

# **Law, Spatiality and the Tshwane Urban Space**

by

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## Summary

This project focuses on the relationship between law and space. In the South African context, apartheid can be understood as a legal system that regulated material space. This system produced social relations and conditions that remain, despite the abolition of the apartheid legal system. Spatial justice captures the relationship between law and space. Looking at law from the perspective of spatial justice provides a vocabulary for explaining how spaces (as social relations) remain after laws have gone. Following feminist geographer Doreen Massey, I call for law to recognise relational space. The city of Tshwane's lawscape provides me with three instantiations through which to investigate the spatial justice discourse. The first chapter considers the case of Schubart Park, a high-rise complex in the inner city of Tshwane. An estimated 700 families were evicted from the building complex in 2011. The constitutional court, one year later, ordered the re-instatement of the inhabitants, but the buildings still stand empty. The second chapter focuses on the city of Tshwane street names case. During 2012, a number of street names across the city were changed. The constitutional court, in 2016, handed down a judgment that brings to the surface the notions of belonging in the city. The third chapter traces the grand narrative of the municipality by analysing the mayoral speeches of the past five years and the Tshwane 2055 plan. This project hopes to contribute to the vocabulary of spatiality and spatial justice from a post-apartheid South African perspective and in particular from the vantage point of the administrative capital.

## **Declaration of originality**

I, Isolde de Villiers with student number 23222795, understand what plagiarism is and I am aware of the University's policy in this regard. I declare that this thesis is my own original work. Where other people's work has been used, this has been properly acknowledged and referenced in accordance with departmental requirements. I have not used work previously produced by another student or any other person to hand in as my own.

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# Chapter 1

## Introduction

### 1.1. Research problem

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. These spatial dimensions of law were particularly evident during apartheid in South Africa and the spaces still carry the traces. The central research problem of this project concerns the relationship between law and space. In the South African context, apartheid is understood as a legal system that regulated actual or material (first) space.<sup>1</sup> This system produced certain social relations and conditions (second- and thirdspace)<sup>2</sup> that remain despite the abolition of the apartheid legal system. The notion of spatial justice frames the relationship between law and space. Looking at law from the perspective of spatial justice possibly provides a vocabulary for explaining how spaces (as social relations) remain after laws have gone. One of the main arguments of this project is that law and legal thought generally perceive of space as abstract and that a relational view of space is required instead.

The city of Tshwane's lawscape provides me with three instantiations through which to investigate the concepts and thoughts in the spatial justice discourse. The first substantive chapter, Chapter 2, considers the case of Schubart Park, a high-rise complex in the inner city of Tshwane. The city of Tshwane evicted an estimated 700 families from the building complex in September 2011.<sup>3</sup> The constitutional court, one year later, ruled in favour of the residents and ordered their re-instatement, which by that time was impossible because most of the outer structures of the buildings were

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<sup>1</sup> Firstspace refers to physical space, space that can be measured and mapped. It is a concept used by Edward Soja that corresponds to Henri Lefebvre's notion of perceived space.

<sup>2</sup> Secondspace refers to mental space, ideological space. In Soja E *Thirdspace: Journeys to Los Angeles and Other Real-and-Imagined Places* 1996 he proposed an alternative way of thinking about space, 'thirthing as othering', that is builds on the spatial triads (triple dialectics in Lefebvre's terms or 'trialectics' in Soja's words) of Lefebvre (perceived, conceived and lived space) and that of Michel Foucault (space, knowledge and power). I expand on these concepts below. See section 1.4. Leibniz and Lefebvre: the importance of relative space.

<sup>3</sup> See footnote 212 and section 2.4.2. The politics of inhabitation and the violence of habitat below, for the number of inhabitants evicted. The estimated number of inhabitants evicted is 3000-5000.

removed through looting. The buildings still stand empty. Throughout writing this project, the empty shells of Schubart Park have called for a serious consideration of the concepts of inhabitation, simultaneity, space-time and the gendered relations of space. The next chapter, Chapter 3, focuses on the city of Tshwane street names cases. During 2012, the city of Tshwane embarked on a process to introduce 28 new street names across the city. A number of court cases ensued and the constitutional court in July 2016 handed down a judgement that brings to the surface the notions of belonging, mapping loss and spirit of place. The final chapter before the conclusion, Chapter 4, traces the grand narratives of the Tshwane municipality by analysing the mayoral speeches of the past five years and the Tshwane 2055 vision. These sources connect to concepts such as the right to the city and the sanitation syndrome in cities. With this project I hope to contribute to the vocabulary of 'law and geography', 'law and space', 'law and architecture', the 'lawscape' and 'spatial justice' from a post-Apartheid South African perspective and in particular from the vantage point of the administrative capital; the city of Tshwane/ Pretoria.

The underlying problem of this research project is law's spatiality. Understanding colonialism and apartheid as space-producing systems of law, sheds some light on the reproduction of space and social relationships and the way in which these systems still haunt the present despite their so-called endings. Not only do I look at the continuations, the reproductions and the grand narratives, but also the ways in which the everyday tactics of ordinary inhabitants disrupt these.

## **1.2. City of Tshwane/ Pretoria**

The core difference between Pretoria and Johannesburg is aptly captured by architect Clive Chipkin, who remarked that it could be attributed to the fact that Pretoria was built around a church square and Johannesburg around a market square.<sup>4</sup> Johannesburg and Cape Town, the economical and legislative capitals respectively, are usually topics for research, artworks, novels and poems while Pretoria is not as popular a topic. Bloemfontein, the judicial capital also receives considerably less attention than Cape Town and Johannesburg. There could be several reasons for the lack of creative works that has as its explicit setting and focus the city of Tshwane/

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<sup>4</sup> Chipkin C *Johannesburg Style: Architecture and Society 1880s-1960s* 1993.

Pretoria. Some obvious starting points could include that the city of Tshwane/ Pretoria does not have the excitement and the money of Johannesburg and it lacks the natural beauty and historical traces of Cape Town. The exact reason for the dearth of art and literature from and on the city of Tshwane/ Pretoria is however not the focus of this project. Rather, it is precisely Pretoria/ Tshwane's dullness that surfaces important features of its spatial character. As administrative capital, the bureaucratic character of Pretoria does not invite creative engagement or aesthetic exploration. This meticulous procedural character of Tshwane/ Pretoria masks the city's power, since the ostensible dullness disguises its violence.

Pretoria, named after Voortrekker leader Andries Wilhelmus Jacobus Pretorius (founded by his son Marthinus Wessel Pretorius in 1955), was the administrative and legislative capital of the apartheid regime of the National Party. The city is still the administrative capital and officially called Pretoria, but the broader area around the Pretoria central business district was renamed to the City of Tshwane Metropolitan Municipality. One of the concerns around the name change is that it will obliterate history. The meaning of the word Tshwane is also in dispute. The most plausible explanation is that the word '*tshwane*' is Setswana for the Apies River that runs through the city, but some claim that it is named after an Ndebele chief who ruled the area before the settlement of whites in the area.<sup>5</sup>

The city of Tshwane/ Pretoria is the capital city, the city of capital and of capital punishment.<sup>6</sup> The symbolic value of Tshwane/ Pretoria is at the heart of the debates around the changing of the city's name. Currently, the broader metropolis is called Tshwane and the inner city is still called Pretoria. However, the council is bringing fresh attempts to change the name of the central business district to Tshwane. In this thesis, I use Tshwane/ Pretoria to refer to current day Pretoria and use Pretoria to refer to the apartheid capital.

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<sup>5</sup> Makhubu N 'Pretoria vs Tshwane' *Pretoria News* 13 April 2012 at 1 and Meldrum A 'Renaming Drive will Turn Pretoria into Tshwane' *The Guardian* <http://www.guardian.co.uk> (accessed 27 May 2005).

<sup>6</sup> See section 4.4.2. In chapter 4 I expand thoroughly on capital punishment, and in particular the execution of political prisoners.

The space of time I have taken to write up this project has seen many spatial changes, but also many continuations and stagnations. On the front of the spatial turn in law, with associated concepts such as the right to the city and spatial justice, this discourse has definitely become more acknowledged and commonly used in jurisprudential and other conversations. Globally there has been an increased emphasis on boundaries and borders amidst an increasing global refugee crisis. Brexit in the United Kingdom and the election of Donald Trump has seen a return to place as national boundaried enclave.<sup>7</sup> Terrorism is increasingly defined in terms of territory. Whether an act of violence is classified as a terrorist attack is determined by where it takes place and where those perpetuating the act are 'originally' from. In South Africa sustained student protests over the course of 2015 and 2016, starting with #Rhodesmustfall, developing into #feesmustfall and #afrikaansmustfall brought campuses to a standstill nationally with increased militarisation and heightened violence as campuses closed their campuses and gates to students. The calls for transformation and free decolonized education by the students have been met with a withdrawal into place as fixed and closed and it is yet to be seen if the status quo of the corporatized university will not be strengthened rather than challenged by these protests. In the city of Tshwane, these years were also marked by service delivery protests and marches against insourcing and illegal immigrants to the Union Buildings and to government buildings in the city. The municipal building, Munitoria, was demolished and the council is ready to move into their new building on Madiba Street, Tshwane house. A municipal election in 2016 replaced the mayor Kgosisentso Ramokgopa from the ANC with Solly Msimanga from the DA. These can either mark shifts in the lawscape, or just the reproduction of the space. The empty shells of Schubart Park remain consistently vacant, uninhabited and became increasingly hollow throughout this project.

My instantiations in this project are all situated in the urban context, but the intricate connection between the urban and the rural should not be ignored. Urban studies have contributed significantly to law's spatial turn and so have geography and architecture along with other less apparent spatial disciplines such as literature and philosophy. I now look at the spatial turn broadly speaking and how this was taken up in law.

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<sup>7</sup> On a more parochial level a new all-white all-Afrikaans residence, called after one of Van Riebeeck's company's ships 'De Goede Hoop', at the University of Pretoria has underscored this enhanced embrace of place as a safe, fixed enclave.

### 1.3. The spatial turn (in law)

Space is not new, the study of spatiality is also not new and the impact of space and the spatial on thinking in various fields and disciplines can equally not be labelled as a novel endeavour. In fact, some would say that to claim that the emphasis on space is a new phenomenon, is 'terribly outdated'.<sup>8</sup> What makes the focus on spatiality a 'new' critical idiom is its intensified presence in the literature of various humanities disciplines since the 1960s. The spatiality in literary and cultural studies has similarly become a key concept over the past decades.<sup>9</sup> Foucault pointed out that whereas time was the 'obsession' of the nineteenth century, space became equally important in the mid-twentieth century.<sup>10</sup> Postmodernism has of course also played a role in enabling the spatial turn in these disciplines.<sup>11</sup> Tracing modern thought and the impact of modernity (and in particular a European post-renaissance view) on concepts of space therefore forms an important focus. While also finding traces or roots already in the renaissance, there are sources and factors that are more recent that contributed to the spatial turn. World War two and its aftermath presented a number of motivations for a renewed focus on space: the devastating societal restructuring that followed immediately thereafter, a newfound scepticism of pronouncements in the past, the increased level of mobility and intensified movement brought about by the 'massive movements of populations – exiles, émigrés, refugees, soldiers, administrators,

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<sup>8</sup> In the 1930's Mikhail Bakhtin, a Russian literary theorist, wrote in his essay 'Forms of Time and of the Chronotope in the Novel: Notes toward a Historical Poetics' that '[h]ere and abroad, serious work on the study of space and time in art and literature has only just begun'. The essay was only published in the year of his death 1975 and in a 2008 tribute to him in the form of an edited collection of essays, the editors remarked, in the introduction to the volume, that this statement 'is now terribly outdated'. See Bemong N, Borghart P, De Dobbeleer M, Demoen K, De Temmerman K & Keunen B (eds.) 2010 *Bakhtin's Theory of the Literary Chronotope: Reflections, Applications, Perspectives* Academia Press: Gent. These are the published Proceedings of the workshop entitled 'Bakhtin's Theory of the Literary Chronotope: Reflections, Applications, Perspectives' hosted 27-28 June 2008.

<sup>9</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 3.

<sup>10</sup> 'As Foucault put it, history, not geography was the "great obsession of the nineteenth century"'. Tally R *Spatiality: The New Critical Idiom* 2013 on 27. The full context of the quotation gives some content to the word 'obsession': Foucault M 'Of Other Spaces: Utopias and Heterotopias' (transl.) Miskowiec Jay *Architecture /Mouvement/ Continuité* 1984 on 1 'The great obsession of the nineteenth century was, as we know, history: with its themes of development and of suspension, of crisis, and cycle, themes of the ever-accumulating past, with its great preponderance of dead men and the menacing glaciation of the world.' The text that this quotation is taken from was originally entitled 'Des Espace Autres' and it was used as the basis of a lecture given by Foucault to a group of students in 1967. He did not review the article, which was later published by the French journal *Architecture /Mouvement/ Continuité* in October 1984, and therefore it did not form part of the official body of his work. It was released in the public domain shortly before Foucault's death at an exhibition in Berlin.

<sup>11</sup> Later Tally quotes Frederic Jameson *Postmodernism, or, the Cultural Logic of Late Capitalism* 1991 on 418 and invokes what Jameson refers to as 'the new spatiality implicit in the postmodern'. Tally R *Spatiality: The New Critical Idiom* 2013 on 38.

entrepreneurs, and explorers'.<sup>12</sup> These factors show how displacement and deracination, and not really a homely rootedness, present the impetus for thinking differently about our world in spatial terms. 'As things fall apart' (are falling and continue to fall apart), the spatial turn presents a call for new forms of mapping 'to make sense of spatial or geographical place' as old landmarks fail to give the necessary guidance any longer.<sup>13</sup>

The increased attention to space, in addition to time, is therefore, although a recent turn or a reasonably new critical idiom, not truly new in any ordinary sense of the word.<sup>14</sup> The turn is still rather new in law since the uptake of this new critical idiom has been sparse in legal theory and jurisprudence. I must hastily add however that during the time-space that I wrote up this project, the notion of spatial justice and concepts connected thereto has increasingly started to appear not only in academic discourse, but also in policy documents and acts. Law's spatial turn can be captured, according to Braverman and others in their recent edited collection,<sup>15</sup> in three waves described in terms of disciplines (law, geography and architecture amongst others): the first turn to space was cross-disciplinary,<sup>16</sup> the second phase involved inter-disciplinary work<sup>17</sup> and the third phase can be characterised as post-disciplinary.<sup>18</sup> The question of law's

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<sup>12</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 13.

<sup>13</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 37.

<sup>14</sup> Despite the title of Tally's 2013 publication Tally R *Spatiality: The New Critical Idiom* 2013.

<sup>15</sup> Braverman I, Blomley N, Delaney Da and Kedar A (eds.) *The Expanding Spaces of Law: A Timely Legal Geography* 2014 on 2-12. Through their book, they attempt to establish legal geography as a field of inquiry that is neither a sub-discipline of human geography, nor a specialised area of law. They define legal geography as a stream of scholarship where the interconnectedness of law and spatiality (and in particular the ways in which the one constitutes the other) is the object of inquiry.

<sup>16</sup> The cross-disciplinary explorations, with which the spatial turn can be said to have commenced, are linked to the Law and Society movement started in the 1960s by Ruscoe Pound. There were also human geographers who were concerned with legal issues, but notably not concerned with the law as such. During the 1980s, under this first wave, authors such as Gerald Neuman, John Calmore, Gerald Frug and Richard Briffault considered the spatial dimensions of community and its legal implications. In general, this wave did not take account of the problematic, fluid and complex nature of space, apart from a few authors. One of these authors is Boaventura de Sousa Santos, whose 1987 'Law: a map of misreading toward a postmodern conception of law' introduced a new legal common sense.

<sup>17</sup> The Critical Legal Studies movement of the 1980s and 1990s triggered it. Underlying theoretical foundations included neo-Marxism and poststructuralism. Key works from this time included Gordon Clark's *Judges and the Cities* (1985), Nicholas Blomley's *Law Space and Geographies of Power* (1994) and David Delaney's *Race, Place and the Law* (1998). Davina Cooper's *Governing out of Order: Space, Law and the Politics of Belonging* was an explicitly and normatively critical work, which raised the question of policy-relevant research versus ethical perspectives. The work of Lisa Pruitt exposes, what she terms, the 'metronormative' urban bias.

<sup>18</sup> The third, or post-disciplinary wave, does not see law and spatiality as belonging to separate disciplines. The inquiry is therefore not across disciplines and neither between disciplines, but rather beyond the mere concept of disciplines. It introduces as such a 'third field'. This wave embraces

spatial turn therefore also concerns the question of the nature of law as a discipline, that is, the classification of law as a humanity, a social science or a pure science and therefore also the question of jurisprudence, ideology, point of view, methodology and approach.

Did these waves and engagements across, between and beyond disciplines truly constitute a spatial turn in law? The concept of spatial justice (despite the possibility of critique presented by space) has not embraced the potential of space to disrupt and unsettle the *status quo*. Instead, argues Philippopoulos-Mihalopoulos, engagements with space in law is largely insufficiently theorised and in fact ‘despatialised’.<sup>19</sup> Law’s spatial engagement, he explains, has paradoxically actually been a turn away from space because it has either been parochial and affirming, through for example established principles of jurisdiction, or secondly it has been merely a ‘flirtation’ with terminology through the employment of spatial metaphors. Philippopoulos-Mihalopoulos calls this ‘simply add space and stir’.<sup>20</sup> Spatial justice should truly be in-between. This means that it belongs neither to law nor to space, with space and law forever elusive to one another. Understood in this way, spatial justice is a radical conception and not merely a linguistic endeavour or an attempt at finding ground in geography. Spatial logic in law (as opposed to formal logic in law) therefore exposes law to the ‘simultaneous contingency of space’; it allows space to be law’s mirror and treats space as an ethical position.<sup>21</sup>

The book, *Henri Lefebvre: Spatial politics, everyday life and the right to the city*, by Butler,<sup>22</sup> is a central text in spatial justice theory. He examines the work of Lefebvre thoroughly within the context of law. Lefebvre’s work mainly involves geography, urban planning, cultural studies and social theory. Butler provides a systematic analysis of Lefebvre’s work and its significance in the fields of law and state power. His main

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legal pluralism, a view that does not view law as primarily and inherently the project of the state. Braverman I, Blomley N, Delaney D and Kedar A (eds.) *The Expanding Spaces of Law: A Timely Legal Geography* 2014.

<sup>19</sup> Philippopoulos-Mihalopoulos A ‘Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space’ *Law Culture and the Humanities* 2010 on 188.

<sup>20</sup> Philippopoulos-Mihalopoulos A ‘Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space’ *Law Culture and the Humanities* 2010 on 192.

<sup>21</sup> Philippopoulos-Mihalopoulos A ‘Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space’ *Law Culture and the Humanities* 2010 on 195-196.

<sup>22</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012.

argument is that critical legal scholars use the work of Lefebvre for framing a view of the law as continuous processes of production and political struggles over inhabitation. These processes continuously shape law and state power. Before I look at Butler's reading of Lefebvre, and in particular, how he unpacks the right to the city and the notion of inhabitation, I look at the work of Jennifer Nedelsky. Even though Nedelsky is not commonly cited as a spatial justice theorist or a law and geography scholar, I regard her work on rights as relations as spatialising law. Nedelsky looks at rights in terms of the ways in which they are produced by relations; thereby she acknowledges the radical uncertainty of space and its interaction with rights. The thinking of Descartes, Newton, Leibniz, Spinoza and Kant all contributed to the increased focus on space.

#### 1.4. Leibniz and Lefebvre: the importance of relative space<sup>23</sup>

Even though Descartes, Newton, Leibniz, Spinoza and Kant all engaged with space and their theories were influential in the development of theories on space, their points of departure differed greatly. For Descartes space was grid-like and corresponded with the mathematical principle of the Archimedean point on which his entire philosophy was based. This principle also relates to the first Cartesian principle of *cogito ergo sum*, and just like Archimedes' single strong point from which the earth can be moved, the perspective of an individual can somehow be generalised as a broader view of the world.<sup>24</sup> Descartes held that space could not be separated from bodies in space. He therefore rejected a view of space as a vacuum or vessel within which bodies are held. This view of space as a substance in itself is congruent with a Euclidean notion of space, but departed from the classical view of space as a 'plenum that was full of matter'.<sup>25</sup> The idea of space as a vacuum was however embraced by Newton, who disagreed with Descartes in viewing space as 'absolute, independent, infinite, three-dimensional, eternally fixed' as a container.<sup>26</sup> Leibniz objected to Newton's view on theological grounds since it entailed that space existed before God's creation, which was a situation untenable for Leibniz. I return to the distinction between Leibnizian and

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<sup>23</sup> The ideas expressed under this heading have been published in De Villiers I 'Leibniz, Lefebvre and the Spatial Turn in Law' *HTS Theological Studies Journal* 2016 72 1 1-6.

<sup>24</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 27.

<sup>25</sup> This view was held for instance by atomist Lucretius around a century BCE, see Tally R *Spatiality: The New Critical Idiom* 2013 on 28.

<sup>26</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 28.



