# PHARMAKON

## URBAN LAW AND THE MAKING OF JOHANNESBURG

eric nyembezi makoni

UNIVERSITY
OF
JOHANNESBURG

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Eric Nyembezi Makoni

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*For*

*the margins, and all its inhabitants*

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# Foreword

Urban injustice is tenacious, perhaps especially in postcolonial settings. It is, for instance, widely acknowledged and frequently asserted that the built form, as well as the physical, social and economic functioning, of South African cities continue to reflect and reinforce the inequalities of the colonial and apartheid eras. Why is this? How did it come to be so? And, most importantly, how can it be countered? These are the questions Eric Nyembezi Makoni grapples with in *Pharmakon: Urban Law and the Making of Johannesburg.*

Based on, but extending significantly beyond, the PhD thesis that the author completed under my supervision at the University of the Witwatersrand in 2020, *Pharmakon* is at once a theoretical, historical and philosophical text. Using Andreas Philippopoulos-Mihalopoulos' notion of "lawscape" as its primary analytical lens, Makoni zooms in on the close entwinement between law and urban planning. He clearly shows how the joint wielding of legal and planning powers constructed and maintained apartheid cities, and thereafter critically interrogates post-1994 attempts to transform the very same cities through the use of the very same powers.

The study is set in the city of Johannesburg, with all its complexities, contradictions and fragmentations, where the multifaceted dimensions of spatial injustice have always been on particularly harsh display. Weaving together Johannesburg's colonial, apartheid, and post-apartheid spatial and legal histories, the book connects past legal instruments with present-day urban challenges and questions the post-liberation legal system's capacity to undo the harms that its predecessors had, quite literally, cast in concrete. Through the provocative metaphor of "pharmakon", something that is both poison and remedy, Makoni manages to capture both the danger and the promise of wielding urban law's ambivalent power, in its interaction with spatial planning, in pursuit of (urban) societal reconstruction.

*Pharmakon* is proudly a decolonial text. It unceremoniously unmasks the continued extractivism and oppressive coloniality underlying contemporary neoliberal urban spatial transformation projects. But it doesn't leave matters there. Refusing to succumb to the defeatism inherent in Audre Lorde's timeless assertion that "the master's tools will never dismantle the master's house", Makoni instead rises to its challenge: His decolonial project is not about glibly labelling legal and planning tools as colonial and on that basis advocating for their discardment and replacement. Instead, he examines them closely as they operate, entwined, in a deeply fraught city, seeking to understand the logic of their design, the mysteries of their functioning and the contradictions of their power. As *Pharmakon* unveils this understanding, Makoni dares to ask whether the tools hold within them the possibility, if themselves reimagined, reconfigured and reprogrammed, to renovate the rummages of a "master's city" into something both liveable and just. On more than one level, this is decoloniality at its most constructive.

*Pharmakon*'s most powerful message is ultimately a hopeful one, that sources of power previously used to oppress are capable of decolonisation, of being freed from their predilections and wielded towards liberation. It is a rare urban law text, written about the law by an urbanist, which lends it a measure of critical distance from the texts it interrogates. Its original contribution to knowledge lies in its interdisciplinarity, its rich historical narrative and its multifaceted theoretical lens. While playing off in Johannesburg, *Pharmakon*'s lessons resonate far beyond it. It offers conceptual tools and critical insights applicable to cities across the Global South, while deepening our understanding of how legal tools, and the power that they embody, operate in cities everywhere.

**Prof Marius Pieterse**
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Johannesburg, 25 March 2025

# Introduction

## Law as Pharmakon

### Introduction: Law as Such

> *'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]

Urban law is a *pharmakon*. The concept of 'pharmakon' is rarely associated with law and spatial planning or, particularly, the role of these instruments in the production of racialised social spaces. For Derrida, a pharmakon can be defined as a both a remedy and a poison.[2] In philosophical terms, a pharmakon goes beyond the medicosocial definition of drugs as having healing and killing properties, depending on how they are administered. Instead, a pharmakon captures how *all things* – all instruments, technologies and knowledges can do good and bad, depending on how they are applied. Bernard Stiegler, in particular, aptly outlines 'the two-faced character of all *pharmaka* [...] intoxication and remedy, danger and help'.[3] Using the metaphor of a hammer in the hands of a skilled mason to define the concept of a pharmakon, Stiegler points out that:

> *The hammer can be simply another tool, just a device, but it can also be the instrument of a specific culture. And in such a case, the hammer transforms the body and mind of a true craftsman. This is maybe not the case for an unskilled laborer, but it is true for someone who has spent years working with a hammer*

> *in order to create specific stones, e.g. a mason. For him the hammer is not a tool, but a pharmakon: he feels the hammer in his hand and cannot help being transformed. His tools are his friends, he has known them for many years, knows how they react, how they can help him.*[4]

In many ways, this concept of pharmakon denotes the relations of power between individuals, institutions, entities, cities and states within a given moment, circumstance, event, context and time. In the case of urban law, therefore, the technologies and knowledges of law and planning can be, and have been, used to build cities and regions that are progressive (in the sense of promoting sociospatial justice and democracy for all, for instance). On the other hand, urban law has also been employed in the service of fostering nefarious ideas of racism, narrow nationalism, xenophobia, homophobia and other markers of difference that promote sociospatial, economic and political exclusions, marginalisations, erasures and death.

Most literature from the West has emphasised the civilisational and modernising aspects of urban law and how it has allowed the emergence of the rational utilisation of land and, ultimately, the creation of well-ordered cities and regions. In fact, the two disciplines of law and spatial planning are said to be at the centre of 'order', saving the world and its inhabitants from Hobbesian chaos and the state of nature. For the proponents of urban law, planning and its redemptive qualities, the disciplines, practices and processes of town and country planning and their enforcement through various legal instruments, represent the epitome of development and civility. As this logic goes, had it not been for town and country planning, the world would have been congested, enveloped in thick fog and smog, and rife with water-borne diseases, lung infections and other untold afflictions that resulted from the European industrial revolution. Toxins from its industries would have poisoned urban dwellers to death. When viewed through this civilisational and developmental lens, planning acted as a *remedy* for a world that would have been turned into something from an apocalyptic horror movie. Perhaps so.

It is sad, however, that the so-called Western civilisational and modernising mission of legislated planning did not have the same effects for the rest of the world, particularly for the peoples of Africa and those parts in the Global South that were on the receiving end of colonialism, its brutality, genocidal violence and related systems of pillage, land theft and other systems of marginalisation. As some scholars point out, what was viewed by the West as European expansion and the formation of an 'empire' was, for those inhabiting the lands that were being conquered and pillaged, the genesis of untold 'shrinkage', dwindling and the loss not only of land, livestock and other material affects for living but also of humanity.

The forced imposition of European civilisation and modernity through the barrel of the gun and blood-letting marked a turning point in the geospatial configuration of the world. At the centre of this global configuration was the use of cartography-as-mapping not just as land-parcelling but also as the partitioning of power. Put differently, European colonialism and its variegated systems, processes and mechanics of power fractured the world at geospatial, geopolitical and geoepistemic levels. In fact, some decolonial scholars opine that the tragic imagination of a colonial world had its roots at a geoepistemic level. That tragic imagination emerged from the cognitive space, or the 'cognitive empire', to use Ndlovu-Gatsheni's term.[5]

Also at the centre of European imperialism and its cartographic fracturing of space and power was the equally nefarious use of legislation, decrees and claims that sought to justify unjustifiable systems of land dispossession and related oppressive practices. Planning theorists like Oren Yiftachel, for instance, point to the 'dark side' of planning.[6] This point is well articulated by decolonial scholars who posit that although Eurocentric planning practices - this so-called modernity and its related development - arguably may have had a positive effect on Europe and its peoples; it had a gravely dark side, or underbelly, termed 'coloniality'.[7] The 'European game'[8] of radical expansion, therefore, was nothing short of being poisonous for the Global South. This is where the pharmakon effect of colonial laws and related planning practices emerges. Although these laws and

practices may have resulted in the civilisation and development of the Empire, its peoples and spaces, they simultaneously marginalised key civilisations in Africa and the Global South at large, leading to their radical alterity, underdevelopment and subsequent subordination in the world order.[9]

The world order that emerged from the imperial logic of colonialism was predicated on racial hierarchisation, racial capitalism and its class hierarchisation on a global scale.[10] As Santos posits, this 'abyssal thinking' and its prioritisation of race as the primary principle of spatial ordering was precariously held together by the laws that created and regulated the centre or periphery dichotomies.[11] It is commonplace, now, that the world's epistemic and material centre has become synonymous with the West and that the 'rest' of the world continues to exist at the epistemic and material periphery.

While these treacherous, exclusionary geospatial and geoepistemic spaces are precariously held together by disparate legal and cartographic regimes that operate at local and international levels, there are collective spaces of radical insurgencies that strive to push back against global coloniality. At an epistemic level, calls for the decolonisation of knowledge, power, being, nature and space are one such collective combative force for change.

In this book, therefore, I wish to examine how law and spatial planning in the city, loosely defined here as 'urban law', shape the socioeconomic, political and spatial order of urban spaces. I argue here 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 various forms of power – everyday social relations between people, objects and ideas all render to law its dynamic nature and its societal relevance. Law and the city, thus, are mutually constitutive and entangled, together forming what Andreas Philippopoulos-Mihalopoulos elegantly termed the 'lawscape'.[12]

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 the operations of the law within

such materiality, on the other'.[13] In other words, the *law in the city* (that is, the lawscape) becomes inescapable because it governs and regulates all human activities. Humans and their activities become saturated and subsumed by and 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.*[14]

Having made the point that all urban spaces are saturated and subsequently transformed by various laws, in this book I focus on the making of the colonial, apartheid and post-apartheid lawscape. Specifically, I wish to examine the spatial and socioeconomic effects of urban law in the making of South African cities in general – and Johannesburg in particular. Also of interest here is how urban law has been used by various regimes or governments to establish and foster specific political visions, ideals and ideologies, such as colonialism, apartheid and democracy, for instance.

As South African cities emerged in the late seventeenth century, during the colonial era, urban law played an integral role in shaping everyday societal relations between different races, classes, ethnic groups, genders and nationalities.[15] Actually, for centuries the South African lawscape has fundamentally been shaped by identity politics.[16] Racial difference, in particular, has been used as one of the key sociospatial, economic and political organising principles in these cities. From the colonial encounter onwards, the intersection between law, spatial planning and race determined South African cities' sociospatial milieu.

With the arrival of the Dutch at the Cape in 1652, for instance, a foundation was set for racial segregation when the Dutch East India Company emphasised racial hierarchisation between white 'settlers' and black 'natives'.[17] This practice of racial segregation was reinforced through legislation and planning from the nineteenth century onwards. In the mining towns of Kimberley and Johannesburg, for example, the colonial state experimented with legislating racial segregation through its enforcement of the colour-line in the erection of residential areas. Whereas the enforcement of racial segregation was relatively 'loose' between the seventeenth and nineteenth centuries, this was to change in the twentieth century, when the colonial/apartheid[18] state entrenched its segregationist ideology through law and planning.[19]

Racial zoning played an integral role in the creation of South African cities. In many ways, it allowed for the practice of racial capitalism.[20] As racial capitalism took root in South Africa, racial hierarchisation created racially fractured cities, divided into the 'zone of being', where the setters lived, and the 'zone of nonbeing', where the natives resided. As Fanon posits:

> *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 conciliation is possible, for 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.*[21]

As is shown in the chapters that follow, this distinction between the 'settler town' and the 'native town' was established and maintained throughout South African history by the enforcement of segregationist laws. For centuries, South Africa's urban history was shaped by 'abyssal thinking', with the 'colour line' informing the creation of racially segregated cities.[22] Put differently, the constitution of South African cities was predicated on 'radical difference', that is, the racist ideology that people of different colour cannot inhabit the same space as equals.

While the extent and consequences of legal and planning instruments in the history of the making of South African cities are apparent,[23] the fact that both these instruments are now employed by the 'post-apartheid' state in the reconstruction of cities remains curious.[24] 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.[25]

In this context, the objectives of the book are twofold: to trace the genesis and evolution of Johannesburg from colonial times to the present, with a focus on the role played by law and spatial planning, and to examine the extent of law and spatial planning's transformational force, particularly in relation to the promotion of spatial justice and socioeconomic rights in the city. Because legal and planning instruments were used in the regulation and spatialisation of racial difference during the colonial and apartheid eras, this discussion aims to explore urban law's potential in forging new and inclusive urban sensibilities in post-apartheid cities such as Johannesburg.

Some of the key questions that I ponder on in this book are rather paradoxical: since urban law and related planning processes were complicit in the production of racialised and fragmented spaces during the colonial/apartheid era, to what extent has urban law reconstituted itself in the service of fostering meaningful reconstruction and inclusive development for all urban inhabitants? Put differently, using the pharmakon analogy, how much of the poison, and how much of the remedy, is still present in the law and planning portion? Can urban law still cause harm in the sense of marginalising millions of urban residents, as was the case during high colonialism/apartheid, or is it potent enough to heal and mend the fractured urban morphology? To what extent can it also contribute to the imagining, making and experiencing of truly decolonial cities?

Perhaps the questions posed above are 'strong enough'[26] to compel us to be more critical and cautious of ideas, concepts and perceptions often taken for granted, such as the munificence of law and the seemingly apolitical nature of urban planning. What emerges from the unfolding discussion, however, is the realisation that, like a knife on a kitchen table, which can dice an apple or cause fatal harm to anyone when misused, the instrumental deployment of urban law, and what it can be used for, is dependent on those who have the power to formulate it and wield it. In other words, ideology and power cannot be divorced from law and planning as critical technologies for sociospatial engineering and ordering.

So, the discussions presented in this book attempt to contribute to the emerging, and urgent discourse on the spatialisation, and decolonisation of urban law, and urban governance in post-1994 South Africa. By deploying the concepts of lawscape for instance, this book appreciates the complex power dynamics inherent in both legal and spatial planning practices and processes. In other words, there is a realisation that both urban law and planning are not mere apolitical instruments that can be used by various social actors only for the broader public good. Instead, law and planning can, and have been appropriated by both state and non-state actors, to form part of the technologies of spatial control, domination, and surveillance.

The concept of pharmakon (meaning both remedy and poison) also becomes central in this book.[27] It sheds light on the potentially 'bright side' (i.e., the remedy) of law and planning - its potential for doing good for all human (and more-than-human) species in a given society. Similarly, the term 'pharmakon' also exposes the potentially 'dark-side' (i.e., poison) of law and planning - when these instruments are nefariously deployed to divide cities, and states, resulting in the socio-spatial marginalisation of some peoples rendered powerless.

Another contribution that this book thrives to make, is to foreground the salience of epistemologies of the South, as well as decolonial theory in the appreciation of the complexities inherent in making cities - and making them more just, inclusive, and pleasant for all inhabiting them.[28] In some way, as the book takes a genealogical and historical approach to the appreciation of the colonial/apartheid lawscape in the making of a city like Johannesburg, it also points to the paradigmatic potential of decolonial theories, and practices in providing new discursive ruptures critical for imagining, formulating, and implementing planning laws that are aimed at building new democratic, and just cities in South Africa and beyond.

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# The Structure of this Book

Following this brief introduction, chapter one philosophically anchors the book on the spatial turn in law and a legal turn in spatial planning - while gesturing towards the decolonial turn in urban law. 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 one, sets the foundation for Chapter two, 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 morphology of contemporary South African cities. It demonstrates how the ideology of racism that was dominant from the seventeenth century onwards found its way into law and planning, resulting in the production of racially fragmented colonial and apartheid cities.

Chapter two 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 three explores Johannesburg as a case study and shows how the legal and planning forces discussed in Chapter two played out in shaping this city's sociospatial milieu.

Chapter four provides a macro-level outline of the unfolding post-1994 lawscape. It discusses the post-1994 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: first, the Constitution and its provisions - how it alters the lawscape generally and forms part of the lawscape itself; second, the content of laws that were enacted post-1994 to give effect to the constitutional vision; and, third,

the impact of court findings in cases brought in an attempt to enforce socioeconomic rights.

Chapter five grounds and localises the discussion presented in the previous chapters by focusing on the effects of new democratic 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 a neoliberal lawscape to entrench historical inequalities, Chapter six attempts to map possible decolonial vistas for urban South Africa. It does so by highlighting various urban insurgences, revolts and 'revolutions' that continually strive to push back coloniality, and the new neoliberal planning agenda that arguably reinforces old colonial/apartheid inequalities while unwittingly entrenching new ones.

# One

# Urban Law In/Theory

## Introduction: Lawscape and Its Contours

> *The blindness of theory renders practice invisible or undertheorized, whereas the blindness of practice renders theory irrelevant.*[29]

> *[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.*[30]

In a time such as this, when the 'promises of [Western] modernity have become problems for which there seem to be no solutions at all'[31] in the name of civilisation, development and progress, there is an urgent need for new theoretical and conceptual frames that can rescue the world from this epistemological purgatory and abyss. In writing about urban law, therefore, it is imperative to bring together some of the critical concepts that demonstrate the relationship between law and spatial planning. These include the lawscape; the production of space; the right to the city; modernity/coloniality; and abyssal thinking. These notions stem primarily from the disciplines of law, urban planning and decolonial theory. When read contrapuntally, they provide a sound philosophical scaffolding necessary for the analysis of the equally complex lawscape.[32] What emerges from a close reading of the concepts is that law and spatial planning practices and processes are constitutive and reflective of specific power relations within a given city, state or society. In fact, both law and spatial planning reflect the state's efforts to establish and regulate societal order within a given society.[33]

## The Spatial Turn in Legal Studies

In the past decade, the 'spatial turn' in legal studies has resulted in the steady growth of academic literature on the relations between law and the city, and between law and space.[34] This scholarly interest 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'.[35] 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',[36] 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 the 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. He uses the term 'lawscape' to define the almost unavoidable influence of law in informing sociospatial, economic, political and environmental issues in cities.[37]

The term 'lawscape' refers to the dynamic and complex interrelationship between law and the city (law/city). The law/city, therefore, becomes an inescapable lawscape - that is, 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, law operates through varied technologies that are visible and invisible.[38] Even the minutest of everyday human relations are regulated by 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.*[39]

Contributing to the understanding of the 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 interprets the symbiotic relationship between these two disciplines.[40] 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.*[41]

Blomley's concept of critical legal geography allows for a genealogical study of the evolution of cities and of 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'.[42]

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 those decades, various laws were enacted and implemented, particularly in the fields of property development and ownership and land use, as were other regulations governing the ordering of space in the built environment.[43] 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.*[44]

The fact that the law can 'explicitly prohibit or mandate certain spatial formations' is important, because this relates to its influence in city-making processes. As is 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' sociospatial form.[45]

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'.[46] 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'.[47]

In the event that the state refrains from spatial regulation, and 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 a lack of formal public planning, results in the emergence of ad hoc and/or poor planning practices accompanied by the lack and/or inadequate provision of basic services and commodities, such as clean water, electricity and housing. Therefore, legal

modes of influence on the city shape what some scholars refer to as the production of space.[48]

## The Production of Colonial Space

As Philippopoulos-Mihalopoulos's concept of lawscape attempts to capture the 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 exists a 'spatial triad' that comprises: the conceived space (the realm of the imagination, the mental space); the perceived space (that is, 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).[49] 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 is 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 on the other.[50] As is outlined in the chapters that follow, the 'tragic imagination'[51] 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.[52]

What can also be drawn from Lefebvre's concept of the spatial triad is that law and spatial planning are power-laden practices that are reflective of the dominant state ideology. In most instances, the state – as well as private institutions and individuals with economic and political power – has the tendency to influence how the sociospatial and economic resources are structured and distributed within a given city or region. In fact, viewing the city as a social space – that is, a product shaped by

everyday human in/actions - reveals the city's susceptibility to manipulation through the use of tools and mechanisms aimed at creating and/or maintaining a particular status quo.[53] 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 and socioeconomic opportunities. In outlining the symbiotic relationship 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.*[54]

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.[55] 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.[56] The following section attempts to explore the colonial lawscape and how it was informed by the logic of modernity/coloniality inherent in modern law and planning practices and processes.

