THE POTENTIAL OF TRANSFORMATIVE CONSTITUTIONALISM TO FREE PEOPLE FROM APARTHEID SPATIAL PLANNING

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Contents

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To my mother, Sindiswa Lucwaba, everything is possible because of you.

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CHAPTER 1: INTRODUCTION

1.1.Research problem

Karl Klare introduced legal scholars to the term "transformative constitutionalism", and since then, constitutional writers have added various layers of imagery and thought, and have expanded on the original article to emphasise, apply and better interpret its multiple ideals. Even with the expansion and rich archive on the concept, including an article by former Chief Justice Pius Langa embracing the concept, it is widely agreed that transformative constitutionalism has not been able to meaningfully transform socio-economic rights jurisprudence in South Africa to break structural poverty.[1]

In this regard, I contend that South Africa is a country in continued spatial crisis, built on the architecture of what Boaventura de Sousa Santos calls the abyssal line. Through this line, a bifurcated society is created which continues to banish the black impoverished into the space of non-human – the other side of the abyssal line. This line, created through colonisation, has persisted through and redrawn itself in response to apartheid and South Africa's constitutional democracy If transformative constitutionalism is to be effective, it must respond to the space on the "other" side of the line which serves to keep its inhabitants in a perpetual state of illegality and sub-humanity. If we do not properly contextualise the space that surrounds, defines and haunts the black poor and marginalised, South African socio-economics rights jurisprudence will consistently find itself falling short of the desired outcomes.

The purpose, of this mini dissertation is therefore, to understand South Africa as a country in a spatial crisis that leads to the entrapment of the black body in a social, political, economic and legally depressed state. The crisis describes and is as a result of the multiple upheavals and ruptures that have shaped the post-colonial, particularly African, landscape, and experiences of its people.[2] Particular to the post-colonial landscape is that these ruptures are largely defined by the history of extraction, exclusion and violence by the white elite against the black poor. The nature of the crisis is that it continues to support and re-enact the same colonial oppressive outcomes, ensuring the black poor continue to exist in a state of marginalisation. The spaces in the crisis are also work to physically push out and keep marginalised black people in informal spaces away from economic activity. But additionally, the intangible elements of space mean that black people carry the consequences and

[1] J Dugard "Courts and Structural Poverty in South Africa To What Extent Has the Constitutional Court Expanded Access and Remedies to the Poor" in D Bonilla Maldondo (ed) Constitutionalism of the Global South and the Activist Tribunals (2013); S Sibanda Not purpose made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty (2011) 22(3) Stellenbosch Law Review; S Wilson and J Dugard *"*Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights*"* (2011) 3 *Stellenbosch Law Review* 664–682

[2] A Mbembe and J Roitman "Figures of the Subject in Times of Crisis" (1995) 7 *Public Culture* 324.

definitions of these spaces with them which define how they are interpellated, ensuring that in and out of the physical space they are viewed as sub-human.

In this dissertation I am particularly interested in how transformative constitutionalism can proactively facilitate spatial justice for the historically and presently marginalised in ameliorating the effects of the crisis. Spatial justice, in my understanding would mean the removal of the abyssal line and simultaneity between those interpellated as human and sub-human.

1.2.Sub-questions

1.2.1. How does this spatial crisis impact on the subjectivities of those living during the time of spatial crisis?

1.2.2. How apartheid planning and post-apartheid planning has shaped the notions of being and belonging?

1.2.3. Can transformative constitutionalism be adapted to respond to South Africa as a country in crisis?

1.3.Core concepts and understanding

Three concepts and ideas lay the foundation for this dissertation and are the main influencers of its structure and conclusions. Firstly, the crisis and subjectivity, secondly informality, and lastly a contextualisation of the realities of socio-economic rights litigants.

1.3.1. The spatial crisis and subjectivities

Critical to this dissertation is to situate South Africa as a country in crisis. In chapter one, I focus on the meaning of this crisis, a condition of all post-colonial African countries unable to deliver material benefits to ordinary citizens in their an attempt to fulfil the promises of liberation.[3] Often this crisis also manifests itself through instability and declining state performance.[4] The crisis cannot be viewed as a result of a single point in time, rather it includes both minor and major transformations in African societies which also includes the lived experiences of people, both those that result from major

[3] S Ndlovu-Gatsheni "Fiftieth anniversary of decolonization in Africa: a moment of celebration or reflection?" (2012) 33 (1) *Third World Quarterly* 81.

[4] V Azarya and N Chazan "Disengagement from the state in Africa: Reflections on the experience of Ghana and Guinea (1987) 29(1) *Comparative studies in society and history 116*.

ruptures and those in response to everyday life.[5] I rely in this thesis on Mbembe and Roitman[6] to define the meta crisis, but contend that because space is central to the continuation of the crisis in South Africa, it is more aptly defined as a spatial crisis.

In the crisis, the law/authority does not act equally on everyone, it acts unevenly depending on which side of humanity one lies.[7]

Mahmood Mamdani describes the bifurcated world as the following:

> To stretch reality, but without stepping outside the bounds of the real, the Africa of free peasants is trapped in a non-racial version of apartheid. What we have before us is a bifurcated world, no longer simply racially organized, but a world in which the dividing line between those human and the rest less human is a line between those who labour on the land and those who do not. This divided world is inhabited by subjects on one side and citizens on the other; their life is regulated by customary law on one side and modern law on the other; their beliefs are dismissed as pagan on this side but bear the status of religion on the other; the stylized moments in their day-to-day lives are considered ritual on this side and culture on the other; their creative activity is considered crafts on this side and glorified as the arts on the other; their verbal communication is demeaned as vernacular chatter on this side but elevated as linguistic discourse on the other; in sum, the world of the "savages" barricaded, in deed as in word, from the world of the "civilized".[8]

Additionally, Sabelo Ndlovu-Gatsheni speaks of a complex relationship that exists in the post-colonial state, resultant from the state's inability to provide material benefits to ordinary citizens, which culminates in a divide between ordinary citizens who become subjects, and the political elite or rulers who become full citizens. Boaventura De Sousa Santos, who I rely on heavily in this dissertation, refers to an abyssal line which separates the human and sub-human, legal and illegal, visible and invisible, formal and informal.[9] I understand Ndlovu-Gatsheni not to solely refer to financial benefits and its popular consequence, poverty, but material in the sense that they lead to significant changes to their lived experiences which includes the social, economic, legal and political. In terms of De Sousa Santos,

[5] A Mbembe and J Roitman "Figures of the Subject" (1995) 324.
[6] A Mbembe and J Roitman "Figures of the Subject" (1995).
[7] Even though in a situation of no crisis this may equally apply, the inequality in the crisis – the spatial crisis being specific to the post-colonial state - is directed to a specific group – the black poor – of people who historically have suffered similar or the same injustices.
[8] M Mamdani *Citizen and subject: contemporary Africa and the legacy of late colonialism* (1996) 61.
[9] B De Sousa Santos "Beyond Abyssal Thinking: from global lines to ecologies of knowledges" (2007) https://www.eurozine.com/beyond-abyssal-thinking/?pdf Accessed October 20191.

benefits to ordinary citizens would only be "material" once able to have the effect of deconstructing the abyssal line in its various forms.

Mamdani, Ndlovu-Gatsheni and De Sousa Santos point us in the direction of those who are interpellated as sub-human beings alongside those who are seen as human in a single society. In the main, illustrating how law acts upon them, but also highlighting two distinctly different systems operating in both these spaces. What I seek to do in this dissertation is to direct attention to the spaces of those who are interpellated as sub-human, which are often labelled as informal, and to take seriously the different systems at play in the lives of those considered as sub-humans. The focus here on the word "informal" rather than "invisible" or "illegal" is to enable an analysis based on a term that that is often viewed as innocent – completely void of meaning - in which to describe a sector, which often conceals the way it works to act violently on the people it seeks to label. Part of my foregrounding assumption is that for those inhabiting the space of the human, the law plays out as intended, but that for those in the sub-human, as per Mbembe, life consists of a "predictable insanity".[10] And so, for those who are interpellated as sub-human, their actions do not always result in the outcomes as per the written rules or laws.[11] Importantly here is that the incongruency between action and result is not limited to the actions of the subjects, but also those of the court, as law acts through these spaces.

This space then in what is labelled as the informal is central to this thesis. My understanding of space with regards to the abyssal line is defined by three levels of understanding, which I use concurrently in thinking about the space on the "other" side of the line. At a global level I follow de Sousa Santos' assertion that the abyssal line serves as the foundation for Western Modernity, permanently dividing the world into those viewed as human and those who are sub-human. Santos stating that whilst there have been some shifts of the line depending on the particular epoch, it continues to be permanently fixed and defined by colonialism, defining the coloniser as human and the native as sub-human.[12] This abyssal line reconfigures itself at a national level, adapting in the African case to the nature of the post-colonial state to create Mamdani's (anti-black) bifurcated state. Read alongside Frans Fanon[13], in a spatial sense, those who are white and considered human on this side of line reside in the zone of being, and those who are black and considered sub-human on the "other" side, in the zone of non-

[10] A Mbembe and J Roitman "Figures of the Subject" (1995) 339-340.
[11] A Mbembe and J Roitman "Figures of the Subject" (1995) 342.
[12] B De Sousa Santos "Beyond Abyssal Thinking (2007) 5-6.
[13] F Fanon Black skin white masks (1967)

being. The zone of non-being, a zone of internal colonialism demarcating racial inferiority and sub-humanism.[14]

Mbembe tells us that subjects construct their subjectivities in response to this crisis in other words their daily acts of informality are in response to the decreased opportunities available to pursue their livelihoods to the fullest extent.[15] Azarya and Chazan call these responses and adaptations forms of "disengagement" employed by vulnerable groups to adjust to a country in crisis. [16] It is these subjectivities that this work is concerned - the multiple ways in which subjects negotiate this crisis. As this work focuses on the informal, I purposely rely on the term "subject" versus "citizen" or the more general term "person/people," as it essential in consistently describing those on the informal side of the line as sub-human. These subjectivities are important as I view them as a major hinderance in the success of the court's socio-economic rights jurisprudence. Ignoring them and how they are constructed, distorts our analysis, incorrectly placing the disconnect between the court's intentions and undue outcomes on an outplaying of transformative constitutionalism rather than improper contextualisation[s] as the issue.

The crisis I will be looking at in this thesis is therefore a spatial, one which results in the entrapment of the black impoverished in a state of social, economic and political deprivation. Space being both the main site, driver and enabler of the crisis.

1.3.2. "Informality"

In this dissertation I place the idea of informality or the informal as central to the project. [17]The spaces considered as informal create a dilemma for policy making, but also conflate the informal with chaos, invisibility and illegality.[18] There are multiple elements to this informality, but I place four themes of

[14] R Grosfoguela, L Osob and A Christouc "'Racism', intersectionality and migration studies: framing some theoretical reflections" 22 (6) *Identities: Global Studies in Culture and Power* 4

[15] V Azarya and N Chazan "Disengagement from the State in Africa" (1987) 116.

[16] A Mbembe and J Roitman "Figures of the Subject" (1995) 340-342.

[17] I note that there are multiple ways of being and living in the informal and that many people opt out of formal spaces for the informal. But this dissertation mainly focuses on those that have been pushed into the informal the crisis and their historical position. I further acknowledge that informality can also be constructed by privileged people for their own benefit, but purposely do not refer to this kind of informality as it is not relevant in pursuance of this project.

[18] P Harrison, E Piterse, S Scheba and M Rubin "Daily practices of informality amidst poverty" https://www.africancentreforcities.net/wp-content/uploads/2018/12/Informality-Project_05_11_lowres-singlepages.pdf (2018) 5; 35; 40

informality at the centre of this dissertation: uncertainty, historical and persistent exclusion, informality as an alternative to formality, and the variable nature of informality.

Khawuleza, Khawuleza,

Khawuleza mama Khawuleza

Nang' amapolisa azongen 'endlini mama

The above lyrics are from a Hugh Masekela cover of the song *Khawuleza* written by Dorothy Masuku. The song specifically refers to a warning call by children to shebeen owners to hide their illegal alcohol as police are on their way to raid the beer halls/shebeens. Here, I use this song to illustrate four important themes of informality, on which my understanding of the project is based.

Firstly informality, whilst not exclusive to the South African context, is stubbornly shaped by the basis of historical race-based exclusion. In the main, the majority of those who operate, in the informal are the same as those previously excluded from economic opportunities and thus impoverished. Ananya Roy stresses the need not to conflate informality with poverty, but that within informality there are "varying degrees of power and exclusion".[19] Here whilst I fully agree with Roy, in South Africa, because of the structural nature of exclusion, the majority of informality is driven by those who are black and impoverished, or at the very least excluded from mainstream economies.