Newtonian concepts of space in the thinking of Lefebvre, who preferred Leibniz's relative space to Newton's absolute space.<sup>27</sup> Leibniz argued that space does not exist separately, but can be viewed as the relationship between bodies; in a similar way as we would view distance between two points.<sup>28</sup> Leibniz therefore introduces the idea of space as relational. For Spinoza, space itself was God/ Nature.<sup>29</sup> Kant rejected the views of both Leibniz and Newton and held, in step with his 'Copernican Revolution' that the world cannot be perceived how it really is, rather our human reason can only grasp the world as it is seen by us.<sup>30</sup> In contrast to space as real and objective, Kant viewed it as ideal and subjective.<sup>31</sup> For him the Newtonian absolute space 'belonged to the world of fable' and the proponents of Leibniz and his concept of relational space ran the risk of 'cast[ing] geometry down from the summit of certainty' and therefore he insisted on an understanding of space as a mental construction.<sup>32</sup>

Some expansion on the work of Leibniz is warranted since he has had a great impact on the conceptualisation of spatiality in the context of spatial justice. The work of Chris Butler makes a convincing case for the relevance of Lefebvre (and how he was influenced by Leibniz) for considering the relation between spatiality and law and power.

We can say also that God, the Architect, satisfies in all respects God the Law Giver, that therefore sins will bring their own penalty with them through the order of nature, and because of the very structure of things, mechanical though it is. And in the same way, the good actions will attain their rewards in mechanical way through their relation to bodies.<sup>33</sup>

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<sup>27</sup> Lefebvre H *The Production of Space* 1991 on 1-3 and Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 in Chapter 2.

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

<sup>29</sup> This view is important to Deleuze's development of the notion of 'nomadology'. Nomadology captures the distinction between nomadic approaches and statist approaches as identified by Deleuze in '1227 *Treatise on Nomadology: The War Machine*', the twelfth plateau in Deleuze G and Guattari F *A thousand plateaus: capitalism and schizophrenia* (transl.) Massumi B 2004. The statist or agricultural model corresponds with Cartesian conceptions of space as divided into fixed territories and is associated with Kant. Deleuze views Spinoza, Lucretius and Nietzsche as 'nomad-thinkers' and their approach to space as nomadic, not fixed to categories and without exact limits. For a discussion of these concepts in the context of the broader spatial turn and the concept of geocriticism see Tally R *Spatiality: The New Critical Idiom* 2013 on 29, 127-132 and 157.

<sup>30</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 29.

<sup>31</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 29 referring to Kant I *Theoretical Philosophy 1855-1870* (transl.) Walford D and Meerbote R 1992 on 397.

<sup>32</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 29 referring to Kant I *Theoretical Philosophy 1855-1870* (transl.) Walford D and Meerbote R 1992 on 397.

<sup>33</sup> Leibniz G 1714 *Monadology* Latta R (transl.) 2014 at paragraph 89. The paragraphs of Leibniz's *Monadology* are numbered and I refer to the number of the paragraph.

Central to Leibniz's view of space is the idea that nature brings about difference. He based this assertion on the fact that there are no trees or even leaves of trees that look exactly like another. With this, he noted that identity and repetition have an incongruous relationship to divergence and variation. Nature produces trees (repetition), but nature produces also difference (trees are not identical). Lefebvre uses this argument of Leibniz to call for also recognising this principle in spaces created through by humans. He showed how these spaces are just as varied as the landscapes produced by nature.<sup>34</sup>

It is common cause amongst western historians that Descartes ended the tradition that, following Aristotle, viewed space and time amongst other categories that assisted to group and name sensory observations and evidence. Descartes in many ways can be said to have introduced the contemporary view of space, which, like many branches of the sciences and especially mathematics, became systematically removed from the roots it shared with metaphysics. After Descartes, space and time were either seen as simple pragmatic apparatuses for assembling sensory data or seen as somehow elevated above the information provided by the senses of the body. His Cartesian logic ushered in a view of space as absolute. The philosophers who came after Descartes (Spinoza, Newtonians, Leibniz) considered space as such a dominant category that the questions they debated were whether space was a divine quality or an 'order immanent to the totality of what existed'. It was Kant who brought back the former idea of space as category. For Kant space was relative, an ontological tool and a way to group together phenomena. Space was however removed from the empirical sphere and was seen as a subset of the foundation of consciousness. That entailed that space participated in the internal and the ideal, and accordingly took on qualities of the transcendental which ultimately made it ungraspable.<sup>35</sup>

Metaphysical thought (or classic philosophy) presented space as a substance in itself, which Lefebvre terms 'absolute space'.<sup>36</sup> He explains that Spinoza attributed space to an absolute being (for Spinoza this absolute being was God). Seen in this manner,

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<sup>34</sup> Lefebvre H *The Production of Space* 1991 on 397.

<sup>35</sup> Lefebvre H *The Production of Space* 1991 on 1-2.

<sup>36</sup> Lefebvre H *The Production of Space* 1991 on 169.

space could be perceived of as infinite and therefore without shape or content. Space perceived as without direction, form, or orientation, could create the impression that it is not something that can be known or understood. Space as such could not be fathomed. However, Lefebvre instead insists on the formulation of Leibniz, namely that space, despite its divine and absolute attribution, is not unknowable, but instead 'indiscernible'.<sup>37</sup> The significance of viewing space as 'indiscernible' as opposed to incomprehensible, lies in Leibniz's understanding of 'indiscernible'. With 'indiscernible', he proposes that space cannot be reduced to anything: 'Space in itself [is] neither "nothing" nor "something" – and even less the totality of things or the form of their sum'.<sup>38</sup> Lefebvre emphasises that Leibniz's view is preferred by modern mathematics, even though philosophers have taken space and its proportions and figures for granted. To discern space or to discern something within space requires, for Leibniz, that there must be axes that have direction, i.e. an axe must have an origin as well as a left and a right. Since space in itself is indiscernible, it needs to be occupied in order to be discerned. Furthermore, for Leibniz, it cannot merely be occupied by anybody or any object; instead, it should be a body that gives direction to space and can define and demarcate it.<sup>39</sup> This brings Lefebvre to conclude that Leibnizian space is simultaneously concrete and abstract; abstract because it is underpinned by mathematical thinking that gives space a primordial and transcendental character and yet concrete because it is marked by the requirement of occupation. The rejection of abstract space (space as *a priori* a vacuum with only formal attributes) entails the rejection of a certain representation of space. Lefebvre emphasises that Leibniz rejects abstract space and distances himself from the idea of space as an empty container that waits only to be filled with bodies. The logic of the container is ruled by separateness. In a container separate, separated and separable entities collect in fragmented fashion. He argues that this mode of separation is transferred to entities and their components: 'fragmentation replaces thought, and thought, reflective thinking, becomes hazy and may eventually be swallowed up in the empirical activity of simply counting things'.<sup>40</sup>

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<sup>37</sup> Lefebvre H *The Production of Space* 1991 on 169.

<sup>38</sup> Lefebvre H *The Production of Space* 1991 on 169.

<sup>39</sup> Lefebvre H *The Production of Space* 1991 on 170.

<sup>40</sup> Lefebvre H *The Production of Space* 1991 on 170.

Lefebvre calls this the 'logic of separation' that supports and is constituted by a 'strategy of separation'.<sup>41</sup> In light of this, Lefebvre proposes a different conjecture. He suggests that the only alternative that one can pose to the logic of separation that marks abstract space is to think whether a body can make space. He highlights in particular the body's ability to be active and the varying energies of bodies. Because there is a direct link between the body and the space of the body, there is a relationship between the body's 'occupation of' and 'deployment in' space.<sup>42</sup>

Before producing effects in the material realm (tools and objects), before producing itself by drawing nourishment from that realm, and before reproducing itself by generating other bodies, each living body is space and has its space: it produces itself in space and it also produces that space. This is a truly remarkable relationship: the body with the energies at its disposal, the living body, creates or produces its own space; conversely, the laws of space, which is to say the laws of discrimination in space, also govern the living body and the deployment of its energies.<sup>43</sup>

The idea that space is produced by bodies, and the relations between them is productive because it enables the reproduction of space, correlates with notions of spatial memory or spatial legacy. For Lefebvre, space is created by a three-way dialectic of perceived, conceived and lived space. Edward Soja's corresponding terms are firstspace, secondspace and thirdspace.<sup>44</sup> Initially this thesis was structured around Lefebvre's three-way dialectic linked to Soja's three spaces. Instead of having one chapter per 'space' category, all the chapters now encompass perceived, conceived and lived space; also acknowledging that these categories are not necessarily clear cut and trying to constantly move beyond law's conceived space. I provide an overview of Lefebvre's and Soja's distinctions between these spaces here.

Firstspace is represented space, secondspace representational space and thirdspace is lived space. Representation pertains to a standing in relation to the real. The representation of space, including geography, is 'thoroughly enmeshed with the larger battles which constitute our world', as Harley points out.<sup>45</sup> The intricate relationship

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<sup>41</sup> Lefebvre H *The Production of Space* 1991 on 170.

<sup>42</sup> Lefebvre H *The Production of Space* 1991 on 170.

<sup>43</sup> Lefebvre H *The Production of Space* 1991 on 170.

<sup>44</sup> Soja E *Thirdspace: Journeys to Los Angeles and Other Real-and-Imagined Places* 1996.

<sup>45</sup> Harley JB 'Deconstructing the Map' in Laxon P (ed.) *The New Nature of Maps: Essays in the History of Cartography* 2001.

between architecture, mathematics, philosophy and art becomes clear in the historical development of perspectives on space, and, as Robert Tally explains, definitely in the spatial views of societies of early modern Europe.<sup>46</sup> The development of cartography is connected to the revolution in modern thought that brought about the geometrical method; where abstract space is not necessarily tied to, nor seen in relation to place.

Secondspace can be thought of as mental space or, in Lefebvre's terms: 'conceived space'. It is space that is conceptualised, 'the space of scientists, planners, urbanists, technocratic sub-dividers and social engineers',<sup>47</sup> and lawyers, I add. It is also the space of 'a certain type of artist with a scientific bent - all of whom identify what is lived and what is perceived with what is conceived'.<sup>48</sup>

Thirdspace is when secondspace expectations mediate the experience of life in the firstspace.<sup>49</sup> If firstspace is what can be perceived (the built environment of the city and the things, places and aspects that can be seen and therefore mapped) and secondspace is the space that is conceived (that which is imagined or regulated or ordained and argued over; the space of architects, marketing and law), then thirdspace is somewhere between first- and secondspace. It combines first- and secondspace to create what Soja describes as, 'a fully lived space, a simultaneously real-and-imagined, actual-and-virtual locus of structured individuality and collective experience and agency'.<sup>50</sup> Soja continues that thirdspace is space that is fully lived, 'a simultaneously real-and-imagined, actual and virtual locus of structured individuality and collective experience and agency'.<sup>51</sup> It is the result of 'thirthing', which means another way of thinking about space, a new spatial imaginary. Lefebvre locates lived space as follows:

This world of images and signs, this tombstone of the 'world' (*'Mundus est immundus'*) is situated at the edges of what exists, between the shadows and the light, between the conceived

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<sup>46</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 26.

<sup>47</sup> Lefebvre H *The Production of Space* 1991 on 38.

<sup>48</sup> Lefebvre H *The Production of Space* 1991 on 38.

<sup>49</sup> Soja E *Thirdspace: Journeys to Los Angeles and Other Real-and-Imagined Places* 1996.

<sup>50</sup> Soja E *Thirdspace: Journeys to Los Angeles and Other Real-and-Imagined Places* 1996.

<sup>51</sup> Soja E *Postmetropolis* 2000 on 11.

(abstraction) and the perceived (the readable/visible). Between the real and the unreal. Always in the interstices in the cracks.<sup>52</sup>

Soja emphasises that his conceptualisation of thirdspace comes from Lefebvre's insistence that 'two terms are never enough'.<sup>53</sup> It is on this account that Foucault developed the concept of 'heterotopology' and Lefebvre developed the notion of 'lived space' (as an other to perceived and conceived space). Foucault wanted to capture space as both enabling and oppressive, Lefebvre insisted on the social production of space. Thirdspace, lived space and heterotopology are alternative ways of thinking about space based on a 'trialectic' approach to space. The third term is not introduced as a way of mediating between or consolidating existing dialectics on space (physical and mental, space and knowledge), but rather to disrupt and to subvert. This is what thirding as othering entails. The emphasis on lived space is important. In addressing the research problem regarding the lingering effect of law on space, and the role that a legal culture which sees space mainly as un-lived and abstract as opposed to relational play in creating this problem, I ask three narrower research questions, which all have their origin in the thirdspace, in lived space, in an other space. If, for Lefebvre, 'two terms are never enough', and the aim of Soja's thirdspace was to introduce an other term, thirdspace, I want to insist that even three terms are never enough. It is therefore that I draw on Massey's work. Her approach to space as heterogeneous and open and as the coming together of stories thus far, introduces another term, or terms as it were. I expand on this approach below.

### 1.5. Approach and methodology

The main conceptual framework of this project draws from the work of Doreen Massey, a geographer. Working in the field of human geography, her work concerns the study of places where we live. Massey came through the Marxist ranks as a geographer, but her theory lacks the sometimes-dogmatic elements associated with Marxist thought. In her early work she relies strongly on Lefebvre and other Marxist scholars, but develops her own and distinct voice in later works such as *for space*. Massey's geography places gender firmly and centrally on the agenda. As I explain above, the

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<sup>52</sup> Lefebvre H *The Production of Space* 1991 on 389.

<sup>53</sup> In the French: 'il y a toujours l'autre'. Ikas K and Wagner G (eds.) *Communicating in the Third Space* 2009 on 52.

work of Lefebvre played a big role in the spatial turn in law. A feminist approach to the work of Lefebvre is important for many reasons and, for addressing the research problem in this thesis, in particular for the following three reasons. Firstly, it emphasises the unequal gender relations that produce and are produced by space. Space is gendered through and through. Following the Lefebvrian concept of the production and reproduction of social space to think about colonialism and apartheid, a feminist approach enables us to see both colonialism and apartheid also as distinctly modernist masculinist projects. Secondly, Lefebvre's social space (as opposed to abstract space) calls for the acknowledgment of space as relational.<sup>54</sup> Social space is a 'concrete abstraction'; it is abstract, but in a very real sense, since it has very real implications.<sup>55</sup> Both Butler<sup>56</sup> and Andreas Philippopoulos-Mihalopoulos<sup>57</sup> call for law to be approached as concrete abstraction. In this sense, law must acknowledge social space, must recognize that space is produced by social relations. Lefebvre writes: '[i]f space embodies social relationships, how and why does it do so? And what relationships are they?'<sup>58</sup> A feminist approach gives content to these relations and draws from a long history of relational theory in feminist scholarship. Thirdly, the ostensible fatalistic trap of a never-ending and inescapable trap of Marxist production and reproduction is suspended by Massey's feminist thinking. She argues that maintaining space (the continuation of space) is hard work and takes extreme effort and exercises of power. There is therefore a possible way out of the endless cycle of the reproduction of unequal spatial relations. Massey furthermore highlights the gaps in the thinking of other prominent spatial justice thinkers, such as David Harvey and Soja.<sup>59</sup>

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<sup>54</sup> Lefebvre H *The Production of Space* 1991 on 26-27.

<sup>55</sup> Lefebvre H *The Production of Space* 1991 on 27.

<sup>56</sup> Butler explains that law can best be understood in terms of Lefebvre's concrete abstraction and elaborates on this in chapter 3. Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 6-7, 42-43 and 55-79, and more recently Butler C 'Abstraction Beyond a 'Law of Thought': On Space, Appropriation and Concrete Abstraction' *Law and Critique* 2016 27(3) 247-268.

<sup>57</sup> In calling for the project of spatial justice to be both realistic and utopian, Philippopoulos-Mihalopoulos relies on Lefebvre's view of space as a 'concrete abstraction'.<sup>57</sup> Philippopoulos-Mihalopoulos A 'Law's Spatial Turn: Geography, Justice and a Certain Fear of Space' *Law Culture and the Humanities* 2010 on 195.

<sup>58</sup> Lefebvre H *The Production of Space* 1991 on 27.

<sup>59</sup> See sections 2.5.4. Radical geography and/ as feminist critique and 2.7.2. Time-space-compression.

A second important underlying approach is the emphasis on stories. Massey says we should see space as the simultaneity of stories-thus-far.<sup>60</sup> There are different stories and storylines gathered in this thesis. Initially I wanted to include a lot more novels and poems than what currently features in the work. Throughout I call for the acknowledgment and inclusion of the everyday narratives of ordinary people in the administrative capital. The stories of the women of Schubart Park are at the heart of Chapter 2, Chapter 3 asks how we acknowledge the everyday lives and narratives of those who are not heroes and heroines, and Chapter 4 draws attention to the way in which the grand narratives of the city exclude the ordinary stories of its inhabitants. The importance of literature, its influence on the spatial turn broadly speaking and its close connection to law, run through this thesis. In chapter 3, I expand in more detail on the role of literature,<sup>61</sup> but there are also stories and literary works in each of the chapters. Woven through the thesis are the following texts: in chapter 2, the stories of some women of Schubart Park, in chapter 3, three novels on the notion of home<sup>62</sup> as well as NoViolet Buluwayo's *We Need New Names*,<sup>63</sup> and in chapter 4 the poems of two Pretoria poets,<sup>64</sup> as well as Hilda Bernstein's *The World that was Ours* and a short story by Eugene Marais.<sup>65</sup>

## 1.6. Research questions and chapter overview

Below I outline the main and sub research questions underpinning each chapter.

Chapter 2: How is the lingering effect of law evident in the case of Schubart Park and what role did abstract space play in the eviction of the residents? In order to address this question, I ask a series of subsidiary questions: Can spatial justice concepts such

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<sup>60</sup> Massey D for space 2005 on 9. Viewed in this way, this thesis is also the coming together of stories up to now. An article that relies on the work of Jennifer Nedelsky and Martha Nussbaum is entitled 'The universe is made of stories, not of atoms'. Van Marle K 'The Universe is Made of Stories, not of atoms' *Phronimon* 2000 2 346-360. The title is taken from the words of poet Muriel Rukeyser as quoted by André P Brink in his 1998 *Duiwelskloof*. In this article, Van Marle weaves stories together, amongst others the stories of Nussbaum and Nedelsky, and stories told at the Truth and Reconciliation Commission. This thesis follows a similar approach.

<sup>61</sup> See sections 3.4.5. Literature and 3.4.6. Literary cartography (writing as mapping and writer as mapmaker).

<sup>62</sup> See section 3.3.4.1. Home: three novels. The novels are *Home* by Toni Morrison and the same title by Marilyn Robinson as well as Zoë Wicomb's novel *October*.

<sup>63</sup> See section 3.4.6. Literary cartography (writing as mapping and writer as mapmaker).

<sup>64</sup> Lebogang Lance Nawa and Wilma Stockenström. Although Stockenström was not born in Pretoria, as Nawa was, she lived in Pretoria and wrote several poems on the city. Initially I wanted to include more works of literature.

<sup>65</sup> See section 4.3.1. Political trials.



as the right to the city, simultaneity, a focus on inhabitation and the everyday stories of inhabitants change this view of space? Why is space gendered and how does such a view of space challenge abstract space? Can concepts of time-space present an alternative to abstract (dead) space that will take account of lived experiences, inhabitation and heed the call for the right to the city.

Chapter 3: What is the impact of the production and reproduction of space as unequal social relationship through law on a sense of belonging? This broad question is answered with particular reference to the Tshwane street names case and consists of the following sub-questions: What do the street names cases in the city of Tshwane/ Pretoria reveal about a sense of belonging in the city? How is the sense of belonging connected to a spirit of place? What is mapping/ drawing lines and how does it foster or foreclose a sense of belonging in the city? What does it mean to map tentatively by to drawing lines of flight? Can rogue urbanism, as a form of mapping African cities, contribute to another sense of belonging in cities? How does and can literature critically engage with law's approach to space as abstract in order shape an understanding of belonging in post-Apartheid South Africa?

Chapter 4: Is the continuing story in the Tshwane lawscape a grand narrative of violence through administrative power linked to a view of space as abstract? This is an important question given the bureaucratic nature of the administrative capital. I break this question up into the following parts: What are the past and contemporary grand narratives of the city of Tshwane/ Pretoria? How can spatial justice respond to and disrupt these grand narratives? Is our formalistic culture part of the spatial continuation? What are the possible gaps in spatiality and how can these gaps be identified with reference to the grounding of Lefebvre through Leibnizian space?

Throughout this thesis, I rely on the work of Massey. I link each chapter with a core concept of hers. Schubart Park, in chapter 2, resonates strongly with the notion of simultaneity. This block of flats, the evictions and the court cases highlight the relational nature of space, even though this feature was not acknowledged in the legal processes. I therefore rely on Massey to draw attention to these gaps and silences and the importance of viewing space as heterogeneous simultaneity. This also links to the ideas of difference, inhabitation and the everyday covered in chapter 2. The street name case, which forms the basis of chapter 3, relates to Massey's

understanding of place. Chapter 3 takes up different understandings of belonging and look into the phenomenological concept of *genius loci*. Massey understands place not as fixed, but as open. She questions the distinction that is often made between space (in flux) and place (static). This is an important framework for chapter 3 and the arguments on belonging. Chapter 4 centres on the grand narratives of the city of Tshwane/ Pretoria. These include the sanitation syndrome during colonial times, the forced removals and cluster of acts that enabled the apartheid project and more recently, the state of the city addresses by the mayor, as well as the ‘world-class’ city plan *Tshwane 2055*. For this chapter, Massey’s critical stance to the concept of ‘world city’ that she created, presents a critique of present day gentrification and globalisation as well as former strategies of state power as seen in colonialism and apartheid. I conclude this project by reflecting on what a geography of responsibility might mean in the context of law in 2017 in South Africa’s administrative capital.<sup>66</sup> I proceed to the stories of the city of Tshwane/ Pretoria, thus far.

