting more than 400 unlawful occupiers of two buildings in the inner-city of Johannesburg; it brought to light the need for the City to be engage with the citizens particular in a matter that would have resulted in the latter being evicted. This case's emphasis on meaningful engagement in particular, meant that the City was to factor in a strong community engagement and participation component in its governance structures, thus resulting in the opening up of public participation spaces in urban planning. As per the judgment:

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[83] *South African Informal Traders Forum* v. *City of Johannesburg* 2014 (4) SA 371 (CC).

[84] *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC); For a detailed discussion on this matter see Lilian Chenwi 'A New Approach to Remedies in Socioeconomic Rights Adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others'* (2009) 2 1 *Constitutional Court Review* 371-393.

> Engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine – (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and (e) when and how the city could or would fulfil these obligations.[85]

The court's emphasis on meaningful and transparent engagement was informed by its desire to ensure that the rights to human dignity, and life are protected as per the dictates of the constitution.[86] As engagement is a two-way process, it meant that the City was able to consider the plight of those to be evicted, and address put in place some mitigation measures within its resources, while not evading its constitutional obligations of providing basic services, and housing to the poor.

Similarly, *Olivia Road* also acknowledged the role that those facing eviction that they must 'not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands'.[87] In the same vein, the court was able to use the law to protect the relatively powerless by retaining their sense of agency to engage with the powerful actors, i.e. the City in this instance.

The court's decision to order the City to provide alternative accommodation to those that were facing eviction was significant, as it did not only set a precedence for similar cases that were to follow. Most importantly, this case demonstrated the capacity of rights-based litigation to protect the poor, while at the

[85] *Olivia Road* para. 14
[86] *Olivia Road* para. 16.
[87] *Olivia Road* para. 20.

same time compelling the City to be humane in its implementation of its development strategies, and policies. Moreover, *Olivia Road* arguably contributed to the progressive altering of Johannesburg's cityscape, specifically the inner city, in a manner that did not dehumanise the urban poor.

One can only speculate what would have happened if the City had succeeded in evicting all poor people from the so called bad buildings. What is certain however, is that such mass evictions in the name of urban renewal, and attracting investment, would have caused untold social suffering to thousands of poor people in Johannesburg. Also, it would have invoked the past, where such evictions were commonplace. Olivia Road signifies a break from the past where 'unsanitary grey spots' would be stamped out without any recourse for those evicted from those areas.[88] So, *Olivia Road* is an example of how urban governance practices can be transformed through meaningful engagement between the powerful (i.e. the City in this instance), and the most vulnerable in society.

While the City's Inner-City Renewal Programme was well-intentioned from an urban planning perspective (as it sought to create a hygienic urban environment), the fact that this programme was to result in mass evictions of many unlawful occupiers meant that it was unreasonable, and therefore unconstitutional.[89] This finding by the court also contributed to a new approach to urban governance. Put differently, instead of detaching itself from the plight of the residents within its jurisdiction, the City was compelled by this judgment to adopt a reasonable, and humane approach as it implements its policies. This has a long-lasting effect on the spatial form of the city, as the City cannot unwittingly engage in a colonial/apartheid-style of arbitrarily evicting the 'undesirables'. For such a draconian approach to Johannesburg's planning would have introduced the

[88] See Susan Parnell 'Creating Racial Privilege: The Origins of South African Public Health and Town Planning Legislation' 1993 3 *Journal of Southern African Studies* 471-488. Also refer to chapters 3 & 4 of this dissertation for a detailed discussion on colonial/apartheid laws and the sanitation syndrome.

[89] Olivia Road para. 17.

colonial/apartheid 'sanitary syndrome' through the back door, thus upsetting the spatial transformation agenda.

What also emerges from *Olivia Road*, is the Court's role in prioritising legislative and other measures aimed at spatial transformation. While the Constitutional Court found the National Building Regulations and Building Standards Act 103 of 1977, to be constitutional, it emphasised the need for this legislation to be read with the Constitution and the PIE Act in mind. This meant the prohibition of arbitrary evictions in the city. *Olivia Road* also indicates the significance of the courts not only in the interpretation of the law in favour of transformative constitutionalism. It also points to the transformation of the legal culture towards the realisation of spatial transformation through the implementation of laws that entrench human dignity, such as the PIE Act.

The City's obligations towards assisting the unlawful occupiers with access to shelter was also emphasised by the court in *Blue Moonlight*.[90] In this case, in 2006 at least 86 people had unlawfully occupied premises that comprised of factory buildings, garages, and office space in Berea, Johannesburg were facing an eviction by a private company, Blue Moonlight Properties 39 (Pty) Ltd (*Blue Moonlight*). In purchasing these premises with the intention of redeveloping them, *Blue Moonlight* was in full knowledge that the premises under discussion were occupied by the urban poor. At the heart of this matter however, was for the court to decide the rights of the owner of the property as per section 25 of the Constitution, and the obligations of the City with regard to the provision of housing to the occupiers in the event of them being evicted.[91] The case also brought to bear the extent of the reasonableness of the City's housing policy, particularly with regard to providing housing relief to people evicted from private properties.

In deliberating on this matter therefore, the Court attempted to balance the private property rights provision, i.e. section 25(1) of the Constitution, with the

[90] For a detailed discussion on this case see Kate Tissington and Stuart Wilson 'SCA Upholds Rights of Urban Poor in Blue Moonlight Judgment' (2011) 12 *ESR Review: Economic and Social Rights in South Africa* 3-6.
[91] Blue Moonlight para. 1.

occupiers' right not to be evicted from their home as per sections 26 of the Constitution. Also foregrounding the court's judgment was its acknowledgement of the historic spatial, as well as socio-economic injustices that has seen most South Africans living in abject poverty. With regard to the housing crisis, for instance, there was an acknowledgment that over two million people in the country were living in informal settlements. These housing shortages formed part of the reason for some of the poor to unlawfully occupy privately owned properties.[92]

Without reiterating the entire judgment here, suffice to state that while the Court found Blue Moonlight entitled to an eviction order, the fact that such an eviction was to render the occupiers homeless meant that the City was to be involved in this otherwise private eviction dispute. In other words, the City could not ignore the imminent plight that was to befall the occupiers in the event of them being evicted. Moreover, the court declared that the City had an obligation to assist people evicted from buildings by private owners. This means that the City could not hide behind lack of funds, in the process state passing the proverbial buck by claiming (in neoliberal fashion) that it is not responsible for the side-effects of market forces. Staying true to the constitutional objective of protecting the poor's socio-economic rights, the court emphasised the state's obligations and responsibility for people who fall on hard times due to the operation of market forces.[93]

Like in *Olivia Road*, *Blue Moonlight a*lso indicates how the law, and the courts balance competing claims for legal rights. Moreover, these two cases demonstrate how the courts can influence the City's approach to urban governance. As was the case in Olivia Road, the City was expected to reconsider the reasonableness of its housing policy, particularly in relation to private evictions. Apart from impacting on the City's housing policy approach, the *Blue Moonlight*

[92] Blue Moonlight para. 2.

[93] See Gerard S. Dickinson 'Blue Moonlight Rising: Evictions, Alternative Accommodation and a Comparative Perspective on Affordable Housing Solutions in Johannesburg' (2011) 27 3 *South African Journal on Human Rights* 466-495.

judgment compelled the state to be more 'humane' and sensitive to the plight of the poor, even as they deal with private developers.