Importantly, *Khawuleza*, on the backdrop of South Africa's history, also illustrates a second element of the informal sector, that informality is an alternative rather than a polar opposite to that which is formal. The rise in shebeens in South Africa was initially in response to the Liquor Act[20] which prohibited the sale of beer by "Africans" and their entry into licensed premises.[21] This being said, it also presented a new opportunity to place economic value on skills held by vulnerable black women, who were excluded from the mainstream market. And whilst shebeen queens in present South Africa may no longer brew the beer, shebeens remain an important and persistent element. This is both because of their cultural and social contributions, and also as an alternative avenue for income that

[19] A Roy "Urban informality: toward and epistemology of planning" (2005) 71(2) *Journal of the American Planning Association* 148.
[20] Act 27 of 1989.
[21] Z Hlalethwa "The rise of shebeen queens" 17 August 2018 https://mg.co.za/article/2018-08-17-00-rise-of-the-shebeen-queens (accessed 20 December 2018).

allows an entry into the market for black women who are the most vulnerable group in society, through the transformation of the informal spaces available to them, to make them work to sustain their livelihoods. In line with Roy, this dissertation rejects the notion of the labelling of the informal sector as a whole, and rather calls for a view of informality as a mode of urbanisation, an "organising urban logic".[22]

Lastly and in addition to the previous point, what *Khawuleza* illustrates through the transformations of these spaces is the dynamic nature of the informal space, one that cannot be viewed without taking cognisance of the intersections of space and time. Whilst apartheid spatial planning demarcated certain spaces and in doing so certain groups of people as informal and eventually invisible and illegal, these places have over time, and are consistently, transformed through the agency of those people who occupy the spaces to advance their lives and livelihoods to the best of their abilities given the circumstances. These shebeens represent that in the "informal", the people respond to the spatial crisis to create their own realities, in a way that makes sense for them.

1.3.3. Transformative constitutionalism versus activist tribunals

In this dissertation I use the Colombian constitutional court, often referred to as an activist tribunal, to offer a different model for a court's response to the vulnerable citizens of a country in crisis. I propose that activist tribunals may provide some lessons on how activist court's may be better equipped to more effectively realise the socio-economic rights of marginalised people.

In the introduction to the book *Activist Tribunals of the Global South*, Daniel Bonilla Maldonado speaks of three activist tribunals of the Global South, South Africa, Colombia and India. Activist, in that all three of the constitutional courts have contributed to the reform of the private and public sectors in their countries. "What makes these three countries relevant and attractive for a comparative constitutional law analysis is that they have legitimate, creative, and regionally prestigious constitutional courts that have addressed the foregoing common issues: consolidating liberal democracies, political violence, high levels of inequality and poverty, and cultural diversity – are notable.[23]

This dissertation does not go as far as to do in-depth comparison of all three courts, but makes comments on comparisons between the South African and both the Indian and Colombian courts.

[22] A Roy "Urban informality" 148.
[23]D Bonilla Maldonado "Toward a constitutionalism of the Global South" in D Bonilla Maldondo (ed) *Constitutionalism of the Global South and the Activist Tribunals* (2013) 29.

Whilst there are notable differences in the geographies, politics and cultures of the three countries, I focus on the court's approach to socio economics rights jurisprudence. This is relevant as the countries are similar in their in the levels of inequality, a history of political violence and vast cultural diversity.[24] In Bonilla Maldonado's work, it is suggested that all three courts may be classified as activist tribunals, but whilst I will not go as far as to say the South African court cannot be classified as such, its socio-economic rights jurisprudence falls slightly short of this definition. Here I echo Jackie Dugard when she states:

> I believe that the Court's cautious approach to direct access and socioeconomic rights can best be understood as reflecting a jurisprudential conservatism that arises from a legal culture and training in which access to justice for the poor and socioeconomic rights do not feature strongly. Without clear pointers, South African judges are ill equipped to deal with many of the current challenges regarding structural poverty, and consequently, they appear uncomfortable with playing an activist, pro-poor role.[25]

Klare previously, and also Dugard in the above, place the court's conservatism as a function of legal culture, and whilst I agree here, this dissertation places a spotlight on a specific element of legal culture, the way in which the courts contextualise the circumstances of the litigants. And so, I contend that a large part of the success of the Colombian court has been its ability to situate itself in the shoes of the litigants to become a voice of the poor. As Jackie Dugard states with regard to the South African court, the court needs to "embrace a role as the dedicated institutional voice of the poor"[26]

In this dissertation, I in no way assume there is a position of the perfect constitutionalism, rather look for elements that may enhance South Africa's own constitutionalism. And what is evident in the Colombian and Indian constitutions is that judgements that have been able to impact the daily needs of people, which in terms of the South African jurisprudence has been a missing element, with critics stating its tendency to decide very specific issues quite broadly.

1.4.Chapter Outline

This dissertation consists of five chapters. The first chapter provides a framework for the dissertation, explaining the overarching concepts to be presented and the assumptions to be relied on.

[24] D Bonilla Maldonado "Toward a constitutionalism of the Global South" 25-26.
[25] J Dugard "Courts and Structural Poverty *in* South Africa" (2013) 325-326.
[26] J Dugard "Courts and structural poverty in south Africa" (2013) 326.

The purpose of the second chapter is to describe South Africa as a country in a crisis. The anchoring concept here is the constitution of individual and collective subjectivity within the spatial crisis.. In unpacking the notion of subjectivity, I rely on Mbembe and Roitman's writings, and further propose that it is this crisis that supports the continued operation of an abyssal line in society which separates and determines those who are visible and invisible in society, and operates to categorise those who are invisible as also "informal" and therefore illegal.

In the third chapter I further build on this idea of the spatial crisis by focusing on the spatial aspects of the "informal" side of the line. In doing this I explore the idea of space and its constitutive nature, beginning by tracking its physical elements, but then moving on to focus on the intangible aspects of space. This is done through examining the writings of Edward Soja, Andreas Philippopoulos-Mihalopoulos and Henri Lefebvre to understand the ideas of spatial injustice. I propose that space acts as a conduit for apartheid spatial planning to continue to act violently on the people on the "other" side of the abyssal line, shaping the notions of being and belonging and trapping these people in a time of neo-apartheid.

Lastly, I propose how courts might respond to the other side - "informal" side - of the abyssal line. Here, I focus on transformative constitutionalism and its limited successes in meaningfully impacting on the lives of those on the informal side of the line.

CHAPTER 2: SOUTH AFRICA AS A COUNTRY IN A CONTINUED SPATIAL CRISIS AND THE ENTRAPMENT OF THE BLACK BODY

2.1 Introduction

The purpose of this chapter is to locate South Africa as a country in a state of continued spatial crisis, one originating in colonisation, deepened during apartheid, and still operational in post-apartheid South Africa. This crisis refers to the continued operation of an abyssal line which serves to separate society into those human – on "this" side of the line, and those non-human - the "other" side of the line. The contours and borders of the line remain constant, with the exception of the inclusion of the black elite in post-apartheid South Africa on "this" side of the line. I rely on Mbembe and Roitman to define the meta crisis, but contend that because space is central to the continuation of the crisis in South Africa, it is more aptly defined as a spatial crisis.

Key to the spatial crisis is the constitution of individual and collective subjectivities in response to the spatial crisis. I use Ananya Roy's understanding of the "informal", which rejects a westernised view of urbanisation - which serves to label the spaces on the "other" side as "non-formal" and illegal - in order to begin to understand the role of communities in constituting their own realities and how it is these realities that court's must take heed of, if their judgments are to bring about a more contextualised and truer sense of justice. In other words, this chapter seeks to create an alternative view of the kind of individuals the courts should be responding to through their judgments.

Lastly, I contend that the seemingly "informal" daily practices of informality of those individuals on the "other" side of the line may point to a complete rejection of the bifurcated state by those on the "other" side. This rejection is based on a demand for full humanity and not simply access to the space on "this" side of the line, rather a return to their own, reconstituted humanity.

2.2 The constitution of subjectivities in response to a time of spatial crisis

In their article called *Figures of the Subject in a Time of Crisis,* Mbembe and Roitman refer to two concepts, "the crisis" and the subject.[27] They describe "the crisis" as "the constitutive site of particular forms of subjectivity", one that should not be considered as a specific point in time, rather the immediate present.[28] In other words, the crisis is continuously occurring and being constituted, defined by a multiplicity of factors. They elaborate that the time of crisis is defined by, "the acute

[27] A Mbembe and J Roitman "Figures of the Subject" (1995)323-352.
[28] A Mbembe and J Roitman "Figures of the Subject" (1995) 323.

economic depression, the chain of upheavals and tribulations, instabilities, fluctuations and ruptures of all sorts (wars, genocide, large-scale movements of populations, sudden devaluations of currencies, natural catastrophes, brutal collapses of prices, breaches in provisioning, diverse forms of exaction, coercion and constraint) that make up the fundamental experiences of African societies over the last several years".[29] It is within the context of the crisis that individuals begin to construct their own survival norms at various levels of society and begin to translate these into their own truths, and ideals of possibilities.[30]

Important in Mbembe and Roitman's work, and instructive in this dissertation, is the reliance on the word "subject" rather than "citizen". Relying on Mamdani[31] and Ali Mazrui[32], Ndlovu-Gatsheni states:

> The failure by the state to deliver material benefits and freedom to ordinary people resulted in a problematic relationship between state and citizens. Those in control of the state became the only full citizens, together with their clients and cronies. The majority of ordinary people became subjects once more, just like under colonial rule. Instead of governing, the elites in charge of the state became rulers in the crudest sense of the term, whereby their words became law and they reduced citizens not only to subjects but also to powerless sycophants and hungry praise-singers.[33]

Moving forward, I purposely use the word subject and resultant subjectivities rather than citizen to denote that the majority living in crisis, are locked outside of economic, social and political benefits, and reduced to subjects rather than full citizens.

Further, Mbembe and Roitman speak about the regime of subjectivity which refers to a shared configuration of everyday life, based on that which is material and allows them to make sense of and contextualise everyday life, its parameters and possibilities.[34] "The crisis" determines the multiple regimes of subjectivity. Mbembe and Roitman suggest that although, in the main, the daily occurrences within "the crisis" seem scattered, random, disconnected, or part of everyday happenings, not intrinsically interlinked, they are in fact repetitive and are known to almost everyone. Mbembe and Roitman state instead that these daily occurrences have become "ways of doing" which

[29] A Mbembe and J Roitman "Figures of the Subject" (1995) 324.
[30] A Mbembe and J Roitman "Figures of the Subject" (1995) 325.
[31] M Mamdani *Citizen and subject: contemporary Africa and the legacy of late colonialism* (1996).
[32] A Mazrui *On Heroes and Uhuru Worship: Essays on Independent Africa* (1967).
[33] S Ndlovu-Gatsheni "Fiftieth anniversary of decolonization in Africa" (2012) 81.
[34] A Mbembe and J Roitman "Figures of the Subject" (1995) 324.

belong to the register of new forms of public knowledge."[35] In their words, "the series of operations in and through which people weave their existence in incoherence, uncertainty, instability and discontinuity… they recapture the possibility for self-constitution, thus instituting other 'worlds of truth.'"[36]

Therefore, in this dissertation when referring to subjectivity I mean the way in which marginalised people reconstitute their identities in response to the "material conditions of their societies"[37]. Often this is in direct contrast to the overly simplistic identities ascribed to them by constructed and inherited societal norms. These subjectivities are built through them making sense of their world the opportunities it offers and the alternative pathways they have created within it for their own survival.[38]

Those operating within the crisis live in a constant state of uncertainty, an "insanity" of sorts.[39] Here, the insanity refers to "the unbearable discrepancy that exists between publicly announced reality and that other constantly changing, unstable and uncertain…realm...Every step or effort made to follow the written rule is susceptible to lead not to the targeted goal, but to a situation of apparent contradiction and closure from which it is difficult to exit either by invoking the very same rules and authorities responsible for applying them, or by reclaiming theoretical rights supposed to protect those who respect official law"[40] In my understanding of Mbembe and Roitman, the way in which individuals navigate this insanity, assists in constituting their ways of living, the ways in which they view their world. It is from this insanity, that a sense of understanding and "making sense" is born. In other words, it is the understanding of this insanity, that is in fact quite stable, repetitive and predictable, that subjects build their worlds of truth. That it is that which is inexplicable that becomes the "normal state of affairs"[41]

Azarya and Chazan list four coping mechanisms of individuals in the post-colonial state to disengage the state: These are 'suffer–manage syndrome', 'escaping', 'creation of systems parallel to those of the state' and 'self-enclosure'.[42] These coping mechanisms, state Azarya and Chazan, "are all attempts to adjust to an environment of diminishing opportunities and increasing vulnerabilities"[43]. These

[35] A Mbembe and J Roitman "Figures of the Subject" (1995) 340.
[36] A Mbembe and J Roitman "Figures of the Subject" (1995) 325.
[37] A Mbembe and J Roitman "Figures of the Subject" 324.
[38] A Mbembe and J Roitman "Figures of the Subject 323-324.
[39] A Mbembe and J Roitman "Figures of the Subject" (1995) 342.
[40] A Mbembe and J Roitman "Figures of the Subject" (1995) 342.
[41] A Mbembe and J Roitman "Figures of the Subject" (1995) 339.
[42] V Azarya and N Chazan "Disengagement from the State in Africa" (1987) 116-129.
[43] V Azarya and N Chazan "Disengagement from the State in Africa" (1987) 116.

mechanisms include a combination of social, economic, religious, political, and cultural elements. Suffer-manage syndrome includes constant adjustment in order to cope with the deteriorating circumstances; escapism is in the form of migration; and self-enclosure refers to the reduced use of state channels in order to protect oneself from its uncertainties.[44] Parallel systems, the mechanism most relevant to individual subjectivities, is described as a response to crisis by creating alternative and parallel systems to those of the state as an outlet for human needs that the state had failed to fulfil. [45]Examples include informal markets (black markets), smuggling, corruption and the use of alternative methods of justice.[46] The logic behind these alternatives is that they override official channels and skirt the state's laws. This form of disengagement involves attempts at beating the state systems and laws.[47]

Whilst all these writers may not agree on the language used to describe the crisis, materially they all describe the same condition of the post-colonial African state. Common here is that there is a particular form of crisis common to the post-colonial state[48], one that firstly results in a failure of the state "to deliver material benefits and freedom to ordinary people"; secondly creates a stark divide between the formation of identities of those persistently benefitting in their previous categories (with the exception of the political elite) defined as coloniser -citizen and colonised- subject; and that those defined as subjects perform daily acts as a response to the crisis that intersect and create alternative forms of economy, livelihoods and authority that subvert the negative effects of the crisis.