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<sup>66</sup> Massey D ‘Geographies of Responsibility’ *Geografiska Annaler: Series B, Human Geography* 2004 86 5–18.

## Chapter 2

### Schubart Park: women's voices and the right to the city



A picture showing the lawscape: a red traffic light, a one-way sign, and a new construction site across the empty shells of Schubart Park  
(Photograph taken during spring 2016).

Precisely because space is a product of... relations-between, relations which are necessarily embedded in material practices which have to be carried out. It is always in the process of being made. It is never finished; never closed. Perhaps we could imagine space as a simultaneity of stories-thus-far.<sup>67</sup>

#### **2.1. Introduction**

At the core of this project lies spatiality: space as relational. More specifically, I am interested in the relationship between law and space. The broad research problem that I identify is the lingering or continuing effect of law on spaces. The relationships produced by law persist long after the laws that created these relations have been abolished or repealed or have fallen into disuse. This is particularly evident in post-apartheid South Africa. In this sense, I identify a spatial memory or haunting of space or spatial lingering. This concept of the production and reproduction of space as unequal relationships as opposed to a notion of space as abstract is central to a critical

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<sup>67</sup> Massey *D for space* 2005 on 9.

version of the spatial justice project. In this chapter, I investigate the idea of spatial continuation or reproduction through the instantiation of Schubart Park in the city of Tshwane/ Pretoria. Built during apartheid as a civil servant housing scheme nowadays completely abandoned, this apartment complex provides a suitable backdrop against which to investigate the ways in which law conceives of space as abstract. In this chapter, I start with an overview of the history of the apartment complex. The events and court cases relating to Schubart Park highlight several important spatial justice aspects. I look specifically at five concepts. Firstly, the right to the city and how the court processes and the conduct of the city council illustrate who is considered to have the right to the city. I unpack the right to the city specifically as a cry and a demand and as connected to the right to difference. Secondly, I consider the differing notions of habitat and inhabitation and how these are echoed in the distinction between eviction and evacuation. The third aspect concerns Schubart Park as gendered space and the women's voices heard and ignored by the legal process. Here notions of throwntogetherness and relationality are important. Fourthly a gendered approach to space places emphasis on the everyday lived realities of inhabitants through which there can be tactics to challenge the limiting effect in the abstract space of law and power. Lastly space as connected to time and associated concepts such as 'space-time compression' and the 'chronotope' show how space when placed in conjunction with time is also a way of challenging abstract, fixed, un-lived space.

## **2.2. Schubart Park**

### **2.2.1. The early history and construction of the apartment complex<sup>68</sup>**

The Schubart Park apartment complex consists of a set of four high-rise buildings in the central business district of Pretoria/ Tshwane. The four high rises together with a supermarket, community hall and swimming pool form the Schubart Park complex, and the remnants still occupy almost an entire city street block in the western part of the city. Three of the four buildings (blocks A-C) have 25 floors and the fourth one

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<sup>68</sup> Parts of the history of Schubart Park, as well as the discussion of the court cases have been published in Van Marle K and De Villiers I 'Law and Resistance in the City of Pretoria: Space, History and the Everyday' *The Australian Feminist Law Journal* 2013/38 129-145.

(block D) has 28 floors; amounting to a total of 813 units in the complex.<sup>69</sup> The four high-rise buildings were all built on raised platforms of three stories high each and they were connected by a mezzanine level to form an integrated whole. The towering structure of Schubart Park is a distinct feature of the city of Tshwane/ Pretoria skyline. These structures were built during the mid-seventies. What were at one stage the homes of approximately 5000 city inhabitants, are now entirely empty. Schubart Park was originally built to provide low-cost social housing to civil servants in the capital. The apartheid government's National Housing Board commissioned the building of Schubart Park in order to provide white middleclass civil servants with accommodation in close proximity to the administrative capital and also to prevent the spread of a racially mixed low income neighbourhood in Pretoria.<sup>70</sup> Its construction commenced in 1976. It was designed as a whole district in itself with recreational facilities. As a building of modernist typology it was very impressive for its time and intended to be the first of several replicas of this structure to be built around the city of Pretoria.<sup>71</sup> The replication of the apartment complex was never realised. Blocks A to C are built on the same plans with vertical rows of each flat stacked upon the other to form a rectangular block. Block D is built in a cross-like fashion that is reminiscent of Le Corbusier's drawing of a tower block for his plan for a contemporary city of three million people.<sup>72</sup> At the outset the apartments were intended to be a social housing project to provide subsidised accommodation to civil servants working in the city. Rental amounts included electricity and tenants paid rent according to their income. Their close proximity to the inner city district was important for assisting, in a bureaucratic manner, with the project of law at the time, namely racial segregation through spatial regulation and organisation. When it was built, the complex was an impressive structure and the

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<sup>69</sup> To write about Schubart Park in the present tense can be misleading because the whole apartment complex is now deserted and dilapidated to such an extent that the past tense seems more appropriate.

<sup>70</sup> The project cost around R 8.3 million at the time. Du Toit J 'Utopia on trial again: Perceived resident quality at Schubart Park in South Africa' 2009 26:2 *Journal of Architectural and Planning Research* on 161. It was built both to further the racial segregation strategies and to address the poor white question as captured in the first Carnegie report. The findings of the first Carnegie commission of enquiry were authored by J F W Grosskopf; R W Wilcocks; E G Malherbe; W A Murray; J R Albertyn and published as *The poor white problem in South Africa. Report of the Carnegie Commission* 1932 Pro ecclesia-printers: Stellenbosch.

<sup>71</sup> Swart J *Urban Church. Re-developing space within Pretoria's Schubart Park Complex* 2011.

<sup>72</sup> Swart J *Urban Church. Re-developing space within Pretoria's Schubart Park Complex* 2011 on 84.

only one of its kind in Pretoria at the time. The only other residential high rise at that stage was Kruger Park, adjacent to the Schubart Park complex.<sup>73</sup>

After South Africa's transition to democracy in 1994 the demographics of the inhabitants of the flats changed, partially because of the city opening up to other races and subsequently due to what has been termed the 'white flight' from the inner city.<sup>74</sup> The buildings increasingly deteriorated, mainly due to neglect and the lack of services provided by the city council. Ownership of the apartment complex changed. After 1994 the administration of Schubart Park fell to the Gauteng Housing department.<sup>75</sup> This meant that racial and income integration was part of the policies regulating the housing complex. The complex came under the full control of the Pretoria city council in 1999. As the city council partially privatised some of their services, the municipal entity Housing Company Tshwane was formed in 2001 and took over the housing complex in 2005.<sup>76</sup> Many attribute the start of the problems of the blocks to the takeover by Housing Company Tshwane,<sup>77</sup> but it is clear from various newspaper reports, as well as from the Human Science Research Council's (HSRC) research report on place perspective in the eighties, that the problems existed prior to this date. The years from 2005 were marked by reduced service delivery, poorer tenant control and general deterioration of the block.<sup>78</sup> For several years, the situation only became worse; the

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<sup>73</sup> The Civitas Building, Poyntons Centre, Agricultural Union Centre, National Treasury Building, Telkom Towers (North and South) and Hallmark Building were the only other buildings taller than Schubart Park in the whole of Pretoria in the days of its construction.

<sup>74</sup> For engagements with the concept of 'white flight' from South African cities, see for example: Saff G 'The Changing Face of the South African City: From Urban apartheid to the Deracialization of *Space*' *International Journal of Urban and Regional Research* 1994 18(3) 377-391, Visser G 'Gentrification and South African Cities: Towards a research agenda' *Cities* 2002 19(6) 419-423, Tomlinson R '1678 From exclusion to inclusion: rethinking Johannesburg's central city' *Environment and Planning* 1999 31 1655-1678, Donaldson R 'Mass rapid rail development in South Africa's metropolitan core: Towards a new urban form?' *Land Use Policy* 2006 23 344-352.

<sup>75</sup> Du Toit J 'Utopia on trial again: Perceived resident quality at Schubart Park in South Africa' 2009 26:2 *Journal of Architectural and Planning Research* on 161.

<sup>76</sup> Du Toit J 'Utopia on trial again: Perceived resident quality at Schubart Park in South Africa' 2009 26:2 *Journal of Architectural and Planning Research* on 161-162.

<sup>77</sup> Housing Company Tshwane (sill) describes themselves as the leading providers of social housing in the city of Tshwane. Created in 2001 they have been mandated to promote, let, develop and maintain property primarily for low and middle-income classes. To qualify for their property one must at least be 21 years of age, must be married or single with dependants and must earn a household income between R4000 and R7500. Some of the Schubart Park inhabitants are still housed in HCT properties – such as Clarina. [www.thehct.co.za](http://www.thehct.co.za). Yeast City Housing, the first social housing company in South Africa, also operates in Tshwane, but under the Social Housing Act.

<sup>78</sup> Du Toit J 'Utopia on trial again: Perceived resident quality at Schubart Park in South Africa' 2009 26:2 *Journal of Architectural and Planning Research* on 163-164.

water was cut off for long periods, the overall upkeep and maintenance were neglected and reports of criminal activity increased.

On 21 September 2011 things took a decided (and tragic) turn. The City of Tshwane Metropolitan Council (the city council)<sup>79</sup> terminated the supply of water and electricity to the block around 11 September 2011. According to the established pattern the residents on 21 September 2011, in an attempt to raise awareness of the problem through protest, were caught in a literal battle with city authorities after two localised fires broke out in one of the blocks and residence of that block were evacuated. Before this termination of services in 2011, the residents and the city council were involved in on-going disputes about the provision of services such as water, electricity and refuse removal. The city council stalled the provision of these services to the housing complex and this used to lead to violent protests, fires and subsequent arrests of those involved in the protesting, but also those looking on or merely visiting other residents in the housing complex. This long history of the city council's denial of a sense of place is what really lies beneath the court case before the constitutional court. On 22 September 2011 the legal representatives of the residents applied to the North Gauteng high court for an interdict to prevent the imminent evacuation of the residents from the housing complex.

The city council saw the events of 21 September 2011 as an opportunity to evict the inhabitants of Schubart Park. The city council claimed that it was an emergency and evacuated the residents instead of evicting them, which would have required a longer process and, notably, also meaningful engagement. More than a year after the evacuation/ eviction the constitutional court ruled that the evacuation was not a proper solution to the longstanding problems between the city council and the inhabitants.<sup>80</sup>

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<sup>79</sup> The Constitutional Court refers to 'the City' but I choose to refer to the City Council to avoid creating the impression that the administrative body that is the City Council is 'the city' and by extension that the city belongs to the council, which would be against the spirit of place of this contribution. Because this chapter, through the notion of sense of place, raises the question of who has the right to the city, this distinction is of importance.

<sup>80</sup> *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC).

### 2.2.2. Court cases in the North Gauteng high court and the constitutional court

The tenants brought the case to the high court in Pretoria and ultimately to the constitutional court. They were successful, to a degree, at the constitutional court.<sup>81</sup> The residents first took their claims to the high court in Pretoria (North Gauteng high court), which is a mere two blocks away from the Schubart Park complex. The case in the North Gauteng high court in Pretoria took place in three parts: an urgent application for immediate re-occupation; attempts at reaching an agreement in the form of a draft order; and the granting of a final order by the high court. The urgent application on 22 September 2011 for the reoccupation of the residents' homes was dismissed, but the high court ordered that the city council should make temporary accommodation available and instructed the legal representatives of the city council and the residents to reach an agreement and prepare a draft order. This application for immediate relief to re-occupy Schubart Park was dismissed by the high court through the granting of three different orders on 22, 23 September (interim orders) and 3 October (the final order) 2011 respectively. The application for leave to appeal the final order of 3 October was also dismissed by judge Prinsloo of the high court on 5 December 2011.<sup>82</sup> The two interim orders dismissed the application (interdict) for immediate re-occupation and were made subject to the parties reaching agreement and proposing a draft order. The second order kept in place the provisions of the first interim order, but added specifically that the parties should actively seek to reach an agreement. In terms of the first order, the city council was to provide 'immediate assistance' (in the form of temporary accommodation) to the residents of Schubart Park. The first order instructed the legal representatives of the city council and the residents to reach an agreement and to prepare a draft order. The draft order was to be confirmed on the next day, 23 September. The parties could not reach an agreement and therefore the matter was postponed to 3 October 2011. Meanwhile, the police removed residents from the remaining two blocks. According to the details in the judgment by the constitutional court, between 3000–5000 people were either on the streets or in

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<sup>81</sup> *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC).

<sup>82</sup> Leave to appeal was refused because the judge was of the opinion that there was not a reasonable possibility that a different court would come to a different conclusion. He summarised the application for leave to appeal to be based on his failure to recognise that the different blocks of Schubart Park were different states of inhabitability and that some blocks were actually more inhabitable than others were.



temporary shelters by the end of September.<sup>83</sup> By that stage the fourth block, block D, was already empty.<sup>84</sup> The order of 23 September already included temporary provisions in terms of which the city council offered (tendered) a series of relief measures that they were willing to take. The document setting out these undertakings by the city council was referred to in the 3 October judgment as the city council's 'tender'. The residents rejected this tender, no agreement was reached, the draft order was not granted and therefore the parties were back in court in October 2011.

The application for the interdict was an urgent application by the residents to move back in. The final order was handed down on 10 October 2011. The decision was made after the court considered arguments presented by counsel, documents submitted to court and expert evidence delivered by four expert witnesses (structural engineers) for the Metro Council who testified on the structural condition and safety of the buildings. It is strikingly ironic that, given the close proximity of the high court, that the judge did not rely on the testimonies of the inhabitants, nor on his own appraisal of the inhabitability of the building.

The heads of argument of the City of Tshwane in the constitutional court raised the 'unhygienic and unhealthy' conditions in Schubart Park as one of the conclusions reached after the investigation of structural Engineers, SCIP Engineering Group which firm was appointed by the City of Tshwane after the proceedings in the North Gauteng high court. They further more claimed that because of these unsanitary conditions, the building 'cannot be occupied in its current state'.<sup>85</sup> The City of Tshwane relied on the regulations of the National Building Act:<sup>86</sup>

The local authority may, by notice, in writing to the owner, order the evacuation of such building where the state of such building, equipment, installation of facility will cause conditions which

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<sup>83</sup> *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) at par 8.

<sup>84</sup> For a very thorough account of the conditions in the block at 2010 see the master's thesis of Johan Swart, *Urban church, re-developing space within Pretoria's Schubart Park complex*, 2011 available at <http://upetd.up.ac.za/thesis/available/etd-12092010-174515/>.

<sup>85</sup> *Schubart Park v City of Tshwane* Respondent's Head of Arguments in the Constitutional Court at par 30.4. '[T]he residential complex is extremely unhygienic and unhealthy and cannot be occupied in its current state'. Record of proceedings: p.445, par 2.2.14.

<sup>86</sup> The Regulations had been issued in terms of section 17(1) of the *National Building Regulations and Building Standard Act* 103 of 1977.

in the opinion of local authority may be detrimental to the **safety or health** of the occupiers or users of such a building.<sup>87</sup>

The City of Tshwane acknowledged that they were not in a position to exercise their powers in regards with the security and safety of Schubart Park in a manner that would violate the residents' rights. The heads of argument mentions in particular: the constitutional rights to access to housing and dignity and the right not to be arbitrarily evicted.<sup>88</sup> Furthermore, the City of Tshwane also accepts their responsibility to furnish the residents with adequate housing.<sup>89</sup> Despite these concessions of their responsibility and the limits of their powers, the city justifies their actions with reference to the alleged insecure and unsanitary conditions in the apartment complex. For this, they rely on the supreme court of appeal's judgment in the *City of Johannesburg* case and the history of resistance in the block:

In *the City of Johannesburg*, supra, the SCA held that once the prescribed requirements of the notice of evacuation in terms of section 12(1) and (4) of the NBRA have been met, then a court has no discretion, and none could be imported in terms of PIE, or via the Constitution, in order to refuse to give effect to that notice.<sup>90</sup> In our submission, the applicants **cannot be allowed to live in unhealthy, unhygienic, dangerous and uninhabitable conditions**, particularly given the history of fires and fatalities that followed the outbreak of fire within the residential complex.<sup>91</sup>

Reading the affidavit of Anita Watkins, a former resident of Schubart Park it becomes clear that the safety and sanitation of the Schubart Park complex were invoked with all its metaphorical power. Tracing the media coverage on the Schubart Park case and

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<sup>87</sup> Regulation 15A (4) of *National Building Regulations*. Own emphasis added.

<sup>88</sup> *Schubart Park v City of Tshwane* Respondent's Head of Arguments in the Constitutional Court at par 57. The City of Tshwane makes this concession with reference to *City of Johannesburg v Rand Properties (Pty) Limited and Others* 2007 (6) SA 417 (SCA), at par 32.

<sup>89</sup> *Schubart Park v City of Tshwane* Respondent's Head of Arguments in the Constitutional Court at par 57.

<sup>90</sup> *Schubart Park v City of Tshwane* Respondent's Head of Arguments in the Constitutional Court at par 58.

<sup>91</sup> *Schubart Park v City of Tshwane* Respondent's Head of Arguments in the Constitutional Court at par 59. Own emphasis added. The fatalities that they refer to must be the fatalities that followed a fire that broke out in Kruger Park in 2008 in which six people passed away, two of them after jumping from the windows their flats. a fire started in Kruger Park, allegedly by members from Schubart Park who were evicted on the same day (without the necessary court order) from their flats for non-payment of rental. See '6 die in fire as Red Ants evict tenants' Sowetan Live available at (accessed February 2014) <http://www.sowetanlive.co.za/sowetan/archive/2008/07/23/6-die-in-fire-as-red-ants-evict-tenants>.

reading the final judgment of the constitutional court it becomes clear that the conditions in Schubart Park was mainly due to a lack of maintenance and a failure to provide the necessary services. Mapule Phore, the Strategic Executive Director of the department of Housing and Sustainable Settlements in the City of Tshwane metropolitan council, who deposed to the affidavit used in the constitutional court, claimed that they tried their best to renovate the Schubart Park complex in order to limit the health and safety risks, but that they were unsuccessful. This does not correspond with the evidence they provided in the high court that claimed that renovation was impossible while the residents were still living in the block. The constitutional court did not deem the excuses of impossibility and necessity, as presented by the City of Tshwane and with reliance on acts such as the National Building Regulations and Building Standard Act, as relevant. As such, it did not regard the removal of the residents as an evacuation, but as an eviction and therefore the factual evidence presented in support of the impossibility argument were irrelevant and the only questions were whether the City of Tshwane followed the correct eviction procedures as mandated by the Constitution. The narrow questions considered by the court were therefore centred on the effects of the high court orders.<sup>92</sup> Below in section 2.4 I link the distinction between evacuation and eviction to the difference between habitat and inhabitation.

One of the constitutional court clerks gave a moving personal account of his experience on the day that judgment was delivered in the case:

I was watching one of the residents who had come to the Court to hear the outcome. He was wearing a red t-shirt emblazoned with 'Residents of Schubart Park' written on it so that we would all know that whatever the outcome read in Court that day, it would have a direct impact on his life. As Justice Nkabinde read out the hand-down note and it became apparent that he

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<sup>92</sup> *Schubart Park v City of Tshwane* at 20-21. 'The only defence raised by the City to the dismissal order in its opposing affidavit is impossibility. The oral evidence of the witnesses called by the City in the High Court proceedings, although at times straying beyond the ambit foreshadowed in their answering affidavit, remained factual in nature and did not purport to found lawful authority for the removal beyond reasons of safety and temporary impossibility in the circumstances that existed at the time of the application. And persistence in an argument that the immediate removal of residents on grounds of safety and temporary impossibility could result in the permanent lawful deprivation of the occupation of their homes, would have foundered on the authority of the decisions in this Court in *Pheko and Olivia Road*.' *Pheko and Others v Ekurhuleni Metropolitan Municipality* SA 598 (CC) at paras 38, 40 and 45. *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at par 49.

was going to be able to go back to his home, I watched him gradually sit up in his seat, smile; hold his head up a little higher.<sup>93</sup>

On 3 October 2011, the high court ordered that the city council should implement this tender. The tender provided for various provisions relating to immediate relief for the residents in terms of storage facilities, alternative accommodation and longer term construction of alternative accommodation for the residents.<sup>94</sup> The 3 October order, which made the tender enforceable, was appealed against in the constitutional court and the matter was heard based on section 26(3) of the Constitution, the right not to be evicted from one's home without a court order.

In the constitutional court, there were attempts to include the history of the block into the judgment, but the court could have gone further in their account of history and inclusion of stories.<sup>95</sup> The constitutional court explained that the complex was built in the 1970s as part of a state-subsidised rental scheme for the benefit of apartheid's white civil servants. The Court then jumps to July 1999, when the city council took over Schubart Park. At first, the city council rented the units to civil servants, but over

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<sup>93</sup> Mackintosh D 'A most moving day' *UCT Law Review* 2013 on 66.

