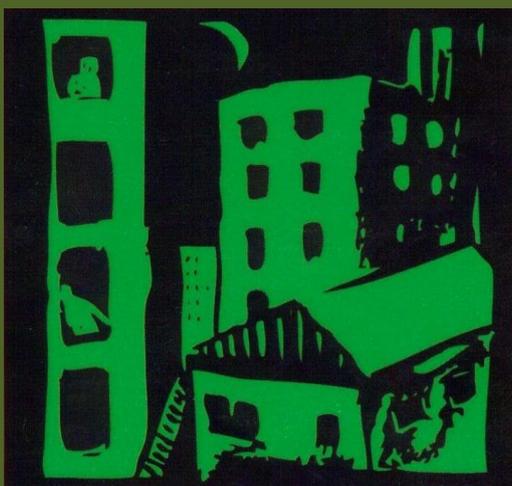


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Poverty as injustice

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1 INTRODUCTION

The title and thus broad framing of this article is “poverty as injustice”. The implicit other side of the claim “poverty as injustice” is that justice would mean the absence of poverty. Our contention is that the understanding of poverty as a practical social *problem* in the first place rather than as a manifestation of injustice results in an approach to poverty that is focused solely on technical and managerial solutions to poverty. Such approaches to poverty are problematic because they lose sight of the political dimensions of poverty, that is, the fact that poverty is embedded in a particular ideology. A definition of “poverty” as inadequate *access* to basic living resources, such as, food, water, housing and health care, surfaces the

political dimensions of poverty. What determines access to these basic resources is economic and political power. Any response to poverty must therefore engage power. At the heart of any response to poverty must be the search for, and the ideal of, justice.

One example of the negation of the influence of power and politics is the manner in which the role of law in the context of poverty is conceptualised. Law is often seen and used as simply an instrument of policy, as regulation alone, intended to give concrete and binding effect to policy choices and to ensure fairness in the implementation of policy choices. Alternatively, law in the form of the Constitution is seen as a benign formative framework for development of policy. But at heart, law is an expression of ideology and power: the fundamental rules of property, transaction, liability and procedure simultaneously create and maintain inequalities and power imbalances – in Sen’s words, law “stands between availability and entitlement”.¹ Any engagement with the role of law in the context of poverty must in the first place take account of the ways in which law creates and maintains poverty.

In this article we illustrate, from different perspectives, the extent to which responses to poverty negate rather than engage the fundamental questions of justice that poverty raises. Coming from the fields of theology, specifically liberation theology, and law, specifically legal philosophy, housing law and socio-economic rights, we work from a multi-disciplinary angle that originated organically because of a shared interest in the notion of poverty. The shared interest, as will become clear below, centres on how in our respective fields the political question of justice is elided in engagements with poverty.

Our purpose is to highlight the dangers of a purely pragmatic approach to address poverty and to argue for an understanding of poverty that seeks to frame poverty as injustice and the concern with poverty in the language of justice. The article has two main parts: first, we attempt to unpack our claim on a theoretical/ conceptual level, and then we turn to some examples to illustrate the claim. As already noted, our response to the problem we highlight and what we seek as an alternative is to reconfigure poverty as injustice, the absence of poverty as justice and accordingly the concrete ways in which to address this as seeking justice rather than by means of technical / managerial solutions.

2 REFLECTIONS ON DEFINITIONS AND APPROACHES

2.1 Different definitions of poverty; different approaches in response

Different definitions of “poverty” lead to different approaches to overcoming it. Leonardo and Clodovis Boff speak of three explanations for poverty:² An *empirical explanation* defines “poverty” as *moral deficiency*: people are poor because they are lazy, backward or lack a positive work ethic. The response to poverty in this case is either apathy, or, alternatively, aid or relief.³ The poor are regarded as an object without

¹ Sen A *Poverty and famines. An essay on entitlement and deprivation* (1981) at 166.

² Boff L & Boff C *Wat is de theologie van de bevrijding?* (1986) at 34-35.

³ See also in this respect Ross T “The rhetoric of poverty: Their immorality, our helplessness” (1991) 79 *Georgetown Law Journal* 1499 and Williams LA “Welfare and legal entitlements: the social roots of

agency of their own, and made dependent on external aid or support, trapped in a vicious cycle from which they cannot escape.⁴

A *functionalist explanation* defines “poverty” as *economic or social regression (or underdevelopment)*. This is a modernist or reformist approach and suggests that development, investment and economic growth will over time assist poor countries in the south, and thereby poor people, to overcome their poverty and be on par with their neighbours in the north. It does not acknowledge the ways in which investment often keeps poor countries poor whilst investing countries grow richer, and the failure of economic growth to actually trickle down to the poor. The Gross Domestic Product of South Africa grew by 24% between 1990 and 2008, cited as one of the faster growing economies in the world at the Rio Summit, yet in the same period it depleted its natural resources per capita by 33%.⁵ Economic growth had serious negative environmental consequences, whilst at the same time it probably had little positive value for the children of Limpopo or the Eastern Cape who are still excluded on the margins. The table is expanded to include a few more people who play the same game, but the game has essentially stayed the same. Even those who speak passionately of nationalisation are playing this game, making one wonder whether the aim of nationalisation is inclusion of the most vulnerable, or another way of coming to the table for those already in power (and wealth). Although this approach can often lead to great strides in terms of national development objectives, the poor remains an incapacitated object who is seldom at the table of decision-making about development priorities, the distribution of resources, and the agenda that shapes the economic and political landscapes of a country, city or local community. The limiting effect of existing power imbalances are also negated in this approach.⁶

A *dialectical explanation* defines “poverty” in terms of the distribution of power and resources, the economic organization of society, and the dominant ideology at work. “Poverty” in this definition is rooted in the way in which capital, which is in the hands of a few, rules over labour, which is provided by the masses.⁷ In this definition “poverty” is injustice, “poverty is an evil”: it is not merely a developmental issue but it is essentially political and conflictual.⁸ It requires an alternative socio-economic-political system with the poor as subject of their own liberation, in local contexts, but also in national and global contexts.⁹ It is requiring nothing less than a revolution – a

poverty” in Kairys D (ed) *The politics of law. A progressive critique* 3 ed (1998) at 569, both of whom trace this ‘demonising’ rhetoric about the poor in the poverty related jurisprudence of the American Supreme Court.

⁴ See also Jürgen Habermas’ description of narratives that depict the poor as “administrable subjects” to whom predetermined solutions are prescribed in Habermas J “Law as medium and law as institution” in Teubner G (ed) *Dilemmas of law in the welfare state* (1986) 210.

⁵ Tempelhoff E “Al groei BBP, ly land se omgewing” *Beeld* 19 Junie (2012).

⁶ Sampie Terreblanche provides a powerful critique along these lines in Terreblanche S *A history of inequality in South Africa 1652-2002* (2002) at 58-62. See also in general his *Lost in transformation* (2012).

⁷ Boff & Boff (1986) at 35, referring to Pope John Paul II.

⁸ Gutierrez G *A theology of liberation: History, politics and salvation* (1988) at 171.

