



***Reading transformative constitutionalism through a spatial lens: The value of legal geography for transformation***

By

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## Summary

As an attempt to contribute meaningfully to scholarly intervention within the post-apartheid South African jurisprudence, this dissertation joins the engagement with transformative constitutionalism, as formulated by Karl Klare. The main research problem for this project is to ask what role transformative constitutionalism plays in the realisation of socio-economic rights (if any). My main interest is to read transformative constitutionalism through a spatial lens and to investigate the connection between the continuance of apartheid spatial organisation and poverty. The overarching enquiry is based on the question: how could transformative constitutionalism combined with a concern with legal geography address poverty and specifically the implementation of socio-economic rights?

Transformative constitutionalism is a long-term project intended to bring about change through interpretation in the adjudicative process; it embodies a desire a changed legal culture in the constitutional dispensation. The concept of transformative constitutionalism has been described using the bridge metaphor enunciated by Mureinik which symbolises a transition from an authoritarian past, towards a culture of justification. The assumption has been that this is the kind of approach and change in legal culture that has informed post-apartheid jurisprudence and adjudication. The assumption made in this research is that transformative constitutionalism as an approach is an enabling tool because it embodies within its function, change and a transformed legal culture. However, I go further by focusing my discussion of transformative constitutionalism through a spatial lens to investigate how legal geography can address poverty and the implementation of socio-economic rights specifically. Legal geography is a stream of scholarship that considers the interconnectedness of law and spatiality. The focus on spatiality purports to discuss space as an 'ethical position' in as far as it calls for a radical thinking about justice, spatial justice. The discourse framework of transformative constitutionalism can be significantly advanced by adopting a critical spatial perspective. The overlap between space, knowledge and power can be both oppressive and enabling. Thinking spatially about justice can reveal new insights that challenge and expand our practical knowledge towards more meaningful actions to achieve greater justice and realise a legal culture concerned with capacitating the impoverished people.





## **Chapter 1: Introduction**

### **1.1 Research problem**

The main research problem for this project is to determine the role that transformative constitutionalism plays in the realisation of socio-economic rights. My main interest is to read transformative constitutionalism through a spatial lens and to investigate the connection between the continuance of apartheid spatial organisation and poverty. How could transformative constitutionalism combined with a concern with legal geography address poverty and specifically the implementation of socio-economic rights?

### **1.2 Motivation**

Since South Africa adopted the 1996 Constitution, the expected or promised transformative goals have not materialised in the manner in which most people, impoverished people in particular, had hoped. The dawn of the constitutional dispensation had promised to many who were previously marginalised that they will now flourish in a South African environment that not only brought with it new opportunities and possibilities; but one where the ideals of the Constitution guaranteed material rights, socio-economic rights. It is to be appreciated that these rights are distinguishable from the so-called first generation rights (civil and political rights) because by their nature, they impose a positive obligation on the state to realise them and their realisation is heavily resource-dependent. Resource constraints and budgetary limitations are often the main reasons raised for the lack of material realisation of socio-economic rights obligations. Valid as this reason may be, to an extent, it has over the years proven to be a diluted and an unacceptable reason in light of factors such as a lack of prioritisation of resources, mismanagement of funds and at times sheer political unwillingness to deal with the plight of the impoverished.

Here I use the word 'impoverished' deliberately because it connotes a position which is a product of past injustices; a system which intended to politically and socially incapacitate a group of people whom are now considered 'poor'. This research however, proposes a different way of thinking, away from a formalist method of legal analysis which had for many years informed our legal culture. It seeks to highlight the importance of reading



transformative constitutionalism through a spatial lens because the transformative project necessitates different intellectual tools and calls for re-conception of approaches to legal argumentation. The spatial turn in law and the spatiality framework, offers and opens up possibilities for new ways of thinking through cognitive mapping. It should be acknowledged that the prevailing legal culture has played an important role in the manner in which spaces are constituted, regulated and occupied. A key aspect of the spatial turn is that space is socially produced, it does not determine social action but it provides a context for it.<sup>1</sup>

There has been much debate about the justiciability of socio economic rights because it raises questions of judicial overreach or the counter-majoritarian argument. The objection is usually that the enforcement of these rights is not suitable for judicial enforcement because of the doctrine of the separation of powers and the issue of polycentricity.<sup>2</sup> The most prominent objection in relation to the inclusion of socio-economic rights in the Bill of Rights is that these are rights that are not capable of being enforced by the courts and it would be inappropriate for courts to do so.<sup>3</sup> These perspectives on how the law should play a role in various spaces and in the material livelihood of people is but an example of the prevailing formalist legal culture and presents an idea and a particular way of thinking and approach of argumentation in law. However, the argument made in this research project is that transformative constitutionalism, combined with a concern with legal geography, has the potential to address poverty and specifically the implementation of socio-economic rights in a reimagined way because spatiality awakens the relationship between law and space and gives substantive and material meaning to abstract legal concepts which have thus far been the norm.

In this research, I propose to combine two theoretical perspectives to unpack the research problem. I consider transformative constitutionalism as an important discourse framework for conceptualising the possible impact that the Constitution can have on various areas of law. I am also interested in reading transformative constitutionalism through a spatial lens by

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<sup>1</sup> Soja EW 'The city and spatial justice' (2009) Paper prepared for presentation at the conference *Spatial Justice*, Nanterre, Paris, March 12- 14, 2008 available at <https://www.jssj.org/wp-content/uploads/2012/12/JSSJ1-1en4.pdf> [accessed on 18 November 2018].

<sup>2</sup> Currie I & De Waal J *The Bill of Rights Handbook* (5ed) (2005) 569.

<sup>3</sup> Henderson 'A process perspective on judicial review: the rights of party-litigants to meaning participation' (2014) *Michigan State Law Review* 1031 – 1032.



using the central tenets of this framework, as practical tools for applying a critical legal approach to transformative constitutionalism.

Leibniz argues that space does not exist independently but it must be understood as a relationship between bodies, in other words, that space is relational.<sup>4</sup> According to this argument space cannot be viewed separately from those who occupy it and thus offers a useful tool as a material response to abstract debates about social justice and poverty. An important feature of the trajectory of legal geography and legal scholars who are critical-legal-studies oriented in their work is that legal geography has always been explicitly and normatively critical.<sup>5</sup>

For purposes of this study the notion of transformative constitutionalism, in as far as it necessitates a culture of justification<sup>5</sup>, is specifically important because it requires legal practitioners and the courts to justify and account why they choose to engage with the constitution and its purported goals in a particular manner. However, the focus on spatiality constitutes a material response to abstract concepts that the courts apply, such as 'reasonableness', in socio-economic discourse. In fact, any transformative project occurs and exists in a particular context and space and the application of the law and its ramifications have extension in space.<sup>6</sup> Thus spatiality will provide a grounding tool through which to read and conceptualise transformative constitutionalism. Klare describes the transformative constitutional project as 'a long-term project of constitutional enactment .... Committed to transforming a country's political and social institutions...'; this transformation cannot occur 'in isolation but in a historical context of conducive political developments.'<sup>7</sup> On the other hand, spatiality functions as a map which offers a fictional or figurative representation of the space within which we find ourselves.<sup>8</sup>

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<sup>4</sup> Tally R *Spatiality: The New Critical Idiom* (2013) 28.

<sup>5</sup> Braverman I, Blomely N, Delaney D & Kedar A 'The Expanding the Spaces of Law: A Timely Legal Geography' (2013) *Legal Studies Research Paper Series* 6.

<sup>6</sup> De Villiers I 'Leibniz, Lefebvre and the spatial turn in law' (2016) 72(1) *HTS Theological Studies* 1.

<sup>7</sup> Klare K 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 150. Also see Zitzke E 'A New Proposed Constitutional Methodology for Effecting Transformation in the South African Law of Delict' submitted in fulfilment of the requirements for the degree LLD in the Faculty of Law, University of Pretoria, August 2016.

<sup>8</sup> Tally (note 4 above) 2.



If law is understood as an expression of ideology and power, it is necessary to interrogate the role that the courts play in the adjudication of socio-economic rights and the effect thereof. The adjudication of socio-economic rights has remained a contested area of law as it has raised questions about how courts ought to enforce these rights for their effective realisation.<sup>9</sup> More so in the South African context, where the material realisation of these rights translates to more than material fulfilment but speak to a broader capacity to enable the impoverished to participate effectively in the political space as active members of society. It is with this view that a discussion on whether transformative constitutionalism as a framework can have a meaningful impact in the conceptualisation and enforcement of socio-economic rights is useful. Any engagement with the role of the law in the context of poverty and achieving social justice must effectively take into account the ways in which law creates and maintains poverty.<sup>9</sup> As such, transformative constitutionalism will be discussed to the extent that it speaks to the culture of justification in the exercise of power and is committed to the transformation of legal practices in legal interpretation; with a view to radically alter existing assumptions about law in the adjudication of socio-economic rights.

### **1.3 Research questions**

In unpacking the research problem, I firstly ask what impact spatiality and legal geography has in understanding material inequality and poverty. I answer this question by conducting a desktop analysis of the concept that is spatiality and by discussing the underlying tenets that characterise legal geography. This is followed by briefly mapping the various perspectives on what constitutes material inequality and poverty. Thereafter, possible connexions will be identified, as a response to the question. The first question forms the theoretical basis; in the second chapter I analyse the transformative constitutionalism approach and how it could be read through a spatial lens. I take on this task by arguing that the concept of transformative constitutionalism can be enhanced and could, through spatiality, present a possibility of a more meaningful transformative outcome which would have a more hopeful constitutional lustre in a way that effectively responds to the long-term project imagined in Klare's work.

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<sup>9</sup> Brand D, De Beer S, De Villiers I & Van Marle K 'Poverty as Injustice' (2013) 17 *Law, Democracy & Development* 273-297.



Ultimately, the last research question that will form part of the substantive part of this research project is to ask how transformative constitutionalism read through a spatial lens could be of benefit to socio-economic jurisprudence or a jurisprudence concerned with material transformation. In response to this question, I focus on a case analysis to illustrate that the reasoning of the court was restricted and impoverished because even from an arm-chair perspective, the court had room to delve substantively with matters that were within its judicial purview to decide on. A spatial lens in socio-economic rights should strengthen the constitutional mandate by inspiring tangible transformative outcomes through material equality. The adjudicative process must evolve and respond to the social needs and this cannot happen if we remain tethered to formalistic or deferent legal approaches.

#### **1.4 Theoretical approach**

The approach that will be applied in this research is the critical perspective, critical legal studies in particular with a slight influence from African jurisprudence. I employ a critical approach that seeks to consider socio-economic rights beyond the traditional rights-based approach that currently dominates the jurisprudence on socio-economic rights. This approach places an emphasis on deconstructing poverty and its relationship to transformation and purports to highlight the manner in which those who are impoverished are subjected to marginalisation within the schema of socio-economic rights.

#### **1.5 Chapter Overview**

This dissertation is broadly divided into five chapters. The first chapter is the introductory chapter which lays the basis for my argument and discusses the key concepts, transformative constitutionalism, spatiality and legal geography generally. The following three chapters constitute the substantive discussion that aim to deal with the overarching research question, namely the value of legal geography for transformation. Chapter two is an enquiry about the impact that spatiality and legal geography has in understanding material inequality and poverty. This will be followed by chapter three of the research which will be organised around discussing how transformative constitutionalism could be read through a spatial lens. The final and fourth substantive chapter which will be comprised of the discussion on how reading



transformative constitutionalism through a spatial lens could be of benefit to socio-economic jurisprudence or a jurisprudence concerned with material transformation. It is also in this final chapter where I conclude with a case analysis based on the *Mazibuko*<sup>10</sup> judgment which seeks to demonstrate the arguments formulated and concepts that will be dealt with in the following chapters. The research project will be concluded with closing remarks of the literature and the main arguments that have been advanced in the preceding chapters, in the fifth and final chapter. This will be the overarching structure of the research project.

In offering a response to the first research question, in chapter two, I consider the work by Hatcher<sup>11</sup> whose work is focused on understanding the relationship between law and the city through the interdisciplinary perspective of legal geography. Lefebvre's work is pertinent to research concerning legal geography and social theory in as far as it discusses the social space as a mode of production and alienation in the everyday lives of many.<sup>12</sup> Isolde de Villiers in an article titled *Tshwane 2055* has a considered discussion on spatial justice and she unpacks this discussion by discussing theorists in the field, such as Doreen Massey<sup>13</sup>, whose work is also relied on.

Chapter two begins with an explanation and exploration of the 'spatial turn' in law. Spatiality and legal geography can be considered as interdisciplinary intellectual projects, in line with the general jurisprudence perspective as enunciated by Douzinas and Geary. A general jurisprudence embodies a wider concern of legality and it considers a variety of aspects that are not only limited to law.<sup>14</sup> I assume that spatiality has an impact on the understanding of the transformative capability of socio-economic rights in South Africa and the argument that unfolds thereafter is to propose what I imagine and understand this impact could be, based on an assessment of literature. Essentially the 'spatial turn' in law is a 'new' approach to the traditional literary analysis of time and history. This engagement then leads me to a consideration material inequality and poverty because the research question is to ascertain the impact of spatiality and legal geography in understanding material inequality and poverty.

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<sup>10</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC).