<sup>94</sup> *Schubart Park v City of Tshwane* at par 12 sets out the terms of the tender: 1. That the First Respondent will provide and if necessary further construct for those individual residents, who were forced to vacate the Schubart Park block of flats because of the fire at the aforesaid property and who still require same, temporary habitable dwellings, that afford shelter, privacy and amenities at least equivalent to those that were destroyed . . . 2. The First Respondent is to immediately assist the individual members . . . with removing of all their belongings . . . from the aforesaid property. 3. The requirements of paragraph 2 will be accomplished by means of the individual members . . . accompanied by members of the Second Respondent . . . 4. The First Respondent will provide storage facilities . . . for the aforementioned belongings . . . 5. The First Respondent is to place security personnel at the storage facilities. 6. The First Respondent is to forthwith commence with the refurbishment and renovation of the flats known as Schubart Park in Central Pretoria, subject to the recommendation of structural engineers and subject to the building reasonably being capable of refurbishment and/or renovation. 7. The aforesaid refurbishment and renovation of the flats known as Schubart Park shall be completed by the First Respondent within a period not exceeding 18 (eighteen) months, which period may be extended from time to time by agreement or Order of Court. 8. In the event that the technical advice referred to in the aforementioned paragraph dictates that the buildings known as Schubart Park must be demolished and/or cannot be refurbished and/or renovated then the First Respondent will furnish those qualifying residents who may choose to accept this tender with alternative habitable dwellings, that afford shelter, privacy and amenities of life. 9. Subsequent to the refurbishment and renovation of the Schubart Park block of flats referred to in paragraph 6, the First Respondent will relocate the Applicants to Schubart Park, central Pretoria, subject to the following: 9.1 The Applicants providing proof of their rights, and based on the merits and qualification, to occupy the property known as Schubart Park; 9.2 The Applicants' right of occupancy in the Republic of South Africa'.

<sup>95</sup> In paragraph 2 of the judgement, Justice Froneman sets out the broader history of the apartment complex and in paragraphs 3 and 4 he explains the more recent history that lead to the events on 21 September 2011.

time, the constitutional court explains, ‘increased urbanisation and the resultant decay took their toll.’<sup>96</sup> By the time the events that led up to the litigation in this matter occurred, the condition of the buildings had markedly deteriorated, the buildings were occupied by many persons not known to the city council and, approximately 10 days before 21 September 2011, the water and electricity supply to Schubart Park was stopped.’<sup>97</sup> The judge continues: ‘Unfortunately the city council’s treatment of the residents of Schubart Park also shows that they appeared to regard them as ‘obnoxious social nuisances’, who contributed to crime, lawlessness and other social ills.’<sup>98</sup> Looking at the skeleton of block D, it is tempting to concur with the city council. However, upon closer inspection, one realises that the decay of the building and the looted structure is much more complex. Looking up at block D, we see the remnants of a mural of a nursery school on the third floor, complete with an apple tree, a rainbow and colourful flowers. In addition, the physical decay of the building is due to the landlord’s failure to invest in maintenance, upkeep, and repairs. These failures occur concurrently with demographic shifts in which South Africans of all races try to make Schubart Park, a model apartheid housing complex, their home. In the language of the city council and the high court, these residents and their protests against unsustainable living conditions became a source or symptom of decay at Schubart Park. Meanwhile, the residents articulate their own sense of home and place – their place in Schubart Park and their place in relation to the law.

The city council attempted to defend the evacuations based on the impossibility of restoring possession. They also invoked existing legislation that addresses the removal of people from unsafe buildings, in situations of disaster and eviction in the normal course.<sup>99</sup> The constitutional court however, ruled that since the application was

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<sup>96</sup> Note how decay is described as a result of urbanisation, not of poor maintenance. It’s as if the wording suggests that the building suffered from Black people moving into the cities. *Schubart Park v City of Tshwane* at par 2.

<sup>97</sup> *Schubart Park v City of Tshwane* at par 2. What is striking from this passage is the way in which decay is described as a result of urbanisation and not of the City Council’s poor maintenance.

<sup>98</sup> *Schubart Park v City of Tshwane* at par 50. This reference to the City Council’s relationship to the block sketches a picture of the haunting spirit of place which stays despite changes in the structure of a place.

<sup>99</sup> *The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (PIE); section 54 of the *Disaster Management Act* 57 of 2002 (DMA); section 12 of the *National Building Regulations and Building Standards Act* 103 of 1977 (NBRA); Regulation A15 of the NBRA, GN R 2378 GG 12780, 12 October 1990; and section 11(2) of the *City of Tshwane Metropolitan Municipality, Fire Brigade Services By-Laws*, published under LAN 267 in Gauteng Provincial Gazette 42 of 9 February 2005.

not one requesting to return possession of any object or property, but indeed of the applicants' home, the city council still had to comply with the provisions of section 26(3) of the Constitution. This section determines that:

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.<sup>100</sup>

This clause marks a radical break of the 1996 Constitution with the apartheid practices of racially motivated evictions and forced removals.<sup>101</sup> It is estimated that approximately 3.5 million people were forcibly removed from their homes between 1960 and 1983.<sup>102</sup> For black South Africans, having a home was never a certainty in the 20<sup>th</sup> century. Their presence in desirable places was used to justify their forced removal from those desirable places to destitute and deprived places. In interpreting section 26 of the Constitution, the constitutional court often invokes the history of these dispossessions in applying the provision,<sup>103</sup> as it did in the *Schubart Park* case. The constitutional court found that the city council failed to adhere to the requirements of

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<sup>100</sup> *Schubart Park v City of Tshwane*. Section 26(3) of the Constitution of the Republic of South Africa.

<sup>101</sup> The ideas around *Schubart Park* and *genius loci* - see section 3.3.2. A sense of belonging and/ or *genius loci* (spirit of place) – have already been published in De Villiers I 'Sense of Place and Spirit of Place in the *Schubart Park* Case' in Hamilton N, Majury D, Moore D, Sargent N, Wilke C (eds.) *Sensing Law* 2017. In the same edited collection Sarah Buhler, in her contribution entitled 'Law's sense of smell: odours and evictions at the Landlord Tenant Board' show how tenants are considered nuisances because of their smelly bodies. Black South Africans were acutely vulnerable to being removed from their homes because of the grand political aesthetics during apartheid in which black bodies could easily be moved to rural wastelands or locations on the outskirts of the cities.

<sup>102</sup> Weideman M *Land reform, equity and growth in South Africa: A comparative analysis* PhD Thesis University of Witwatersrand on 11-12. The first chapter of Weideman's thesis provides a useful overview of some of the key pieces of apartheid spatial legislation that violently established segregated spatial relations and that produced stories of upheaval and displacement.

<sup>103</sup> For the Constitutional Court's extensive jurisprudence on this section see the following cases: *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* [1997 \(1\) SA 526](#) (WLD), *Government of the Republic of South Africa and Others v Grootboom and Others* [2001 \(1\) SA 46](#) (CC); *Port Elizabeth Municipality v Various Occupiers* [2005 \(1\) SA 217](#) (CC); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others (Agri SA and Others, Amici Curiae)* [2005 \(5\) SA 3](#) (CC); *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* [2007 \(6\) SA 511](#) (SCA); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008 \(3\) SA 208](#) (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* [2010 \(3\) SA 454](#) (CC); *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* [2010 \(2\) BCLR 99](#) (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2012 \(2\) SA 104](#) (CC); *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another, Phoko and Others v Ekurhuleni Metropolitan Municipality* [2012 \(2\) SA 598](#) (CC).

section 26(3), therefore the removal of the residents was unlawful and the normal defences in applications for spoliation applications did not apply. The constitutional court further had to consider whether the tender of the city council constituted appropriate relief in terms of section 38 of the Constitution.<sup>104</sup> The main issues were that the city council neglected to engage meaningfully with the residents before drafting their offer to the residents (the ‘tender’ that was attached to the 23 September order and confirmed by the 3 October order) and the tender failed to provide adequate alternative relief.<sup>105</sup> The constitutional court upheld the appeal and ordered the city council to restore the residents in the occupation of their homes after meaningful engagement. Research done on the housing complex in the fields of architecture and urban planning generally attributes the poor conditions of the building to poor management and lack of maintenance.<sup>106</sup> The city council created the conditions under which they claimed they were eligible to evacuate the residents while blaming the residents for the poor state of their homes.

### **2.3. The right to the city**

‘At the heart of the Schubart Park struggle is an implicit debate over who has the right to the city.’<sup>107</sup> The concept of right to the city, as introduced by Lefebvre, encompasses the right to appropriation and the right to participation.<sup>108</sup> The ideas of Lefebvre echo in the slogan of the Schubart Park residents: ‘the City of Tshwane belongs to us and Schubart Park belongs to us’.<sup>109</sup>

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<sup>104</sup> Section 38 deals with the enforcement of rights and provides: ‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the **court may grant appropriate relief**, including a declaration of rights’. Own emphasis added.

<sup>105</sup> Requirement in terms of s38 of the Constitution – see par 47 – 51 of *Schubart Park* case.

<sup>106</sup> Du Toit J ‘Utopia on trial again: Perceived resident quality at Schubart Park in South Africa’ 2009 26:2 *Journal of Architectural and Planning Research* 161.

<sup>107</sup> Runciman C *Mobilisation and Insurgent Citizenship of the Anti-Privatisation Forum, South Africa: An Ethnographic Study* PhD Thesis University of Glasgow 2012 at 211.

<sup>108</sup> Lefebvre H *Writings on Cities* Kofman E and Lebas E (translated and selected) 1996.

<sup>109</sup> Runciman explains that this slogan could be heard during weekly committee meetings Runciman C *Mobilisation and Insurgent Citizenship of the Anti-Privatisation Forum, South Africa: An Ethnographic Study* PhD Thesis University of Glasgow 2012 on 213.

### 2.3.1. A cry and a demand<sup>110</sup>

In the face of this pseudo right, the *right to the city* is like a cry and a demand... a transformed and renewed right to urban life.<sup>111</sup>

Lefebvre's 'right to the city', in his 1967 essay of the same title, encompasses an urgent call for different intellectual tools to approach the city.<sup>112</sup> Theoretical engagements on cities merely serve the bureaucracy of controlled consumption. It perceives of cities as collections of needs for consumption, whereas, as Lefebvre highlights, needs are anthropological.<sup>113</sup> This includes the need for creativity and for information, for knowledge, art and play, physical activity and sexuality.<sup>114</sup> The right to the city can therefore not be reduced to a cumulative right comprising a collection of existing human rights placed within an urban context;<sup>115</sup> just as spatial justice cannot simply be a spatial interpretation of social justice. In a South African context, Marius Pieterse has given content to the right to city with reference to justiciable socio-economic human rights. Recently, Thomas Coggin has published an article that focuses on how the law of nuisance relates to the right to the city.<sup>116</sup> Patrick Bond supports the idea that spatial justice cannot merely be social justice in space by asserting that the right to the city is not primarily about liberal constitutionalism, but rather a vehicle for political empowerment.<sup>117</sup> He asks whether the right to water, within the broader right to the city can be radicalised when cast in the terms of, what Bond calls, 'urban revolutionaries'.<sup>118</sup> In Bond's view, the reason why the idea of a "right to the city" as a rallying cry' has gained popularity, is because it can possibly present a

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<sup>110</sup> The ideas around the right to the city included under this heading has been published in De Villiers I 'Tshwane 2055 and the (im)possibility of spatial justice' *De Jure* 2014 47 202-217.

<sup>111</sup> Lefebvre H *Writings on Cities* 1996 on 158.

<sup>112</sup> Lefebvre H *Writings on Cities* 1996 on 146-159.

<sup>113</sup> Lefebvre H *Writings on Cities* 1996 on 147.

<sup>114</sup> Lefebvre H *Writings on Cities* 1996 on 147.

<sup>115</sup> Coggin T and Pieterse M 'Rights and the city: An exploration of the interaction between socio-economic rights and the city' (2012) 23 *Urban Forum* 257 and Pieterse M 'Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa' (2014) 131 *SALJ* 150-177.

<sup>116</sup> Coggin T 'Redressing Spatial apartheid: The law of nuisance and the transformative role of social utility and the right to the city' *South African Law Journal* 2016 133 2 434 – 451.

<sup>117</sup> Bond P 'The 'Right to the city': Limits to rights talk and the need for rights to the commons' *Theomai: Perspectivas diversas sobre la problemática territorial y urbana* 2013 42-63.

<sup>118</sup> He lists Henri Lefebvre and David Harvey. Bond P 'The 'Right to the city': Limits to rights talk and the need for rights to the commons' *Theomai: Perspectivas diversas sobre la problemática territorial y urbana* 2013 on 44.



‘profound critique of neoliberal urban exclusion’.<sup>119</sup> With reference to the well-known debate by critical legal scholars in South Africa that the rights narrative is not the optimal language for progress in South Africa,<sup>120</sup> and through reliance on the failure of the Soweto water case, he warns against ‘considering rights as a foundational philosophical stance’.<sup>121</sup>

Specific urban needs should constitute specific places of ‘simultaneity and encounters, places where exchange would not go through exchange value, commerce and profit’.<sup>122</sup> Lefebvre problematizes the science of the city, which has the city as object of study, and the silence of the working class in conceiving of cities. Bringing this back to the Schubart park housing complex, the initial evacuation of the residents was the silencing of the working class, the continued operations around Schubart park displays a further disregard for the working class, despite the claims to public participation and consultation processes during the drafting of *Tshwane 2055*.<sup>123</sup> This silence, Lefebvre argues, brings about an absence of both the subject and the object and he suggests two ways to address this.<sup>124</sup> Firstly, a political programme of urban reform not defined by the framework of the current society, not limited to reform and not subject to a ‘realism’.<sup>125</sup> Secondly, mature planning projects that do not shy away because of the feasibility of their utopian aspects. ‘Urban life has yet to begin’ and the current imperative is to take up new intellectual tools and develop new theories.<sup>126</sup> Lefebvre

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<sup>119</sup> Bond P ‘The ‘Right to the city’: Limits to rights talk and the need for rights to the *commons*’ *Theomai: Perspectivas diversas sobre la problemática territorial y urbana* 2013 on 43.

<sup>120</sup> Bond refers in particular to Brand D ‘The politics of need interpretation and the adjudication of socio-economic rights claims in South Africa’, in Van der Walt AJ (ed.) *Theories of social and economic justice* 2005, Madlingozi T ‘Good victim, bad victim: apartheid’s beneficiaries, victims and the struggle for social justice’, in Le Roux W and Van Marle K (eds.) *Law, memory and the legacy of apartheid: ten years after AZAPO v President of South Africa* 2007, Pieterse M ‘Eating socioeconomic rights: the usefulness of rights talk in alleviating social hardship revisited’, in *Human Rights Quarterly* 2007 29 796-822 and Roithmayr D ‘Lessons from Mazibuko: persistent inequality and the commons’, in *Constitutional Court Review* 2011 on 1.

<sup>121</sup> Bond P ‘The ‘Right to the city’: Limits to rights talk and the need for rights to the *commons*’ *Theomai: Perspectivas diversas sobre la problemática territorial y urbana* 2013 on 52. ‘As we have seen, however, critics point to the opposite processes in the water case, and consider a move through and beyond human rights rhetoric necessary on grounds not only that – following the Critical Legal Scholarship tradition – rights talk is only conjuncturally and contingently useful (Roithmayr 2011). Ashwin Desai (2010) offers some powerful considerations about the danger of legalism when building the South African urban social movements’.

<sup>122</sup> Lefebvre H *Writings on Cities* 1996 on 148.

<sup>123</sup> See chapter 4 for a further discussion of the Tshwane 2055 policy.

<sup>124</sup> Lefebvre H *Writings on Cities* 1996 on 155

<sup>125</sup> Lefebvre H *Writings on Cities* 1996 on 150-151.

<sup>126</sup> Lefebvre H *Writings on Cities* 1996 on 150-151.

envisages theories that will build towards the right to the city, without proposing the right to the city as an end goal that should (or could) be reached. The right to the city should not be understood as a 'single visitation right', nor as a 'return to traditional cities'.<sup>127</sup> For Lefebvre space reflects social relationships and at the same time space also influences social relationships. Therefore, space is what mirrors and replicates both justice and injustice. Spatial justice approached in this manner should therefore also include an engagement with spatial injustice.

Lefebvre's essay on the right to the city is both 'a cry and a demand'.<sup>128</sup> It was a cry that at the time responded to the crushing state of everyday life in cities and it was a demand that was actually in the form of a command. Namely a 'command to look that crisis clearly in the eye and to create an alternative urban life that is less alienated, more meaningful and playful but... conflictual and dialectical, open to becoming'.<sup>129</sup> Harvey refers to the context and circumstances<sup>130</sup> within which Lefebvre wrote the essay and argues that the revival of the right of the city should not lead us to Lefebvre's intellectual legacy for an explanation, but rather '[w]hat has been happening in the streets, among the urban social movements, is far more important'.<sup>131</sup>

This cry and demand of the right to the city echoes in the slogan of the Schubart Park residents: 'the City of Tshwane belongs to us and Schubart Park belongs to us'. It cries out to raise awareness about the living conditions in Schubart Park and the city council's failure to properly maintain the block, it cries out against the high-rise and its alienating topology, and it demands a sense of belonging within these undignified conditions and admits the alienation. This slogan deliberately avoids the name Pretoria and instead uses Tshwane. This can be seen as an attempt by the residents to reclaim the space for those who were excluded from the spaces of Pretoria by the apartheid

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<sup>127</sup> Lefebvre H *Writings on Cities* 1996 on 158.

<sup>128</sup> Lefebvre H *Writings on Cities* 1996 on 158. For other authors who emphasise the right to the city as a cry and demand see Harvey D *Rebel cities: From the right to the city to the urban revolution* 2012 on x and Purcell M 'Excavating Lefebvre: The right to the city and its urban politics of the inhabitant' *GeoJournal* 58 2002 99–108.

<sup>129</sup> Harvey D *Rebel cities: From the right to the city to the urban revolution* 2012 on x.

<sup>130</sup> Harvey deems it 'highly significant that 'The Right to the City' was written before (*The Irruption* as Lefebvre later called it) of May 1968' and makes special mention of the fact that the essay was written for the centennial celebrations of the publication of Volume 1 of Marx's *Capital*. He therefore suggests that the essay might have looked different if it was written after the May 1968 uprisings.

<sup>131</sup> Harvey D *Rebel cities: From the right to the city to the urban revolution* 2012 on xi-xii.

regime. A series of street names were also changed during 2012. In chapter 3 I cover the street name cases in more detail. Schubart Street, the eastern border of the Schubart Park complex, was changed to Sophie de Bruyn Street. Schubart Street was named after the once head of the state museum in the former Schubart street Anton Frederik Schubart. He was born in the Netherlands and was the state secretary during the presidency M.W. Pretorius. Sophie de Bruyn, after whom the street is now called, was one of the women who led the women's march to the Union Buildings in 1956. She was born in 1938 in Villageboard, a mixed neighbourhood in the Eastern Cape where different races lived alongside each other. Later, when her father joined the army to fight in World War II, her mother, with the children, moved out of the family home to Schauder, an area developed specifically for the 'coloured' community. She was one of the founding members of the South African Congress of Trade Unions, which later developed into Congress of South African Trade Unions. The name of Schubart street was changed along with 25 others and new signs were erected during June 2012. Currently the old names appear at the bottom of the sign, with a red line through it, with the new names at the top of the sign. This co-presence of the old and the new acknowledges history, the previous name of a white Dutch born male names exist alongside the present name of a black South African born female and constantly invokes the past. On the corner of Sophie De Bruyn (Schubart) street and Johannes Ramokhoase (Proes) streets is block D of Schubart Park. This block is the most damaged of the four blocks. Since most of the residents moved out in 2009, after a long period of no water or electricity supply, the block has fallen prey to metal thieves. Railings from staircases, water pipes encased in walls, facades, and cables from the lifts were looted. Looking beyond the old/new street sign one can see the remnants of a mural of a day care centre through the skeleton of the concrete slabs that used to be block D.

### **2.3.2. The right to difference and the right to urban life**

The right to the city must be understood as inextricably linked to the right to difference.<sup>132</sup> This important connection surfaces when the right to the city is read with

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<sup>132</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 104. Through the work of Lefebvre he investigates power's spatial dimensions, in particular legal and administrative power, he also considers different and contemporary forms of and struggles for spatial justice and looks at radical political movements and participatory models of reaching decisions.

Lefebvre's concrete utopia, an idea that emanates from the work of Ernst Bloch, who, like Lefebvre, followed a humanist version of Marxism.<sup>133</sup> Concrete utopia stands in contrast to abstract utopia. Abstract utopia is mere fantasy or wishful thinking.

For Lefebvre, the Paris commune of 1871 and the May uprisings of 1968 encompassed concrete utopia. Butler's points out the similarities between the thoughts of Lefebvre on utopia and Bloch's philosophy of hope.<sup>134</sup> Two elements mark Bloch's philosophy of hope: firstly the 'not yet' and secondly 'concrete utopia'.<sup>135</sup> The 'not yet' presents the real possibility of revolution and rupture. Concrete utopia has in mind the transformation of existing social tendencies by simultaneously anticipating and also affecting the future. Lefebvre's engagement with the situationist international, and in particular his exposure to the Dutch artist architect Constant Nieuwenhuys's 'New Babylon' project, awakened him to concrete utopia. New Babylon envisioned a city in the air. In this city, there are mega structures suspended in the heavens. Although this vision received a lot of critique (the adverse ecological implications, its resemblance to Le Corbusier and modernism, the architectural determinism of the project) Lefebvre took from New Babylon the potential alternatives and, importantly, the city as a work of creative interaction between its inhabitants; the city as 'the oeuvre of its citizens'.<sup>136</sup> The city is a work of art that is continuously in the process of being remade. The focus is on differential space and the politics of autogestion. Because of contradictions, abstract space can never reach absolute dominance and therefore there is a possibility for differential space. Abstract space is governed by the logic of habitat, which is illustrated in suburbia. As a challenge to abstract space, differential space firstly is against homogeneity and fragmentation of abstract space, secondly it emphasises appropriation instead of domination and thus the role of the body becomes central and thirdly the appropriation of space happens through social and political forms that are

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<sup>133</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 134. Butler's book *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* places Lefebvre within legal studies and analyses the relevance of Lefebvre's thinking for the study of state power and of law. He offers a critical approach to the involvement of law and state power in struggles over the inhabitation of space. Through a discussion of the importance of the 'everyday' in Lefebvre's work, Butler highlights the fact that Lefebvre situates the everyday in the center of the ethical and aesthetic aspects of Marx's project of social transformation.