In the next section, I use the concept of the abyssal line to describe this divide created in the crisis between the citizen and the subject.

2.3 The crisis and the operation of the abyssal line

The concept of the abyssal line can be found in the writings of Boaventura De Sousa Santos. In De Sousa Santos's words, "the abyssal line is the invisible line that divides a world/people into the human and the sub-human, the human ruled by a dichotomy of regulation and emancipation, and the other by appropriation and violence"[49]. The abyssal line is constructed through that which is visible and that

[44] V Azarya and N Chazan "Disengagement from the State in Africa" (1987) 116-129.
[45] V Azarya and N Chazan "Disengagement from the State in Africa" (1987) 121-126.
[46] V Azarya and N Chazan "Disengagement from the State in Africa" (1987) 121-126.
[47] V Azarya and N Chazan "Disengagement from the State in Africa" (1987) 121.
[48] This does not preclude that non-post-colonial states may be experiencing their own crisis, rather I focus on a crisis particular to post-colonial states
[49] B De Sousa Santos "Beyond Abyssal Thinking" (2007) 1.

which is invisible, with the invisible being the foundation and reinforcing that which is invisible[50]. Over time, states De Sousa Santos, that which occupies the other side of the line, the invisible, becomes non-existent.[51] De Sousa Santos explains that the other side of the line as one beyond legality and illegality, beyond truth and falsehood "These forms of radical negation together result in a radical absence, the absence of humanity, modern sub-humanity.[52] The exclusion is thus both radical and non-existent, as sub-humans are not conceivably candidates for social inclusion. Modern humanity is not conceivable without modern sub-humanity.[53]

It might be useful to consider the kind of abyssal line we have created in the constitutional era. Tshepo Madlingozi says this:

> The hegemonic constitutional project is then how to integrate the "formerly" oppressed and excluded into the "new" South African polity and state through universal enfranchisement, extension of human rights to all, equitable distribution of (mainly) state goods, and de-racialisation of the spheres of civil society and the economy. The consensus is that all of these can be, are being achieved, through South Africa's peculiar brand of "transformative constitutionalism" (Klare, 1998: 150). And yet, from the perspective of historical victims of settler colonialism transformative constitutionalism has neither realised the aforementioned de-constitutionalising exigency nor the constitutionalising imperative.[54]

In the paper, Madlingozi, proceeds to outline five crises of the constitution: widespread protest action by marginalised communities; the anti-black bifurcated state; African law viewed as subservient to European law; the subjugation of indigenous sovereignties; and the lack of a post settler dispensation.[55]

Madlingozi uses these crises to argue in favour of the failure of the transformative constitutionalism project. He argues that these crises indicate the persistence of pre-colonial structures and spaces, and that transformative constitutionalism as a project has been unable to significantly shift the status of black people.[56] Similarly, Ramose's Africanist post-conquest Manifesto argues that the outcomes of the current constitutional democracy were foreseeable, his main premise rests on the need for

[50] B De Sousa Santos "Beyond Abyssal Thinking" (2007) 2.
[51] B De Sousa Santos "Beyond Abyssal Thinking" (2007) 2.
[52] B De Sousa Santos "Beyond Abyssal Thinking" (2007) 2.
[53] B De Sousa Santos "Beyond Abyssal Thinking" (2007) 2.
[54] T Madlingozi "On Settler Colonialism and Post-Conquest Constitution-ness: The Constitutional Vision of African Nationalists of Azania/South Africa" in B de Sousa Santos & B Sena Martins (eds.) *The Pluriverse of Human Rights* (2019) 5.
[55] T Madlingozi "On settler colonialism" 6-7.
[56] T Madlingozi "On Settler colonialism" 14.

intentionality in building a constitution and post-colonial state that result in a sense of African being and belonging through the restoration of African humanness – moving the native from the place of non-human into the human; removing the settlers' right to conquest through redistribution and restoration, and moving the view of the settler away from the colonising other[57].

Madlingozi further argues that the constitutional process and outcomes favoured the ANC's inclusionary manifesto, rather than restoring the land and complete sovereignties of Africans. That the consequences of this was to redraw/recast the abyssal line and "the re-entrenchment of the notion that Africans are below the human line and that being the case, that they are not deserving of reparations, recovery of sovereignties and restoration of titles over land'.[58]

2.3.1 Reimagining the other side of the abyssal line

It may be useful to begin to practically explore the idea of the spatial crisis and whether South Africa is in fact a country in a crisis. With colonialism and apartheid as the main drivers of the spatial crisis, as well as apartheid spatial practices and planning still haunting the post-apartheid landscape, it is not by chance, then, that in spatial terms, amongst others, South Africa is still wading through its own crisis. A crisis, which for black people in the main, loudly manifested and built itself through law and space, now continues to do so within the new boundaries of the "informal" space. In order to illustrate this continued state of crisis, I rely on two case studies of the Johannesburg inner city and Delft, an area in Cape Town, produced by the Mandela Initiative.

2.3.2 "Informal" spaces in the Global South

Ananya Roy in an article focused on urban geographies, speaks about the production of space, focusing on the context of the Global South. Roy refers to what she calls the Asian Century, which reflects the large proportion of urban growth and development of new urban spaces, occurring in countries situated in the Global South. Roy and other scholars from the Global South, suggest that it is more instructive to look at the construction of urban spaces from the vantage point of the Global South, rather than the current urban global growth trend models which are based on the north.[59] Roy continues that this Western influence on delineating that which is the urban norm, also tends to incorrectly define that which is legal and illegal or regulated and unregulated spaces. Roy contends

[57] T Madlingozi "On settler colonialism" 13.
[58] T Madlingozi "On settler colonialism" 12.
[59] A Roy "The 21st Century Metropolis: New Geographies of Theory" *Regional Studies* (2009) 46(3) 825.

that viewing urban spaces from the perspective of the Global South, may offer a different understanding. Firstly, that often even those spaces classified as informal, are a product of, and lie within the scope of the state, and that the production of such space is deliberate, resulting from a culmination of "extra-legal, social and discursive regulation".[60] Secondly, that which is informal is also a producer of space, but often it serves to devalue, or place a differentiated value on this space, and that the large area of differentiation is not necessarily between that which is formal and informal, rather that which is "informal" is "internally differentiated".[61]

This reliance on a westernised view of urban spaces is not helpful in understanding how space is produced in the context of the Global South. The next section which focuses on "informal" spaces" and rejects how the classification of "informal" tends to minorify and devalue the spaces and livelihoods of those who in fact form the majority, and represent the new and multiple ways people transform and construct cities in the Global South.

2.3.3 Daily practices of informality; the case of *Johannesburg Inner City and Delft*

In a recent study named "Daily practices of informality amidst urban poverty", the Mandela Initiative explores "multiple forms of informality and the connections between them" namely, the study focuses on Hillbrow in the Johannesburg Inner City and the Delft township, on the outskirts of Cape Town. The study seeks to gain a better understanding into those practices labelled as "informal" and how they form part of the livelihoods of those occupying these spaces. This study provides a practical example of how those living on the other side of the abyssal line, the "informal" side of the abyssal line, construct their subjectivities in response to the spatial crisis. The study is useful, in that whilst there is much writing on the practices of informality with specific focus on the provision of housing and the operation of informal businesses, there is little consideration on the multiple dimensions of this informality and how these interact to create the daily lives or, as per Mbembe and Roitman, the worlds of truth of those operating in the "informal" space.[62]

Whilst the study notes the vast differences between Delft and Hillbrow – mainly economic and location (proximity to the "city") – it takes the view that both spaces may be used to answer certain questions, rather than to collapse them into the same category. These answers allow the writers to "think through complex phenomena that are currently experienced across diverse localities".[63] For my

[60] A Roy "The 21st Century Metropolis" (2009) 826.
[61] A Roy "The 21st Century Metropolis" (2009) 826.
[62] P Harrison "Daily practices of informality" (2018) 6-7.
[63] P Harrison "Daily practices of informality" (2018) 22.

purposes, it allows me to take two vastly different instances of "informality" and understand the commonalities of the predicaments of those living in these "informal" spaces. These commonalities existing specifically as not a uniform, but similarly triggered, response to the spatial crisis. It is my assertion, in support of the study, that these daily practices are highly organised, intentional and predictive, and the separation between the formal and "informal" is largely one that is arbitrarily constructed. This study in particular focuses itself on responding to these issues: the diversity and intersections of "informality", the agency of local people, the governance of informal spaces, and the entanglement of the formal and the informal".[64]

The study concluded with five complexities to be considered when rethinking "informality": intersection, ambiguity, agency, paradox and entanglement.

Regarding intersectionality the study noted changes in the space in the inner city characterised by speedy transformations, whilst Delft is rather characterised by incremental changes and upgrades. Delft itself "assembled through the interaction between state provided housing and extensions and additions by local residents"[65]. Some of these transformations have been initiated as a result of the government providing starter houses, with the expectation that the residents would extend and add onto the houses according to their own means, and in other situations as a means to generate additional funds, as in the case of backyard houses. In any of these processes, multiple sites of "informality" exist. From the means of generating the additional funds (informal banks/Stokvel's) to the use of creative materials to add onto the properties, the use of illegal electricity and water connections, and the creative uses of spaces to create new and multiple homes.[66] Further, in all these sites there is a constant intersection between formal and informal spaces, both in terms of human activity and spatiality.[67] With regard to housing or tenancy arrangements – subdivisions in the case of the Hillbrow and the renting out of backyards in Delft – informal structures are built right on top of formal spaces. Both concrete and human interactions in these spaces constantly moving seamlessly between the formal and informal, with individuals naturally relying on both.

Agency is described as the following: "The practices above reflect a high degree of agency in multiple and negotiated ways, as they enjoy strategies to improve their livelihoods and access to the city. These everyday practices, are cumulatively transformative, contributing to the production of these cities' spaces, it is through layer upon layer of action that change is wrought and cities are built. The point is

[64] P Harrison "Daily practices of informality" (2018) 7.
[65] P Harrison "Daily practices of informality" (2018) 23.
[66] P Harrison "Daily practices of informality" (2018) 23-28.
[67] P Harrison "Daily practices of informality" (2018) 30.

that households and inner-city users are engaged in quiet but often highly innovative set of practices that incrementally re-shape cities and spaces. These are not actions of subversion but should be appreciated as ways that people find to make cities "work" for them and meet their needs"[68]

Entanglement is described as the "intertwined relationship between informal and formal practices and modes of regulation". In this study it refers rather to the entanglements between rules that regulate the "informal" and formal sectors. That residents in both areas, have no problem turning to either formal or "informal" modes of regulation, depending on what is most suitable. For instance, in the inner city, although relationships with landlords are largely informal in the sense of "legal and binding agreements" and operate in largely invisible spaces to keep away from law enforcement officials, *mastandas ("informal" building managers)* often use the threat of calling the police in instances on non-payment or evictions.[69] Important here is that the reliance on formal forms of regulation is not artificial or anecdotal, residents combine the formal and "informal" to yield the best possible outcome.

Lastly, the study found the existence of a paradox - the fact that many of the practices referred to in these "informal" spaces are termed informal but are in fact subject to established management systems.[70] That the word informal itself is too often synonymous with chaos, whereas there are established processes and structures in place[71]. To reinforce Mbembe, these practices are not only regulated through well-known and publicised rules respected by those who occupy the spaces, but are orderly in the sense that they are completely predictable.

2.3.4 Intersectionality and entanglement destabilizing the abyssal line

Important to the Mandela Initiative findings are the ideas of entanglement and intersectionality between the formal and informal. Mostly so, because whilst these daily practices form what must be considered when taking into account these worlds of truth, they are only possible and are built on top of that which is formal. The possibilities of those in the informal are entirely defined by the formal. For example, in Delft, whilst the space is remade by residents adding onto or transforming houses provided by government, the foundation lies in the formal and, it is the formal that dictates the direction of the development in the formal.

[68] P Harrison "Daily practices of informality" (2018) 49.
[69] P Harrison "Daily practices of informality" (2018) 35-37;45-46.
[70] P Harrison "Daily practices of informality" (2018) 51.
[71] P Harrison "Daily practices of informality" (2018) 40.