<sup>11</sup> Hatcher C 'Law, space and the city: a legal geography of urban change in post-socialist Bishkek, Kyrgyzstan' (2015) 7(1) *International Journal of Law in the Built Environment* 39.

<sup>12</sup> Lefebvre H *The Production of Space* (1991).

<sup>13</sup> Massey D *For Space* (2005); Massey D *Space, Place and Gender* (1994).

<sup>14</sup> Douzinas C & Geary A 'From Restricted to General Jurisprudence' in C Douzinas & A Geary *Critical Jurisprudence* (2005) 10.



The argument proposed here is that the impact of spatiality and legal geography could, in its conceptual understanding de-mystify narratives about the nature of poverty while directing the attention of the transformation project towards underlying structural aspects of persistent poverty. Hereafter, I consider spatial justice and I look to the work of Soja, Philippopoulos-Mihalopoulos and Lefebvre. I map the specific qualities of spatial justice because an explicitly spatialized concept of justice presents new opportunities for both building theory and more importantly for this research, for a spatially informed social and political action.<sup>15</sup>

Chapter three begins by defining transformative constitutionalism as a long term project, a discourse framework which advocates for a change of legal culture from an authoritarian approach to a culture of justification with a vision to create a transformed legal order. This chapter lays out thoroughly what the term means according to Klare and the interpretation of various other authors who have engaged with the concept. I also draw on the extra-constitutional criticism of the concept by Madlingozi who is vehemently opposed to the idea of transformative constitutionalism because, from his perspective, it is a continuation of settler-created state form and thus not tasked with the decolonisation agenda.<sup>16</sup> From this perspective I briefly raise the concern that even within a post-apartheid era, we seem to be tethered by a formalistic legal culture. Thus there remains a need even now to continuously interrogate and reinforce this vision for a transformed legal culture. In amplifying the concept, I briefly consider the bridge metaphor and its significance in understanding transformative constitutionalism. Thereafter, I delve into a discussion on spatiality and legal geography. Legal geography is a stream of scholarship that considers the interconnectedness of law and spatiality. This is an important perspective because it embraces that nearly every aspect of law is either located, occurs in or it has a spatial frame of reference.

Chapter four is the last substantive chapter which explores the benefit of spatiality for socio-economic jurisprudence. It serves to illustrate the arguments that precede this chapter through a case analysis of the *Mazibuko* judgment which concerned adjudication of the

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<sup>15</sup> Soja (note 1 above) 1.

<sup>16</sup> Madlingozi, T 'On Settler Colonialism and Post-Conquest *Constitutionness*: The Decolonising Constitutional Vision of African Nationalists of Azania/South Africa ' draft forthcoming chapter in book edited by Boaventura de Sousa Santos.



section 27 right of access to water.

I begin with a synopsis of the facts of the case, map out the reasoning of the court and the approach of the court which I then problematize as being particularly procedural and critique the courts' lack of a concerted substantive engagement with the matters before it. By referring to literature and other discourses such as spatiality, legal geography and transformative constitutionalism are already ways of rediscovering effective ways to further the transformative project and discussed by Klare. Through this critique, I suggest that transformative is an ongoing engagement and also illustrates that the South African legal culture in the adjudicative process still tends to support formalism and positivism which stifles the transformative goals. This constitutional court judgement brings to the surface a serious call for consideration of law's spatiality. Spatial justice provides new opportunities for spatially informed social and political action. Thinking spatially about justice can be of such importance to us because it has the potential of revealing new insights that expand our practical knowledge into more meaningful and tangible ways to achieve greater justice.<sup>17</sup>

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<sup>17</sup> Soja (note 1 above) 1.



## **Chapter 2: The impact of spatiality and legal geography on understanding material inequality and poverty**

### **2.1 Introduction**

At the centre of this research project lies spatiality: reading transformative constitutionalism through a spatial lens and investigating the value of legal geography for transformation in the post-apartheid era. The research question that will order this chapter is to discuss what impact spatiality and legal geography has in understanding material inequality and poverty. Spatial concepts provide the possibility to facilitate an engagement with various social phenomena and inform debates about social justice, inequality and poverty amongst others. A focus on the socio-spatial in socio-economic research foregrounds material inequalities, differences and power relations that feed into policies and practices. This perspective then places a focus on spatial justice where inequalities based on location, mobility, and poverty are assessed by applying a spatial understanding of socio-economic characteristics.

The work of Douzinas and Geary will be considered to discuss the two prong meaning of jurisprudence namely, that it is the law's consciousness (the wisdom of law) and law's conscience (exploring law's justice). Interdisciplinary work is valuable for purpose of this project, to problematise the prevalence of poverty and the lack of realisation of socio-economic rights in South Africa. An interdisciplinary approach to the law can reveal the possibilities of the law to constitute a discourse of transformation for post-apartheid South Africa. It is one of the concerns of this project to propel an understanding of post-apartheid jurisprudence that is able to engage with notion of transformation by drawing from literature, narratives and perspectives beyond legal instruments.

Legal geography conjoins space and place in an impactful way around issues of justice, equity and critical thinking.<sup>18</sup> The reality in the South African context is that the spatial dimensions of law were orchestrated in a particular manner during the apartheid system and during a governance system preceding apartheid. This system of governance created a particular social formation and conditions which manifest themselves in various ways, one of which is material

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<sup>18</sup> Baroutsis, A, Comber, B & Woods, A 'Social Geography, Space, and Place in Education', available at <http://education.oxfordre.com/view/10.1093/acrefore/9780190264093.001.0001/acrefore-9780190264093-e-115?print=pdf> [accessed on 16 August 2018].



inequality and poverty. Legal geography frames the discussion on the relationship between law and space.<sup>19</sup> For Lefebvre, space is the reflection of social relationships but he notes that space also influences social relationships.<sup>20</sup> From this perspective, space mirrors and replicates justice and injustice. This research project aims to contribute to the engagement with transformative constitutionalism by expanding its conceptual understanding through viewing it from a spatiality and spatial justice perspective. In this chapter, I begin with an overview of the spatial turn in law and by mapping the conceptual basis that informs spatiality and legal geography. A discussion on the key tenets of spatiality and legal geography will lay the basis upon which the argument for this chapter will be developed.

Secondly, I focus on material inequality and poverty in a separate section with the purpose of highlighting that there is a relationship between law and space. This was most evident in the context of the apartheid era in that it was a system that regulated political, social and material space. This regulation has translated into a number of consequences in the 'aftermath'<sup>21</sup> namely material inequality and poverty that is located, occurs in and which has a particular spatial frame of reference.<sup>22</sup> Thirdly, spatial justice is discussed with a view to link the possible outcome of understanding transformative constitutionalism through a spatial lens.

## **2.2 The spatial turn in law: Spatiality and legal geography**

Legal geography is a stream of scholarship that considers the interconnectedness of law and spatiality; nearly every aspect of law is either located, occurs in or it has a spatial frame of reference.<sup>21</sup> The South African context is a befitting example for law's interconnectedness with space because the enforcement of the apartheid system manifested itself in a spatial manner. Spatiality and legal geography is an interdisciplinary intellectual project, in line with the general jurisprudence perspective discussed below.<sup>23</sup> Therefore, I assume that spatiality has an impact on the understanding of the transformative capability of socio-economic rights in South Africa. The discussion begins from the basis that those who are subjected to the most

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<sup>19</sup> Bennett L & Layard A 'Legal Geography: Becoming Spatial Detectives' (2015) 9(7) *Geography Compass* 406.

<sup>20</sup> Lefebvre (note 12 above) 106.

<sup>21</sup> Modiri J 'Towards a "(Post-) Apartheid" Critical Race Jurisprudence: "Divining our Racial Themes" (2012) 27 *SA Public Law* 232.

<sup>22</sup> Braverman et al (note 5 above) 2.

<sup>23</sup> Douzinas & Geary (note 14 above) 10. `



grievous kind of impoverishment and poverty are located within specific spaces; and those for whom socio-economic rights would help realise a kind of social justice are a product of spatial influences. In this sense, material inequality is in a very real sense experienced through space in the South African context. Consequently, I consider the extent to which a reading of transformative constitutionalism framework through a spatial lens could play a role in understanding these dynamics and move the transformation project forward. Legal geography explores how legal practice through its application of rule bound approach, co-produces places while at times dismissing, spatiality.<sup>24</sup>

The 'spatial turn' as discussed by Lefebvre is an acknowledgement of the impact that space has on people's lives; it highlights the inequalities that produce and that are produced by space. For instance, social geographers conceive of various spaces such as neighbourhoods, towns, suburbs and the like as dynamic entities that are continuously constructed and constituted. These spaces are important as consequences upon which social inequalities play out in people's daily lives.<sup>24</sup> The spatial perspective is useful because it reveals the variability of human identity; it situates, locates and positions individuals as subjects that use and occupy space.<sup>25</sup> Spatiality and legal geography are conceptually rich concepts which can reveal changing values in society.<sup>26</sup> The argument that spatiality and legal geography have an impact in understanding material inequality and poverty is based on the assumption that space and law convey moral worth and educe moral considerations to varying extents.<sup>27</sup>

Hatcher in his work examines law and the legal processes in Bishkek, the capital of Kyrgyzstan, with a view to expand the meaning 'law' beyond the prevalent Western formulations of law we have come to know by focusing on plurality and the overlap of multiple legal spaces. In addition, the author argues that legal geography over-emphasises space and pays less attention to time because appreciating time in legal geography responds to the processes and mobilities of law and space while disrupting fixed and static interpretations. The importance of time is its interconnectedness to space.<sup>28</sup> Enjoining the

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<sup>24</sup> Bennett & Layard (note 19 above) 406.

<sup>25</sup> Lawson HA 'Categories, boundaries, and bridges: The social geography of schooling and the need for new institutional designs' (2016) *Education Sciences* 6(32), 1–14.

<sup>26</sup> Taylor W *The Geography of Law* (2006) 3.

<sup>27</sup> Taylor (note 25 above) 5.

<sup>28</sup> Hatcher (note 11 above) 39.



aspect of time in studies related to law and space highlights the importance of ‘historical trajectories that produce mobile, overlapping and contradictory legal spaces.’<sup>29</sup>

Reading transformative constitutionalism through a spatial lens is broadly an engagement with the notion of a general rather than a restricted jurisprudence.<sup>30</sup> Douzinas and Geary describe jurisprudence as law’s consciousness which is the wisdom of the law and conscience which is the exploration of law’s ‘justice and of an ideal law or equity at the bar of which state law is always judged’<sup>31</sup>. The authors describe jurisprudence as the wisdom of the law; as being what is and what ought to be, the positive and the normative, law and justice.<sup>32</sup> This is a useful perspective for the purposes of this research project because it provides a meaningful contribution in the development of my main interest, to read transformative constitutionalism through a spatial lens.

Legal geography interrogates the intersectionality between law and the various spaces within which law occupies or influences. It is a discipline that concerns itself with how law defines space through understanding the impact that the law has on the everyday experiences in a particular place or geographical area. This is why legal geography is an important lens within which to understand material inequality; by understanding law not only as those sets of rules that regulates but by engaging in a deeper discourse about material inequality. In fact material inequality itself is experienced and most glaringly manifests itself in very specific geographical spaces.<sup>33</sup> Legal geographers argue that law should not be understood merely as a passive set of rules; rather, law operates to regulate space and it ‘is active in formulating the rules and processes by which society understands and navigates actual places.’<sup>34</sup> Understood this way, perhaps it is not far-fetched to make the observation that there is value in legal geography for transformation because legal geography recognises that law is not just a set of rules but it is an active influence in processes that society understands.

Law plays a role in the way that spaces are formed and transformed. To illustrate this view

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<sup>29</sup> Santos B *Toward a new legal common sense: law, globalization and emancipation* (2002).

<sup>30</sup> Douzinas & Geary (note 14 above) 10.

<sup>31</sup> Douzinas & Geary (note 14 above) 1.

<sup>32</sup> Douzinas & Geary (note 14 above) 35- 36.

<sup>33</sup> Brown TE ‘The Expanding Spaces of Law: A Timely Legal Geography’ (2016) 50(1) *Law & Society Review* 268.

<sup>34</sup> Brown (note 33 above) 268.



in the South African context- apartheid laws and policies, poverty and the demarcation of spaces resulted in material inequality which manifested itself in those spaces. Transformative constitutionalism is interwoven into space as a critique because it is an approach that is committed to transforming the political, social and socio-economic. Transformative constitutionalism embodies the preposition that a certain interpretive method is pertinent for the realisation of the full transformative potential of the constitution.<sup>35</sup> However, for the transformative project to be optimised there must be an acknowledgment that its potential will not only be realised through a selection of the 'most appropriate' interpretive method. There ought to be an appreciation that the law is already active in formulating the rules and processes that transformative constitutionalism assumes only become active through interpretation. This observation helps identify the limits that transformative constitutionalism may have as a framework. Spatial justice may be a useful concept in identifying and resisting the 'invisible hand of capitalism' and its role in maintaining poverty.