The court's objective of protecting the poor's right to dignity, and their right to the city is demonstrated in the *South African Informal Traders Forum and Others v City of Johannesburg and Others* (*SAITF*) case.[94] In 2013 SAITF applied to the High Court to halt an eviction of licensed informal traders by the City's Metro police. The City's objective of evicting these informal traders was predicated on its assumption that informal trading contributed to inner-city decay, as well as crime, and grime. In hearing this case, the High Court ruled that the case was not urgent, and was thus stuck off the court roll. Following this ruling, SAITF approached the Constitutional Court to seek for an interdict as part of the relief.

In deliberating on this matter, the Constitutional Court highlighted the plight faced by the evicted informal traders as a result of their forced removal from their trading stalls. As the Court outlined, the eviction of traders caused 'financially perilous condition' for traders, and the postponement of the case was in fact a 'ruinous delay' that would have exacerbated the dire socio-economic conditions faced by traders and their dependents.[95] The Court also highlighted how the City's conduct of evicting traders had a 'direct and on-going bearing on the rights of children, including their rights to basic nutrition, shelter and basic health care services', thus being unconstitutional as per the provisions of section 28(1)(c) of the 1996 Constitution.[96]

In an attempt to justify its apartheid-style evictions of poor informal traders in the inner-city, the City evoked the 'sanitation syndrome' debate of the early 20th century that viewed the presence of the poor in the city as a socio-spatial ill to be summarily dealt with. As stated in the judgement, the City attempted to defend its actions by stating that is was 'convenient' for it to evict the traders on behalf of the inner-city residents that no longer enjoyed access to 'ATMs, walk-in banks,

[94] *South African Informal Traders Forum v. City of Johannesburg 2014 (4) SA 371 (CC).*
[95] *SAITF* para. *30.*
[96] *SAITF* para. *32.*

departmental stores, restaurants and other amenities because of criminality that hides among the illegal hawkers'.[97]

The City's association of poverty, with criminality remains one of the remnants of the sanitation syndrome of the colonial times. The City's use of phrases such as 'Operation Clean Sweep'[98] when forcibly evicting informal traders for instance, attest to this narrow view of the city as a space that can be 'medicalised', and shielded from the dirt, grime and crime associated with the poor. This trope of sanitising the city through urban policy dealt a blow not only in the *SAITF* judgment but also in *Olivia Road*, and *Blue Moonlight*, were the court emphasises that the poor be treated (by the City and the private developers) in a humane manner, as prescribed in the Constitution. By acknowledging the reality of informality, SAITF opened an avenue for the imagining and planning of a humane city predicated on spatial justice.

6.6 REFLECTIONS

Johannesburg's post-apartheid lawscape is in the process of being fundamentally reconstituted through legislative and planning measures. As the City applies its various planning strategies that are all aimed at promoting spatial justice, the city's varied neighbourhoods have experienced a considerable level of socio-spatial, and economic transformation. Without a doubt, Johannesburg's most affluent areas (particularly the northern suburbs) have benefited from both public, and private sector investments.

The investments on physical infrastructure in particular, has seen areas such as Sandton becoming 'the riches square-mile' on the African continent. With regard to the townships, and the inner-city, the City has, through its IDPs and other policy measures, implemented programmes and projects that have given these areas a 'face-lift'. The provision of housing, water, electricity and other related amenities in Johannesburg's townships, has resulted in the alleviation of abject poverty for millions of the city's residents.

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[97] *SAITF* para. 32.
[98] *SAITF* para. 7.

Despite these developments, there still exist some areas in need of innovative legislative, as well as policy alternatives if spatial justice for all is to be attained. For one, post-apartheid Johannesburg's spatial form remains fragmented on class and racial lines. While the City has invested in the Corridors of Freedom as well as the BRT public transport system to promote mobility and spatial integration; the increase in the number of gated communities has further complicated Johannesburg's already fractured spatial milieu. These gated communities, together with private sector led 'regeneration' projects in inner cities, are one example of how a lot of spatial injustice in post-apartheid South Africa has been perpetrated by the private sector or by the forces of private capital, with the state taking more of a passive role in development as per the neoliberal template.[99]

In the same breath, the rights in the Constitution and their enforcement in cases such as Blue Moonlight has provided an important counterweight to this – Blue Moonlight ensures that the state cannot just 'roll back' and give people over to the market. Instead, it retains responsible towards them, particularly the most vulnerable. This means that constitutionally-driven rights-based litigation arguable marks the 'return of the state', as the state strives to play an active role mitigating the effects of global capitalism and its complex neoliberal packages. With the state thriving to be developmental through its interventionist policies, and laws, it means that South African cities are not quite given over to private developers and neoliberal logic. It remains to be seen how the tug-of-war between the state and the private developers will shape South Africa's lawscape.[100]

The chapter also demonstrated how the City's urban governance approach is also informed by the courts, as the latter attempt to realise the state's constitutional mandate of spatial inclusivity, and justice. At the centre of the cases

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[99] Martin Murray *Taming the Disorderly City: The Spatial Landscape of Johannesburg after Apartheid* (2008) at 125; Also see Martin Murray *City of Extremes: The Spatial Politics of Johannesburg* (2011).

[100] See chapters 8 and 13 of the National Development Plan on the developmental role of municipalities (and the state at large), and the role played by legal and planning instruments in making the state more relevant in shaping the future of cityscapes. All these efforts must be read against the post-apartheid state's progressive planning legislation outlined in chapter 5 of this dissertation.

discussed above, was the influence of post-apartheid law in shaping the city's planning policies, particularly with regard to the urban poor. The *Olivia Road* case for instance, did not only mark an end to the City's Bad Buildings programme; it also shaped the city's housing policy in relation to eviction. Moreover, in *SAITF*, the City was compelled to change its policy, and approach in relation to informal trading in the inner-city. This attests to the transformative power of the law, as it contributes to the city's spatial transformation. Instead of viewing the urban poor as a nuisance to be forcible evicted, the City now has to ensure that its governance policies are reasonable, and are also informed by meaningful engagement with the poor, as well as the private developers. Thus, as Johannesburg's lawscape transforms, law, planning and rights-based litigation continue to influence the pace of these transformation processes.

CHAPTER 7: TOWARDS A DECOLONIAL LAWSCAPE?

> The connection between the lawscape and spatial justice is both fragile and solidly immanent, which means that there is no prescription that guarantees the emergence of spatial justice, yet the lawscape is the only ground on which spatial justice can emerge.[1]

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7.1 INTRODUCTION: OF A NEW SPATIOLEGAL CONSCIOUSNESS

So, if law and spatial planning practices were complicit in the production of racialised and fragmented spaces during the colonial and apartheid era, to what extent (if at all) have these two disciplines/practices contributed to the reconstruction and/or transformation of post-apartheid cities? This dissertation sought to address this primary research question; a question predicated on the assumption that law and planning contributed to the making of urban geographies of inequalities in the colonial/apartheid South Africa. The question also sought to examine the extent at which both legislative and planning measures have reconstituted or transformed post-apartheid cities.

What emerged from this dissertation, is that while both legal and planning instruments can be (and were) used to create racially segregated cities in South Africa; the same instruments can (almost ironically) be used to redress the socio-economic and spatial injustices that they facilitated in creating in the first instance. The difference in outcomes, as legal and planning instruments are applied in a given space therefore, is determined primarily by the ideological as well as the political disposition of actors applying these instruments of socio-spatial and economic ordering.[2] In addressing the aforementioned research question, it became apparent that South African cities' spatial form as well as the everyday

[1] Andreas Philippopoulos-Mihalopoulos 'Spatial Justice in the Lawscape' In Andrea Brighenti (ed.) *Urban Interstices: The Aesthetics and Politics of the In-Between* (2013) at 90.
[2] Andrew Halpin 'Ideology and Law' (2006) 11 2 *Journal of Political Ideologies* 153-168.

socio-spatial, economic relations were intrinsically shaped by the logic of racism, spatially realised through law and planning. In other words, the political administrators, lawyers and planners of the colonial/apartheid era, used race as the primary principle of producing and ordering space.