⁹ Boff & Boff (1986) at 35.

transformation of the basis upon which socio-economic systems work. Commentators have often referred to the changes that occurred in South Africa in the early 1990s as a “legal revolution”, in an attempt to capture the shift from parliamentary to constitutional supremacy and possibly a shift in approaches to legal interpretation and adjudication. For us, a more apt description is Laurie Ackerman’s, and following him Drucilla Cornell’s, description of the change as a “substantive revolution”, that is adoption of a new *Grundnorm*/foundational principle, namely, freedom and human dignity. South Africa in this version became a *Rechtsstaat*:

The Constitution, then, is emblematic of the very revolution that took place. It is a revolution that gives life to the spirit of transformation – a spirit of transformation of the realm of external freedom as it is legalised, but never in a final sense, so that it remains grounded in the ideal of a self-legislating community that is always aspirational and not merely a social fact.¹⁰

2.2 Development versus liberation: the contribution of liberation theologies

Since the 1960s, so-called “theologies of liberation” have extensively critiqued the project of addressing poverty through development, as a project of modernisation serving the interests of rich countries at the expense of the poor: “Poor countries are not interested in modelling themselves after the rich countries, among other reasons because they are increasingly more convinced that the status of the latter is the fruit of injustice and oppression.”¹¹

Liberation theologies were a response from below articulating the suffering of economically oppressed people and seeking to unmask the “lie” of development as maintaining the status quo of power relationships and entrenched, exploitative and oppressive ideologies. It is reading

[T]he underdevelopment of the poor countries ... as the historical by-product of the development of other countries. The dynamics of the capitalist economy lead to the establishment of a centre and a periphery, simultaneously generating progress and growing wealth for the few and social imbalances, political tensions, and poverty for the many.¹²

Development theories and practices have only slightly altered the tables, often keeping the tables unequal through theories of development and investment, adding only a few seats, instead of facilitating a radical restructuring of existing tables in a way that was marked by fundamental changes to the manner in which society, politics, the economy, and the distribution of resources and power relationships worked.

Liberation theologies propose a radical departure from dominant discourses, namely, alternatives to dominant development paradigms and an embrace of liberating and reconstructive paradigms. What is required is not development but rather liberation from the socio-economic-political structures that exclude people from the

¹⁰ Cornell D “Bridging the span toward justice: Laurie Ackerman and the ongoing architectonic of dignity jurisprudence” in Barnard-Naude AJ Cornell D & Du Bois F (eds) *Dignity, freedom and the post-apartheid legal order. The critical jurisprudence of Laurie Ackerman* (2008) 18 at 20. See also Ackerman LWH “The legal nature of the South African constitutional revolution” (2004) 4 *New Zealand Law Review* 633.

¹¹ Gutierrez (1988) at 14.

¹² Gutierrez (1988) at 51.

table in order for them to be poor and oppressed, namely, the creation of new tables with radically new arrangements between those at the table, the insistence that every single person belongs at the table, and the removal of obstacles or mechanisms that hinder some from participating fully at the table.

What is required is “the integral liberation” of all human beings and of human beings as whole beings (i.e., spiritual, psychological, socio-economic-political liberation):¹³ “The goal is not only better living conditions, a radical change of social structures, a social revolution; it is much more: the continuous creation, never ending, of *a new way to be human, a permanent cultural revolution.*”¹⁴ This vision relates to Drucilla Cornell’s framing of transformation as not only a radical change of a system, but also the transformation of individuals themselves. This definition of transformation “turns us to the question of what kind of individuals we would have to become in order to open ourselves to new worlds”.¹⁵

The contribution of liberation theologies has implications not only at a macro-level but also with regards to how poverty intervention strategies at national, city or neighbourhood levels are conceptualised and implemented, emanating from specific definitions of poverty that result in specific approaches. Related to strategies of development is an approach to justice that amounts to nothing but legal strategy that we discuss below.

2.3 “Justice has fled our world”¹⁶

Roger Bergowitz notes that “justice has fled our world” to be replaced by law. He refers to the example of a company which pays a fine so that it can continue to dump toxic waste in a reservoir or that moves to the Bahamas in order to avoid tax. The response to these activities is not that the company even though acting within the limits of the law, acting legally, is acting unjustly, but rather that because it is acting legally it is also acting justly. In his words: “Lawfulness ... has replaced justice as the measure of ethical action.”¹⁷ This understanding of law as the prevailing one in legal modernity stands in contrast to the classical natural law understanding of law as justice. In modern times the ideal of justice amounts to “obedience to rules”, “an instrument of politics and economics.”¹⁸ He identifies three ways in which this understanding manifests in how we conceive of justice: justice as fairness; justice as efficiency; and justice as legitimacy. We will unpack this further below.

For Bergowitz, in order to move beyond the above conceptions of justice, justice needs to be understood as a transcendental activity, a thought process that challenges the certainty of calculation.¹⁹ Justice entails a thinking that goes beyond the application

¹³ Boff & Boff (1986) at 15; see also Gutierrez (1988) at xxxviii.

¹⁴ Gutierrez (1988) at 21.

¹⁵ Cornell D *Transformations* (1993) at 1.

¹⁶ Bergowitz R *The gift of science. Leibniz and the modern legal tradition* (2005) at ix.

¹⁷ Bergowitz (2005) at ix.

¹⁸ Bergowitz (2005) at ix.

¹⁹ Bergowitz (2005) at x. See also Douzinas C *The end of human rights* (2000) and Douzinas C & Geary A *Critical jurisprudence. The political philosophy of justice* (2005).

of rules and, as we will elaborate on below with reference to Marianne Constable, a thinking that goes beyond empirical sociological observation and measurement. In contrast to fairness, legitimacy and efficiency this kind of thinking about law and justice “requires that an individual sacrifice his rights, his pride, and even his self to something bigger and ultimately more meaningful.”²⁰

Positivism is, of course, the approach to law that amounts to a distinction between law and justice described above. Bergowitz notes that although it is sometimes assumed that positive laws are not based on reasons this is a mistake.²¹ Because they are based on reasons the justifications employed in the service of positivism must be critically analysed. Positivists deny the existence of transcendent values and principles and therefore rely on societal norms like fairness, efficiency and legitimacy. This is an important insight that must be heeded, namely, that positivists have not merely abandoned justice but rather have “transform[ed] the nature of justice”.²² The modern day understanding of law and justice is based on a scientific understanding, that law and justice is a “knowable product of science”.²³ Law’s becoming social-legal is a concrete outcome of this understanding and we elaborate on this below.

2.4 “The social scientification of law”²⁴

“Sociology – whether as science or as interpretation, as law or as philosophy speaks the truth of positive law in the language of belief and appearance, the language of ‘legitimacy’, ‘value’, ‘norms’, ‘distribution’, and ‘policy’ – from which ‘justice’ and the ‘true’ world disappear.”²⁵

Marianne Constable²⁶ traces the development of 20th century legal thought through Nietzsche’s history of metaphysics. Nietzsche in *The twilight of the idols* observes “[h]ow the ‘real world’ at last became a myth”. Under the heading “History of an error” he tells the story of how the world of ideals disappeared to be replaced by a phenomenal/ material world.²⁷ He identifies six stages: Platonism; Christendom; Kant; Positivism/ Utilitarianism/ Rationality, and finally the phase in which the world of ideal has been abolished and replaced by an apparent one. But for Nietzsche, with the abolition of the ideal we also abolished the material, with nihilism as the result.²⁸ Constable, following Nietzsche, then distinguishes between six phases in modern legal thought: first, a phase of virtue that is followed, secondly, by one of divine/ natural law and, thirdly, by one of moral law; where after, fourth, positive law, and then a shift to

²⁰ Bergowitz (2005) at xi.