## The Darker Side of Blindness

There have been various moments in modern history where legal and urban planning instruments were nefariously applied, particularly by the state. The Jewish Holocaust in Europe,[57] colonialism in Africa, India and Latin America, and apartheid in South Africa[58] exemplify some of the most gruesome state-led

projects that used law and urban planning as tools for 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’.[59] Their assertion is informed by their postmodernist reading of urban planning as a two-edged sword, having 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’.[60] 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?*[61]

Yiftachel has also written extensively on the progressive and repressive aspects of urban planning.[62] He posits that the defining elements of urban planning are evinced by the employment of its practice ‘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.[63] There are also detailed accounts of the spatial divisions in cities such as Jerusalem, where religious differences are spatialised through the enforcement of legal and urban planning instruments.[64] In the case of the Jewish Holocaust in Budapest, Hungary, the creation of concentration camps and the unleashing of state violence towards the Jews is one example of how power was exerted through legal and planning mechanisms.[65] Writing on the application of the ‘spatial solution’ to the ‘Jewish question’ in Budapest, 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'.[66]

Similarly, from the seventeenth century onwards colonial India saw the formulation of laws and 'spatial solutions' to the 'native question' that justified genocidal violence, land dispossession and other similar projects aimed at dehumanising the colonised subjects.[67] In Africa, the spatial imagining of colonial cities was defined by racialised genocidal violence. Scholars like Fanon and Kipfer, amongst others, highlight the 'dark side' of planning in the production of space in colonial Africa.[68] 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.[69]

Reading Fanon with decolonial scholars such as Walter Mignolo, for instance, the settler's imagining and ordering of the colonial city portrays the dialectic of modernity/coloniality.[70] 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 the European subject and this subject's break from the primordial symbols and dogma that limited its individualism - such as religion, for instance.[71] The disciplines and practices of philosophy, law and urban planning were critical to the realisation of European enlightenment and civilisation. Writing of the Aristotelian notion of citizenship, for instance, Hill states that: '[t]he notion of the city was a key element in the development of Western thought on freedom, the individual, and civility'.[72]

Whereas some celebrate the project of modernity for its civilising characteristics, decolonial scholars observe that modernity has a 'darker side', referred to as coloniality.[73] 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.*[74]

Coloniality, therefore, refers to the prevalence of 'colonial situations'[75] after the dismantling of the physical administrative institutions of colonialism. As Grosfoguel posits:

> *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.*[76]

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 sixteenth century onwards.[77] In other words, the logic of coloniality is entangled with the 'rhetoric of modernity' - and the two constitute two sides of the same coin.[78] An example of a spatial/temporal manifestation of modernity/coloniality is the unfolding of the Industrial Revolution in Europe while Africa and other countries in the Global South were experiencing colonialism.[79]

## Traversing the Decolonial Turn

Acknowledging the dark side of modernity, and its use of law, spatial planning and other technologies of power[80] in the reproduction of coloniality, some scholars from the Global South have called for the centring and privileging of Southern epistemologies hitherto marginalised by Western modernity.[81] Moreover, some scholars have also called for the decolonisation of knowledge, power, being and nature. Decolonial theorists argue that a colonial matrix of power continually reproduces global coloniality.[82]

The term 'global coloniality' refers to the sociospatial and economic marginalisation of millions of people through the 'othering' of their knowledge systems and their way of life on 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 is relegated to the realm of alterity.[83]

The recent resurgence of epistemologies from the Global South[84] marks what has been termed a 'decolonial turn'.[85] The decolonial turn is predicated on deliberate efforts to unmask and dismantle coloniality.[86] It is imperative for the fields of law and spatial planning to embrace and/or engage with the decolonial turn because this 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 curbing 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 to explain the prevalence of uneven development in the world.[87] Santos views the modern world system as characterised by what he terms 'abyssal thinking', where visible and invisible abyssal lines structure and cartographically map the world system. These abyssal lines

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 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.*[88]

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.[89] He explains 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. In contrast, for those on the other side of the line (the Fanonian zones of non-being), violence and appropriation are the defining modes of governance.[90] The other side of the abyssal line, therefore, is defined by what Maldonado-Torres terms the non-ethic of war, where the coloniality of being and its hallmarks of poverty and death are forever present.[91]

Santos's concept of post-abyssal thinking is important in this study because it illuminates contemporary social realities from a different philosophical and geospatial position. 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 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 thesis with Mignolo, the former's call for the creation of an 'ecology of knowledges'[92] forms part of what Mignolo refers to as 'epistemic disobedience'.[93]

The decolonial turn (and the quest for a decolonial condition, or 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 that defines these instruments of spatial ordering.[94] By applying a decolonial perspective to legal studies, Santos argues for the existence of 'pluri-legal'[95] knowledges and systems in society. The recognition of pluri-legal knowledges and systems marks a shift from the restrictive 'legal/illegal' dichotomy that currently dominates the legal milieu, creating possibilities for accepting other legal realities beyond the 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'.[96]

> *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.*[97]

If urban law is 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 the equitable redistribution of commodities and opportunities in the city, thus gesturing towards 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'.[98] The subsection that follows attempts to outline some of its key tenets.

## Looking for Justice, Here

Decolonial theory prioritises the creation of a world characterised by a shared, common and equal humanity, and social justice can be said to form an integral part of that 'post-abyssal' world.[99] Various theorists have contributed to the development of the concept of social justice. Nancy Fraser, for example, strives to transcend the limits of both the politics of redistribution and the politics of recognition.[100] According to Fraser, social justice must be approached, in the first instance, by the realisation that injustices and unrecognition continue to prevail in all the world's cities and regions. Social justice is a quest for the redistribution of socioeconomic resources (the politics of distribution) and the recognition of difference (the politics of recognition).[101]

The politics of redistribution assumes that the plight of socioeconomically marginalised people can be addressed through restructuring the economy and the subsequent redistribution of socioeconomic gains. The politics of recognition, on the other hand, is aimed at promoting the 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 the redistribution of socioeconomic resources and opportunities and the recognition of difference. Whereas redistribution's relevance rests on its emphasis on the promotion of equitable access to socioeconomic resources, recognition allows for an epistemological transcendence beyond the tyranny of global racial hierarchisation.

When read from a decolonial perspective, Fraser's view of social justice endeavours to dismantle global coloniality.[102] Global coloniality is framed by what Santos refers to as 'radical difference',[103] that is, the global hierarchisation in modern societies predicated on the privileging of male/heterosexual/patriarchal/sexist/Christian conceptions of being-in-the-world. Those people who fall outside these categories (LGBTQIA+, women, and people of colour, for instance) are *not recognised*, because they are labelled as 'dispensable and bare lives'.[104] Unrecognition, therefore, is intrinsically linked to 'dispensability', 'radical absence', 'nonexistence' and 'non/sub-humanity'.[105]

Fraser's theory 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 - in other words, laws and cities that allow for all urban inhabitants to have access to socioeconomic resources as well as recognition. Beyond the politics of distribution and recognition, Fraser's social justice framework dovetails with Harvey's concepts of the right to the city and the concept of spatial justice as advanced by various legal philosophers.[106]

Harvey presents social justice in the city as concerned with the evaluation of distribution of wealth, income, education, job opportunities and other related socioeconomic factors.[107] His attempt to 'spatialise' and/or add a 'territorial' aspect to social justice brings to the fore the significance of space (and territoriality) in the analysis of everyday sociospatial, economic and political dynamics in contemporary capitalist societies.[108]

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.[109] Following Lefebvre, Harvey identifies and provides an analysis of the socioeconomic injustices inherent in capitalist societies.[110] The right to the city, therefore, is 'a cry for help and sustenance by oppressed peoples in desperate times'.[111] 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*'.[112] This means that all of a city's inhabitants have the responsibility to submit ideas on, as well as make 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.

In agreement with 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, and social movements,

have appropriated the right to the city concept as a rallying cry for social justice, socioeconomic rights, spatial justice and an epistemological platform for imagining an ideal 'just city'.[113]

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'?*[114]

The right to the city, therefore, is a collective right, the roots of which 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.*[115]

Harvey compares these claims for the right to the city with other similar claims for collective rights, such as the 1960s Civil Rights Movement in which minority groups (such as women, people of

colour and gay people) challenged 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.*[116]

The right to the city concept thus provides a solid conceptual anchor that is 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 socioeconomically marginalised, are continually strained by deepening societal inequalities.[117]

Through the implementation of neoliberal legislation and policies in spatial planning, the capitalist lawscape has in some instances reinforced and/or produced sociospatial 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 vie for the realisation of their vision of city development. Thus, the right to the city may be viewed as a concept that can be appropriated not only by the urban poor but also by the middle and upper classes.[118]

In presenting the right to the city as a 'cry and a demand' for an ideal, just city, Harvey is equally cognisant of this concept's potential and limitations. He views the right to the city as 'an empty signifier full of immanent but not transcendent possibilities'.[119] In other words, it can be appropriated and utilised by various social actors who have a vested interest in the everyday sociospatial, economic, political and environmental factors that define a particular city. Depending on what the individuals and/

or collective who appropriate the concept require, the right to the city can be used for reformist and revolutionary purposes.

In the last couple of decades, 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 sociospatial processes that define them.[120] From a sociolegal perspective, for instance, Mitchell illuminates how the anti-homeless laws in the United States (US) perpetuate an exclusionary form of urbanism. Specifically, Mitchell highlights how San Francisco's 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'.[121] As these cities strive for global competitiveness, the rights of the homeless and the poor become severely limited and their actions gravely 'criminalised'. This criminalisation of poverty is performed through the application of stringent regulations and bylaws that govern the everyday use of private and public spaces, for instance. Regarding 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 States that those who have homes and jobs are willing to answer 'yes' to the first question and 'no' to the second.*[122]

Waldron's observation is not only confined to the US. Like the global capitalism that fuels it, the criminalisation of poverty, homelessness and informality has become global. Therefore, the urban poor's struggles for equitable redistribution of amenities and opportunities, as well as recognition of difference, have also become global. This is evinced by the urban poor's quest for the rearticulation and enactment of the right to the city, including legal rights.

## (Il)legal Rights in an Illegitimate 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.[123] 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 socioeconomic rights and urban citizenship make 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 to balance the claims made as part of the right to the city. Indeed, legal rights may seem to be relatively restrictive because they are there to maintain 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. In Pieterse's opinion:

> *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 – physically, politically, socially and in the imagination – in ways that promote dignity, tolerance, participation, diversity and human flourishing.*[124]

In post-1994 South Africa, legal rights are entrenched in the Constitution of 1996 and therefore dovetail considerably with the claims for the right to the city. The Constitution of 1996 also guarantees the justiciability of socioeconomic rights – that is, the rights to access water, housing, healthcare services and education, as well as constitutional guarantees of a substantive right to equality.[125] These justiciable rights can contribute to the fostering of spatial justice because they give people legal avenues through which to demand a change in the lawscape. The balancing (and disciplining) of the right to the city with justiciable legal

rights 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 used by urban inhabitants to claim legal rights and the right to the city is rights-based litigation, which enables urban citizens from disparate social classes to seek relief through the courts. Although 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 'polycentric' legal rights and other related socioeconomic claims to the city.[126]

## Reflections

This chapter illustrated how the 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 and competing claims from the city's inhabitants. The notion of lawscape, therefore, is important because 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 embodies power that can be used to create a particular lawscape. In this regard, law becomes instrumental in the process of sociospatial, economic and political relations. Moreover, the lawscape is constituted not only by legislation and policy but also by litigation. As various social actors engage with and navigate through the lawscape, their agency in appropriating the law as an instrument of realising specific socioeconomic, 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 the city while defining the city's sociospatial, political and economic milieu. For Harvey and Lefebvre, the right to the city is a cry and a demand, mostly from the poor who 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. This chapter also made the point that while the right to the city forms an integral part of the spatial turn in legal studies, there is a need for the right to the city to be reconciled with justiciable legal rights. This is because legal rights provide the legislative stability and predictability necessary for the realisation of spatial justice and inclusive democracy in cities.

As part of appreciating the formation of the contemporary lawscape, and claims to the city, a decolonial epistemic perspective was employed to unmask the 'dark side' of 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 divide contemporary cities and societies, between zones of being and zones of nonbeing. Thus, decolonial theory provides a critical lens that enables the appreciation of how law and planning can contribute to the imagining and realisation of a post-abyssal world, where the pursuit of common humanity and human rights is the norm and not the exception.[127]

# Two

# Mapping Spatial In/Difference

## Introduction: Cartographies of Radical Difference

> *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.*[128]

> *Segregation was a phase, the highest stage, in the evolution of white supremacy.*[129]

This chapter provides a historical narrative of the intersection between law, specifically planning legislation, spatial planning practices and racial hierarchisation in the making of South Africa's colonial/apartheid cities. Drawing from the philosophical/analytic framework of lawscape detailed in Chapter one, it demonstrates that the colonial/apartheid project was predicated, and hinged, on a complex body of legislation and spatial planning practices that produced geographies of gross sociospatial and economic inequalities. From the mid-seventeenth century onwards, the formulation and subsequent implementation of various pieces of legislation resulted in the 'compartmentalisation' of space[130] primarily on racial lines, leading to the production of racially segregated and spatially fractured South African cities.[131]

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 and spatial justice. Guiding this discussion are the following questions: Who had the right to the colonial/apartheid city? To what extent did the colonial/apartheid urban law shape South Africa's sociospatial form as well as the everyday

societal interactions within it? Throughout this chapter, the concepts of the lawscape, the right to the city and modernity/coloniality are the bedrock for the discussion of issues of access to, as well as belonging in, the colonial/apartheid city.

This chapter therefore periodises some of the key historical events and laws that had a bearing on the making of contemporary South African cities. First, it provides an outline of the production of the colonial lawscape, focusing on the colonial encounter between 1652 and 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. To begin with, early cities were built for white people and as spaces inhabited fully only by them. Black people (meaning all 'non-white' people) were 'planned out' of the cities because 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 hostels.

Thereafter, the discussion focuses on the evolution of South African cities from 1910 to 1947, that is, during the Union years. During this time, South African cities grew in population size, as well as economic and infrastructural sophistication. It was also in this era that laws regulating lives in cities were enacted for the first time, amongst them the law that actively enforced racial segregation.

The chapter then outlines the apartheid laws and related spatial planning practices that unfolded from 1948 right through to 1978 (early apartheid). It was in this period that the urban, colonial, sociospatial 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, from 1979 to 1993. This era is important for the understanding of the transformation of the South African lawscape for a number of reasons. Primarily, it was in this epoch that various apartheid laws were repealed, thereby creating space for the reimagining of a post-apartheid society.

## Death by Zoning

Although 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 were instances where these noble professions were used in the service of realising spatial fragmentation. In other words, there is evidence at a global level which suggests that law and planning contributed in varying degrees to spatial segregation.[132] In those unfortunate instances, the application of legal 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 sociospatial, economic and political engineering in the colonies resulted in the creation of racially segregated cities and regions.[133] From the seventeenth century onwards, therefore, racial segregation became simultaneously, 'a conscious policy, a process (by definition never completed), a system and an ideology'.[134]

Colin Bundy 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.[135] Consequently, 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 outcome was often accompanied by genocidal violence, spatial fragmentation and the subsequent radicalisation of racial, class, gender and ethnic differences.

It is therefore less surprising that, in most Western countries, segregationist strategies were often used to marginalise minority communities. The spatial structure of cities in Western countries still reflects the deliberate ghettoisation of black and Hispanic minority groups, for example. However, in most colonies of the Global South, it was through colonialism and other related systems of oppression that racial segregation was practised.[136]

In the making of colonial cities in South Africa, racism justified racial hierarchisation and sociospatial segregation.[137] John W. Cell points out how from the seventeenth 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'.[138] Colonial South African cities were therefore 'cut in two' between the zones of being and the zones of nonbeing.[139] What was also apparent in colonial urban South Africa was that the ideology of segregation permeated beyond the spatial separation of population groups. Its impact also shaped the realms of political, social, economic and psychological life. As Cell asserts:

> *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.*[140]

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'.[141]

These forms of exclusion defined colonial and apartheid South Africa. In such a racially segregated society, the dominant white group's monopoly over the political institutions of the state – and the technologies of control, such as planning law – formed an integral part of sociospatial ordering.[142] The dominant group also had a strong hold over armed forces and the organs of the

state responsible for the promulgation and enforcement of laws aimed at promoting racial segregation.

Since legal and spatial planning are predominantly state-led processes and practices, these instruments were used to serve the ideological interest of the state.[143] So, from the mid-eighteenth century to the mid-1980s, South Africa witnessed radical sociospatial and economic engineering, predicated on a racialised application of a complex body of planning legislation and practices.[144] Because 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 epoch, the law was applied to discipline and control the subjugated black majority while keeping the dominant white groups in check.[145]

In explaining the influence of state power regarding segregation, Cell highlights how segregation was sometimes 'carried out under the façade of constitutionality'.[146] 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'.[147] 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.[148] 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, however, it established, maintained and perpetuated varied conditions of perpetual nervousness and precarity.

There were also moments in history when the legal and planning practices' modernist, technical preoccupation with law and order was unfortunately captured and used for establishing racial segregation. In such unfortunate moments of

fatal imagination, the racist state would employ its bureaucratic machinery, and brute force administered by the police and/or the army, to carry out its divisive policies. 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.[149]

> *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.*[150]

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.[151] Because the law dictates what is legal and what is illegal, when misappropriated, its use in the service of racial segregation results 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.[152]

## Differentiated in Law

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.[153] 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, delineated by the arrival of Jan van Riebeeck in 1652 until just after the formation of the Union in 1910.[154] The second phase was marked by the promulgation of the Natives Land Act 27 of 1913 and the Natives (Urban Areas) Act 21 of 1923. Whereas the former Act ushered in the beginning of the accumulation of native land by settlers through dispossession, the

latter 'marked the beginning of the conscious nationwide pursuit of urban segregation'.[155] The third phase was the apartheid era that began with the ascendance of the National Party into power in 1948, and lasted until its decline and demise from the late 1970s to 1993. Throughout this era, a plethora of legislation was 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.*[156]

In the context of Lemon's periodisation 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 selected key legislation that played an integral part in shaping the contemporary South African lawscape.

## Pre-Union Years – 1652 to 1909

The arrival of Jan van Riebeeck and the Dutch East India Company in 1652 is not only of historical significance but is also at the root of racial segregation in the land that was later to be called South Africa. From the outset, the colonial encounter between Van Riebeeck, the Dutch East India Company and the local African people was 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'.[157] Using race and racial hierarchisation as a sociospatial, political and economic organising principle, European settlers went on to subjugate the native populations in South Africa.[158] It is this colonial subjugation and dehumanisation

of Indigenous peoples in early South Africa that laid the path for the segregationist systems of colonialism and apartheid.

In fact, the colonial wars that characterised the colonial encounter resulted from the gradual displacement of native African people and 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'.[159]

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

> *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 Strangers' Location if not housed by their employers or owning their own property.*[160]

The creation of the 'Native Strangers' land in mid-nineteenth-century Port Elizabeth also stemmed from 'a colonial expression of the idea [...] that black people were essentially aliens in urban areas'.[161] This period witnessed, too, the creation of locations and 'Native Villages' for black and coloured people in East London, Cradock, Graaff-Reinet and Grahamstown.[162] In the late nineteenth century, cities in the Boer republics of Transvaal and Orange Free State are said to have been practising what might be termed loose forms of urban segregation.[163] Similarly, African and Indian locations were 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.*[164]

Anti-Indian sentiments expressed by some members of the white population in Durban resulted in the residential segregation of Indian people in the late 1870s.[165] Cape Town was not spared from racial segregation. The existence of coloured, African and other population groups at the heart of this expanding colonial settlement raised alarm for white settlers who considered that other races posed a health threat.

The colonial encounter that unfolded from the mid-seventeenth 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 African people who were forced to form part of the emergent capitalist system as landless labourers.[166] 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.*[167]

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 sociospatial, economic and political relations, the effects of which were to be felt long after the demise of the colonial/apartheid project.

## The Dis/Union Years - 1910 to 1947

The years following the formation of the Union of South Africa in 1910 were characterised by the consolidation of white power and the subsequent crystallisation of racial segregation.[168] 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 and exploited black people with greater vigour than any other government that had preceded it.*[169]

These 'racist laws' enacted during the Union years also fundamentally shaped 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 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 stipulated the following:

> *(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:*
>
> *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*
>
> *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'. In addition, the commission was to decide on the 'areas within which persons other than natives shall not be permitted to acquire or hire land or interests in land'[170]. The Act therefore became a solid legislative tool that not only fractured South African society along racial lines but also dictated the sociospatial and economic landscape that was to define South Africa cities and regions for centuries to come. The Act's reach and impact 'raises important questions about the relationship between law and social process, and the extent to which legislation causes or reflects social change'.[171] As Beinart and Delius recently observed, the Natives Land Act was an example of 'the segregationist and racist legislation that fixed discriminatory foundations in South African law'.[172]

Land dispossession had already taken place between the seventeenth and nineteenth centuries in South Africa, but the Natives Land Act officially recognised and entrenched racially skewed land-ownership patterns.[173] It recommended that only 7 to 8 per cent of the Union of South Africa's land be set aside as African reserves; this number was increased to 11.7 per cent in 1936. One of the most detrimental effects of the Act was that it restricted African people from buying or leasing land outside reserves from people who were not African people. 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'.[174] Most of the land in these reserves was arid and not suitable for either cropping or human habitation. Thompson observes that as the population of African people 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.*[175]

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 per cent of the country that the Land Acts set aside for white ownership'.[176]

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 the 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.*[177]

The sociospatial 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 African people, 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.[178]

Apart from the Natives Land Act, early legislation was brought into being that served as anti-slum and anti-crowding planning instruments. This 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 for local authorities to deal with the prevention and suppression of communicable diseases in emerging colonial industrial cities.[179]

The Public Health Act also reflected town planning principles that sought to prevent the proliferation of slums and

other sociospatial and political 'nuisances' related to slum-dwellings. For instance,

> *[it] 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.*[180]

The Act further gave local authorities the power to perform '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'.[181] This was an attempt to not only avoid the spread of diseases but also prevent overcrowding.

The Public Health Act's objectives of maintaining hygienic urban spaces, although seemingly rational from a town planning perspective, were influenced by the colonial thinking of the time that racialised disease. Maylam observes how this Act contributed to a 'sanitation syndrome' discourse, since 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'.[182] 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'.[183]

Moreover, some urban historians observe that the Public Health Act, and the Public Housing Act, played an instrumental role in tackling the looming social, economic and political challenges posed by the growing, poor, white working 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 where standards of living were 'respectable'.[184] 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 and job reservations for the growing white population. Whereas this legislation empowered

white people in early 1920s South African cities through colonial planning and other related welfare programmes, black population groups were '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.*

Although 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 the state was able to plan for white populations and craft a 'unified white identity' that was critical for the survival of this minority group in South Africa.[185] Moreover, this legislation played a role in discouraging the formation of a multiracial working-class consciousness that would have emerged as a result of both black and white populations living together in slums. So, racial segregation through legislation was also important for cementing the racial capitalism that was taking root in various industrial towns of South Africa.