Throughout the dissertation, it also became apparent that racial capitalism also enhanced the colonial/apartheid state's drive towards promoting racial segregation. In Johannesburg, the discovery of gold in 1886, and the need for cheap Black labour to work in white-owned mines, factories and homes for instance saw the relegation of the so-called 'non-whites' to the Fanonian zones of nonbeing and alterity, i.e. segregated townships and homelands. The logic of racism therefore was used to justify the legislation of racial zoning in colonial/apartheid Johannesburg.[3]

Part of the creation of a 'white city' like Johannesburg also meant that the state had to create and perpetuate the myth of a 'superior white race' that was to be distinguished from the natives by their socio-economic wealth, and political sophistication, as well as by the exclusivity of spaces they inhabited. This creation of a 'white aristocracy' saw the colonial/apartheid state formulating various development programmes aimed at uplifting the socio-economic status of whites. This was particularly the case in Johannesburg from the 1920 onwards, where the colonial state implemented various empowerment programmes aimed at uplifting poor whites' socio-economic status.[4]

The dissertation also attempted to outline how the colonial imagining of cities like Johannesburg as racial cities, was intensified during the apartheid era, i.e. between 1949 and the late 1980s. In this era, a plethora of segregatory laws such as the Group Areas Act and other influx control legislation where used to further segregate people on racial grounds. By the 1970s, all South Africans

[3] Achille Mbembe 'Aesthetics of Superfluity' (2004) 16 3 *Public Culture* at 380.

[4] See in particular, Lis Lange *White, Poor and Angry: White Working Class Families in Johannesburg* (2003); Susan Parnell, 'Creating Racial Privilege: The Origins of South African Public Health and Town Planning Legislation' 1993 3 *Journal of Southern African Studies* 471-488.

belonged, and/or resided in legally and racially determined 'group areas' (at least in principle).

What accompanied the apartheid's legislated racial zoning was the uneven delivery of basic services such as water, electricity, and housing. As highlighted throughout the dissertation, urban spaces inhabited by white population groups were relatively well-serviced, while Black areas were relatively neglected by the apartheid state. The housing and other meagre services provided for Black people in Johannesburg's townships for instance, were meant to plan them out of white areas, while allowing for the state to effectively regulate and monitor their daily activities.[5]

Apart from mapping out the historical processes that facilitated the making of racially fragmented cities in South Africa, an attempt was also made to outline some of the efforts made by the post-apartheid state to reconstitute the apartheid lawscape. What emerged from the discussion on post-apartheid cities, is that the state has managed to achieve a considerable degree of success with regard to transforming Johannesburg to into a more spatially just city. From the outset, the establishment of a constitutional democracy saw the elevation of the Constitution as the primary instrument for political, as well as socio-economic and spatial transformation.[6]

Moreover, the post-apartheid state's commitment towards redressing the apartheid urban legacy by providing millions of South Africans with housing, as well as access to water and electricity – all point to the ongoing transformation of cities. The courts have also played a significant role in the reconstitution of South African cities by balancing varying claims for legal rights.[7] While most people in cities like Johannesburg do not have access to the courts, those that have,

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[5] Fassil Demissie 'Controlling and 'Civilising the Natives' through Architecture and Town Planning in South Africa' (2004) 10 4 *Social Identities: Journal for the Study of Race, Nation and Culture* at 483.

[6] See Johan van der Walt, 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 1 *Fundamina* 1-47.

[7] Marius Pieterse *Rights-Based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg* (2017) at 45.

contribute to the development of right-based jurisprudence predicated on promoting spatial justice, equality, as well as human dignity.[8]

The following sections will provide a summary of the chapters, as well as some reflections on key findings/observations. This will be followed by a discussion on some of the proposed interventions that could contribute to the decolonisation of post-apartheid cities, towards the attainment of spatial justice. The chapter concludes by providing some suggestions on areas in need of further research.

7.2 SUMMARY OF CHAPTERS

In an endeavour to provide a sound philosophical scaffolding for the thesis, chapter 2 provided a discussion on lawscape and the right to the city. These concepts form part of critical legal geography, a transdisciplinary discipline that has contributed immensely in the 'legal spatial turn'.[9] The idea of lawscape in particular provided an analytical frame for anchoring the discussion on law, the city and space. As outlined in chapter 2, lawscape appreciates the mutual imbrication of law and the city, resulting in creation of a city that is fully saturated, and shaped by law. Inversely, law becomes intensely shaped by everyday activities, processes and imaginings defining the city. Lawscape, therefore becomes a product of legal and planning activities, that result in the production of a particular social space.[10]

The idea of the lawscape therefore, allowed for the appreciation of how the legal and planning practices were employed in the service of creating colonial/apartheid, as well as post-apartheid spaces. As the colonial/apartheid state was imagining and formulating racial cities, it relied on the disciplines of law and planning in realising its racist ideology. This resulted in the production of a colonial lawscape, were everyday relations between different groups were

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[8] Malcolm Langford, Ben Cousins, Jackie Dugard, and Tshepo Madlingozi (eds.) Socio-Economic Rights in South Africa: Symbols or Substance? (2013).

[9] Andreas Philippopoulos-Mihalopoulos 'Law's Spatial Turn: Geography, Justice and a Certain Fear of Space' (2010) XX(X) *Law, Culture and the Humanities* 1-16; David Harvey *Rebel Cities: From the Right to the City to the Urban Revolution* (2012).

[10] For a detailed account on the lawscape and spatial justice, also see Andreas Philippopoulos-Mihalopoulos *Spatial Justice: Body, Lawscape, Atmosphere* (2015).

governed by segregatory laws. In appreciating the production of the lawscape in colonial/apartheid Johannesburg for instance, it became apparent that law and planning can be captured by specific political forces, as well as dominant ideologies, such as racism. Once captured, these tools contributed to the realisation of racial capitalism, and its reliance on the production cheap and readily exploitable Black labour.[11]

Similarly, a discussion on the right to the city in chapter 2 demonstrated how social space is produced by everyday relations of disparate social groups, often with competing claims, and visions of the city.[12] As the right to the city is a cry and a demand, both the poor and the wealthy find themselves jostling for political, social and economic power to shape the city according to their hearts' desires. The concept of the right to the city was later applied in the analysis of Johannesburg, revealing how its lawscape was deeply imbued in the colonial logic of racial difference.[13]

The right to the city concept was also employed in chapter 4 and it shows how actual enactments of the right through habitation practices actually contributed to Apartheid's downfall. In other words, it was peoples exercise of the right to the city in the face of the law that made group areas system 'collapse'. Similarly, chapter 6 shows how the right to the city is now infiltrating the lawscape through being bolstered and endorsed and finding expression through rights-based litigation. One of the important effects of this is that it has provided a counterweight for neoliberal forces which would otherwise have seen the state retreat from development and would have left the victims of apartheid without recourse against perpetuations of spatial apartheid through market forces.[14]

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[11] Daryl Glaser *Politics and Society in South Africa* (2001) at 32-58.
[12] Harvey op. cit. note 9 above.
[13] Paul Maylam 'Explaining the Apartheid City: 20 Years of South African Urban Historiography' 1995 21(1) *Journal of Southern African Studies* at 22.
[14] Pieterse op. cit. note 7 at 220.