²¹ Bergowitz (2005) at xii.

²² Bergowitz (2005) at xii.

²³ Bergowitz (2005) at xii.

²⁴ Constable M “Genealogy and jurisprudence: Nietzsche, nihilism and the social scientification of law” (1994) *Law & Social Inquiry* 551.

²⁵ Constable (1994) at 588.

²⁶ Constable (1994). See also Munger F “Asking the right question” (1994) *Law and Social Inquiry* at 605-608; Sarat A “Leading law into the abyss: What (if anything) has sociology done to law?” (1994) *Law and Social Inquiry* 609.

²⁷ Nietzsche F *The twilight of the idols* (1968) at 40-41.

²⁸ Nietzsche (1968) at 40-41; Constable (1994) at 552.

social policy and distributive justice come to the fore. The abolition of the ideal is completed in the fifth phase in favour of the material world.

For philosophers and researchers, for those who live in a society that accepts such truths, law becomes what sociology knows it to be: the norms (in their double sense) of a population; the management of risks and interests; the policies enforced by officials in the context of belief in the justice of state violence or, in other words, positive law.²⁹

In phase six, Constable notes that critical scholars acknowledge the collapse of the distinction between is/ ought and reality/ appearance.³⁰ The question that she urges is, “what remains ... what world is left?”³¹ Like Bergowitz she wants to think about the complicated character of current relations between law and science. Her aim is also to highlight that justice is what is at stake.³² She argues that contemporary law more and more relies on what we know by way of sociological research to the detriment of justice. For her, justice is that aspect of law that traditionally has made law to be something other than an imposition of the force of will.³³ She does not seek to reject all empirical study or deny the importance of law and society work, but asks if there is a way to think of law in the present time other than through the sociological understanding of structure and/ or agency.³⁴ The pervasiveness of this sociological understanding strengthens the notion of governmentality that Michel Foucault described as a feature of a modern understanding of law in his work many decades ago.

2.5 Governmentality

Foucault’s insights also expose to our minds something of what we find problematic about many approaches to the alleviation of poverty. Foucault famously lamented what he called “juridical regression”, namely, that the traditional understanding of law and power was replaced in modern times by normative power.³⁵ In contrast to juridical power that amounted to the sovereign’s right to take life, a negative power, normalising power is exactly power over life, the right to administer, develop and multiply the life of a population. Normalising power plays itself out in two forms: discipline and bio-power. Where discipline is the technique in which individuals, for example, in a prison or mental institution, were observed and governed³⁶, bio-power, power over life, is used to maintain, control and regulate communities and populations.³⁷ Governmentality results as a specific and complex form of power by which the citizen is placed under constant surveillance. Three differences between traditional forms of power (juridical power) and governmentality (normalising power) could be noted. First, the former’s regressive

²⁹ Constable (1994) at 588.

³⁰ Constable (1994) at 588.

³¹ Constable (1994) at 588.

³² Constable M “Thinking non-sociologically about sociological law” (1994) *Law and Social Inquiry* 625 at 625.

³³ Constable “Thinking non-sociologically” (1994) at 626.

³⁴ Constable “Thinking non-sociologically” (1994) at 628.

³⁵ See in general Foucault M *The history of sexuality* vol 1 (1979).

³⁶ See in general, Foucault M *Discipline and punish* (1977).

³⁷ See in general Foucault M *Power/ knowledge* (1977).

and negative power is replaced by a normalising and productive power that constructs knowledge about its objects. Secondly, the power of governmentality is not a property but rather a strategy, a way through which to relate to people. Thirdly, the operation of power is not centralised as in the traditional model but rather localised and operates through diverse and multiple networks.³⁸ Many responses to the “problem” of poverty stand in the guise of this notion of governmentality. Law and accordingly legal responses are transformed by normalising power. Human life is captured by endless regulation, poverty is regarded as a problem to be solved by way of technical solutions, and the poor are managed and governed through new techniques. This approach to law relates to the functionalist explanation and its definition of poverty discussed above.

One angle from which to approach this question would be to look at urbanisation and more specifically at urban spaces. Foucault states that “space is fundamental in any form of communal life; space is fundamental in any exercise of power”.³⁹ An approach to poverty that engages with the underlying power and ideology of poverty should therefore also look at the idea that power is embedded in a wide range of social practices that play out in various spaces. An understanding of governmentality in city spaces can guard against rhetoric on poverty eradication that gets caught up in neo-liberal managerialism. Such an approach sees the city as a metaphor and reads the urban space as an image that reflects how everyday managerial “technologies” or governmentality create and maintain inequalities and power imbalances. The manner in which poverty plays out as injustice in urban spaces serves as a representation of law’s injustice towards the poor in general. Notions of governmentality support a focus on the how of government, on the specific mechanisms, techniques and procedures which political authorities deploy to realise and enact their programmes.⁴⁰ Exposing the violence and injustice in these modes of managerialism, the approach supports a call for a re-imagination or re-enchantment of the law, to be something beyond mere management.⁴¹

De Certeau refers to what Foucault discerns as the “move which has organized the discursive space”.⁴² He continues to explain this “move” as the “miniscule and ubiquitously reproduced move of ‘gridding’ a visible space”. The significance and purpose of this gridding is to make occupants of the visible space available for observation and “information”.⁴³

³⁸ Veitch S, Christodoulidis, E and Farmer, L *Jurisprudence* (2004) at 241.

³⁹ Rabinow P *The Foucault reader* (1984) at 252. This remark is from an interview between Paul Rabinow and Michel Foucault entitled “Space, knowledge and power”. It is a response to the remark that “in technology of power, of confession as opposed to discipline, space seems to play a central role”.

⁴⁰ Rose N “Governing advanced liberal democracies” in Barry A, Osborne T & Rose N *Foucault and political reason: Liberalism, neo-liberalism and rationalities of government* (1996) 37.

⁴¹ See Antaki M “The turn to imagination in legal theory: The re-enchantment of the world” (2012) *Law and critique* 1.

⁴² De Certeau M *The practice of everyday life* (1984). He clarifies that in this context, for Foucault, the “move is not, as in his earlier book, *The History of Madness*, the epistemological and social move of isolating excluded people from normal social intercourse in order to create the space that makes possible a rational order”: De Certeau (1984) at 46.

⁴³ De Certeau (1984) at 46–47.

3 SOME EXAMPLES

3.1 Poverty in South African cities and towns

In urban environments laws and bye-laws often criminalise the poor, i.e. homeless or landless communities, refugees or asylum-seekers, and vulnerable children or women, instead of addressing the fundamental imbalances of power as expressed through access or the lack thereof. The poor are blamed for being poor, instead of blaming policies and practices of government, the rich and the market, for the exclusion of the poor.