<sup>134</sup> Bloch E *The Principle of Hope* 1995 MIT Press: Cambridge.

<sup>135</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 132-134.

<sup>136</sup> Lefebvre H *The Production of Space* 1996 on 117 and Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 138-139 and 143.

aimed at autogestion (or self-management).<sup>137</sup> In its starkest form, the right to the city is a renewed right to urban life, in other words it is the right to inhabit the city and not to be expelled from the metropolitan to the margins of the city.<sup>138</sup> Segregation is a market driven process for Lefebvre. These processes are devised so they lead to social division and polarisation. It is because of urban regeneration that marginalised groups are forced to relocate into the ghettos on the periphery around the city. He states that 'without self-management participation has no meaning'.<sup>139</sup> Despite this clear insistence on the link between the right to the city and difference, creativity and autogestion, Butler points out that it has been interpreted and appropriated in several alarming ways. The first is the institutionalisation of the right to the city. This can be seen in the work of Don Mitchell, UN-HABITAT, Mark Purcell and Soja.<sup>140</sup> Another interpretation of the right to the city pertains to spatial citizenship. This approach sees the right to the city replace formal conceptions of political citizenship with spatial or urban modes of citizenship. For Lefebvre this is an issue because citizenship then stays tied to the social contract. On the declaration of the rights of man and citizen, Marx distinguishes between 'man' and 'citizen': In a capitalist society citizens' political rights serve the rights of man, namely the rights of an egotistical individual who is not concerned with other people or community.<sup>141</sup>

The right to difference is therefore connected to and dependent on the right to differ; to contest and to challenge. The right to difference is much more than just another human right. For Lefebvre:

The 'right to difference' is a formal designation for something that may be achieved through practical action, through effective struggle – namely, concrete differences. The right to difference implies no entitlements that do not have to be bitterly fought for. This is a 'right' whose only justification lies in its content; it is thus diametrically opposed to the right of property,

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<sup>137</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 142.

<sup>138</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 143.

<sup>139</sup> Lefebvre H *The survival of capitalism: reproduction of the relations of production* 1976 on 120 in Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 146.

<sup>140</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 147.

<sup>141</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 149. Mark Purcell captures how Lefebvre's right to the city can be practically incorporated into spatial citizenship. Purcell M 'Citizenship and the right to the global city: reimagining the capitalist world order' *International Journal of Urban and Regional research* 2003 27(3) 564-590 on 565 'the right to the city challenges liberal democratic Westphalian model of citizenship. Butler labels his project as sophisticated, but still lacking because of the limits of locality. Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 149.

which is given validity by its logical and legal form as the basic code of relationship under the capitalist mode of production.<sup>142</sup>

Effective struggle was part of the story of the Schubart Park residents' council. The apartment complex had a community hall and the inhabitants held regular meetings. One of the active members was Lizzie Steenkamp. She used to be a resident of Schubart Park. She volunteered several interviews and sound bites to journalists during the tumultuous years of the Schubart Park litigation. I draw attention to four women's voices. The affidavit of Anita Watkins to look at how the court process gave voice to the story of Schubart Park and how a sense of place was established within the confines of formal documents. I further link her affidavit and the testimony of the expert witnesses to a distinction between inhabitation and habitat below. Unfortunately, despite the fact that the affidavit for the constitutional court was drafted in Watkins's name, very little of her own experience as an inhabitant of the block comes through and more focus is placed on the experts who testified on behalf of the city council. The voice of Lizzie Steenkamp provides a sense of belonging encapsulated, from a resident's perspective, in the right to the city and the right to Schubart Park understood as the right to differ. Her voice counters the remnants of Watkins' voice as found in the affidavit.<sup>143</sup> Below I also look at the voices of Auntie N and Mama R. In connection with the right to the city as the right to differ, I focus on Lizzie Steenkamp.

Steenkamp is an active member of the Residents' committee (which is still operative) and I met her at community meetings held at the end of 2014 and the beginning of 2015. The most important aspect that Steenkamp's stories underscore is the sense of belonging and community experienced by the residents. They are still a close community despite living in different areas of town. Her account shows that the residents did not only live in the apartment complex, but they made their lives there and had a strong sense of place. This cohesion between the inhabitants was not visible on the text of the court papers, but could be discerned from residents' involvement with the litigation: 'On the day of the decision delivered by the constitutional court,

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<sup>142</sup> Lefebvre H *The Production of Space* 1991 on 396-397 in Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 152.

<sup>143</sup> See section 2.4. Inhabitation and Habitat.

some 200 residents from Schubart Park showed up at court in red T-shirts reading: 'My home, my pride, for ever'. There were tears of joy as they learnt of the victory'.<sup>144</sup> The voices of these women are included in order to portray the way in which the appropriation and silencing of these voices through court process were produced by a certain spirit of place and in turn produced the sense of place or rather lack of a sense of place or belonging for Schubart Park residents.

Was this victory in the constitutional court linked to the struggle of the residents' forum and was their struggle necessarily an exercise of the right to difference? There are three interconnected distinctions in Lefebvre's right to difference: induced versus produced difference, minimal versus maximal difference and particularities versus difference.<sup>145</sup> Difference is induced when it remains inside a set or a system that is created according to a specific law, but produced difference presupposes the collapse of the system as such. The struggle of Schubart Park did not bring about the collapse of the entire system, but it did open up the possibility of looking differently at so-called evacuations in the city. Minimal difference can be compared to the difference between numbers of the same mathematical set whereas maximal difference is comparable to the difference between sets of finite and infinite numbers, for example. Lastly, particularities are defined by nature and humans' relation to nature whereas difference 'are embedded in social relationships and thereby the social totality'.<sup>146</sup> It is the right to difference that introduces the possibility of a radical instability into the right to the city and brings about that the city is constantly revised, and reproduced. Without the right to the difference, the right to the city is entirely deradicalised. It is the absence of the right to difference (and to differ) that leads to the engagements that institutionalise the right to the city and translates it into human rights language or neutralises the right to the city as the right to citi-zenship. There is a reciprocity between the right to difference and the right to the city. It is important that the right to difference must be rooted in contestation and ongoing struggles for the right to the city, otherwise the right to difference also becomes reified and a static concept of mere diversity. The ongoing

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<sup>144</sup> Mashego A 'Schubart Park residents cheer' *Pretoria News* 10 October 2012 on 6.

<sup>145</sup> Lefebvre H *The Production of Space* 1991 on 396-397 in Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 153-154.

<sup>146</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 154.

struggles of the Schubart Park residents' committee are hampered because they are spread out across Tshwane/ Pretoria.

Over the course of the years of struggle between the city council and the residents of Schubart Park, Steenkamp was always willing to speak to the media and it was particularly at the time of the eviction that her story became better known.<sup>147</sup> In November after the evictions it was reported that Steenkamp lived in Schubart Park for nine years and was 48 years old when the evictions took place.<sup>148</sup> In Schubart Park, her family (six children) lived in different units in the block and because of the spacious apartments they had their own rooms, which was important for her two school-going daughters. After the evictions, she and her husband with her two teenage daughters lived on the street for nine nights before moving into a one-room unit in Ajo, the alternative accommodation made available by the city council.<sup>149</sup> Only 180 units in total (different apartments across the city) were made available by the city council and Steenkamp's eldest daughter had to find accommodation for her and her baby at a friend's place in Sunnyside.<sup>150</sup> Three of Steenkamp's children now live in Soshunguve and her eldest son also lives in Ajo. Steenkamp explains that the evictions had a massive strain on families. 'The family now stays in a one-room unit at Ajo and has to share a bathroom with other residents. Men enter the bathroom while her daughter is showering, she says. Once, the girl was stuck in the shower while a couple "bumped" outside'.<sup>151</sup> At community meetings, Steenkamp explains that most ex-residents of Schubart Park are still traumatised. They still have contact with one another, even though they are scattered over the city. She tells of how her refrigerator fell down the dark staircase while they were carrying it out after the eviction, it has several bumps and scratches to tell the story of September 2011. Her son, Peter, explains that many

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<sup>147</sup> Steenkamp is also involved in a community collective called 'Tshwane Sites of Struggle' formed in December 2014 and some information was gleaned from her narrations during a meeting on 17 January 2015.

<sup>148</sup> Nicolson G 'Residents demand action in Schubart Park, in face of Tshwane apathy' 11 November 2011 available at <http://www.dailymaverick.co.za/article/2011-11-11-residents-demand-action-in-schubart-park-in-face-of-tshwane-apathy/#.VM5xoNKUcl0> (accessed 13 February 2013).

<sup>149</sup> Nicolson G 'Residents demand action in Schubart Park, in face of Tshwane apathy' 11 November 2011 available at <http://www.dailymaverick.co.za/article/2011-11-11-residents-demand-action-in-schubart-park-in-face-of-tshwane-apathy/#.VM5xoNKUcl0> (accessed 13 February 2013).

<sup>150</sup> Makhubu N *Pretoria New* 'Schubart Park tenants live in turmoil: Families split, furniture all over the city' 24 October 2011 at 3.

<sup>151</sup> Nicolson G 'Residents demand action in Schubart Park, in face of Tshwane apathy' 11 November 2011 available at <http://www.dailymaverick.co.za/article/2011-11-11-residents-demand-action-in-schubart-park-in-face-of-tshwane-apathy/#.VM5xoNKUcl0> (accessed 13 February 2013).



people missed the queue for registration as residents on the day, because they were busy collecting their furniture from inside. He says it was a difficult choice to make – to choose between standing in the queue to register and secure alternative accommodation (‘looking after your wellbeing’) or ‘looking after your property’ and trying to retrieve your things from your flat before it was looted.<sup>152</sup> He lost all his furniture at the time. He continues to say that the thing that people do not always realise about Schubart Park is the strong sense of community that existed between the inhabitants. ‘We were one big family, if we organised a picket, everyone knew that they just had to come, and we were there’.<sup>153</sup> The Schubart Park building complex had a community hall. The residents committee was established in 2001. Another former resident captures her attachment to the place by saying that she grew up there and that she used to be the youngest member of the residents committee. ‘I have pictures there’, she expounds. She is now 28 years old and moved into Schubart Park with her parents at the age of 8.<sup>154</sup> Lizzie Steenkamp stresses that this sense of community and solidarity has not dissipated; the residents still have contact with one another even though they are scattered over the city.

The reasoning of the constitutional court, even though the outcome was in favour of former inhabitants such as Lizzie Steenkamp, did not explicitly acknowledge her struggle and her and the residents’ council’s right to differ. Acknowledging the right to the city as connected to the right to difference ultimately requires a different way of reasoning. Knowledge in utopia is introduced through transduction. Lefebvre rejects the Cartesian view of space as grid-like substance in itself along with the Newtonian conception of space as a vacuum and instead returns to Leibniz’s understanding of space not as a vacuum, but as something constituted by the bodies within space.<sup>155</sup> Lefebvre uses this view to argue, based on a Marxist understanding, how space is produced through relationships. This also justifies his insistence on social space as opposed to abstract space. As part of his call for the right to the city, Lefebvre expresses an urgent need to change our intellectual approaches and tools.<sup>156</sup> He

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<sup>152</sup> Peter related the events at a Tshwane S.O.S meeting on 31 January 2015.

<sup>153</sup> Peter related the events at a Tshwane S.O.S meeting on 31 January 2015.

<sup>154</sup> Nthombiyane attends the meetings of Tshwane S.O.S in her capacity as Schubart Park residents’ committee representative and as a member of the Right to Know Campaign.

<sup>155</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 40.

<sup>156</sup> Lefebvre H *Writings on Cities* (transl.) Kofman E and Lebas E 1996 on 151.

specifically suggests experimental utopia and transduction. With experimental utopia Lefebvre envisions that utopia be studied from the ground through experimental consideration of its implications and repercussions.<sup>157</sup> Transduction is distinct from induction and deduction and requires a constant feedback between the conceptual framework that is used and observations made. As a methodology, it requires spontaneous mental operations and according to Lefebvre it ‘introduces rigour in invention and knowledge in utopia’.<sup>158</sup> Transduction is dialogic and not monologic, in terms of Mikhail Bakhtin’s distinction. Dialogism is not confined to linguistics, instead, it extends the metaphor of dialogue beyond communication. Looking at the right to the city as dialogical underscores the relationality of city life and highlights the importance of community. The idea of community in city life can however not be a homogeneous community. Here it is valuable to draw on the work of Iris Marion-Young and her conception of the ‘ideal of community and a politics of difference’ as well as ‘city life as public life’. These concepts draw a solid connection between the right to the city, the right to difference and the right to differ.

The right to the city of Lefebvre requires a class-conscious understanding of community. Whereas Lefebvre’s concept of the right to the city calls for an acute class-consciousness in thinking of urban spaces, Massey introduces the importance of a gender-consciousness. Both of these views of space/ place and spatial justice relate the visions of urban space directly to the type of community that will be constituted by the space. Below I focus on the role of gender in the right to the city and how this could initiate a different concept of community based on difference. I therefore now look at Iris Marion Young’s conception of community.

City life should be forms of social relations, which Young would define as ‘the being together of strangers’.<sup>159</sup> Those who dwell in the city are tied to one another around certain goals, interests and ideas, but they are not bound into a community with communal ends that are in any way final, nor are mutual identification or reciprocity necessarily part of their identification as city dwellers. The city provides a space where ‘persons and groups interact within spaces they all experience belonging to, but

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<sup>157</sup> Lefebvre H *Writings on Cities* (transl.) Kofman E and Lebas E 1996 on 151.

<sup>158</sup> Lefebvre H *Writings on Cities* (transl.) Kofman E and Lebas E 1996 on 151.

<sup>159</sup> Young IM *Justice and the Politics of Difference* 1990 on 240.

without those interactions dissolving into unity or commonness'.<sup>160</sup> This coming together around a specific goal can be illustrated by an example that Young uses in a different context.<sup>161</sup> In calling for women to be seen as a series rather than a group she uses the illustration of people waiting for a bus.<sup>162</sup> People waiting for a bus are fleetingly united through this activity or routine and their community dissolves as the routine passes. There is political potential in their tentative being together in the sense that they might organise themselves differently if the bus is late or if the bus travels on the wrong route.

The ideal of community that activists and radical theorists usually have in mind is an entity that can provide a counter or an alternative to capitalist patriarchal society's domination and exploitation. These notions are often connected to affect rather than to an explanation of the notion of community. Young contends that these ideals of community seldom 'ask what it presupposes or implies, or what it means concretely to institute a society that embodies community'.<sup>163</sup> She therefore criticises the very concept of community because of these shortcomings. Community as concept is challenged on practical and philosophical grounds. The problem with the ideal of

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<sup>160</sup> Young IM *Justice and the Politics of Difference* 1990 on 237.

<sup>161</sup> See Young IM 'Gender as Seriality: Thinking about Women as a Social Collective' *Signs* 1994. Series, as opposed to a group (or seriality contrasted to group being) entails habitually limited social being which is structured through existing conditions and physical surroundings. A series is not actively being together, but people are rather united by objects and habits and routines and practices in a passive manner. Because of their interaction with their surroundings, inmates or people listening to the radio are grouped together by their shared environment and responses thereto. Young uses serial collectivity to capture a rethinking of the category of woman; a concept that she derives from Sartre's *Critique of Dialectical Reason*, where he initially employs the notion to capture relationships between people in social classes and the system of consumption and production that characterises capitalism. To think of women not as a group, but as a series acknowledges that there are not necessarily shared biological or psychological attributes that can constitute the category of woman.

<sup>162</sup> Young IM 'Gender as Seriality: Thinking about Women as a Social Collective' *Signs* 1994 on 724; Sartre JP 1976 *Critique of Dialectical Reason* (trans. Alan Sheridan Smith, ed. Jonathan Ree) 'Sartre describes people waiting for a bus as such a series. They are a collective insofar as they minimally relate to one another rules of bus waiting. As a collective they are brought together relation to a material object, the bus, and the social practices transportation. Their actions and goals may be different, nothing necessarily in common in their histories, experiences. They are united only by their desire to ride on that route... are in this way a social collective, they do not identify with do not affirm themselves as engaged in a shared enterprise, themselves with common experiences. The latent potential to organize itself as a group will become manifest, however, fails to come; they will complain to one another about service, share horror stories of lateness and breakdowns, perhaps assign one of their number to go call the company, or discuss sharing a taxi.

<sup>163</sup> Young IM 'The Ideal of Community and the Politics of Difference' *Social Theory and Practice* 1986 on 1.

community is ultimately that it denies difference.<sup>164</sup> In other words, thinking about dialogical flows and interrelationality in the city, as connected to the right to urban life, should at its core envision difference to be wholly part, in fact the structuring feature, of these conversations, flows and relationships. Indeed, she calls for a politics of difference, and not a notion of community as a 'normative ideal of emancipation'. The foundation for this politics of difference is the unoppressive city. In such a city social relations are sans subjugation and 'persons live together in relations of mediation among strangers with whom they are not in community'.<sup>165</sup>

The city has always been a place of independence with a level of freedom and a wanted facelessness or anonymity to many marginalised groups and to others who are considered 'deviant in the closeness of face-to-face community'. The possibility of liberation in the capitalist city (city of capital and capital city) is indeed besieged by contradictions and opacity.<sup>166</sup>

The unoppressive city, as a city that can host the ideal of community as a politics of difference, is a city of publics. Public cities foster city life as public life. The city constantly becomes the meeting place of strangers a site of throwntogetherness and simultaneity of stories thus far. The right to difference is supported by the right to the city as a right to urban life. The city as lived space contrasts the city as abstract space. The city should therefore not merely be a habitat; an abstract space that is divided into city blocks, but a place of inhabitation and participation in urban life. I connect lived space to inhabitation and abstract space to habitat and explore these terms with reference to Schubart Park and especially the affidavit of Anita Watkins, the named applicant in the Schubart Park cases.

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<sup>164</sup> She identifies this metaphysics that denies difference with reference to Derrida's 'metaphysics of presence' and to what Adorno terms 'the logic of identity'. Young IM 'The Ideal of Community and the Politics of Difference' *Social Theory and Practice* 1986 on 1.

<sup>165</sup> Young IM 'The Ideal of Community and the Politics of Difference' *Social Theory and Practice* 1986 on 2.

<sup>166</sup> Young IM 'The Ideal of Community and the Politics of Difference' *Social Theory and Practice* 1986 on 19-20 and at note 31. Elizabeth Wilson makes a similar point in *The Sphinx in the City*. See chapter 3 for further expansion on this. Section 3.4.4. Rogue urbanism, unmapping, countertopographies and the 'sphinx' in the city. Young refers specifically to Marshall Berman who gives a fascinating account of the attractions of city life in *All That Is Solid Melts Into Air* 1982 Simon and Schuster: New York. She also references George Shulman who contrasts the open-endedness of city life with the pastoral vision of community in 'The Pastoral Idyll of Democracy' in *Democracy* 3 (1983): 43-54 and another work by David Plotke, 'Democracy, Modernization, and Democracy,' *Socialist Review* 14 (March-April 1984): 31-56.

## **2.4. Inhabitation and Habitat**

The city council argued that the removal of the residents was an evacuation, and not an eviction. Based on this distinction they deemed it unnecessary to enter into meaningful consultation or provide alternative accommodation and therefore the city council's case was mainly based on factual evidence presented in support of Schubart Park as a structure and as a habitat. The evacuation/ eviction distinction in the Schubart Park case connects to habitat/ inhabitation.

Inhabitation is linked to lived space whereas habitat is connected to abstract space. In the context of Schubart Park, the inhabitants of Schubart Park articulated their need for inhabitation of the block, for living, for dwelling in Schubart Park as a way of being in the world. The high court disregarded the attention they drew to inhabitation and the fact that the apartment block, despite the horrid living conditions was still inhabitable. With reference to expert evidence and regarding Schubart Park as abstract space, they heard evidence on the apartment complex as a habitat. None of the Schubart Park residents were asked to give evidence in the high court case. Meanwhile, the city council called three 'experts' to testify on the conditions of the building. For the application to appeal brought in the supreme court of appeal, the city council obtained a report from a structural engineer to present as evidence and it was admitted as evidence in the appeal case. In response to this report by the city council, the attorneys of the residents obtained their own report from a structural engineer, but the application to have this report admitted as evidence in the constitutional court was dismissed. Before I deal with the content of the expert reports, I want to point out the fact that the courts (law) constructed Schubart Park's sense of place predominantly on the evidence of professional expert witnesses. The city council enlisted these witnesses while the voices of the residents, save for that of Anita Watkins, were not heard and the evidence of the expert enlisted by the residents was also not heard. The experiential and place-based expertise of residents on their living conditions can be a powerful political and legal tool. Here, the Schubart Park residents tried to challenge the expertise of the professionals who testified on the state of the buildings, with which the residents were intimately familiar.