Chapter 2 also sought to demonstrate the processes underpinning the designing of a colonial city.[15] Using the work of various decolonial scholars, the chapter demonstrated how the colonial city relied of racism a foundational principle of socio-spatial ordering.[16] Santos in particular, highlighted how the zones of being are defined by law and regulations, as they are spaces of civilization, and progress. As for the zones of nonbeing, or what he termed 'the other side' of the abyssal line, law is absent or withdrawn there, and in its place, violence and appropriation prevails.[17] This conceptual framing informed later discussions on the making of colonial/apartheid Johannesburg, as a racial city with varied spaces of inequality. So, the concepts of the lawscape, the right to the city, and coloniality of space allowed for the foregrounding of the need to decolonise South African cities.

Following the theoretical framing discussed above, chapter 3 attempted to provide an example of how the colonial/apartheid lawscape was created in South Africa. The chapter provided a historical narrative of how legal and planning practices predicated on racism, coalesced to create South African cities as quintessential racial cities. Put differently, the chapter demonstrated how myth of racial difference was appropriated by administrators, political leaders, and planners among others, who then used legal and planning practices to implement racial segregation.[18] Chapter 3 also provided a genealogical and historical account of the formulation and implementation of colonial/apartheid laws, as well as planning practices. The discussion began by focusing on the racial imagining of urban South Africa from pre-Union years i.e. from 1652 to 1909. From as early at

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[15] In fact, the colonial world was imagined through a divisive colonial model defined by the 'abyssal thinking'. See Boaventura de Sousa Santos 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) XXX -1 *Review* at 1-9; James Blaut *The Colonizer's Model of the World: Geographical and Eurocentric History* (1993).

[16] Walter D. Mignolo *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (2011); Nelson Maldonado-Torres, *Against War: View from the Underside of Modernity* (2008); Ramon Grosfoguel 'The Epistemic Decolonial Turn: Beyond Political-Economy Paradigms' (2007) 21(2-3) *Cultural Studies*, 211-223.

[17] Boaventura de Sousa Santos 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) XXX -1 *Review* at 12.

[18] John W. Cell *The Highest State of White Supremacy: The Origins of Segregation in South Africa and the American South* (1982).

the 17th century, racial segregation was beginning to shape the spatial form of early colonial towns such as Cape Town. By the 19th century, the idea that black people did not belong in white cities was evinced by the creation of 'Native Strangers' locations in areas such as Port Elizabeth for instance.[19]

Chapter 3 also highlighted how racial planning in urban South Africa found impetus from the 1920s onwards, when the colonial state formulated specific laws aimed at promoting spatial segregation; these included the Urban Areas Act of 1923. It was during the Union years (i.e. between 1910 and 1947) that the idea of African as temporary visitors in a white city was cemented. In this era, the sanitation syndrome idea was also used to justify the destruction of racially mixed places. Moreover, the white empowerment agenda had begun from the 1920s onwards. This white empowerment agenda was necessitated by the plight of 'poor and angry' white people whose socio-economic status was viewed as posing a threat to the grand idea of white supremacy.[20] Racial zoning was further cemented during the apartheid era, when the state formulated more legislation that sought to plan Black people out of white cities, while simultaneously 'boxing' all races in segregated spaces.[21]

What emerged also from chapter 3, is that while town planning was necessary in the creation of urban South Africa, its infusion with racist ideas of spatial ordering resulted in the creation of segregated cities. In creating the colonial/apartheid lawscape therefore, the state used a complex plethora of legislation, accompanied by mass forced removals, to regulate people's' everyday activities. During the colonial/apartheid era, the state passed laws that penetrated the private domain, resulting in the regulation of sexual relations between races, as well as other 'little apartheids' that saw the use of public urban amenities and

[19] Paul Maylam 'Explaining the Apartheid City: 20 Years of South African Urban Historiography' 1995 21(1) *Journal of Southern African Studies* at 22.
[20] Lis Lange *White, Poor and Angry: White Working Class Families in Johannesburg* (2003); Susan Parnell 'Creating Racial Privilege: The Origins of South African Public Health and Town Planning Legislation' 1993 3 *Journal of Southern African Studies* 471-488.
[21] Maylam op. cit. note 19.

facilities being racialised.[22] This colonial/apartheid lawscape however, was to be dismantled from the 1980s onwards, with most of apartheid's influx control laws being repealed.

While chapter 3 provided a 'broad picture' on the making of urban South Africa, chapter 4 attempted to zoom into Johannesburg to demonstrate some of the processes underpinning the making of a colonial/apartheid city. From the outset, Johannesburg was imagined as a racial city.[23] What followed the discovery of goldfields on the Witwatersrand was a massive project of socio-spatial engineering, predicated on the radicalisation of racial differences. This nascent town's administrators, as well as the wealthy Randlords, invested in creating Johannesburg as a white city reminiscent of European cities. This meant that town planning as well as a range of legislation were to be employed in the service of creating a European city in Africa.[24]

As demonstrated in chapter 4, in as early as the 1900s black townships were being erected by the town council, and the Parks (i.e. Parktown and its surrounds) were already taking shape as predominantly English-speaking, white neighbourhoods.[25] This racial zoning continued right through to the 1980s, resulting in the creation of uneven geographies of inequalities. Chapter 4 therefore attempted to provide concrete examples of how both white and black neighbourhoods were created in the height of colonialism and apartheid. As these neighbourhoods were being formulated as racial enclaves, those areas that were racially mixed were razed to the ground by the colonial/apartheid state, with the sanitation syndrome being used as justification for racial zoning. This foreclosed any chances for cosmopolitanism taking root in Johannesburg of the time.[26]

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[22] Immorality Act 5 of 1927; Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985.
[23] Achille Mbembe 'Aesthetics of Superfluity' (2004) 16 3 *Public Culture* at 380.
[24] Rand Pioneers Incorporated *Seventh Annual Report, 1908-1909* (1909).
[25] Alan Mabin 'Suburbanisation, Segregation, and Government of Territorial Transformations' (2005) 56 *Transformation* 41-64.
[26] Parnell op. cit. note 20.

While the colonial/apartheid state was meticulous in the application of its segregationist laws, there existed instances in Johannesburg were racial mixing was almost unavoidable. As demonstrated in chapter 4, the presence of black workers in white Johannesburg albeit limited, contributed to the undermining of the state's project of realising total segregation. The greying of Johannesburg however, gained momentum in the early 1980s when the apartheid legal and political edifice was beginning to crumble. This 'greying' process was arguably an expression of the right to the city in the face of the law, leading to a change on the lawscape. What also emerged in chapter 4 is that as the apartheid state was trying to reform itself, it repealed most of its influx laws, while simultaneously passing new laws aimed concretising the colonial/apartheid spatial status quo.[27] In other words, the legislation passed on township land rights, were meant to keep Africans confined in those particular areas. An attempt was made on the part of the apartheid regime in its dying years therefore, to attempt to use the law to preserve the colonial/apartheid form of Johannesburg, and its related inequalities in infrastructure development.