The meaning of *(dis)-em-power-ment* from such a vantage point will be profoundly political in how access to basic sources of power is mediated or not, in the way described by Friedmann, i.e. access to social networks, social organization, income, finance, defensible life space, information, surplus time and basic infrastructure.⁴⁴ The more access people gain to such sources of power the more empowered they will be, and the less access the more disempowered, in terms of Friedmann's theory. Friedmann speaks of empowerment as *the politics of alternative development* –understanding the developmental process and engagement with issues of poverty as profoundly political in as far as it ensures access that will shift the playing fields and provides the poor with options to exercise agency and choice. Access without choice is not real access; liberationist development will ensure access that is prioritised, co-designed and co-owned by the poor.⁴⁵

Informal traders in the city centres of Pretoria and other cities create small means of income for themselves to sustain their families. Politicians and policymakers view their presence as negative for the city's image, impacting detrimentally upon formal trade, and congesting pavements that become conducive to crime. Instead of innovative ways of inclusion to provide sustainable access for informal traders to an economic base that will break the cycle of poverty, and ensure decent trading conditions, there is a clampdown on informal traders, attachment of their stock (which they often permanently lose), and police and legal action taken against them in terms of the city's bye-laws. Through an exercise of political power, rooted in dominant discourse and backed up by legislation, the poor are denied access to economic power, and their fundamental rights violated.

Homeless and landless people cannot access land close to socio-economic and educational opportunities and often devise informal or more sophisticated strategies to become more visible and to position themselves in a way that will secure them greater access. In cities, like Sao Paulo in Brazil, this became evident in so-called *vertical favelas* where poor people invade abandoned inner city buildings and with the best legal and town planning support secure tenure and land rights for themselves.⁴⁶ This is what movements, such as, Abahlali baseMjondolo in Kennedy Road in Durban, Slum Dwellers International and others, are working for. In Pretoria small pockets of homeless people

⁴⁴ Friedmann J *Empowerment: the politics of alternative development* (1992).

⁴⁵ Friedmann (1992).

⁴⁶ Berryman P *Religion in the megacity: Catholic and Protestant portraits from Latin America* (1996).

working in underemployed situations live by the rivers and spruets of the city, not necessarily as consciously as the people of Kennedy Road, but as intentional about the *positional power* they gain in terms of accessing sources of livelihood.

Even those engaged professionally in the field of poverty eradication often work with definitions of poverty and approaches to overcoming it that fail to address poverty as injustice, poverty as ideologically-politically, and therefore often also theologically-legally perpetuated. In apartheid South Africa there was a close relationship between ideological-political and theological-legal discourse to justify and produce fragmented cities with evil results. Failure to deconstruct such discourses in the context of ongoing poverty and to explore alternative and probably liberating approaches to poverty will fail the majority of South Africans dismally.

On Mandela Day a nation collectively soothes its conscience by with minutes of action, backed by media support and publicity, but in the long run it begs the question of how much things have changed for the poor as a result, often being objectified further by this day.

3.2 Bye-laws and inner city rejuvenation policies: Lowliebenhof, Senator Park and Schubart Park

In the inner city of Johannesburg in Braamfontein is a block of flats called Lowliebenhof. It is a ten story block and the applicants have different leases in terms of which they are (still) living there. These leases were initially with various landlords. Interestingly, the first lease dates back to 1994. These leases contain different termination and escalation clauses. The respondent in a legal dispute (Aengus Lifestyle Properties (Pty) Ltd) became involved in the management of Lowliebenhof in 2007 through an associated company.⁴⁷ Claiming that it is in line with the “city’s initiative at refurbishing and upgrading the Johannesburg inner city” the respondent took transfer of the entire block in 2009, improved the building and wanted to increase the rent. The respondent attempted to achieve this increase by cancelling the existing rental contracts and offering new contracts on increased rental terms. The case was concerned with the question whether the landlord was allowed to cancel these leases and evict the tenants should they refuse to accept the revised contracts. The revised rates were based on market related rentals and resulted in a 100% increase in some of the cases and a 150% increase in others. The litigation history of the applicants living in the block started in September 2008 when the previous landlord issued written notices to vacate, upon which the tenants brought a complaint to the Gauteng Rental Housing Tribunal. The ruling of the Constitutional Court in March 2012 sent them back to the Tribunal.

Senator Park is seven storey block of flats in Keerom Street in the centre of Cape Town. On the one side of Keerom street stands the Western Cape High Court, and on the

⁴⁷ In the Supreme Court of Appeal judgment Brand JA explains: “The respondent purchased the property in 2007, but only became the owner in May 2009...It was not a party to the leases... However, by operation of the common law principle of *huur gaat voor koop*, the respondent became the successor to all rights and obligations deriving from these lease agreements, when it became owner of the building.” *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* [2011] 3 All SA 535 (SCA) at para 4.

other stands this block of flats that has acquired many (telling) names: “notorious”, “Ponte of Cape Town”, “problem building” and a “negative space”.⁴⁸ In April 2011 the body corporate of the block obtained a court order allowing it to implement a scheme for the renovation of the building. Tenants had to vacate their flats and only owner-occupiers were allowed to stay on in a part of the building that would not be affected by the renovations. In July 2011 there were still occupants in three of the flats and the body corporate launched an application in the High Court for their eviction. Member of the body corporate, Melanie Hofmeyer, in her affidavit in support of this application, explained that Senator Park had become “a byword for urban decay, criminality and overcrowding”. The building is now being renovated and flats sold to investors.⁴⁹ Following this precedent many other “problem buildings” in the city are being targeted to be “cleaned up” with the help of the Problem Buildings Bylaw. Ironically it appears that the inhabitants of these buildings merely move to other buildings. In order to prevent this movement, body corporates all over the city are instituting stricter vetting requirements. This has a very real effect on the cost of renting a flat in the City Bowl area and on the poor to access accommodation in town.

Schubart Park tells a similar story of a neglected and potentially hazardous block of flats from which residents were evacuated. The block of flats consists of three high rise occupiers were “evacuated” after a localised fire broke out in one of the buildings. Once it became clear to the occupiers that the City had no plans to reinstate their occupation of the properties, they launched an urgent application in the North Gauteng High Court, seeking an order directing the City to restore their occupation of the properties. The City relied on acts and bye-laws to obtain the evacuation order and give legitimacy to their application. The Disaster Management Act 57 of 2002, the City's Fire By-Laws and the National Building Regulations and Building Standards Act 103 of 1977 served to exercise bio-power over the residents of the blocks in claiming that their lives were in danger. Prinsloo J declined granting an order allowing the occupiers to go back to the properties. The residents applied for leave to appeal to the Constitutional Court. In October 2012 the Constitutional Court ruled that the City should allow residents to move back into Schubart Park.⁵⁰

The events above in respect of the three blocks of flats capture two of the main grounds on which evictions are based: either to get rid of illegal occupants, in the sense that they occupy the property illegally or are involved in illegal activities on the property, or, on the other hand, for the sake of development, or improvement, to protect the occupants from purported hazardous situations. Based on these grounds, evictions

⁴⁸ What the three blocks discussed in this section also have in common is their proximity to the High Court that granted the initial eviction and evacuation orders against the residents. All three blocks are within a 2km radius from these courts. For a discussion on how courts create a particular landscape of exclusion (also for their surroundings) see Pavlich G “Accusation: Landscapes of exclusion” in Taylor W (ed) *The geography of law: landscape, identity and regulation* (2006) 85.