Intersectionality between formal and informal is also what makes the ability to recognise the existence of a crisis difficult. Because of how people have made their lives, this blinds us from the spatial crisis, and it becomes possible to imagine that we are either not in a crisis or it is not as bad as it is; the intersection makes the spatial crisis both visible and invisible. Julia Hornberger in her analysis of the Johannesburg inner city states, "the notion of crisis as developed by Mbembe and Roitman may not be the best to describe Johannesburg's inner city environment and the intervention of the police. Their use of "crisis" refers to a situation of "acute economic depression, chain of upheavals and tribulations, instabilities, fluctuations and ruptures of all sorts (wars, genocides, large-scale movement of people [...] coercion and constraint) … Johannesburg's inner city has become a destination for immigrants (national and international) to escape exactly that situation of crisis at home and to seek better opportunities. As such, the inner city can still be imagined by its inhabitants as a place of opportunity, offering the possibility of a better future"[72].And whilst I agree with Hornberger in the sense that Johannesburg allows some sort of new imagining of a different future, it is one that has been reimagined given the truths available to the people. In explaining the crisis Mbembe says this "Every step or effort made to follow the written rule is susceptible to lead not to the targeted goal, but to a situation of apparent contradiction and closure from which it is difficult to exit either by invoking the very same rules and authorities responsible for applying them, or by reclaiming theoretical rights supposed to protect those who respect official law."[73] Mbembe and Roitman further state that there is no law or norm that exists within the crisis without its double/opposite, that for every law there is someone or something attempting to circumvent or avoid it.[74] I think this is an important part of Hornberger's own analysis of the multiple imagined relationships between the police and different individuals - the unpredictability of the outcomes dependent on both individual relationships both within and external to the precinct.

There is a need to constantly balance the agency in the creation of these worlds of truth, with the foundation of the formal upon which it is built. In other words, whilst taking seriously the agency used in transforming these spaces, it is not enough to take them at face value or as entirely positive, there is a need to balance this with the boundaries for their transformation or lack thereof, set by the operation of "formal" spaces and regulations.

To further complicate the issue of agency, Madlingozi in his doctoral thesis speaks of poor people's movements, with a focus on Abahlali Basemjondolo. Here, Madlingozi asserts that many of these

[72] J Hornberger "'My Police – Your Police': The Informal privatisation of the Police in the Inner City of Johannesburg" *African Studies* (2004) 63(2) 226-227.
[73] A Mbembe and J Roitman "Figures of the Subject" (1995) 342.
[74] A Mbembe and J Roitman "Figures of the Subject" (1995) 340.

movements, in particular Abahlali, do not simply exist in an attempt for inclusion on the other side of the line, rather in complete rejection of the line and the bifurcated state. Madlingozi asserts that such movements exist not for inclusion within the current status quo, rather a "(re)constitution of the social and spiritual worlds"[75] in order for a restoration as the African as human. I speak in more detail about the ideas of restoration of humanity of the African in chapter 3, but important for the current discussion is that here Madlingozi in a view towards "post-colonial constitution and belonging" continues in his discussion to completely reject the idea of the South African township and any fetishisation of it.[76] Relying on Es'kia Mphahlele, he sates: "Mphahlele further observed that although there were positive elements to the 'survivalist culture' that had emerged in these spaces, this culture was, ultimately, a culture very much shaped by the struggles for survival and thus denuded of Afrikanhumanness. For Mphahlele, township residents were still unhomed people 'caged' in spaces to which they had been forced into"[77]

Further, Madlingozi suggests that Abahlali's decision to set up their shacks in the space between the demarcated township area and the city – no man's land – is intentional and serves "to challenge colonialist discourse"[78] Abahlali, through these spaces, are not, unlike Mbembe's views on disjunctive inclusions, attempting to be included in the city, rather completely disrupt/reject the idea of the abyssal line and the existence of the bifurcated state.[79] This I think can be stretched to many, if not most daily practices of "informality", that this constant movement and entanglement between the formal and informal is not just convenient, but rather a revolt against the abyssal line. That the building of "informal" structures on top of, around and in front of the "formal", is in direct rejection of the "formal". And this I think is in line with beginning to see the "informal" as an alternative rather than the polar opposite of the "informal". That these daily practices of informality are both a statement of very particular subjectivities, built on a specific demand for a certain type of humanity, and a creation of a new "formality".

2.4 Conclusion

In this chapter I place South Africa as a country in a continuing crisis. I have then sought to use Mbembe and Roitman's conception of the constitution of subjectivities in response to the spatial crisis

[75] T Madlingozi *Mayibuye iAfrika? Disjunctive inclusions and back strivings for constitution and belonging in 'South Africa* (LLD thesis, University of London, 2018) 162.
[76] T Madlingozi *Mayibuye iAfrika?* (2018) 173 – 174.
[77] T Madlingozi *Mayibuye iAfrika?* (2018) 173.
[78] T Madlingozi *Mayibuye iAfrika?* (2018) 174.
[79] T Madlingozi Mayibuye iAfrika? (2018) 174-177.

– subjects constructing new worlds of truth in line with what is on offer to them. Further, I have relied on De Sousa Santos's conception of the abyssal line to illustrate how the operation of the spatial crisis, forms an abyssal line separating those in the "formal" and "informal" space. Whilst a version of this line existed in the colonial and apartheid era, which classified white as human and black as non-human, the continued operation of the spatial crisis has ensured the line has been redrawn, but using the same margins.

Additionally, I rely on the case studies on Delft and the Johannesburg inner city provide a practical look into the worlds of truth of those who occupy these "informal" spaces, and the construction thereof. That these are in fact seamlessly intertwined with the "formal". Indicating that, any view that seeks to create a separation of the formal and "informal", or condemn these spaces will tend to act violently on the people within them, as these acts of "informality" are acts of survival within the context of a crisis. Further that these acts of "informality" not only represent the knee jerk reaction of marginalised people to their poor circumstances, but also a very intentional demand for a recognition of a full humanity which cannot function in tandem with the bifurcated state.

CHAPTER 3 - HOW APARTHEID PLANNING AND POST-APARTHEID PLANNING HAS SHAPED THE NOTIONS OF BEING AND BELONGING

3.1.Introduction

In the previous chapter I described South Africa as a nation in crisis, divided through the operation of an abyssal line. In this chapter, I look at the intentionality of the construction of this line through apartheid spatial planning. Whilst the previous chapter sought to describe the nature of the spatial crisis, this chapter focuses on space as the driving force in maintaining and reconstructing the spatial crisis. This chapter will focus mainly on the "informal" side of the abyssal line, beginning in the concrete aspects of space and spatial planning, tracing both colonial and post-apartheid state actions in the creation of the two sides of the abyssal line. Further, it relies on Henri Lefebvre's insights on the right to the city and Philippopoulos-Mihalopoulos's dual construction of spatial justice – ontological and epistemological – to begin to suggest what spatial justice may look like in a post-apartheid South Africa.

This chapter places time as a central concern of the space on the "other" side of line the line, asserting that the "other" side has become trapped in a time of neo-apartheid.

It is proposed that this focus on space will provide better context on the "informal" side of the abyssal line, and how the intersection between law and space tends to limit the scope of the worlds of truth developed by individuals on the "informal" side of the line.

3.2.The nature of Pre/Post-Apartheid Spaces

Oranje and Merrifield provide an overview of South African spatial planning from around the 1930s to 2010. Early spatial planning was characterised by ideas of a national department of regional and physical planning that would set the national planning agenda, guided by a set of spatial planning and development rules.[80] This process would start from the (national) centre with clear directions and control, and find expression all the way down to well-planned neighbourhoods.[81] "Spatial planning was conceptualised within a modernist discourse of new planning apparatuses informed by long-term

[80] M Oranje and A Merrifield "National spatial development planning in South Africa 1930-2010: An introductory comparative analysis" *Town and Regional Planning* (2010) 2010 (56) 32.
[81] M Oranje and A Merrifield "National spatial development planning" (2010) 32.

visions and the imperative to segregate and racially restructure cities".[82] Whilst the idea of the formal department of regional and physical planning itself was not completely accepted due to scepticism with the notion of a national super power, the ideologies of the time would set the apartheid government's trajectory for controlled areas, limited uses of land and controlled development based on race.[83]

The promulgation of the Land Act in 1913 laid the foundation for what would be segregated land usage for white "owners" of land, and black people whose presence in the urban was considered only for the provision of labour.[84] Oranje and Merrifield speak of two economic rhythms at the time "one (for whites) was based on a state supported market economy and the other (for blacks) was to reinforce oppressive state controls on the movement and accommodation of black labour and to counter mixing between the working classes"[85]. The Land Act, say Oranje and Merrifield, would come to define further government actions on land inhabited by people of colour and produce what they call the "myth of a subsistence economy" which would serve to justify the payment of lower wages to people of colour providing labour.[86]

Apartheid era spatial planning saw tightened controls on the movement and settlement of people of colour in urban spaces, with one of the most significant contributors to spatial development being the creation of the Bantustans – black "self-governing" territories, with 13% of land set aside for 70% of the population. Everything that follows, indicates an intentionality to maintain this national order. The laws that followed attempted to bring economic sensibilities to these actions by demarcating certain areas close to the Bantustans for economic activities, and further increasing control over movement by demarcating certain areas for industrial activities and limiting the amount of urban land to be used for industrial activities.[87]

Further Mbembe points to the important relationship between production, space, the black body and ideas of race. In specific reference to Johannesburg they say this:

> It is by now a commonplace to assert that the city of Johannesburg grew in connection with both the forces and relations of production. Less well understood is how relations of race and class determined each other in the production of the city. It can be argued that race here became, in

[82] P Hendler "Rethinking Spatial Planning and Land Use in South Africa – A Historical Analysis" *Urban Land History - Dynamics which still influence the present, a working paper for the SA Cities Network working Paper Series on Urban Land* (2015) 14.
[83] M Oranje and A Merrifield "National spatial development planning" 33.
[84] P Hendler "Rethinking Spatial Planning" (2015) 1.
[85] P Hendler "Rethinking Spatial Planning" (2015) 2.
[86] P Hendler "Rethinking Spatial Planning" (2015) 2.
[87] M Oranje and A Merrifield "National spatial development planning" (2010) 33-34.

> and of itself, both a force of production and a relation of production. As such, race 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. Race in South Africa first manifested itself as a peculiar investment in the cognitive framing of people, things, and relationships (their respective qualities and the scales by which equivalences, differences, and incommensurability between them could be formally established). In the money economy of early Johannesburg, this peculiar investment took the form of a social utilitarianism applied to practical and mental forms. As a potential commodity form, black life was not only needed but also valued for its industrial utility.[88]

Whilst Oranje and Merrifield base their analysis on a country built on intentional and institutionalised racism, Mbembe importantly illustrates the complete dependence of the growth of Johannesburg not just on the provision of labour provided by the black body, but also a psychotic relationship between the importance of the black body to production, inverse to that of its disposable nature built on a form of hysteria codified through race politics. What Mbembe does here is to remove the emptiness of race-based production, and reveal its robust complexities and entanglements, central to the continued growth of the city. This psychosis I will deal with more later in the chapter, but importantly it has implications for the post-apartheid government's response to apartheid spatial planning.

In Oranje and Merrifield's analysis, post-apartheid interventions were based on two imperatives; a focus on social development in those areas of extreme poverty, and targeted economic investment in those areas with potential for economic development. Formerly – through the National Spatial Development Framework (the framework) – this was based on the assumption that the poorest individuals were found in the rural areas, but later under the National Spatial Development Perspective (the perspective) this assessment turned to one that was person based rather than place based which in itself received a fair amount of resistance from officials and political party leaders. The perspective though was only that, and was more to achieve learning principles rather than set guiding plans, similar to those achieved under the apartheid system.[89] "Key to such investment would be more robust economic analyses, 'proper' spatial development planning and improved monitoring and review; high-level agreement on the spatial prevalence of development potential and need, and enabling and supportive actions to be undertaken by each of the spheres of government to enable exploitation of the potentials and addressing of the needs".[90] Further, although different to the

[88] A Mbembe "Aesthetics of superfluity" in A Mbembe and S *Nuttall (eds) Johannesburg the Johannesburg the Elusive Metropolis* (2008) 6
[89] M Oranje and A Merrifield "National spatial development planning" (2010) 37.
[90] M Oranje and A Merrifield "National spatial development planning" (2010) 37.

framework in its way of determining space, it produced similar outcomes, favouring urban areas for economic investment rather than rural.[91] To further stress the battling government interventions, "macroeconomic factors resulting in jobless growth and low incomes paired with ballooning housing prices have undermined the right to the city of the working poor and unemployed primarily through marginalising them from established housing markets – most of the new subsidised housing was built in peripheral areas relatively far from social services and work opportunities"[92].