Chapter 5 outlines the efforts made by the post-apartheid state in transforming South Africa's urban form. It does so by highlighting the significant role played by the 1996 Constitution, as well as its emphasis on spatial justice and socio-economic rights. Apart from outlining some of the key debates of transformative constitutionalism, the chapter also demonstrates how the post-apartheid lawscape has been fundamentally shaped by the introduction of a plethora of new legislation all aimed at realising the constitutional vision of crafting a democratic and inclusive society.[28]

What also emerged from chapter 5 is that the post-apartheid legislation has created a sound foundation that informed municipal planning processes. In

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[27] Chris Alden *Apartheid's Last Stand: The Rise and Fall of the South African Security State* (1996) at 20-21.

[28] Jeannie van Wyk and Mark Oranje 'The post-1994 South African Spatial Planning System and Bill of Rights: A Meaningful and Mutually Beneficial Fit?' (2014) 13 4 *Planning Theory* 349-369.

addition to these legislation, there exist various policy measures whose objectives are premised realising spatial justice. The content and operation of these policies clearly show how policy and law now derive their force from the constitution and are aligned with its objectives. Transformative constitutionalism now filters into the lawscape, and then, through legally conceived tools like IDPs and SDFs, into the physical form of cities. Moreover, these policy measures have contributed to the bolstering of urban governance, as well as municipal planning process. Furthermore, the post-apartheid legislative and policy measures have allowed for the courts to hold the state accountable, particularly in matters related to the realisation of spatial justice and socio-economic rights.

One of the primary societal transformative forces post-apartheid South Africa, is the justiciability of rights. As outlined in chapter 5, the fact that various social groups with competing legal claims and rights, are able to approach the courts for relief, has continued to alter the lawscape. Chapter 5 therefore highlighted how rights-based litigation contributes to the entrenching of democratic constitutional values while holding the state, the private sector, and the poor inhabitants of cities accountable to their respective obligations. In the case of *Grootboom, Olivia Road* and *Blue Moonlight* for instance, the courts demonstrated their capacity to uphold the rights of the poor, while ensuring that the state realises its constitutional obligation towards the vulnerable in society, and the private developers' influence to alter the cityscape is limited – all within the ambit of reasonableness and mutual engagement.[29]

While chapter 5 demonstrates the extent at which the Constitution as well as planning-related policy measures are aimed at fostering societal transformation; it also points out some of the challenges that the state has to address in order to fully realise its objective of spatial justice for all. Some of these challenges include the stubbornness of the apartheid legacy of spatial fragmentation and socio-economic inequalities. These challenges are entrenched and embedded in the very physical infrastructure of urban South Africa. So, what emerges from chapter

[29] Langford et. al. op. cit. note 8.

5, is that while the transformation of urban South Africa is underway, the pace of transformation is relatively uneven.

While chapter 5 provided a broad appreciation of the transformational forces unfolding in urban South Africa at large, chapter 6 provides a more nuanced narrative on the reconstitution of Johannesburg's lawscape. The chapter demonstrates how after the repealing of apartheid laws from the early 1980s onwards, Johannesburg experienced unprecedented urbanisation, particularly from those racial groups that were hitherto barred by law from inhabiting the white city. This urbanisation of poverty, particularly to areas in and around the inner-city was met with the withdrawal of capital, and subsequent urban decay. What emerges from chapter 6, however is that Johannesburg's socio-economic and spatial transformation has been steady, yet grossly uneven. In other words, the legacy of colonial/apartheid planning is still evident in the city's spatial form and built environment and it contributes to the reproduction of societal inequalities. Moreover, the shortage of well-located land in the city, has seen the expansion of former apartheid Black townships, thus unwittingly resulting in the continuation of the apartheid-style spatial planning.[30]

Chapter 6 also highlights how, from an urban governance perspective, the City has managed to formulate an integrated development planning system, centred around the IDPs and SDFs. These planning policy instruments have informed the City's financial planning, development planning and project management systems, allowing for optimal utilisation of state resources. Apart from the IDPs, the City has, through its entities, implemented a range of programmes and projects aimed at mending the fractured spatial form. These include the Corridors of Freedom, as well as township and urban renewal programmes.[31] These urban planning policy measures have proved to be in line with the constitutional vision of spatial transformation.

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[30] Sarah Charlton 'Inclusion Through Housing: Limitations and Alternatives in Johannesburg' (2010) 21 *Urban Forum* 1-9.

[31] Philip Harrison, Graeme Gotz, Alison Todes and Chris Wray (eds.) Changing Space, Changing City: Johannesburg After Apartheid (2014).

While the post-apartheid legislative and policy measures have contributed to the efficient governance of Johannesburg, the City remains faced with the challenge of evenly providing basic services, particularly to its poor inhabitants. Some of the struggles for housing in particular, have found their way to the courts, where judges have to balance the interests of competing individuals and social groups. Chapter 6 therefore attempted to present cases that depict the contribution of rights-based litigation in shaping the City's urban governance.[32]

What emerges from chapter 6, is that sound legislative and policy measures have been put in place to capacitate Johannesburg's vision towards becoming spatially transformed city. What remains an obstacle however, is the fact that this city's socio-economic challenges are intrinsically linked to its colonial/apartheid spatial structure that does not allow for an immediate and wholesale spatial transformation. Notwithstanding these structural challenges, it is apparent that most of the city's residents' lives have improved since the advent of democracy in 1994. This is particularly true in the areas of water and electricity provision. While millions of the city's inhabitants remain in informal settlements, a considerable number of the poor have benefited from the state's subsidised housing programmes for instance. Thus, while spatial transformation remains uneven in some cases, post-apartheid Johannesburg's socio-spatial and economic milieu is continually changing.[33]

7.3 REFLECTIONS

The primary thesis that emerged from this dissertation therefore is that: law and spatial planning can be appropriated by the state and/or other powerful sectors within society to further specifically determined socio-spatial, economic and political ideals and/or ideologies of the time. This dissertation has demonstrated how legal and planning instruments were used to produce racially segregated and unjust cities in South Africa. Ideally, law and planning instruments are by their nature supposed to be technical, objective, and apolitical, as they are both aimed

[32]Also see Pieterse op. cit. note 7 at 220.

[33] National Planning Commission *National Development Plan: Our Future – Make It* Work (2014).

at creating societal order.[34] However, from the discussions above it is apparent that these instruments can be appropriated, politicised and infused with specific ideologies, resulting in the production of a particular social space. Depending on the nature of ideologies, law and planning instruments can either contribute to the creation of a spatially fractured society, as was the case during the colonial/apartheid era. In the same vein, these instruments can be appropriated and employed in the service of creating an inclusive, democratic society, as is evinced by the emergence of a post-1994 lawscape.

As was illustrated through a historical overview of the colonial/apartheid in chapters 3 and 4, South African cities were in the main, imagined and designed along racial lines. Racial difference therefore, became one of the primary principles of socio-spatial ordering with the legislative and planning instruments being used to realise the making of a racial city. Interestingly, even at the height of colonialism and apartheid, these instruments were used to simultaneously empower white population groups, while 'planning-out' the black majority. This therefore points to the fact that the issue is not with the instruments of law and planning per se, as it is with the ideological/political positioning of those with the power to influence socio-spatial engineering.

So, depending on who wields these instruments of socio-spatial engineering, law and planning can either result in the making of racially bifurcated cities, as was the case in colonial/apartheid South Africa, or they can be used in the service of realising spatial justice. When the racist colonial/apartheid state was dismantling in 1993, the legal and planning instruments have since been used to try and turn cities into more spatially just places. The difference therefore, is that these instruments were now infused or informed by a new political drive towards creating a democratic society.