⁴⁹ Nick van Huyssteen, a ReMax Living estate agent, described the building as prime property and said that after renovations, many people would want to live there. Available at http://www.iolproperty.co.za/roller/news/entry/investors_line_up_to_buy (accessed 22 July 2012).

⁵⁰ *Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Another* Case CCT 23/12 [2012] ZACC at para 26.

are in most cases legitimised, but they are still unjust since they deprive poor people of their homes. In the *Maphango* judgment the Lowliebenhof building is described as: “The flats are their homes and they live there.”⁵¹ There is significance in the Court’s choice of words: “live” as opposed to “reside” or “stay”. These words intertwine the fact of their living with their home and with these flats. It is important at least in the sense that they are not business entities operating there, but rather individuals who are being alive within the building. A dialectical approach to poverty, which acknowledges that poverty is rooted in the way in which capital, in the hands of a minority, rules over the labour of masses can assist in appreciating this notion of home outside accepted notions of ownership. Andre van der Walt argues for a move away from what he describes as “the logic of centrality”.⁵² He explains that even though poverty and other marginal social positions are not regarded with the same contempt as that of the 1800s, these conditions “still carry some stigma of physical, mental or moral weakness or shortcomings”. Linked to this is the association of property with “personal, social and moral worth or superiority”.⁵³ Taking a critical stance towards the centrality of property and advocating a property of the margins exposes and emphasises the political and ideological dimensions of poverty.

The evictions and evacuations are justified by means of the respective cities’ rejuvenation policies. The City of Johannesburg has an extensive fifty-five page Inner City Regeneration Charter of July 2007. Apart from a broader, more extensive Integrated Development Plan, the City of Cape Town in partnership with the Central City Central District Cape Town Partnership also created the Central City Development Strategy in August 2007, and the Tshwane Inner City Development and Regeneration strategy is a 2005 document governing Pretoria.

As illustrated by the court cases, there is a tension between the rejuvenation of the city and the poor. The Johannesburg policy manages to capture this tension in stating that “[o]ur Inner City will not be a dormitory for the poor, nor an exclusive enclave of loft apartments, galleries and coffee shops”.⁵⁴ Furthermore, the Johannesburg policy is more aware of the potential violence of city rejuvenation projects:

In the face of these challenges, City efforts have sometimes been seen as localised, fragmented and episodic and have been critiqued as not always sensitive enough to the circumstances of poorer residents and informal businesses.⁵⁵

⁵¹ *Maphango v Aengus Lifestyle Properties (Pty) Ltd (Inner City Resources Centre as Amicus Curiae)* 2012 (3) SA 531 (CC) at para 2.

⁵² Van der Walt AJ *Property in the margins* (2009) at 231

⁵³ Van der Walt (2009) at 231. He argues that centrality remains a powerful force in legal thinking through the rhetoric and logic of the rights paradigm. “Even when the status of not having property and requiring state or social support is regarded sympathetically as the unavoidable and personally unblameworthy outcome of some natural disaster or irresistible social, economic or political force, its description in terms of emergency, dire straits or desperate circumstances tends to confirm the normality of having property and the abnormality of need, poverty and marginality.”

⁵⁴ City of Johannesburg Inner City Regeneration Charter (July 2007) at 5. Available at http://www.joburg-archive.co.za/2007/pdfs/inner_city_regeneration_charter.pdf (accessed 12 December 2012).

⁵⁵ City of Johannesburg Inner City Regeneration Charter (July 2007) at 4.

Cape Town's City Development Strategy resonates with Aengus Lifestyle Properties' "ultimate living space":

Specific goals of the programme include transforming the Central City into a premier business location; a high quality sustainable urban environment; a popular destination for Capetonians and visitors; a leading centre for knowledge, innovation, creativity and culture in Africa and the South; and a place that embodies the heart and soul of Cape Town.⁵⁶

Pretoria's broader policy aims capture something of the global project of city rejuvenation: The City of Tshwane is committed to the revitalisation of the Inner City, in line with the trend in other major cities in the country and around the world. The purpose of the Tshwane Inner City Development and Regeneration Strategy is to form the foundation for the regeneration of this area through the introduction of certain key interventions. In the 39 pages of this document, the poor get a single mention as one of the strategic focus areas: "To ensure the community's well-being by addressing poverty and making essential services and facilities available and affordable."⁵⁷

Bas De Gaay Fortman points out that the failure to implement the rights of the poor can notably be discerned from language used with regard to poverty policies. He argues that if these rights were to be taken seriously, it would seem to imply just one type of terminology: that of poverty eradication.⁵⁸ Instead, he says, phrases, such as, "poverty alleviation", "poverty reduction" and "pro-poor growth", reflect an inability to bring about justice for the poor. The Tshwane Inner City Development and Regeneration Strategy aims to "address" poverty. The choice of words bears an uncomfortable resemblance to addressing a problem, treating a disease or disciplining a trouble maker.⁵⁹

Pretoria's rejuvenation project is couched in the language of development theory, rather than liberation theory. In volume 2 of *The Practice of Everyday Life*, De Certeau discusses the effects of renovations and the process of rejuvenation and compares them to therapeutic institutions.⁶⁰ He explains:

[R]enovation participates in the medicalization of power, [i]t takes responsibility for the health of the social body and thus for its mental, biological, or urban illnesses. It treats organs and circulatory systems by not taking people into account. A broken-down block is simply substituted for an ailing liver.⁶¹

⁵⁶ Cape Town Central City Development Strategy (August 2007) at 1. Available at <http://www.capetownpartnership.co.za/programmes/strategy/> (accessed 12 December 2012).

⁵⁷ The City of Tshwane, together with faith-based organisation Tshwane Leadership Foundation and various other stakeholders, are in the process of drafting a policy on homelessness. The policy is based on findings published in 2005 by Du Toit and Erasmus in a HSRC report that was prepared for the City of Tshwane Metropolitan Council entitled *Developing a policy on street homelessness for the City of Tshwane*. A copy of this report is available at http://www.hsrc.ac.za/Research_Publication-19277.phtml.

⁵⁸ De Gaay Fortman B "Poverty as failure of entitlement: Do rights-based approaches make sense?" in Williams L (ed) *International poverty law* (2006) at 34.

⁵⁹ For an insightful exposition of the linguistic gravity of the term "address" see Derrida J "Force of Law: The mystical foundation of authority" (1989-1990) *Cardoza Law Review* 921 - 1045. He invokes the idiom of addressing oneself to someone or something on pages 920 - 923, 935, 945, 947, 949, 959, 969 and 1037.

⁶⁰ De Certeau M *The practice of everyday life, Vol 2: Living and cooking* (1998).

⁶¹ De Certeau (1998) at 139.

