Constitutional Court Review 2019
Volume 9, 195–217
https://doi.org/10.2989/CCR.2019.0008

Dismantling Apartheid Geography: Transformation and the Limits of Law

RALPH MADLALATE

ABSTRACT: This article reflects on aspects of the Constitutional Court's contribution to shaping spatial politics in post-apartheid South Africa. In a milieu characterised by extreme inequality and racial and class-based segregation, it interrogates the Court's engagement with the odious legacy of apartheid geography which continues to lock South Africa's cities and rural areas into its racist logic. The article begins by exploring the notion of apartheid geography as a product of racial, class-based and spatial discrimination buttressed by discriminatory laws. The article then outlines the relationship between law and space by drawing from critical legal geographic theory to cast South Africa's space as the product of racial, class-based and spatial discrimination. As a key site in the legal production of space, this article analyses how the Court in *Mazibuko v City of Johannesburg* and *Daniels v Scribante* understands space in an effort to map its own role in reconfiguring post-apartheid spatial relations. This article introduces critical legal geographic methodology as a way of understanding the Court's spatial jurisprudence in the post-apartheid era. Mapping the theoretical insights of this interdisciplinary approach to the study of law and geography reveals shortcomings in legal theory. This article argues that adopting critical legal geographic methodology will lead to increased recognition of the operation of spatial, racial and class-based inequities in legal adjudication. This may in turn lead to spatially contextualised judicial decision-making that aims to address apartheid geography.

KEYWORDS: race, cities, space, South Africa, apartheid geography, transformation, inequality

AUTHOR: Research Fellow, Harvard Law School, Centre on the Legal Profession
Email: fmadlalate@gmail.com

ACKNOWLEDGEMENTS: I presented an earlier version of this paper at the Constitutional Court Review IX conference in Johannesburg, I wish to thank the participants for their comments. I am grateful to Vuyisile Ncube, Mpho Raboeane, Kelly Hwang and Jason Brickhill for useful comments on earlier drafts. I am also indebted to the editors and anonymous reviewers for their helpful suggestions.

I INTRODUCTION

> Anyone who travels through our beautiful countryside cannot help but notice that the living conditions of workers who live on farms do not always meet a standard that accords with human dignity. There is little doubt that things have improved, but unfortunately not uniformly so. Why not?[1]

What does the promise of transformation mean for post-apartheid spatial relations? In the context of racial segregation and spatial inequality what role can the Constitutional Court ('the Court') play? This article reflects on aspects of the Court's contribution to shaping spatial politics in post-apartheid South Africa. In particular, I interrogate the Court's engagement with the odious legacy of apartheid geography which continues to lock South Africa's cities and rural areas into its racist logic. This article develops in three main parts. Part I briefly explores the notion of apartheid geography, showing that it lies at the intersection of racial, class-based and spatial discrimination buttressed by discriminatory laws. I argue that the landscape of apartheid has socio-political effects which often go unacknowledged, not least, in the resolution of legal disputes. Part II outlines an approach to analysing the relationship between law and space by drawing from critical legal geography. By adopting a Lefebvrian view of space as a social product, the spaces we inhabit are brought to life and shown to be the subject of sustained conflict. In these sites of contest, law and legal processes play a dominant role which warrants interrogation. This part shows that critical legal geography provides a valuable theoretical frame which we can use to make sense of the Court's spatial jurisprudence.

Part III then turns to consider some aspects of the Court's spatial jurisprudence through the lens of critical legal geography. Juxtaposing the Court's judgments in *Mazibuko v City of Johannesburg*,[2] and *Daniels v Scribante*,[3] this article introduces critical legal geographic methodology as a way of understanding the Court's spatial jurisprudence in the post-apartheid era. I argue that by adopting this methodology we can more adequately recognise the operation of spatial, racial and class-based inequities in legal adjudication. This will in turn lead to spatially contextualised judicial decision-making in response to apartheid geography. This part revisits *Mazibuko* and recasts it as more than a purely socio-economic rights case, although it has been rightly received as a key case in the socio-economic rights canon, I argue that the case is equally important for what it demonstrates about the Court's understanding of post-apartheid space. I then consider the Court's understanding of space in *Daniels*, arguing that this decision edges towards a critical understanding of apartheid geography that differs from the Court's approach in *Mazibuko*. As a key site in the legal production of space, I assess how the Court in these two judgments understands space in an effort to map its own role in reconfiguring post-apartheid spatial relations. To be sure, the focus on two judgments does not decode the Court's entire record, and is not conducive to drawing definitive inferences. I focus here on tentatively discerning operative themes in the judgments. In so doing, I explore the workings of space, race and law in post-apartheid South Africa; and illustrate the utility of critical legal geographic approaches in this context. Undoubtedly, dismantling the numerous manifestations of apartheid geography cannot be achieved by the mere rendering of legal decisions. However, I focus here on decisions of the apex Court in order to understand some of its normative interventions in the light of the country's racialised spatial inequality. A complete

[1] *Daniels v Scribante & Another* [2017] ZACC 13, 2017 (4) SA 341 (CC)('*Daniels*') para 111.

[2] *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28, 2010 (4) SA 1 (CC)('*Mazibuko*').

[3] *Daniels* (note 1 above).

examination of the Court's interventions is beyond the scope of this article although certainly worthy of further study.

A Decoding apartheid geography

What I refer to as 'apartheid geography' has origins that precede the rise of formal apartheid. Indeed, the existence of racially distinct spaces can be traced to the colonial encounter.[4] By apartheid geography, I mean the creation and maintenance of racially-identified spaces, coupled with racial and class-based segregation and an uneven distribution of social goods and public amenities, which are skewed in favour of white people. In essence this phenomenon is an expression of white supremacy, concretised and given meaning through laws and policies which produce physical, psychological and social barriers. This process is premised on segregating space to determine access to social goods and opportunities. This logic was central to the creation of spaces to privilege white users in apartheid South Africa.[5]

The production of apartheid geography is characterised by the vicious manipulation of black people's access to space through racist social and economic policy crystallised in an array of discriminatory laws.[6] Indeed, much of the story of black space is characterized by marginalisation, involuntary migration, insecurity of tenure and legal precariousness. Much of the legal basis which has produced this phenomenon predates formal apartheid yet adopts a near identical logic which produced harm in equally violent ways.[7] In the urban context, this logic is manifest in cities characterised by a commercial or industrial centre occupied by predominantly white-owned businesses and enterprises which are skirted by poorly-serviced and overcrowded township areas designed for occupation by an overwhelmingly black labour force.[8] In the countryside, this logic is apparent in the large numbers of black people who occupy spaces in which they have insecure tenure as former sharecroppers turned labour tenants, farm dwellers and occupiers of land in which they hold limited rights.[9]

While racial segregation was a feature of colonial life in the nineteenth century, this project gained momentum in the twentieth century. This period saw black peoples' rights in land eroded and extinguished as the state led by a white minority created a country in which black people had severely limited rights. Early changes in the South African economy were facilitated by legislation such as the Glen Grey Act 25 of 1894 which created distinct areas for black people while simultaneously directing their economic lives.[10] The thrust of this law is encapsulated by Cecil John Rhodes who, speaking at the Cape House of Parliament, asserted:

> Every black man cannot have three acres and a cow, or four morgen and a commonage right. We have to face the question, and it must be brought home to them that in the future nine-tenths of

[4] N Worden *The Making of Modern South Africa: Conquest Segregation and Apartheid* (3rd Ed, 2000) 75.

[5] J Robinson *The Power of Apartheid: State Power and Space in South African Cities* (1996); F Johnstone 'White Prosperity and White Supremacy in South Africa Today' (1970) 69 *African Affairs* 124, 128.

[6] I use 'black' to refer to Indian, Coloured and African people.

[7] E Emdon 'The Limits of Law: Social Rights and Urban Development' in R Tomlinson, R Beauregard, L Bremner & X Mangcu (eds) *Emerging Johannesburg: Perspectives on the Post-Apartheid City* (2003) 215, 216.

[8] J Williams 'South Africa: Urban Transformation' (2000) 17 *Cities* 167, 168.

[9] H Wolpe 'Capitalism and Cheap Labour-power in South Africa: from Segregation to Apartheid' (1972) 1 *Economy & Society* 425, 437.

[10] N Worden (note 4 above) at 54.