### 2.4.1. Dwelling and the shift from habitat to inhabitance

The liveability of Schubart Park was reduced to calculations and expert evidence on whether the block can serve as a habitat, removed from its residence, removed from the desperate cry and demand of the inhabitants in the high court. Lefebvre's account of inhabitance and the shift to habitat links to the notion of 'dwelling'. Of particular importance here is the link between Heidegger's notion of 'dwelling' and Gaston Bachelard's thoughts on home.<sup>167</sup> Heidegger was intrigued by romantic poet Friedrich Hölderlin's line: 'Full of merit, yet poetically, man dwells on this earth.'<sup>168</sup> For Heidegger poetry is what first brings us into the earth, making us belong to it. The notion of dwelling stands in contrast to the functionalism and calculation of modernist spatial planning. Along these same lines Henri Lefebvre noted the following:

Heidegger, now, shows, us a world ravaged by technology, that through its ravages leads us towards another dream, another (as yet unperceived) world. He warns us: a lodging built on the basis of economic or technological dictates is as far removed from dwelling as the language of machines is from poetry.<sup>169</sup>

In *The poetics of space* Gaston Bachelard reflects on the 'dreamlike qualities of the house'.<sup>170</sup> Of concern for Bachelard is the 'poetic' or 'material imagination' and its connection to the relationships between humans and the everyday objects and spaces of their world.<sup>171</sup> These thoughts by Bachelard assisted Lefebvre in his formulation of the 'loss of affect' or the 'disenchantment of the traditional domestic space' that resulted out of technological modernism and its take on spatial planning and development. Butler also highlights Lefebvre's account of the body and its relationship to space is crucial. For the example of the social housing project of Schubart Park, Lefebvre's trust in the ability of the body to refuse the authority of bureaucratic rationality is of importance. 'Forms of bodily inhabitance' for example resisting linear repetition, seeking alternative modes of transport to the use of a car can be part of

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<sup>167</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 121.

<sup>168</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 121. Heidegger M 1971 on 216.

<sup>169</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 121.

<sup>170</sup> 1969; Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 123.

<sup>171</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 124.

political resistance to bureaucratic dominance. Inscribed in these forms of resistance is also a confrontation with linear time, speed and quantification.<sup>172</sup>

For Christian Norberg-Schultz dwelling, in the existential sense of the word, depends on visualization, symbolization and contemplation (the functions of settling).<sup>173</sup> With reference to Heidegger's image of the bridge, which unifies the whole world and gathers being into place, he sketches the spirit of place as the accumulation of the sense.<sup>174</sup> This illustrates how the humanist geographers developed a deep understanding of place through experience, feeling and the senses, while the question of power, and the role it plays in the constitution and production (and reproduction) of place and the meaning and contestation thereof, did not really feature in their analysis. In that sense, the humans of humanist geography were regarded in a specific and rather individualistic way. The geographers who in the 1980's started to draw from Marxism, poststructuralism and feminism regarded this idea of place as bounded and organic and Heidegger's concept of dwelling as somehow exclusionary and limiting. Humanist geography saw places as natural and as they are supposed to be; in an ecological way in other words. The critique, based on Marx's concept of false consciousness, pointed out that even though places may seem natural, they are all but the only way they could be or were supposed to be. The social processes that constructed places became important.<sup>175</sup> The belief that spaces are natural relates to an objective vantage point from which these assumed spaces can be observed. A view from nowhere.

The term the 'god trick' describes the way in which modern science tries to replace the human observer, who will inevitably be subjective, with technologies that claim to be neutral and objective. Donna Haraway critically comments on the scientific objectivity in some human geography.<sup>176</sup> These are merely attempts to create a view from nowhere that is not neutral, nor objective, but ultimately perpetuates a distinctly

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<sup>172</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 130.

<sup>173</sup> Norberg-Schultz C *Genius Loci: Towards a Phenomenology of Architecture* 1980 on 18.

<sup>174</sup> Richardson WJ *Heidegger. Through Phenomenology to Thought* The Hague 1947 on 585.

<sup>175</sup> For a thorough discussion of this shift, see Cresswell Tim 'Place' in Thrift Nigel and Kitchen Rob (eds.) *International Encyclopaedia of Human Geography* 2009 on 170-174.

<sup>176</sup> Holloway L 'Donna Haraway' in Hubbard P and Kitchin R *Key Thinkers on Space and Place* 2011 on 219. In the context of space and place Haraway's contribution has largely been to question the distinction between that which is considered 'natural' and what is, on the other hand, considered as 'cultural'. Instead, she insists on the 'hybridity' of things.

masculine agenda and an exploitative view of the world.<sup>177</sup> The implication of this understanding of Haraway is two-fold: firstly a call for the distinction between the natural and the cultural (as brought about by a scientific view) to be replaced by an understanding of things as hybrid and secondly, and insistence on situated knowledge (as opposed to objective neutral knowledge).<sup>178</sup>

The 'god trick' in the Schubart Park case was performed by the expert evidence given in the North Gauteng high court. A large part of Watkins's affidavit is dedicated to challenging the evidence of the 'experts' called as witnesses by the city council in the North Gauteng high court.<sup>179</sup> After pointing out general errors in the approach of the court to the evidence of the experts, she interrogates each expert report separately. The main purpose of the evidence of the experts called by the city council was to prove that the building was uninhabitable without, however, pointing to the responsibility of the city council to keep the buildings in good repair. In the North Gauteng high court, the city council did not enlist the services of a forensic structural engineer; it was only in the supreme court of appeal that such evidence was submitted by the city council. Watkins requests the constitutional court to accept as new evidence a report by a structural engineer commissioned by the residents of Schubart Park as evidence to counter the city council's report on the structural soundness of the buildings.<sup>180</sup> According to this 'leading expert forensic structural engineer,' it was clear that the 'building posed no danger to the lives of the occupiers.'<sup>181</sup> However, the constitutional court did not allow this evidence from an expert nominated by the Schubart Park residents. Watkins points out that none of the experts accepted by the court was independent since they were all employed by the city council.<sup>182</sup> Furthermore, it was important to show that the experts all testified on conditions that had already existed

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<sup>177</sup> Haraway D *Simians, Cyborgs and Women: The Reinvention of Nature* 1991 on 189 as referenced in Holloway L 'Donna Haraway' in Hubbard P and Kitchin R *Key Thinkers on Space and Place* 2011 on 220.

<sup>178</sup> With 'hybrid' she refers to 'material-semiotic' or 'cyborg'. Haraway D *Simians, Cyborgs and Women: The Reinvention of Nature* 1991 on 189 as referenced in Holloway L 'Donna Haraway' in Hubbard P and Kitchin R *Key Thinkers on Space and Place* 2011 on 221.

<sup>179</sup> Eleven of the forty-seven pages.

<sup>180</sup> Watkins A *Founding Affidavit in Constitutional Court* at par17.4-17.7.

<sup>181</sup> Watkins A *Founding Affidavit in Constitutional Court* at par15.2.

<sup>182</sup> Watkins A *Founding Affidavit in Constitutional Court* at par15.3.



from 2008 and that these could not be attributed simply to the events of 21 September 2011.<sup>183</sup>

Watkins deals firstly with the evidence given by Mr Lengoabala, the Fire Chief of the city council. She contradicts his claim about the fire hazards posed by the buildings by pointing out that the fire hazards had been in existence for a long time. During cross-examination, he conceded that the fire hazards had existed since 2004. Moreover, Watkins showed that the fire equipment could be replaced and repaired while the residents were still in the block. Lastly, the fire equipment was the responsibility of Tshwane, not the residents. Mr Lengoabala was unaware of the existence of the residence committee and had never liaised with any of them.<sup>184</sup> He displayed a general ignorance of the building and its workings: he was not aware that there was a budget of R20 million available for the maintenance of Schubart Park and that the state of the fire equipment was due to a lack of maintenance. Furthermore, he was entirely unfamiliar with the building and was under the impression that there was a central access control system.<sup>185</sup> Watkins then combs through the evidence of Mr Wyers, an electrical engineer with specific expertise in high voltage electricity plants. He was at the time the director of technical services in Tshwane. He confirmed that the electricity services were in working order until ten days before 21 September. He claimed that the electricity could not be restored while the residents were in the apartment block, but could not provide an explanation for this claim.<sup>186</sup> According to Wyers, the buildings could collapse anytime and he could not expect his subcontractors to work under those conditions. When asked for support for this statement, he relied on hearsay facts that the buildings were designed for 120 families and that there were at the time 700 families living there.<sup>187</sup> This is patently incorrect, because there are 813 units in the Schubart Park building complex.<sup>188</sup> This testimony shows how 'experts' figured the residents as the causes of the decay of this building that had been designed with a different demographic in mind. On the 22<sup>nd</sup> of September 2011 during the first hearing, Wyers testified that the electricity substation at Schubart Park could not be repaired.

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<sup>183</sup> Watkins A *Founding Affidavit in Constitutional Court* at par15.4.

<sup>184</sup> Watkins A *Founding Affidavit in Constitutional Court* at par15.5.1.

<sup>185</sup> Watkins A *Founding Affidavit in Constitutional Court* at par15.5.3.

<sup>186</sup> Watkins A *Founding Affidavit in Constitutional Court* at par15.9.1.

<sup>187</sup> Watkins A *Founding Affidavit in Constitutional Court* at par15.9.2.

<sup>188</sup> Schutte CD *Social interaction and Place Perspective Experienced by Residents of Schubart Park, a High-Rise Complex in Pretoria* 1984 on 16-17.

Watkins however referred to one of Wyers's own earlier reports, which was written prior to the September 2011 evictions, where he explained that the substation could indeed be fixed, but at a high cost (approximately R8 million).<sup>189</sup> Lastly, Watkins deals with the evidence of Mr. Phola, a building control officer with a diploma in civil engineering. His report is based on an inspection that he conducted in August 2011, a month before the evacuation/ evictions. During cross-examination in the court he conceded that the conditions he described in his testimony as 'life-threatening' had been present for many years prior to the evictions.<sup>190</sup> All of these points of criticism move Watkins to conclude that the conditions in the block, although dire, did not 'support the need for immediate evacuation without recourse to the legislative framework'.<sup>191</sup> If the evidence of Andre Fullard, structural engineer for Schubart Park, would have been admitted, the version would have read that the block has a robust structure and that only a major natural disaster could make it collapse. The suggestion that the building complex was a 'death trap' was misleading and it would have removed any concerns that residents will return to a life-threatening situation.<sup>192</sup> After a thorough treatment of the evidence presented by Schubart Park and the evidence accepted by the constitutional court, it still seems as if the residents, and not the experts, were the best judges of the liveability of the complex. The judge could have easily conducted an inspection in loco, because of the vicinity of the apartment complex to the high court in Pretoria. The legal process constructed a specific sense of place of Schubart Park: a derelict modernist housing complex that has been 'taken over' by unknown numbers of unruly residents who can be subject to collective punishment and be exempt from rule of law protections. The residents' rich experiential sense of place and their struggles to make homes in a place not meant for them in the midst of deteriorating physical conditions, in turn, were excluded. This exclusion and silencing of lived and inhabiting experience is the violence of habitat.

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<sup>189</sup> Watkins A *Founding Affidavit in Constitutional Court* at par15.9.2.

<sup>190</sup> Watkins A *Founding Affidavit in Constitutional Court* at par15.15.4.

<sup>191</sup> Watkins A *Founding Affidavit in Constitutional Court* at par15.16.

<sup>192</sup> Watkins A *Founding Affidavit in Constitutional Court* at par18.

#### 2.4.2. The politics of inhabitation and the violence of habitat

One of the important features of the removal of residents from blocks A, B and C<sup>193</sup> in September 2011, was that it did not happen within any of the relevant legal frameworks. The city council could have relied on the proceedings provided for in the *National Building Regulations and Building Standards Act* if it wanted to follow the route of declaring the building derelict and dangerous.<sup>194</sup> Alternatively, it could have instituted eviction proceedings in terms of the Prevention of Illegal Evictions Act,<sup>195</sup> if it wanted to claim that the residents were unlawfully occupying the flats. Watkins demands that 'not even during a disaster can an eviction take place outside a legal framework'.<sup>196</sup> She strongly denies the suggestion that the residents vacated the buildings on a voluntary basis. Instead, Watkins states that they were removed from their homes by force.<sup>197</sup> The city council's failure to operate within any one of the applicable legal frameworks not only underscores the lack of respect for the tenants and the homes they made in the buildings on 'fallow' land, but it also supports the statement by Watkins that the removal 'had nothing to do with the general state of the buildings'.<sup>198</sup> This paves the way for her dispute of several crucial 'facts' accepted in the North Gauteng high court: she contests the facts presented on the conditions of the building prior to 21 September 2011, the city council's claims around the restoration of electricity to the building, the suggestion that substantive damage was caused by the events on 11 September, estimations of the number of residents who inhabited the building at the time of the removals and the crucial question of whether they were lawful occupants or not.<sup>199</sup> Regarding the conditions of the building before and immediately after 21 September 2011, Watkins points out that the reports that were used by the city council in the North Gauteng high court were all drafted long before the events of 21 September transpired and they were drafted specifically with a view of supporting the refurbishment that never took place. She states that these reports

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<sup>193</sup> Block D was not inhabited at that stage due to its deteriorated state, residents already started moving out of Block D out during the course of 2009, when electricity and water infrastructure was 'either destroyed or stolen'. Some people continued to live in the block, but were described as 'vagrants'. 23 August 2010 Schubart Park Block D crumbling <http://sawearthobserver.blogspot.com/2010/08/schubart-park-block-d-crumbling.html> accessed February 2013.

<sup>194</sup> Act 103 of 1977.

<sup>195</sup> Act 19 of 1998.

<sup>196</sup> Watkins A *Founding Affidavit in Constitutional Court* at par12.4.

<sup>197</sup> Watkins A *Founding Affidavit in Constitutional Court* at par13.1.

<sup>198</sup> Watkins A *Founding Affidavit in Constitutional Court* at par13.5.

<sup>199</sup> Watkins A *Founding Affidavit in Constitutional Court* at par12.3.

were simply altered for purposes of the urgent proceedings on 22 September 2011 in the North Gauteng high court.<sup>200</sup>

Lefebvre problematizes the science of the city, which has the city as object of study, and the silence of the working class in conceiving of cities. Specific urban needs should constitute specific places of 'simultaneity and encounters, places where exchange would not go through exchange value, commerce and profit'.<sup>201</sup> Bringing this back to the Schubart Park housing complex, the initial evacuation of the residents was the silencing of the working class, the continued operations and lack thereof at Schubart Park display a further disregard for the working class.<sup>202</sup> This silence, Lefebvre argues, brings about an absence of both the subject and the object and he suggests two ways to address this.<sup>203</sup> Firstly a political programme of urban reform not defined by the framework of the current society, not limited to reform and not subject to a 'realism'. Secondly, mature planning projects that do not shy away because of the feasibility of their utopian aspects. 'Urban life has yet to begin' and the current imperative is to take up new intellectual tools and develop new theories.<sup>204</sup>

The eviction of approximately 700 families started out as a police operation against crime, according to Watkins.<sup>205</sup> She emphasises that the nationality and background of the heads of the households in Schubart Park were diverse; the current residents were demographically very different from the white civil servants that the city had intended as tenants for the racially segregated modernist housing complexes.<sup>206</sup> She traces the origins of the problems and the 'serious mismanagement which caused conditions to deteriorate' to 2000 when Schubart Park was transferred from the Provincial Government to the City of Tshwane.<sup>207</sup> As early as 2008, three years before the 2011 evictions, the conditions of the building were already considered 'dangerous'.<sup>208</sup> The central argument posed by Watkins is that the events that transpired on the

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<sup>200</sup> Watkins A *Founding Affidavit in Constitutional Court* at par12.2.

<sup>201</sup> Lefebvre H *Writings on Cities* (transl.) Kofman E and Lebas E 1996 on 148.

<sup>202</sup> This is so despite the claims to some public participation and consultation processes, for example during the drafting of Tshwane 2055, which I discuss in chapter 4.

<sup>203</sup> Lefebvre H *Writings on Cities* (transl.) Kofman E and Lebas E 1996 on 155.

<sup>204</sup> Lefebvre *Writings on Cities* (transl.) Kofman E and Lebas E 1996 on 150-151.

<sup>205</sup> Watkins A *Founding Affidavit in Constitutional Court* at par5.5.

<sup>206</sup> Watkins A *Founding Affidavit in Constitutional Court* at par1.

<sup>207</sup> Watkins A *Founding Affidavit in Constitutional Court* at par6.1-6.3.

<sup>208</sup> Watkins A *Founding Affidavit in Constitutional Court* at par6.1-6.3.

21<sup>st</sup> of September 2011 did not materially alter the conditions at Schubart Park. The dangerous conditions and general bad state of the building were due to ten years of 'neglect and mismanagement' by the city council and not because of the fire that erupted in block C, as the city council claimed.<sup>209</sup> The city council's defence in the North Gauteng high court was that 21 September was a 'watershed moment' and that it 'pushed the building past the point that it was suitable for human habitation'.<sup>210</sup> Watkins continuously stresses that the city council and not the residents should be held responsible for the circumstances in Schubart Park.<sup>211</sup> The city council claimed that the mass public violence made their conduct on the day of 21 September 2011 necessary, but Watkins points out that only 60 out of the approximately 4000 residents participated and were arrested, which is a very small percentage of the total population of the apartment block.<sup>212</sup> Even though blocks A and B were still occupied on the 22<sup>nd</sup>, those arriving home after the events of the day were denied entrance to the building and spent the night on the street.<sup>213</sup> The residents were profiled as criminal, violent, and responsible for the deterioration of the buildings that the city council refused to maintain in good repair. Men and women experienced the effect of this evacuation / eviction differently. Some of the men could find some shelter in bars and clubs, while this option was not available to women. Some women returned on the night of the 22<sup>nd</sup>, perhaps with their babies on their backs there was no longer a home with a kettle where they could boil water to prepare bottles for their children. These lived realities raise the importance of acknowledging not only class, but definitely also gender in the story of Schubart Park.

## **2.5. Schubart Park as a gendered space**

Some feminist geographers are wary of the Marxist and masculine lines in radical geography. Gillian Rose exposes the limits and the masculinity of geographical

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<sup>209</sup> Watkins A *Founding Affidavit in Constitutional Court* at par6.4.

<sup>210</sup> Watkins A *Founding Affidavit in Constitutional Court* at par8.4.3.

<sup>211</sup> Watkins A *Founding Affidavit in Constitutional Court* at par7.2

<sup>212</sup> Watkins A *Founding Affidavit in Constitutional Court* at par7.3-7.4. She 2.4.2. The politics of inhabitation and the violence of habitat the inhabitants at between 3000 and 5000. Following a relational approach to space, it is probably more meaningful to express the number of inhabitants evicted in terms of families – 700 families. See for example Van Marle K 'Denke as voorwaarde vir 'n gesonde samelewing/ Thought as condition for a healthy society' *Tydskrif vir Geesteswetenskappe* 55 2015 on 541.

<sup>213</sup> Watkins A *Founding Affidavit in Constitutional Court* at par7.7.

thought.<sup>214</sup> She highlights the links and discords between feminist and Marxist approaches to space and explains that both these approaches argue that unequal social relationships are expressed through and constituted by spatial production and differentiation.<sup>215</sup> She also relies on the work of Homi Bhabha in relation to solidarities that are not based on exclusionary tactics.<sup>216</sup> According to Rose, patriarchy and capitalism must however be understood as two separate systems and can therefore not be regarded from a single vantage point.<sup>217</sup> My sense is that the capitalist and patriarchal elements of law often intersect and in an attempt to contribute to a post-apartheid jurisprudence on space and place it might be useful to take in an approach that tries to look at both, like Rose does in *Feminism and Geography*.<sup>218</sup> It is within this context that I shift focus to gendered space and look at two other women's voices from Schubart Park: that of Auntie N and Mama R.

Du Plessis conducted an ethnographic study at Schubart Park for purposes of her Occupational Therapy Master's degree.<sup>219</sup> Her research started in 2008 around the Kruger Park eviction and fires. She was interested in the creative ability of the

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<sup>214</sup> Rose G *Feminism and Geography* 1993.

<sup>215</sup> Rose G *Feminism and Geography* 1993 at 113.

<sup>216</sup> Rose G 'The interstitial perspective: a review essay of Homi Bhabha's *The Location of Culture*' in *Environment and Planning D: Society and Space* 1995 13:365-373.

<sup>217</sup> See for example Linda McDowell who argues the counter point, namely that capitalism and patriarchy are conceptually similar structures. McDowell L 'Cultures of Labour: Work, Employment, Identity and Economic Transformations' in Anderson K (ed.) *Handbook of Cultural Geography* 2003 and McDowell L *Gender Identity and Place* 1999.

<sup>218</sup> Rose G *Feminism and Geography* 1993 at 113-136. Other geographers who engage with this are J.K Gibson-Graham. The name J.K Gibson-Graham is a pseudonym from the combined names of Julie Graham and Katherine Gibson who are both economic feminist geographers. The collaboration started when they were both undergraduate students in Clark University in Worcester and both of them followed a strong Marxist line in their doctoral research projects. The continued and fruitful collaboration between these two theorists over the course of thirty year is of particular interest from a spatial perspective particularly because they wrote from different parts of the world, Graham while at the University of Massachusetts, Amherst and Gibson at various institutions in Sydney. As Wendy Larner highlights, their commitment to this long-distance shared theoretical engagement appears more impressive when one remembers that e-mail, skype and internet were not around for a big portion of their collaborative years. Larner W 'J.K. Gibson-Graham' in Hubbard P and Kitchin R *Key Thinkers on Space and Place* 2011 on 171-172. Their spatial contribution lies specifically with their rigorous engagement with capitalism in geography. A few main texts contributed to building this scholarship: *Rethinking Marxism* 1993, *The end of Capitalism (as We Knew it): A Feminist Critique of Political Economy* 1996, *Class and its Others* 2000, *Re-presenting Class* 2001 and *A Postcapitalist Politics* 2006. Their concepts of 'alternative economy' or 'non-capitalist economy' were a big influence on geography and economic geography in particular. Throughout her discussion of their co-authored work, Larner speaks about them in the singular: 'Gibson-Graham herself was steeped in these intellectual and disciplinary traditions' referring to Marxist and neo-marxist ideas in capitalist globalisation.