The overtly racist Natives (Urban Areas) Act 21 of 1923 (Urban Areas Act) was promulgated to curb and regulate the urbanisation of African people in towns and cities.[186] African peoples' 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 these objectives, the 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.*[187]

The 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'.[188] Although 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 because it set the principles and guidelines for racial zoning. The Act's insistence on the extension and/or creation of locations on 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 the 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 in locations, native villages and native hostels only, 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.[189] In establishing these proclaimed areas (locations, native villages and native hostels), the state was also able to enforce stringent surveillance and control mechanisms over black lives, primarily through law and planning.[190]

The economic consequences of the Urban Areas Act were as dire as its regulation of urbanisation, housing and mobility of African people in urban areas. One example of the negative economic effects of this Act was 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 position of native locations on the outskirts of urban areas and the curtailment of meaningful socioeconomic development created unequal economies between these locations and the white urban areas.[191]

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 the right to carry out forced removals of 'black tribes' from the land they occupied.[192] 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.*[193]

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' – pockets of land inhabited by black citizens 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 African 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 prohibited black people from buying land from white people, 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 who could not be absorbed by the existing job market were expelled from the cities to the native reserves.

The primary objective of this legislation was to create racially segregated white residential areas that could both attract and retain European migrants who 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 white people and multiracial slums were cleared for the establishment of respectable white neighbourhoods. The Union had to prioritise the poor white people issue as a way of curtailing a multiracial working-class/poor political consciousness. Such a unity would have threatened not only the unity of white people within a fragile Union, it also could have resulted in the breakdown of the very foundations of racial capitalism, an economic system that was heavily depended on cheap, exploitable labour and racially segregated sociospatial and political ordering.[194] The law, and planning, was instrumental in creating this racially stratified sociospatial 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.*[195]

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

Thus, from the outset, South African colonial cities were envisaged as racial cities and sociospatial and economic injustices were entrenched. While the white residences and areas of work and play assumed and/or aspired towards European city development and planning, black areas morphed into dormitory zones for housing cheap labour.[196]

## The Early Apartheid Years - 1948 to 1978

The ascendency of the apartheid regime in 1948 and the subsequent consolidation of Afrikaner nationalism also intensified colonial racial segregation. Throughout the apartheid era, a host of racial laws with a divisive spatial effect were promulgated and implemented with varying degrees of success.[197] In fact, the main objectives of the apartheid laws were to cement racial segregation, as was envisioned in the National Party's manifesto, which 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.*[198]

The Group Areas Act 41 of 1950 in particular had 'more far-reaching effects than any previous legislation on racial segregation'.[199] 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, Indian and African people. 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'.[200]

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, and involved reshuffling people to their group areas. Because group areas were racially defined, the racial hierarchisation that characterised the colonial cities meant that the provision of social amenities and economic opportunities was to be unequal, with white groups being favoured.[201] 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.*[202]

The principle of race-zoning that supported the Group Areas Act and other related legislation denied the forging of a shared South African identity.[203] 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 by race zoning is immeasurable'.[204] The Group Areas Act, therefore, was one of the laws that consolidated the segregationist legislation that existed in urban South Africa from the late nineteenth century.

The Prevention of Illegal Squatting Act 52 of 1951 formed part of 'a co-ordinated legislative framework'[205] aimed at stemming the urbanisation (or influx) of black people to white urban areas. The Act therefore strived to ensure that no person shall:

> *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;*
>
> *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.*[206]

As part of enforcing its implementation, punitive mechanisms were included in the Prevention of Illegal Squatting Act for those persons who contravened its racial segregatory objectives.[207]

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 public premises and vehicles or portions thereof for the exclusive use of persons of a particular race or class'.[208] The Act specified that public premises included 'any land, enclosure, building, structure, hall, room, office or 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'.[209] This meant that any person of any racial 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 the possibilities of creating a shared South African identity.

During apartheid, district-specific laws were passed at national level, notably 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 [...].*[210]

Although the Natives Resettlement Act was promulgated specifically for Johannesburg, it reflected the dominant separatist logic of apartheid and its brutal effects on South Africa's sociospatial and economic milieu as a whole.

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

> *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.*[211]

The apartheid state also established a highly effective bureaucratic machinery, the primary purpose of which 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 applied in Bantu residential areas only and were aimed at controlling the urbanisation and settlement of black people in urban areas.[212] The regulations further limited the spatial and socioeconomic mobility of black people.[213]

## Apartheid's Dying Years - 1978 to 1993

Despite the effort by the apartheid state to create an effectively segregated South African society, a number of social, economic and political forces 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 unsuccessful. Despite the regulation of their movement, African people 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, and the costs associated with forced removals, all began to take a toll on the apartheid economy from the late 1970s onwards.[214]

Apart from the fact that 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'[215] that they faced every day, townships such as Soweto were becoming more 'ungovernable' from 1976 onwards, posing a threat to the apartheid regime.[216] The political consciousness in black townships in the mid-1970s was also bolstered by the intensification of various anticolonial struggles across the Southern African region. Moreover, the pressing economic hardships resulting from poor

wages and 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 decline and demise of apartheid from the late 1980s. The idea of creating self-sustained homelands/Bantustans had also failed - these reservoirs of cheap black labour lacked any political legitimacy and any meaningful economic base. All these factors resulted in the National Party experimenting with various legislative and policy reforms as part of its 'last stand'.[217]

From 1978 onwards, the apartheid state devised a 'programmatic reform strategy' that formed part of a broader Total National Strategy.[218] At its centre was an attempt to improve the subordinate socioeconomic 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; that black trade unions be granted full recognition; that the job reservations policy be phased out; and the maintenance of segregated facilities be waived.[219] These recommendations were captured in the Twelve-Point Plan that formed the blueprint for the reform of apartheid from 1979 to 1986. Some of the points outlined in the blueprint of apartheid reform included:

> *Recognition and acceptance of the existence of multinationalism and of minorities in the Republic of South Africa.*
>
> *The acceptance of vertical differentiation with built-in principle of self-determination at as many levels as possible.*
>
> *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.*
>
> *The division of powers amongst South African white people. The South African coloured people and the South African Indian people, with a system of consultation and co-responsibility so far as common interests are concerned.*
>
> *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.*

*The removal of hurtful, unnecessary discriminatory measures.*

*The recognition of economic interdependence and the properly planned utilisation of manpower.*[220]

Although the remaining five points deal with apartheid South Africa's foreign policy, the points listed above were 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 sociospatial, economic and political set-up while also trying to appease the black majority by promising minor reforms in urban policy, as set out in points 6 and 7. The Twelve-Point Plan, therefore, was a betrayal of the shift in the political project of segregation. Faced with the inevitability of multiracialism and the imminent demise of apartheid, the apartheid state attempted to shift its governance strategy towards a 'separate but equal' approach.

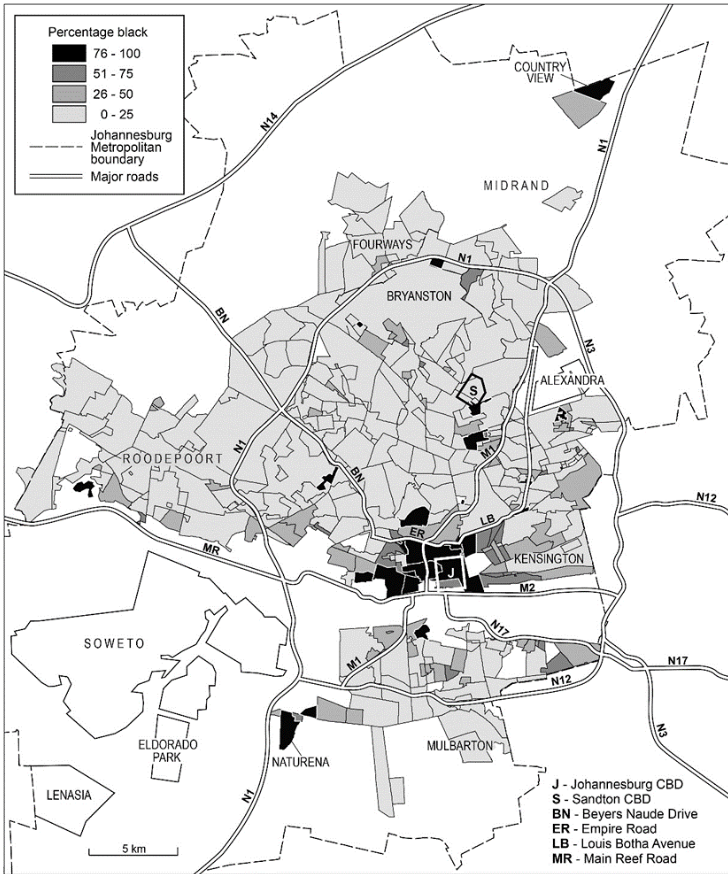
Following these reform-oriented points, the state repealed a number of laws. In 1986, it withdrew the Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 (this compelled all African people above the age of 16 years to carry 'reference books', or passbooks) and the Prohibition of Mixed Marriages Act 55 of 1949. The Separate Amenities Act 49 of 1953 was repealed in 1990, the Bantu Education Act 47 of 1953 and the Group Areas Act in 1991, and the Bantu Homelands Citizenship Act 26 of 1970 (which regarded all African people as citizens of homelands, and thus 'aliens' in South Africa) in 1994.[221]

At the same time, the apartheid state passed other reform-oriented legislation that guided the governing of black township properties. This included 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',[222] for instance, attests to the continued logic of apartheid, where black community 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, the subsequent repeal of some laws and the introduction of softer reform policies on black urbanisation, were all an attempt by the apartheid state to dig in and maintain the sociospatial and economic status quo. The efforts to improve black townships and to develop them economically while giving black people rights were 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 venture into white neighbourhoods. These reforms did not succeed in turning the democratisation tide that was sweeping through South Africa and the rest of the African continent.

Following the repeal 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 came 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 outward sprawl, as white capital and residents decentralised away from decaying inner cities.[223]




**Map 1**: The location of black residents in formerly whites-only neighbourhoods of Johannesburg, 1996.

Despite these social issues and their spatial consequences, the demise of apartheid marked the beginning of a new era for South Africa. Just as law and planning had created a racial lawscape, these instruments were to be used to redeem racial cities by transforming them into inclusive urban spaces characterised by human rights for all and spatial justice. Indeed, as the spectre of apartheid was losing grip, instances occurred where law and litigation were beginning to play an integral role in resisting the racial lawscape.[224]

## Reflections

This chapter outlined the processes that supported the making of the colonial/apartheid lawscape. In South Africa, it became apparent that the colonial logic of city-making was deeply steeped in and informed by racial difference. Whereas the colonial state's project of racial segregation was loosely administered between the seventeenth and the late nineteenth centuries, it became more elaborate from the twentieth century onwards with the promulgation of racially determined segregationist laws. Unlike the earlier sanitation syndrome and the subsequent forced removals that were used to justify racial segregation in the name of hygiene and town planning, urban South Africa in the mid-1920s 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. Although 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 the 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.*[225]

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.

# Three

# A Racial City Imagined

## Introduction: Spatial Violence

> *[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.*[226]

This chapter outlines some of the effects that colonial/apartheid laws and spatial planning practices had on the making of Johannesburg. It argues that the lawscape of colonial/apartheid Johannesburg radically shaped a complex interaction between race, space and difference. As this nascent city was taking shape in the late nineteenth century, after the discovery of goldfields in the Witwatersrand region (the Rand), its early foundations were predicated, in the main, on the beginnings of racial capitalism, 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 racialised economic system was dependent on the exploitation of cheap African labour to work in the mines and industries. However, the segregationist ideas of the time attempted to spatially separate that source of labour (black people) and their townships from the mines and factories where their labour was needed.[227] This was perpetuated by the Stallardist myth that African people in particular were perceived to be temporary sojourners in colonial/apartheid Johannesburg. It is in these socioeconomic and spatial complexities and paradoxes that Johannesburg's sociospatial order was forged. As Maylam 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.*[228]

Against this backdrop, this chapter argues that there were at least three sociospatial and economic forces that had a bearing on the making of Johannesburg as a 'racial city'.[229] One was the emergence of racial capitalism with the discovery of gold on the Witwatersrand, and the subsequent industrial revolution that shaped Johannesburg's urban form, as well as sociospatial relations between (and within) disparate racial groups. Second, there was the colonial/apartheid state's obsession with the 'poor white question' and the 'native question', which resulted in the intensification of residential segregation and the use of racialised legal and spatial planning instruments. That is, legislated racial zoning became an instrument for sociospatial engineering and urban governance.[230] Third, 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.[231]

An examination of the unfolding of the Johannesburg lawscape from the late nineteenth century to the present also allows for the foregrounding of discussions on issues of identity-formation and access to socioeconomic rights in South African cities. Put differently, the pervasive nature of lawscape in colonial/apartheid Johannesburg simultaneously produced and shaped everyday social, economic and political interactions within and between different population groups.

## Law and Racial Capitalism

Johannesburg's history is dominated by the gold-mining industry, the subsequent emergence of racial capitalism and its effect on the city's sociospatial order. 'Racial capitalism [is] the process of deriving social and economic value from the racial identity of another person.'[232] From its proclamation as a mining town in 1886, Johannesburg experimented with diverse legislation

and development strategies that had a bearing on race relations, labour relations and other related factors inherent in the emergent capitalist system.[233]

From the outset, the application of loose, and yet detrimental, forms of racial segregation on the mines had a major influence on the spatial configuration of Johannesburg.[234] Innes notes that the discovery and extraction of gold in Johannesburg was spatially 'formative' because 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'.[235]

The capitalist relations of production in early Johannesburg were predicated on the emphasis on racial differentiation. This meant that black and white mineworkers were treated differently, with the latter enjoying preferential treatment through the employment of 'civilised labour' policies.[236] Black mineworkers, 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 black and white workers in early twentieth-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.*[237]

These wage disparities attest to the manner in which the colour line[238] was entrenched in Johannesburg mines. While the mine owners were boasting 'a weekly output of £750 000 worth of raw gold'[239] from Johannesburg alone, both white and black mineworkers were developing lung diseases, such as phthisis and pneumonia. So, the form of capitalism that emerged in late nineteenth-century Johannesburg was both class- and race-

based.[240] This is evinced by the introduction of laws aimed at reinforcing the colour bar on the 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'.[241]

The African mineworker of late nineteenth-century Johannesburg was therefore 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.[242] While the law provided a structure for the coercion of African mineworkers, the planning policy of racial zoning saw the realisation of segregated residential areas, with black mineworkers packed and crowded into single-sex barracks and/or compounds.[243]

First introduced in Kimberley to house workers on the diamond mine, the system of single-sex compounds was refined on the gold mines of the Witwatersrand.[244] The living conditions there were appalling and dehumanising. Some urban historians credit the prevalence of the migrant labour system and the subsequent fracturing of African family structure in South Africa to the introduction of single-sex compounds. 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.[245]

African mineworkers' lives in hostels were also regulated by a plethora of legislation.[246] 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 on the mines) 'against breach of contract by African people, which was made a criminal offence'.[247] As a result, the Act saw the appointment of Native Labour Inspectors, whose responsibilities included the policing of African mineworkers in Johannesburg.[248]

Thus, the mining industry and other related sectors, such as manufacturing, led to 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 twentieth 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 sociospatial engineering'.[249]

## Colonial Johannesburg 1886 to 1947

The emergence of Johannesburg as a mining town in 1886 was complex. Between 1886 and 1899, the town was controlled by three different administrations whose vision of its development was yet to be fully imagined and realised. Moreover, the outbreak of the South African War between 1899 and 1902 interrupted the administrative trajectory of the town. When Johannesburg's first town council was installed in 1901, it encountered various administrative, financial and socioeconomic challenges that were to fundamentally shape the town's future. For one, its administrative capacity was constrained and the development of urban infrastructure was slow. This was compounded by the dire financial straits that the town faced as a result of the unpredictability of the mining sector.

Furthermore, people had been flooding in from various parts of the country and the world to take part in the gold rush.[250] Early Johannesburg's rapidly expanding population resulted in a shortage of affordable accommodation, particularly for poor white and black workers. Consequently, in the 1890s, the town was characterised by 'insanitary areas, slum conditions and a lack of appropriate accommodation' inhabited by workers of all races.[251] Because most of these workers were employed in the mines located in the town, they were compelled to reside in areas adjacent to work. Thus, various working-class neighbourhoods emerged. These included Marshalltown south of the city, Ferreirastown on the western side of the city, Fordsburg to the west, and Brickfields (Burghersdorp) and Vrededorp, near Braamfontein, which was a predominantly Afrikaner neighbourhood.[252] Lis Lange observes how the character of these early Johannesburg neighbourhoods was influenced by the type and price of accommodation, proximity to work and 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 – created a space where classes, races and nationalities could mix, colonial bourgeoisie with the popular classes, Boer with Briton, and whites with blacks.*[253]

A factor that also had an influence on the sociospatial character of Johannesburg in its formative years was land-ownership patterns. The economic influence of the mine owners allowed them to purchase and own most of the land where these new neighbourhoods were located. As landowners they engaged in land speculation, resulting in accommodation being expensive for poorly paid workers. The influence that the mine owners and the Chamber of Mines had on land and related taxes limited the town council's powers to intervene in the provision of affordable housing for the poor and the working class.[254]

Although most of Johannesburg's early neighbourhoods were multiracial in character, the dominance of segregationist ideologies and the sanitation syndrome that had taken root in Britain and some parts of Europe in the eighteenth to nineteenth centuries was read and interpreted through racially jaundiced eyes. In other words, the housing scarcity and the poor white peoples' 'condition' was understood 'in the context of a colonial society where racial hierarchy constituted the basis for political and social domination'.[255]

This colonial logic infused 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, Marshalltown and Vrededorp were posing a health hazard.[256] However, the racialisation of diseases and other related social ills (the assumption that diseases were prevalent in these slums as a result of racial mixing) demonstrated the dominance of racist thinking that emanated from Social Darwinism.[257]

As the Johannesburg Town Council was dealing with the slum conditions through slum- and 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 infuse these noble development initiatives. By the mid-1920s, the Public Health and Public Housing Acts set in motion the process of removing both white and 'non-white' people from the slums. The former were moved to council-subsidised houses built on well-located land, whereas the latter were relocated to racially designated locations on the outskirts of what by then had become a city.[258]

What also shaped Johannesburg's sociospatial milieu from 1907 to 1922 was the growth of the white working class, which only added to the housing shortage, a solution to which seemed to elude the city's administrators. This was evinced by a series of commissions of enquiry set up in this era to deal with white poverty, in general, and the white working class without adequate housing, in particular.[259] Concerned about the insanitary conditions that most poor white people 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'.*[260]

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',[261] for example, the Johannesburg City Council designed a battery of segregationist laws that divided Johannesburg decidedly on racial lines. Racial zoning meant that the colonial state and the Johannesburg local authorities could legally control African urbanisation through law, while at the same time creating locations for natives. The Stallard Commission of 1921 provided a

solid reference point for the application of racial zoning and the position of African people in the 'white city' of Johannesburg.[262] One of the Commission's recommendations was that:

> *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 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.*[263]

The influence of 'Stallardism'[264] in the Johannesburg City 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 African people to the newly created south-western native locations of Klipspruit and Orlando, from 1904 onwards.[265]

As outlined in the previous chapter, 'sanitation syndrome' justified the Johannesburg City Council's involvement in the clearance of slums and the subsequent forced removal of people from slums to areas on the outskirts of the city. As early as 1901, this 'hygienist' agenda of 'sanitising' urban spaces, as embedded in and realised through the application of public health law, resulted in the clearance of slums such as the Coolie Location and Kaffir Location, which were viewed by the City Council as seedbeds for disease, crime and other undesirable activities and immoral practices.[266] The outbreak of plague in Coolie Location confirmed the need for the city's segregationist policy and was followed by the forced removals of poor white, Indian, coloured and African people 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.*[267]

The forced removals that commenced in the early twentieth 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 were 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 the black population group was taking place, the state facilitated the urbanisation of white population groups in the northern and eastern parts of the city.[268]

Moreover, after the South African War, new residential areas were built for some poor white people, particularly Afrikaners, who were moving in large numbers from rural areas to towns.[269] From a socioeconomic rights perspective, the white areas benefited tremendously from the investments made by the Johannesburg City Council in physical infrastructure and basic services.[270] 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.*[271]

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 was the direct result of the colonial state's commitment to uplifting poor white people.[272] This meant that poor white people were strategically located in Johannesburg, with access to better amenities and services. Furthermore, the entrenchment of Stallardism and its prioritisation of a radical difference between racial groups saw the

fracturing of Johannesburg's spatial form and of everyday social, economic and political relations.

From the early 1920s onwards, the colonial state and the Johannesburg City Council increased efforts to regulate and enforce residential segregation.[273] As discussed in the previous chapter, various legislation, such as the Natives (Urban Areas) Act of 1923, was put in place to simultaneously provide some form of housing for African people while at the same time curbing their 'influx' and permanent habitation in white cities. The idea of building racially segregated residential estates in the 1920s was not new. As indicated later in this chapter, the forced removals and subsequent building of native townships south-west of the city, such as Soweto[274] from 1904, was also informed by the logic of racial segregation.