> them will have to spend their lives in daily labour, in physical work, in manual labour. This must be brought home to them sooner or later.[11]

At a spatial level, this exploitative project gained momentum with the enactment of the Natives Land Act 27 of 1913 and the later Native Trust and Land Act 18 of 1936, which barred black people from owning 87 per cent of the country's land. This segregationist urge was coupled with a desire to extract from black people their labour and partly incorporate them into the country's economy as sources of cheap labour.[12] Infamously, these laws and other measures facilitated the dispossession of black people of their land and its reallocation to white farmers and settlers. These laws also confined the African population to woeful conditions in rural reserves which were politically and socially isolated from parts of the country designated for white people. These laws tore black men from their livelihoods as subsistence farmers and thrust them into wage labour either on farms or in mines, while black women were condemned to languish in the rural reserves trying to eke out a living on the meagre resources that were available. These rural reserves became sites of concentrated poverty, unemployment and malnutrition.[13]

In urban areas, the Natives (Urban Areas) Act 21 of 1923 ensured that racial integration would be strictly controlled and that the settlement patterns of black people would take place on terms dictated by the white government. The rationale of this scheme is captured in the report of the Stallard Commission which looked into racial integration in urban areas and concluded that:

> The native should only be allowed to enter the urban areas, which are essentially the white mans' creation, when he is willing to enter and to minister to the needs of the white and should depart therefrom when he ceases to so minister.[14]

Thus the Stallard doctrine laid the basis of racialised spatial inequality in South Africa's growing cities.[15] It meant that black people were constantly haunted by the spectre of unlawfulness when they entered white zones, including urban areas and some rural areas from which they could be ejected with few procedural and substantive safeguards. Within this racist logic, the pattern of urbanisation in the twentieth century was set. Black people's spatial practices were valid only to the extent that they served the interests of white South Africa. Traditional ways of being were violently disrupted and replaced by a state-led spatial practice which reinforced white supremacy.

During this period, black spatial practice (including traditional livelihoods, customary practices and secure tenure) was put under mutually reinforcing pressures. The loss of land rights in rural areas coupled with the implementation of taxes which forced black people into wage labour resulted in migration into urban areas where black people had limited temporary rights and could thus be exploited as mine workers or labourers in the country's emerging

[11] C Rhodes, Speech at the Second Rereading of the Glen Grey Act to the Cape House Parliament (30 July 1894), available at https://www.sahistory.org.za/archive/glen-grey-act-native-issue-cecil-john-rhodes-july-30-1894-cape-house-parliament.

[12] H Wolpe (note 9 above) at 440.

[13] E Unterhalter *Forced Removal: The Division Segregation and Control of the People of South Africa* (1987) 32; S Phatlane 'Poverty and HIV/AIDS in Apartheid South Africa' (2003) 9 *Social Identities* 73, 80; N Andersson & S Marks 'Apartheid and Health in the 1980s' (1988) 27 *Social Science & Medicine* 667, 671.

[14] R Davenport 'African Townsmen? South African Natives (Urban Areas) Legislation through the Years' (1969) 68 *African Affairs* 95, 95.

[15] This follows a pattern of racist urbanisation in colonial societies (W Shaw *Cities of Whiteness* (2007) 37).

industries.[16] This placed black spatial practice under strict control, as Beinart and Delius rightly argue:

> The Land Act prohibited purchasing of white land, but not occupation; it demarcated scheduled areas for African communal land ownership; and it controlled the forms of tenancy on white-owned land. Agricultural production on white land was controlled, not prohibited. While each region revealed its own patterns, almost all had one thing in common: white-owned land was not occupied exclusively by whites. Black people predominated on the great majority of white-owned farms in South Africa, where they lived as tenants and workers both before and after the 1913 Land Act.[17]

These spatial effects were undergirded by a racist legal environment. The change in patterns of land ownership, coupled with the fact that black people continued to reside on land given over to white owners helped create a discourse of spatial illegality which would become the hallmark of apartheid. In this process, the law was used to determine who could be present, as well as when and on what terms this was to occur. By using the law in this way, legal concepts such as ownership, nuisance, trespass and eviction became tools wielded by the state and private actors to advance a racist agenda and ensure that the formation of South Africa's urban and rural areas occurred on terms beneficial to white people. In this way, the law both sowed the seeds of, and upheld, racialised unlawful occupation in the country.

The processes and mechanisms determining lawful access to space based on race reached increased intensity and scope with the rise of the apartheid government. This period saw the furtherance of the state's racist policy through the enactment of laws which would be zealously advanced by the National Party through the Group Areas Acts of 1950 and 1966 which ensured that urbanisation was within the racial classification paradigm established by the Population Registration Act 30 of 1950. This marked an important period in the development of the country's spaces. The implementation of the Group Areas Act meant that any semblance of racial integration within cities could be curtailed and black residents forcibly removed to townships designated for them. These forced removals were coupled with influx control measures designed to regulate the racial demographics of space at any given time. Effectively, the state could determine the number of black people required as labourers in an urban area and expel those deemed surplus to requirements. This ruthless system was legally enforced with the courts playing a key role in its implementation.[18] The law's harsh operation in the removal of black persons from white areas is captured by Didcott J:

> Once you are officially 'idle', all sorts of things can be done to you. Your removal to a host of places, and your detention in a variety of institutions can be ordered. You can be banned forever from returning to the area where you were found, or from going anywhere else for that matter, although you may have lived there all your life. Whatever right to remain outside a special 'Bantu' area you gained by birth, lawful residence or erstwhile employment is automatically lost.[19]

The policing and manipulation of space in line with the state's policy occurred on at least three mutually reinforcing scales. First, at the nano-level: as was evident in restrictions on interpersonal relations. Secondly, at the micro-level, as was evident in the implementation of urban group areas and household segregation. Thirdly, at the macro-level, as was evident in the interdependent yet unequal relationship between the Bantustans, the reserves and white South

[16] A Lemon 'The Apartheid City' in A Lemon (ed) *Homes Apart: South Africa's Segregated Cities* (1991) 1, 9.

[17] W Beinart & P Delius 'The Natives Land Act of 1913: A Template but not a Turning Point' in B Cousins & C Walker (eds) *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015) 21, 24.

[18] E Unterhalter (note 13 above) at 12.

[19] *In re Dube* 1979 (3) SA 820 (N) 821C–821E.

Africa's urban centres. This system of spatial control made black people legally vulnerable in cities, major industrial and commercial centres in relation to white South Africans. They would eventually be denied political membership and citizenship from these spaces through the Bantu Homelands Citizenship Act of 1970.[20] The operation of these laws meant that black people entered South Africa from the Bantustans as temporary sojourners whose notional political citizenship lay in the 'independent' Bantustans.[21]

While this vignette does little to capture the callous indignity of black life within apartheid geography, it illustrates that spatial expressions of racial discrimination formed a key pillar of the state's racist policy. These laws created areas which differentiated their users' experiences on the basis of race and ensured that inequality would be reproduced by their very design. This is evident in the vast distances between areas designated for black occupation and central business districts, public schools and health-care facilities that were entrenched by apartheid spatial planning. Contemporary manifestations of this spatial discrimination are evident in the large numbers of black people experiencing precarious tenure in land and housing.[22] This spatial dislocation also has economic consequences as the occupants of these racialised spaces are simultaneously dislocated from education and work opportunities, which are key to upward mobility.[23] Accordingly, apartheid geography is far more than an historical aberration or a mere infrastructural problem – although this is evident in the country's chronic housing shortage. Instead, it is a social condition premised on the reproduction of a racial hierarchy through spatial means. Clearly the law, through a series of directives, interdictions and bans, has been central to this process. This makes the geography of apartheid at once a geography of law: a network of legal provisions which shape use and access to space, thus guiding socio-political outcomes.

To be sure, discriminatory laws have been central to the production of South African space from the colonial encounter, to the zenith of apartheid. While these laws have been repealed and replaced with new legislation in line with the country's non-racial 'transformative' constitutional project,[24] what they have left behind are spaces indelibly marked by the politics of racial oppression. This tenacious expression of racism has proved difficult to dislodge in the post-apartheid era. This is despite a raft of new laws promulgated in response to the history of black spatial insecurity.[25] While these pieces of legislation are designed to enhance security of tenure and move the country away from apartheid geography they are frequently pitted against private interests in property. In this milieu, the legal concepts of nuisance, trespass and eviction continue to play a prominent role in regulating black spatial practice. The courts have been called on to resolve the tension between old order rights and socio-economic rights

[20] J Dugard 'South Africa's "Independent" Homelands: An Exercise in Denationalisation' (1980) 10 *Denver Journal of International Law & Policy* 1, 11.