De Certeau lists a variety of everyday city practices (including a passerby who “marks with graffiti his or her way of reading a poster”) and argues that the practices of “making do” is a program for a renovation policy. The renovation policy too often “takes the life away from concerned blocks that it then transforms into ‘tombs’ for well-off families”.⁶²

3.3 Examples from recent judicial decisions

One context within which the relationship between law and poverty has been explicitly engaged with over the last decade and a half is in the decisions of the Constitutional Court around constitutional socio-economic rights – that is, rights to things, such as, food, water, housing, health care, education and social assistance. In these decisions the relationship plays out first in the obvious way that government’s performance in alleviating and dealing with poverty is evaluated against legal standards. But the relationship is evident in this context also because the decisions of the Court display how the parties in the cases (usually a government agency and a group of impoverished people, the latter represented by some institution of civil society) and the Court think about poverty and the relationship between law and poverty. This is important because the courtroom, for better or for worse, is one of the so-called “official publics”⁶³ within which the terms of the debate about poverty are determined. We will use two relatively recent decisions of the Court to illustrate this, the cases of *Joseph v The City of Johannesburg* (*Joseph case*)⁶⁴ and *City of Johannesburg v Mazibuko* (*Mazibuko case*)⁶⁵.

The *Joseph* case dealt with the termination of the electricity supply to a block of flats in central Johannesburg, Ennerdale Mansions, occupied by a group of impoverished people. In a train of events depressingly familiar to the inner city poor, the residents of the building had paid their monthly electricity rates to their landlord. The landlord, who had a so-called block supply arrangement with City Power, the agency of the Johannesburg Metropolitan Council responsible for electricity provision, was supposed to pay over these collected rates to City Power, but kept the money for himself over a period of four years, so that a very substantial amount of arrears was built up. City Power then, after giving notice of its intention to do so to the landlord, but not the residents of the building, terminated the electricity supply to the building for non-payment. The residents then approached the courts to have the electricity supply reconnected, arguing that the termination was unlawful, as City Power was under a duty to notify them and not only the landlord of its intention to terminate the supply before

⁶² De Certeau (1998) at 142.

⁶³ N Fraser “Talking about needs: Interpretive contests as political conflicts in welfare-state societies” (1989) *Ethics* 297.

⁶⁴ *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

⁶⁵ *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC). For discussions of this case see Liebenberg S *Socio-economic rights adjudication under a transformative constitution* (2010) at 480; Bond P “Fighting for the right to the city: Discursive and political lessons from the right to water” paper presented to the Right to Water Conference 2010, Syracuse University, New York, 29 March 2010, available at

<http://www.ukzn.ac.za/ccs/files/bond%20syracuse%20Fighting%20for%20the%20Right%20to%20the%20City.pdf> (accessed 14 December 2012).

doing so and to provide them with the opportunity to come to an arrangement with respect to the arrears, so as to forestall termination. City Power responded that it had no legal relationship with the residents, and only a contractual one with the landlord, so that it was under no legal obligation to notify the residents or give them the opportunity to resolve the problem before acting. In the High Court this argument of City Power held up, so that the application of the residents was rejected. But in the Constitutional Court Justice Skweyiya held the termination of the electricity supply to be unlawful on the basis that City Power, although in no contractual relationship with the residents, had a constitutional duty to provide basic services, including, electricity to them in a fair and equitable manner, which translated into a right of the residents to receive those services in such a manner. The decision to terminate the electricity supply affected that “right to service delivery” adversely, so the Court continued, which meant that City Power was indeed under a duty to act fairly to the residents before disconnecting. The Court specifically held that the City should have given the residents 14 days notice of its intention to terminate and, although it was not duty bound to provide an opportunity to the residents to make representations, it had to remain open to approaches from the residents to make arrangements for resolving the problem before termination.

The *Mazibuko* case, in turn, dealt with two aspects of the City of Johannesburg’s policy with respect to the provision of water. The complaint in the case, brought on behalf of a number of impoverished people living in Phiri township in Soweto, was that the City’s policy to provide only 25 litres of water per person per day for free, coupled with the policy of introducing in Phiri township so called pre-payment meters for water – that is, a metering system in terms of which “credits” for water had to be bought in advance and that terminated water supply to individual households without warning as soon as these credits ran out – violated their constitutional right to sufficient water, in essence because it meant that at some point during the course of any given month their water supply was terminated. Justice Kate O’Regan in the Constitutional Court dismissed their complaint, holding broadly that the Constitutional Court was not equipped to decide whether or not the amount of 25 litres per person per day was an adequate basic water supply, and that the pre-payment metering system fell within the range of credit control mechanisms allowed the City in terms of the National Water Act and was introduced in Phiri township in a fair manner.

To us the judgments in both these cases illustrate in a variety of ways the extent to which a disconnection has developed in talk about poverty in South Africa between poverty and justice and indeed between the law relating to poverty and justice.

This is first so in the extent to which both cases illustrate how, in the context of poverty, justice has been reduced to a question of fairness and indeed an anaemic procedural fairness, reminding of Bergowitz’s concern with justice “fle[eing] the world” and being replaced with or reduced to fairness, efficiency and legitimacy, and the preoccupation with efficiency exhibited by the functionalist understanding of poverty which negates substantive questions of justice, which we relate above.⁶⁶

⁶⁶ Bergowitz (2005) at ix.

In both cases the basic predicament of the complainants presents a substantive question of justice – let us call it (re)distributive justice. This question in the *Joseph* case was in the first place quite simply whether it was right that a group of impoverished people, some of them elderly and infirm, should lose access to what in the modern urban world is a basic resource for survival with dignity – household electricity – because of no fault of their own, but the dishonesty of their landlord (perpetrated without their knowledge). Underlying this question was an even more basic one: whether it is ever right, even where impoverished people are “at fault” because they did not pay for electricity, for that basic resource to be denied them. Similarly, in the *Mazibuko* case the question was whether it was “right” that impoverished people should lose access to that most basic resource for survival with dignity – water – when their (manifestly inadequate) basic free allocation for a month has run out and they are unable to pay for more water. Both cases, in other words, were about what impoverished people were entitled to receive as a matter of right.

Yet in both cases this substantive “justice” question is subsumed in a question of fairness, efficiency and legitimacy (lawfulness). In both cases the issue engaged and eventually decided by the Court is only under what circumstances and in which ways access to electricity and water can be taken away from impoverished people, that is, how to act fairly in terminating access to these resources.⁶⁷

In the *Mazibuko* case Justice O’Regan first refuses to consider at all the question whether the amount of 25 litres of free water per person per day is adequate to meet the basic needs of the claimants in that case, citing the Court’s lack of technical expertise with respect to water needs, use and reticulation in justification.⁶⁸ Instead, she simply asks whether the decision to adopt the 25 litre amount was legitimate – whether it was lawful, that is within the power of the City in terms of the National Water Act to make – and whether the decision was taken in a fair manner (according to a process that complies with basic structural standards of good governance, such as, transparency, consultation and periodic review).⁶⁹ Similarly, she never considers the question whether it was right that the pre-payment metering system meant that impoverished people in Phiri township and elsewhere regularly faced having to go for days or weeks without water simply because they cannot pay for it. Again, she simply holds that the adoption of the policy to introduce the pre-payment meters fell within the Council’s power (was legitimate in that narrow sense) and happened in a nominally fair manner.⁷⁰

In the *Joseph* case the issue is from the start argued and decided as simply a question of the fairness of the termination of a “service”, rather than as a question of substantive entitlement or constitutional right (ideal) to electricity and so adequate housing. The only context within which the question whether perhaps the residents of

⁶⁷ For a similar argument with respect to a broader range of decisions, articulated in terms of ‘basic needs’, see Wilson S & Dugard J “Taking poverty seriously: The South African Constitutional Court and socio-economic rights” (2011) 22 *Stellenbosch Law Review* 664.