This practice of racial zoning in Johannesburg penetrated the private housing market, too. Beavon observes how, in the late nineteenth century, private property developers in the Witwatersrand area inserted 'racial exclusion clauses in suburban property title deeds'.[275] 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 than the domestic servants of the registered owner or his tenant reside on this erf on in any other manner occupy the same.*[276]

These practices were intensified by the promulgation of the Native (Urban Areas) Act of 1923, its amendment in 1930 and the Slums Act of 1934, discussed in the previous chapter. The Urban Areas Act was one of the key legal instruments that cemented residential segregation in colonial Johannesburg.[277] It gave local authorities the responsibility of providing segregated areas for African residence.[278] As a means of raising revenue for establishing

black locations, local authorities were mandated to establish Native Advisory Boards and a Native Revenue Account.[279] The Act was used by the Johannesburg City Council to remove what were dubbed 'surplus persons'[280] (the unemployed and, thus, the undesirable) from the area under its jurisdiction – an agenda that most of its white residents had been tabling since 1913.

Although the Urban Areas Act was set on fragmenting Johannesburg along racial lines, one of its provisions – that alternative accommodation be found prior to the removal of persons – presented a challenge for the Council. The number of African people in Johannesburg surpassed the number of houses the Council could provide. With the amendment of the Act in 1930, however, the Johannesburg City Council was able to continue with its nefarious project of forced removals without the burden of providing alternative accommodation.

The Slums Act of 1934 was also one of the legal instruments that enabled the Johannesburg City Council to realise its project of racial zoning.[281] Although this Act was designed for the clearance of slums in Johannesburg, it was appropriated and used for advancing residential segregation. By evoking this Act, the city was able to rezone some properties from residential to commercial, thus being legally justified in 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.[282] In most instances, physical buffers such as industries, as well as, in later years, freeways were established to separate black townships such as Soweto and Alexandra from white neighbourhoods.[283]

Commenting on the spatial location of black locations in Johannesburg, Maylam observes how the 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'.[284] 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 to the provision of socioeconomic rights.[285]

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.[286] However, this colonial lawscape set a solid framework for the intensification of racial sociospatial engineering that was to be realised with the ascendance of the National Party and its apartheid laws from 1948 onwards.

## The 'High-Apartheid' Years, 1948 to 1978

With the National Party assuming power in 1948, the segregatory roles of the legal and urban planning instruments were refined and intensified. At the heart of the apartheid regime was an attempt to give shape to the Stallard Commission recommendation that black people were to be perceived as temporary sojourners in white Johannesburg. As a result, there was an increase in the enforcement of pass laws and in the expansion of townships for African, coloured and Indian people, all with the aim of controlling the urbanisation of African people.[287]

As discussed in the previous chapter, one of the most notorious pieces of legislation designed for urban apartheid was the Group Areas Act of 1950. Using the racial categories outlined in the Population Registration Act 30 of 1950 (white, coloured, Indian and African), the Group Areas Act strived for a comprehensive urban segregation.[288] The effects of the Act in Johannesburg were dire, even for coloured and Indian population groups who hitherto had been relatively shielded from the effects of the Urban Areas Act of 1923. As Mabin postulates:

> *[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.*[289]

The 'problems and pains' unleashed by the Group Areas Act in Johannesburg included 'social dislocation, division of families and the constant process of reclassification'.[290]

Because 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 (residential and commercial) and the application of urban and regional planning principles and practices to achieve apartheid's separatist ideology. Mabin and Smit observe that, from the 1950s onwards, planning for racial zoning and the application of general urban planning practices became entangled. So, urban planning's principal quest for efficiency and order was 'captured' in the service of racial segregation.[291]

Regarding the effects of the Group Areas Act on property rights, 'non-white' people who 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 for poor white people. Moreover, as part of the apartheid state's project of comprehensive residential segregation, the Group Areas Act intensified the destruction of racially mixed settlements, referred to as 'grey areas' and/or 'black spots'.[292] For apartheid town and regional planners, the Group Areas Act conflated the technical requirements demanded of the profession (such as effective land-use planning), with the state's demand for racial zoning.[293] 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.*[294]

These three objectives of the Group Areas Act made 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 reorganisation of the Black, Coloured and Asian areas [as] a feature of the policy of apartheid'.[295] Perhaps it is worth outlining some of the examples that depict the detrimental effects of the Group Areas Act, in fracturing Johannesburg's spatial form and perpetuating the social suffering of those affected by this legislation.

## Cosmopolitanism Deferred? A Brief Reflection on Sophiatown

The narratives on the rise and fall of Sophiatown continue to capture the attention of writers and social commentators.[296] Founded in 1905 by Herman Tobiansky, this township, which comprised 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 African, Asian and coloured people, could own property in Sophiatown.[297] This made Sophiatown, and its neighbouring townships of Newclare and the Western Native Township (collectively referred to as the Western Areas), a unique space, where possibilities for an emergent cosmopolitanism could take root.

Although the narrative of Sophiatown has revolved around its vibrant culture and multicultural nature, its existence amidst the Johannesburg of the early twentieth century meant that it was viewed with contempt, particularly by the state and some sections of the white community who had begun to buy into the Stallardist (segregationist) ideas of Johannesburg as a 'white city'. In fact, Knevel points out that, as early as 1907, about 99 of the 100 white residents of Sophiatown petitioned against selling land there to African and coloured people.[298] 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 by the state. Therefore, 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'.[299] 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'.[300] This neglect of Sophiatown also stemmed from the fact that it was associated with poor Afrikaners and other people of limited means, the so-called 'Kaffirs' and 'Coolies'.

Sophiatown's impoverished status relative to the leafy suburb of Parktown, for instance, was further compounded by a rise in crime, gangsterism and overcrowding as a result of mushrooming backyard shacks from the 1930s onwards. This eroded the 'respectability' aspirations of the minute black, coloured and Asian middle class who resided in Sophiatown.[301] In fact, these slum-like conditions led to the City Council's call (and that of a significant number of its white constituency, particularly the poor Afrikaners) for the relocation of African, Asian and coloured people from this township.[302] 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, because they would no longer have to compete with Asian and African people.

The 'anti-native' sentiments of the poor Afrikaners living in Sophiatown intensified from the 1940s onwards. Most importantly, the ascendency of the National Party into power in 1948 solidified this position on the removal of African, Asian and coloured people. Consequently, from 1955 onwards, the removal of populations from Sophiatown ensued. Most of the African people were forcibly relocated to Meadowlands, Soweto. Coloured people also faced the brunt of forced removals, thus finding

themselves displaced to Eldorado Park. The Indian people were relocated to Lenasia and the Chinese to central Johannesburg.[303]

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. The petition '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 were at odds with the policy of apartheid'.[304] After purchasing Meadowlands from the Johannesburg City 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.*[305]

> *By the close of 1960, at least 60 000 people had been removed from Sophiatown. In implementing this exercise, the apartheid central government and Johannesburg City Council allocated at least GBP 16 million to African housing between 1949 and 1955.*[306] *This financial commitment, as well as the use of brute force, demonstrates the state's resolve to realise its segregationist agenda.*

In effecting the forced removals from Sophiatown, the apartheid state used the proverbial carrot-and-stick approach, with anti-slum and Group Areas legislation being the stick, and the promise of better housing in Meadowlands and other similar native neighbourhoods in Soweto being the lure, particularly for poor tenants who were disgruntled at paying 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 permission for beer-brewing - appealed to most people living in Sophiatown, particularly poor tenants.[307]

**Image 1**: A photograph of forced removals in Sophiatown

Although the 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 who had been living in overcrowded conditions. As for the landlords (those who owned property in Sophiatown), forced removals meant the loss of property and other related income-generation avenues. It is no surprise, therefore, that it was property owners 'who offered the most stubborn resistance, until last'.[308] Some 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 poor white people. From the ashes of

Sophiatown, Triomf (meaning 'triumph') emerged. This new white settlement marked the triumph of Afrikaner nationalism and a manifestation of the colonial/apartheid project of racial zoning.

In removing African people from Sophiatown to Meadowlands and Diepkloof, the coloured people to Westbury and later Eldorado Park, and the Indian people to Lenasia, apartheid law and racial planning had triumphed. However, this also meant that the rich sociocultural vibrancy, as well as the crime and political activism that had defined Sophiatown, was to emerge in Soweto. As Goodhew posits; 'removals 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.[309]

## Bounded Spaces: The Making of Soweto and 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 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.[310]

This quote by Belinda Bozzoli encapsulates how the 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'[311] therefore cannot be extricated from the 'native question', that is, the colonial/apartheid state's preoccupation with regulating the influx of African people into the 'white

city'.[312] Although these black townships have disparate histories, their narratives dovetail in that they were both meant to serve as dormitory spaces for housing cheap African labour.

## Soweto

Soweto emerged as a result of the state's attempt to segregate Johannesburg through housing. By forcibly removing African people from the inner-city settlements and slums to the periphery of the city, the colonial/apartheid state was able to maintain some control over this source of labour. Soweto therefore became, in the main, a dormitory township and a reservoir of cheap labour to be used 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 nineteenth century onwards. Its genesis can be traced back to 1904, when African people were removed from the inner-city slum in the present-day Newtown area, after an outbreak of bubonic plague.[313] In responding to this outbreak (and also because of the 'sanitation syndrome' that was prevalent at the time), the Johannesburg City Council moved African people to the municipally owned farm of Klipspruit.[314] This settlement later became the nucleus of a massive African township, 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 African people could not be permanent residents in a 'white city'. Apart from the uncertain tenure faced by the African inhabitants, no town planning was implemented in 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 or building standards. Moreover, the location lacked social amenities and bulk infrastructure, such as water, electricity and sanitation.[315] Notwithstanding its precarious beginnings, Klipspruit (and its neighbouring location, Kliptown) marked the start of the 'planning out' of African and other 'non-white' people 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 African people forcibly removed from the inner city and 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 African people. This resulted in the formation of Orlando township in 1932. By the 1950s, Orlando had a population of more than 97 000 people, with no basic amenities and services. As Gorodnov observes, at that time, 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'.[316]

Relative to the white suburbs to the north, Orlando and other neighbourhoods that constitute Soweto were not established to support any meaningful economic activities but as dormitories, which cheap black labour would leave and return to at the end of the day. 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 'matchbox' houses made of relatively cheap material. However, given the rapid urbanisation of African people, the quantity of these houses was not adequate - and squatter camps mushroomed in Soweto.[317]

The apartheid central government also built single-sex hostels in Soweto, to house migrant workers, in areas such as Dube and Jabulani between 1950 and 1960.[318] 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 in townships pitted African people against each other. Resentment grew between hostel-dwellers and township residents, which later manifested as violent ethnic clashes in the 1980s. Such ethnic polarisation was also spatially mirrored in Soweto suburbs, which remain ethnically zoned to this day.[319]

*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 divided.*[320]

The Urban Areas Act also facilitated the economic marginalisation of the African population in Soweto by limiting the economic activities and businesses in the township. It prohibited African people from owning laundries, pharmacies, bookshops, drapers and outfitters until the late 1970s. Even lawyers and doctors were prohibited from operating from their homes.[321] This systematic marginalisation of African people from any meaningful participation in the economy had long-term consequences for township residents.

The creation of Soweto, therefore, was the 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 buying land for the development of African housing, to further its objective of realising spatial segregation. In this way, legal and planning instruments were employed as administrative strategies for controlling the natives, with housing playing an integral role.[322]

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.[323] 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 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 of 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.*[324]

The buffering of Soweto (and other black townships) rendered these spaces a Fanonian zone of nonbeing, that is, spaces of alterity where human beings were reduced to basic market-determined identities - i.e., cheap labour.[325]

Despite these efforts, 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 sociospatial and economic position. This was achieved through its position on the outskirts of the city and the dominance of the monotonous matchbox houses that still exist to this day. Moreover, given the dormitory status of this township, most Sowetans still continue to travel long distances to work in the formerly white Johannesburg. Efforts by the post-apartheid state to create a 'township economy' have proved to be futile, because the colonial/apartheid lawscape remains entrenched.

## Alexandra

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, 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.[326]

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.[327] The Urban Areas Act of 1923 saw a massive and rapid influx of people into Alexandra, who were being forcibly removed from Johannesburg's slums. This swarm of people led to 'inconceivable overcrowding' and the subsequent mushrooming of informal housing structures. The

dire conditions were compounded by the absence of electricity, sanitation and other related amenities.[328]

The uninhabitable conditions of Alex are well articulated by Bozzoli, who observes that although this township began with freehold rights, with relatively large yards, hyperurbanisation and the subsequent demand for housing, compelled landowners to build backyard shacks on their properties. This congestion was further compounded by the random erection of informal dwellings in and around formal housing. Early twentieth-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.*[329]

In the late 1970s, at least 75 000 people are said to have lived on 358 hectares of land, in about 4 000 houses, surrounded by a sea of shacks, flats and three hostels. The hellish conditions in this 'bounded space' were to contribute to the growing socioeconomic and political grievances that the residents of Alex held against the colonial/apartheid state.[330]

From the early 1950s onwards, as part of accomplishing the objectives of the Group Areas Act, and as a solution to decongest the township, the apartheid government embarked on a project to evict thousands of Alexandrans. Some were relocated to Soweto – further congesting that township. These removals, however, did not yield the expected results, because people in Alex were able to successfully mobilise against the state. Moreover, a range of influential political formations and social movements in this township resisted the state's efforts to raze Alex to the ground.[331]

As 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 and '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'.[332] This plan did not fully materialise, but it was indicative of the project of using segregationist laws and planning to control and subjugate African people.

Although Alex was not spatially located on the margins of the city, unlike Soweto, and was not razed to the ground, like Sophiatown, the colonial/apartheid lawscape ensured that it was socioeconomically and politically marginalised. Notwithstanding the material poverty of most of Alex's residents, this township became known as a symbol of political resistance against the colonial/apartheid state. Apart from once being the home of most anti-apartheid stalwarts (including Nelson Mandela and Walter Sisulu), Alex's ordinary residents engaged in various strategies and tactics to fight against the repressive system. These included bus boycotts and numerous resistances against forced removals.[333]

These shared experiences of everyday social suffering and resistance against the state's brutal laws all contributed to the forging of a common township sociopolitical identity that helped the residents of Alex to collectively rise against the state from the early 1980s onwards. It is also worth noting, in the case of Alexandra (and other townships inhabited by 'non-white' people), that the rudimentary planning that crammed people into small spaces created fertile ground for the emergence of new cultures and identities.[334]

## A Garden Township: The Making of Parktown and White Suburbia

Unlike the native townships, white suburbs were meticulously planned by the colonial/apartheid state. A glimpse of Parktown suggests that from the outset it was planned for the Randlords and other wealthy individuals who were benefiting from Johannesburg's industrialisation. Founded in 1893, this affluent suburb was meant to be a 'garden township' comprising one-acre plots.[335] The spatial location of Parktown was also planned in such

a manner that it shielded the wealthy from the noise and dust of 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.*[336]

Distancing themselves from the town, Johannesburg's wealthy class moved to Parktown, located 'high up on a plateau' with magnificent views that traced the 'undiluted hills and valleys as far as the Magaliesberg'.[337]

The lifestyle led by the mostly English-speaking Randlords in Parktown resembled that of the aristocrats of Europe. The creation of the garden township was made possible by the abundance of cheap labour. As Callinicos points out: 'Gardens burgeoned and blossomed, blessed by an abundance of cheap African labour. Small armies of blacks fetched soil and carried away rocks. Rows of young trees marked off the broad street frontages. Terraces, lawns, shrubberies and rose gardens were laid out'.[338]

Unlike Sophiatown, Soweto and Alexandra, Parktown's road networks and water and electricity infrastructure allowed its wealthy white inhabitants to live a comfortable life. The planning laws of the time also permitted Parktown residents to experiment with different architectural designs, giving the suburb a unique aesthetic 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.[339] 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-white' people 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.*[340]

Given the relative superiority of the physical infrastructure of the northern suburbs, it is also apparent that the colonial/apartheid state 'was central to the creation of a physical environment of highways, houses, schools and infrastructure'.[341] These facilities were in the main reserved for white people. While some African people worked and resided in the 'white city' as domestic workers, their use of amenities in the suburbs was limited by their relatively poor socioeconomic 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)'.[342]

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 townships 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 as in the bounded spaces of townships, white suburbs were bounded, 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 tread because it 'represented the heart of darkness, the unknown, the unclean',[343] African, coloured and Indian peoples were no strangers to white neighbourhoods. Many worked there as domestic servants, gardeners and maids. However, statutory racial zoning robbed both black and white people of the cultural dynamism that would have been brought forth by cosmopolitanism.[344]

## 'Formal Apartheid' Dismantled: 1979 to 1993

The townships that the colonial/apartheid administration in Johannesburg built for people who were not white contributed immensely to the struggle against and subsequent dismantling of apartheid. While from the 1970s onwards the apartheid government under John Vorster and PW Botha attempted to reform apartheid by repealing various influx control laws and introducing legislation aimed at winning over the black populace, various other internal and external socioeconomic and political forces coalesced, leading to the end of apartheid.

By this time, most of the townships in Johannesburg had intensified their struggles, with the intention of making the state ungovernable. The Soweto Uprising of 16 June 1976, in particular, marked a turning point not only in Johannesburg townships but across South Africa as a whole. Instead of peaceful boycotts and protests, people in the townships engaged in violent action to demand the dismantling of apartheid, spurred by various political formations (including the African National Congress [ANC]) which mobilised people to protest.

The Six Day War of 1986 in Alexandra, for instance, was not only a response by the community to the teargassing of mourners after the funeral of a schoolboy. It was a revolt against the socioeconomic and political deprivation that the community had endured from its inception.[345] In many ways,

Johannesburg's townships became 'theatres of struggle' against the socioeconomic and political injustices imposed by apartheid laws and planning practices.[346]

The apartheid government's repeal of influx control and the relaxation of the enforcement of the Group Areas Act in the mid-1980s was insufficient to reverse the revolutionary urban tide that was engulfing the country. Part of the Botha Administration's Twelve-Point Plan, these reforms were not only piecemeal, they actually fanned the desire of an oppressed people for a complete reconstitution of the social, economic, spatial and political order.[347]

Although the repeal of 'little apartheid' laws and influx control laws was significant, it came a little too late for the apartheid government. This was primarily because, despite the restrictive objectives of these segregatory laws, Johannesburg was never truly segregated in the true sense of the word. As Alden argues,

> *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.*[348]

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.[349]

What the repeal of apartheid laws did achieve, was the 'greying' of Johannesburg, because it allowed African, coloured and Indian people to move to some of the former white areas without contravening any laws. The inner city and its surrounds (Hillbrow, Berea and Yeoville, for example) witnessed the earliest wave of intense urbanisation. From the mid-1980s, Johannesburg's spatial environment experienced a transformation that had yet to be effected politically. This swell of urbanisation grew from 1993 onwards, after the fall of apartheid.

From the mid-1980s to the early 1990s, Johannesburg (and South Africa at large) experienced a 'Gramscian interregnum'[350] – a precarious and delicate societal transition where everything hung in the balance – when the old apartheid system was dying and a new democratic system was emerging on the horizon. In this interregnum, various policy challenges arose, stemming from the simultaneous enervation of the old system and its injustices and the anxieties and hopes for the reconstitution of the urban political and sociospatial context.

One of the challenges that unfolded during this time was that the 'greying' of Johannesburg alarmed some white population groups in the city centre and its surrounds, and many of them retreated to the northern suburbs that had been rapidly expanding since the mid-1970s. As white people vacated the central business district (CBD) in large numbers, they rented out or abandoned the buildings they owned, which were then immediately occupied by African, Indian, coloured people 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 from the Johannesburg City Council, all contributed to the drastic decline of the inner city.[351]

The repeal of the apartheid legislation that had governed the city's urbanisation processes for more than six decades meant that between 1980 and 1993 a legislative void opened up, which was 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 became trading spaces for poor urban-dwellers, neglected and/or abandoned building apartments became overcrowded, 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 Johannesburg's interregnum. The decline of inner-city Johannesburg was to continue almost two decades into the post-apartheid era.

As the apartheid edifice was being knocked down from above by the state, in its desperate attempt at reform by revoking most of its laws, and from below by ordinary people in townships and some white people who sympathised with the political cause of the oppressed, the reconstitution of the colonial/apartheid lawscape was imminent. However, in the light of the new political dawn, it became apparent that Johannesburg's sociospatial form and the racially skewed economic arrangements entrenched by the colonial/apartheid state for more than a century would not dissipate instantaneously.

Even so, various post-apartheid architects came to see that the law, litigation and planning were to be integral to the reconstitution of Johannesburg's sociospatial and economic structure. The influential role of law and litigation in reconstituting South Africa's lawscape was made apparent in the *S v Govender* court case in 1982.[352] 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-white people without providing alternative accommodation for them. This case was to become an important precedent for future cases related to housing in post-apartheid South Africa.[353]

The prioritisation of constitutional reform, which culminated in drafting the Interim Constitution of 1993 and the Bill of Rights, also attests to the law's critical role in the quest for spatial justice and transformation.[354] So, over and above the political negotiations that were taking place from 1985 to 1993, law and planning were to be critical to the transformation of the urban milieu. But first, these instruments were to be 'redeemed', given their complicity (unintended or otherwise) in spatialisation by segregationist ideologies for more than a century.[355]

## Reflections

Thus, colonial/apartheid Johannesburg's sociospatial and economic milieu was crystallised through a plethora of racially divisive legislation and planning processes and practices. The colonial imagining and myth of Johannesburg as a '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 white people and the inferiority of black people saw Johannesburg bifurcated along racial lines. Racial zoning also cemented the nascent city's racially skewed sociospatial and economic inequalities – with the white race and class emerging as its 'aristocracy'.[356]

Underscoring the creation of Johannesburg as a racial city was the state's drive towards empowering poor white people, particularly the Afrikaners who had been displaced from the rural areas after the South African 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 poor white people in the twentieth 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 nineteenth century onwards was a city cast in the rigid mould of racial segregation. The pass laws and the land laws, for instance, led to the destruction of places such as Sophiatown, whose cosmopolitan nature, if nurtured, would have resulted in making Johannesburg a culturally vibrant melting pot.