[21] E Unterhalter (note 13 above) at 19.

[22] Statistics from June 2018 show that 13,6 per cent of South Africans live in informal dwellings, and 5,5 per cent in traditional dwellings. Stats SA. The latest household statistics and more available at http://www.statssa.gov.za/?p=11241.

[23] J Seekings & N Natrass *Class, Race and Inequality in South Africa* (2005) 258, 265.

[24] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150; C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 248, 248.

[25] This legislative framework includes the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997 (ESTA).

guaranteed to unlawful occupiers.[26] This has generated a vibrant discourse centred on the intertwined rights to property, housing and related rights in South African legal circles.[27] Much of this literature is framed using the language of rights. Recent scholarship has sought to incorporate Lefebvrian ideas around the 'right to the city' into notions of rights-based spatial practice.[28] Responding to the lack of race consciousness in this literature, I have argued elsewhere that legal discourse is inadequately attuned to the inequity of racialised space in resolving contestations over rights in urban settings.[29] In what follows, I introduce critical legal geography as a methodological approach to unpacking the complexity of the intersection of race, geography and law in post-apartheid South Africa. This approach, I argue, has the potential to improve legal responses to the effects of apartheid geography.

II LAW'S SPACE: UNDERSTANDING LEGAL GEOGRAPHY

This part draws on the growing literature concerned with legal geography, and mapping the theoretical insights of this interdisciplinary approach to the study of law and geography. This is in order to capture the contours of the relationship between space and law; and to understand its importance to human existence. This reveals the social and political meaning of law and its operation in the context of space.

A The politics of space

Critical legal geography is premised on a contextual approach to space. In what is a foundational contribution to the field, Henri Lefebvre pioneered an approach to conceptualising space which escapes the commonplace view of space as a mere natural container in which life takes place.[30] On the contrary, Lefebvre argues that it is the very processes of life which serve to *produce* space. Accordingly, space is not merely inert matter but a living social construct – deliberately created pursuant to social action. In this view, 'the spatial practice of a society secretes that society's space' in a gradual process.[31] Thus, Lefebvre asserts that space and time are inextricably linked to social and political practice:

> Space is not a scientific object removed from ideology or politics; it has always been political and strategic. If space has an air of neutrality and indifference with regard to its contents and thus seems to be 'purely' formal, the epitome of rational abstraction, it is precisely because it has already been occupied and used, and has already been the focus of past processes ... Space has been shaped

[26] S Wilson 'Litigating Housing Rights in Johannesburg's Inner City: 2004–2008' (2011) 27 *South African Journal on Human Rights*, 127; S Wilson 'Curing the Poor: State Housing Policy in Johannesburg after Blue Moonlight' (2014) 5 *Constitutional Court Review* 280, 282.

[27] S Wilson 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (2009) 126 *South African Law Journal* 270, 280.

[28] T Coggin & M Pieterse 'Rights and the City: An Exploration of the Interaction Between Socio-economic Rights and the City' (2012) 23 *Urban Forum* 257, 264; T Coggin 'Redressing Spatial Apartheid: The Law of Nuisance and the Transformation Role of Social Utility and the Right to the City' (2016) 133 *South African Law Journal* 434, 448; M Pieterse *Rights-based Litigation, Urban Governance and Social Justice in South Africa: the Right to Joburg* (2017).

[29] R Madlalate '(In)Equality at the Intersection of Race and Space in Johannesburg' (2017) 33 *South African Journal on Human Rights* 472, 487.

[30] H Lefebvre *La Production de l'Espace* (1974) (trans D Nicholas-Smith, 1991) 38.

[31] Ibid.

> and moulded from historical and natural elements, but this has been a political process. Space is political and ideological. It is a product literally filled with ideologies.[32]

Accordingly, spatial conventions far from being neutral tend to reveal the social relations which produce them while creating or transforming existing social relations. Demystifying socio-spatial relations allows us to decode these processes and reveals the forces that underpin them. This calls us to resist thinking of space as pre-ordained, natural or ahistorical. Instead, we see social and spatial relations as inextricably linked in an interdependent relationship which is both 'space-forming and space-contingent'.[33] In this view, society shapes space and is simultaneously shaped by space. This occurs as space becomes an expression of social policies, prejudices and ideals. Viewed through this lens, phenomena such as mass evictions, gentrification and the displacement of racial and ethnic groups, are not isolated events but part of a socially driven narrative which Lefebvre termed 'the production of space'.[34] In my view, the contemporary production of space is channelled through an array of laws and legal norms which direct spatial practice. These include housing and eviction laws, zoning and spatial planning regulations and trespass laws. These laws and legal norms often mask a variety of other interests, such as maintaining racial and class-based divisions, or excluding segments of the population, deemed otherwise undesirable, from certain spaces.[35]

This socio-spatial theory articulates an intuition understood by the architects of racial segregation and apartheid in South Africa. Apartheid geography operates by denying access to what Galster terms 'opportunity structures'.[36] By limiting access to opportunity structures, the apartheid state was able to determine black people's lives by confining them to underserviced, overcrowded areas with poor access to health-care and education facilities. At its core, this project harnessed the power of space to define its users' lives in key political, economic and social ways. This process, in turn, reinforced racist ideology. By shaping the content of black life, space was central to producing racial identities in South Africa. Blackness was forged within sites of concentrated poverty and social isolation which restricted individuals to few opportunities save to be exploited as cheap labour.[37] In contrast, whiteness was shaped by access to capital, both economic and social, health, wellness and technology which allowed its beneficiaries widespread opportunities for upward mobility. This racial dichotomy was incubated within South Africa's segregated spaces. As an instrument of social control, apartheid geography served its purpose and continues to differentiate its users' experiences in ways that have yet to be undone.[38]

Understanding space as a social product calls us to resist relying solely on legal categories. Instead, it demands decoding spatial politics beyond legal doctrine. This reveals that space operates in ways that are irreducible to legal categories. For instance, land, housing and

[32] H Lefebvre, 'Reflections on the Politics of Space' (1976) 8 *Antipode* 31.

[33] H Lefebvre (note 30 above) at 81.

[34] Ibid.

[35] M Murray *City of Extremes: the Spatial Politics of Johannesburg* (2011) 153.

[36] C Galster 'Polarisation, Place & Race' (1993) 71 *North Carolina Law Review* 1422, 1440.

[37] S Ruddick 'Constructing Difference in Public Spaces: Race, Class and Gender as Interlocking Systems' (1996) 17 *Urban Geography* 132, 139; D Goldberg 'Polluting the Body Politic: Racist Discourse and Urban Location' in M Keith & M Cross (eds) *Racism, the City and the State* (1993) 45, 51.

[38] Z Kon & N Lackan 'Ethnic Disparities in Access to Care in Post-Apartheid South Africa' (2008) 98 *American Journal of Public Health* 2272, 2277; T Salisbury 'Education and Inequality in South Africa: Returns to Schooling in the Post-Apartheid Era' (2016) 46 *International Journal of Educational Development* 43, 47.

environmental rights are often viewed as distinct (legal) issues in the South African context regulated by separate pieces of legislation and policies documents. This obscures the fact that natural, manufactured and social spaces are intertwined. I thus consider the different zones – urban, rural, public and private – under the banner of space which captures the range of considerations relevant to each without viewing them as necessarily disparate. I adopt this approach, as the spatial politics of the rural and urban are inextricably linked in the South African context such that we cannot properly understand one without understanding the other. This is due to the interdependent relationships between homelands and cities, black townships and white industrial and commercial districts. Accordingly, contemporary South African public discourse, which is increasingly dominated by contestations over land, cannot be separated from questions of racial justice in housing and access to resources in cities.