Some of the failures with post-apartheid spatial planning are deeply rooted in a lack of direct confrontation of apartheid spatial planning. Apartheid spatial planning was intentional, whilst post-apartheid spatial planning was "to be continued". In other words, the plans brought about by government were more directed at emerging problems instead of paying more attention to the intricate storyline on which the problems were built. Further, a difficulty in dealing with the underlying relationship between race and production, one whilst clearly articulated during apartheid, became more of a silent and unuttered foregone conclusion in the post-apartheid city. it is my assertion then that the relationship between race and production continue to drive growth, driven by more nuanced, but inherited, hysteria.

More recently the Spatial Planning and Land Use Management Act (SPLUMA)[93], which is the first piece of national spatial planning legislations, begins to take an integrated approach to national spatial planning, looking at issues through fair spatial development planning and land use[94]. Although a positive turn for post-apartheid spatial planning, Handler laments over the unwillingness or inability of municipalities to implement the requirements of the legislation.[95] Further, Verna Nel states that whilst SPLUMA attempts to promote some new and innovative practices, it still relies on zoning laws which have been criticised for being out of date and tend to be exclusionary.[96] Nel further cites the "informal" nature of informal settlements and the absence of land use management schemes. Further, local governments are particularly reluctant to introduce and enforce land use schemes in informal settlement areas out of a fear of continued discontent from residents.[97] Whilst SPLUMA requires local governments to include "provisions that permit the incremental introduction of land use management and regulation in… informal settlements, slums and areas not previously subject to a land use scheme", it does not directly speak to the intersection of the formal and informal, rather a reliance on

[91] M Oranje and A Merrifield "National spatial development planning" (2010).
[92] P Hendler "Rethinking Spatial Planning" (2015) 3-4.
[93] The Spatial Planning and Land Use Management Act 16 of 2013.
[94] P Hendler "Rethinking Spatial Planning" (2015) 28-33.
[95] P Hendler "Rethinking Spatial Planning" (2015) 28.
[96] V Nel "Zoning and Effective Land Use Management in South Africa" (2016) 27 *Urban Forum* 80-81.
[97] V Nel "Zoning and Effective Land Use Management in South Africa" (2016) 81.

bringing these "informal" spaces to be governed within the norms of the "formal" without due consideration, that a solution lies at the intersection, not at either extreme.

3.3. Space and its (In)Justice

This section focuses on understanding the peculiarities of space and how law acts through space to create and sustain spatial injustice.

3.3.1. The idea of space

Sarah Keenan writes about the use of legal geography to address the traditional ways in which law and space are treated - that law, whilst not necessarily ignoring space, tends to operate in a manner that assumes the pre-existing and inert nature of space, and that space is separate from the individuals who occupy it and the socio-political around it.[98] Further, that law is universal and operates equally and neutrally on all humans and because it is based on generalised principles made to protect the rights of all individuals, it is presumed to operate in equal measure on all citizens and presumptively contains no biases.[99]

Keenan then turns to legal geography as a means to ensure law is more concerned with its context, able to have reference to the embeddedness and fullness of space, to draw from geography's principles as a synthesiser, and using multiple knowledges to understand the meanings and effects of space.[100] Legal geography, in the words of Keenan, "is concerned with undermining the law's claims to universality and neutrality and with putting law in context… by demonstrating both conceptually and practically that space is not the neutral background to law but rather a key means through which it operates".[101]

Further, Keenan states that law, acting through space, affects one's ideas of being and belonging. An individual's surrounds, and what is generally available or in reach, is what will generally define who the individual becomes. Space not only "goes with" an individual, but also haunts. Keenan elaborates that these concepts do not mean that subjects physically, or even consciously or subconsciously, take their spaces with them, rather that which is "within reach physically, socially and conceptually…is (was) determined by how they are positioned in spaces of belonging. Those spaces, which not only surround but also constitute the subject (their subjectivity), are not determined by physical co-

[98] S Keenan *Subversive Poverty Law and the Production of Spaces* (2015) 21.
[99] S Keenan *Subversive Poverty* (2015) 21-22.
[100] S Keenan *Subversive Poverty* (2015) 23.
[101] S Keenan *Subversive Poverty* (2015) 23.

ordinates but by a multiplicity of heterogenous and ever-shifting networks and relations…that is the hegemonic networks of belonging that are already there, pre-existing the subject, determining what is within reach and intersecting to form inherited spaces of oppression".[102]

3.3.2. Spatial Justice

In describing spatial (in)justice Edward Soja states: "In the broadest sense, spatial (in)justice refers to an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice. As a starting point, this involves the fair and equitable distribution in space of socially valued resources and the opportunities to use them."

Much like Keenan, Soja continues that "space is not an empty void, it is always filled with politics, ideology, and other forces shaping our lives and challenging us to engage in struggles over geography".[103] Soja's conception of space is rooted in the idea of the socio-spatial dialectic, that "our spatiality, sociality and historically are mutually constitutive, with no one inherently privileged a priori". We are continuously shaping and being shaped by our spaces, through the material and imagined worlds not given to us by our own choosing.[104]

Philippopoulos-Mihalopoulos writes about law's spatial turn – law's turn away from space, stemming from a fear of space and its peculiarities, and how it may affect law and its long-standing boundaries.[105] In other words, law's fear of space's ability to change its established rules and predictable outcomes, causing law's engagement with space to remain at a surface level, whereby law is more concerned with the concrete aspects of space, rather than engaging with the discourse itself that would allow for its reform."[106]

In his definition of space in relation to law, Philippopoulos-Mihalopoulos focuses on the violent, continuous and constitutive aspects of space. Whilst he rejects the earlier notion that space can be a form of law, Philippopoulos-Mihalopoulos concerns himself with the way in which law acts through space. He speaks about space's "indifferent universality as a gesture of uncontained violence: space withdraws from the human, and any mediation through concepts of 'place', 'identity' or 'agency' simply reiterates the violence by dissimulating its effect."[107] In other words, space conceals the violent

[102] S Keenan *Subversive Poverty* (2015) 167.
[103] E Soja *Seeking spatial justice* (2010) 38.
[104] E Soja *Seeking spatial justice* (2010) 37.
[105] A Philippopoulos-Mihalopoulos "Law's Spatial Turn: Geography, Justice and a Certain Fear of Space*" Law, Culture and the Humanities* 6 (2010) 1-2.
[106] A Philippopoulos-Mihalopoulos "Law's Spatial Turn" (2010) 8.
[107] A Philippopoulos-Mihalopoulos "Law's Spatial Turn" (2010) 8.

way in which law acts upon and constitutes personhood. Explained differently, Keenan states that legal geography demonstrates that the law, space and identity are constantly constructing each other. Important to this analysis, is the idea of law operating through a conceptual grid, that the lines and coordinates on a map, whilst seemingly innocent, serve to "tell particular stories about a people and that can function as a cloaked tool of violence"[108]. These stories/spaces, Keenan elaborates, not only follow us, but tend to also be inherited by those individuals of similar characteristics and continue to define and haunt the spaces we occupy.[109] The violence that Keenan refers to is the law operating through these spaces/stories, reconstructing and recreating.

Philippopoulos-Mihalopoulos's conception of spatial justice separates it into two characteristics: "first, in an ontological manner, the radical nature of this justice that works in different ways than its habitual temporal or social conceptualization; and second, in its epistemological counterpart, the location of justice, both within and without the juridical space in aporetic calculation".[110]

In terms of the epistemological characteristic he speaks of this oscillation between law and space, as something more than interdisciplinarity but rather one using the other to constantly question, reform and continuously negotiate its position.[111] My understanding of Philippopoulos-Mihalopoulos here is that spatial justice, much like Costas Douzinas and Adam Geary's[112] interpretation of justice, is that justice is never quite arrived at, it is always coming, always in contestation but also the here and now. Law uses space to constantly reform in order to produce a just outcome, an outcome which is constantly being constituted.

In my understanding of Philippopoulos-Mihalopoulos's ontological characteristic, spatial justice is based on relationality and simultaneity. It recognises all these processes, live and corporeality happening at the same time, but also the oneness of all these things. That all these realities are to be taken seriously, individually whilst also recognising their universality without subjecting them to an indifference.[113] It is about recognising one's citizenship, whilst having full regard to the other. Understanding that the other does not live in isolation, or "over there", but rather that my space includes the other, and that necessarily entails a withdrawal for the other. The question Philippopoulos-Mihalopoulos asks is that it may be relatively easy to care for the ones 'over there', but what about the ones who want to be 'right here', right where we stand?[114]

[108] S Keenan *Subversive Poverty* (2015) 34.
[109] S Keenan *Subversive Poverty* (2015) 28.
[110] A Philippopoulos-Mihalopoulos "Law's Spatial Turn" (2010) 11.
[111] A Philippopoulos-Mihalopoulos "Law's Spatial Turn" (2010) 16.
[112] C Douzinas and A Geary *Critical jurisprudence the political philosophy of justice* (2005).
[113] A Philippopoulos-Mihalopoulos "Law's Spatial Turn" (2010) 8-9.
[114] A Philippopoulos-Mihalopoulos "Law's Spatial Turn" (2010) 13.

Philippopoulos-Mihalopoulos' two characteristics become important particularly in the expected versus the actual impact of socio-economic rights judgments in the post-94 era. Firstly, in thinking about relationality it becomes important to circle back to the invisible post-94 era baseline which accepts a certain level of poverty in order to move forward. Through the acceptance of this baseline it immediately protects a status quo and only allows movement around, on top of and besides it, instead of moving the baseline through the complete decry of poverty as a whole. The consideration of what is just then tends towards an absolute practice rather than one which is relational. My understanding of Philippopoulos-Mihalopoulos's conception of relationality and simultaneity is that in addressing it, judgments should rely on a two-fold test. If the issue for instance concerned access to housing, the first leg of the test would include an evaluation of, the basic norms required or what is defined as adequate in terms of access to housing. The second leg would then move from the assertion that what is adequate should be directly comparable not only within the context of those who occupy similar spaces, but any other individual at any given point. In other words, the justice of the impoverished, or the extent of access afforded to the impoverished, should be directly comparable and equal to, any other individual and not measured in terms of access within the standards of poverty. And in order to achieve this, it is not possible to determine a fixed norm, rather housing norms that are continuously tested. Further this kind of relationality becomes impossible where one is comparing citizens and subjects, being and non-beings, that which is legal and that which is illegal. In the next section we see that relationality and simultaneity are even further by the intersection of space and time and the difficulty in finding relationality where those on the other side of the line ossified in time.

3.3.2.1. The Right to the City

Henri Lefebvre introduces us to the concept of the right to the city. In the main, this refers to a renewed access to urban life, the right of the working class to participate in the making of the city and consequently the remaking of themselves. According to David Harvey: "The right to the city is far more than the individual liberty to access urban resources: it is a right to change ourselves by changing the city. It is, moreover, a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization."[115]

[115] D Harvey "The Right to the City" (2008) 53 *New Left Review* 1.

Importantly, Lefebvre states that "in itself reformist, the strategy of urban renewal becomes inevitably revolutionary, not by force or circumstance, but against the established order.[116]

The right to the city is basically a view of the city and its people through the lens of spatial justice. But further, both Huchzermeyer and Brown see the right to the city as playing a critical role in challenging the status of the legal-political order and driving legal and institutional reform. Further, Brown calls for, when viewing the concept through law, to move away from the concept of "radical politics", but rather focus on the link between cities and citizenship and the possibilities for driving the reform of the exclusionary practices of urban development.[117] For Huchzermeyer, whilst it is important for the working class to play a larger role in urbanisation, legal experts have a responsibility to begin grappling with the legal elements and processes that may practically give meaning and realise the concept of the right to the city.[118] What the right to the city does is allow room for Philippopoulos-Mihalopoulos's conception of spatial justice, that as much as law produces spatial injustice by acting violently through space, it is only law acting through space that we may achieve spatial justice.

Ananya Roy delves further into this idea in her article "worlding of the Global South" that the urban in itself is not a given and is a result of processes of spatial change and global capitalist development.[119] She further states that cities of the Global South are constantly being created and recreated through urban revolutions. Roy speaks about a global worlding "that the Global South should be understood as a temporal category, an emergence that marks a specific historical conjuncture of economic hegemony and political alliances"[120]. What she is speaking about here is viewing urban theories from a world view of the Global South, using the Global South, its histories and its context as the starting point. For our purposes it is more of an internal worlding, using legal geographies on either side of the abyssal line to determine what a right to the city could and should look like.

Further, to this understanding of Roy, is southern urbanism through revolutions. My understanding of this is Roy does not refer only to those "official" revolutions, but rather those consistently taking place in the urban city. And an understanding of space through revolutions, means that time becomes an important element. Space within its historical context and revolutions must also be understood at its intersection with its temporal nature. So, for example, the township, or in particular the example of

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[116] H Lefebvre *Writings on Cities* (1996) 154.
[117] A Brown "The right to the city: road to Rio" (2010) 37 (3) *International Journal of Urban and Regional Research* 968.
[118] M Huchzermeyer *Reading Henri Lefebvre from the 'Global South': The legal dimension of his right to the city* UHURU Seminar Series, Rhodes University, 20 May 2015 6.
[119] A Roy "Worlding of the Global South" in S Parnell and S Oldfield *The Routledge Handbook on Cities of the Global South* (2014) 14.
[120] A Roy "Worlding of the Global South" (2014) 15.