⁶⁸ *Mazibuko* case at para 61.

⁶⁹ *Mazibuko* case at paras 69-74.

⁷⁰ *Mazibuko* case at paras 78-158.

the building have a substantive right to electricity comes into play is in the determination of whether a duty to act fairly in taking away electricity is triggered. The question whether it is substantively right at all to deprive the residents of electricity, even though they had been paying for it all along – in essence to let them bear the burden, be punished for their landlord’s dishonesty – is mentioned not once, indeed it is assumed to be so. All that is considered is whether the manner in which that burden or punishment is imposed on them is procedurally fair.

The two cases also illustrate Constable’s “social scientification of law” related above – the problem she identifies also in law of the replacement of ideals with the phenomenal/material world and the reduction of questions of justice to counting and the practically possible. In both cases the constitutional ideal – the substantive right to adequate housing including household electricity; the substantive right to water – is sacrificed for that which is practically possible or, the more oft used term “deliverable”.⁷¹ As such the two cases also reflect the focus on efficiency so central to the functionalist view of poverty related above and the view of economic ordering underlying that approach.⁷²

This is most graphically illustrated in the *Mazibuko* case. Justice O’Regan starts her judgment in that case with a paragraph eloquently describing the importance of water for human beings and explicitly proclaiming the ideal, the right to water:⁷³ “Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water.” But just one paragraph later this right and the constitutional ideal are dragged back into the realm of the possible and deliverable in no uncertain terms:⁷⁴

At the same time, ours is a largely arid country, often assailed by drought. Redeeming the constitutional promise of access to sufficient water for all will require careful management of a scarce resource. The need to preserve water is a responsibility that affects all spheres of government. A major piece of legislation adopted only three years after democracy was achieved in 1994, the Water Services Act ... highlights the connection between the rights of people to have access to a basic water supply and government’s duty to manage water services sustainably.

As becomes clear in the rest of her judgment, what O’Regan J means with the “management of a scarce resource” relates both to water reticulation - the systems for delivery of water and a need to prevent and reduce wastage - and the need to ensure financial sustainability of the provision of water through the recouping of costs from “consumers” – that is, credit control systems.

These two requirements pervade the rest of her judgment, so that Justice O’Regan describes the right to water not as an ideal (and as such perhaps never truly attainable), but as a matter of what is achievable given the practical and financial constraints facing the Metro in its realisation. The right is from the outset fused with

⁷¹ See *Joseph* case at paras 34 and 47 for references to a right to “delivery” of services.

⁷² See text accompanying notes 5 and 6 above.

⁷³ *Mazibuko* case at para 1-2.

⁷⁴ At para 3.

practical considerations related to its implementation – the ideal is reduced to what is deliverable.

This is perhaps most evident in Justice O'Regan's treatment of the question whether the introduction of pre-payment meters was in accord with the constitutional right to water. Justice O'Regan simply does not consider the fact that the pre-payment meter causes the regular complete discontinuation of water supply for impoverished people without any alternative supply until they buy more water. Instead, having held that the meters were both within the Metro's power to introduce (legitimate) and were introduced in a fair fashion, she substantively justifies its imposition only with reference to their efficiency as mechanisms to enforce payment (and so contribute to the sustainability of water provision) and the fact that they were part of a broader effort to upgrade water reticulation in Soweto to prevent water loss.⁷⁵

The same can be said of the *Joseph* case. One example will suffice. Justice Skweyiya's judgment is suffused with a concern for effective cost recovery for electricity provision to ensure the sustainability of the provision of the service in general terms.⁷⁶ But it is in the description of the content of the fairness rights that the Court holds the residents are entitled to that this issue is most clearly at play. As explained above, the Court in the *Joseph* case did not engage with the substantive question of whether the applicants had a right to household electricity but instead dealt only with the manner in which their existing access to electricity could be fairly terminated. Therefore, to the extent that rights were directly relied upon to decide the case, it was only the residents' administrative law procedural fairness rights that were in issue. Having held that the residents were entitled to procedural fairness before termination of their electricity supply, the Court next had to determine what duties those rights imposed in practical terms on City Power. On face of it the applicable legislation – the Promotion of Administrative Justice Act⁷⁷ ("the PAJA") – in its section 3(2)(b) mandated that for any decision to which the PAJA's procedural fairness applied, among other things, at least reasonable notification of the pending decision and a reasonable opportunity to make representations must be provided to those who stand to be affected adversely by the decision.⁷⁸ The question that Justice Skweyiya had to decide in the case was whether the municipality both had to notify the residents in advance of the decision to terminate and had to provide them with a reasonable opportunity to make representations. Contrary to long standing precedent on this point and contrary to what section 3 of the PAJA clearly seems to mandate, Justice Skweyiya holds that City Power was only subject to a duty of 14 days advance notification, but was not required to provide the residents with an opportunity to make representations prior to termination.⁷⁹ The Court explicitly held that "it would impose an undue burden on [City Power's] human resources and

⁷⁵ See eg paras 166-167.

⁷⁶ See eg paras 29 and 51-52.

⁷⁷ Act 3 of 2000.

⁷⁸ S 3(2)(b) provides that an administrator taking a decision affecting the rights or legitimate expectations of any person "materially and adversely" "must" provide to such person notice of the impending decision and a reasonable opportunity to make representations, in addition to a number of other things.

⁷⁹ *Joseph* case at paras 56-65.

administrative capacity” to require provision of an opportunity to make representations and that “[e]fficiency and capacity considerations” mandate that City Power be excused from this duty.⁸⁰ Clearly here even the fairness rights in issue – already a pale shadow of the substantive right to housing and to household electricity that was really in play – are subjected for their definition to the realms of practical possibility, to what is “deliverable”.

The *Joseph* and *Mazibuko* cases finally also illustrate for us the “juridical regression” lamented by Foucault that we relate above – the problem that the traditional understanding of law and power has in modern times been replaced by normalising power. The two cases in particular provide good examples of normalising power in the form of discipline at work.

To our minds, this is true in a number of ways. First, as already related earlier, both cases are centrally about payment for services, water in the one instance and household electricity in the other, and the capacity of local government institutions to recoup costs of service provision through enforcing payment for services. On reading both judgments, however, it becomes clear that this is not only a practical concern at play – there is a distinct disciplinary dimension to it also. In short, just as the two cases are in part about good government and how local government institutions must act to be “good”, they are also about good citizenship and how impoverished people must act to be regarded as “good”.⁸¹ Examples of this abound, but for now we refer to only one of those. In reaction to an argument of City Power that it should not be subjected to procedural fairness guarantees with respect to the decision to terminate the residents’ electricity supply because to impose these requirements on it would unduly hamper its effective delivery of service and in particular its ability to enforce payment to ensure sustainability, Justice Skweyiya has the following to say:⁸²

[R]ights entail responsibilities. Citizens who can, must take responsibility for paying for services provided to them in fulfilment of government’s statutory and constitutional obligations. Government is entitled to require this of citizens. Moreover, government regulation is implicit in the notion of providing electricity.