B Mapping the law: introducing critical legal geography

The influence of Lefebvrian constructions of space encourages understanding law and geography as co-constitutive. Viewing space as a social product illustrates the manner in which space, law and society are related. This reveals that 'law and space actively shape and constitute society, while being themselves continually socially produced'.[39] This co-constitutive view of law, society and space distinguishes critical legal geography as an analytical approach. Once recognised, this interaction challenges us to rethink both law and space as Blomley et al assert, 'by reading the legal in terms of the spatial and the spatial in terms of the legal, our understanding of both "space" and "law" may be changed'.[40]

Once we view space as a social construct produced through everyday interactions, we can critically examine the landscapes of legal geography. This school of thought draws on critical theory, viewing law as a discourse of power which is constructed and contested within society.[41] In line with this approach, our analysis is not 'confined to a doctrinal analysis of legal reasoning set out in the text of the case, law report or judgment'.[42] Instead, the analysis goes beyond the text to locate law in its social context – mapping law onto its place in everyday life. This means expanding the notion of what is relevant in legal analysis to include questions about the spatial location of litigants, the milieu they occupy and other markers, be they political, economic or social, which constitute their identities and determine their social positioning. This wider view seeks to capture a broader range of situational influences operative in the resolution of legal disputes. This approach resonates with the 'call to context' issued by John Calmore, who argues that: 'traditional legal analysis and advocacy are too often plagued by the tendency to extrapolate issues from their history and the broader social and normative contexts that bear so heavily on them'.[43] This view recognises that legal disputes are rarely 'just legal problems' but arise in a context marked by race, class and space.

At the core of the critical legal geographic approach is an attempt to denaturalise the operation of legal arrangements which have gained the appearance of being irrefutable truths. This reveals that seemingly neutral legal moves are underpinned by *particular* spatial

[39] S Blandy & D Sibley 'Law, Boundaries and the Production of space' (2010) 19 *Social & Legal Studies* 275, 278.
[40] N Blomley, D Delaney & R Ford *The Legal Geographies Reader: Law, Power, and Space* (2001) xvii.
[41] N Blomley & G Clark 'Law, Theory, and Geography' (1990) 11 *Urban Geography* 433, 439.
[42] L Bennet & A Layard 'Legal Geography: Becoming Spatial Detectives' (2015) 9 *Geography Compass* 406, 421.
[43] J Calmore 'A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty' (1999) 67 *Fordham Law Review* 1927, 1927.

imaginaries: both articulated and unspoken spatial visions motivating actions of interpretation and delimitation. Understanding this necessitates viewing law as nested within a range of relationships in which the role of law is but one strand in a complex web of elements. Thus, legal geographers engage with different 'ways of knowing the world' in order to capture the range of experiences which arise at the interface of law and society.[44] This approach resists the reification of law and reveals that beneath law's magisterial appearance lie numerous sites of contestation. These contestations are often shrouded in silence as positive legal texts become the dominant expressions of socio-legal reality.[45] In order to escape this shortcoming, legal geography goes beyond legal texts, exploring the telling silences about space in law.[46] Thus, rather than beginning with the text, critical legal geography calls us to *locate* the law.

Scholarship in critical legal geography observes that while law is everywhere, law's operation is not always cognisant of *where* it operates. This lacuna is explored by several scholars. For example, Blomley and Bakan argue that:

> The legal mentality is curiously acontextual, such that legal relations and obligations are frequently thought of by the Courts and other legal agencies as existing in a purely conceptual space, with little recognition of their spatial heterogeneity or the local material contexts within which law is understood and contested.[47]

Similarly, in the context of political boundaries, Richard Ford argues:

> There is no self-conscious legal conception of political space. Most legal and political theory focuses almost exclusively on the relationship between individuals and the state. Judges, policymakers, and scholars analogize decentralized governments and associations either to individuals when considered vis-à-vis centralized government, or to the state, when considered vis-à-vis their members, but consider the development, population and demarcation of space to be irrelevant. *Space is implicitly understood to be the inert context in which, or the deadened material over which, legal disputes take place*.[48]

Following this line of critique Bartel et al argue: 'that law does not transcend place, but is still dependent on it, is not a truth generally acknowledged by law's servants and scholars'.[49] As a result, legal concepts are often inadequately spatialised.[50] The preference amongst lawyers is towards reliance on abstract principles which exclude from legal consideration issues such as location, the effects of conquest, structural discrimination, or biased economic systems. Of course, competing views are never completely banished as dissenting narratives survive their formal exclusion, existing in oppositional discourse. Consider the contemporary call for 'land reform from below' and other subversive practices by marginalised groups such as Abahlali baseMjondolo.[51] Given the powerful impact of spatial engineering in the country's history, the tendency towards legal dislocation (the extrication of space from law) presents a serious challenge. This is so not least because the constitutional matrix creates a rights

[44] L Bennet & A Layard (note 42 above) at 412.

[45] C Smart *Feminism and the Power of Law: Sociology of Law and Crime* (1989) 11.

[46] L Bennet & A Layard (note 42 above) at 413.

[47] N Blomley & J Bakan 'Spacing Out: Towards a Critical Geography of Law' (1992) 30 *Osgoode Hall Law Journal* 661, 690.

[48] R Ford 'The Boundaries of Race: Political Geography in Legal Analysis' (1994) 107 *Harvard Law Review* 1841, 1857 (emphasis added).

[49] R Bartel, N Graham & S Jackson *Legal Geography: an Australian Perspective* (2013) 349.

[50] N Blomley 'Landscapes of Property' (1998) 32 *Law & Society Review* 567, 570.

[51] Abahlali baseMjondolo Press Statement '*Occupy, Resist, Develop*' (18 December 2015), available at http://abahlali.org/node/15082/.

framework, access to which depends largely on a person's connections to space.[52] Indeed, rights-claimants often experience the deprivation of rights based on where they are located. For example, urban residents of black townships and informal settlements demand housing, water and other basic socio-economic rights while the deprivation of those resident in South Africa's rural areas is compounded by their geographic remoteness from basic education, health-care and social security infrastructure.

C Towards a synthesis of space, society and law

So far, I have discussed space, law and society as distinct, and in so doing, I have been echoing the dominant divisions of labour which shape discourse on these issues. This is, of course, not an accurate reflection of everyday life. The work of critical legal geography is to weave together the seemingly separate discourses to make sense of their interconnectedness. In adopting this approach, I follow Blomley who argues: 'law and geography do not name discrete factors that shape some third pre-legal, aspatial entity called society. Rather the legal and the spatial are, in significant ways, aspects of each other'.[53] This perspective calls for integrated conceptions capturing the many complexities of social and legal and spatial relations. Developing a language to capture the points at which law, society and space intersect, Blomley deployed the term 'splice'.[54] For Blomley, this socio-legal concept identifies the 'instances or moments where legally informed decisions and actions *take place* [in the sense of both of the occurrence of a legal performative (an event) *and* of being spatially located and embodied]. Splices are locally enacted encodings, which weave together spatial and legal meanings.'[55] Put differently, a splice refers to the notion of a simultaneous convergence of legal, social and spatial categories.

In everyday life, splices operate as powerful socio-legal frames which become naturalised and considered expressions of some common-sense idea. Blomley illustrates the legal and geographical interconnectedness of splices arguing that while some orderings are apparently based on the discourse of law, such as 'citizen', 'these are simultaneously bound to spatial frames in ways that are mutually dependent'.[56] These splices reflect the convergence of legal and spatial orderings which have been naturalised such that they lose their links to the discourse of law and space and appear instead as inert and pre-existing. For instance, 'a legal category such as "citizen" is meaningless without the spatial category "territory"; similarly, the term "refugee" is considered as a legal categorisation but fundamentally reflects spatial dislocation'.[57] The tendency to dislocate and naturalise these frames has resulted in them being understood as neutral legal categories apart from their spatial dimensions. This naturalisation has important consequences as Blomley argues:

[52] Coggin and Pieterse argue for a rights-based approach to transport in T Coggin & M Pieterse 'A Right to Transport? Moving Towards a Rights-Based Approach to Mobility in the City' (2015) 31 *South African Journal on Human Rights* 294; Coggin & Pieterse 'Rights and the City' (note 28 above).

[53] N Blomley 'From "What?" to "So What?": Legal Geography in Retrospect' in J Holder & C Harrison (eds) *Law and Geography* (2003) 17, 29.

[54] L Bennet & A Layard (note 42 above) at 410.

[55] Ibid.

[56] N Blomley (note 53 above) at 30.

[57] Ibid.