Delft on the outskirts of Cape Town. Delft represents the "outcomes of different phases of state housing strategy over the past thirty years or so. However, state strategy is not the end of the story, with the residents of Delft continually adapting their living conditions by extending, reconstructing and building new structures through processes that are often informal, or at least only partly formal".[121] Whilst at some point in time it mainly represented segregation and forced removals, through transformations initiated by its people, it has become a complex landscape of subjectivities created on a violent past-present, but also a making of oneself and home.

Without being completely prescriptive on what spatial justice and the right to the city may look like in the post-apartheid state, one would imagine, as per chapter 2, it would first and foremost be premised on a need for reconstitution, guided by an unequivocal rejection of the bifurcated state and a need for simultaneity in humanity.

3.4.Space and time: being and belonging through the landscape

Tshepo Madlingozi writes about what he terms a time of neo-apartheid. Madlingozi states that this time is defined by the defunct transition from apartheid to post-apartheid South Africa where colonialism and apartheid have survived the transition.[122] In this time, Madlingozi characterises those on the non-human side of this line as ossified in time, stating:

> Temporal ossification by deliberate processes that re-enact colonial and apartheid processes of primitive accumulation, impoverishment, re-"tribalisation", enforced racialisation and social invisibility; and an imposed conceptualisation of time and temporality via a cluster of post-1994 keywords – including transitional justice, final constitution, a new united nation - that perpetuates the monoculture of western modernity in terms of which time unfolds in a linear, evolutionary and homogenous manner, and thus rendering invisible those groups that exist according to the times of "non-western" cosmologies, epistemologies and legalities.[123]

Madlingozi's use of the term ossified in time is important. In the above quote he speaks of how this ossification is the re-enactment of apartheid processes. In other words, the same individuals who were previously racially subjugated have not moved and continue to suffer the same kinds of oppression and exclusion. But here I stretch Madlingozi to include a linearity in the way the constitution has

[121] P Harrison "Daily practices of informality" (2018) 23.
[122] T Madlingozi "Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution" (2017) 125.
[123] T Madlingozi "Social justice in a time of neo-apartheid constitutionalism" (2017) 125.

advertently or inadvertently treated periods of time. Not to stretch Madlingozi's point too far, but it points to continued ossifications of epochs that ensure time is treated as linear, and responses to socio-economic injustices deal with the parameters of the desired epoch. The nature of these ossifications, the proceeding accepted narrative – what and how things should be remembered, what and who caused what - usually based on the version of the conqueror.

Madlingozi later in his paper references how the struggle for decolonisation has been recast as one for access to human rights. This ignores the historic nature of oppression and the current state of and causality of the majority marginalised black population. It takes for granted that the problems the black marginalised currently find themselves in are as a result of poverty or "bad luck", which require a certain level of acceptance, rather than a complete redress.[124] One where poverty is just something that, exists, and one – the political elite and those on the other side of the line - must do whatever they can to improve the condition of those who are impoverished rather than pursue the decolonial project which involves the complete return to the human of those previously marginalised. This, I refer to as Madlingozi's second leg of ossification – selecting the boundaries and the proceeding grand narrative of each period of time.

Madlingozi's time of neo-apartheid should not be confused or conflated with the spatial crisis I began to detail in chapter 2. Part of my argument here is that South Africa exists in a permanent state of macro crisis which cuts across time, but concurrently, there exists specific micro crises as a result of specific times and spaces. The micro crises, for example racialisation and capitalism, are not only a result of the macro crisis, but also the macro crisis is supported, maintained and driven by the micro crises. Madlingozi's time of neo-apartheid is helpful in that it refers to a specific temporal point in the macro crisis, which whilst takes on the shape of the macro-crisis, delineate the specific resulting micro crises.

Madlingozi's concept of ossification in time is further compounded through Mbembe's conceptions of the landscape and the workings of the unconscious. Mbembe argues "that the post-apartheid metropolis in general, and Johannesburg in particular, is being rewritten in ways that are not unlike the operations of the unconscious. The topography of the unconscious is paradoxical and elusive because it is bound to several distinct modes of temporality. So is the psychic life of the metropolis. This psychic life is inseparable from the metropolitan form: its design, its architectural topographies, its public graphics and surfaces. Metropolitan built forms are themselves a projective extension of the society's archaic or primal fantasies, the ghost dances and the slave spectacles at its foundation."[125]

[124] T Madlingozi "Social justice in a time of neo-apartheid constitutionalism" (2017) 135-138.
[125] A Mbembe "Aesthetics of superfluity" (2008) 2.

Mbembe goes on to speak about the importance of the black body and the production of Johannesburg, and how one of the drivers of the stability of the apartheid state was racism couched in the duality of the black body. How the black body was considered a commodity of great value, but in the same vein, how death was absolutely necessary to achieve the production goals. This "consistent activation of doubleness"[126] was important in ensuring a strong relationship between profits and what Mbembe called delirium. Mbembe goes on to state that the functioning of the apartheid city relied heavily on this doubleness and the creation of schizophrenic subjects who lived in this world of delirium and hysteria in order to justify this doubleness and greater system. In present day South Africa this same delirium continues and is expanded to the political elite, and further, as per Madlingozi, through the liberal language of the constitution and resultant socio-economic rights jurisprudence. Here I assert that the nature of the post-apartheid state and the legitimacy of the constitutional language relies in part on this continued hysteria, a hysteria practically illustrated through the labelling of "informality", and one where relationality is impossible between being and non-being.

Finally, I propose that there is an interplay between the psyche, time and topography of the post-apartheid city that allow for the ossification in a time of neo-apartheid. That these elements all work together to entrap the black body on this other side of the abyssal line. And that the notion of spatial justice is one broad enough to offer an entry point in the reproduction of these spaces. Spatial justice allows for a look into the law, in this case socio-economic rights jurisprudence, through a lens wide enough to recognise both the active and concealing nature of these spaces.

3.5.Conclusion

In this chapter I started by looking at apartheid spatial planning, and the intentionality that followed the ideas of segregation and ensuring the black population remained on the edges of the cities, economic activity and therefore humanity. I then moved to a brief overview of post-apartheid spatial planning efforts, finding that whilst significant interventions had been undertaken, they were built on the foundations laid by apartheid planning and therefore tended to perpetuate the same outcomes and reinforce the same spaces, for example. heavy investment in the metros as they are defined as the areas with the biggest economic growth potential. Lastly, whilst interventions like SPLUMA, as the first national response to apartheid spatial planning, signal a step in the right direction in responding

[126] A Mbembe "Aesthetics of superfluity" (2008) 6-9.

to apartheid spatial planning, it also relied on old apartheid frameworks such as zoning laws to operate and therefore failed to free spaces from apartheid planning.

I then moved to the intangible elements of space, illustrating that space itself is not inert, but that law acts through it to act violently upon individuals, it is both constitutive and constituted. Therefore, there cannot be any concept of justice without spatial justice. Relying on Philippopoulos-Mihalopoulos, this would include a conception of spatial justice that uses space to continuously transform and test law and its boundaries, and also considers everyone's justice in equal measure, concurrently in the same space.

CHAPTER 4: TRANSFORMATIVE CONSTITUTIONALISM AS A RESPONSE TO THE SPATIAL CRISIS

4.1. Introduction

The research question that this chapter responds to is can transformative constitutionalism be adapted to respond to South Africa as a country in crisis?

The first part of this chapter deals with the imagery of the constitution and the ideals upon which it is built. This section further begins to unpack the success or lack thereof in achieving these ideals, and how far the transformative constitutionalism project has been successful in meaningfully changing the lives of the marginalised on the "informal" side of the line. The next section looks to use the lessons from the Colombian constitutional court to provide a different way of imagining a constitutional project in a country with large groups of marginalised people, struggling with gross inequalities that are both structural and historical. The final section proposes a politicization of the needs of marginalised people through a better contextualization of people occupying the informal space, based on their efforts towards a remaking of the self in response to the spatial crisis

4.2. The ideals of transformative constitutionalism

The postamble of the interim constitution describes the constitution as "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".[127] This image describes the constitutional process as one with a linear conception of time, moving from one side of the bridge – apartheid, to the absolute other – the post-apartheid/constitutional era.[128] In the case *of Azapo vs the President of the Republic of South Africa*[129], Justice Didcott, describes the constitutional era as an absolute break between the old and the new.

There has been significant literature on the imagery of constitutionalism. However, what is largely agreed by constitutional scholars is that the image of the bridge is one that is either largely rejected

[127] Constitution of the Republic of South Africa, Act 200 of 1993.
[128] W Le Roux "Bridges, clearings and labyrinths: The architectural framing of post-apartheid constitutionalism" *SA Public Law* (2004) 19(1) *632.*
[129] *Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 4 SA 671 (CC).

in whole, or requires a nuanced interpretation.[130] Further, that there is the need to view the divide between apartheid and post-apartheid[131] as not a fixed point/divide, but rather looking at transformation as a permanent ideal, remaining on the bridge, using history to move from side to the other. [132]

In Pierre De Vos's critique of the imagery of the bridge he states that a linear view of the constitution creates what he calls a "grand narrative view of history"[133]. A neat and concise description of South Africa's past which places the understanding of the constitutional text "within the context of a universally accepted structuring, meaning-giving story about the origins and purpose of the interim and 1996 Constitutions"[134]. "The idea of the interim constitution as a link between a dark, apartheid past and a bright, human-rights-based future."[135] The implication of this grand narrative is that judges would be compelled to apply this pre-accepted version of history blindly, leaving out their personal opinions and politics. De Vos states that this approach would be incongruent with the constitutional project which requires critical engagement, and that judges cannot be released from their responsibility to interpret the constitution within a particular value system.[136] Further, stating that "when one works with history one should therefore strive to read history from a position of critical intelligence, aware that any reading is already a choice that excludes and includes-even when one might not realise it …. History cannot be understood from the vantage point of history itself, rather it is a product of the present and reflects our understanding of the past".[137] My understanding here of De Vos is that he rejects the notion of this grand narrative as it would result in a stagnant view of history, based on a single narrative that if remains unchallenged, inherently possesses the ability to perpetuate biases.

Wessel Le Roux states that three images/approaches of the bridge may be concluded from constitutional writers. The first being the linear approach, which utilises fixed boundaries of pre- and post-apartheid, working as per De Vos, to restrict the courts to the grand narrative of history. The

[130] AJ Van der Walt *"*Dancing with Codes - protecting, developing and deconstructing property rights in a constitutional state" (2011) 118 *South African Law Journal*; P De Vos "A bridge too far? History as the context in the interpretation of the South African Constitution (2001) 17 *South African Journal of Human Rights*

[131] Here I use the term post-apartheid very specifically. Whilst agreeing with Mignolo that it is important to delink the Global South from western narratives of coloniality and modernity, I use pre- and post- to illustrate the paradigm change caused by the liberation struggle in South Africa. A Struggle which culminated in the enactment of the constitution after the legal end apartheid.

[132] P Langa "Transformative Constitutionalism" (2006) 17 *Stellenbosch Law Review* 354.

[133] P De Vos "A bridge too far?" (2001) 8.

[134] P De Vos "A bridge too far?" (2001) 9.

[135] P De Vos "A bridge too far?" (2001) 10.

[136] P De Vos "A bridge too far?" (2001) 16.

[137] P De Vos "A bridge too far?" (2001) 20-21.

second, per Van der Walt, considers transformative constitutionalism as an act of bridging, remaining suspended on the bridge, "intensifying the awareness of the abyss" which keeps the status of the law open[138]. The third, continues with the focus on bridging and the abyss, but relies on what Kant describes as the sublime – being in awe of the bridge and the abyss, and the realisation of its vastness.[139]. This, states Le Roux, allows for a constitutionalism that uses as the starting point the realisation of the limitations of the legal imagination.[140]

The idea of starting with limitations becomes important as the first step is to acknowledge the extent of the abyss, followed by an acknowledgment of the limitations of the human imagination in fully grasping its extent. In order to leave law as open as possible, one should be willing to consistently engage with the vastness of the abyss, but in such engagement continuously acknowledging limitations so as to encourage constant reform, contestation and movement. This third image of the bridge is particularly important when read with Philippopoulos-Mihalopoulos's ideals on spatial justice. This third image speaks to justice never quite being achieved, being in the present and also a future ideal, but also the idea of space being law's conscience. Whilst noting that spatial justice is not the entire picture of justice, space is an element that keeps one on the bridge and allows us to question and reimagine.