Realising the true potential of legal geography scholarship for transformative constitutionalism lies in understanding the direct engagement of law with space; not as separate disciplines but as perspectives that are in conversation with each other in order to foster and enable a substantive transformative project. Benson, who was commenting on the relationship between power and time, characterises judicial review as a paradox in that it is a creator of legal space and it can also be an inhibitor of access to it.<sup>36</sup> For legal geography, space is the organising concept and this is important when reading transformative constitutionalism through a spatial lens because through the culture of justification, legal practitioners are expected to justify why a particular way of interpretation or interpretive method is considered to be the appropriate method to engage with the legal question(s) and facts. This choice cannot be made merely by considering abstract legal concepts; spatiality and legal geography foregrounds this choice because law is not merely a set of rules but is active in the processes of society.<sup>37</sup> That the law is not merely a set of rules but is active in the processes of society will be mapped in the section which follows, which deals with material inequality and poverty. Hopefully this will foster an understanding about structural

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<sup>35</sup> Roux T 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference' (2009) *Stellenbosch Law Review* 258, 259.

<sup>36</sup> Braverman et al (note 5 above) 22.

<sup>37</sup> Du Toit A *Poverty measurement Blues: Some Reflections on the space for understanding 'chronic' and 'structural' poverty in South Africa* (2005)2.



poverty and grievous material inequality that engages with the complexities of social relations, agency, legal culture and transformation.

### **2.3 Material Inequality and Poverty**

The argument proposed here is that the impact of spatiality and legal geography could, through its conceptual basis de-mystify narratives about the nature of poverty while directing the attention of the transformation project towards underlying structural aspects of persistent poverty.<sup>38</sup> Valuable as transformative constitutionalism is as an interpretive tool for the realisation of the transformative project, prevailing interpretive methods or legal culture (professional instincts) often remain linked to positivist assumptions at the risk that legal culture remains unchanged.<sup>39</sup> An understanding of poverty has to move beyond what Du Toit refers to as the 'government of poverty' which is the attempt to make sense of it as only an objectively measurable and scientifically manageable phenomena.<sup>40</sup>

By referring to space and legal geography, it is not so much about the understanding of material structures that occupy space that are of concern but what these structures represent. It is about the 'modes of representation that position subjects in relation to their surroundings in certain ways'.<sup>41</sup> Spatial concerns and interpretations of landscape reveal the underlying effect of space on the individual and the social and legal discourses regulatory practices that depend on these discourses being connected to one another.<sup>42</sup> I cannot imagine that it can be merely theorised or understood in a vacuum but it is manifested through lived experiences and is evident through social dynamics. Legal geographers propose that legal geography analytically identifies lived social relations and experiences; it identifies aspects of the social as either legal or spatial and co-joins these aspects with the purpose of projecting into physical space, legal forms of meaning to better understand the nature of this symbiotic relationship between space and law.<sup>43</sup>

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<sup>38</sup> Taylor (note 25 above) 5.

<sup>39</sup> Klare K 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150.

<sup>40</sup> Du Toit (note 37 above) 2.

<sup>41</sup> Taylor (note 25 above) 5.

<sup>42</sup> Taylor (note 25 above) 5.

<sup>43</sup> Braverman et al (note 5 above) 1.



In earlier scholarship about legal geography, De Sousa Santos identified the importance of using other disciplines and comparing them with law as a way of ‘imagining the real’ and he refers to this as a sociological study of the law.<sup>44</sup> This perspective finds resonance with general jurisprudence as discussed by Douzinas and Geary because the benefit of using other disciplines (other than law) to inform the understanding of legal concepts expands the reach of legal rules when dealing with real issues such as material inequality. Spatiality and legal geography enable new ways of understanding and looking at legal phenomena; perhaps inequality and transformation are not uniquely legal phenomena but they are, in very real ways regulated by the law. Section 9 of the Constitution provides for equality and refers to substantive equality while the socio-economic rights in the Bill of Rights are material rights that by their nature are concerned with material realisation of basic resources to enhance the livelihoods of the impoverished people in South Africa. As Modiri laments, the expected change within the period of democratisation has not been realised because in many material and tangible ways; the lives of the black majority in South Africa have not necessarily improved.<sup>45</sup>

From as early as 1964, there was already a recognition that the social sciences can have a meaningful impact in understanding the law; legal study was and continues to be important in investigating social processes and outcomes.<sup>46</sup> For instance, Don Mitchell’s study on what he terms an ‘annihilating space by law’ is a critique of the extent to which legislation regulates and criminalises homeless people. These anti-homeless legislation seem to be an attempt to annihilate the space within which homeless people must live.<sup>47</sup> This is an example of how the concept of space and geography is applied in legal studies which then illustrates a particular application of ideas about law and justice.

Legal geography embodies a radical normative commitment in the ‘bridge-building era’ and this is more than coincidental phrasing because in the context of transformative constitutionalism, Mureinik refers to the bridge metaphor and the transformative

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<sup>44</sup> Braverman et al (note 5 above) 1.

<sup>45</sup> Modiri J ‘Towards a “(Post-) Apartheid” Critical Race Jurisprudence: “Divining our Racial Themes”’ (2012) 27 *SA Public Law* 232.

<sup>46</sup> Braverman et al (note 5 above) 4.

<sup>47</sup> Mitchell D ‘The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States’ (1997) 29(3) *Antipode* 303.



constitutionalism project itself is described by Klare as an enterprise concerned with inducing large-scale social change.<sup>48</sup> Van Der Walt on the other hand, criticises this bridge metaphor which is usually invoked when discussing issues about transformative constitutionalism because the crossing of the bridge implies a linear progression. Instead he proposes another metaphor – dance – but ultimately returns in his argument to the reinterpretation of the bridge; as one of transformation as opposed to transition.<sup>49</sup> I can already identify important connexions between legal geography and transformative constitutionalism. Material inequality is the antithesis; it entails the just distribution of material resources and basic resources to enable decent livelihoods, taking into consideration past disadvantages and discrimination on the basis of race. Inadvertently, material justice should be a concept that seeks to respond to materially unjust living conditions and address the unequal distribution of resources and glaring impoverishment in society. As an all-inclusive notion, material justice ‘affirms the use value of life, all forms of life, against the interest of wealth, power and technology’.<sup>50</sup>

Space is not just an inert or passive medium but is itself constitutive of expression. These consequences are not coincidental but speak to the reality that:

Law regulates, controls, and demarcates spaces by zoning, borders, rules of ownership, eviction legislation, building regulations, immigration control and a variety of other means of exercising power... The notion of spatial justice frames the relationship between law and space.<sup>51</sup>

In fact, I would suggest that spatiality and legal geography must inform the discussion on material inequality and poverty. Especially in understanding the South African context, where during the Apartheid regime, the legal system was orchestrated to impoverish and deprive a particular group of people of material entitlements on the basis of race.

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<sup>48</sup> Mureinik E ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31, 31-32; Klare K ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146.

<sup>49</sup> Van der Walt AJ ‘Dancing with Codes: Protecting, Developing and Deconstructing Property Rights in a Constitutional State’ (2001) 118 *South African Law Journal* 258, 295.

<sup>50</sup> Murcott M ‘The Role of Environmental Justice in Socio-Economic Rights Litigation’ (2015) 132 *South African Law Journal* 875.

<sup>51</sup> De Villiers I ‘Law, Spatiality and the Tshwane Urban Space’ (July 2017) submitted in fulfilment of the requirements of the degree LLD in the Faculty of Law, University of Pretoria.



The constitutional dispensation recognises social justice and the Bill of Rights embodies the notion of transformation.<sup>52</sup> In keeping with the Constitution's acknowledgement of social justice, constitutionalism is the theory of constitutional law and may be understood as a body of theoretical prescriptions. It is a theoretical framework that prescribes what a Constitution and constitutional law *should* do as opposed to simply describing what a particular constitution does.<sup>53</sup> More directly for the argument of this research project is to highlight that constitutionalism is also normative; setting out the values that must be effected in the governance process.<sup>54</sup> The principles embodied within constitutionalism influence governmental practice, it influences or at least should influence those who operate state systems, judges in particular.

Reading transformative constitutionalism through a spatial lens could have a significant impact on the adjudication of South African socio-economic rights as a transformative tool in the discourse around material inequality.<sup>55</sup> Because legal geography is about the interconnectedness of law and spatiality, it stands to reason that material inequality be discussed within this discourse. There are stark gaps in the distribution of basic resources which so tangibly manifested and experienced in the environments in which the impoverished occupy in the South African context, post- 1994. This approach, if understood as a transformative tool or normative standard has the ability to enhance and strengthen the enforcement of socio- economic rights. Legal geography and spatial concepts can do this by reforming the court's approach; its legal culture (to borrow from the transformative constitutionalism language) on matters of justice and material equality. Further, to provide grounding meaning to abstract legal concepts such as reasonableness within socio-economic rights discourse. With regard to the discussion on legal geography, Braverman et al identifies three waves of legal geography scholarship, one of which is referred to as the 'post-disciplinary wave'; a stream that is informed by other scholarly disciplines which aim

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<sup>52</sup> Constitution of the Republic of South Africa, 1996. This point was well articulated in the decision- *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W) paras 51-52:

Our Constitution encompasses a transformative provision. As such, the State cannot be a passive bystander in shaping the society in which individuals can fully enjoy their rights? [The full transformative power of the rights in the Bill of Rights will only be realised when they are interpreted with reference to the specific social and economic context prevalent in the country as a whole, and the social and economic context within which the applicant now finds itself in particular. (per Jajbhay J).

<sup>53</sup> Currie I & De Waal J *The New Constitutional and Administrative Law Volume 1* (2001) 10.

<sup>54</sup> Currie & De Waal (note 51 above) 11.

<sup>55</sup> Murcott (note 48 above) 877.



to conceptualise the legal space and this includes the social sciences.<sup>56</sup>

## 2.4 Spatial Justice:

The embodying feature of the notion of justice is that individuals, in relation to one another, are entitled to a relative position of equality or inequality. Hart emphasises the importance of understanding this because it must inform decisions when burdens or benefits are to be distributed and as something which must be restored when it is disturbed.<sup>57</sup> This is why justice has long been understood as that which maintains or restores balance or proportions.<sup>58</sup> If a law is intended to respond to the alleviation of poverty then ‘treating like cases alike’ would entail paying close attention to the needs of those who seek relief.<sup>59</sup> An appreciation of spatial justice from a radical geographical perspective embodies the key tenet that space produces and is produced by unequal social relationships, and places an emphasis on the aspect of the state of living in a particular place – inhabitation instead of habitat.<sup>60</sup>

Philippopoulos- Mihalopoulos suggests that spatial justice should mean something beyond social justice or regional justice. Spatial justice has its basis either in space, location or position and as such space can either be absolute, relative or relational. He notes that justice must then be spatial when it is concerned with the distribution of resources.<sup>61</sup>

Spatial justice as a concept that is associated with the spatial turn in law is a ‘radical conception.’<sup>62</sup> Spatial justice embraces that space is intertwined with normative production.<sup>63</sup> Secondly, spatial justice has this potential because its conception is integral for a ‘relational understanding of space.’<sup>64</sup> As such, if space is understood as a medium through which unequal social relations are produced and which it produces, this creates a conceptual understanding that space is not neutral or abstract but it is political. Consequently, this fosters a different understanding of the nature of the conditions which people find themselves in that creates

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<sup>56</sup> Braverman et al (note 5 above) 10.

<sup>57</sup> Hart HLA *The Concept of Law* (1961) 155.

<sup>58</sup> Hart (note 55 above) 155.

<sup>59</sup> Hart (note 55 above) 159.

<sup>60</sup> De Villiers I ‘*Tshwane 2055 and the (im)possibility of spatial justice*’ (2014) *De Jure* 202.

<sup>61</sup> Philippopoulos-Mihalopoulos ‘*Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space*’ *Law, Culture and Humanities* (2010) 7(2) 187.

<sup>62</sup> De Villiers (note 49 above) 11.

<sup>63</sup> Philippopoulos-Mihalopoulos *A Spatial Justice, Law and the Geography of Withdrawal* (2010).

<sup>64</sup> De Villiers (note 49 above) 149.



material inequality and it instigates a substantive inquiry about the underlying reasons for those conditions.

Thirdly, spatial justice and the embodying principles of legal geography can breathe much needed fresh perspectives in socio-economic rights litigation by challenging the underlying invisible hands of capitalism. Brand argues that the invisible hands of capitalism are subverting the transformative mandate of the Constitution.<sup>65</sup> The market could also be the space that produces unequal relationships. In the discussion of the nature of material inequality, Brand notes that the capitalist paradigm operates in a perverse manner in that the dominant market operates on the assumption that the impoverished people will over time benefit through the trickle-down effect.<sup>66</sup> Somehow this method is conceived as enabling a just distribution of resources based on the problematic assumption again that the market is not only neutral but it is also the market that creates equal opportunity for its participants to advance their interests.

Lefebvre goes further by stating that capitalism has many facets: it is comprised of land capital, commercial capital, and finance capital.<sup>67</sup> All these facets play a role in the manifestation of societal norms according to their varying capabilities. Lefebvre considers yet another aspect of capitalism, hegemony, which is also tied to the function of money, various markets and social relations of production. Hegemony by its definition, denotes control that is more than influence; it means political leadership which is based on the consent of those who are led by such leadership. However this consent is attained by the polarization of the ruling class' world view. So individuals are ruled not only by force but through ideas.<sup>68</sup> However, hegemony is something a little more than an influence because it is exercised over the entire society but it is an important consideration for analysing the actions of the bourgeoisie, particularly in relation to space.<sup>69</sup> Hegemony has the proliferating effect because it is exercised over both institutions and ideas. The ruling class seeks to preserve its hegemony through various means available including through the use of

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<sup>65</sup> Brand JFD 'Courts, Socio-Economic Rights and Transformative Politics' LLD dissertation, Stellenbosch University (2009) 78.