> A splice can appear simply part of the order of things, and thus non-negotiable. In so doing, splices can have a number of effects. Put bluntly, they construct the world in ways that systemically favour the powerful: employers, men, whites, property owners.[58]

Thus, these splices encourage particular ways of thinking which legitimate spatial distinctions in governance and regulation. By marking a space as distinct, it can then be afforded different treatment not permitted in another space. In this way, people at the margins of society endure violence which has been naturalised and expected. Consider, for example, a commonplace splice in post-apartheid South Africa – the unlawful occupier. This frame is itself a new spatio-legal concept developed by the Court in interpreting the Prevention of Illegal Eviction Act 19 of 1998. In *Port Elizabeth Municipality* the Court traced the terminological shift in the legislation from 'squatters' to 'unlawful occupiers' and the ideological shift from preventing squatting to preventing unlawful eviction which followed the repeal of the Prevention of Illegal Squatting Act No 52 of 1951.[59] The swift integration of the term in the country's spatial lexicon illustrates the power of law in generating legally reinforced social narratives. This conceptual reframing has not, however, fundamentally altered the nature of the condition described or freed it from its negative connotations. The concept of an unlawful occupier simultaneously refers to a legal status, social positioning and a spatial displacement which combine to produce results not attributable to either of these factors independently. Legally, unlawful occupation entails limited rights in property and implies a range of consequences. Spatially, it entails residence in a place which is not one's own – a territorial dislocation. Socially, this carries a stigma which when combined with racial and class connotations in the South African context create a powerful social ordering frame. This framing reflects a spatial and legal precariousness, which, once naturalised, legitimates the legal and ethical distinctions made against unlawful occupiers and provides 'justification' for their (mis)treatment.

As I have illustrated, contemporary patterns of mass unlawful occupation exist as the product of colonial and apartheid racialisation, segregation and land deprivation. The concept of unlawful occupation can be traced to the shifts in spatial practice towards white individual ownership and the disruption of commonage-based spatial practice led by the state in the nineteenth and twentieth centuries. By removing many black people's legal basis for occupation and confining them to specific places, the state created a spatial and legal category which allowed for expedited forced relocation and racial spatial engineering. Racialised shifts in land holding have made vast numbers of black people vulnerable to unlawful occupation as their land rights were extinguished while they continued to reside on the land of the new white owners. These unlawful occupiers could then be swiftly removed pursuant to common law principles.[60] Considering the still unfolding effects of these processes, the idea of the 'unlawful occupier' as a neutral signifier becomes unsustainable. While anyone can theoretically bear this

[58] Ibid.

[59] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC)('*Port Elizabeth Municipality*') at paras 11–13. The Court in *Occupiers of Mooiplaats v Golden Thread Ltd* [2011] ZACC 35, 2012 (2) SA 337 (CC) at para 4 underscored the rationale behind this normative shift. Reprimanding Golden Thread for citing the occupiers as 'the people who intend invading the Farm Mooiplaats' and 'the people who invaded the Farm Mooiplaats', the Court held: 'this description of human beings is less than satisfactory and cannot pass without comment. It detracts from the humanity of the occupiers, is emotive and judgmental and comes close to criminalising the occupiers. This form of citation should not be resorted to. A more neutral appellation like "occupiers" might well be more appropriate'.

[60] *Graham v Ridley* 1931 TPD 476.

description, the reality is that unlawful occupation continues to track racial, class-based and spatial distinctions drawn in the making of the country's contemporary spatial arrangement. The notion of the unlawful occupier in the post-apartheid era is the conceptual successor of the racialised transgressor of spatial laws during apartheid. These persons would have been pejoratively labelled squatters under apartheid; they comprise people characterised as idle or redundant Africans – who were banished to the reserves – or urban blacks – who provided cheap labour in the urban economy. Post-apartheid jurisprudence reveals that many of the trajectories of these 'unlawful occupiers' have remained unaltered.[61] This is true of many low-income residents of Johannesburg's inner city.[62]

Once characterised as unlawful occupiers, the socio-spatial dimensions of this predicament are replaced by a convenient legal frame which obscures the subjects' origins, history and lived experience. This framing simplifies the resolution of spatio-legal problems by circumscribing the range of considerations which are deemed relevant in adjudication which in turn leaves these splices uninterrogated. By adopting a critical legal geographic lens, we can challenge this dominant understanding pervasive in spatial jurisprudence and prompt increased attention to South Africa's production of post-apartheid space. This methodology goes beyond traditional legal reasoning and relies on more than is contained in the parameters of legal disputes as characterised by the parties or adjudicators. By weaving together the various social, legal and spatial complexities which occur simultaneously and go unnoticed in everyday life, we arrive at an understanding which is concerned with far more than the rights a person enjoys in property, for instance, but a picture of reality which reflects the subjects' true conditions. This view can potentially denaturalise oppressive social orderings that have gained the semblance of neutrality. In adjudication, this methodology can potentially improve the way that cases are adjudicated by widening the range of considerations which guide decision-makers.

In the preceding sections, I have provided a synopsis of apartheid geography showing that it is constantly reproducing hierarchies as society operates within preformed spaces while modelling future developments based on this racial logic. I then outlined a way of decoding the legalities surrounding this phenomenon in ways that go beyond static readings of space as pre-ordained. In this way I have shown some of the politics of interpretation, argument and framing which are central to how we make sense of our environments. In what follows I develop this idea by exploring the manifestations of apartheid geography in legal discourse.

III THE CONSTITUTIONAL COURT AND ITS RECOGNITION OF SPACE

While there are a range of registers available for socio-spatial contestations in the polis, the discourse of law occupies a dominant role.[63] In this milieu, courts make authoritative interpretations of the meaning of fundamental rights. Naturally, the interpretations given to rights by the judiciary play an important role in the politics of space. The Court, as final decision-maker on fundamental rights in the South African Constitution, is thus a key site in the process of interpretation, representation and narration that shapes spatial discourse. Unsurprisingly, apartheid geography is a recurring theme in many cases before the Court,

[61] *City of Johannesburg v Rand Properties (Pty) Ltd* [2007] ZASCA 25, 2007 (6) SA 417 (SCA); *Thubelisha Homes v Various Occupants* [2008] ZAWCHC 14 (Where the occupiers relocated during the late-apartheid spatial deregulation).

[62] K Beavon *Johannesburg: The Making and Shaping of the City* (2004) 221.

[63] South Africa's constitutional democracy affirms the Constitution as the supreme law. (Constitution, s 1(c).)

albeit often as an unacknowledged backdrop. It forms part of the considerations in areas such as housing,[64] education,[65] and local government law.[66]

In this part, I analyse contestations over legal meaning and contestations around space, tracking how post-apartheid space is to be understood and what spatial imaginaries are envisaged for the future. I juxtapose *Mazibuko* and *Daniels,* contrasting the approach to space contained in these decisions.[67] I read these judgments through a critical legal geographical lens and suggest that this reveals far more than the meaning of the law. In so doing, I eschew an approach based on technical law, instead viewing law as a social construct in order to map the boundaries which the Court sets in adjudication at the intersection of race and space. By recognising that law is a contested system of knowledge which is a site of power struggles we can explore which discourses are most powerful in each case. While these decisions primarily involve the interpretation of socio-economic rights, I recast them as part of the legal production of space.

A *Mazibuko* and the legal discourse of space

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

In *Mazibuko*, several residents of Phiri, a black township in Soweto, brought a claim challenging the City of Johannesburg's Free Basic Water policy on the basis that it failed to meet the constitutional guarantee of a right to have access to sufficient water. The challenge was premised on the argument that the impugned policy failed to provide the applicants with sufficient water given the specific needs of the affected community. In particular, the applicants pointed to the reality of overcrowding, multifamily residences and backyard dwellings in spaces originally designated for single-family use.[68] These are contemporary manifestations of apartheid geography which, through influx control and other measures, confined black people to limited spaces. These spaces were underserved yet highly prized due to their proximity to the meagre economic opportunities available.[69] The applicants further alleged that the limits placed

[64] *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46 CC; *Port Elizabeth Municipality* (note 59 above).

[65] *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng & Another* [2016] ZACC 14, 2016 (4) SA 546 (CC) at para 38.

[66] *Western Cape Provincial Government & Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government &Another* [2000] ZACC 2, 2001 (1) SA 500 at para 41; *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363; *Democratic Alliance & Another v Masondo NO & Another* [2002] ZACC 28, 2003 (2) SA 413 (CC) at para 56.

[67] A full exploration of the Court's spatial jurisprudence is beyond the scope of this article, though certainly worthy of analysis in further work.

[68] *Mazibuko* (note 2 above) at para 88.

[69] K Beavon (note 62 above) 231.

on their water usage were racially discriminatory in comparison to white neighbourhoods where the meters were not installed. This case illustrates the contemporary effects of not only the country's racially tainted capitalism, which condemns many black people to structural unemployment, but also apartheid geography which ensured that access to housing and water in black spaces was woefully inadequate.