<sup>219</sup> Du Plessis R *Factors influencing the Creative Participation of people living in an inner city* 2012.

inhabitants and invited them, simply, to tell their story. She interviewed four candidates and presented their stories as layered accounts. I only relate two of the inhabitants' stories here. The central question was to determine how internal and external factors impact the creative participation of people living in the inner city. The core question of her project resembles that of Schutte, as commissioned by the Human Science Research Council (HSRC) in 1984, to determine the place perspective of Schubart Park. The significant difference is that Schutte's survey was a qualitative survey, whereas Du Plessis engaged with the narratives of the residents. In 1984,<sup>220</sup> the Human Science Research Council through a group of researchers compiled a report on the 'place perspective' of Schubart Park.<sup>221</sup> The term 'place perspective' refers to the idea that people's perception of a place depends on their interpretation of the 'social experiences and meanings attached to places'.<sup>222</sup> This report portrays initial perceptions of the building style as positive, but records high levels of alienation. The report made specific reference to the fact that Schubart Park, unlike other blocks in the city, allowed the keeping of pets, it detailed the availability of firefighting equipment on every floor, outlined the measures for back-up electricity, highlighted that the blocks were supervised by two 'female employees' and that preference were given to families with children.<sup>223</sup> These references are noteworthy because the tales of Schubart Park ultimately also become tales of fire, of abandoned pets, of women and of families torn apart. The majority of the inhabitants at the time of the survey in 1984 were married, only 4.5% was not Afrikaans speaking, the entire population of the block was white,<sup>224</sup> and most residents have stayed in the flats for longer than a year.<sup>225</sup> Even though the complex formed a unit, it is clear that different sub-cultures developed over the years. The blocks contain different sizes of units. Block A and D are the only blocks with three-bedroom units (only families could apply for these three-bedroom units) with 21 of these units in block A and 2 in block D. The bulk of block C's units are bachelors

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<sup>220</sup> Also the year in which the state of emergency was announced.

<sup>221</sup> Schutte CD *Social interaction and Place Perspective Experienced by Residents of Schubart Park, a High-Rise Complex in Pretoria* 1984. This report, at 16 and 17, sets out valuable tables of the rent of different units and the minimum income required as a criteria for occupation.

<sup>222</sup> Du Toit J 'Utopia on trial again: Perceived resident quality at Schubart Park in South Africa' 2009 26:2 *Journal of Architectural and Planning Research* on 171 note 1.

<sup>223</sup> Schutte CD *Social interaction and Place Perspective Experienced by Residents of Schubart Park, a High-Rise Complex in Pretoria* 1984 on 16.

<sup>224</sup> The report makes no reference to racial demographics – indicating that there was no diversity.

<sup>225</sup> Schutte CD *Social interaction and Place Perspective Experienced by Residents of Schubart Park, a High-Rise Complex in Pretoria* 1984 on 27 – 29.

units and one-bedroom units (126 of the 210) while block B contains mainly two-bedroom units (126 of the 189).<sup>226</sup> Schutte argued through these surveys that the place perspective was initially positive in Schubart Park, but some of the findings during the research do not entirely support this optimism.<sup>227</sup> Perhaps the concept of place perspective relied on a certain notion of communal living, which can rather be thought of in terms of throwntogetherness?

### 2.5.1. Throwntogetherness as gendered space

Place as an ever-shifting gathering of lines of flight poses the question of our 'throwntogetherness', as Massey explains.<sup>228</sup> For her, space is the dimension of the social, radical simultaneity, multiplicity and it presents contemporaneous existence. Her understanding of the relationality of space relies on the premise that all things are flux, but this should not be construed as a general state of evanescence, because entities have the ability to withstand and bear.<sup>229</sup> Whereas Lefebvre's concept of the right to the city calls for an acute class-consciousness in thinking of urban spaces, Massey introduces the importance of a gender-consciousness.

Throwntogetherness is what makes place special, not a preconceived collective identity or an over-romanticised idea attached to a certain landscape, but precisely the inevitable challenge that is 'negotiating the here and now'.<sup>230</sup> This means the navigation that takes place inside and in-between the human and the non-human animal. This is not to negate a sense of awe and wonder that attaches to a stroll through a place, nor does it detract from the unique experience and emotion that accompanies being in familiar places, but this negotiation of the geography and history that is brought together by relations is the 'event of place'.<sup>231</sup> She beautifully captures the event of place in reminiscing about her hometown:

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<sup>226</sup> Schutte CD *Social interaction and Place Perspective Experienced by Residents of Schubart Park, a High-Rise Complex in Pretoria* 1984 at table 1 at 15.4

<sup>227</sup> Schutte CD *Social interaction and Place Perspective Experienced by Residents of Schubart Park, a High-Rise Complex in Pretoria* 1984 reports high levels of alienation (Table 15), low perceptions of neighbourliness (Table 19), and medium levels of social cohesion (Table 21). A small percentage saw flat life as permanent (only 28%) at 30 and almost 80% agreed that it is better not to interfere with things happening in the block, at 42.

<sup>228</sup> The concept of throwntogetherness first makes its appearance in Massey's *for space* 2005.

<sup>229</sup> Massey D *for space* 2005 on 152-154.

<sup>230</sup> Massey D *for space* 2005 on 140.

<sup>231</sup> Massey D *for space* 2005 on 140.



It is not just that the old industries will die, that new ones may take their place. Not just that the hill farmers around here may one day abandon their long struggle, nor that that lovely old greengrocer is now all turned into a boutique selling tourist bric-a-brac. Nor, evidently, that my sister and I and a hundred other tourists soon must leave. It is also that the hills are rising, the landscape is being eroded and deposited; the climate is shifting; the very rocks themselves continue to move on. The elements of this 'place' will be, at different times and speeds, again dispersed.<sup>232</sup>

Place offers this fleeting constellation of comings together. Place is not necessarily coherent and cannot be seen as a neat slice through time, but rather a joining up of various processes. Without ignoring the critique that this attention to place is depoliticised, Massey insists on working with the term 'conjuncture' as a way of avoiding an assumption of inherent coherence of place. Conjuncture or 'thinking conjuncturally' entails moving to and fro between different frames and scales of time to bring together the character of the varying processes that only appear to be happening or take place at the same time.<sup>233</sup> This is useful for understanding the palimpsestic and layered nature of place. In the context of law as a process, viewing place as an event would mean to look over time at the different laws and legal rules that took place over time, but at a given moment see to inhabit the same place at once, in the same moment. She emphasises that its negotiation is demanded by the throwntogetherness of place. But negotiation is never without unequal power relations. I think here of the link between settlement as a legal and contractual term and a spatial concept of place (a settlement). Settlement mars the end of negotiations. Settling also marks the end of the openness and flux of place. Peter Kuch hints at a similar idea in his chapter contribution to *the Geography of Law*.<sup>234</sup> Writing in the context of the colonisation of Australia recounts the story of Aroobonew, the first Aboriginal that Governor Arthur Phillip captured to study. Kuch quotes a reference to Aroobonew's initial fear that his capturers were going to eat him. He writes that even though Aroobonew survived dinner and was not eaten by the enlightened Europeans, he sadly did not survive his capture, because he died of smallpox during 1789. Kuch

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<sup>232</sup> Massey D *for space* 2005 on 140-141.

<sup>233</sup> Massey D *for space* 2005 on 141.

<sup>234</sup> Kuch P 'Natives, Savages, and People – The Enlightened Observations of Governor Arthur Phillip and Judge Advocate, Lieutenant-Colonel David Collins in Taylor W (ed) *The geography of Law: Landscape, identity and regulation* 2006 on 111-112.

points out: ‘thousands of other Aborigines were enslaved, raped, mutilated, poisoned or shot as European people ‘settled’ the continent during the next two centuries’. In the introduction to the collection, William Taylor emphasises that the artificial intervention of ‘so-called settler societies in the landscape (bringing in plants, altering the courses of rivers) has recently spared a fresh interest in looking at imperialism from an environmental perspective.<sup>235</sup> Settlement ends the negotiation of the throwntogetherness of place. Place’s throwntogetherness means that place cannot be purified, in the same vein space cannot be emptied out. The terms of engagement in the social and natural trajectories are extremely important given throwntogetherness. The stories thus far culminating, not neatly and coherently, but conjuncturally, are central to the throwntogetherness of place. Politics is the continuing question of our interrelations. This is what marks one aspect of the responsibilities of place, which Massey covers extensively.

To illustrate the relational politics of the spatial, the politics of the event of place and the complexity of throwntogetherness, Massey, in 2005, uses an example of immigration in Germany. Ten years later, in September 2015 German chancellor Angela Merkel made headlines with her open refugee policy, responding to the increasing immigrant crisis in Europe due to on-going conflict in Syria.<sup>236</sup> Her ‘new’ policy has increasingly come under critique during 2016 and there has been considerable backlash against it from the right. From Massey’s example it is clear that attempts to create a broader acceptance of immigrants is a long-standing project in Germany. A large boulder arrived in Hamburg just before the advent of the new millennium. It was found by labourers where the river Elbe opens into the sea. The arrival of this large rock was met with some celebration and soon became a much-loved feature of Hamburg, where people ate their lunch and had picnics. Nevertheless, it turned out that the rock that stranded on German soil was in fact an immigrant. It was urged south by moving ice and then remained behind as the ice started to retreat. This ‘foreigner’ was then later used in a marketing campaign to urge local to accept other, human, immigrants just as readily, following a relaxation of immigration laws in

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<sup>235</sup> Taylor W (ed) *The geography of Law: Landscape, identity and regulation* 2006 on 6.

<sup>236</sup> <http://www.spiegel.de/international/europe/the-limits-of-humanity-merkel-refugee-policies-have-failed-a-1079455.html> accessed 18 March 2016.

2000.<sup>237</sup> The poster that what used in the marketing campaign uses this out-of-place boulder. It displays an image of the rock with a doorway cut from it. This image invokes the established saying that Hamburg is the gateway to the world. Beyond the doorway lies the Elbe river with a typical Hamburg postcard scene, complete with a ferry and clock tower. The door open up towards the sea and therefore, in my view, it does not really appear inviting. In fact, it seems like entering through the door will see one streaming out of Hamburg, rather than into it. Nonetheless, Massey reads this as an attempt to unsettle place. The caption of the poster reads: 'Hamburgs ältester Einwanderer' (Hamburg's oldest immigrant). Massey shows how this poster attempted to understand 'place as permeable' and to invite a 'living of place as [an ever-shifting] constellation of trajectories'.<sup>238</sup> The poster said that if even large rocks move around, then we surely have to question our set ideas of who and what belong where. Places put the question of our living together to us in a very particular way, and it is this question which surfaces the political. This is how place relates to spatiality, says Massey.<sup>239</sup> Notions of embracing disorder and harnessing incoherence are central to her explanation of how spatiality relates to place.<sup>240</sup> The relation consists of two parts: 1. 'the irreducibility of instability is linked to, and certainly conditional upon, space/spatiality' and 2: 'that much "spatial politics" is concerned with how such chaos can be ordered, how juxtapositions may be regulated, how space might be coded, how the terms of connectivity might be negotiated'.<sup>241</sup> So many of the methods usually used to imagine space, are simply efforts to tame space. In chapter 4 and with specific reference to the colonial, apartheid and present South African urban context I

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<sup>237</sup> Massey D *for space* 2005 on 149.

<sup>238</sup> Massey D *for space* 2005 on 149-150.

<sup>239</sup> In making this argument she refers to Donald J *Imagining the modern city* 1999 Athlone Press: London, who relies on Mouffe C 'Citizenship and political community' in Miami Theory Collective (eds) *Community at Loose ends* 1991 University of Minnesota Press: Minneapolis. She also makes reference to Nancy J-L *The Inoperative Community* 1991 University of Minnesota Press: Minneapolis, and Rajchman J *Truth and Eros: Foucault, Lacan and the question of ethics* 1991 Routledge: London and 1998.

<sup>240</sup> She quotes Derrida: 'Chaos is at once a risk and a chance' Derrida J 'Remarks on deconstruction and pragmatism' in Mouffe C *Deconstruction and Pragmatism* 1996 Routledge: London 77-88, as well as Laclau's argument that dislocation 'opens up the possibility of politics'. She invokes Sennet's 1970 urge to embrace disorder (Sennet R *The uses of Disorder* 1970 Penguin: Harmondsworth) and insists on Levin's 1989 'productive disorder' (Levin Y 'Dismantling the Spectacle: the cinema of Guy Debord' in Sussman E (ed.) *On the passage of a few people through a rather brief moment in time: the Situationist International 1957-1972* MIT Press: Cambridge MA 72-123

<sup>241</sup> Massey D *for space* 2005 on 151-152.

elaborate on the taming in the form of sanitation of space and how it correlates with the function of law.<sup>242</sup>

Is it possible to reimagine space entirely as the simultaneity of stories-thus-far?<sup>243</sup> Simultaneity or coevalness<sup>244</sup> are important concepts in challenging existing discourse on development and the distinction between the developing and the developed world. The concepts suggests a sequential rather than a simultaneous existence of spaces and places. Massey writes about simultaneity by responding to Bergson's *Matter and Memory and Time and Free Will* as well as Deleuze's reading of him in *Bergsonism*.<sup>245</sup> Bergson takes particular issue with Zeno's paradox, which determines that a continuum (movement) cannot be divided into discrete units. Zeno postulated that in order to travel a certain distance, you first have to travel half of that distance and in order to travel that half distance, you first have to travel half of that half distance continuing ad infinitum and suggesting that, viewed in this way, you will never be able to travel that distance. Massey points out that their taking issue with time is founded on a certain idea of space. Bergson's obsession was with time, and to argue for its openness and fluidity. This however had devastating effects on the conceptualisation of space. His concern with time has frequently been attributed to a classic (and one can say modernist) prioritisation of time. In fact, Soja shows that Bergson was one of the central influences that lead to the subordination of space to time that marked the period from the 1850s onward.<sup>246</sup> In step with this, Foucault also asks whether the long process of denigrating space started with Bergson.<sup>247</sup> Massey explains that in the Bergson-Deleuze engagement with Zeno's paradox, what stands out is the way in

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<sup>242</sup> See section 4.3.3. Sanitation syndrome in the lawscape: Lady Selborne, Schubart Park and clean-up missions.

<sup>243</sup> See Massey's call for just such a re-imagining. Massey *D for space* 2005 on 130.

<sup>244</sup> Even though I have previously encountered the term 'coevalness' in Massey's writing, the importance of the concept in spatiality discourse really only dawned on me during a lecture series presented by Stewart Motha at the University of Pretoria during August 2015. It was in particular Dipesh Chakrabarty's *Provincializing Europe* 2007 that made me look out more closely for the term. Chakrabarty writes on 8 'The inhabitants of the colonies, on the other hand, were assigned a place 'elsewhere' in the 'first in Europe and then elsewhere' structure of time. This move of historicism is what Johannes Fabian has called 'the denial of coevalness.'. The idea of coevalness dismisses the notion of development that holds that the rest of the world plays catch-up with the West.

<sup>245</sup> Massey *D for space* 2005 on 23-24. Referring to Bergson H 1910 *Time and Free Will* Muirhead Library of Philosophy (transl.) Pogson FL George Bergson H 1911 *Matter and Memory* (transl.) Paul NM and Palmer WS George. Also referring to Deleuze's reading of Bergson in Deleuze G 1988 *Bergsonism* (transl.) Tomlinson H and Habberjam.

<sup>246</sup> Soja E *Postmodern Geographies: the reassertion of Space in critical social theory* 1989.

<sup>247</sup> 'Did it start with Bergson, or before?' Foucault M 'Questions on Geography' in Gordon C (ed) *Power/knowledge: selected interviews and other writings, 1972-1977* 1980 on 70.

which space is cast in a negative light as the absence of movement and the antithesis of the continuum. She then turns the argument around to show that based on their understanding it would also be impossible to define space in terms of a connection to relations. The shift from the activity to the dimension, from spatialisation to space, is very important. She argues that representation takes on elements of spatialisation and 'in the latter's action of setting things down side by side; of laying them out as discrete simultaneity. But representation is also in this argument... the representation of stasis'.<sup>248</sup> It is this understanding of representation as 'fixing things' and as 'taking time out of them' that brings about the equation of spatialisation with the production of space that gives space the attribute of a 'discrete multiplicity' while also characterising it as stability and immobility.<sup>249</sup> To recognise the duration in things that are external and therefore to interpret space and time underlie Massey's argument: 'Space as the dimension of a multiplicity of trajectories, a simultaneity of stories thus far'.<sup>250</sup> She rejects a 'static contemporaneity' in favour of a 'dynamic simultaneity'.<sup>251</sup> Time cannot be reduced to space and neither can space be reduced to time. They are always co-implicated. In regards with time 'there is the necessary production of change through practices of interrelation' and when it concerns space 'there is the integral temporality of a dynamic simultaneity'.<sup>252</sup>

### 2.5.2. Auntie N and Mama R

Du Plessis describes 'Auntie N' as an 'ordinary white women', 64 years of age. She sketches a vivid image of her protesting in the frontlines amongst the other black faces. She is tired and old, she cries 'tears of desolation and helplessness; a desperate woman, trying to sell a home-baked banana bread to anyone willing to buy it'.<sup>253</sup> At the time of Du Plessis's interviews she had been living in Schubart Park for 14 years and was a member of the residents' committee for 8 years.

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<sup>248</sup> Massey D *for space* 2005 on 23.

<sup>249</sup> Massey D *for space* 2005 on 23.

<sup>250</sup> Massey D *for space* 2005 on 24.

<sup>251</sup> Massey D *for space* 2005 on 55.

<sup>252</sup> Massey D *for space* 2005 on 55.

<sup>253</sup> Du Plessis R *Factors influencing the Creative Participation of people living in an inner city* 2012 on 70.

The profile description of Mama R begins with the words friendly and well-groomed. She is a Northern-Sotho speaking woman 28 years of age. She moved into Schubart Park, but moved out again after 5 years; after the trauma of the 2008 evictions and fire at Kruger Park.<sup>254</sup> All her participants tell the story of the initial desirability of Schubart Park: everyone wanted to live there, and then later these attitudes changed. The study of Du Plessis tends to be close to the city's reading of the block. She states that it seemed to her that everyone in the block stopped fighting the decay that was setting in and she perceives the block as chaos.<sup>255</sup>

Du Plessis's work is a very narrow and located study, but one that captures the specificity of place. Because of the initial shying away from the specificity of place, the desire to extrapolate and the result of a turn away from the local that marked geographical inquiry, the renewed focus on the local (as suggested by Massey and others) was initially met with aversion in academic geography circles. Massey however defends the focus on place that accompanies locality studies and she shows convincingly how the distinctly differentiated politics and economic circumstances of different localities resulted in very distinctive issues.<sup>256</sup> Of course, she concedes, the attachment to place covered the whole spectrum of politics, of which the most concerning, at that stage, were those loyalties that were founded on the 'aggressively exclusivist nationalism of Eastern Europe and the former Soviet Union'.<sup>257</sup> To this, one can add the nationalism and desperate place protection of the South African government during apartheid. A focus on place is therefore not a parochial or nationalist project, but instead one that attempts to highlight the discontinuities by focus on smaller and more specific narratives without wanting always already to frame individual experience within the broader grand global capital reference. It captures in a different way Massey's claim that geography matters. It matters because of specificity, particularity and because of the difference that comes with place. Massey further suggests that spatial differentiation was geography's interpretation of Derrida's 'difference' and therefore the conversations on place became entangled in

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<sup>254</sup> Du Plessis R *Factors influencing the Creative Participation of people living in an inner city* 2012 on 70-71.

<sup>255</sup> Du Plessis R *Factors influencing the Creative Participation of people living in an inner city* 2012 on 76. The block scares her and she is scared that she will be hit by something – after a 2 litre coke bottle just missed her. Her focus is also on the stories of the dangers and drugs in the block.

<sup>256</sup> Massey D *Space, Place and Gender* 1994 on 118.

<sup>257</sup> Massey D *Space, Place and Gender* 1994 on 118.

poststructuralism and postmodernism. She does not construe this as a positive confusion because the issues addressed by locality studies are separate from those tackled in postmodernism.<sup>258</sup> She explains that the negative connotation to 'local struggles' or 'local concerns' was borne out of a range of associations with this category: exclusiveness, particularity even an essentialist association which was read as a selfish refusal to take onto account the 'greater good of some (implicitly or explicitly) supposed universal'.<sup>259</sup>

### 2.5.3. Relational space and rights as relationships

Massey, because of the strong Marxist influence on her work, would classify herself as radical geographer.<sup>260</sup> However, there is also a deep concern with gender that marks her scholarly contribution and, perhaps, this concern accords for her defence of the focus on place in her locality studies. She depicts the early debates in geography as aimed at relating places to their broader contexts by considering the relations within and outside of places. It would therefore seem as if the geographical project has an underlying pre-occupation with space (as opposed to place) and that the distinction between space and place can be related to the difference between disciplines. The distinction between urbanists (urban studies scholars) and geographers could be reduced to a focus on place (inner city spaces) and space (broader, global context). Massey captures this as geography's need to see space in 'geographically more expansive terms'.<sup>261</sup> The result of this was two-fold, she explains. On the one hand, places lost their specific individual characteristics (personality, sense of place) and on the other, it brought about a line of thinking that saw all causality extended to a kind of vague global logic, which could not really be located.