Despite the colonial/apartheid laws aimed at creating 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, although 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 would 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 nineteenth century onwards. This challenge intensified after the repeal of colonial/apartheid laws started in the late 1970s. 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.

# Four

# Re/Constituting the Urban

## Introduction: Of Precious and Precarious Development[357]

> *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.*[358]

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 by the post-apartheid state to promote spatial justice and thus reconstitute the lawscape. From the late 1980s onwards, various legal scholars and policymakers 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 to making the colonial/apartheid lawscape - that is, 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'.[359] So, these two instruments of societal engineering were to be the antidote to the very sociospatial, economic and political challenges they initially created.

Given the 'experimental' nature of the South African transition and its reliance on the legal system, the role of law and spatial planning in remaking post-apartheid South Africa was to be 'precious and precarious'.[360] Its preciousness rested 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 socioeconomic rights in the Bill of Rights of the 1996 Constitution attests to South Africa's attempt to use the law as an instrument to foster social and spatial justice. So, the transformation of a colonial/apartheid lawscape to a democratic one rested largely on the law, and specifically on the Constitution and its 'transformative' potential.[361]

The precariousness and fragility of the post-apartheid reconstruction project, however, was marked by the challenges of meeting 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 and spatial segregation through its physical architecture and the built environment as a whole (as well as the sociopsychological engineering related to more than a century of racial segregation), the remaking of the post-apartheid cityscape and lawscape was not to be without its hurdles. For instance, 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). This raised the problem of building a just city on the foundations of 'concretised differences'. This chapter outlines some of the challenges and opportunities faced by the post-apartheid state as it engages in the reconstitution of the colonial/apartheid lawscape.

## Constitutionalism and Spatial Politics

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.[362] 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 vision of the Constitution as a 'bridge' that would 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; lay 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; improve the quality of life of all citizens and free the potential of each person; and build a 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, and the Constitution in particular,

to contribute to the delivery of South Africa from its dark history and into 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', presents South Africa's 1996 Constitution as almost revolutionary, in the sense that it transcends a liberal and technical reading of law while simultaneously emphasising a shift in legal culture.[363] This sentiment is 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'.[364]

The socioeconomic transformation and sociospatial justice envisaged through the Constitution is predicated on the need for urgent societal transformation in the face of the 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 an acknowledgement that the abolition of apartheid and the dawn of constitutional democracy were 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'.[365]

The need for the transformation of legal culture and legal tradition, on the other hand, stemmed from the necessity to shift from the apartheid legal culture that viewed law in an ahistorical, apolitical and yet a scientific and technical manner, thus creating the assumption that 'The Law' is universal and reflexive and, therefore, in no need of radical change. The transformation of legal culture, therefore, was expected to change the context, manner and approach in which law and planning were imagined and implemented in a post-apartheid setting. In other words, efforts to transform legal culture come 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'.[366]

Pieterse contributes to the debate on transformative constitutionalism by highlighting the potential of a Constitution-centred approach to development, particularly in establishing socioeconomic rights. However, he warns against the simplicity and potential danger of a 'bridge' metaphor that suggests transition to be linear, moving 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.*[367]

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 sociospatial and economic relations in a post-apartheid society. This involves the dismantling of the 'old' status quo manufactured 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'.[368] For Van der Walt, this development algorithm is characterised by a number of principles:

> *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.*[369]

The supremacy of the Constitution is clearly outlined in Section 1(c) of the 1996 Constitution. There are also various provisions in the Constitution that seek to achieve the state's transformative and developmental agenda. These include Section 1(a–b), which strives to promote 'human dignity, the achievement of equality and the advancement of human rights and freedoms; [n]on-racialism and non–sexism'. This provision is enhanced by Section 9(2–3), which guarantees everyone's 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, amongst 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 for the transformation of South Africa's sociospatial milieu. 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 who benefited from the empowerment initiatives of the colonial/apartheid era to keep their property. However, when read with Section 25(2)(a–b), there are 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 and compensation. These constitutional provisions are central because they are at the heart of the current debates on land reform, land restitution and property rights.[370]

The debates on land restitution and redistribution are likely to influence policies and strategies related to urban land reform and development. Moreover, they are bound to inform major cities' approach to the ever-pressing need for housing in a time of rapid urbanisation and growing levels of unemployment and poverty. As various parties within government and society at large grapple with the necessity to review Section 25 of the Constitution, the future role of municipal planning and private sector involvement in land development hangs in the balance. Such debates point to both the preciousness and the precariousness of transformative constitutionalism.

As part of the formulation of the post-apartheid lawscape, Sections 26 and 27 of the Constitution outline justiciable socioeconomic rights, making the South African 1996 Constitution one of the most progressive 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 resources, to achieve the progressive realisation' of the right to access to adequate housing. The phrase 'reasonable legislative and other measures' is key, because it includes 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 the 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.[371]

The provision on the right to access adequate housing is supported by Section 26(3), which states 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 who find themselves compelled to unlawfully occupy private or public property, it continues to define urban politics and governance. As is noted later in this chapter, the wealthy and 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), which guarantees the rights to 'healthcare services, including reproductive health care; sufficient food and water; and social security', creates a legal avenue for various social groups to turn to the law and the courts in their quest for spatial and social justice.

Although the national, provincial and local spheres of government are responsible for ensuring socioeconomic rights and societal transformation, more responsibilities rest on the local government sphere, the developmental mandate of which 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 or gas, municipal public health services, municipal public transport, municipal planning, local amenities, refuse removal and street trading, amongst others.

In guiding municipalities as they strive to accomplish 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, socioeconomic 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. They, and other related local government laws and policies, have guided municipalities in meeting their developmental mandate. Apart from providing 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. Although 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 achieved through the establishment of various municipal-level multistakeholder participation forums. In some instances, rights-based litigation has been used by various urban residents to claim or contest a range of justiciable rights in the city.[372]

## Crafting a Democratic Lawscape?

While the 1996 Constitution remains the supreme law of the land, a plethora of other legislation has been promulgated to set out the post-apartheid government's developmental priorities. Most of these laws are explicitly aimed at achieving the constitutional objectives discussed earlier. Regarding the promotion of spatial justice, and socioeconomic rights in particular, there is legislation that can collectively (and yet loosely) be referred to as planning law. For Jeannie van Wyk, planning law is interdisciplinary, because it straddles constitutional law, property law and environmental law.[373] Informed by transformative constitutionalism, post-1994 planning law attempts to create

an integrated planning system predicated on democratic values and ethos.[374]

What is interesting to note about post-apartheid planning in South Africa is that even after the repeal 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 No. 27 of 1949; the Orange Free State Townships Ordinance No. 9 of 1969; the Cape Land Use Planning Ordinance No. 15 of 1985; and the Transvaal Town-Planning and Townships Ordinance No. 15 of 1986. The former black townships, on the other hand, continued to be regulated by the Black Communities Development Act, 1984, and later on by the Less Formal Township Establishment Act No. 113 of 1991.

These planning ordinances were in use even after the reconfiguration of South Africa's provinces in 1994 - only to be superseded by the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).[375] This meant that for more than two decades, post-apartheid South Africa did not have a coherent, integrated planning legislation. Moreover, the use of this old-order planning legislation in a post-apartheid setting meant that, initially at least, planners and cities had to try to forge the spatial justice goals of the Constitution with tools that were not designed for this purpose. This might have contributed to the complexity faced by the post-apartheid state in realising its vision for spatial transformation and inclusive development. As is outlined in the subsection that follows, however, despite the persistence of the legacy of apartheid in cities, the post-apartheid state continues to formulate and implement laws aimed at promoting the constitutional vision of spatial justice.

## New laws and 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, and 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 presents a brief discussion on these legislative instruments, with the intention of assessing the extent to which their objectives align with the constitutional vision of promoting spatial justice and inclusive development.

**The Development Facilitation Act (DFA)**

The Development Facilitation Act (DFA) ushered in a new planning ethos informed by the post-1994 government's ambitious programme of sociospatial and economic transformation, which was the Reconstruction and Development Programme (RDP).[376] At the heart of the DFA was the promotion of the efficient development of land in 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'.[377] Furthermore, it laid down the general principles governing land development in the country. In addition, the DFA aimed at promoting security of tenure. All these objectives, related to land development and land tenure, were guided by the constitutional vision of undoing the skewed land-ownership and land-development practices that had characterised the colonial/apartheid era.

The DFA's attempt to forge 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 plan. As stated in Section 3(1)(1–viii), it stipulated 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 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, which had emphasised racial segregation and spatial fragmentation, towards a more democratic and inclusive planning regime. The principles 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 emanating from the DFA were the land development objectives (LDOs). The LDOs were local-level strategic plans, the primary purpose of which was to foster spatial restructuring through spatially integrating fragmented urban spaces. This purpose was to be achieved through the creation of integrated public transport systems and the provision of water, electricity and education facilities. Given the spatial fragmentation that had resulted from racial zoning, the LDOs were also meant to stitch together the urban fabric by promoting the development of compact cities. Such cities would facilitate a more integrated and cost-efficient approach to the delivery of bulk infrastructure and other related urban amenities. The LDO land-development guidelines were influenced by the principles of environmental planning and sustainable development.[378]

The LDOs can be said to have been the first local development strategies to guide municipal planning in an era of transition.[379] Regarding housing, for instance, the LDOs guided

municipalities as 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 would increase during a period in future.[380] The DFA therefore played a significant role in facilitating the government's RDP, particularly in respect of low-cost housing provision (dubbed RDP housing) and physical infrastructure development.[381]

Although the government has been lauded in some circles for its RDP housing programmes, which have provided homes to millions of South Africans, there has also been criticism about the poor quality of the houses and their location on the outskirts of major cities.[382] Notwithstanding these criticisms, the LDOs played an integral role in guiding planning, including the implementation of the RDP housing programme, which has immensely transformed the post-apartheid cityscape. The DFA was later repealed, but 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.

### The Housing Act

Apart from the DFA, another early piece of legislation that shaped the post-apartheid spatial form is the 1997 Housing Act. The primary objective of this Act is to enforce Section 26 of the 1996 Constitution, which guarantees everyone the right 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 based on integrated development planning principles.[383]

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 achieved through prioritising housing programmes that contribute to the process of racial, social, economic and physical integration in urban and rural areas. This legislative intervention is the antithesis of the colonial/apartheid housing laws that deliberately encouraged racial zoning.

The Housing Act also mandates the formulation of a National Housing Code[384] and outlines the powers and responsibilities of all three spheres of government regarding housing provision,[385] while determining the funding mechanisms to support housing development.[386] 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 give effect to Section 26 of the Constitution, and continue to shape the post-apartheid lawscape as various inhabitants of the city use them to claim their legal rights specifically, and their right to the city, broadly.

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

**The Prevention of Illegal Eviction and Unlawful Occupation of Land Act of 1998 (the PIE Act).**

One of the consequences of inadequate housing, homelessness, unemployment and poverty in post-apartheid cities has been the unlawful occupation of state-owned 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 repealed the notorious Prevention of Illegal Squatting Act of 1951 and in its place formulated the Prevention of Illegal Eviction and Unlawful Occupation of Land Act of 1998 (the PIE Act). This Act protects landowners and unlawful land occupiers. It does so by providing specific procedures for the eviction of unlawful occupiers, thus protecting vulnerable social groups, particularly the elderly, women, children and disabled persons.[387]

The PIE Act gives effect to Sections 25(1) and 26(3) of the Constitution in that it protects property owners from instances that may result in the loss of their private property. Similarly, the Act protects the rights of those persons who might have unlawfully occupied land or abandoned buildings. As it seeks to balance the interests of the propertied classes and the vulnerable, it reconfigures the sociospatial relations in cities in various ways. For one, although 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 for unlawful occupation, in court. Balancing these 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.*

Because these provisions apply to both state-owned 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 contributed to an increase in rights-based litigation, resulting in the courts playing a considerable role in matters that shape cities' sociospatial dynamics and development planning in general.[388]

**_The Municipal Systems_ Act No. 32 of 2000**

Recognising that the establishment of sustainable human settlements is dependent on the coordination of stakeholders from various sectors of the community, the post-apartheid state has adopted an integrated development planning approach. This means that municipalities in particular have to develop integrated development plans (IDPs) and spatial development frameworks (SDFs) that allow for effective spatial planning and the 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 the local level. It is geared to fostering the role of local authorities as they attempt to fulfil their developmental mandate.

The Systems Act's objectives include 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 Act aims to 'provide for community participation', while establishing a framework for 'the core processes of planning, performance management, resource mobilisation and organisational change which support the notion of developmental local government'.[389]

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 primarily because it emphasises the developmental functions of cities and municipalities in promoting social justice through efficient service delivery and effective municipal planning and governance. The Systems Act underscores the importance of multistakeholder participation and consultation in all development planning processes.[390] It also encourages integrated development planning:

> *23. (1) A municipality must undertake developmentally oriented planning so as to ensure that it –*
>
> *strives to achieve the objects of local government set out in section 152 of the Constitution;*
>
> *give effect to its developmental duties as required by section 153 of the Constitution; and*
>
> *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.*

Furthermore, the Systems Act mandates all local, district and metropolitan municipalities to prepare 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 –*
>
> *links, integrates and co-ordinates plans and considers proposals for the development of the municipality:*
>
> *aligns the resources and capacity of the municipality with the implementation of the plan:*
>
> *forms the policy framework and general basis on which annual budgets must be based.*

The Act outlines in detail the processes to guide the formulation of IDPs.[391] From the time of its promulgation, therefore, the Systems Act not only shaped the future of municipal planning and budgeting. Its application also depicts the overt role played by law in moulding municipal planning systems and processes. In other words, the Act became the bedrock of municipal planning law,

facilitating 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 regarding municipal planning, the making of a post-apartheid IDP system has not been without its challenges. The first-generation IDPs (those formulated between 2000 and 2010), for instance, were often dubbed 'wishlists' because they lacked substance and strategy.[392] In other words, these initial IDPs were either overambitious in their articulation of municipal development objectives, or they were hampered by a lack of human capacity and funding. These shortcomings were reflected in the uneven delivery of services across various municipalities.[393]

Despite the challenges related to its implementation, the Systems Act remains one of the linchpins anchoring South Africa's municipal planning processes. Municipal planning remains legally binding, and the financial accountability of municipal leaders and officials is safeguarded by the Systems Act. Moreover, the inclusion of mandated community participation in municipal planning attests to the government's commitment to bottom-up approaches to planning. The Systems Act's multisectoral approach to development, and its legislation of multistakeholder participation, resonate with the idea of the right to the city as it strives to realise the constitutional vision of spatial transformation.[394]

### ***The Spatial Planning and Land Use Management* Act 16 of 2013 (SPLUMA)**

The Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) is punted as the most progressive of the post-apartheid planning laws.[395] It is the first post-apartheid piece of planning legislation to create 'an overarching framework for spatial planning, policy and land use management for the entire country, including rural and informal settlements'.[396] As outlined in its preamble, this Act was 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'. Furthermore, it details the preparation and legal status of SDFs across local, provincial and national spheres of government.[397]

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 spatial justice; spatial sustainability; efficiency; spatial resilience; and good administration.[398] The principle of spatial justice seeks to 'redress' all past spatial and other development imbalances 'through improved access to and use of land'.[399] As part of achieving spatial justice through SPLUMA, the formulation of SDFs attempts to address the challenges of informal settlements in urban areas and rural poverty. In addition, SPLUMA promotes spatial planning mechanisms, such as land-use schemes, to enable disadvantaged communities to access land.[400] Spatial justice as a development principle is critical to the thesis of this book, because it demonstrates how law and planning can be used to achieve the public interest through the reconstitution of everyday sociospatial, economic and institutional processes and activities.

The SPLUMA principle of spatial sustainability 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. These emphasise that the state 'must take reasonable legislative and other measures, within its available resources' to progressively achieve social rights. So, as the state endeavours to realise spatial justice, it does that by providing adequate fiscal institutional and administrative means to support all planning tools, policies and strategies aimed at transforming South Africa's sociospatial and economic milieu.[401]

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.[402] Spatial sustainability is further supported by the SPLUMA principle of efficiency. The latter states that land development should optimise the use of existing resources and

infrastructure.[403] Moreover, the principles of spatial resilience and good administration aim to promote 'flexibility' in spatial planning to allow for innovative development planning and land-use management.[404]

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 the planning ordinances discussed earlier in this chapter, are repealed. SPLUMA therefore marks a new legislative regime in post-apartheid planning law, because it envisages creating a harmonised, intergovernmental planning system predicated on the constitutional vision of societal transformation.

Although it was enacted in 2013, the implementation of SPLUMA objectives in all spheres of government remains a challenge. Partly this stems from the fact that departments responsible for spatial planning are yet to align their financial/budgeting processes and institutional instruments to cater for the holistic application of this Act.[405] Moreover, given the disparate development trends across South Africa, with some municipalities and provinces still lagging behind in their spatial planning, the implementation of SPLUMA is likely to be uneven, at least in its early stages. Notwithstanding this challenge, 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.[406]

## Planning Policies Post-1994

Apart from the legislation discussed above, policies and strategies have been established to give form to 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 RDP, the National Development Plan (NDP) and the Integrated Urban Development Framework (IUDF). While the following section will discuss the aforementioned

policy initiatives, acknowledgement is made to the contentious macroeconomic policies such as the Growth, Employment and Redistribution (GEAR) strategy, and the Accelerated and Shared Growth Initiative for South Africa (ASGISA) that shaped South Africa's economic and sociospatial milieu.

### ***The Reconstruction and Development Programme*** **(RDP)**

Adopted in 1994 as one of the foundational policy frameworks geared towards manifesting the constitutional vision of a democratic and equal society, the RDP's primary objective was to be a blueprint for socioeconomic and spatial transformation. Therefore, the RDP was predicated on at least six principles: integration and sustainability; people-driven development; peace and security; nation-building; meeting basic needs and building infrastructure; and democratisation.[407] These key principles were meant to inform the post-apartheid state's economic development framework, fiscal policy and budgeting framework and public sector restructuring. This people-centred policy was later replaced by a more neoliberal version, but its foundational principles continue to find articulation in most of the government's developmental policies and programmes that support socioeconomic rights and spatial justice.

### ***The National Development Plan (NDP)***

The NDP strategic policy document, which sets out the developmental vision of the state as informed by the Constitution, was adopted by Cabinet in 2014 to provide a mid-term multipronged developmental roadmap for the state and its developmental partners. Chapter 4 of the NDP, for instance, emphasises the need to expand the country's economic infrastructure, particularly electricity, water, transport and telecommunication, to support socioeconomic 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.*[408]

The NDP also presents various policy interventions and project proposals to equitably distribute 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, and 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 in the post-apartheid state. Apart from outlining the planning legacy of colonialism/apartheid in urban and rural settlements, the chapter articulates some concrete policy interventions and programmes to transform 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 sociospatial 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'.[409]

In addressing the constitutional right 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 to ensure that the delivery of housing is to be used to restructure towns and cities and strengthen the livelihood prospects of households. In drafting this chapter, the National Planning Commission (NPC) 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 urban and rural areas; implementing catalytic development interventions to achieve spatial transformation; and balancing the demands

for spatial equity, economic competitiveness and environmental sustainability. [410]

Chapter 8 also proposes five overarching principles for spatial development to address urban and rural spatial inefficiencies. These development principles also form the foundation of SPLUMA. They are spatial justice, spatial sustainability, spatial resilience, spatial quality and spatial efficiency. As discussed above, these principles strive to realise sociospatial and economic transformation in South Africa. However, the NDP also recognises the 'accommodation conundrum' faced by the state; that is, the challenge of housing millions of people in an economic environment that restricts cities' and towns' capacity to produce more employment opportunities. Although the government has delivered more than 3.2 million subsidised housing units, expanded access to water to at least 97.7 per cent of the population, access to sanitation to 82 per cent and access to electricity to 75 per cent, the housing conundrum still affects the poor in urban and rural areas.[411]

As also outlined in Chapter 8 of the NDP, the state's Breaking New Ground housing policy (BNG) revised in 2004 did not succeed in fully tackling the housing challenge. For one, the programme 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'.[412] These challenges, according to the NPC, are a testament to the unwitting reinforcement of apartheid geography by post-apartheid housing policy.

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 IDPs and SDFs.[413]

The NDP also highlights the need for programmes and strategies that address upgrading townships and informal

settlements. In meeting these spatial restructuring targets at a national level, the NPC proposed the formulation of a National Spatial Framework (NSF). This is envisaged to provide strategic direction for spatial restructuring through the provision of principles that guide spatial planning imperatives at provincial and municipal levels.[414]

Whereas Chapter 8 responds directly to the demands for spatial justice and socioeconomic 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 and economically competitive cities that can drive spatial transformation and inclusive development.[415] 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 constitutional vision of building a new society predicated on democratic values and a shared future.