In resolving the dispute, the Court invoked a particularly de-contextualised reasonableness analysis finding that the policy fell within the bounds of reasonableness and, as such, was compliant with the right to sufficient water.[70] Of interest in this article, however, is the manner in which the Court depicts space in the context of apartheid geography which continues to stratify our cities. In representing apartheid geography the Court adopts a historical framing strategy throughout the judgment. This framing stops short of interpreting the contemporary ramifications of this history. While exploring the influence of apartheid on the applicants' claims, the Court frames the spatial context as follows:

> Apartheid urban planning did not permit black people to live in the same urban areas as white people. Soweto was developed in accordance with this appalling racist policy. It is home to approximately a million people. Phiri, where the applicants live, is one of the oldest areas in Soweto. Most of the houses in Phiri are brick yet generally the people who live in Phiri are poor.[71]

Evidently, the Court recognises the racially discriminatory motive behind the production of Soweto, and Phiri in particular. However, this framing is couched in historical terms, adopting a temporal lens rather than a spatial one. Emphasising the official fall of apartheid, the Court paints apartheid geography as a relic of the past. This obscures the social production of space which is shaped by repealed discriminatory laws such that, although formal apartheid has ended, the deleterious effects of racialised spaces are reproduced in contemporary spatial relations. Despite black spaces remaining disadvantaged by and large, the Court is keen to confine the effects of apartheid geography to a particular time without drawing connections between the contemporary vulnerability of black people and its historical origins in colonial and apartheid oppression. This framing effectively circumscribes the consideration of modern apartheid geography and allows the Court to foreground other considerations such as the need to allow the City to implement its policy. By describing history without drawing connections to the contemporary geographical manifestations of this history, the Court occludes a key factor in the applicants' disadvantage.

The adverse effects of the historical framing of spatial disadvantage are also evident in the Court's approach to the question of discrimination. The Court held that there was no racial discrimination on the part of the municipality by choosing to impose pre-paid water meters only on the residents of Soweto and not imposing similar measures on the city's white suburbs or other 'areas with poor black residents'.[72] The Court thus dismisses the claim of discrimination arguing 'it is not clear that the applicants have established that the policy impacted more adversely on black and poor customers given that other deemed consumption areas where poor black customers reside were not targeted'.[73] The Court's framing of the inquiry into discrimination also reveals some of the rationale behind the decision:

[70] M Wesson 'Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg*' (2011) 11 *Human Rights Law Review* 390, 405.

[71] *Mazibuko* (note 2 above) at para 10.

[72] Ibid at para 149.

[73] Ibid.

> To determine whether the discrimination was unfair it is necessary to look at the group affected, the purpose of the law and the interests affected. *In this case, the group affected are people living in Soweto who have been the target of severe unfair discrimination in the past*.[74]

Clearly, the Court constructs racialised spatial disadvantage as a relic of the past. This narrative casts space as pre-ordained and does little to re-imagine an urban environment without apartheid geography. Instead, the Court accepts this historicised representation of apartheid geography and reproduces it. The Court reached this finding despite the City of Johannesburg conceding that the manifestations of racialised space were such that the geographic differences could result in racially disparate outcomes.[75] By locating apartheid discrimination as a historical aberration confined to a particular point in time, the Court is able to characterise the applicants as the victims of *past* unfair discrimination. This interpretation effectively confines apartheid geography's racial effects to the historical archive and ignores contemporary manifestations of apartheid's racial logic. The Court can then avoid grappling with the full extent of injustice that arises from living in a racialised space in post-apartheid South Africa. Traditional legal methodology burdens the applicants with proving the pertinent aspects of their claim, in this case the adverse consequences of apartheid geography and its contemporary manifestations. Accordingly, the status quo is just unless shown otherwise. This creates a legal narrative in which race-based spatial disadvantage has ceased to exist through the elimination of discriminatory laws. This rewriting of the legal narrative erases intergenerational disadvantage faced by the residents of black ghettoes.[76] This narrative obscures the fact that the production of space is not solely driven by discriminatory law but is being reproduced despite race-neutral laws. By adopting this view, the Court casts Soweto's space as neutral while effectively allowing spatial inequities to persist.

The above extract reveals another important aspect of the judgment: it illustrates the Court's preference for a class-based frame.[77] Curiously, in this case where racial discrimination was raised as a substantive ground for consideration, race or more precisely being a black inhabitant of a racialised space is not given much consideration by the Court. Instead, the Court prefers to frame the applicants as 'poor', 'vulnerable' or 'desperate'.[78] By avoiding the language of race, the Court obscures a key criterion not only in the creation of the township but a factor which continues to shape its occupants' lives in contemporary South Africa. The fact of the matter is that the applicants were settled there because they were black.[79] Given the country's history of colonial and apartheid oppression, this subtle move towards a class frame diffuses one of the most powerful stratifying forces in the country's history – race. To be sure, poverty

[74] Ibid at para 150 (emphasis added).

[75] Ibid.

[76] Many of the residents of Soweto have developed as an urban 'underclass' of concentrated disadvantage. W Wilson *The Truly Disadvantaged: The Inner City, The Underclass and Public Policy* (1987) 58; J Seekings & N Natrass (note 23 above) at 271.

[77] S Sibanda 'Now We're Just "the Poor": Race Consciousness and the Discourse of Socio-Economic Rights' (unpublished work on file with author).

[78] The judgment contains numerous instances in which the Phiri community is referred to as 'poor', while other references to the community in question speak of them being the 'desperate', 'vulnerable', or 'those most in need'.

[79] The shortcomings of this class-based narrative are exposed in the judgment of Froneman J in *Daniels v Scribante* who illustrates that class was not the dominant determinant in the allocation of space. He points to state-led efforts to lift white people out of poverty which ignored black people. *Daniels* (note 1 above) at para 132.

remains racialised, however, the manifold effects of racialisation cannot be reduced to purely economic considerations.[80]

As I have argued, apartheid geography extends beyond material deprivation to speak to the subordination of black people in all aspects of political and social life. This phenomenon is best captured by a structural understanding of racism according to which racism is instilled in systems and institutions which reproduce white supremacy despite the absence of overt acts of discrimination.[81] The utility of this approach is that it moves the questions about racism away from overt acts or offensive laws but calls us to examine the substructure of society in which racism is embedded. In this view, it becomes impossible to characterise the residents of Phiri as targets of past discrimination. While this is true, it fails to capture the contours of their contemporary oppression. While I do not suggest that the Court avoids race completely (racial discrimination is a substantive ground behind the residents' challenge), the Court's approach to race often amounts to 'noticing but not considering race'.[82] Gotanda describes the technique of racial non-recognition in judicial analysis as follows:

> It addresses the question of race, not by examining the social realities or legal categories of race, but by setting forth an analytical methodology. This technical approach permits Courts to describe, to accommodate, and then to ignore issues of subordination. This deflection from the substantive to the methodological is significant. Because the technique appears purely procedural, its normative, substantive impact is hidden.[83]

This methodology despite its apparent neutrality effectively suppresses racial subordination – the socio-political cost of which is evident in limiting tools of resistance against racial discrimination. While the slippage between race and class may seem innocuous, it is anything but as Lopez argues:

> The language of race may well constitute the single most indispensable tool for combating and ameliorating the deleterious effects of racism. Because race is so deeply embedded in this society, its reach and effects must be addressed in terms of race itself—there is no better, indeed, no other language available to us.[84]

Despite the Court's apparent reluctance to engage with race and space in this case, it was compelled to consider apartheid's racist policy in order to address the issue of unfair discrimination on the grounds of race as this ground was explicitly raised by the applicants. Unsurprisingly, given the downplaying of the effects of race, the Court held that there was no such discrimination. Thus, in a few swift moves the Court dismisses the challenge to racialised spatial disadvantage by, first, emphasising the break from the past. Secondly, the Court locates the effects of apartheid geography in the historical archive and finally, the Court introduces

[80] Pierre De Vos argues 'escaping poverty and joining the middle class does not — as some have argued — free "black" South Africans from the effects of racial identity and race-based thinking' in P De Vos 'The Past is Unpredictable: Race, Redress and Remembrance in the South African Constitution' (2012) 129 *South African Law Journal* 73, 78.

[81] E Bonilla-Silva 'Rethinking Racism: Toward a Structural Interpretation' (1997) 62 *American Sociological Review* 465, 476; J Modiri 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28 *South African Journal on Human Rights* 405, 407.