<sup>66</sup> Brand (note 63 above) 177.

<sup>67</sup> Lefebvre (note 12 above) 10.

<sup>68</sup> Bates T R 'Gramsci and the Theory of Hegemony' (1975) 36(2) *Journal of the History of Ideas* 351, 352.

<sup>69</sup> Lefebvre (note 12 above) 10.



knowledge and resources.<sup>70</sup>

This commercial perspective emphasises economic gain or prosperity (for some) while entrenching material inequality in accessing basic resources such as education, information and other primary access to foster a meaningful livelihood for the most disadvantaged.<sup>71</sup>

Lefebvre in his writing discusses the characteristics of the 'science of space' as:

Representative of the political use of the knowledge. This knowledge is weaved into forces of production and into the social relations of production and into the social relations of production.

Lefebvre describes the role of space as 'active' in that it is operational or instrumental in its influence and it is also characterised as knowledge and action in the existing mode of production.<sup>72</sup> An already produced space can be decoded, it can be read; such space implies a process of signification.<sup>73</sup> Thus spatiality or the notion of space can propel an understanding of material inequality because it is experienced through a produced space and it helps to analyse material inequality. Subsequently the purpose of theory should be to 'elucidate their rise, their role and their demise.'<sup>74</sup> To borrow from Lefebvre's work, legal geography/spatiality can be used as codes, so to speak to 'highlight contents- i.e. the social (spatial) practices inherent to the forms under consideration.'<sup>75</sup>

The effect of material inequality in South Africa has been malevolent because it has resulted in the deprivation of access to basic resources that can at least facilitate transformation.

Transformation is not only political but it is about transforming current societal norms that are disabling to the impoverished through widening material inequality.<sup>76</sup> Transformation and an effective realisation of material rights does not requires more than an ability to participate politically because

a simple right to vote, without food, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create the

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<sup>70</sup> Lefebvre (note 12 above) 10.

<sup>71</sup> Brand (note 63 above) 78; see also Terreblanche *S A History of Inequality in South Africa 1652- 2002* (2002) 58-9.

<sup>72</sup> Lefebvre (note 12 above) 10.

<sup>73</sup> Lefebvre (note 12 above) 17.

<sup>74</sup> Lefebvre (note 12 above) 17.

<sup>75</sup> Lefebvre (note 12 above) 18.

<sup>76</sup> Soja EW *Seeking Spatial Justice* (2010) 3.



appearance of equality and justice, while by implication socio-economic inequality is entrenched.<sup>77</sup>

The correlative of material inequality could be the concept of sustainable development which at its crux has the idea of equity (or justice). Sustainable development embraces inter and intra-generational equity with the concern or purpose of meeting basic human needs that also embody notions of transformation and redress.<sup>78</sup> This research enquiry purports to go further than to only propose ways to address material inequality (which is also important) but aims to understand material inequality through other streams of scholarship. The factors that influence material inequality are complex and adopting a spatial perspective in dealing with these issues can open up new sources of insights towards a spatial consciousness.<sup>76</sup>

## **2.5 Conclusion**

The focus of this chapter has been to show that spatiality has an impact in enabling the transformative capability of socio-economic rights in South Africa. The focus on spatiality and legal geography for this research project is aimed at highlighting that social inequality produces and are produced by space. Legal geography is a stream of scholarship that considers the interconnectedness of law and spatiality, further interrogating the various spaces within which law occupies and influences. Material inequality and poverty was one of the topics that was discussed in this section; in light of the main research question which is to ascertain the impact that spatiality and legal geography has in understanding material inequality and poverty. Legal geography as a conceptually rich theoretical framework/interdisciplinary perspective assists in de-mystifying narratives about the nature of poverty while directing the attention of the transformative project towards underlying structural aspects of persistent poverty. Though transformative constitutionalism is a valuable tool towards the realisation of the transformative project, prevailing legal culture often remains linked to positivist assumptions at the risk that the legal culture may remain unchanged. Finally, spatial justice was discussed in so far as it pertains to the distribution of resources. It provides another perspective to material inequality by challenging the underlying invisible hands of capitalism which Brand notes, subverts the transformative

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<sup>77</sup> Langa P 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

<sup>78</sup> Krog A *A Change of Tongue* (2004) 127.



mandate of the Constitution. In the next chapter I turn to transformative constitutionalism and the possibilities of reading it spatially.



### **Chapter 3: Reading Transformative Constitutionalism through a Spatial Lens**

#### **3.1 Introduction**

In this chapter I consider and evaluate aspects of spatiality and how it could inform a re-conceptualisation of the notion of transformative constitutionalism. I consider how transformative constitutionalism could be read through a spatial lens. The aim is twofold: firstly to engage critically with the notion of transformative constitutionalism in order to push its transformative potential with a view to contribute to socio-economic change. Secondly, it is to disclose alternative possibilities for the adjudication of socio-economic rights. I argue that the further development of the concept of transformative constitutionalism, through spatiality could present a possibility of a more meaningful transformative outcome which could have a more hopeful constitutional lustre in a way that effectively responds to the long term project imagined in Klare's work. Transformative constitutionalism marks a new legal order grounded in the Constitution. Justice Langa stated in his article that the crux of transformative constitutionalism is change and a transformed legal order.<sup>79</sup> Krog describes transformation as not the same thing as change, rather it is a radical conception and reimagining a different order.<sup>80</sup> Transformative constitutionalism presents the possibility to challenge unequal power relationships which undermine the constitutional values that are embodied in the Constitution.

I raise the concern that even within the post-apartheid era, our socio-economic rights jurisprudence seems to continue to be tethered by a formalistic legal culture. Thus there remains a need to continuously interrogate and reinforce this vision for a transformed legal culture. In amplifying the concept, I consider the bridge metaphor and its significance in understanding transformative constitutionalism. Thereafter, I delve into a discussion on spatiality and legal geography.

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<sup>79</sup> Langa P 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

<sup>80</sup> Krog A *A Change of Tongue* (2004) 127.



### 3.2 Transformative Constitutionalism

Klare defines transformative constitutionalism as a long term project concerned with the realisation, interpretation and application of the Constitution; which embodies the objectives of transforming political, institutional and power relationships towards a democratic society.<sup>81</sup> The envisaged change of the new legal order is both formal and substantive, where the exercise of power is justified and regulated through the separation of powers to ensure checks and balances in government's exercise of power. The rule of law prescribes that everyone should be treated equally but transformative constitutionalism requires that this requirement be suspended, in its formal sense, in order to realise a substantive form of equality, capable of effecting real/tangible change.<sup>82</sup> The question that is interrogated in this research project is aimed at determining whether the courts, by using the transformative constitutionalism framework in the interpretive exercise are capable of effecting transformation.

Krog identifies in her book that there are three phases in the transformation process; one of which is participating fully in processes and power structures by everybody. As such, there is a demand for accountability to the people whom are represented.<sup>83</sup> This offers a very useful conceptual and contextual appreciation of why socio-economic rights should be understood as enabling tools for the impoverished, to capacitate them with a view to be meaningful participants in a democratic and transformation geared processes. Furthermore, adjudication within the court offers one platform within which to hold government accountable when socio-economic rights are not enforced or realised. The other phase in the transformation process, as discussed by Krog, is the consolidation of democracy socially, culturally, politically and economically. Krog further observes that it is here that most work still needs to happen to ensure the realisation of the transformation project in South Africa.<sup>84</sup> Klare's reading of the constitution is that it is a document that not only allows but requires transformation of society - the Constitution enables transformation.

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<sup>81</sup> Klare K 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150.

<sup>82</sup> Klare (note 80 above) 153-154.

<sup>83</sup> Krog (note 78 above) 127.

<sup>84</sup> Krog (note 78 above) 128.



Central to Klare's understanding of the constitution and the transformation project as mandated by the constitution is that for transformation to be realised, it requires a new adjudicative method which requires that judges provide the substantive basis for their decisions.<sup>85</sup>

The discourse on transformative constitutionalism Klare states, denotes a reform that falls short of a revolution which is realised within the bounds of the law; in this sense Langa refers to a social and economic revolution.<sup>86</sup> The metaphor of the bridge became a significant metaphor for the long-term project of transformative constitutionalism and for realising substantive equality and social justice in South Africa. Van der Walt states that the image of the bridge remained in the 1996 Constitution as the image connoting the transition between the old and the new social and legal order for constitutional transformation discourse.<sup>87</sup> According to Van Marle, a critique in the context of transformative constitutionalism is foundational because this kind of constitutionalism is itself a critical process that is 'committed to transforming political, social, socio-economic and legal practice in such a way that it will radically alter existing assumptions about law, politics, economics and society in general.'<sup>88</sup> Interrogating these metaphors may assist in the discourse that will contribute to disentangling/dismantling a South African story or stories from a broader discourse of legal and political modernisation and may complicate any superficial understanding or hasty celebration of a legal modernity.<sup>89</sup>

Klare also refers to legal culture which denotes the 'professional sensibilities' or dispositions that those in the legal profession are naturally inclined to act or think, argue or reason.<sup>90</sup> The continuing impression is that the formalist/ positivist legal culture persists and this is a hindrance to the expected transformative project. These dispositions frame the legal culture and the manner of thinking; abstract legal ideas are formulated and applied without an appreciation of context or practical implications of the influence of these specific ways of

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<sup>85</sup> Klare (note 79 above) 156.

<sup>86</sup> Langa (note 77 above) 352.

<sup>87</sup> Van der Walt (note 47 above) 259.

<sup>88</sup> Van Marle K & Motha S *Genres of Critique: Law, Aesthetics and Liminality* (2013) 51.

<sup>89</sup> Van Marle & Motha (note 86 above) 51.

<sup>90</sup> Klare (note 79 above) 150.



thinking. Spatiality is proposed to be a lens that challenges these abstract legal concepts which are a response or a product of a certain legal culture.

In his article Philippopoulos-Mihalopoulos stated that 'spatiality is an ethical position' and the impact of space as he further explains is a 'demand for a radical conception of justice.'<sup>91</sup> This dissertation connects spatiality, legal geography and transformative constitutionalism by acknowledging that law does not occur in a vacuum but occupies space. Again Lefebvre's work finds resonance here because his understanding of production and reproduction of space supports the argument that space is relational.<sup>92</sup> The submission made in this research project is that transformative constitutionalism can go further when perceived through a spatial lens. This is an attempt to re-imagine the South African legal culture and to propel the transformation project; it is an opening up of possibilities for transformation.

Reading transformative constitutionalism through a spatial lens could possibly strengthen or inspire a stronger mechanism that the court can use to ensure that socio economic rights are effectively realised and to hold government accountable toward that obligation. I concede that the realisation of socio-economic rights through the adjudication of these rights can play an important role in social transformation and to this effect Klare in his article draws a possible link between constitutionalism and the South African Constitution.

Within the context of transformative constitutionalism, the bridge metaphor was referred to in the *AZAPO*<sup>93</sup> decision by (Chief) Justice Mahomed who stated that if not for the mechanism that was adopted through the Truth and Reconciliation Commission, providing for amnesty, 'the historic bridge' itself might never have been erected. This could be understood to mean that without the political decision that was taken to legally 'forget' the past, a better and brighter transition into a new democratic order may have not been realised as vengeance and retaliation would have continued. The court further stated that the erection of the bridge appears to symbolise an escape from a cycle of revenge, freeing South Africans from their past.<sup>94</sup> In addition, the bridge functions as a bridge because it connects two places and it (supposedly) does so securely. This approach or interpretation by

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<sup>91</sup> Philippopoulos-Mihalopoulos, (note 59 above) 10.

<sup>92</sup> Lefebvre (note 12 above) 363.

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<sup>94</sup> *AZAPO* (note 93 above) para 18.



the court may be problematic in that the bridge is conceived in a linear manner, as if it enabled a neat and clean break from the past.

However, for the purposes of this project if the bridge is associated with transformative constitutionalism, it can be useful in as far as it suggests redress from a particular status quo to a system that is able to empower the impoverished through the realisation of socio-economic rights.

The transformative constitutionalism project can be an enabling tool that challenges unequal power relationships which undermine spatial justice, that manifests itself through material inequality and poverty. If transformative constitutionalism is a radical change then this change should extend to and include spatial justice because looking at law from the perspective of spatial justice provides a vocabulary for explaining how spaces (as social relations) remain after laws have gone.<sup>95</sup> De Villiers captures this relationship between transformative constitutionalism and spatiality by stating that the 'transformative project of the South African constitution requires, amongst other things, spatial justice'.<sup>96</sup>

For law to function it must have a medium or domain upon which to exercise dominion and it does this over spaces and bodies.<sup>97</sup> Consequently, orders and subjectivities that are created by the law have a strong spatiality presence. While geography's main characteristic is to demarcate boundaries, the regulation of boundaries is the primary function of the law.<sup>98</sup> However, modern social theory places much emphasis on time and fails to adequately engage with the notion of space because it has been treated as fixed, inanimate and inactive. Mahmud argues though that spatiality and time are mutually constitutive.<sup>99</sup> It cannot be denied that time brings about change and change occurs over time. This research explores the changing landscape of law by reading transformative constitutionalism through a spatial lens by unpacking the possible value of legal geography for transformation. Time is solidified and fixed within the rationality immanent to space.