***The National Housing Code***

As outlined, 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 the Department of Human Settlements) formulated a National Housing Code in 2000 (later revised in 2009). A housing-related policy, it outlines the key policy principles, guidelines and norms and standards that apply to government's housing assistance programmes.[416] 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 upgrading informal settlements and on providing support to households that comply with the Department of Human Settlement's Housing Subsidy Scheme, households headed by minors, first-time homeowners and other vulnerable groups. The Code also stipulates 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 programme that assists people in emergency circumstances. These include people who have to be relocated following the upgrading of informal settlements and/or as part of natural disaster 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 and provincial and local authorities, the Department of Human Settlements facilitates the provision of affordable social housing to vulnerable groups as part of promoting security of tenure.[417]

### *Comprehensive Plan for the Development of Sustainable Human Settlements*

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 the BNG. The BNG policy was revised in 2004 with the objectives of fast-tracking sustainable housing provision and giving effect to the constitutional mandate of promoting access to affordable housing.

Central to the BNG policy is the progressive eradication of settlements, the promotion of densification, supporting urban renewal and inner-city regeneration, the acquisition of well-located private land for housing development, the development of social and economic infrastructure, and municipalities as they implement various housing programmes.[418] It marked a shift from the provision of housing to sustainable human settlements. This means that government recognised that housing provision was not just about providing a housing structure, but also about providing all the other social facilities and amenities that allow people to lead a meaningful life.

While well-intentioned, the BNG policy has been a subject of debate amongst some scholars who opine that it does not provide meaningful direction regarding low-cost housing. The continued growth of informal settlements, and the eviction of the poor as part of urban regeneration, for instance, have been cited as emblematic of this policy's weakness in providing housing.[419]

Although this scholarly analysis and critique of housing policy is well founded, there is also evidence that the post-apartheid government's efforts have continued to restructure South Africa's spatial milieu. The recent 20-year review of the state, for instance, points 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 benefited from the national housing programmes. This indicates the extent of the interface between communities and government, and each of the 3.7 million households.*[420]

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

***The Integrated Urban Development Framework (IUDF)***

In a further endeavour to promote spatial justice, the state formulated the 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 a sustainable growth model of compact, connected and coordinated cities and towns, supported by four strategic goals: spatial integration; inclusion in and access to economic opportunities; economic growth; and good urban governance.[421]

These strategic objectives seek to activate nine policy levers, 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.[422] Viewed together, these policy levers are intended to promote spatial justice through sociospatial 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 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 related to transportation and communication. Moreover, a rise in urbanisation, coupled with poverty and unemployment, has resulted in higher demand for housing, water, electricity and other related urban amenities.[423] These urban inefficiencies stem from, amongst other factors, the insufficient use of spatial planning tools in towns and cities. In other words, most urban municipalities struggle to meet their constitutional mandate of promoting socioeconomic 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 spatial transformation. In addition to transport, the IUDF identifies job creation and housing as the three key elements that can contribute to spatial transformation. It proposes:

> *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.*[424]

All these proposals are intended to assist municipalities to effectively plan for current and future urbanisation trends. As part of planning for smart cities, the IUDF's objective is to promote compact cities that allow for the use of smart transport systems, smart energy and smart physical infrastructure. The smart cities model forms part of the Fourth Industrial Revolution, in which 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 on a local and global scale. The IUDF vision therefore attempts to create 'liveable, safe, resource-efficient cities and towns that are socially integrated, economically inclusive and globally competitive, where residents actively participate in urban life'.[425] This vision is well-aligned with 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. These include weak planning and coordination within government, poor state-private sector coordination and weak intergovernmental relations structures. In turn, these challenges result in the poor utilisation of resources, 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) and poor integrated transport planning. Poor urban management and delays in the processing of spatial planning procedures in turn frustrate development.[426]

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 with 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 good transport network and sustainable human settlements.[427]

Because the IUDF's aim is effective 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; the shortage of well-located public land for settlement development; the skewed residential property market; and the persistence of poor spatial planning in townships and informal settlements. To overcome these housing-related issues, the IUDF proposes accelerating the upgrading of informal settlements; promoting densification, including providing support for 'back-yarding', and prioritising inner-city regeneration.[428]

The IUDF also outlines its strategies for improving the efficiency of land governance and management, integrated urban infrastructure and 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. Although it is still early to assess the sociospatial and economic effects of the IUDF, its strategic thrust promises to contribute to the transformation of South Africa's lawscape.

## Constitutional Rights-Based Litigation Post-1994

The justiciability of constitutional rights in post-apartheid South Africa has contributed to the reconstitution of the lawscape.[429] The fact that the courts continue to play an integral role in creating spatial justice in cities allows us to test the state's legislation and policies against the constitutional demands for a more spatially just society. This section presents a brief discussion on some of the socioeconomic rights cases that have contributed to altering the lawscape in post-apartheid cities. Instead of providing a detailed summary of the cases, the discussion attempts to draw

out some key points and court decisions that have a bearing on urban spatial transformation.

***Government of the Republic of South Africa v Grootboom***

The case of *Government of the Republic of South* Africa *v Grootboom* has been cited as one of the most groundbreaking socioeconomic rights cases in post-apartheid South Africa.[430] In 2000, 510 children and 390 adults (including Irene Grootboom) were evicted from a privately owned piece of land. Following this eviction and the destruction of their shack dwellings, they occupied temporary dwellings on the Wallacedene sportsfield in Oostenberg, Western Cape. Through their legal representative, the evicted parties evoked Section 26(1) of the Constitution, which guarantees everyone the right to access adequate housing; Section 26(2), which obliges the state to take reasonable legislative and other measures, within its available resources, to progressively achieve this right; Section 26(3), which states that 'no one may be evicted 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), which states that children have the right to shelter.

*Grootboom* brought to bear the sociospatial 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 who find themselves living in shacks, such as Grootboom, are victims of low-paced housing delivery and unemployment. The prevalence of these injustices therefore attests to the 'harsh realities that the Constitution's promise of dignity and equality for all remains for many a distant dream'.[431]

From a spatial justice perspective, *Grootboom* is important because it demonstrates how the courts evaluate the reasonableness of legislative and other measures intended to meet 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 emphasising 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'.[432]

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.

This interpretation of Section 26 is important because it also extends the notion of 'reasonableness' to the formulation and implementation of strategic planning policies and instruments such as IDPs, all aimed at sociospatial and economic transformation.[433] Apart from outlining the importance of reasonableness, with the capacity of the state or institutions tasked with the responsibility of implementing programmes aimed at achieving 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 colonial/apartheid injustices. Moreover, a reasonable programme must have a wide reach: one 'that excludes a significant segment of society cannot be said to be reasonable'.[434] This inclusive approach to rights by the courts attests to the significant role that this institution, and the law at large, can play in redressing sociospatial injustices, thus transforming the lawscape for the better.

While acknowledging the obligations of the state in realising justiciable rights, the court underscores 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.[435] This means that communities cannot expect the manifestation of all rights immediately. Instead, there is a need to balance the demands for certain rights with the capability of the state and related institutions to provide for these.[436] This notion of progressive realisation of rights within available resources is reasonable. However, there are 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. Balancing the progressive realisation of rights within available means, therefore, continues to be tested particularly in major cities where 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 socioeconomic rights to the poor, such as healthcare, sufficient food and water and social security.[437] Although these socioeconomic rights can be realised only 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 not only contributed 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.

### *President of the Republic of South Africa v. Modderklip Boerdery*

In *President of the Republic of South Africa v. Modderklip Boerdery* (*Modderklip*) the court also played a critical role in altering property relations between landowners and unlawful land occupiers.[438] In May 2000, about 400 people from Daveyton township in Benoni, on the East Rand, illegally occupied Modderklip farm, where 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. By October

2000, after Modderklip delayed acting decisively, the informal settlement (now called Gabon) had expanded to 18 000 people, with approximately 4 000 residential units.

Without reiterating the findings of the court, *Modderklip* is significant because it considered 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 private property rights while protecting the rights of vulnerable occupiers. The *Modderklip* case is therefore an example of how rights-based litigation in post-apartheid South Africa continues to alter the lawscape, resulting in negotiated sociospatial change.

While the tenure security of unlawful occupiers in this case remained precarious, the landless people were given a legal avenue (and protection) to stake their legal rights. Similarly, the case demonstrates how landowners even, 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 legal culture and practices to meet the constitutional transformative aims set out in the Bill of Rights. In the same vein, the significance of the case also rests on the fact that it demonstrates that the exercise of private property rights should accommodate and not violate the right to housing.[439]

***Olivia Road***

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*).[440] In this case, at least 400 people faced possible eviction by the City of Johannesburg from the inner-city buildings that they had illegally occupied. The eviction formed part of the City's urban renewal programme to rid the city of 'bad buildings' and their unlawful occupiers. In dealing with this matter, the Constitutional Court questioned the reasonableness of the City's urban renewal programme, which threatened the eviction of not only the occupiers of Olivia Road but also the hundreds

of thousands of people who inhabited the inner city's other dilapidated buildings.[441]

As was the case in *Grootboom* (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 because it did not prioritise the 'possibility, even the probability, that people would become homeless as a direct result of their eviction'.[442] In other words, the forced removal of people from the inner city was unconstitutional in that it contravened a plethora of rights. This intervention by the courts attests to their 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* judgement 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'.[443] 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.[444] By indicating that it prefers housing disputes in this context to be solved through meaningful engagement, the court is also endorsing a bottom-up/participatory approach to city-making, allowing for the inclusion of the poor in devising solutions to their own housing needs. [445]

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 duty of the state to be developmental without being draconian, as it applies its policies and strategies. Through this judgement, the judges managed to reaffirm their role as fair adjudicators, particularly for vulnerable groups in society. From a spatial transformation perspective, therefore, *Olivia Road* indicates that the courts and the law are central in negotiating 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 and the reasonableness of legislative and other measures aimed at spatial transformation shapes the city's approach to development-oriented programmes. Moreover, the case gave the occupiers not only a sense of belonging in the city but also visibility as human beings with rights.[446]

### *Blue Moonlight*

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* (2012) (*Blue Moonlight*), the role of private developers in moulding the post-apartheid cityscape was deliberated by the courts.[447] Summarising the case here, the court was tasked to decide on the fate of at least 86 poor people who had unlawfully occupied the commercial property of Blue Moonlight, Berea, in 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) of the Constitution) and the obligation of the City of Johannesburg to provide housing for the occupiers in the event that they were 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 sociospatial injustices.[448] It foregrounded the role of the Constitution in improving the lives of all South Africans, particularly the socioeconomically vulnerable. The court therefore was faced with the task of deciding whether the occupiers should 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 on the City to provide them with some form of 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 far as dealing with evictions from private land was concerned.[449]

While the court emphasised that Blue Moonlight's rights to property be protected, it also highlighted the risk of homelessness that would imminently befall the occupiers in the event that they were evicted. The court therefore argued that when a private developer purchases 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'.[450] 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'.[451]

Thus, courts and the law limit private developers' influence in dictating the city's sociospatial structure. As demonstrated in *Blue Moonlight*, 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 afford the poor the exercise of their rights. In its judgement, the court concluded that although *Blue Moonlight* was entitled to an eviction order, the City's housing policy was found to be unreasonable and unconstitutional because it did not cater to provide temporary relief to those people facing imminent evictions from privately owned land.[452] Therefore, evictions may take place only as long as they do not render the poor homeless. This case is yet another example of how law is used to influence specific sociospatial outcomes, guided by the principles of transformative constitutionalism.[453]

### *Rail Commuters Action Group*

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 *Rail Commuters Action Group v. Transnet* (*Rail Commuters Action Group*), for instance.[454] This judgement begins by outlining the effects of racial spatial planning not only on the 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.[455] These spatial injustices are compounded by the

fact that some of these black commuters have died while using Metrorail trains. This contravenes the commuters' constitutional right to safety and life.[456]

The applicants 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 the safety and security of commuter Metrorail trains in the Western Cape.[457] The court reached the 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 while they were using rail transport services.

This ruling was significant because it exposed and acknowledged the spatial injustices that characterise the public transport system, where 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 of inclusive spatial planning, namely, safety, convenience and health. An integrated urban mobility network in particular plays an important role in mending the colonial/apartheid spatial form that continues to reproduce spatial injustices.[458]

### *Diepsloot*

The courts' role in facilitating spatial justice is also evinced by its use of 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.[459] Because this low-cost township was to be established on a piece of land adjacent to a wealthy white suburb, the landowners' association vehemently rejected the City's proposal. In classic 'not-in-my-backyard' fashion, the landowners' association's primary grounds for rejecting the proposed development were that the development was likely to cause nuisance and crime and thus negatively impact on 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.[460]

***Kyalami Ridge***

In a similar case, the Constitutional Court ruled in favour of displaced poor people in the *Minister of Public Works* v. *Kyalami Ridge Environmental Association* (*Kyalami Ridge*).[461] In 2001, after heavy rains had destroyed homes in Alexandra township, the state identified a piece of land to erect at least 200 houses as a transit camp for some of the flood victims. The land identified for this proposed camp was adjacent to an affluent northern suburb, Kyalami. Learning of the news of the proposed transit camp, the Kyalami residents objected, citing various environmental concerns and the fact that they had not been 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 and other measures related to disaster management. Like *Diepsloo*t, *Kyalami Ridge* attests not only to the role played by rights-based litigation in transforming the spatial milieu of post-apartheid cities. It also demonstrates the constitutional commitment to protect the rights and human dignity of all South Africans irrespective of their socioeconomic class.

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.[462] In this case, the inhabitants of 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 in society. Undoubtedly, these kinds of decisions mark a radical shift in post-apartheid legal culture. Such outcomes would have been almost impossible to achieve under apartheid when private property rights

ruled supreme.[463] Thus, rights-based litigation contributes to promoting spatial justice in post-apartheid cities.[464] 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. Although most poor people cannot afford to use this avenue to claim their rights, those who have managed to do so have greatly benefited from the law and the courts' interventions. Similarly, middle- and upper-class residents have turned to rights-based litigation as a means to protect their interests and their property. However, the courts have often taken care to enforce their rights only to the extent that this contributes to, and does not frustrate, the broader dictates of spatial justice, such as in *Diepsloot* and *Kyalami Ridge*.[465]

The role of the state (and its urban planners) and the rights of private developers are continually challenged, partly by law and by disparate rights-based claims from different communities. 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 and fostering a spatially just society.

## Reflections

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 to the transformation of South Africa's lawscape by introducing legislation and policy measures all aimed at realising the constitutional vision of an inclusive society. As discussed above, all the legislative and policy measures are development-oriented, and mandate all three spheres of government to formulate and implement programmes and projects aimed at achieving spatial justice.

Whereas 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 and SPLUMA provide a sound legislative framework that continues to guide spatial planning in all three spheres of government. SPLUMA in

particular has repealed all old planning legislation. Its objectives of transforming South Africa's space economy are backed by an equally sound intergovernmental institutional framework and a detailed approach to spatial planning processes. SPLUMA's objectives of spatial transformation, predicated on the principles of spatial justice and spatial resilience, are likely to contribute to manifesting the constitutional vision.

Similarly, the NDP and the IUDF are critical policy measures that continue to shape spatial planning thinking and approaches. As a multisectoral policy, 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 a national blueprint for development, the NDP is the first of its kind in post-apartheid South Africa to attempt 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, which promote strategic programmes that are critical for democratic municipal planning. As is explained in the next chapter, the implementation of these policies remains uneven. However, their contribution to the transformation of South African society after 1994 is evident. Through these post-apartheid legislation and policies, the South African lawscape continues to be transformed, albeit at an uneven pace.

Apart from the legislative and policy measures, rights-based litigation has contributed immensely to the transformation of post-apartheid society. The courts have presented themselves as an avenue where all South Africans can claim their legal rights. Although there are challenges regarding the limited number of poor people in particular who can access the courts, in the last two decades the courts have demonstrated significant transformation in terms of their legal culture. Unlike the apartheid legal culture, which 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 and the coproduction 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 socioeconomic rights is concerned. Though the legacy of colonial/apartheid remains evident, the post-apartheid legislative and policy measures and rights-based litigation act as an antidote purposefully designed to create a new, constitutionally driven lawscape.

# Five

# Coloniality Prevails

## Introduction: An Anxious City

> *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.*[466]

Following the discussion in Chapter three on the potentially transformative role of legal and planning instruments in the reimagining and subsequent construction of a democratic society, this chapter focuses on Johannesburg as a unit of analysis, in an attempt to ascertain the extent to which these legal and planning instruments have contributed to the promotion of sociospatial justice and urban governance. In many ways, post-1994 Johannesburg is a microcosm of post-apartheid society because although it is a site of multiple forms of transformation it is also a site of continuities.

The chapter begins by examining the manifestation of planning law in various parts of the city, notably the inner city, the affluent suburbs, the townships and informal settlements. Since all these geographies of inequality formed an integral part of the colonial/apartheid lawscape, this section is interested in how 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) to achieve its developmental mandate. This discussion is premised on the appreciation of various sociospatial, 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 Integrated Development Plans (IDPs) as one

of the key policy instruments of urban governance and spatial transformation.

## Johannesburg After Apartheid

The repeal of the Group Areas Act and other influx control laws from the late 1970s onwards meant that African, Indian and coloured people could leave their 'racial zones' and move in to the former 'white cities', such as Johannesburg. As discussed in the previous chapter, this era was marked by unprecedented levels of urbanisation, with people moving in particularly from the townships, the homelands and from the rest of the African continent. This rapid urbanisation has continued to define post-1994 Johannesburg's sociospatial and economic milieu. From an urban governance perspective, the City has had to contend with increasing demands for housing, job opportunities and basic services from various social groups that claim their right to this city.[467]

Various transformative forces continually unfold in Johannesburg as the City and its diverse inhabitants engage in the 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 and projects aimed at promoting mobility within the city. At the same time, historical sociospatial and economic factors limit or resist these envisaged changes. Colonial/apartheid sociospatial cleavages are embedded in Johannesburg's spatial form and built environment. The continued existence of stratified neighbourhoods (now marked along racial and class lines), the uneven delivery of housing, water, electricity and other related basic services, and other spatialised economic and social injustices, all attest to the fact that Johannesburg's spatial transformation remains an unfinished project.

## Crime, Grime and Withdrawal

The narrative of post-apartheid Johannesburg's 'traditional' central business district, (the CBD, or the inner city) has been characterised by the urbanisation trope of poverty, crime and

grime that became evident from the mid-1980s. Johannesburg was one of the first post-apartheid cities to experience 'greying' – that is, after the repeal of apartheid influx control laws, the deracialised Johannesburg CBD and its surrounding neighbourhoods – Hillbrow, Berea, Yeoville, Marshalltown, Bertrams and Doornfontein, in particular – witnessed an 'influx' of African, coloured and Indian population groups.[468] This process of 'greying' also marked the intensification of the urbanisation of black people who had previously been forbidden by law to permanently reside in areas designated for white people.

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.*[469]

As the dream of a multiracial 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'.[470] Post-apartheid Johannesburg was an urban space in transitional turmoil. The City had yet to restructure and democratise its institutions; it had yet to implement new laws and policies. It would take more than a decade to make any meaningful changes in sociospatial and economic terms. This meant that the inner city, at least in the first decade after the demise of apartheid, manifested the morbid signs of urbanisation – poverty, dereliction and/or abandonment of commercial and residential buildings, and high levels of unemployment.

Beavon and Larsen (2015) cite 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 the crime and grime that were on the rise in the inner city.[471] The use of pedestrian walkways as trading spaces, and littering and a general sense of urban decay, all contributed to the abandonment 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.*[472]

The relocation of the Johannesburg Stock Exchange, from Diagonal Street in downtown Johannesburg to Maude Street in Sandton, in 2000, signified the new economic hub of the city, which focused 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'[473] in the old CBD. The migration of prominent businesses to the north of the city had an important bearing on the spatial form and social makeup of both the inner city and Sandton Central. In the case of Sandton, billions of rands were poured into the area for infrastructure investment. But while Sandton was industrialising, the inner city went into a rapid economic decline. Post-apartheid Johannesburg's sociospatial relations therefore can be defined by the processes of 'influx and withdrawal':[474]

> *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.*[475]

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. Whereas some of the poor inhabitants found a home in backyard shacks in established townships and informal settlements scattered on the edges of the city, others resorted to illegally occupying dilapidated buildings in the inner city.[476] These unlawful occupations have been condemned by the City and private property developers, leading to threats, and the realities, of forced removals.[477]

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 are reminiscent of the sanitation syndrome of the colonial times that saw City administrators removing people from the inner city in the name of promoting hygiene.[478] In the post-apartheid era, the poor's initial response to forced evictions was direct action, but the past decade has seen some of them turn to the courts in an attempt to claim their rights to inhabit the city.