Note that absent from this statement is any recognition that the “citizens” involved in the case (the residents) had in fact paid and that the Court’s eventual decision in the case is not, that because they had paid their electricity supply cannot be terminated, but that it may still be terminated, as long as they are notified of the intention to do so in advance. Absent in other words is any notion of rights that these “citizens” are entitled to simply because they need them, not because they deserve them for having acted in some required manner. Rights instead seem to be regarded as things that you are entitled to only if you act as a “good citizen” should.

⁸⁰ *Joseph* case at para 62.

⁸¹ See Madlingozi T “Good victim, bad victim: Apartheid’s beneficiaries, victims and the struggle for social justice” in Le Roux W & Van Marle K *Law, memory and the legacy of Apartheid: Ten years after AZAPO v President of South Africa* (2007). See also Mamdani M *Good Muslim, bad Muslim: America, cold war, and the roots of terror* (2005).

⁸² At para 52.

The second manner in which discipline is at work is slightly more indirect, but emanates most clearly from the *Mazibuko* case although similar concerns also operate in the *Joseph* case. The *Mazibuko* case can in general be described as a study of the manner in which an Anglo-American model court, such as, our Constitutional Court, deals with concerns about the institutional capacity and legitimacy of courts generally in the exercise of their review powers. Justice O'Regan is centrally concerned in shaping her judgment with the extent to which she and the Court generally are unable sensibly to engage with the issue because of their lack of technical expertise with respect to the subject matter, and their lack of democratic legitimacy, not being accountable to the electorate as are the legislature (directly) and executive (indirectly).⁸³ It is these concerns that lead her not to engage at all with a range of substantive issues raised in the case, most notably the question whether 25 litres of free water per person per day is enough to meet basic needs. Justice O'Regan concerns about capacity and legitimacy are of course real and it is certainly so that the Court on its own is both unable and a democratically illegitimate forum to decide the eminently political questions of justice that arise in the case. But the problem is that Justice O'Regan's reaction is not simply to leave these issues alone – she explicitly leaves them to the City of Johannesburg's executive branch to decide. That is, she *defers* decision of these issues to the Metropolitan Council.⁸⁴ The rhetorical "side-effect" of this move is powerful. The residents of Phiri Township – the "consumers" of "water services" as they are styled – are cast into the role of passive recipients of services, the manner in and the conditions under which these are to be provided to them and the manner in and conditions under which these could be denied them, are to be determined unilaterally by the Council. In short, following Boff and Boff, they are regarded as subjects without any agency of their own,⁸⁵ rendered "administrable subjects", open to the exercise of disciplining power.⁸⁶

4 CONCLUDING REFLECTIONS

For as long as the majority of South Africans are trapped in the injustice and evil of poverty, without an experience of economic liberation, there is a need for poor and others alike, in collaboration, to choose a praxis of liberation very consciously and very intentionally. What could this mean in practical terms?

Gutierrez maintained that what was important for the poor was not only orthodoxy but orthopraxy⁸⁷ – good news for the poor would not so much be expressed through the right doctrines but through the right actions, namely,

- moral and political conversion to the struggles of the poor;
- solidarity with and participation in grassroots communities and movements (led by the poor);

⁸³ At paras 61-66.

⁸⁴ For a more substantive engagement with this point see Brand D "Judicial deference and democracy in socio-economic rights cases in South Africa" (2011) 22 *Stellenbosch Law Review* 614.

⁸⁵ Boff & Boff (1986) at 34-35

⁸⁶ Habermas (1986) at 210.

⁸⁷ (1988) at xxxiv.

- intellectual debate about poverty as a political problem with concrete proposals for alternatives;
- developing and brokering access to infrastructure and sources of power;
- going beyond relief and development strategies to advocacy and policy-making that will change the playing fields and ensure liberation / transformation; and
- creating new tables, new ways of doing what we do – whether it is theology or law or social work, new ways of partnering with the poor as our teachers and interpreters, new policies and discourses, new ways of being human

A liberationist praxis will create spaces in which the poor will form alliances, create a new consciousness, analyse the causes of their poverty, articulate their own struggles and aspirations, and organise their own movements very strategically; and professionals and academics, activists and community developers, will work with the poor to help facilitate and broker the radically new tables of inclusivity, optimum access, new ways of distributing resources, new ways of sharing power, new ways of owning production or land.

Where in our own country and cities are the voices of the poor articulating their own aspirations and visions, informing the priorities of government agendas and budgets? How are churches, lawyers, civil society, academia and policymakers listening to these voices that are often silent or silenced? How willing are we to be disturbed by the disarming honesty and call for conversion present in these voices?

To liberate = to give access = to give life

Creating access should not be seen as another form of handout creating new dependencies, but as that which strengthens local agency and capacity – the what, how, when, where and why of access should be co-determined and co-owned by the very people for whom access is brokered. Then it will indeed liberate in ways that will give life.

The aim of exposing how justice was reduced to meanings, such as, fairness, efficiency and legitimacy discussed earlier is to question an understanding of law and justice founded on a purely scientific world view devoid of any compassion. This does not entail a rejection of science or a return to a pre-scientific approach to law, but rather an urge for a critical re-thinking about the ideal of justice. Such an understanding of justice stands in the guise of what Bergowitz (following Derrida and Cornell) calls the “ethical activity of thinking” and a contemplation of justice that goes beyond contemporary sociological and positivist understandings of and approaches to law and politics.⁸⁸

De Certeau’s notion of the city walker who through the everyday practice of walking defies the grid-like structure of the city and the “geometrical and geographical space of visual, panoptic, or theoretical constructions” by making use of spaces that cannot be seen challenges the world and the gaze of the technocrat. The city walker

⁸⁸ Bergowitz (2005) at xiv- xvi.

through this elementary way of experiencing the city calls into being a “migrational, or metaphorical city.”⁸⁹

What is required in our response to poverty is *a new kind of compassion* – no longer a concept of bleeding heart evangelicals or human rights lawyers, or worst of all, neo-liberal technocrats, but a political concept in as far as it becomes what the word literally suggests – to suffer with, to be in close solidarity with those absent from the table, with their degradation and exploitation, with the harshness and hardness with which they have to contend. Compassion in this sense is the first step of a liberating praxis and of re-thinking the meaning of justice. Political and legal action on behalf of the poor without compassion, or suffering with, becomes an intellectual game of classroom activists who are far removed from the actual realities of those about whom they intellectualise.

Questioning whether a politics of compassion is naive within the global capitalist system could be indicative of our complete fatalism in the face of global capital, our inability to outwit exclusivist practices in order to create viable and radical alternatives, and our paralysis of language and praxis in the face of widening gaps. It could be a tactic of avoiding the actual embrace of exactly such a politics. Compassion in the sense used here is not a vague and empty notion but a radical act of solidarity accompanied by disentanglement from economic arrangements that exclude, and new commitments to radical forms of inclusion. Our project cuts across the disciplines of theology, philosophy and law in order to re-think the definitions of and the approaches to poverty – a rethinking that could result in alternative angles from which to respond to the poor in respectful and just ways.

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⁸⁹ De Certeau (1984) at 93. The image of “reading” the city space as a text can also be found in the Rodriguez song: “Gomorra is a nursery rhyme, You won't find in the book, It's written on your city's face, Just stop and take a look” Rodriguez “Gomorra” from the album *Cold Fact* (1970).

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