As demonstrated in chapters 5 and 6, these instruments have done remarkably well insofar as reconstructing the apartheid city is concerned. For one,

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[34] For the technical, modernist aspects of planning, see Alan Mabin and Dan Smit 'Reconstructing South Africa's Cities? The Making of Urban Planning 1900-2000' (1997) 12 2 *Planning Perspectives* 193-223.

the laws as well as the legal culture has completely changed to realise the constitutional vision of spatial justice. Moreover, the planning and governance practices have changed in post-apartheid cities, with IDPs playing a central role in redressing post-apartheid cities' socio-spatial and economic injustices. Furthermore, the justiciability of legal rights impacts positively on the ongoing process of reconstructing the post-apartheid lawscape.

What also emerged from this dissertation, however is that the constitutionally driven process of transforming the apartheid lawscape and city-scape has not been entirely successful. For one, the apartheid city's spatial form, as well as built-environment remains intact. As this spatial form was designed to segregate people on racial, ethnic and class lines, it continues to do so even after the collapse of political apartheid. Indeed, while most of the former whites-only suburbs have witnessed a high level of racial mixing, with black middle-class moving to these areas; most black townships remain exclusively black. So, the impact of racial zoning and spatial segregation has kept most of South Africa's urban neighbourhoods relatively segregated.[35]

In cities such as Johannesburg, the apartheid spatial form has been further complicated by the emergence of gated communities. These are fortified middle and upper-class residential enclaves that emerged as a result of both perceptions and realities of violent crimes in the city. These gated communities also emerged in Johannesburg's affluent suburbs as part of 'a desire to construct and maintain a sense of order, safety, comfort, familiarity and class homogeneity', and thus they 'literally, and harshly, prohibit entry to those who do not belong, and are not wanted, within'.[36] While some of the reasons for these exclusive, gated communities (particularly the fear of violent crime) may be justifiable, their proliferation in Johannesburg and other major cities in South Africa, have arguably

[35] Philip Harrison and Harrison Kirsten (2014) 'Soweto: A Study in Socio-spatial Differentiation' In Harrison, Philip, Gotz, Graeme, Todes, Alison and Wray, Chris (eds.) *Changing Space, Changing City: Johannesburg After Apartheid* (2014).
[36] Pieterse op. cit. note 7 at 149.

resulted in the emergence of new social divisions that some have referred to as 'neo-apartheid'.[37]

With these new geographies of exclusion adding a new layer of class-based spatial segregation in post-apartheid cities, the state's efforts in mitigating the negative effects of these developments has been dismal. In fact, private developers have contributed immensely in the fracturing of South Africa's cities on class lines, as most of their real estate developments cater primarily for the wealthy. This 'real estate capitalism'[38] has also contributed to the emergence of exclusive malls and shopping centres that have created a culture of 'enclosed consumerism', with people from difference racial and social groups only superficially, and momentarily congregating in malls under heavy security surveillance. In many ways, the rise of private developer-led exclusive real estate developments, have robbed post-apartheid cities of producing genuine spaces of collective civic interaction. Indeed, cases such as *Blue Moonlight* provide some foreground for a legal pushback against this, but this remains a challenge for law, jurisprudence and policy going forward.

Apart from the gated communities and their exclusivity, African, Coloured, and Indian townships in Johannesburg have also kept a relatively homogenous racial profile. In many ways, the legacy of racial segregation that is evinced the existence of physical infrastructure built during the colonial/apartheid times, has continued to bedevil the post-apartheid socio-spatial transformation agenda. In these urban geographies of inequalities, racial tensions often mount, particularly in the face of rising rates of unemployment and poverty. Recently, some members of the Coloured community in Johannesburg for instance, voiced their concerns over their relative marginalisation, with some stating that '[w]e have had enough of the blatant and very clear oppression in South Africa. It is a conscious effort and it is by design. It is not by accident or default that we have been left outside of the

[37] Alan Mabin 'Suburbanisation, Segregation, and Government of Territorial Transformations' 2005 56 *Transformation* at 57.

[38] Martin Murray *Taming the Disorderly City: The Spatial Landscape of Johannesburg after Apartheid* (2008).

economy'.[39] Such sentiments attest not only to the plight the poor in post-apartheid cities, but also the challenges faced by post-apartheid cities in addressing the historical issues of racialised socio-spatial and economic injustice.

This dissertation also demonstrated how the uneven delivery of basic services such as water, electricity as well as housing for the poor threatens the state's project of spatial transformation in post-apartheid cities such as Johannesburg. While the state's low-cost housing RDP programme has benefited millions of people in the city, millions more still have no access to adequate housing.[40] The housing challenge has been exacerbated by the urbanisation of poverty, which in turn has led to millions of Johannesburg's poor inhabitants living in informal settlements, backyard shacks, and abandoned buildings. The unavailability of well-located land for housing in Johannesburg for instance, has led to the expansion of existing townships that were built during colonial/apartheid times, thus unwittingly resulting in the further entrenchment of historical spatial patterns, and related injustices.[41]

What has also been outlined in this dissertation, are the challenges faced by post-apartheid cities in balancing the demands for global competitiveness, and the pressing need for realising socio-economic rights, and spatial justice in an era of intensified global capitalism and neoliberal governance. In Johannesburg for example, the City's 'World Class African City' vision is continually tested against the realities of high levels of unemployment and abject poverty faced by millions of its inhabitants. These urban governance pressures are also evident in post-apartheid cities' planning policies and growth and development strategies, whose implementation is made difficult by the drive to strike a balance between realising both pro-growth and pro-poor development objectives.[42]

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[39] https://citizen.co.za/news/south-africa/2017934/sas-coloured-communities-ready-to-explode-analysts-warn/ [accessed 12 October 2018].

[40] Presidency *National Development Plan: Our Future – Make It Work* (2014) at 258.

[41] Philip Harrison, Alison Todes and Vanessa Watson *Planning and Transformation: Learning from the Past Experience* (2008).

[42] Ibid.

7.4 A DECOLONIAL INTERVENTION TO LAW & PLANNING

To overcome some of these limitations faced by the state in transforming post-apartheid cities, it is clear that more innovative and radical solutions are required. Recently, the idea of 'decolonisation' has dominated South Africa's agenda on societal transformation.[43] At the centre of the decolonisation agenda is the imagining and realisation of a new society predicated on human rights, spatial justice and economic inclusivity for all people. In many ways, the decolonisation agenda dovetails with that of transformational constitutionalism discussed in chapter 5. Given the current dominance of decolonisation as a 'developmental ideology' therefore, it is opportune to appropriate it as a driving force towards producing decolonised, post-apartheid cities.

So instead of being new, the decolonisation spirit is embedded in the post-apartheid laws, policies and planning instruments. What is needed therefore, is the foregrounding of the developmental objectives of these laws and planning practices, with the purpose of co-producing knowledges and practices that can result in the creation of inclusive cities. As part of the decolonisation of cities, there is a need for the privileging of African cultural practices and knowledges that were hitherto marginalised. The emphasis given on meaningful engagement and public participation in cases such as *Olivia Road* and SAITF and laws such as the Structures Act for instance, has already sown the seeds for the coproduction of planning knowledge. These cases, laws and others related to them provide a departure point towards the creation of spatially just cities in South Africa.

A decolonial epistemic perspective's relevance for legal and planning practices, rests on the premise that it is 'not an essentialist, fundamentalist, anti-European critique' of the modern world. Instead, decolonial thought and practices are critical of both Eurocentric and Third World fundamentalisms as well as colonialism and nationalism.[44] Their primary goal is to create cities and ultimately,

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[43]Sabelo Ndlovu-Gatsheni *Epistemic Freedom in Africa: Deprovincialization and Decolonization* (2018).