In a situation where there is broad consensus amongst academics that the overall ideals of transformative constitutionalism are in the main positive, and that the concept of the bridge is open to such a broad and flexible interpretation, the question becomes what the practical implications of the application of the constitution have been. If we are to take this generous view of the bridge, we must consider if the application of the constitution been able to amplify the abyss to be used as a flexible tool to respond to the post-apartheid state still in crisis. This in the context where a World Bank report released in 2018 on overcoming poverty in South Africa states that whilst poverty in South Africa has decreased, the society remains extremely unequal, with race being a strong predictor of poverty, and the black population at the highest risk of being poor.[141]

Why has transformative constitutionalism, whilst playing a role in improving the lives of those most marginalised, not been able to significantly impact/address the structural elements of poverty? Jackie Dugard states that the relief pursued by the court, in the main, offers limited and generally policy-

[138] W Le Roux "Bridges, clearings and labyrinths" (2004) 640-641.
[139] W Le Roux "Bridges, clearings and labyrinths" (2004) 634.
[140] W Le Roux "Bridges, clearings and labyrinths" (2004) 642.
[141] The World Bank "Overcoming Poverty and Inequality in South Africa An Assessment of Drivers, Constraints and" (2018) xxii http://documents.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf (accessed 28 September 2018).

based relief, shying away from pronouncing on potentially transformative issues.[142] Further, the court, rather than focus on the lived experiences of the claimants, begins from the liberal baseline with poverty as an unescapable reality to be managed rather than eliminated.[143] In an article by Danie Brand, he writes of the politics of need interpretation, stating that "the political discourse around issues of poverty and the basic need is a process of politicisation, depoliticisation and repoliticisation".[144] In other words, the prevailing political discourse with regard to certain socio-economic rights, will determine the kind of poverty that deserves intervention by the government.[145] Brand goes on to state that one of the ways in which dominant groups depoliticise poverty is through its naturalisation.[146] Poverty being attributed to external forces such as the global economy, and considered a natural part of societal structures.

Case law suggests the same as Dugard, with the court often unable to make truly transformational decisions and refusing to adjudicate on matters that may have broad reaching consequences for the alleviation of poverty.[147] The court's socio-economic rights jurisprudence has been generalised in nature, rather than also addressing the needs of a specific group of people.[148] Further, where the judgement does attempt to effectively deal with the situation in front of it, there is a reluctance to decide on a broader issue that would possibly benefit vulnerable people in similar situations. The case of *Olivia Road v City of Johannesburg*[149] involved the eviction of 400 occupiers from buildings in the inner city of Johannesburg. By the time the matter had reached the constitutional court, the issues at hand were the correctness of the order for eviction in the SCA, and whether the city's housing programme catered reasonably for the occupiers and categories of people who lived in desperate conditions within the inner city.[150] The Court found that that even though the applicability of the housing plans to other vulnerable groups raised a constitutional issue, it was not in the interests of justice to decide on the matter.[151] Additionally, the Court found it unnecessary to decide on issues

[142] J Dugard *"*Courts and Structural Poverty in South Africa To What Extent Has the Constitutional Court Expanded Access and Remedies to the Poor*"* in D Bonilla Maldondo (ed) *Constitutionalism of the Global South and the Activist Tribunals* (2013) 318-319.
[143] S Wilson and J Dugard *"*Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights*"* (2011) 3 *Stellenbosch Law Review* 664–682.
[144] D Brand 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in AJ van der Walt (ed) *Theories of social and economic justice* (2005) 19.
[145] D Brand "The politics of need interpretations" (2005) 19.
[146] D Brand "The politics of need interpretations" (2005) 20.
[147] J Dugard "Courts and Structural Poverty" (2013) 297.
[148] D Brand "The South African Constitutional Court and Livelihood Rights" in Vilhena O Baxi U Viljoen F (eds) *Transformative constitutionalism: comparing the apex courts in Brazil, India and South Africa* (2011) 431.
[149] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC para 2.
[150] *Olivia Road* para 8.
[151] *Olivia Road* para 36.

relating to the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act[152] (PIE) as it was of the opinion that meaningful engagement negated the occurrence of such issues.[153].

The case of *Government of the Republic of South Africa v Grootboom*[154] was also an eviction case that dealt with the eviction of a group of people living on private land and in need for government to provide temporary housing. "The Court, instead of deciding the claim as presented to it – a claim of a particular group of people for a specific form of concrete relief – decided it as a challenge to the state's housing policy in its entirety."[155] Instead of dealing with the issues of the particular group of people, the court instead only made a finding that the government's overall housing policy was incorrect to the extent that it did not provide for people in such emergency positions.[156]

4.3. The activist justice of the Colombian constitutional court

The Colombian constitutional court has been lauded for its efforts on judicial activism. Judicial activism is understood as the judicial power to effect social change through policy making – in the Colombian case, to make constitutional rights and principles a reality.[157] Of particular interest to this paper is the Colombian court's doctrine of the Unconstitutional State of Affairs (USoA).

The USoA is a legal ruling that may be invoked where the court is of the opinion that there has been a failure by the legislature and the executive to protect fundamental human rights, and where the constitutional court is justified in embarking on policy making and the distribution/reallocation of resources to the extent that it unclogs institutional blockages

In the Colombian Constitutional Court, USoA may be invoked when a case meets the following criteria: 1) the widespread use of constitutional reviews (*accion de tutela*) for similar cases, 2) verification of a systemic and structural violation of fundamental rights in a generalised manner; 3) the violation is as a result of a malfunctioning of the state; 4) the decree of remedies will involve the design of policy and allocation of significant public resources.[158] In a paper written by Libardo Ariza, focusing on the

[152] Act 19 of 1998.
[153] *Olivia Road* para 38.
[154] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC.
[155] D Brand "Livelihood Rights" (2011) 431.
[156] D Brand "Livelihood Rights" (2011) 431.
[157] M Iturralde "Access to Constitutional Justice in Colombia" in D Bonilla Maldondo (ed) *Constitutionalism of the Global South and the Activist Tribunals* (2013) 367.
[158] LJ Ariza "The Economic and Social Rights of Prisoners and Constitutional Court Intervention in the Penitentiary System in Colombia" in D Bonilla Maldondo (ed) Constitutionalism of the Global South and the Activist Tribunals (2013) 141-142.

socio-economic rights of prisoners in Colombia, he states that the importance of the doctrine is that it seeks to unblock institutional barriers that would impede the proper implementation of Economic Social and Cultural Rights (ESCR).[159]

In his paper, Ariza pens a critique of the USoA and how whilst the remedy has seen some success in instances of marginalised people where their civil liberties have not been removed, it has not been as effective for marginalised citizens in the Colombian prison system.[160] Without disregarding Ariza's critique, for the purpose of this paper, it is the way in which Ariza describes the building of these cases by the court that becomes important in the nuances between Colombian and South African case law. Ariza uses the example of a constitutional case filed against the torturous conditions of the Colombian prison system. In describing the process the court undertakes, Ariza states that a court begins by translating the issues at hand into the "language of constitutional adjudication" – deciding the scale of the case.[161] For the imagery of scale, Ariza uses a paper by de Sousa Santos in which he speaks of law in relation to maps, and how scale is used as one of the mechanisms on a map to represent or distort reality and allows one to filter the kind of details placed on a map, which in turn deliberately reveals or conceals certain phenomena.[162] In this sense, Ariza uses this imagery of scale, stating that the choice of scale is the judge's starting point in deciding on the scale of approach dependent on the particular reality/problem that is being addressed.[163] In the case of the Colombian prison system, the court chose a large scale approach, focusing on the institutional, structural and historical elements, and less so on the individual plight/suffering of each of the prisoners, and further viewing time as continuous, between different stages of an institutional crisis acting upon marginalised people.[164] In other words, the spatial crisis in the prison system was not limited to the present day manifestation of the spatial crisis itself, but its historical context, and was seen as a sustained part of a larger perpetuating crisis. Ariza states "Once the case is constructed as the manifestation of a historical reality, it is easier to avoid the discussion of policies dedicated to present day situations in the case law."[165] Importantly, Ariza is stressing that once you properly construct or contextualise a case, it becomes easier to locate or adjudicate on it within a wider more deliberate structural and historical scope, rather than using a more generalised history to place a present day realty that often leads to the facts getting lost in a more ideological and generalist policy-based realm.

[159] LJ Ariza "Rights of Prisoners" (2013) 148.
[160] LJ Ariza "Rights of Prisoners" (2013) 156.
[161] LJ Ariza "Rights of Prisoners" (2013) 150.
[162] B de Sousa Santos "Law: A Map of Misreading. Toward a Postmodern Conception of Law" 14(3) *Journal of Law and Society* (1987) 284.
[163] LJ Ariza "Rights of Prisoners" (2013) 150.
[164] LJ Ariza "Rights of Prisoners" (2013) 150.
[165] LJ Ariza "Rights of Prisoners" (2013) 151.

4.4. How the South African court might respond to a country in crisis

A large part of the lessons to be learnt from the Colombian court above is the importance of building a case within the proper context of those who are litigating, who are often also those who are most marginalised. Additionally, I add one further avenue for the South African court to better respond to litigants who are within the spatial crisis through a study of the impact of the court's language on the politicisation or depoliticization of socio-economic rights.

To be clear, it is not my assertion in this chapter that courts are singularly able to deal with and move a country out of a state of crisis. Rather I contend that there are tools available to the South African courts to ameliorate the situation and better address the needs of those on the "other" side of the line.

4.4.1. Building a case - Context and Aesthetics

Wilson and Dugard stress the need for the courts to place greater emphasis on the context of poverty and the lived experiences of socio-economic rights litigants.[166] A court in determining the impact of the denial of the rights, should begin with the lived experiences of the litigants. With regard to the Colombian court, this would entail the court, placing itself in the shoes, so to speak, of the litigants. In this regard, a lesson from the Colombian court for the South African court, would be choosing the correct scale, correctly locating the facts of the case in order to ensure material considerations are not concealed, rather amplified. In this case it would mean making central the relevant daily practices of informality essential to the collective subjectivities of the litigants. Wilson and Dugard propose a three-step test in adjudicating socio-economic rights – the determination of an interest within the context of the litigants, then the determination of whether the interest is one worth protecting, and lastly, whether the policy relied on by the state constitutes a correct response.[167] It is my contention here that the central lever to this test is the correct contextualisation of the facts, and only if and when that has been sufficiently completed by the court can it move on to the other considerations.

[166] S Wilson and J Dugard "Taking Poverty Seriously" (2011) 665.
[167] S Wilson and J Dugard "Taking Poverty Seriously" (2011) 672-673.

4.4.1.1. Case Study – *Residents of Joe Slovo v Thubelisha Homes*

The case of *Residents of the Joe Slovo v Thubelisha Homes and Others* [168] involved the eviction of nearly 20 000 occupiers from 4 000 households from the Joe Slovo informal Settlement in Cape Town. The Joe Slovo settlement was to be reconstructed as part of the national Breaking New Ground (BNG) policy which seeks to eliminate informal settlements.[169] In the Constitutional Court the matter concerned two legal issues, the applicability of PIE, and whether the City had acted reasonably within the meaning of section 26. [170] Central to this decision was whether the city as the owner of the land had provided consent, whether tacit or implicit, at any point to the occupiers to reside on the land. The Court found that even in circumstances where the city had not acted to remove the occupiers in the 15 years they had occupied the land, and even where the city had provided essential services to the area, this did not amount to an acknowledgment of the occupiers as legal tenants, rather the upgrades where humane in nature and rather spoke to the city's Constitutional mandate and responsibility of care.[171] In coming to his conclusion Yacoob J speaks of the inequalities created by our past system and the evictions suffered at the hands of the previous regime and how PIE was enacted to ensure that even those who occupied land unlawfully were treated fairly and not evicted without taking all circumstances into account.[172] Further, that PIE was enacted to ensure fair eviction procedures, taking into account the humanity of the unlawful occupiers.

Yacoob J's reasoning is interesting in that one might say he has attempted taking a small-scale approach in appreciating the particular circumstances of the case and the vulnerable people, also attempting to fully locate the case in the historical and institutional context by referencing South Africa's history and the reasoning behind legislation like PIE. This description does not sit very well alongside his subsequent narrow definition of consent to not include the actions of the municipality in providing access to amenities to the occupiers over a 15-year period, and secondly the consideration of just and equitable circumstances existing. Yacoob J goes on to speak of the impossibility of construing the actions of the state as tacit consent and how the purpose of PIE was in no way to confer rights of occupation on those who never had.[173] But it must be argued that given the background Yacoob J presented for rights in terms of PIE, it may have been just to allow for an extension of the tacit consent to include the unlawful occupiers. Given the extent of the amenities provided by the state, the number of years the occupiers had lived there relatively peacefully, and the fact that in

[168] 2009 ZACC 16.
[169] *Joe Slovo* para 25.
[170] *Joe Slovo* para 15.
[171] *Joe Slovo* para 49.
[172] *Joe Slovo* para 69.
[173] *Joe Slovo* para 50.

Yacoob J's words – they had no right of occupation. It is my contention that the type of analysis ensued by Yacoob J should have allowed for a more generous interpretation of consent constructed from a starting point of the historical nature of forced removals, but within the complexities of a continued and structural violence on a particular group of vulnerable people.