Although the narrative of the post-apartheid inner city has evoked the image of this space as the new 'heart of darkness', there are new sociospatial and economic forces that arguably alter this space's lawscape in a positive way. For one, post-1994 inner-city Johannesburg presents itself as the heart of a new African cosmopolitanism, with new 'ethnoburbs' (spaces of ethnic clustering) defining the city's spatial milieu.[479] Apart from local ethnic groups, these ethnoburbs comprise people from numerous other African as well as Asian countries, such as Pakistan and India. This cosmopolitanism from below has been characterised by the burgeoning of primarily informal economic activities. So, whereas 1990s 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.[480]

The growth of informal businesses in inner-city Johannesburg is laudable, but this informality has spread to other spatial practices, notably in the areas of housing and trading. The derelict and/or abandoned structures in Johannesburg's inner city attracted not only the urban poor who unlawfully occupied these buildings, but also 'slum lords'. Moreover, some of the city's pavements and walkways have been transformed by street hawkers into spaces of informal trading. Critical urban scholars view these informal spatial practices as a form of 'insurgent planning',[481] but the City, its urban planners and private developers reject these practices, regarding them as against the principles of legal town planning - that is, spatial order and hygiene.[482]

Inner-city Johannesburg, including the suburbs of Hillbrow, Berea and Yeoville, challenge the traditional 'Eurocentric' concepts of urbanism (the spatial, socioeconomic and political practices of inhabiting the city). What is emerging in these spaces are alternative ways of inhabiting the city that often are very different from the City's and private developers' vision. In many ways, the inner city and its surrounds have become a contested space where the urban poor's survival strategies are often pitted against the City and the private developers, resulting in a significant number of rights-based litigation cases about properties in the inner city. In reading the inner-city lawscape, therefore, it becomes apparent that the idea of the urban poor as 'social infrastructure' with complex survival networks (defined as the right to the city) has to be reconciled with legal rights.[483]

## The Affluent Suburbs

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

Another characteristic of these affluent suburbs has been the proliferation of 'security estates', or gated communities, and 'private cities', particularly in the 'new north', such as Sunninghill, Steyn City and surrounding neighbourhoods.[484] These upper/middle-class neighbourhoods emerged as a result of the growth of the middle-class and the realities and perceptions of the rise in crime in Johannesburg.[485] A glance at the 'exclusionary' prices of these residential properties north of Johannesburg, and in areas immediately south of the old CBD, for instance, suggests that although the movement of all people in the city is no longer hindered by apartheid laws, market forces have continued to perpetuate 'class apartheid'.[486]

The concentration of upper- or middle-class residential and commercial properties north of Johannesburg has been accompanied by an increase in related urban amenities, such as private hospitals, boutique cafés and other markers of modernity that make 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 these areas. Moreover, it has compelled the City to invest extensively in the provision of public infrastructure and basic services there, such as roads, water, electricity and sanitation. Because these areas are the main contributors to the City's coffers through the payment of rates and taxes, they remain primary sites for all forms of investment.[487]

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, attests to the dominance of market-led neoliberal planning. In fact, the neoliberalisation of social, economic and political processes permeates urban development and planning in Johannesburg.[488] In the view of some critics, the rapid expansion of private sector-led development in Johannesburg's suburbs has reduced city planners to 'agents of neoliberal urbanism'.[489]

The scepticism that surrounds private developers' influence on the transformation of Johannesburg's spatial milieu highlights

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. As a result, some wealthy residents, too, have turned to the courts to assert their legal rights. These 'privileged struggles' are often an attempt by Johannesburg's rich elite to protect themselves and their property from crime.[490] Some of the cases presented before the courts are driven by NIMBYism (Not In My Backyard), but most relate to the protection of private property and the maintenance of a particular spatial character in wealthy neighbourhoods. The legal contestations between the rich and the urban poor in Johannesburg, therefore, are primarily about the form that the city's spatial, socioeconomic and environmental milieu should take. Because both parties' legal rights are guaranteed by the Constitution, the courts play an integral role in balancing these demands and claims to the city.

## Townships and Slums

Like the inner city and the former white suburbs, Johannesburg's townships in the post-apartheid era have experienced continuities and changes. Regarding the continuities, townships such as Soweto and Alexandra are still characterised by colonial/apartheid physical infrastructure, especially in their monotonous housing designs. Moreover, the ethnoburbs that were created during colonial/apartheid times (for example, 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.[491] Part of these townships' economic deprivation stems from the historical fact that they were planned and created as residential areas with little or no mixed development. To some extent, this explains why most of the people who live in townships work outside these spaces. With the current 'township economy' characterised by spazas (informal convenience shops), hair salons, carwash services, *shisanyamas* (community barbecues) and other related informal activities, most townships arguably have 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 are confirmed by high levels of unemployment in areas such as Soweto, Alexandra and Diepsloot. In 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 its negative image.[492] As a result, for some of its residents, Alexandra represents the biblical sin city of Gomorrah - a colloquial name used by some in reference to this place.

Recognising the socioeconomic challenges faced by most of Johannesburg's townships, the City and Gauteng province have prioritised these spaces for serious investment. For example, in 2001 the government initiated a multibillion-rand presidential renewal project, the Alexandra Renewal Project (ARP), with the intention of providing decent housing and basic services to thousands of informal settlement dwellers.[493] According to the Johannesburg Development Agency (JDA):

> *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.*[494]

Although the ARP was well intentioned, most of Alex's residents were dissatisfied with the outcomes of the programme, citing a lack of adequate public consultation, and corruption.[495] Despite the billions of rands spent by the government to 'renew' Alexandra, the township remains overpopulated, and thousands of its residents still live in backyard shacks and informal settlements.

Soweto has also witnessed a considerable level of spatial transformation in the past decades. After 1994, new neighbourhoods were established there as part of the RDP. These

new 'townships' included Bram Fischerville, Thulani, Slovoville, Matholesville, Tshepisong and Leratong Village. They were developed primarily to house people relocated from various informal settlements and backyard shacks in Johannesburg.[496] However, some of these new neighbourhoods in Soweto 'took the form of site-and-service schemes and were barely distinguishable from the shack settlements because their top structures were informal.'[497]

Apart from these housing projects, the Baralink Regeneration Project, located on the eastern edge of Diepkloof and surrounding Soweto's largest transport interchange, explicitly attempted to promote spatial integration. The project, which began in 1999, envisioned Baralink as the 'Gateway to Soweto', with a mixed development consisting of residential, medical, commercial and office facilities. In addition, the 2010 FIFA World Cup spurred the City of Johannesburg to invest in infrastructure in Soweto. This included upgrading stadiums and the development of the Rea Vaya Bus Rapid Transit (BRT) public transport system. Under the notion of 'consumer citizenship', the Maponya and Jabulani malls, as well as the Soweto Theatre, were established.[498]

All these developments, and other related private sector initiatives (such as restaurants and pubs), contributed to a transformation of Soweto. But, 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 its residents.

Post-apartheid Johannesburg has also created its own 'apartheid-style' townships, notably Diepsloot, north of the city. Diepsloot was founded in 1995 as a transit camp (later to become a permanent home) for evictees who had been moved from Alex, Honeydew and Zevenfontein informal settlements. This transit camp later exploded into one of the most impoverished post-apartheid townships in Johannesburg. Like other townships, Diepsloot is characterised by untold poverty, high levels of unemployment, a housing shortage and gang-related crime.[499]

In most of Johannesburg's townships, the post-apartheid state's free public housing programme (RDP housing) has

unwittingly reproduced and/or reinforced apartheid planning logic by building these houses on the periphery of the city. RDP houses (and their monotonous architectural designs) are commonplace in Soweto, Alex, Diepsloot and other townships in Johannesburg, where, in many ways, they reinforce spatial inequalities - in concrete. Commenting on these 'new ghettoes of the poor' that are predominantly a product of state investment, Philip Harrison argues that their dispersed locations 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.[500]

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.*[501]

In post-apartheid Johannesburg, townships, backyard shacks and informal settlements have continued to be spaces of alterity that confine most black people to 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.*[502]

The coloured and Indian townships of Eldorado Park and Lenasia, respectively, also bear the scars of colonial and apartheid planning and endure acute housing shortages, unemployment and drug-related crime. There, too, infill projects aimed at addressing the housing crisis have resulted in development proposals that reinforce apartheid-style planning. Breaking the mould in township housing provision is a conundrum for the City, because most of the land parcels that could be used to further develop (the already congested) townships are not viable for development, for various geotechnical reasons.[503]

Although Johannesburg's spatial transformation continues, the unrelenting legacy of apartheid planning seemingly continues to have a hold. The state is investing billions of rands to promote sociospatial and economic development, but the pace of spatial transformation has been too 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 no wonder, then, that most of the so-called service delivery protests, xenophobic violence and 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 who still cannot fully enjoy their socioeconomic rights.[504]

Despite all the socioeconomic and spatial injustices that characterise most of Johannesburg's townships and informal settlements, the people who live there have developed survival strategies, albeit predominantly informal, that make these places their own. For example, there has been an upsurge in cultural industries, with music in particular contributing to positive sentiments about these townships. Furthermore, most people residing in townships have transformed these spaces into homes, having formed networks, jobs, families and emotional ties there. Thus, life in post-apartheid townships can also be characterised by cultural vibrancy, entrepreneurship, innovation and resilience, defined as '*Kasinomics*'.[505]

## Transforming Urban Governance in Johannesburg

In response to its constitutional mandate of being 'developmental', post-1994 Johannesburg also started restructuring and transforming its institutions. In this regard, the City was guided by the principles of the 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.

Other strategic plans, too, contributed to the broader institutional restructuring of the City, notably the iGoli 2002 and iGoli 2010.[506] The first guided a complete overhaul of Johannesburg's governance structure. Through this plan, the city established a core administration comprising various departments, 11 regional administrations and 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 set up 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.[507]

These city-owned entities have continued to transform the city's sociospatial and economic environment. The 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 it has championed include the Corridors of Freedom, which takes a transport-oriented development approach to promote mixed-use development in the city. Through this programme, the City envisages creating transport links between previously spatially segregated areas, such as from Soweto to the CBD and from Alexandra to Sandton.[508]

In an endeavour to integrate the city through spatial planning, the Corridors of Freedom programme also seeks to create:

> *Safe 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'.*[509]

Through the JDA, the City has managed to implement the relatively successful BRT system called Rea Vaya, mentioned earlier in this chapter. This BRT system has contributed to the integration of the city's hitherto disjointed spaces while improving mobility for the urban poor. Moreover, various inner-city projects, such as the upgrades of the Park Station and the Constitution Hill precincts, have all resulted in spatial transformation in Johannesburg. Regarding township development, the JDA has been involved with the development and upgrading of infrastructure in the Jabulani node and Orlando East, in Soweto.

Similarly, JOSHCO has played an integral role in developing and providing affordable social rental housing to millions of Johannesburg's residents.[510] This entity's housing projects form part of 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 to the City's governance and provision of basic services. It is true that there are challenges in delivering services, but these entities have contributed to the sociospatial and economic transformation of Johannesburg.[511]

The corporatisation of basic services (particularly of water, electricity and waste removal) in Johannesburg formed part of the City's governance strategy not only to optimally deliver these services but also to boost the city's finances, which were in dire straits in the early 2000s.[512]

These urban governance-related challenges unfolded at a moment when various sectors within the city were expecting an even delivery of basic urban amenities and bulk infrastructure services, particularly housing, water, electricity and sanitation

facilities. The City had a mammoth task in 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 a local and global level.

From a planning perspective, post-1994 Johannesburg was expected to restitch the fractured apartheid spatial structure through the implementation of pro-poor projects, of which the construction of RDP houses formed an integral part. This restitching of the cityscape, however, was 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 expansive enough for the envisaged massive low-cost housing programmes. As mentioned earlier, the development of low-cost housing on the periphery unwittingly contributed to the sociospatial marginalisation of the poor.[513]

The hyperurbanisation of poverty that began in the mid-1990s meant that the City had to find strategies to house the urban poor, including new migrants from within and without the South African borders. Simultaneously, the City had to regenerate the inner city as part of its urban renewal programme. However, the project of rehabilitating 'bad buildings' meant that the City had to contend with the dilemma of first removing the unlawful occupiers who inhabited these unsafe and unhygienic buildings. Under the new constitutional dispensation, in which arbitrary evictions are unconstitutional, the City often found itself at loggerheads with the law and the courts, on housing and other socioeconomic rights-related matters.

The City's challenge is to create a new lawscape, in a global environment that compels cities to be both economically competitive and sociospatially redistributive. Put differently, in implementing pro-poor strategies while embracing a pro-growth development approach, the City continually has to walk a tightrope between various proverbial masters with competing demands.[514] This balancing act in governance is evinced, in one respect, by the City's branding drive to promote Johannesburg as a 'world-class African city of the future'. While well intentioned,

attaining this vision has proved to be extraordinarily difficult for the City, given the deeply entrenched sociospatial and economic inequalities that characterise its neighbourhoods. Nonetheless, it has put in place various legislative and policy measures aimed at balancing its pro-poor and pro-growth development strategies. Some of the key policy measures include the City's Integrated Development Plans (IDPs) and their related Spatial Development Frameworks (SDFs), and City Improvement Districts (CIDs) initiatives.

## Integrated Development Planning

As per the Municipal Systems Act of 2000, the City is mandated to formulate five-year plans (IDPs) designed to guide all municipal planning processes, and related SDFs (which inform the former regarding the spatial effects of proposed development programmes). These planning instruments guide the municipalities' budgeting processes, as well as the identification and implementation of development-oriented projects. As legally binding plans and as part of the intergovernmental relations and planning process, IDPs have to receive considerable political and financial support from all three spheres of government.[515] Thus, they also harness intergovernmental planning efforts across these three spheres.[516]

From the early 2000s, Johannesburg's 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 planning and public health; local safety and security.[517] This means that IDPs are envisaged as key instruments for the reconstitution of Johannesburg's space economy:[518]

> *[The IDP embodies] 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.*[519]

Johannesburg's first draft of 'a fully-fledged Integrated Development Plan' [520] was the City Development Plan (CDP) in 2001/02, later 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 and performance management processes. As part of place-branding, the City used the Joburg 2030 formulation process to anchor its shared, long-term vision of a 'world-class African city'.[521] But the Joburg 2030 was in the main an economic development strategy, the strength of which was its in-depth analysis of the city's local economy.[522] This also identified a number of challenges that hindered the city's socioeconomic development.

A review of the Joburg 2030 reveals this plan's privileging of economic development.[523] Its economic determinism had a pro-poor development slant, which was clear in its prioritisation of inclusive socioeconomic development.[524] However, to make a pro-growth strategy viable, the city had to put in place 'world-class' infrastructure that would lure potential investors at a 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.[525] So, although the Joburg 2030 plan attempted to chart a sound developmental path, the extent of its success in promoting economic development programmes was contentious.

The formulation of Johannesburg's IDPs from 2003 to 2010 was simultaneously experimental and overambitious. The 2003/2004 IDP, for instance, tried to address almost all the challenges faced by the City – issues related to the economy, skills, housing, electricity, roads, storm water, waste management, parks and cemeteries and safety and security.[526] It was a deliberate attempt to create a multisectoral plan that would respond to the developmental needs of the City while complying with the Municipal Systems Act of 2000.

In the 2003/2004 IDP, the aim was to establish 'city plans' 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 and the SDF, at the same time outlining institutional arrangements and a performance management system.[527]

Although Johannesburg's mandate of promoting socioeconomic development and social justice was clearly outlined in its plans as early as 2003, trouble loomed, particularly regarding service delivery.[528] The 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 the processes related to development planning.[529]

Like most cities in transition, Johannesburg still needed 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.[530]

Although the 2003/2004 IDP was overly 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. Various reasons lie behind Johannesburg's financial woes in the early years of democracy. They included 'a long-standing practice of high spending based upon high standards of provision for a minority of the population'.[531] 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 levels of revenues being collected; budgeting continued to be on the basis of 100 per cent revenue collection.*[532]

Apart from the issues outlined above, the early IDPs proved to be relatively poor from a content and strategy perspective. They were criticised for being 'wishlists' that uncritically outlined 'unfunded mandates', thus being 'weak' and devoid of meaningful strategy.[533] The weakness of IDPs as strategic planning instruments was compounded by the fact that the City was hamstrung by the lack of sound financial and performance management systems. At the same time, the City was struggling 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 has stated:

> *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.*[534]

From 2010 onwards, however, the City's 'second-generation' IDPs and SDFs demonstrated a considerably greater level of sophistication.[535] The City tried 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.[536] Moreover, influences from international urban planning discourses on strategic spatial planning, spatial integration and smart cities were steadily finding their way into Johannesburg's urban planning approach.[537] 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 global urban planning trends. In realising its developmental objectives, the City's 2016/2021 IDP identifies at least 10 strategic objectives that are in line with the global urban agenda. These include fostering economic growth, job creation, investment attraction and poverty reduction; the informal economy and SMME support; the green and blue economy; transforming sustainable human settlements; the 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.[538] These strategic priorities reflect the City's commitment to 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 by using smart growth strategies predicated on innovation and environmental integrity.

What further renders the City's 2016/2021 IDP relatively sound and credible is that all its developmental projects and programmes are spatially anchored through the *Spatial Development Framework 2040*.[539] Moreover, SPLUMA has cemented the role of SDFs in providing clear guidelines on their formulation

and implementation across all three spheres of government.[540] The SDF is important because it spatially guides the City's capital investment, thus allowing for a more integrated approach to development planning. It also identifies 'priority transformation areas'. These include, strengthening the metropolitan core (the traditional CBD); developing Corridors of Freedom; addressing marginalisation by prioritising poorer areas; addressing informal settlement challenges; and identifying 'a hierarchy of nodes' critical for economic growth.[541]

In addition to the IDPs and SDFs, a number of sector plans and growth and development plans aim to promote sociospatial integration and economic development in the city.[542] Over the past two decades, efforts have been made to ensure that all these sector-specific plans are aligned to the IDPs and the SDFs. Moreover, emphasis has been put on the vertical alignment of the City's planning instruments and other related planning instruments at provincial and national level. However, this alignment has proved difficult given the institutional complexities within and between all three spheres of government.[543]

The IDP's developmental objectives are also bolstered 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, the 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 Transport Infrastructure Grant; and the Neighbourhood Development Partnership Grant.[544]

Johannesburg's strategic spatial planning instruments – the IDPs, the SDFs, the BEPP and the Growth and Development Strategy 2040 (GDS) – are legally binding planning instruments and clearly articulate the City's developmental vision, but their implementation has yet to benefit all of the City's inhabitants.

While some residents enjoy a high quality of life, others continue to battle with unemployment, poverty and homelessness.[545]

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 embedding the culture of public participation in plan-making and implementation processes. Indeed, as the City's IDPs and their related SDFs have evolved 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. As legally binding planning instruments (as per the Systems Act and SPLUMA, respectively) they have the necessary credence to drive the transformational mandate of municipalities. Put differently, post-apartheid laws now compel city governments to manage cities in a financially sound, developmental and accountable manner.[546]

## Rights-Based Litigation and Spatial Dynamics

The terrain of rights-based litigation continues to be shaped by various social actors in post-apartheid Johannesburg. This has been particularly so in 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 altering post-1994 Johannesburg's lawscape. Moreover, through rights-based litigation, the state's transformative laws and related legal culture are continually tested.

The relevance of rights-based litigation as a vehicle for claiming legal rights and the right to the city is discussed in the previous chapter. In this section, attention is given to some of the cases that demonstrate the effects of rights-based litigation on Johannesburg's spatial transformation and their possible contribution to Johannesburg's governance approach. To this

end, *Olivia Road*, *Blue Moonlight* and *South African Informal Traders Forum* v. *City of Johannesburg*[547] (*SAITF*) are discussed,

As explained in Chapter 4, *Olivia Road* is important particularly from a 'meaningful engagement' and a 'reasonableness' perspective.[548] The Constitutional Court deliberated on the constitutionality of evicting more than 400 unlawful occupiers of two buildings in the inner city of Johannesburg. In doing so, it brought to light the need for the City to engage with citizens, particularly 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 had to factor a strong community engagement and participation component into its governance structures, thus resulting in opening up public participation spaces in urban planning. As per the judgement:

> *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.*[549]

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.[550] Because engagement is a two-way process, it meant that the City was able to consider the plight of those to be evicted and 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* acknowledged that those facing eviction must 'not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands'.[551] In the same vein, the court was able to use the law to protect the relatively powerless by emphasising their agency to engage with powerful actors (the City, in this instance).

The court's decision to order the City to provide alternative accommodation for those who were facing eviction was significant. Not only did it set a precedent for similar cases that were to follow, but most importantly, this case demonstrated the capacity of rights-based litigation to protect the poor while at the 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, when such evictions were commonplace. *Olivia Road* signified a break from the past, when 'unsanitary grey spots' would be stamped out without any recourse for those evicted from those areas.[552] It is an example of how urban governance practices can be transformed through meaningful engagement between the powerful (the City in this instance) and the most vulnerable in society.

The City's Inner-City Renewal Programme was well intentioned from an urban planning perspective, in that it sought to create a hygienic urban environment, but its threat to evict many unlawful occupiers meant that it was unreasonable, and therefore unconstitutional.[553] This finding by the court contributed to a new approach to urban governance. Instead of detaching itself from the plight of the residents within its jurisdiction, the

City was compelled by this judgement to adopt a reasonable and humane approach as it implemented its policies. This has a long-lasting effect on the spatial form of the city, because the City now cannot unwittingly engage in a colonial/apartheid style of arbitrarily evicting the 'undesirables'. Such a draconian approach to Johannesburg's planning would have introduced the 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. Although 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* 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 in realising spatial transformation through the implementation of laws that entrench human dignity, such as the PIE Act.