[44] Ramon Grosfoguel 'A Decolonial Approach to Political-Economy: Transmodernity, Border thinking and Global Coloniality' (2009) 6 *Kult* at 11.

a world without epistemicides (i.e. the decimation and 'othering' of knowledges deemed inferior), genocides, racism, patriarchy, xenophobia, homophobia, and other 'abyssal lines' of difference that are currently used for discriminatory purposes.[45]

The appropriation of decolonisation as a developmental ideology can arguably contribute to the ongoing process of social-spatial transformation for a number of reasons. For one, the colonial roots of law, and planning, and their marginalisation of African indigenous systems of thinking, and practice is well documented.[46] Moreover, as this thesis has also demonstrated, the ideology of racism coalesced with town planning and law to create geographies of inequalities in South Africa.[47] The decolonisation project therefore, would entail infusing existing legal and planning praxis with indigenous and/or local knowledges that are aimed at creating just cities. The decolonisation of law and planning knowledge and practice, would also entail acknowledging the relevance of indigenous legal and planning knowledges.[48]

The recognition of traditional African legal and planning thought and practices does not and should not entail the complete eradication of European (or any foreign) laws and planning practices that are useful for local planning. If anything, it means recognising that both European and African approaches to law and planning can promote spatial justice, human rights, inclusive economic development and sustainable development. In the same vein, the decolonisation of law and planning does not mean the romanticising of the nostalgic African past, nor does it mean a blind embrace of all knowledges imported from the rest of the world. Instead, in the true spirit of co-creating an ecology of knowledges, it means having law and planning being open and receptive to relevant local and global

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[45] Boaventura de Sousa Santos *Epistemologies of the South: Justice Against Epistemicide* (2014); See chapter 2 subsections 2.4.1 and 2.4.2 for a detailed discussion of decoloniality.

[46] For a detailed account on early African urbanism and the effects of colonialism, see Bill Freund *The African City: A History* (2007).

[47] Paul Maylam, 'Explaining the Apartheid City: 20 Years of South African Urban Historiography' 1995 21(1) *Journal of Southern African Studies* 19-38.

[48] Bill Freund *The African City: A History* (2007).

knowledges and experiences that can contribute to the realisation of decolonial cities.[49]

The notion of *ubuntu* for instance, forms but one of the key African traditional knowledges and governance approaches that can contribute to the decolonisation of post-apartheid law and planning.[50] Defined as 'a philosophy of life, which in its most fundamental sense represents personhood, humanity, humanness and morality',[51] ubuntu can contribute to the realisation of the constitutional vision of socio-spatial justice. The concept of ubuntu also dovetails with the decolonial call for equal, and common humanity, predicated on human rights. Moreover, an ubuntu-infused legal and planning system could mainstream the principles of meaningful engagement, and reasonableness, as articulated in *Olivia Road* and *Blue Moonlight*, resulting in the cementing of collaborative planning practices in post-apartheid cities.

In as much as post-apartheid South African law acknowledges the traditional/customary law as part of the legal system, there is a need for the expansion of customary law to legal and planning approaches.[52] This is primarily important in the field property rights, housing and urban land-use at large. The traditional African land tenure systems for instance, were predicated on relatively communitarian principles.[53] However, as discussed in the thesis, the advent of colonialism, market-led principles of land ownership that privileged individualism in property and land ownership were introduced in South Africa. As Njoh points out:

> In African ethos, land is viewed not as a commodity but "a gift from God" that belongs to the dead, the living, and the unborn. However, colonial authorities

[49] Grosfoguel op. cit. note 44.
[50] Drusilla Cornell and Nyoko Muvangua (eds.) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012).
[51] Yvonne Mokgoro 'Ubuntu and the Law in South Africa' (1998) 1 1 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* at 2.
[52] Thandabantu Nhlapo 'Customary law in post-apartheid South Africa: Constitutional Confrontations in Culture, Gender and 'Living law' (2017) 33 1 *South African Journal on Human Rights* 1-24.
[53] Bill Freund *The African City: A History* (2007).

> introduced neo-liberal market principles and modes of legality that promoted individualism in land ownership throughout the continent. These principles were inherited and vigorously promoted by Western change agents throughout Africa.[54]

As part of decolonising the colonial/apartheid lawscape, the presently neoliberal definition of land and property rights could benefit from a decolonial process 'learning to unlearn' neoliberal practices.[55] Apart from being neoliberal, the definition of property ownership in South Africa has its roots in the colonial/apartheid processes of accumulation though dispossession. These colonial/apartheid/neoliberal definitions and practices of property ownership were predicated on racialised 'possessive individualism'.[56] A decolonial approach to property ownership therefore, should entail prioritising alternative variations of collectivism, that includes initiating inclusive 'urban land reforms, legalising informal habitation and creating private property rights for slum-dwellers'.[57] The calls for a decolonised city 'are actually a demand to end the commodification of things that cannot be commodified: land, labour and money'. This, as Ananya Roy posits, 'is a decolonial ontology, one that necessarily reframes the history and obligations of property and thus the meanings of dispossession and possession.[58]

With regard to housing, and survival in the city, a decolonial approach to planning could contribute to the adoption of 'grounded' housing approaches informed by people's everyday spatial practices. Such approaches would include the acknowledgement of 'informality' in housing and trading, as constitutive of acceptable urban strategies employed by the poor.[59] While the current approaches

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[54] Ambe Njoh '"The Right-To-The-City Question" and Indigenous Urban Populations in Capital Cities in Cameroon' (2015) *Journal of Asian and African Studies* at 1.
[55] Madina V. Tlostanova and Walter D. Mignolo *Learning to Unlearn: Decolonial Reflections from Eurasia and the Americas* (2012).
[56] Ananya Roy 'Dis/possessive collectivism: Property and personhood at city's end' (2017) 80 *Geoforum* at 3.
[57] Ibid at 2.
[58] Ibid at 7.
[59] See AbdouMaliq Simone 'People as Infrastructure: Intersecting Fragments in Johannesburg' (2004) 16 3 *Public Culture* 407-429.

to informality are a remnant of the sanitation syndrome of colonial times that emphasised their complete eradication, a decolonial approach should embrace these informal housing, 'backyarding' and informal trading arrangements as legitimate urban planning strategies from below. There already exist transformations in this regard, as occasioned by rights-based rights litigation (such as Olivia Road and SAITF) that can be used as a starting point for re-imagining informality. Part of the decolonisation project therefore, would also entail decolonising the minds of planners, as well as political administrators as they deal with the survival strategies of the poor.[60] As Miraftab posits:

> For planning in this era a similar process means decolonizing planners' imagination by questioning the assumption that every plan and policy must insist on modernization. This mental decolonization requires recognizing how the ideal of the Western city has been deployed historically in the colonial era, and is now deployed in the neoliberal era to advance a certain paradigm of development and capital accumulation. A collective of developers, planners, architects and politicians and a powerful industry of marketing and image- making have promoted the Western city as an object of desire.[61]

Similarly, a decolonial legal approach would mean abandoning urban governance approaches and policies that criminalise the poor and poverty in general.[62] This would entail anchoring right-based litigation on a sound understanding of the historical circumstances that drive the poor to unlawfully occupy buildings, engage in informal trading, unlawfully occupy land for building informal dwellings, and other related 'illegal' spatial practices. Indeed, while some of these acts are unlawful, they often stem from desperation, thus forming part of 'insurgent planning'.[63] Insurgent planning can be defined as counter-hegemonic practices that the urban

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[60] Faranak Miraftab 'Insurgent Planning Situating Radical in the Global South' (2009) 8 1 *Planning Theory* at 44.
[61] Ibid at 44.
[62] Peter Edelman *Not a Crime to be Poor: The Criminalization of Poverty in America* (2017).
[63] Faranak Miraftab 'Insurgent Planning Situating Radical in the Global South' (2009) 8 1 Planning Theory at 46.

poor engage in as a means of inhabiting the neoliberal city. These activities often go against the formal, (and yet 'anti-poor') planning principles and approaches predicated on law and order.