[82] N Gotanda 'A Critique of "Our Constitution is Color-Blind"' (1991) 44 *Stanford Law Review* 1, 16.

[83] Ibid at 17.

[84] I Haney-López 'Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory' (1997) 85 *California Law Review* 1143, 1188.

an alternative narrative – the deracialised discourse of poverty. This approach leaves the racial configuration of space, power and privilege unquestioned.

Adopting a critical legal geographic approach and reading the space in this case reveals that racial oppression is written into the space's very fabric. This partly explains the distinction made between Phiri and other areas which did not raise objections to the state's policy. The discrimination in effect cannot be reduced to a single incident. While the Court frames the applicants as poor occupants of a historically disadvantaged space, weaving in insights from legal geography has the potential to enhance the accuracy of the applicants' characterisation. Overlaying a socially contingent view of Phiri reveals that its composition is a manifestation of discrimination in and of itself. In this view, we can understand the applicants as subject not only to class-based disadvantage, but also to racial and spatial oppression. This composite view of discrimination makes the applicants appear infinitely more vulnerable as their marginalisation is shown to be imbedded in and reinforced by, not only their identity, but also their location in a racialised ghetto. This re-characterisation of the applicants could have influenced the Court's ultimate reasoning in this case and, in the future, improve the outcomes for those similarly placed in legal proceedings.

B *Daniels* and the legal landscape of conquest

If *Mazibuko* shows the Court limiting its consideration of extraneous factors in spatial adjudication, the judgment of Madlanga J in *Daniels* marks a significant move towards recognising the impact of apartheid geography in legal adjudication. This case concerns the rights of occupiers to make improvements to their dwellings in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). In my view, this case begins to explore the potential of a spatially contextualised approach to adjudication by interweaving the effects of racialised geography and a substantive reading of the Bill of Rights. In contrast to *Mazibuko's* peri-urban setting, this case is drawn from the rural context which is indelibly marked by apartheid geography.

In this case, the Court was called on to consider another aspect of apartheid geography's contemporary manifestation. The dispute arose over improvements to basic amenities Ms Daniels sought to make. These included 'levelling the floors, paving part of the outside area and the installation of an indoor water supply, a wash basin, a second window and a ceiling'.[85] The trouble began as Ms Daniels was an occupier of land owned by a property company and managed by Mr Scribante, who actively sought to remove Ms Daniels from the property through a range of measures calculated to make her continued occupation of the property untenable. These efforts included cutting the electricity supply to the property and failing to maintain the building to a habitable standard, such that Ms Daniels had to approach the Magistrates Court to direct Mr Scribante to restore the electricity supply and make repairs to the building.

The central legal question before the Court was whether an occupier in terms of ESTA was entitled to effect improvements to her dwelling without the owner's consent. The case reached the Court on appeal after Ms Daniels saw her application dismissed with costs in the Stellenbosch Magistrates Court. Her appeal to the Land Claims Court was similarly unsuccessful: the court denied the existence of such a right, holding that it was too great an

[85] *Daniels* (note 1 above) at para 7.

intrusion on the rights of owner to be granted save with the express inclusion in ESTA. Indeed, no such right is contained within the text of ESTA and the courts a quo were not prepared to recognise such a right. In adjudicating the dispute, the courts a quo considered the matter a legal question the answer to which lay purely in black-letter law. The absence of an express right to effect improvements meant the absence of remedy for Ms Daniels. Both the Land Claims Court and the Supreme Court of Appeal refused Ms Daniels leave to appeal.

The Constitutional Court reached a different conclusion. There the matter turned on the right to dignity enjoyed by all occupiers under ESTA in terms of s 5(a) which provides: 'subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to human dignity'.[86] Recognising the importance of dignity under ESTA's legislative scheme, the Court premised its approach on determining what the right to dignity meant for Ms Daniels. The Court also relied on s 6(1) of the Act which provides that occupiers shall enjoy the right to 'reside on and use the land on which he or she resides' and 'to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly'.[87]

The Court reasoned that the right to reside and have access to services cannot be reduced to mere residence in abhorrent conditions. The right to reside must be understood in light of the fundamental rights of occupiers of which dignity is central. According to the Court 'occupation is not simply about a roof over the occupier's head… it is about more than just that. It is about occupation that conduces to human dignity and the other fundamental rights'.[88] Accordingly, Ms Daniels was entitled to make basic improvements to her home in order to bring it to a standard befitting of a dignified life.[89] Mr Scribante raised the point that nowhere in the Act is provision made for a right to make improvements. The Court dismissed this argument holding that if the rights of occupiers were to be so narrowly interpreted such that they were limited solely to those itemised in the Act, this would render the other rights, the context and the purpose of the Act hollow.[90] The Court cautioned against adopting a narrow technical interpretation which would restrict the occupiers' rights. The Court found that a holistic interpretation was therefore necessary:

> A denial of the existence of the right asserted by Ms Daniels might inadvertently result in what would in effect be evictions. This would be a direct result of the intolerability of conditions on the dwelling. And these "evictions" might happen beneath the radar of the carefully crafted eviction process. That would make nonsense of the very idea of security of tenure. After all, like the notion of "reside", security of tenure must mean that the dwelling has to be habitable. That in turn connotes making whatever improvements that are reasonably necessary to achieve this. Of what use is a dwelling if it is uninhabitable? None.[91]

The Court thus overturned the decision of the courts a quo holding that Ms Daniels did in fact have the right to make improvements to her dwelling. In arriving at its conclusion, the Court looked beyond the relevant provisions, the black letter law and the submissions made by the parties. In a bold step, the Court, of its own volition, adopted a frame grounded in

[86] ESTA, s 5(a).
[87] Ibid, s 6(1).
[88] *Daniels* (note 1 above) at para 31.
[89] Ibid at para 26.
[90] Ibid at para 29.
[91] Ibid at para 32.

the narrative of black conquest and dispossession to locate this case in its spatial context. In so doing, the Court read the context temporally as well as spatially. This reshapes the nature of the dispute from the rights of ESTA occupiers to improve their dwellings, to a case about the restoration of dignity for those holding precarious land rights due to apartheid geography. This subtle re-characterisation is powerful as it gives voice to a discourse often marginalised in the resolution of spatial disputes. It allows the Court to delve into the production of space with striking clarity on the racialised patterns of spatial development showing that the rural context in which this case is located is an embodiment of apartheid geography.[92] The Court achieves this by unpacking the human geography which underpins the dispute finding that:

> Dispossession of land was central to colonialism and apartheid…[93] The purpose of it all was, first, the obvious one of making more land available to white farmers. The second "was to impoverish black people through dispossession and prohibition of forms of farming arrangements that permitted some self-sufficiency. This meant they depended on employment for survival, thus creating a pool of cheap labour for the white farms and the mines. White farmers had repeatedly complained that African people refused to work for them as servants and labourers". The third was the enforcement of the policy of racial segregation, which assumed heightened proportions during the apartheid era.[94]

By revealing the full historical context of the space in question, the Court departed from its narrower approach to space evident in *Mazibuko*. This suggests that the Court was taking note of the manifestations of apartheid geography and reading the law in a space-conscious manner. Traditional legal methods rarely call for such nuanced contextualisation. Instead the focus tends to be on positive legal texts considered in the abstract.