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<sup>95</sup> De Villiers (note 49 above) 3.

<sup>96</sup> Mahmud T 'Law of Geography and the Geography of Law: A Post-Colonial Mapping' (2011) 3(1) *Washington University Jurisprudence Review* 63 65.

<sup>97</sup> Mahmud T (note 96 above) 65.

<sup>98</sup> Mahmud T (note 96 above) 65.

<sup>99</sup> Mahmud T (note 96 above) 65.



One way within which transformative constitutionalism can be read through a spatial lens is if spatiality itself can be used as a critique of the legal culture prevalent within the South African legal profession which continues to be informed by a formalist interpretation and an unrelenting pursuit to find *the* answer to legal matters. This critique would be intended to further the transformative project which is grounded on the desire to transform a country's political and social institutions. Space is not merely a description of a landscape and geography is a political space that contrives various dimensions of social consciousness, localities and perceptions of the environment.<sup>100</sup>

The intersection between geography and law is important because together they expose the socio-political interests that structure our society. As such, the exposure of socio-political interests suggest that this may enable a more egalitarian path which could frame and make use of territorial space. Law and geography scholarship should be able to deconstruct the misconception that geographical spaces are simply inactive and are not a reflection of underlying social practices.<sup>101</sup> Therefore, the correlative perspective should be that geography or spatiality is integral to processes of power through which control and domination is reproduced. Spatiality is one mechanism through which transformative constitutionalism can be understood as constructing, framing, generating, challenging and reforming socio-political power.

### **3.3 A re-conception: Through a spatial lens**

Over time there has been an increasing use of spatiality in vocabulary in critical texts to map or reimagine narrative trajectories such as transformation. A number of factors have contributed to the 'spatial turn' in law and one of which is post-modernity. Tally notes that postmodernism alongside post-structuralism and other discourses have been at the nub of effecting the spatial turn. Postmodernism is related to an aesthetic movement of art, architecture and literature; it has also about a historical period and a new way of thinking.<sup>102</sup> In Lefebvre's earlier writings he stated that space cannot be precisely defined 'as either an inert container of social relations or as a purely discursive or mental field.

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<sup>100</sup> . Soja (note 76 above) 101.

<sup>101</sup> Taylor (note 25 above) 141.

<sup>102</sup> Tally (note 4 above) 3.



Instead he understands space as both a product and a precondition of processes of social production.<sup>103</sup>

This research project is concerned with mapping the value of legal geography and spatiality for transformation; and this task requires a new way of thinking about the concept of transformative constitutionalism. Spatiality is an extremely valuable concept for scholars engaged in critical and contemporary literary studies because it enables productive ways of making sense of notions such as space, place and mapping.<sup>104</sup> Literary geography for instance is primarily concerned with notions of space and spatiality when considering various texts and it employs a geographical approach to literary materials. But it goes further, because it pays particular attention to the evolving spatial or geographical formations which influence literary and cultural productions. This can happen by analysing the manner within which literature records the shifting configurations of social space together with the ways that texts play a role in the representation or mapping of spaces and places.<sup>105</sup>

In an effort to delineate the manner within which literature records the shifting configurations of social space, I consider transformative constitutionalism, which marks a new legal order that is grounded in the Constitution.<sup>106</sup> At the crux of transformative constitutionalism is change and a transformed legal order.<sup>107</sup> The envisaged change of the new legal order is both formal and substantive, where the exercise of power is justified and regulated through the separation of powers to ensure checks and balances in government's exercise of power.<sup>108</sup> However, the transformative constitutionalism approach has also been susceptible to criticism and some rejection, as an appropriate post-apartheid social transformation mechanism.

Madlingozi presents an extra-constitutional view of the current Constitution.<sup>109</sup> The real required (and as yet unattained) social transformation in the current context, he argues,

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<sup>103</sup> Butler C *Henri Lefebvre: Spatial politics, Everyday Life and the Right to the City* (2012).

<sup>104</sup> Tally (note 4 above) 3.

<sup>105</sup> Tally (note 4 above) 79.

<sup>106</sup> Barnard-Naude AJ 'The post-Apartheid legal order' in T Humby, L Kotze & A Du Plessis (2012) *Introduction to Law and Legal Skills in South Africa* (2012).

<sup>107</sup> Langa (note 77 above) 352.

<sup>108</sup> Klare (note 79 above) 198-9.

<sup>109</sup> Constitution (note 50 above).



involves the decolonisation of the current constitution and radical transformation. He adopts an approach that is diametrically opposed to a transformative constitutionalist view – he holds the view that the current constitution is not only incapable of achieving real and radical transformation of the South African society but in fact makes it impossible; it is an obstacle to transformation. He proposes an alternative constitutionalism and therefore a constitution through which this can be achieved.<sup>110</sup>

Opposing ideas on how transformation ought to look like is useful in as far as it enables a space for debate and engagement with a view to realise substantive change. In the exercise of mapping spaces and the manner in which literature over time records the shifting configurations of social space, the conception of transformative constitutionalism can be expanded through the spatiality lens to yield an experience of transformation that is informed by something more than a post-liberal reading strategy of the Constitution. In fact Roux, strongly criticises this premise in his article by stating that it is a flawed argument to suggest that a single interpretive method, namely, Critical Legal Studies is able to realise the full potential of the Constitution. He goes on further to suggest an alternative interpretive method, namely a Dworkinian approach. This approach is grounded on the premise that claims about political morality which inform the constitution should be presented as claims about the objective correctness of a particular interpretation.<sup>111</sup>

Law and geography interface helps in understanding the impact that law has on society and on the distribution of material resources. For Massey, space is the aspect of a social, radical simultaneity, multiplicity and it presents contemporaneous existence.<sup>112</sup> She argues that geographic or cartographic techniques and concepts are underutilized because they can be widely applied to specific problems such as lack of access to resources and crime control. These are issues that affect most, if not all legal systems. It can be acknowledged that these techniques alone are not suggested to be magic wands to resolve these social problems; however their key tenets could be extended to increase knowledge and understanding of

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<sup>110</sup> Madlingozi, T 'On Settler Colonialism and Post-Conquest *Constitutionness*: The Decolonising Constitutional Vision of African Nationalists of African Nationalists of Azania/South Africa ' draft forthcoming chapter in book edited by Boaventura de Sousa Santos; Madlingozi T 'Social Justice in a time of neo-apartheid constitutionalism; Critiquing the anti-black economy of recognition, incorporation and distribution' (2018) 29 *Stellenbosch Law Review*.

<sup>111</sup> Roux (note 34 above) 259.

<sup>112</sup> Massey (note 13 above) 6.



civil legal processes.<sup>113</sup> This perspective is not far removed from the aims or the purpose of transformative constitutionalism. Because transformative constitutionalism is a critical theory, its key components constitute practical tools for applying a critical legal approach to the South African socio-economic rights discourse.

Thus reading transformative constitutionalism through a spatial lens is not about highlighting the differences between the two concepts but it is about exploring new ways of realising the transformation project and discovering the impact that legal geography has towards transformation. Much like maps which we use as effective and powerful tools to navigate and make sense of our place in the world. Reading transformative constitutionalism through a spatial map, like a map, could give some reassurance regarding our current position towards the transformative goal but it can also be a fictional or figurative representation of the space within which we find ourselves. The map is a tool which can be used as a point of reference from which to either imagine or navigate the space.<sup>114</sup> When reference is made to space, the notion of space as written about by Lefebvre is imagined as detailed by his theoretical approach to space derived from the Leibnizian notion of relative space as opposed to the idea of 'absolute space'. Lefebvre characterised this idea of spatial relations as a culmination of complex practices, representations and imaginary elements.

Subsequently space is a product and a precondition of processes of social production.<sup>115</sup> The value in understanding space in the abstract is that it engenders and aggravates internal contradictions which is necessary for meaningful transformation, abstract space compels a confrontation with internal contradictions which cannot and should not be hidden or suppressed indefinitely. In fact these internal contradictions point towards the direction of an alternative 'differential space'; which for Lefebvre is the ultimate objective framing for his conception of the politics of space.<sup>116</sup> Wigmore, conceived of geographical influences as a backdrop against which legal systems evolved as opposed to understanding spatial

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<sup>113</sup> Economides K, Blacksell M & Watkins C 'The Spatial Analysis of Legal Systems: Towards a Geography of Law?' (1986) 13(2) *Journal of Law and Society* 161, 162.

<sup>114</sup> Tally (note 4 above) 2.

<sup>115</sup> Butler (note 102 above).

<sup>116</sup> Butler (note 102 above).



relationships as an integral part of the structure of society.<sup>117</sup> Legal rules can also be used to create space either by demarcating geographic or normative areas that people use as spaces whereby they enjoy freedom to act or by establishing relationships that create obligations that either compel or prohibit action upon objects or persons. In addition, law not only creates space but it also occupies it.<sup>118</sup>

For the author, a human geography of law must be intended to explore the extent of the correlation of legal rules' dependence on physical presence; this will raise questions about how the gaps in the geographical distribution of legal services influence the impact of particular norms in local legal culture.<sup>119</sup> Transformative adjudication, in the first instance acknowledges that the positivist manner of legal interpretation forms part of our legal culture.<sup>120</sup> Subsequently, reading transformative constitutionalism through a spatial lens could reveal how gaps in the geographical distribution of legal services impact particular norms in local legal culture. It is important that we begin to question how and in what ways our legal culture is influenced by the social and natural environment.<sup>121</sup>

Transformative constitutionalism can be read through a spatial lens in at least three ways: First, through spatial analysis, gaps could be revealed in the coverage of institutional and normative systems of law by detailed mapping of the distribution and characteristics of the users and providers of legal services.<sup>122</sup> Klare states that transformative constitutionalism embodies constitutional enactment that is committed to the transformation of the country's political and social institutions.<sup>123</sup> To this end, spatiality could, through analysis expose the gaps that currently inhibit the goal of transforming the political and social institutions by mapping the distribution and the characteristics of the users which would enable the transformative possibility of the Constitution.

Further, transformative constitutionalism denotes a call to instigate large-scale social change which must be achieved through nonviolent political processes that are grounded in law. However, Klare also poses the question whether the processes that are grounded in

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<sup>117</sup> Economides et al (note 112 above) 163.

<sup>118</sup> Economides et al (note 112 above) 167.

<sup>119</sup> Economides et al (note 112 above) 167.

<sup>120</sup> Zitzke (note 7 above) 11.

<sup>121</sup> Economides et al (note 112 above) 167.

<sup>122</sup> Economides et al (note 112 above) 171.

<sup>123</sup> Klare (note 79 above) 150.



law are capable of achieving this drastic social change.<sup>124</sup> By reading transformative constitutionalism through spatiality and legal geography, social change can be attainable because spatial justice acknowledges that space produces and is produced by unequal social relationships. Law does not embody this appreciation in itself thus spatiality should inform the reading of transformative constitutionalism.

Secondly, spatiality could explain the underlying processes which determine these locations, for example, by showing the extent to which spatial patterns of legal organisation within defined territories reflect market forces or social needs.<sup>125</sup> It is arguable whether transformative constitutionalism alone, as an embodying concept can flesh out this dynamics; namely, by showing the extent to which spatial patterns of legal organisation within defined territories reflect market forces or social need. Thus reading transformative constitutionalism through a spatial lens could respond to the purported purpose as formulated by Klare, to transform the country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.<sup>126</sup>

Finally, locational analysis can do more than just provide a pictorial representation of the legal system; it can also be used to suggest alternative distributions for legal services, which would improve their utility and efficiency. Similarly, Klare's argument is that the work of legal practitioners who are engaged in adjudication should be inspired by a commitment to social transformation while giving effect to their professional roles.<sup>127</sup> These two perspectives seem to find resonance in furthering the transformative project in that a spatial analysis could do more for the adjudicative process because it suggests alternative distributions for legal services which could result in much needed utility and efficiency. Human geography can have a meaningful contribution towards understanding the nature of the process which informs litigation and other disputes.<sup>128</sup>

For instance, our understanding of civil litigation could be expanded considerably by examining the spatial patterning of civil disputes and the nature of geographical areas and

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<sup>124</sup> Klare (note 79 above) 150.

<sup>125</sup> Economides et al (note 112 above) 171.

<sup>126</sup> Klare (note 79 above) 150.

<sup>127</sup> Klare (note 79 above) 151.

<sup>128</sup> Johnston J *Residential Segregation, The State and Constitutional Conflict in American Urban Areas* (1984).



courts in which they tend to surface. Spatiality can make such a meaningful contribution to the transformation of disputes by explaining the nature of the processes which lie behind litigation and other forms of social conflict.<sup>129</sup> Klare in his article acknowledges that there are multiple ways within which the Constitution can be interpreted and the suggested postliberal reading of the constitution is only one plausible interpretation. Roux identifies this as a shortcoming in Klare's article because he critiques that Klare fails to then go further and suggest what other plausible readings might be.<sup>130</sup> This research project, perhaps to a very small scale purports to expand where Roux believes Klare falls short by, suggest another plausible reading, namely that of reading the transformation project spatiality and exploring the value of legal geography for transformation.