In engaging with these insurgent planning activities, a decolonial approach to city governance would take into account the historical reasons that compel the poor to act unlawfully. Indeed, as demonstrated in chapters 5 and 6, the post-apartheid courts have demonstrated a high level of 'historical consciousness'[64] particularly when dealing with socio-economic rights involving the urban poor.[65] Perhaps the post-apartheid courts' dealing with the urban poor could act as a guide for striking a balance between being decolonial by being historically conscious, while at the same time curbing anarchical urban practices by adhering to the dictates of the Constitution.

Instead of viewing the Western city as the only 'object of desire' therefore, a decolonial approach to law and planning in South Africa should take into account the everyday practices of those inhabiting the city space, particularly the poor. This means asking questions such as; what is an African city, and what defines it in an age of intensified globalisation? How do Africans imagine and live the idea of urban citizenship? These questions could assist in defining the current, and future opportunities, and limitations facing urban South Africans.

The notion of urban citizenship becomes important in the decolonisation debate, particularly when read from both a legal rights-based, as well as right to the city approaches. From a rights-based approach, formal urban citizenship is limited to political citizenship and legality as defined by law. However, from a right to the city perspective, urban citizenship is primarily defined by everyday practices of inhabiting the city.[66] Perhaps a decolonial approach to urban citizenship would attempt to balance the two positions, by crafting laws based on the appreciation a shared, common humanity, thus promoting global citizenship that transcends the colonially-determined notions of nationality for instance.

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[64] Ibid at 44.

[65] See *Olivia Road* and *Blue Moonlight*.

[66] Pieterse *Rights-Based Litigation* (2017) at 38.

Moreover, urban citizenship in a decolonial lawscape would militate against racists, xenophobic, homophobic, and patriarchal behaviours that continue to characterise cities like Johannesburg. For Santos, the idea of a common urban citizenship is linked to that of global citizenship as both are predicated on 'subaltern cosmopolitanism'.[67] Subaltern cosmopolitanism is cosmopolitanism from 'below', or from the 'margins'. It strives to make visible the 'invisible' and 'dispensable' poor who are rendered dispensable by global capitalism and neoliberalism.[68] AbdouMaliq Simone's idea of poor people in Johannesburg 'as infrastructure' for instance, contributes to a decolonial reading of urban citizenship, and habitation. Viewing people as 'infrastructure' Simone takes into account the socio-economic and spatial collaborations, as well as a platform of networks that allow the urban poor to inhabit spaces such as Johannesburg. The concept also takes into account the simultaneous regularity and provisionality – i.e. the predictability and precarity of life in the city.[69]

If clearly fleshed out, a decolonial approach to law and planning in South Africa is likely to contribute to thinking about alternatives to the current global neoliberal governance and planning system.[70] For neoliberal governance has been viewed by many as threatening the project of socio-economic transformation, particularly in highly unequal societies such as South Africa.[71] Alternatives to neoliberalism would be particularly important as South African cities are grappling with contentious issues such as urban land reform; rapid urbanisation; informality, poverty and unemployment. If not dealt with effectively these pressing urban challenges are likely to undermine the current socio-spatial, and economic

[67] Boaventura de Sousa Santos 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) XXX -1 *Review* at 25.

[68] On the 'dispensability' of the poor, see Walter D. Mignolo 'Dispensable and Bare Lives: Coloniality and the Hidden Political/Economic Agenda of Modernity' (2009) VII 2 *Human Architecture: Journal of the Sociology of Self-Knowledge* 69-88.

[69] Abdou Maliq Simone 'People as Infrastructure: Intersecting Fragments in Johannesburg' (2004) 16 3 *Public Culture* 407-429.

[70] Tuna Tasan-Kok and Baeten Guy (eds.) *Contradictions of Neoliberal Planning: Cities, Policies, and Politics* (2012).

[71] Johan van der Walt *Law and Sacrifice: Towards A Post-Apartheid Theory of Law* (2005).

transformation that began in 1994 with the adoption of democratic constitutionalism.

7.5 SUGGESTIONS FOR FURTHER RESEARCH

This dissertation has shown the necessity for alternatives to legal and planning praxis, as well as urban governance approaches. These alternatives should be guided by the constitutional values of socio-spatial, and economic transformation. The decolonisation of law and planning for instance, forms one of the most topical and yet under-researched areas that can inform South African urbanism. While this issue has been dealt with in this thesis, more research needs to be done on how specific matters such as decolonisation of land and property ownership for instance, can be implemented. It is also suggested here that research on decolonising law, planning, the city and space should also take into account the methodological, and analytical instruments that can be used to realise decolonial city futures.[72]

Related to the question of the decolonisation of lawscape in South Africa, are the implications of technology in the reconstruction of cities. The concept of smart cities, and the advent of the 4th Industrial Revolution in particular, promises to have an impact on the everyday socio-spatial practices in post-apartheid cities.[73] In would therefore be worthwhile for more research to be conducted on the impact of smart technologies, systems and processes on South African legal and planning practices, as well as cities. Perhaps Johannesburg's townships, and informal settlement could potentially pose as the new frontiers where these new technologies can be experimented with and subsequently implemented. Moreover, these new technologies are most likely to transform the roles of law and planning, resulting in the formation of a 'New Johannesburg', i.e. a smart, spatially just city with a new 'techno-lawscape'.

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[72] See Linda T. Smith *Decolonising Methodologies: Research and Indigenous Peoples* (2012).
[73] Klaus Schwab and Nicholas Davis *Shaping the Future of the Fourth Industrial Revolution: A guide to Building a Better World* (2018).

With cities such as Johannesburg experiencing high levels of urbanisation amidst equally high levels of unemployment and poverty, issues of (in)formality, (il)legality and planning also need to be explored further. While this research attempted to demonstrate the need for law and planning to discard colonial conceptions of informality, more work with some ground-truthing would greatly contribute to the understanding of the phenomenon of informality. Also linked to questions of informality and illegality of housing and trading in post-apartheid cities, is the issue of urban land reform, and its legal implications. With various political parties calling for the review of section 25 of the Constitution, the issue of urban land reform is likely to impact on the reconstitution of the lawscape. Questions however loom as to the impact of urban land reform on private property rights, housing provision, as well as development planning at large.[74]

As post-apartheid cities grapple with the legacy of apartheid as well as the new challenges brought forth by neoliberalism and global capitalism, the experiment of transformative constitutionalism continues. What is apparent from this dissertation however, is that when law meets spatial planning 'the encounter of the two disciplines invokes an inquiry into the past, a critical reflection on the murky present, and a forecasting into the mysterious future'.[75]

[74] See Ben Cousins and Cherryl Walker (eds.) *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015).

[75] Sabelo J. Ndlovu-Gatsheni 'Coloniality of Power in Development Studies and the Impact of Global Imperial Designs on Africa' (2012) at 1.

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