Race was a key element of the Court's chosen frame. The Court dedicated much of the judgment to tracing Ms Daniels predicament to its historical roots in the dispossession of black people of their land under colonialism and apartheid. This tracing reveals the racial production of space and the inequitable landscapes it has created. By highlighting the salience of race, the Court avoided casting the problem as being one of generalised poverty in order to make a sharper, more accurate point about the racial and spatial inequality at the root of the South African economic order. The Court then incorporated this narrative into the interpretation of the legal framework. In elaborating the milieu in which ESTA must be understood, the Court found that:

> Apartheid sought to divest all African people of their South African citizenship. According to the grand scheme of apartheid, Africans were to be citizens of so-called homelands. The consequence was a variety of tenuous forms of land tenure for victims within what – to apartheid – was "South Africa proper". This meant throughout the length and breadth of our country victims were made strangers in their own country. On farmland – which this case is about – their residence was particularly precarious. They could be, and were often, subjected to arbitrary evictions. Needless to say, they could not have much say on the conditions under which they lived on the farms, however deplorable. This was a life bereft of human dignity.[95]

This illustrates the Court's openness to expanding the range of relevant considerations. The Court made it clear that while the 'legal' question may have been presented by the parties narrowly, the Court was prepared to go beyond a purely legal view towards a framing which

[92] Ibid at paras 13–58.
[93] Ibid at para 14.
[94] Ibid at para 16.
[95] Ibid at para 21.

reflected the reality as experienced by Ms Daniels and countless others. This included the country's history of racialised forced removals and spatial inequality. In this approach, the manifestations of apartheid geography are not only explicitly named but sought to be addressed through reliance on an expanded and contextualised reading of the Constitution's human rights framework. This approach alters dominant representations of space and builds the resources necessary to remediate some of the violence of apartheid geography. The Court was deliberate in outlining the racial and spatial policies which produced the applicant's predicament. Importantly, this allowed the Court to read the entire socio-spatial context and not merely the legal text as the courts a quo had done. Reading the social and spatial context moved the analysis away from the letter of the law towards considering the racial and spatial power dynamics which underpin the case's spatial context. By interrogating the production of space, the Court helped to disrupt the power relations which reinforce spatial inequality. Thus the background of spatial racism was brought into the foreground of the case. This enriched view of law, space and society (including race and gender-based discrimination) allowed the Court to reach a conclusion which would have been unsupported by a mere technical reading of law. This, along with the basic nature of the upgrades Ms Daniels sought to make, tipped the balance in her favour but also expanded protections for similarly positioned occupiers. Beyond Ms Daniels' circumstances, this approach holds immense potential to recalibrate the dominant understanding of space and to reshape laws in favour of substantive remedies for those faced with insecure access to land and housing rights in post-apartheid South Africa.

While the narrative in *Mazibuko* suggests a break with the past, the Court in *Daniels* is clear that the historical context is not always confined to the past. Drawing clear connections between the past and the present, the Court observed:

> Painfully, in some instances this [legacy of land dispossession] is not just history. To this day, some of the poorest in our society continue to keep homes under the protection of ESTA. Needless to say, occupiers under ESTA are a vulnerable group susceptible to untold mistreatment. This is especially so in the case of women.[96]

In this extract we see the Court drawing connections between time and space not only as an introduction to an atemporal or decontextualised legal question, but also as a link between history and contemporary spatio-legal problems. The benefit of this approach is that it does not misrepresent the conditions in the country's spaces as being instantly transformed by constitutional change. Instead, it creates a link with the past which highlights the necessity for effective remedies. The majority's approach thus moves towards recognising the current effects of apartheid geography and not merely its historical existence. The Court achieves this by first outlining the racial and spatial context which gives rise to the dispute. Secondly, the Court interprets the legal framework bearing in mind the context and what the law seeks to achieve. Finally, the Court arrives at a determination that best responds to the injustice caused by the context of apartheid geography.

In a separate concurring judgment, Froneman J explored the continuity with the past to disrupt the dominant narrative about the spatial, social and economic status quo in South Africa. He argued that: 'historical injustice is nowadays not easily denied, but rather avoided'.[97] This call to revisit even norms that appear neutral comes after he had argued that even these conditions had been socially engineered in a historical narrative which saw the state drive

[96] Ibid at para 22.

[97] Ibid at para 117.

inequality in favour of white people. He observed that history is often suppressed by discourses of racial difference, inferiority and misfortune which seek to provide an explanation for the lowly position of many black people in society. He argues:

> [the] Carnegie Commission's report on poor whites showed that poverty, also on farms, had nothing to do with inherent inferiority, but everything to do with social and economic processes outside individual control. The problem was addressed so that white people could maintain dignified living standards. The burning injustice, namely that this corrective action was not extended to black and "coloured" people, must and can be rectified.[98]

This remedial imperative is of course far broader than can be addressed by a single judgment. However, Froneman J expanded on the contribution of the majority judgment. He argued that it had to be understood in the context of the changing nature of property relations that the Court has sought to remedy in a series of property and housing-related judgments.[99] The approach adopted by the majority, and expanded on by Froneman J, certainly disrupted the judicial orthodoxy. The Court's bold retelling of a suppressed narrative and astute reframing of a legal dispute contributes to the resources on which judges and parties may draw. This potential is, however, tempered by Cameron J's separate concurring judgment which, while approving of the majority's approach, alluded to the dangers of judicial pronouncements on history. This judgment set out some of the limits in the majority's approach. Cameron J cautioned that:

> It is not within the primary competence of judges to write history. The histories in my colleagues' judgments were not expressly in issue during argument before us. Neither side referred to them. We did not have the benefit of the parties' contesting approaches to or submissions on them. And the parties placed before us none of the historical sources my colleagues refer to and quote from. This means we are on spongy ground. And we could lose our step. Especially where accounts are incomplete and where they are not directly functional to the determination of the dispute.[100]

This cautionary dictum partly explains the Court's difficulties in addressing apartheid geography. Given that the challenges presented by apartheid geography are rarely purely legal, can the constitutional matrix, premised as it is on judicial review, respond and remediate the ills of racialised space? Although Ms Daniels' case can be viewed in isolation, she is not alone. Ms Daniels represents countless occupiers who pursue a dignified existence in a milieu characterised by violent dispossession and landlessness. In this environment, private and state-sanctioned violence are normalised as rights and the lack thereof reinforce a range of responses. By reading the narrative of racial and class-based inequality into inquiries about what rights are enjoyed by occupiers and owners, we can give meaning to the promise of dignity and move the law towards achieving equality. This can be achieved by expanding the reading of legal facts and concepts, such as the '(unlawful) occupier', in favour of interpretations which appreciate the interplay of race, space and other stratifying categories. By overlaying social and spatial facts in the dispute, the Court's approach in *Daniels* resonates with a critical legal geographic reading of law. This methodology has the potential to increase positive outcomes for those adversely affected by apartheid geography.

[98] Ibid at para 132.
[99] S Wilson (note 27 above) at 280.
[100] *Daniels* (note 1 above) at para 149.

IV CONCLUSION

Addressing the pernicious effects of colonialism and apartheid lies at the heart of South Africa's constitutional project. The success or failure of this project will hinge on its ability to heal the wounds of racial oppression. These wounds are painfully evident in the country's divided spaces. This article has sought to analyse the operation of law in the context of a central tenet of apartheid geography. In so doing, I explored the landscape of apartheid and some of its oppressive manifestations. This apartheid geography, I argue, continues to have profound effects on social and political life across rural and urban settings. This article then introduced critical spatial theory into South Africa's legal discourse as a way of understanding some of the manifestations of apartheid geography. The overall aim is to move legal discourse towards an understanding of space which is grounded in subjects' actual socio-legal experiences. This moves the discourse towards a contextualised mode of legal analysis, which comes closer to reflecting everyday life. Through the lens of critical legal geography, I juxtaposed *Mazibuko* and *Daniels* – important cases in the canon of post-apartheid spatial jurisprudence. This revealed that while mentioning apartheid geography is almost unavoidable, legal constructions of space in this regard are contested and varied.

Evident in the *Mazibuko* approach to race is the tendency to notice the claimants' race and space in deciding the case. However, this amounts to 'noticing but not considering' the full extent of the subjects' subordination. This approach subtly downplays part of the subjects' plight by not examining the social realities in which the claimant is located. Thus, the treatment of racialised space in *Mazibuko* falls short of an engagement designed to remediate the effects of racial classification, segregation and domination. This non-recognition of the historical and contemporary manifestations of spatial inequality produces harm while courts are seemingly trying to right wrongs. For example, by casting legal subjects merely as 'unlawful occupiers', legal analysis fails to recognise that the spatial is a key determinant of the subjects' history, social origin and identity. Failing to capture the effects of geography in legal terms, limits the law's ability to provide meaningful redress. A more context-driven understanding of law and space is required to adequately capture the harm faced by the subjects of racialised space. Ultimately, 'this is a critique of a theoretical tradition, long dominant in the social sciences, of treating context as a container in which – but not because of which – important things happen'.[101] I argue that, the Court in *Daniels* moves to address many of these shortcomings in what is a pioneering judgment. The Court draws on history to recognise that Ms Daniels' predicament arose because of her location within a space marred by apartheid geography. This frame introduces into legal normality an idea which users of space appreciate intuitively – space matters. The potential of this approach lies in its ability to highlight socially-embedded power imbalances which are mirrored in spatial relations. This, I argue, will allow for better remedies and produce beneficial results for law and policy on space. In this context, the majority judgment in *Daniels* marks a welcome move towards a substantive understanding of apartheid geography.

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