Joe Slovo represents those individuals who find themselves so far outside of the law, and in the "informal" space, that only charitable or humanitarian rights are inherited by them. Additionally, because many of these residential spaces are located in the "informal" space, and utilise alternative enforcement schemes and rights of occupation, they are unable to enforce their rights to their full extent as their worlds exist at an unrecognised intersection between the formal and informal. It is the informal status of the occupiers that allows government for all intents and purposes to recognise these people and provide tacit, and some might argue explicit consent, to live on this land, but to still use a defence that no consent was provided. It is their informal nature that allows the law to treat the actions of government as charity, instead of the fulfilment of rights that are owed to the community as recognised occupiers of that land. It is their informal status that did not prompt the court to investigate the possibilities further for in-situ development, and conclude on the basis of information received by the local government that relocation or resettlement in the interim was best.[174]

Joe Slovo also begins to illustrate what the pursuit of the right to the city may look like. It begins to describe practically the (re)making of one's self through the landscape and the responsibility of judges in such circumstances. Firstly, we must note the intentional nature by which the people demand and acquire specific kinds of rights, in a particular manner, at a specific time. The occupation in and of itself is a demand for land, and the subsequent pressure placed on the local government for amenities was in fact a demand for recognition. There was no invisible hand working to provide the people with those amenities, rather a community using their agency, intentionally looking at what was on offer to them and asserting their rights through those means. We see the people of Joe Slovo taking up land in which they think is most economically beneficial for them, using informal processes to demand rights which they think they deserve, through "informal" measures which in the end are not recognised by law, but at the time served them best. The people used their actions to blur the contours of the abyssal line, without requesting a move to the "other" side, rather using the space of the city to redefine themselves through a collusion with the space, describing a different self.

Further, time and space become most important here. The idea that the people want these things where they are and have chosen to be, that the freedoms they are calling for are not freedoms for the

[174] L Chenwi 'Legislative and judicial responses to informal settlements in South Africa: A silver bullet?' *(2012) 2 Stellenbosch Law Review* 378.

future in a space demarcated specifically for their development and existence, it is in this space in this time they want their future. And this space and time they demand to exist is a most uncomfortable fit for Yacoob J, for this kind of recognition would have to be based on an appreciation of being simultaneous with the "other" and a rejection of the bifurcated state.

This is the second leg of test for spatial justice in terms of relativity and simultaneity I propose in chapter 3 based on Philippopoulos-Mihalopoulos. And this I suspect is the difficulty Yacoob J experienced. The extension of the definition of consent would require a reimagining of the occupiers as full humans with not only rights in law, but deserving of particular kinds of rights in a particular kind of space to pursue particular kinds of economic prospects.

Joe Slovo indicates that the right to the city in its application, must at the very least, cause an extreme sense of discomfort in ensuring its realisation. The act of changing a city can always be done through additions and new development, but what special justice through the right to the city demands, is the changing of the self through the city, which is the much more difficult task.

4.4.1.2. *Imizamo Yethu* – Our Efforts

Something that I have alluded to throughout this thesis has been the violent way in which the word "informal" in relation to the black body acts to define those who are impoverished and operating in the formal as flat and uncomplex beings. These definitions range from poor charitable souls, to lazy individuals who deserve their fate, to criminals who by their own volition opted their lives. Their entire uncomplex being could at any given time be summarised into a couple of paragraphs by any judge or lay individual purporting to provide assistance. This simple and common aestheticization of the marginalised and impoverished is what a court must grapple with upfront when deciding on issues relating this specific group of people.

Bhan refers to the aestheticization of slums, he states that "an aesthetic representation of the slum reduces it to its built environment, one characterized by poverty, filth and fragility"[175] That it becomes easier for courts to order the demolishing of slums where the image of the slum is flattened and reduced of its humanity. Bhan further states that "an object is thus created, re-coded with shades of criminality, a lack of entrepreneurialism and accusations of a lack of hygiene. Thus reduced, evictions and resettlement become not tales of the destruction of individual people's lives and livelihoods, but

[175] G Bhan "This is No Longer the City I Once Knew" (2009) 139.

simply the erasure of an image of a slum, emptied of the people who live within it."[176] And I think here we must continue to use the case of *Joe Slovo* as an example. The main focus of the judge in *Joe Slovo* was the deplorable conditions in which the people had lived, with some reference to the fact that these were vulnerable people and the historical aspects of evictions of those most marginalised. But the connection missing from the judge, the final step to be made is that this being said, these people had built homes, families and communities. Here I find it difficult to find an English term to fully express all these elements. An adequate way to take cognisance of this is the isiXhosa phrase *"imizamo yethu"* which also happens to be the name of a township in Cape Town which lies adjacent to the affluent Cape Town suburb of Hout Bay– translated to "our efforts". I find this phase appropriate as in isiXhosa, it goes further than to recognise actions or attempts at a very surface level, but the word *"imizamo"* recognises your efforts and the extent of such within your context, and does so from no other vantage point but your own. It fully recognises your humanity and that *imizamo yakho* "your efforts" is you in your entirety, rich with history and the fullness of life and livelihood. It fully recognises the value of your efforts, that in the face of everything, you produced something, had efforts to display, of which such efforts are valuable.

Here we are reminded of shebeens in the song *Khawuleza* and how they became a symbol of both rejection of the status quo, but also the building of new lives and creation of new economies for marginalised black people. Collectively, these are practices of self-making and self-legitimization that if were to be considered and aestheticized within the context of the "informal" as they currently are could only be conceived as criminality and not a making of oneself. But when considered as Roy does, as alternative economies rather than opposite to the informal, we open up the judgments of the courts more complex being, fuelled by Imizamo Yabo.

4.4.1.3. The South African court's use of language and the tendency to often depoliticise the poor

There is a great deal of criticism towards the South African court and its inability to deal meaningfully with socio-economic rights litigation. The Colombian court is a particularly important example when dealing with the common defence of institutional incapacity by the South African court in response to the criticism of its unwillingness "to embark on a wide-ranging enquiry into what the realisation of socio-economic rights requirements"[177]. Wilson and Dugard problematises the South African court's

[176] G Bhan "This is No Longer the City I Once Knew" (2009) 140.
[177] S Wilson and J Dugard "Taking Poverty Seriously" (2011) 670.

socio-economic rights jurisprudence in that the South African court tends to import the tests of reasonableness and fairness from administrative law into socio-economic rights adjudication.[178] The unsuitability of which is due to the fact that in administrative law it is often the legislation in question that explicitly states the purpose for the exercise of power and the interests in question, unlike the constitution where these are not defined in the constitution.[179] Brand goes further in this argument, stating that the use of these defences by the court in fact tends to depoliticise the issues at hand.[180]

"The political process around issues of poverty and basic need is a process of politicisation, depoliticization and repoliticisation of the issues at stake" [181] Brand states that these strategies of depoliticisation serve to provide reason or a basis in response to poverty, that poverty for one is somehow the fault of the poor, but also that it is inevitable and inescapable. Brand goes on to stress the part the law plays in the politicisation of and the discourse around need politics.[182] Brand states that the court in consistently citing institutional incapacity, whilst to an extent valid, also serves to depoliticise the issues at hand.[183] It does so in two ways; firstly it limits the description of the issues to technical rather than political, and secondly it relegates the discourse of these issues to formally constituted political branches of government" – defining these issues as not the business of the courts or civil society, making them passive recipients of these rights.[184]

In his work on the politicisation, depoliticisation and repoliticisation of needs/socio-economic rights adjudication, Brand refers to three cases to illustrate a more participatory approach for the court when embarking on needs analysis. Firstly the case of *Khosa and Others v Minister of social development and Others* [185] where the court found that "the state had a constitutional duty to provide social assistance to indigent permanent residents" largely based on the court's recognition of the permanent resident's efforts in becoming part of the South African Society.[186] The case of *Modderfontein squatters v Modderklip Boerdery* (Pty) Ltd[187] involved the owner of private property bringing a claim for constitutional damages against the state for the protection of private property inhabited by 4 000 squatters. The court found that the State had failed in its duty to protect the owner's property, but also to provide shelter for those in desperate need. In recognising that both the

[178] S Wilson and J Dugard "Taking Poverty Seriously" (2011) 668-669.
[179] S Wilson and J Dugard "Taking Poverty Seriously" (2011) 669.
[180] D Brand "The politics of need interpretations" (2005) 31.
[181] D Brand "The politics of need interpretations" (2005) 19.
[182] D Brand "The politics of need interpretations" (2005) 22.
[183] D Brand "The politics of need interpretations" (2005) 31.
[184] D Brand "The politics of need interpretations" (2005) 31.
[185] [2004] ZACC 11.
[186] D Brand "The politics of need interpretations" (2005) 33.
[187] 2004 (6) SA 40 (SCA)

owner and the occupiers had taken steps to engage with the state to find an alternative housing solution and come to an amicable solution, whilst the state had failed in its duty to assist either of the parties, the court found against the state, requiring the state to purchase the land from the owner as a housing solution.[188] The case of *Port Elizabeth Municipality v Various Occupiers*[189], similarly involved the court finding that illegal occupiers of land had in good faith attempted to engage with the state for alternative places to live, but the state had failed in its duty to engage meaningfully. Brand, further in his analysis, states that whilst these cases begin to illustrate a different rhetoric – recognising and emphasising the political agency of the communities - one must caution against the courts emphasis on the exclusionary potential of the emphasis on "proper" political action which could exclude other forms of political action. For example earlier I mentioned a need to engage with the intentionality of the demand of housing rights through occupation, whereas in both the cases of *PE Municipality* and *Modderklip* the court stresses that the occupiers engaged in good faith without the intention of forcing the states' hand and jumping the housing que.[190] But I think we must take seriously that in many instances, specifically in the case of informality, communities may not utilise what is considered "proper" politics to assert their rights, rather rely on those avenues available to them. I must agree with Brand that in specifically highlighting the "proper" nature of the avenues used by the litigants in these cases may serve to exclude other actions, that whilst play vital roles in "informal" spaces, are unnecessarily illegitimated in the formal. They should, in fact, be considered, to the extent possible as legitimate, utilising both informal (illegal occupation of the space) and formal (use of the judicial process) means to make the law work for them as best as they possibly can.

4.5. Conclusion

Firstly, in this chapter I dealt with the ideals of transformative constitutionalism and its ability to contain a flexible interpretation which requires consistently moving between both sides of the hypothetical constitutional bridge, critically reflecting on its ideals, with reference to the past in the context of the present. I then moved to a case study on the judicial activism of Colombian constitutional court for an alternative approach, focusing specifically on the doctrine of an unconstitutional state of affairs - illustrating how essential courts are in removing institutional blockages and how effective judgements may be, where the court places a greater focus on "building

[188] D Brand "The politics of need interpretations" (2005) 34.
[189] 2005 (1) SA 217 (CC).
[190] D Brand "The politics of need interpretations" (2005) 33-34

the case" and effectively contextualises the facts of the case to better respond to the needs of the litigants.

Included in the proper contextualisation of the cases is *imizamo yethu* and the power of the court to politicise or depoliticise the needs of marginalised people. The notion of *imizamo yethu* seeks to ensure the court, in its process of contextualisation not only takes the historical and structural elements of the case seriously, but also places great emphasis on the agency of the people in transforming and recreating the spaces, and the interaction of all their informal practices in creating their new worlds of truth.

5. CONCLUSION

Mhlaba wakithi bo
Usemi ndawonye…

Ah thin'asina voti
Silal'emikhukhwini…

Akukhi mehluko kulelizwe
Qhawul' amakhamandela…

Bakhona abany'abakithi
Abasibona sesikhululekile
Kodwa umshosha phansi
Uthi not yet uhuru

Singer and Anti-Apartheid Activist, Letta Mbulu's song "Not yet uhuru" was released in 1992, and though the song was written and sung for/in a particular context, I believe the song was also immensely prophetic, making it equally applicable for the time and space we are in presently. In addition to Mbulu's ever timely song serving as a reminder of the limitations of the initial constitutional bridge illustration; Not Yet Uhuru is a lyrical reminder for a distinct group of people that the spatial crisis is a persistent condition that continues to the landscape us across time and space.

Not yet uhuru speaks to the condition of the spatial crisis I have illustrated above, the inability of marginalised black people – even in democratic South Africa – to (re)gain their full humanity, trapped on the other side of the abyssal line in this time of neo-apartheid that continues to perpetuate the distinct subjugations of colonialism and apartheid. I propose that in this crisis, individuals construct their subjectivities in response to this by opting out of "formal" systems, preferring the "informal" as a means of survival, and further using the "informal" in response to and rejection of the bifurcated society and as a demand for full humanity.

In chapter 3, I propose that on the "informal" side of the abyssal line, both the physical and intangible elements are constructed through laws acting through and sustained by space, but also continue to construct spaces and personhood. I rely on Mbembe to describe the duality of constructionism between the landscape and the conception of the black body, each creating each other, relying on the hysteria surrounding the black body to sustain it. As a response to this I then turn to Philippopoulos-Mihalopoulos's conception of spatial justice as a tool for courts to use to view the spatial crisis through the correct lens, focusing on the ideas of relativity and simultaneity – to offer a Global South based view on the right to the city.

Finally, I contend that transformative constitutionalism contains the flexibility to produce activist courts and result in meaningful change for marginalised people through a proper contextualisation of who those people are. In other words, a court must correct the lens through which it views the impoverished, based on a starting point which is a self-perpetuating crisis which has banished them to notions of sub-humanity, if it is to be effective in meeting their needs.

Transformative constitutionalism may not possess all the tools to free those marginalised from apartheid spatial planning, but increasingly activist courts who adjudicate cases by beginning to address a time of neo-apartheid and seeking simultaneity between those on either side of the line, inch closer a right to the city closer to the needs of its people.

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