Butler makes the point that Lefebvre's theoretical categories propose a way within which critical legal scholars can conceptualise the relationship between law and state power as continuously shaped by political struggles over the inhabitation of space.<sup>131</sup> This introduces a need for critical thinking of the state's role in spatial production which Lefebvre terms 'state mode production'. Butler heeds that on the face of Lefebvre's analysis which suggests that state power tends to have a totalising effect, the state is faced with a daunting task of balancing various political challenges; most of which revolve around grassroots struggles to produce new spaces.<sup>132</sup> The need to create new spaces within the long term project of transformative constitutionalism is evident in Klare's article from the citation of *S v Makwanyane*:<sup>133</sup>

It retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism. The Constitution expresses in its preamble the need for a "new order ... in which there is equality between ... people of all races".<sup>134</sup>

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<sup>129</sup> Economides et al (note 112 above) 172.

<sup>130</sup> Roux (note 34 above) 261.

<sup>131</sup> Butler (note 102).

<sup>132</sup> Butler (note 102) 377.

<sup>133</sup> *S v Makwanyane* 1995 (3) SA 391 (CC).

<sup>134</sup> *Makwanyane* (note 132 above) para 262.



### **3.4 Conclusion:**

This chapter dealt with the question of how to read transformative constitutionalism through a spatial lens within the broader topic: understanding the value of legal geography for transformation. Klare in his article unequivocally identifies that the South African Constitution is particularly different from all the other Constitutions in the world because he refers to it as historically self-conscious. As such how we make sense of our past and frame the narrative around transformation, human rights and other constitutional issues will play a pivotal role in how we interpret and apply the Constitution.

Transformative constitutionalism has been discussed as a long term project that is committed to both social and political change. This notion resounds well with Mureinik's notion of the Constitution as a bridge between the authoritarian past to a culture of justification. Spatiality was discussed as a critical tool within which to re-conceptualise and broaden the impact of transformative constitutionalism in realising the transformative project. Mapping was identified as an important feature in the discourse on spatiality because of its resonance with representation because space is an arena of creativity and political struggle.

In seeking to address the question how transformative constitutionalism can be read through a spatial lens, I identified three perspectives: firstly, spatiality could, through analysis expose the gaps that currently inhibit the goal of transforming the political and social institutions by mapping the distribution and the characteristics of the users which would enable the transformative possibility of the Constitution. Secondly, spatiality could explain the underlying processes by showing the extent to which spatial patterns of legal organisation within defined territories reflect market forces or social needs. Thirdly and finally, locational analysis can do more than just provide a pictorial representation of the legal system; it can also be used to suggest alternative distributions for legal services, which would improve their utility and efficiency. Human geography can have a meaningful contribution towards understanding the nature of the process which informs litigation and other disputes. Within the spatial turn, particular attention has been given to spatial organization of societies how geography informs and conditions various aspects of the everyday.



## Chapter 4: The benefit of reading transformative constitutionalism through a spatial lens for socio-economic jurisprudence

### 4.1 Introduction

This chapter focuses on the question: how transformative constitutionalism, read through a spatial lens, could be of benefit to socio-economic jurisprudence or a jurisprudence concerned with material transformation. The chapter begins with mapping the current position or perspective of the South African socio-economic jurisprudence which is followed by a case analysis and case study to propose a spatial reading of a court case. The case analysis is based on the decision of *Mazibuko*<sup>135</sup> to ascertain how the judgment could have been different if the court took note of concepts such as spatiality, legal geography and transformative constitutionalism. This discussion is linked to the initial research question which is concerned with the impact which spatiality and legal geography has in understanding material inequality and poverty. This is to echo and address the overarching question of this research project, reading transformative constitutionalism through a spatial lens: the value of legal geography for transformation. The chapter ends with a summation of the discussion and reflections on the discussed topics.

Brand relies on the work of Amartya Sen who states that for the individual to develop and gain political freedom, the starting point should be to ensure human flourishing (as the entry point to the problem of poverty and global inequality rather than economic growth).<sup>136</sup> Sen contends that all human beings are equally entitled to enjoy a life that they value and it would be difficult to imagine such a life without simultaneously thinking about the material realisation of the guarantees embodied in socio-economic rights.<sup>137</sup>

More poignantly, Sen observes that 'development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency.'<sup>138</sup> This research begins with the assumption that the influence of

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<sup>135</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC).

<sup>136</sup> Reid-Henry, S. 2012. Amartya Sen: economist, philosopher, human development doyen. The Guardian [Online] 22<sup>nd</sup> November 2012. Available at: <http://www.guardian.co.uk/global-development/2012/nov/22/amartya-sen> human-development-doyen. Accessed 26<sup>th</sup> March 2013.

<sup>137</sup> Sen *A Development as Freedom* (1999) xii.

<sup>138</sup> Sen (note 136 above) xii.



transformative constitutionalism could inspire a stronger mechanism that the court can use to ensure that socio economic rights are effectively realised and to hold government accountable toward that obligation. I concede that the realisation of socio-economic rights through adjudication can play an important role in social transformation and to this effect, Klare in his article draws a possible link between constitutionalism and the South African Constitution. This discussion will lead to the critical consideration of the *Mazibuko*<sup>139</sup> decision and other relevant case law.

I assume that transformative constitutionalism as an approach is an enabling tool because it embodies within its function change and a transformed legal order. The expected change or transformation within the socio-economic context can only occur if one at a time you give houses or food to impoverished people who previously did not have access.<sup>140</sup> I expect to find that, through these concrete transformative outcomes, impoverished people are empowered and capacitated and their capacity to participate at all levels of society is at the same time enhanced. Therefore, part of socio-economic transformation is about enhancing the political capacity of the impoverished. Those concrete transformative outcomes must happen by ensuring that impoverished people are empowered/ capacitated. Ultimately, their capacity to participate in society at all levels must be enhanced; particularly their capacity to participate in the democratic processes in society and to advocate for their own needs and interests, in their own way and in their own terms. So part of socio-economic transformation is enhancing the political capacity of the impoverished.

#### **4.2 Socio- Economic Rights Jurisprudence**

The adoption of a democratic constitution raised expectations of a ‘transformative constitutionalism’ with the hope of a transition from oppressive policies to a democratic dispensation that will usher in and protect socio-economic rights. Entrenchment of socio-economic rights gives hope for redress of societal inequality as socio-economic rights are a measure to achieve basic necessities of life and a restoration of human dignity. Pieterse argues that the consequence of constitutional transformation in South Africa involves dismantling the structures that embody the Apartheid system and that reinforce inequality while focusing on the:

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<sup>139</sup> *Mazibuko* (note 134 above).

<sup>140</sup> Brand et al (note 9 above) 273-297.



...redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of poor and otherwise historically marginalised sectors of society through pro-active and context-sensitive measures that affirm human dignity.<sup>141</sup>

The constitutional framework in South Africa allocates an important role to the courts for the adjudication and protection of socio-economic rights into material entitlements. Those who believe in the strict enforcement of the doctrine of the separation of powers have over time raised concerns about what they believe to be a far reaching influence of the courts in socio-economic rights adjudication. As a result, the judicial enforcement of socio-economic rights has been compromised which in turn has retarded the long-term project of social transformation.<sup>142</sup> Ngang is, as a result, sceptical about the real impact of the enforcement of socio-economic rights in South Africa and argues that little has been achieved in improving the lives of victims of socio-economic deprivation.<sup>143</sup> Considering that the enforcement of socio-economic rights is context specific, there is merit in spatial considerations and legal geography because its conceptual basis demonstrates greater potential towards producing transformative outcomes than the prevalent discourse of the most effective interpretive methods to realise the transformative goals of the constitution.

This perspective is articulated succinctly by these words: ‘just as the realisation of socio-economic rights through political strategies amounts to material entitlements, I argue that the result of positive adjudication should equally amount to entitlement to the same material things promised by the rights in question.’<sup>144</sup> Judicial enforcement of socio-economic right need not be perceived as a hindrance in the effective functioning of government but it can go a long way towards propelling the transformative project and there is value in considering legal geography. Brand argues that:

Democracy has always loomed large in debates about adjudication of livelihood rights claims, whether in objection to the idea of rendering livelihood rights justiciable (counter-majoritarian dilemma-speak) or in justification of it, on the argument that livelihood rights enforced through courts are constitutive

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<sup>141</sup> Pieterse M ‘What do we mean when we talk about transformative constitutionalism?’ (2005) 20(1) *South African Public Law* 155,156, 159.

<sup>142</sup> Ngang CC ‘Judicial Enforcement of Socio-Economic Rights in South Africa and the separation of powers objection: the obligation to take ‘other measures’’ (2014) 14 *African Human Rights Law Journal* 655.

<sup>143</sup> Ngang (note 141 above) 655.

<sup>144</sup> Ngang (note 141 above) 655.



of democracy in that they enable access to the basic material goods required to participate in political and democratic life.<sup>145</sup>

It may be surprising to have poverty as a classification when discussing transformation in a post-apartheid period, relating to the protection of human rights -- particularly socio-economic rights -- in South Africa. Precisely because the underlying assumption is that socio-economic rights ought to alleviate such poverty and empower those in vulnerable and marginalised positions in society. However, poverty is so prevalent in the African context, broadly and in South Africa particularly, that a discussion of poverty strikes at the crux of the discussion on the protection and effective enforcement of socio-economic rights.

Poverty itself constitutes a denial of human rights but its persistence in African communities erodes or nullifies the realisation of both socio-economic and civil and political rights.<sup>146</sup> Poverty is further related to unsatisfactory levels of education, increased unemployment rates, poor political and economic policies, natural disasters, armed conflicts and pandemics such as HIV/AIDS. In an article that explores the challenges that South Africa is facing in protecting human rights at the face of persistent poverty and in a context where there is a big disparity between the poor and the rich, Mubangizi holds that poverty exists when individuals or groups of individuals are unable to meet their basic needs.<sup>147</sup> Thus it should already be raising concerns that the impact of poverty and a lack of an appropriate human-rights protection is a challenge that disempowers people in many African countries. South Africa is no exception to these challenges.

In the South African context, the Constitution enshrines socio-economic rights which makes them fully enforceable and justiciable through the courts. Sections 26 and 27 are usually said to be the most important socio-economic rights as they guarantee access to adequate housing and access to health care services. Given that these rights are both enforceable and are a constitutional commitment, there is no doubt that the primary challenge is to ensure

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<sup>145</sup> Vieira VO, Baxi U & Viljoen F *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 437.

<sup>146</sup> Mubangizi JC 'Some reflections on recent and current trends in the Promotion and Protection of Human Rights in Africa: The Pains & the Gains' (2006) 6(1) *AHRLJ* 146-165.

<sup>147</sup> Mubangizi JC 'Protecting Human Rights amidst Poverty and Inequality: The South African Post-Apartheid Experience on the right of Access to housing' (2008) 2(2) *African Journal of Legal Studies* 130, 131.



the protection of human rights in a South African society which is plagued by poverty and inequality.<sup>148</sup>

Among all the social phenomena that have a notable impact on the protection of human rights, poverty seems to rank at the top of the list and this may be exacerbated by other factors such as unequal access to social and economic resources.<sup>149</sup> Socio-economic rights are concerned with the delivery of basic services within a spatial context that is linked to location and infrastructure that ensures accessibility to services. This is practical and tangible in that there would be actual material transformation thus spatiality in this sense gives meaning to abstract concepts such as reasonableness in the context of socio-economic rights. While on the other hand legal culture pertains to the manner in which legal concepts are approached:

Our crisis is not just about an enormous backlog, but also about a dysfunctional market, torn communities and a strained social fabric, spatial as well as social segregation and a host of all other problems. Our first response must be innovative and diverse. If we only respond to the numbers that must be built we risk replicating the distorted apartheid geography of the past.<sup>150</sup>

Transformative constitutionalism has been anchored both in academia and in the socio-economic rights jurisprudence of the Constitutional Court and it has been embedded in the constitutional framework with the view to address past injustices which were entrenched through the occupation of space. Thus I advance the argument that the anticipated benefit of reading transformative constitutionalism through a spatial lens in socio-economic jurisprudence will require courts to develop a 'jurisprudence which opens up sustained and serious engagement with the normative purposes and values which socio-economic rights should advance within the historical and social context of the South African society.'<sup>151</sup>

When discussing the adjudication of socio-economic rights, there is the notion of polycentricity, which is a process of coordinating mutually interacting variables whereby a

<sup>148</sup> Mubangizi (note 146 above) 133.

<sup>149</sup> Mubangizi JC 'Know Your Rights: Exploring the Connections between Human Rights and Poverty Reduction with Specific Reference to South Africa' (2005) 21 SAJHR 32.

<sup>150</sup> Monare M 'Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence and the Transition to Democracy' Conference to be held from 13- 16 November 2014 at New York Law School available on <http://www.nyislawreview.com/wp-content/uploads/sites/16/2014/11/Mayet-Monare.pdf> [accessed on 20 August 2018].