The City's obligations to assist the unlawful occupiers with access to shelter was emphasised by the court, too, in *Blue Moonlight*.[554] In this case, in 2006 at least 86 people had unlawfully occupied factory buildings, garages and office space in Berea, Johannesburg, and were facing eviction by a private company, Blue Moonlight Properties 39 (Pty) Ltd (*Blue Moonlight*). When purchasing these premises with the intention of redeveloping them, *Blue Moonlight* was in full knowledge that they 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 regarding the provision of housing to the occupiers in the event of them being evicted.[555] The case also brought to bear the extent of the reasonableness of the City's housing policy, particularly regarding 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 (Section 25(1) of the Constitution) with the occupiers' right not to be evicted from their home (Section 26 of the Constitution). Also foregrounding the court's judgement was its acknowledgement of the historic spatial and socioeconomic injustices that have seen most South Africans living in abject poverty. Regarding the housing crisis, for instance, there was an acknowledgement that more than two million people in the country were living in informal settlements and that housing shortages formed part of the reason for some of the poor to unlawfully occupy privately owned properties.[556]

While the Court found *Blue Moonlight* entitled to an eviction order, the fact that the eviction would render the occupiers homeless meant that the City had to be involved in this otherwise private eviction dispute. It 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 meant that the City could not hide behind the excuse of a lack of funds and the state could not claim (in neoliberal fashion) that it was not responsible for the side-effects of market forces. Staying true to the constitutional objective of protecting the poor's socioeconomic rights, the court emphasised the state's obligations and responsibility for people who fall on hard times as a result of the operation of market forces.[557]

As in *Olivia Road*, *Blue Moonlight* 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. In *Olivia Road*, the City was expected to reconsider the reasonableness of its housing policy, particularly in relation to private evictions. The *Blue Moonlight* judgement further compelled the state to be more 'humane' and sensitive to the plight of the poor, even as it dealt with private developers.

The court's objective of protecting the poor's right to dignity and their right to the city is also demonstrated in *South*

*African Informal Traders Forum and Others v City of Johannesburg and Others* (*SAITF*).[558] In 2013, the SAITF applied to the High Court to halt an eviction of licensed informal traders by the City's Metropolitan Police Department. 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 struck it off the court roll. Following this ruling, the SAITF approached the Constitutional Court to seek an interdict as part of the relief.

In deliberating on this matter, the Constitutional Court highlighted the plight faced by the evicted informal traders following their forced removal from their trading stalls. As the court outlined, the eviction of traders caused a 'financially perilous condition' for traders, and the postponement of the case was in fact a 'ruinous delay' that would have exacerbated the dire socioeconomic conditions faced by traders and their dependents.[559] 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.[560]

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 twentieth century, which viewed the presence of the poor in the city as a sociospatial ill to be summarily dealt with. The City attempted to defend its actions by stating that it 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, departmental stores, restaurants and other amenities because of criminality that hides amongst the illegal hawkers'.[561]

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'[562] when forcibly evicting informal traders, for instance, attests to this narrow view of the city as a space that can be 'sanitised' and

shielded from the dirt, grime and crime associated with the poor. This trope of sanitising the city through urban policy was dealt a blow not only in the *SAITF* judgement but also in *Olivia Road* and *Blue Moonlight*, where the court emphasised that the poor must be treated (by the City and private developers) in a humane manner, as prescribed in the Constitution. By acknowledging the reality of informality, *SAITF* opened an avenue for imagining and planning a humane city predicated on spatial justice.

## Reflections

Johannesburg's post-1994 lawscape is in the process of being fundamentally reconstituted through legislative and planning measures. As the City applies its various planning strategies aimed at promoting spatial justice, the city's varied neighbourhoods have experienced a considerable level of sociospatial and economic transformation.

Without doubt, Johannesburg's most affluent areas (particularly the northern suburbs) have benefited from both public and private sector investment. Investment in physical infrastructure, in particular, has seen areas such as Sandton become 'the richest square mile' on the African continent. Regarding the townships and the inner city, the City has, through its IDPs, SDFs, CIDs, and related township revitalisation strategies, implemented programmes and projects that have given these areas a 'facelift'. The provision of housing, water, electricity and other related amenities in Johannesburg's townships has alleviated the poverty of millions of the city's residents.

Despite these developments, there are still areas in need of innovative legislative and 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. Although 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 spatial injustice in post-apartheid South Africa has been perpetrated by the private sector or by the forces of private capital, with the state opting for a passive role in development, as per the neoliberal template.[563]

In the same breath, the rights in the Constitution and their enforcement, in cases such as *Blue Moonlight*, provide an important counterweight to private capital. *Blue Moonlight* ensures that the state cannot just submit and give people over to the market. Instead, it remains responsible for them, particularly the most vulnerable. This means that constitutionally driven rights-based litigation arguably marks the 'return of the state', as the state strives to play an active role in mitigating the effects of global capitalism and its complex neoliberal packages. If the state aims to be developmental through its interventionist policies and laws, it means that South African cities are not just handed over to private developers and neoliberal logic. It remains to be seen how the tug-of-war between the state and private developers will shape South Africa's lawscape.[564]

This chapter also demonstrated how the City's urban governance approach is informed by the courts as they attempt to realise the state's constitutional mandate of spatial inclusivity and justice. At the centre of the cases discussed is the influence of post-apartheid law in shaping the city's planning policies, particularly regarding the urban poor. *Olivia Road*, for instance, not only marked 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 regarding informal trading in the inner city. This attests to the transformative power of the law and its contribution to the city's spatial transformation. Instead of viewing the urban poor as a nuisance to be forcibly evicted, the City now has to ensure that its governance policies are reasonable and informed by meaningful engagement with the poor as much as with the private developers. Thus, as Johannesburg's lawscape transforms, law, planning and rights-based litigation continue to influence the pace of these transformation processes.

# Six

# Inflection Point/Decoloniality

## Introduction: Of a New Spatiolegal Consciousness

> *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.*[565]

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, or practices, contributed to the reconstruction and/or transformation of post-apartheid cities? This book sought to address this primary question, which was predicated on the assumption that law and planning contributed to the making of urban geographies of inequality in colonial/apartheid South Africa. It has also sought to examine the extent to which legislative and planning measures have reconstituted or transformed post-apartheid cities.

Whereas legal and planning instruments can be (and were) used to create racially segregated cities in South Africa, ironically, the same instruments can be used to redress the socioeconomic and spatial injustices they facilitated in the first instance. The difference in outcomes, therefore, as legal and planning instruments are applied in a given space, is determined primarily by the ideological and political disposition of the actors who apply these instruments of sociospatial and economic ordering.[566] In exploring the role of urban law - its formulation, and application, it becomes apparent that South African cities' spatial form and their everyday sociospatial economic relations were intrinsically shaped by the logic of racism and 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 book, it is apparent that racial capitalism also enhanced the colonial/apartheid state's drive to promote racial segregation. In Johannesburg, the discovery of gold in 1886 and the need for cheap black labour to work on white-owned mines and in factories and homes, for instance, saw the relegation of the so-called 'non-white' people to the Fanonian zones of nonbeing and alterity - that is, segregated townships and homelands. The logic of racism therefore was used to justify the legislation of racial zoning in colonial/apartheid Johannesburg.[567]

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 its socioeconomic wealth and political sophistication, as well as by the exclusivity of the spaces it inhabited. This creation of a 'white aristocracy' saw the colonial/apartheid state formulating various development programmes aimed at uplifting the socioeconomic status of white people. This was particularly the case in Johannesburg from the 1920s onwards, where the colonial state implemented various empowerment programmes aimed at improving poor white people socioeconomic status.[568]

The book also attempted to outline how the colonial imagining of cities like Johannesburg, as racial cities, intensified during the apartheid era, between 1949 and the late 1980s. The result was a plethora of segregatory laws, such as the Group Areas Act and other influx control legislation, used to further segregate people on racial grounds. By the 1970s, all South Africans belonged and/or resided in legally and racially determined 'group areas' (at least in principle).

What accompanied apartheid's legislated racial zoning was the uneven delivery of basic services, such as water, electricity and housing. As highlighted throughout the book, urban spaces inhabited by white population groups were relatively well serviced, whereas 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 these people out of white areas while allowing the state to effectively regulate and monitor their daily activities.[569]

In addition to mapping out the historical processes that facilitated the making of racially fragmented cities in South Africa, the book attempted to outline some of the efforts made by the post-apartheid state to reconstitute the apartheid lawscape. What emerges from the discussion on Johannesburg as a post-apartheid city is that the state has managed to achieve a considerable degree of success in transforming it 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 and socioeconomic and spatial transformation.[570]

Moreover, the post-apartheid state's commitment to redressing apartheid's urban legacy, by providing millions of South Africans with housing and access to water and electricity, points to the ongoing transformation of cities. The courts have also played a significant role in the reconstitution of South African cities by balancing various claims for legal rights.[571] Although most people in cities like Johannesburg do not have access to the courts, those who do contribute to the development of rights-based jurisprudence predicated on promoting spatial justice, equality and human dignity.[572]

## Reflections

The primary thesis that emerges from this book is that law and spatial planning can be appropriated by the state and/or other powerful sectors within society to further specifically determined sociospatial, economic and political ideals and/or ideologies of the time. Ideally, law and planning instruments are by their nature supposed to be technical, objective and apolitical, in that both are aimed at creating societal order.[573] However, legal and planning instruments were used to produce racially segregated and unjust cities in South Africa. 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 the 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, or be appropriated and employed in the service of creating an inclusive, democratic society, as is evinced by the emergence of the post-1994 lawscape.

South African cities were, in the main, imagined and designed along racial lines. Racial difference, therefore, became one of the primary principles of sociospatial 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. Therefore, the issue is not with the instruments of law and planning per se, but with the ideological/political positioning of those with the power to influence sociospatial engineering.

So, depending on who wields these instruments of sociospatial engineering, law and planning can either result in the making of racially bifurcated cities, as in colonial/apartheid South Africa, or be used in the service of achieving spatial justice. After the racist colonial/apartheid state was dismantled, legal and planning instruments were used to try and turn cities into more spatially just places. The difference is that these instruments are now infused or informed by a new political drive towards creating a democratic society.

These instruments have done remarkably well in deconstructing the apartheid city. New laws have been written and the legal culture has completely changed to support the constitutional vision of spatial justice. Moreover, planning and governance practices have changed in post-apartheid cities, with IDPs playing a central role in redressing sociospatial and economic injustices. In addition, the justiciability of legal rights impacts positively on the ongoing process of reconstructing the post-apartheid lawscape.

What is also clear, however, is that the constitutionally driven process of transforming the apartheid lawscape and cityscape has not been entirely successful. The apartheid city's spatial form and built environment remain intact. Even after the collapse of political apartheid, this spatial form designed

to segregate people on racial, ethnic and class lines continues to do so. Indeed, while most of the former white people-only suburbs have witnessed a high level of racial mixing, with the 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.[574]

In cities such as Johannesburg, the apartheid spatial form has been further complicated by the emergence of gated communities. These fortified, middle- and upper-class residential enclaves emerged from the fear of violent crime in the city. They were constructed 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 'literally, and harshly, prohibit entry to those who do not belong, and are not wanted, within'.[575] While some of the reasons (particularly the fear of violent crime) for these exclusive gated communities may be justifiable, their proliferation in Johannesburg and other major cities in South Africa has arguably resulted in the emergence of new social divisions that some have referred to as 'neo-apartheid'.[576]

These new geographies of exclusion have added another layer of class-based spatial segregation in post-apartheid cities. Private developers building real estate that caters primarily for the wealthy have contributed immensely to the fracturing of South Africa's cities on class lines. This 'real estate capitalism'[577] has given rise to the emergence of exclusive malls and shopping centres that have created a culture of 'enclosed consumerism', where people from different racial and social groups congregate only superficially and momentarily, under heavy security surveillance. In many ways, the rise of private developer-led exclusive real-estate developments has 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 in the future. The state's efforts to mitigate the negative effects of these developments have had dismal results.

Apart (literally) from the gated communities and their exclusivity, African, coloured and Indian townships in Johannesburg have kept a relatively homogeneous racial profile. In many ways, the legacy of racial segregation that manifests in the physical infrastructure built during the colonial/apartheid times continues to bedevil the post-apartheid sociospatial transformation agenda. In these urban geographies of inequality, racial tensions often mount, particularly with rising rates of unemployment and poverty. Members of the coloured community in Johannesburg, for instance, have 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 economy'.[578] Such sentiments attest not only to the plight of the poor in post-apartheid cities but also to the challenges that face these cities in addressing the historical issues of racialised sociospatial and economic injustice.

Amongst these challenges, the uneven delivery of basic services such as water, electricity and housing for the poor threatens the state's project of spatial transformation in post-apartheid cities such as Johannesburg. Although the low-cost RDP housing programme has benefited millions of people in the city, millions more still have no access to adequate housing.[579] The housing crisis has been exacerbated by the urbanisation of poverty, which 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 has meant the expansion of existing townships that were built during colonial/apartheid times, thus resulting in the further entrenchment of historical spatial patterns and related injustices.[580]

What has also been outlined in this book are the challenges of post-apartheid cities in balancing the demands for global competitiveness and the pressing need for realising socioeconomic rights and spatial justice, in an era of intensified global capitalism and neoliberal governance. In Johannesburg, the City's 'World Class African City' vision is continually tested

against the realities of high levels of unemployment and the abject poverty of millions of its inhabitants. Urban governance pressures are also evident in post-apartheid cities' planning policies and growth and development strategies, the implementation of which is made extremely difficult by balancing pro-growth and pro-poor development objectives.[581]

## Decolonial Meditations

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.[582] 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. 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.

The decolonisation spirit is already embedded in post-apartheid laws, policies and planning instruments. What is needed is to foreground the developmental objectives of these laws and planning practices with the purpose of coproducing knowledges and practices that can result in the creation of inclusive cities. As part of the decolonisation of cities, there is a need to privilege African cultural practices and knowledges that have been marginalised until now. The emphasis by the courts on the City's need to embrace meaningful engagement and public participation, in legal cases such as *Olivia Road* and *SAITF*, and laws such as the Municipal Structures Act, for instance, has already sown the seeds for the coproduction of a planning knowledge. These cases, laws and policies related to them are a departure point towards the creation of spatially just cities in South Africa.

The relevance of a decolonial epistemic perspective for legal and planning practices rests on the premise that it is 'not an essentialist, fundamentalist, anti-European critique' of the

modern world. [583] Instead, decolonial thought and practices are critical of Eurocentric and developing nations fundamentalisms as well as colonialism and nationalism. The primary goal of decolonial legislation and city-planning is to create cities and, ultimately, a world without epistemicides (or the elimination and 'othering' of knowledges deemed inferior), genocides, racism, patriarchy, xenophobia, homophobia and other 'abyssal lines' of difference that are currently used for discriminatory purposes.[584]

The appropriation of decolonisation as a developmental praxis can contribute to the ongoing process of social-spatial reconfiguration of South African cities.[585] The decolonisation project, for instance, 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.[586]

But 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 might be 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 romanticising a 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 cocreating an ecology of knowledges, it means having laws and planning practices that are open and receptive to relevant local and global knowledges and experiences that can contribute to the realisation of decolonial cities.[587]

The notion of *Ubuntu*, for instance, forms one of the key African traditional knowledges and governance approaches that can contribute to the decolonisation of post-apartheid law and planning.[588] Defined as 'a philosophy of life, which in its most fundamental sense represents personhood, humanity, humanness and morality',[589] *Ubuntu* can contribute to the realisation of the

constitutional vision of sociospatial justice. The concept 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.

Although post-apartheid South African law acknowledges traditional/customary law as part of the legal system, there is a need for the expansion of customary law to legal and planning approaches.[590] This is important primarily in the field of property rights, housing and urban land use. The traditional African land-tenure systems, for instance, were predicated on relatively communitarian principles.[591] However, they were marginalised with the advent of colonialism and market-led principles of land ownership that privileged individualism in property and land ownership. 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 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.*[592]

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'.[593] In decolonising the colonial/apartheid lawscape, the presently neoliberal definition of land and property rights could benefit from a decolonial process of 'learning to unlearn' neoliberal practices.[594] A decolonial approach to property ownership, therefore, should prioritise alternative variations of collectivism that include initiating inclusive 'urban land reforms, legalising informal habitation and creating private property rights for slum-dwellers'.[595] 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'.[596]

Regarding 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 adopted by the poor.[597] The current approaches to informality are a remnant of the sanitation syndrome of colonial times that emphasised their complete eradication. A decolonial approach, instead, should embrace these informal housing, 'backyarding' and trading arrangements as legitimate urban planning strategies from below. There are already transformations in this regard, occasioned by rights-based litigation (such as *Olivia Road* and *SAITF*) that can be used as a starting point for reimagining informality.

Part of the decolonisation project, therefore, would also entail decolonising the attitude of planners and political administrators as they deal with the survival strategies of the poor.[598] 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.*[599]

Similarly, a decolonial legal approach would mean abandoning urban governance approaches and policies that criminalise the poor and poverty in general.[600] This would involve anchoring

rights-based litigation on a sound understanding of the historical circumstances that drive the poor to unlawfully occupy buildings, engage in informal trading, illegally occupy land for building informal dwellings and other related 'undesirable' spatial practices. Indeed, although some of these acts may be unlawful, they often stem from desperation, thus becoming a form of 'insurgent planning'.[601] Insurgent planning can be defined as counterhegemonic practices that the urban poor engage in as a means of inhabiting the neoliberal city. These activities often go against formal (and yet 'anti-poor') planning principles and approaches predicated on law and order.

Encouragingly, the post-apartheid courts have demonstrated a high level of 'historical consciousness',[602] particularly when dealing with socioeconomic rights that involve the urban poor.[603] Perhaps this approach 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', a decolonial approach to law and planning in South Africa should consider the everyday practices of those who inhabit 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 of urban life in South Africa.

The notion of urban citizenship becomes important in the decolonisation debate, particularly when read from a legal rights-based and right-to-the-city perspective. A rights-based approach limits formal urban citizenship to political citizenship and legality as defined by law. However, a right-to-the-city perspective defines urban citizenship primarily by everyday practices of inhabiting the city.[604] Perhaps a decolonial approach to urban citizenship would attempt to balance the two positions, by crafting laws based on the appreciation of a shared, common

humanity, thus promoting global citizenship that transcends the colonially determined notions of nationality for instance.

Moreover, urban citizenship in a decolonial lawscape would militate against racists, and the xenophobic, homophobic and patriarchal behaviour that continues to characterise cities like Johannesburg. For Santos, the idea of a common urban citizenship is linked to one of global citizenship because both are predicated on ‘subaltern cosmopolitanism’.[605] This 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.[606] 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 considers the socioeconomic and spatial collaborations, and the platform of networks, that allow the urban poor to inhabit spaces such as Johannesburg. His concept also considers the simultaneous regularity and provisionality – the predictability and precarity – of life in the city.[607]

If clearly fleshed out, a decolonial approach to urban law in South Africa is likely to contribute to thinking about alternatives to the current global neoliberal governance and planning system.[608] Neoliberal governance has been viewed by many as a threat to the project of socioeconomic transformation, particularly in highly unequal societies such as South Africa.[609] Alternatives to neoliberalism would be particularly important in South African cities, which grapple 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 sociospatial and economic transformation that began in 1994 with the adoption of democratic constitutionalism.

This book 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 sociospatial 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. This book touches on this topic, but more research needs to be conducted on how specific matters, such as the decolonisation of land and property ownership, for instance, can be implemented. It is suggested here that research on decolonising law, planning, the city and space should also consider the methodological and analytical instruments that can be used to realise decolonial city futures.[610]

Related to the question of the decolonisation of the lawscape in South Africa are the implications of technology in the reconstruction of cities. The concept of smart cities, and the emergence of various spatial technological advancements in particular, promises to have an impact on the everyday sociospatial practices in post-apartheid cities.[611] It 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 and cities. Perhaps Johannesburg's townships and informal settlements could be the new frontiers where these 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' - in other words, a smart, spatially just city with a new 'techno-lawscape'.

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. This book attempts to demonstrate the need for law and planning to discard colonial conceptions of informality, but more work with some ground-truthing would greatly contribute to the understanding of the phenomenon of informality. Also linked to the 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, are raised regarding the impact of urban land reform on private property rights, housing provision and development planning in general.[612]

As questions on land and property ownership arise in South Africa - the concept of pharmakon as an analytic/ philosophical/theoretical frame, might contribute to the re-imagining and reconstitution the spatiolegal discourse and praxis. Put differently, pharmakon-as-theory may provide urban law scholars with new philosophical lens, grammars, and vocabularies urgently needed to appreciate the inherent power dynamics in urban law. Pharmakon-as-theory may also contribute to the unmasking of urban law's both repressive, and redemptive sides. When applied within the context of the decolonial turn, pharmakon-as-theory may compel scholars and practitioners in the legal and spatial planning fields to prioritise, and centre those aspects of urban law that promote the creation of just, inclusive, and democratic cities.

As cities like Johannesburg grapple simultaneously with the legacy of apartheid and the new challenges that emanate from neoliberalism and global capitalism, the experiment of transformative constitutionalism continues. What is apparent from this book, 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'.[613]

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612 See Ben Cousins & Cherryl Walker (eds.) *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015).
613 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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"This book is truly a pharmakon, a potion historically prescribed and a healing adventurously re-imagined. Pharmakon, as the title indicates, shows how the same thing that can be healing, can also poisons us. makoni takes us through the colonial and postcolonial lawscape of urban South Africa and especially Johannesburg, making a case for how injustice was established through planning laws, and all along trying to find ways in which justice can be achieved. This especially pernicious form of spatial violence is shown to have persevered throughout colonial history, with concrete examples of racial capitalism, where state and private initiatives were implicated. makoni shows how the law has been a conspirator of colonial racialisation, and a precious yet precarious compass to help navigate the post-apartheid lands – the law as true pharmakon, with the trophy of spatial justice in the centre of legal concerns."

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