<sup>151</sup> Klare (note 79 above) 146.



change of one variable influences all the other variables. Fuller and Winston stated that issues that are considered to be polycentric or many-centered, are issues that require interdependent variables to be considered.<sup>152</sup> In the adjudication process, courts are busy with the exercise of dispute resolution between parties, each of which are concerned with representing their version of the case before the court. It is said that the task of the court is to weigh up the arguments before and make a finding in favour of either of the parties through the application of general principles or rules. It is arguable whether this kind of winner-takes-all resolution of a dispute is not suited to the resolution of what have been called 'polycentric issues'.<sup>153</sup> Polycentric elements are evident in almost all cases or claims submitted for adjudication before the courts. It is therefore only those problems in which the degree of polycentricism is particularly high that should be off limits to adjudication. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.<sup>154</sup> Could this have been the underlying reason or intuitive incline of Judge Sachs when he required meaningful engagement of the parties in socio-economic rights cases?

The requirement for meaningful engagement has somewhat crystallised into a requirement reasonable government policy in socio-economic rights as well as a remedy for when there has not been inadequate engagement before the commencement of litigation<sup>155</sup>. An example that illustrates the polycentric nature of matters in socio-economic rights is the case of *Mazibuko*.<sup>156</sup> Justice O'Regan was of the opinion that a complex issue such as the one brought before the court for the determination of the allocation of water per capita was beyond the Court's expertise.<sup>157</sup> Fuller makes the observation that solving a complex, polycentric problem in the absence of specific standards forces the decision maker to rely on experience-based intuition and to perform creative leaps of judgment that simultaneously brings all of the interconnected elements into consideration.<sup>158</sup> This perspective is in concert with precisely what Dugard refers to as the inarticulate premise of judges in the adjudicative process.

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<sup>152</sup> Fuller L & Winston KI 'The Forms and Limits of Adjudication' (1978) 92(2) *Harvard Law Review* 379.

<sup>153</sup> Fuller & Winston (note 151 above) 372.

<sup>154</sup> Fuller & Winston (note 151 above) 398.

<sup>155</sup> Van der Berg S 'Meaningful Engagement: Proceduralising socio-economic rights further or infusing administrative law with substance' (2013) 29(2) *South African Journal on Human Rights* 376.

<sup>156</sup> *Mazibuko* (note 134 above).

<sup>157</sup> *Mazibuko* (note 134 above).

<sup>158</sup> Fuller & Winston (note 151 above) 569.



Inarticulate premises are the factors that inform the Judge's sociological and psychological conditions and those where the Judges' 'preferences and prejudices' lie.<sup>159</sup>

The degree of polycentricism in socio-economic rights litigation is inevitably extremely high. For instance, in the *Soobramoney*<sup>160</sup> case, faced with considerable budgetary, personnel, and infrastructure constraints, the KwaZulu-Natal health department decided to make dialysis treatment available only to those patients who were candidates for a kidney transplant. The Constitutional Court adopted a minimalist approach in interpreting the right of access to adequate health care services, taking into account the budgetary implications of its decision<sup>161</sup>. The approach adopted by the Constitutional Court can be likened to the approach adopted in the American Legal System regarding social and regulatory issues where there has been a categorical refusal by the judiciary to review such matters.<sup>162</sup> They are of the firm belief that this is a disruption that can be avoided, by returning the authority to where it lies, namely the legislative/law making body. The *Soobramoney* case illustrates that any decision requiring the allocation of economic resources is significantly polycentric, as every competing claim on government resources is a relevant factor.<sup>163</sup>

#### **4.3 Case Analysis:**

Klare's article main focus is on courts as law-making sites and on judges in the adjudicative process; although courts are law-making sites at a smaller scale, there is still importance in discussing the impact of the courts in the development of law. In our constitutional scheme, quite a prominent position has been afforded to the judiciary precisely for the development of law. Albery and Davis argue that 'the constitution's transformative purpose constitute an invitation for a realistic critique and realist methods to be introduced into the adjudicative process'.<sup>164</sup> The *Mazibuko* case illustrates the predicament of the complainants and demonstrates an impoverished engagement of justice by the court of justice. If we assume, as stated above, that the absence of basic living resources is justice then questions around access to water or lack thereof, strike at the heart of social justice.

<sup>159</sup> *Mazibuko* (note 134 above).

<sup>160</sup> Dugard J 'Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* 181, 183.

<sup>161</sup> *Soobramoney v Minister of Health, Kwazulu Natal* 1998 (1) SA 765 (CC).

<sup>162</sup> Dobbs DB *The Law of Tort* (2001) 216-17.

<sup>163</sup> Liebenberg (note 74 above) 135.

<sup>164</sup> Kirk J 'Rights, Review and Reasons for Restraint' (2001) *Stellenbosch Law Review* 19, 26.



The test that has been formulated by the court in socio-economic jurisprudence is the reasonableness test, which I argue is not in accord with transformative objectives. The test is designed to assess whether the measure adopted by the government is reasonably capable of achieving the realisation of any of the socio-economic rights. However, it does not encourage a substantive interrogation of the effectiveness of the in tangibly realising the substantive content of the right which would facilitate transformative goals. Kodras argues that there is a need to include a spatial perspective in welfare analysis that is beyond the use of data about an area; ideology has a spatial pattern of applicability.<sup>165</sup> I am advocating for a spatial organisation of legal systems; literary cartography, geography and geocriticism enable productive ways of understanding space and mapping.<sup>166</sup> Massey's description of the relationship between law and geography best captures the embodiment of what I think could be valuable for transformation and that is 'space is a demand for a radical conception of justice, a spatial justice'.<sup>167</sup>

The *Mazibuko* decision centred around the proper interpretation of section 27(1)(b) of the Constitution which provides that everyone has the right to have access to water. The complaint brought before the court was to challenge the City's policy to provide only 25 litres of water per person, per day for free, in conjunction with the policy of introducing a prepaid system for the provision of water whereby the water supply would be terminated to the individual households without warning as soon as the credits ran out. This, they argued would violate their constitutional right to sufficient water.<sup>168</sup> This case illustrates the predicament of the complainants and demonstrates an impoverished engagement by the court. If we assume that the absence of basic living resources is a case of injustice then questions around access to water or lack thereof, strike at the heart of social justice. The complainants in *Mazibuko* were not only going to lose access to sufficient water but there was a likelihood of a violation of their constitutionally protected entitlement to water as a matter of right.

Liebenberg comments on the High Court's opinion in *Mazibuko*<sup>169</sup> – a water-rights case where

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<sup>165</sup> Albertyn C & Davis D 'Legal realism, transformation and the legacy of Dugard' (2010) *South African Journal on Human Rights* 203.

<sup>166</sup> Kodras JE 'The Spatial Perspective in Welfare Analysis' (1986) 6 *Cato Journal* 77, 78.

<sup>167</sup> Tally (note 4 above).

<sup>168</sup> Massey (note 13 above) 194-196.

<sup>169</sup> *Mazibuko* (note 134 above).



the court held that 25 litres of water per person *per day* was the minimum that section 27 required – as an example of the kind of substantive engagement she envisages. The Constitutional Court in this decision rejected two lower-court opinions that held unconstitutional the City of Johannesburg’s policy of installing pre-paid water meters that limited each household’s free water to 6 kilolitres per month. There were two central issues to be decided by the court, namely: whether the City’s policy relating to the supply of free basic water and particularly, its decision to supply 6 kilolitres of free water *per month* to every account holder in the city is in conflict with either section 27 of the Constitution or section 11 of the Water Services Act and whether the installation of prepaid water meters by the municipality in Phiri was lawful. After consideration of the issues the court held that free basic water policy was reasonable and the installation of pre-paid water meters was lawful. Section 27(1)(b) of the Constitution provides that everyone has the right to have access to sufficient food and water and section 27(2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.<sup>170</sup>

It is important to mention the outcome of the proceedings in the High Court because it is in direct contrast to the outcome of the decision of the Constitutional Court. The two issues to be decided before the court remained as mentioned above. The High Court handed down judgement in favour of the applicants and it held that the city’s water services by-laws did not provide for the installation of pre-paid meters and that their installation was accordingly unlawful; because pre-paid meters halt the supply to a resident once the free basic water supply has been exhausted, until the resident purchases credit, they give rise to the unlawful and unreasonable discontinuation of water supply; the pre-paid water meter system was discriminatory; the procedure followed by the city to install pre-paid meters was unlawful and unfair. Therefore, the court held that the city’s free basic water policy was irrational and unreasonable; and accordingly the city should furnish the applicants and all residents of Phiri with a free basic water supply of 50 litres per person per day.<sup>171</sup>

The respondents appealed to the Supreme Court of Appeal (SCA) against the judgment and order of the High Court. The SCA held that because the city’s policy had been formulated on

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<sup>170</sup> Constitution of the Republic of South Africa, 1996.

<sup>171</sup> *Mazibuko* (note 134 above).



the misconception that it was not obliged to provide the minimum set in Regulation 3(b) free of charge to those who could not afford to pay, it was influenced by a material error of law and should be set aside. Further, the Supreme Court of Appeal also concluded that the city had no authority in law to install pre-paid meters. Furthermore the cut-off of the water supply that would be implemented when the free basic water limit has been exhausted, constituted an unlawful discontinuation of the water supply. Consequently, the SCA declared the installation of the pre-paid meters to be unlawful but suspended that order for two years to give the city an opportunity to rectify the situation by amending its by-laws.<sup>172</sup>

The matter further went to the Constitutional Court where the court had to determine the scope of the obligation imposed by section 27(2) and it interpreted this obligation that is delineated by this section as not imposing an obligation upon the state to provide every person with sufficient water, instead it required of the state to take reasonable legislative and other measures to progressively realise the achievement of the right of access to sufficient water, within available resources. The constitutional court held that this is a matter for legislature and executive – institutions of government that are best placed to investigate social conditions in the light of available budgetary resources. O'Regan J was reluctant in the first instance to decide whether the 25 litres of water per person per day was adequate to meet the basic needs of the complainants because the court supposedly lacked the requisite expertise to make such a determination.<sup>173</sup>

A justice-orientated approach necessitates not only an enquiry of whether there was a violation or not of a particular right but it requires a concerted effort to interrogate the content of that right and whether its realisation gives effect to a meaningful exercise of that right. Thus the fact that O'Regan, goes further and simply questions whether the decision that 25 litres of water was legitimate, lawful, taken fairly and within the powers the City could act in terms of the National Water Act was superficial.<sup>174</sup> This approach is in keeping with the reasonableness standard that is applied in the adjudication of socio-economic rights which, by its nature, considers whether the measures adopted by the government are reasonably capable of realising the socio-economic right. A review standard that is capable of achieving

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<sup>172</sup> *Mazibuko* (note 134 above).

<sup>173</sup> *Mazibuko* (note 134 above) para 61.

<sup>174</sup> *Mazibuko* (note 134 above) para 69- 74.



justice, in my view requires a braver approach that is grounded in a substantive interpretation of the content of the socio-economic right in line with the characteristics of transformative constitutionalism – reform and concrete transformative outcomes.

Soja identifies three principles upon which, he suggests, critical-spatial thinking hinges. The first is the ontological spatiality of being. This principle recognises that we are social, temporal and spatial beings. Secondly, space is a result of social production and as such can be socially changed (the social production of spatiality principle). Thirdly, the socio-spatial dialectic whereby the spatial shapes the social just as the social shapes the spatial. It is somewhat a symbiotic relationship. Foucault through his work captured the socio-spatial dialectic by revealing the manner in which the intersection of space, knowledge and power can be oppressive and enabling.<sup>175</sup>

In the adjudicative process, the court has to consciously make a choice how it is to exploit this overlap precisely because the outcome can be either enabling or dis-abling. In the *Mazibuko* decision, the court created a dis-abling result. Within the *Mazibuko* context these concrete transformative outcomes would have been to make a concerted substantive interpretation on the measure of water per day to each resident especially because the court had been given enough persuasive evidence on what would be a sufficient minimum amount and this would not been a prescriptive finding. Spatial (in)justice describes an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice. This requires the fair and equitable distribution in space of socially valued resources and the opportunities to use them. Spatial (in)justice is evident in both outcome and process; sometimes due to a tendency to revert to formalism in our legal culture, the adjudication process can itself be the process that produces spatial injustice.<sup>176</sup>

Similarly, no consideration was given to the appropriateness of installing the prepaid meter system in the context of those particular impoverished people in Phiri who would not be in a position to pay for further supply of water thus were largely, if not solely, dependent on the provision of water by the government. A reasonableness standard is thus clearly not capable of engaging with these concerns; rather it results in the proceduralisation of socio-economic

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<sup>175</sup> Soja (note 1 above) 2.

<sup>176</sup> Soja (note 1 above) 2.



rights. The analysis of the progressive realisation of socio-economic rights ends with a determination against standards of fairness, lawfulness, legitimacy and reasonableness.<sup>177</sup> The substantive issues of the provision of water were deferred by the court to the City of Johannesburg's executive because of certain capacities which the court held it did not have to make a decision of whether or not the measure of 25 litres of water was sufficient nor pronounce on the appropriateness of the meter system.

This finding was made, in spite of the role that the court has, as argued by Klare, in light of the transformative constitution and in light of the new adjudication that *there is a duty of accountability* also on the courts. It is a matter of democratic accountability for it is their programmes and promises that are subjected to democratic popular choice.<sup>178</sup> The implication of this judgement essentially is to state that it is institutionally inappropriate for the court to substantively determine the content of certain social and economic rights and to make a finding in terms of that substantive interpretation given by the court of the right because it may impede on the discretion that government has to formulate policy.

Ironically, within the *Mazibuko* judgment the court stated that the positive obligations imposed on the government to realise socio-economic rights will be enforced by the courts in the following ways: if government takes no steps to realise the rights, the courts will require government to take steps. If the measures that are adopted by the government are unreasonable, the courts will order that those measures are reviewed so that they can meet the standard of reasonableness. The court recognised the importance of the right to have access to adequate water. However, it did not provide a quantified content to the right to water and further held that the City's policy was reasonable. It held that it could not be said, on the evidence before the court that an amount of 6 kilolitre per month per household was insufficient.<sup>178</sup> When the state itself has quantified the entitlement to free portable water, the courts are more willing to order that it is provided.<sup>179</sup>

Further, the court stated that if government adopts a policy with unreasonable limitations or

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<sup>177</sup> *Mazibuko* (note 134 above) para 78- 158.

<sup>178</sup> *Mazibuko* (note 134 above) para 67.

<sup>179</sup> *Mazibuko* (note 134 above) paras 86-89.



exclusions, the court may order that these be removed.<sup>180</sup> Yet, the court goes on to hold that the introduction of the meter system for the Phiri residence was an acceptable method in spite of the fact that the residents would most likely be unable to further purchase water once their monthly free supply has been depleted. An enquiring engagement with the substantive issues would have construed this as an unreasonable limitation to the right to water; a duty the court had to order the government to reconsider, remove or suggest an alternative plan that can be founded within the bounds of reasonableness. A purposive interpretation of the statute would have required a broader analysis which seeks to achieve a radical transformative agenda. This illustrates a concerning disjuncture between what the court says and what it then goes on to hold, a contrasting approach. This approach further demonstrates what the court thinks about the relationship between law and poverty- if policy measures that are formulated to realise socio-economic rights are deemed to be reasonable, they are in turn just.

This observation only illustrates that the reasonableness standard of review is not capable of generating any meaningful transformation because it allows for a deferent outlook from the court and an unengaged analysis of whether methods and measures are procedurally considered and lawful. The court held that the right to water did not require the state to provide every person with sufficient water on demand<sup>181</sup> but in my reading of the judgment, the court failed to then engage with what the right to water *did* require of the state in light of the issues placed before it. Spatiality in such instances could have informed the court's legal analysis by exposing the gaps that currently inhibit the goal of transforming the political and social institutions by mapping the distribution and the characteristics of the users which would enable the transformative possibility of the Constitution. Justification within the framework of transformative constitutionalism requires a substantive analysis of the content of the right so that it is capable of achieving transformation and social justice. Transformative constitutionalism connotes an enterprise of inducing large- scale social change that is grounded in law. In addition, when transformative constitutionalism is considered alongside spatiality, it could explain the underlying processes by showing the extent to which spatial patterns of legal organisation within defined territories reflect

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<sup>180</sup> Currie & De Waal (note 2 above) 592.

<sup>181</sup> *Mazibuko* (note 134 above) para 50.



market forces or social needs.

For example, in the South African context, the Constitutional Court had to engage with the issue of availability of education in the decision of the ‘mud schools’ case.<sup>182</sup> According to the Department of Basic Education’s policy document, schools must be maintained in a condition that is conducive for learning and teaching. Firstly, learning in the school occurred in dilapidated mud buildings from missing roofs to classes being held in neighbouring dwellings. Secondly, there was no running water or sanitation, inadequate seats and desks for the learners that were attending the school. However, the matter was settled through a ‘memorandum of understanding’ between the parties to the case. Consequently, the Department of Education pledged a total of R8.2 billion over a period of 3 years; specific amounts were allocated for the seven schools, a plan for infrastructure was to be managed by the national Department of Basic Education. The significance of this case is that even though litigation is often adversarial, it can play an important role to instigate an appropriate exchange with the executive, when there is political willingness from the government (even though propelled by a legal challenge); this in turn results in improved access to the right to basic education. Locational analysis can do more than just provide a pictorial representation of the legal system; it can also be used to suggest alternative distributions for legal services, which would improve their utility and efficiency.

Political power should not only be understood as the exercise of governmental power but must also be understood as the capacity for the impoverished to exercise agency, which can be realised when there is an absence of ‘poverty’ i.e. access to the most basic resources such as water, housing, healthcare, food and other basic living resources. A meaningful response to poverty must engage power and the law plays an important role because law in the form of the Constitution can be understood as a ‘benign formative framework’ for the development of policy.<sup>183</sup> Ultimately, the law is an expression of ideology and power and the various facets of the law simultaneously create and maintain inequalities and power imbalances. This is aptly echoed by Sen who states that the law ‘stands between availability

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<sup>182</sup> *Centre for Child Law and 7 others v Government of the Eastern Cape Province and others*, Eastern Cape High Court, Bhisho, case no 504/10.

<sup>183</sup> Brand et al (note 9 above) 274.



and entitlement.<sup>184</sup>

In an analysis of the *Grootboom* and *TAC* cases Brand focuses on how the formulation of the judgments reflects the geography of poverty.<sup>185</sup> This in turn demonstrates how the application of the law reinforces the exclusion of the impoverished. Relying on his analysis I hope to make the argument that when transformative constitutionalism is read through a spatial lens the evident architecture, othering on the basis of poverty, of those judgments could inform a different outcome. The celebrated *Grootboom* case<sup>186</sup> provides a good example of the South African court's appreciation of the social and historical settings that should inform the interpretation and application of constitutional rights. In giving effect to the rights of access to adequate housing and the child's right to basic nutrition, shelter, and basic health care services, the Constitutional Court insisted that the state must meet its positive obligation to devise funds, implement and supervise measures to provide relief to those in desperate need.<sup>187</sup> The Court stressed that the exclusion of the "people in desperate need" from plans to provide housing to the poor were unreasonable because a "programme that excludes a significant segment of society cannot be said to be reasonable."<sup>188</sup> The Court reiterated in the case of *Minister of Health v Treatment Action Campaign*<sup>189</sup> that the State is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society.<sup>190</sup>

#### **4.4 Conclusion**

A closer look at socio-economic rights shows that therein is an entitlement to receive certain basic needs that enables its beneficiaries to participate fully in society. The manner in which the rights are formulated in the constitution indicate the idea of active transformation of our law and society. Socio-economic rights are one of the strong indications of a post-liberal and transformative nature of the constitution. Brand's conception of transformation in the socio-economic context is that such transformation can only occur, if at the same time you give houses, food or an education to impoverished people who lacked such access before. So part

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<sup>184</sup> Brand et al (note 9 above) 274.

<sup>185</sup> Brand D 'Law and the city: Keeping the poor on the margins' (2014) *De Jure* 189.

<sup>186</sup> *Government of the Republic of South Africa v Grootboom & Ors* (2000) 11 BCLR 1169 (CC).

<sup>187</sup> *Grootboom* (note 185 above) para 99.

<sup>188</sup> *Grootboom* (note 185 above) paras 43 & 64.

<sup>189</sup> *Treatment Action Campaign* (note 188 above) paras 35-6.

<sup>190</sup> Brand et al (note above 9) 288.



of socio-economic transformation is enhancing the political capacity of impoverished people. One way in which courts can capacitate the impoverished is by giving effect to Klare's proposal which is to justify the judgments and the decisions the court makes in a substantive manner. This creates capacity because it indicates to those whom the courts engages that the court is accountable to them. Justifications of judgements opens up engagement. In this chapter I have discussed the notion of polycentricity which is a concept that clearly acknowledges that many interdependent variables need to be considered by the courts. When courts can appreciate the polycentric nature of socio-economic rights, this enables transformative possibilities. This may also aid the court to determine the necessary stakeholders for the purpose of having meaningful engagements.

This *Mazibuko* decision illustrates the predicament of the complainants and demonstrates an impoverished engagement by the court of justice. If we assume, as stated above, that the absence of basic living resources is justice then questions around access to water or lack thereof, strike at the heart of social justice. Further these complainants in *Mazibuko* were not only going to lose access to sufficient water but there was a likelihood of a violation of their constitutionally protected entitlement to water as a matter of right.<sup>190</sup>



## 5. Conclusion

As an attempt to contribute meaningfully to scholarly intervention within the post-apartheid South African jurisprudence, this dissertation joins the engagement with the concept of transformative constitutionalism, as formulated by Karl Klare. The main research problem for this study was to ask what role transformative constitutionalism could play in the realisation of socio-economic rights. My main interest was to read transformative constitutionalism through a spatial lens and to investigate the connection between the continuance of apartheid spatial organisation and poverty.

If law is understood as an expression of ideology and power, it is necessary to interrogate the role that the courts play in the adjudication of socio-economic rights and the effect thereof. The adjudication of socio-economic rights has remained a contested area of law as it has raised questions about how courts ought to enforce these rights for their effective realisation. More so in the South African context, where the material realisation of these rights translates to more than material fulfilment but speak to a broader capacity to enable the impoverished to participate effectively in the political space as active members of society. It is with this view that a discussion on whether transformative constitutionalism as a framework can have a meaningful impact in the conceptualisation and enforcement of socio-economic rights. Any engagement with the role of the law in the context of poverty and achieving social justice must effectively take into account the ways in which law creates and maintains poverty. As such, transformative constitutionalism has been discussed to the extent that it speaks to the culture of justification in the exercise of power and encourages radical social change facilitated by a change in legal culture in the adjudication of socio-economic rights.

The preceding three chapters formed the substantive basis for this research project which aimed to deal with the overarching research question- what is the value of legal geography for transformation. Chapter two undertook an enquiry about the impact that spatiality and legal geography has in understanding material inequality and poverty. That chapter discussed how transformative constitutionalism could be read through a spatial lens. The next



substantive chapter comprised a discussion on how reading transformative constitutionalism through a spatial lens could be of benefit to socio-economic jurisprudence or a jurisprudence concerned with material transformation. It is also in this final chapter where I concluded with a case analysis based on the *Mazibuko* judgment which sought to demonstrate the arguments formulated and concepts that have already been dealt with in the preceding chapters.

Chapter three dealt with the question of how to read transformative constitutionalism through a spatial lens within the broader question understanding the value of legal geography for transformation. Klare in his article unequivocally identifies that the South African Constitution is particularly different from all the other Constitutions in the world because he refers to it as a historically self-conscious document. As such how we make sense of our past and frame the narrative around transformation, human rights and other constitutional issues plays a pivotal role in how we interpret and apply the Constitution. Transformative constitutionalism has been discussed as a long term project that is committed to both social and political change. This notion resounds well with Mureinik's notion of the Constitution as a bridge between the authoritarian past to a culture of justification. Spatiality was discussed as a critical tool within which to re-conceptualise and broaden the impact of transformative constitutionalism in realising the transformative project. Mapping was identified as an important feature in the discourse on spatiality because of its resonance with representation as space in an arena of creativity and political struggle.

In seeking to address the question of how transformative constitutionalism can be read through a spatial lens, I identified three perspectives: firstly, spatiality could, through analysis expose the gaps that currently inhibit the goal of transforming the political and social institutions by mapping the distribution and the characteristics of the users which would enable the transformative possibility of the Constitution. Secondly, spatiality could explain the underlying processes by showing the extent to which spatial patterns of legal organisation within defined territories reflect market forces or social needs. Thirdly and finally, locational analysis can do more than just provide a pictorial representation of the legal system; it can also be used to suggest alternative distributions for legal services, which would improve their utility and efficiency. Human geography can have a meaningful contribution towards understanding the nature of the process which informs litigation and other disputes. Within the spatial turn, particular attention has been given to spatial organization of societies and



how geography informs and conditions various aspects of the everyday.

Chapter 4 considered how socio-economic rights demonstrate that therein is an entitlement to receive certain basic need that enables its beneficiaries to participate fully in society. The manner in which the rights are formulated in the constitution indicate the idea of active transformation of our law and society. Socio-economic rights are one of the strong indications of a post-liberal and transformative nature of the constitution. Brand's conception of transformation in the socio-economic context that such transformation can only occur, if at the same time you give houses, food or an education to impoverished people who lacked such access before. So part of socio-economic transformation is enhancing the political capacity of impoverished people. One way in which courts can capacitate the impoverished is by giving effect to Klare's proposal which is to justify the judgments and the decisions the court makes in a substantive manner. This creates capacity because it indicates to those whom the courts engages that the court is accountable to them. Justifications of judgements opens up engagement. In this chapter I have discussed the notion of polycentricity which is a concept that clearly acknowledges that many interdependent variables need to be considered by the courts. When courts can appreciate the polycentric nature of socio-economic rights, this enables transformative possibilities. This may also aid the court in deciding who the necessary stakeholders are for meaningful engagements.

The *Mazibuko* case illustrates the predicament of the complainants and demonstrates an impoverished engagement by the court of justice. If we assume, as stated above, that the absence of basic living resources is justice then questions around access to water or lack thereof, strike at the heart of social justice. Further these complainants in *Mazibuko* were not only going to lose access to sufficient water but there was a likelihood of a violation of their constitutionally protected entitlement to water as a matter of right.

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