Massey's *for space* opens with three narrations, the first two pertain to space and time and the third to place.<sup>262</sup> Her first story relates the events around the colonisation of Mexico City, then called Tenochtitlan and ruled by Moctezuma, by the Spanish, under the leadership of Spanish conqueror Hernan Cortes. She tells these events from both

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<sup>258</sup> Massey D *Space, Place and Gender* 1994 on 119.

<sup>259</sup> Massey D *Space, Place and Gender* 1994 on 119.

<sup>260</sup> Hubbard P 'Space/place' in in Atkinson D *et al. Cultural Geography: A Critical Dictionary of Key Concepts* 2005 on 44.

<sup>261</sup> Massey D *Space, Place and Gender* 1994 on 117.

<sup>262</sup> Massey D *for space* 2005 on 3-8.

perspectives, from two different spaces at the same time: the year 'one reed' in Tenochtitlan and the year of 1519 in Spain. She purposely retells the story in a different way to expose how most tales of 'voyages of discovery' are told to convey the crossing and conquering of space. Instead of telling the story to portray the Aztec inhabitants of Tenochtitlan to await the coming and conquering of Cortes, she portrays the Aztecs as active and as a people who have defended and expanded their city successfully through defence against conquering of many other armies in the past.<sup>263</sup> The year one reed is for the Aztecs an important historical and cosmological event as a time in a cycle of years. The way in which we imagine space matters and thinking about space as merely a surface, as (only) land and sea, denies the politics of space.<sup>264</sup> Her second story exposes how the USA and UK presents globalisation as an inevitable process – the necessary merging of spaces within time. Moreover, it is specifically a neoliberal capitalist form of globalisation that is posed as a given, something natural and neutral and necessary, and countries who exhibit different systems are merely labelled as backward, countries that will catch up with the (unavoidable) trend eventually.<sup>265</sup> Globalisation has even been equated to a force of nature, in a 1998 speech of Bill Clinton where he used the analogy of gravity. Massey hints at the irony of Clinton's statement that globalisation, just like gravity, cannot be resisted by referring to the frequency with which he flies in aeroplanes, resisting defying the laws of nature.<sup>266</sup> But marrying and closer to the truth, is the fact that Bill Clinton spent so much of his term to protect and promote what he has called a force of nature. He has done so, and globalisation is still enabled and perpetuated, through US supported institutions such as the World Trade Organisation and the General Agreement on Tariffs and Trade.

Her third narration revolves around the upheavals in 1989 of different parts of old communist Europe. How locality in these struggles came to represent nationality; claims to exclusivity and hostility to those different from so-called 'home-grown authenticity'.<sup>267</sup> But then she moves on to the working-class struggle in defence of

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<sup>263</sup> Massey D *for space* 2005 on 3-8

<sup>264</sup> Massey D *for space* 2005 on 4.

<sup>265</sup> Massey refers in particular to Mali, Mozambique and Nicaragua as countries where the neoliberal capitalist system of free movement of capital coupled with a very firm control over the movement of labour on the other hand, are not followed. 'It reduces simultaneous coexistence to place in the historical queue'. Massey D *for space* 2005 on 5.

<sup>266</sup> Massey D *for space* 2005 on 5.

<sup>267</sup> Massey D *for space* 2005 on 6.



place in a bid to defy globalisation and she also mentions the defence of place by aboriginal groups in an attempt to secure land. Based on these three opening propositions she then poses three questions, on which the rest of her book is based.

The affidavit of Anita Watkins,<sup>268</sup> former chair of the residents committee of Schubart Park, begins by stating, as is customarily required, Anita Watkins' place of work and residence. At the time of the submission, she was residing in Eersterust and worked as a Financial Services manager at Russels Furniture in the Central Business District of Tshwane/ Pretoria.<sup>269</sup> Before moving into Schubart Park in 2008, she lived in Kruger Park from 1999. The reason she had to move out of Kruger Park in 2008 was due to another evacuation by the city council through the red ants on 22 July 2008. This evacuation was occasioned by a fire started in Kruger Park, allegedly by members from Schubart Park who were evicted on the same day (without the necessary court order) from their flats for non-payment of rental. Six people passed away in the fire at Kruger Park. Kruger Park is adjacent to Schubart Park, with 33 stories and it was built in 1970.<sup>270</sup> In a 2011 master's degree on Pretoria's inner city and the role of various inner city faith based organisations Johan Swart, with reference to Naude, describes the idea behind the Kruger Park and Schubart Park housing development as an attempt to settle people (at that stage only white people) in what Naude calls Pretoria's 'fallow'.<sup>271</sup> They were developed together and Schubart Park was envisaged to be duplicated in several blocks in the same area. The planning of these blocks was highly politically influenced and backed by apartheid legislation. *The Group Areas Act* of 1966 had just been passed and the segregation and white-only areas mandated was central to the conceptualisation and planning of both Kruger Park and Schubart Park.<sup>272</sup> Swart describes 'fallow' according to Naude's understanding as 'a piece of no-man's land rich in rancidness' and asserts that Naude's description is still accurate today, namely

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<sup>268</sup> Watkins A *Founding Affidavit in the Constitutional Court* opening.

<sup>269</sup> Russels is situated at 210 Thabo Sehume (previously Andries) street, only 1 kilometre (or according to Google maps, a 13 minute walk) from Schubart Park on the corners of Sophie du Bruyn and Madiba streets. Eersterust, a township to the east of the city of Tshwane/ Pretoria is approximately 18 kilometres, or, according to Google maps, a 30 minute drive from Russels in Pretoria CBD. Watkins moved in with family in Eersterust after her eviction from Schubart Park.

<sup>270</sup> Skyscrapers of Pretoria available at <http://skyscraperpage.com/cities/?cityID=882> (accessed February 2013).

<sup>271</sup> Swart J *Urban Church. Re-developing space within Pretoria's Schubart Park Complex* 2011 on 65 refers to Naude 1991 on 70.

<sup>272</sup> Act 36 of 1966.

that the place is difficult to define because it is neither on the periphery, nor central, and that it is avoided by careful tourists and 'ignored passing by whites'.<sup>273</sup> He also draws links between the term 'urban regeneration zone' and what Naude's so-called 'fallow'.<sup>274</sup>

The stories of Kruger Park are intertwined with those of Schubart Park. In July 2008 a fire that broke out in Kruger Park was reportedly the result of a sign of solidarity with the residents of nearby Schubart Park. The fire was started by the residents of Kruger Park after security guards (known informally as the Red Ants because of their red uniforms and shields) began evicting their neighbours in the Schubart Park block.<sup>275</sup> Six people died in the fire.<sup>276</sup> The deaths included a young child and mother and a couple who tried to escape the fire by jumping from the window.<sup>277</sup> At the start of the following year Schubart Park residents marched to the Union Buildings to hand a petition over to the President.<sup>278</sup> The petition pointed out that there had been no notifications about the evictions in July 2008 and that the evictions mostly affected the women and children of the community.<sup>279</sup> It was after the petition that Mayor Ramakgopa formed a steering committee that could look into the affairs of Schubart Park. Kruger Park was the first to be evacuated in 2008 and many residents of Kruger Park moved into Schubart Park after the fire. Until Schubart Park's evacuation by the city council in 2011, the residents of Schubart Park were promised that they would be

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<sup>273</sup> Swart J *Urban Church. Re-developing space within Pretoria's Schubart Park Complex* 2011 on 64.

<sup>274</sup> Swart J *Urban Church. Re-developing space within Pretoria's Schubart Park Complex* 2011 on 64,.

<sup>275</sup> Six dead in Pretoria high-rise blaze 22 JUL 2008 14:41 *Mail & Guardian Online Reporter and Sapa, Sapa-Afp* available at <http://mg.co.za/article/2008-07-22-five-dead-in-pretoria-highrise-blaze>.

<sup>276</sup> '6 die in fire as Red Ants evict tenants' *Sowetan Live* available at (accessed February 2014) <http://www.sowetanlive.co.za/sowetan/archive/2008/07/23/6-die-in-fire-as-red-ants-evict-tenants>.

<sup>277</sup> Keppler Virginia 'Krugerpark was my huis; waarheen nou?' *Beeld* (Pretoria) 25 July 2008 p 4 'Kry eerste die yskas' – mev Catherine Bawu Krugerpark 2008.

Ons deur is oopgebreek en die goed is net gevat' 'Sy vleis en groente wat hy net voor die brand uitgehaal het om gaar te maak het nog net so op sy kombuis kas gestaan'.

<sup>278</sup> The residents marched again on 22 August 2009. According to an APF report during both of these marches approximately 60% of the protestors were women. Mashao Chauke *Report on Housing Struggles in Schubart Park and Itereleng* 6 April 2010 Available at <http://apf.org.za/spip.php?article381>. The Anti-Privatisation Forum (APF) has been dissolved. The website is not available any longer and material cannot be accessed anymore.

<sup>279</sup> 'Report on Housing Struggles in Schubart Park and Itereleng' APF Tshwane Region Tuesday 6 April 2010 by Dale, from the Anti-Privatisation forum's website <http://apf.org.za/spip.php?auteur8>. Note that the website of the Anti-Privatisation forum has been hacked since the date of finding this article (February 2013) and entering the homepage URL ([apf.org.za](http://apf.org.za)) will not take you to the article. The Anti-Privatisation Forum is now defunct. See in this regard an article by a co-founder on the website of The South African Civil Society Information Service: Dale T. McKinley 'Lessons of Struggle: The Rise and Fall of the Anti-Privatisation Forum.' *SACSIS*, 8 February 2012 available at <http://sacsis.org.za/site/article/1197> (accessed January 2015).

relocated to Kruger Park while renovations to Schubart Park were underway, but this never materialised.<sup>280</sup> The city council failed to start the refurbishment of Kruger Park, which was standing empty since 2008 and there were no attempts to evict the Schubart Park residents in order to start the refurbishment of Schubart Park either. Both housing complexes became to embody the 'fallow' land that they were built on. Schubart Park and Kruger Park are tied together and therefore it is important to look at the Schubart Park while acknowledging this relationship.

Law and rights structure relationships. Nedelsky argues against a liberal conception of rights and self in favour of an approach that focuses on a relational self and asks, every time rights are interpreted and applied, what kind of relationships are and could be created by the right(s).<sup>281</sup> The necessary underlying assertion of this theory is that the relationships in which a human being participates, determine her identity. Human beings are what and who they are because of their relationships. Nedelsky cautions that her project is not utopian. This is to say that she does not propose how rights should work, but rather suggests a new way of representing rights, namely as relationships.<sup>282</sup> Her work presents new ways of looking at, describing and conceptualising rights. Nedelsky's critique against rights talk can be summarised in three points. First, rights are undesirably individualistic, second, rights obfuscate the real political issues and third, rights serve to alienate and distance people from one another.<sup>283</sup>

On the idea of interrelations, Massey refers to the work of Chantal Mouffe on how the identity of the political subject is constructed relationally.<sup>284</sup> For Mouffe identity and interrelations are co-constructed. In addition to this, Massey suggests that spatiality is also important for the creation of such identities, which includes political subjectivity. By extension place and nation – as spatial identities – are also constructed relationally.<sup>285</sup>

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<sup>280</sup> Watkins A *Founding Affidavit in Constitutional Court* at par7.1.

<sup>281</sup> Nedelsky J *Law's Relations: A Relational Theory of Self, Autonomy, and Law* 2011.

<sup>282</sup> Nedelsky J *Law's Relations: A Relational Theory of Self, Autonomy, and Law* 2011 on 4.

<sup>283</sup> Nedelsky J 'Reconceiving Rights as Relationships' *Review of Constitutional Studies* 1993 1 1-26.

<sup>284</sup> Mouffe C *The return of the political* 1993 and Mouffe C 'Post-Marxism: democracy and identity', *Environment and Planning D: Society and Space* 1995 vol 13 259-265.

<sup>285</sup> Massey D *for space* 2005 on 10.

The local (place) and its attendant qualities, its uniqueness and particular coming together of relations are connected to the notion of the everyday and lived space. Furthermore the concept of interrelatedness and how it constitutes space, place and identity is captured in Massey's concept of throwntogetherness. This notion, which is reliant on Massey's alternative notions of simultaneity and time-space, is connected to a focus on the everyday aspect of lived space. I now look at the everyday as connected to the concept of throwntogetherness and notions of gendered space that I cover above.

The best way to think about law and rights (Nedelsky uses law and rights interchangeably and when she talks about rights, she means legal rights) is through the way in which they structure relations. Since rights and law structure relations it has an impact on autonomy (it either inhibits or enhances autonomy) and therefore also impacts the current system without necessarily waiting for law to change or for a new legal system. I suggest that viewing the law in terms of relationships constitutes a radical spatial turn. This is because it thinks in terms of connectedness and not separateness, it understands space as the relations between things and does not view space as an abstract void within which things exist. Nedelsky's theory conceives of being together in the world as opposed to abstract concepts disconnected from time and space. Instead of the liberal individual, autonomous and independent self, Nedelsky insists on the relational self. Relationships, she emphasises, can enhance or undermine autonomy. Nedelsky thinks of rights in terms of structures of nested relationships. She does not restrict relationships to friendships or familial ties.<sup>286</sup> In fact, a large part of what the law does is to structure relationships between strangers.<sup>287</sup> Relationships are also not necessarily caring or kind or good. Feminists are acutely aware of the possible dangers and destructive power of relationships and a relational approach is therefore not one that romanticises community or relationships.<sup>288</sup>

The relational approach to rights can be summarised in four steps. Firstly, one should think of what relationships initially gave rise to the problem, i.e. what are the

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<sup>286</sup> Nedelsky J *Law's Relations: A Relational Theory of Self, Autonomy, and Law* 2011 on 264.

<sup>287</sup> Nedelsky J *Law's Relations: A Relational Theory of Self, Autonomy, and Law* 2011 on 76.

<sup>288</sup> Nedelsky J *Law's Relations: A Relational Theory of Self, Autonomy, and Law* 2011 on 32.

relationships that need to be altered or amended through applying the right. This means thinking about disputes as being caused by certain relationships and these relationships as produced by certain conditions. Secondly, one must think of what values are at stake in the dispute. The third step combines the second and first steps because it asks what kind of relationships will foster the values that are at stake. In other words, how should the relations change in order to promote the values that were lost or are being lost because of the dispute? Fourthly, one should give due regard to the way in which different and competing versions of a right structure relationships differently.<sup>289</sup> In this analysis, rights are not only viewed in relation to one another, i.e. rights are not only balanced or weighed against other rights, but instead rights are also viewed within the broader context of the relationships that they structure. The act of weighing and balancing competing rights therefore happens by looking at how these competing rights structure relationships differently, how they foster or undermine different values and how these rights should be interpreted in order to give rise to relationships that will alter the dispute. Viewed in this way, the relations between Magrieta Hattingh and her immediate family definitely had to be part of the balancing of the rights and could not be dismissed as briefly as the constitutional court had done. Nedelsky argues against the dominant twentieth century American discourse of rights as trumps and uses the example of South Africa to show how a model of rights as trumps has been eroded.<sup>290</sup> She argues that the Canadian and South African constitutions, in requiring courts to sensibly consider when the limitation of rights can be justified, prevents the treatment of rights as trumps. Because rights are ‘collective decisions about the implementation of core values’ she calls for rights not to be seen as ‘trumps’ but instead as ‘triggers’ that can invite democratic conversation on accountability. In Nedelsky’s approach, property rights are not in the first instance about ‘things’, in fact, property rights are primarily about ‘people’s relations to each other as they affect and are affected by things’.<sup>291</sup>

Viewed in this way, Schubart Park is not in the first place about the apartment block situated on the corner of Sophie de Bruyn and Johannes Ramakgoase streets. In fact, the inhabitants’ right not to be evicted from their home, their right to occupy the

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<sup>289</sup> Nedelsky J *Law's Relations: A Relational Theory of Self, Autonomy, and Law* 2011 on 236.

<sup>290</sup> Nedelsky J *Law's Relations: A Relational Theory of Self, Autonomy, and Law* 2011 on 232.

<sup>291</sup> Nedelsky J *Law's Relations: A Relational Theory of Self, Autonomy, and Law* 2011 on 237.

property that they are renting from the landlords are ultimately about Lizzie Steenkamp, Anita Watkins, Auntie N and Mama R. It concerns how they stand in relation to the city councillors, the judges, their lawyers and the other inhabitants of the city of Tshwane/ Pretoria. Along these lines Sarah Keenan, as I discuss in chapter 3, draws attention to the possibility that law and legal processes can lead to property as a relationship of belonging.<sup>292</sup> The law produces relationships of belonging just as political, cultural and spatial networks do. Her insistence on thinking about property as a relationship of belonging also highlights the role that law plays in enforcing cultural and social particularity of orthodox understandings of property.<sup>293</sup> This tendency of law to further what Keenan calls the 'dominant networks of belonging' is very clear in postcolonial contexts, but, as she shows, is also present in contexts where there are 'competing networks of belonging'.<sup>294</sup> In order to re-imagine the established networks of belonging and associated power relations, space needs to be perceived of as contingent. Understanding belonging in terms of *genius loci* or spirit of place can -as explained by Norberg-Schultz - maintain a confined understanding of space and perpetuate existing systems of belonging. The aim of framing belonging or a sense of place with reference to spirit of place should however open place up to a fluidity and contingency.

What is the view of space that we should have in order to fully acknowledge these relations and how does a feminist perspective on space bring this about? These questions relate directly with Massey's opening propositions in *for space*.<sup>295</sup> Space should be recognised as 'the product of interrelations' and secondly, space should be seen as a sphere that presents the possibility of 'the existence of multiplicity'. With the

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<sup>292</sup> See section 3.3.4.2. *Hattingh v Juta* below.

<sup>293</sup> Keenan S 'Subversive Property: Reshaping Malleable Spaces of Belonging' *Social Legal Studies* 2010 on 428.

<sup>294</sup> Keenan S 'Subversive Property: Reshaping Malleable Spaces of Belonging' *Social Legal Studies* 2010 on 429.

<sup>295</sup> The first question is framed around space/ time: 'What might it mean to re-orientate this imagination, to question that habit of thinking of space as a surface? If instead, we conceive of a meeting-up of histories, what happens to our implicit imaginations of time and space?' This is followed up by the second question, which concerns time/ space: 'what if we refuse to convene space into time? What if we open up the imagination of the single narrative to give space (literally) for a multiplicity of trajectories? What kinds of conceptualisation of time and space, and of their relation, might that give on to?' Thirdly she questions place and asks: 'what then not only of the nationalisms and parochialisms which we might gladly see thereby undermined, but also of the notion of local struggled or of the defence of place more generally. And what if we refuse that distinction, all too appealing it seems, between place (as meaningful, lived and everyday) and space (as what? The outside? The abstract? The meaningless)?' Massey D *for space* 2005.

latter Massey refers to a situation of ‘contemporaneous plurality’. Thirdly, she proposes that space should be considered to be perpetually ‘under construction’.<sup>296</sup>

Foucault’s contribution on the notion of space as relational is as follows:

In a still more concrete manner, the problem of siting or placement arises for mankind in terms of demography. This problem of the human site or living space is not simply that of knowing whether there will be enough space for men in the world—a problem that is certainly quite important—but also that of knowing what relations of propinquity, what type of storage, circulation, marking, and classification of human elements should be adopted in a given situation in order to achieve a given end. Our epoch is one in which space takes for us the form of relations among sites.<sup>297</sup>

#### **2.5.4. Radical geography and/ as feminist critique**

Massey levels a very strong critique against both modernism and postmodernism. Although I do not necessarily support all the aspects of her critique, I unpack it here for a fuller picture of her theory. Despite her critique, she does not dismiss postmodernism in its entirety, but rather stands critical towards its holding on to sexism. Both modernism and postmodernism are marked by patriarchy.<sup>298</sup> Both modernism and postmodernism hold possibilities for feminists. Massey describes the way in which both modernism and postmodernism cling to sexism as unimaginative.<sup>299</sup> She specifically takes issue with Harvey and Soja’s work on postmodernism which were both published in 1989: Harvey’s *The Condition of Postmodernity* and Soja’s *Postmodern Geographies*. On the one side postmodernism offers a plurality of voices and the end of a scientific claim to truth that is distinctly masculine. On the other side, modernism presents the possibility for change and progress. Even though things (and that includes modernism) are patriarchal currently, it can change and we can judge between alternatives. It is however, Massey points out, hard to make a choice between the two exactly because of the flexibility of sexism, which has relentlessly clung to both rhetorics. She illustrates this by referring to Soja and Harvey, even though, she acknowledges, there might be various similar writings. It is these works’ claims to a

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<sup>296</sup> Massey D *for space* 2005 on 9.

<sup>297</sup> Foucault M ‘Of Other Spaces: Utopias and Heterotopias’ (transl.) Miskowiec J *Architecture /Mouvement/ Continuité* 1984 on 2.

<sup>298</sup> Massey D *Space, Place, Gender* 1994 on 212.

<sup>299</sup> Massey D *Space, Place, Gender* 1994 on 212.

comprehensiveness of sorts that in particular invites a close reading. Neither of the authors would describe themselves as anti-feminists. Massey therefore makes it clear that what makes the works anti-feminist is not that women or gender should have featured more in the work or be mentioned with more frequency, but the fact that the authors entirely ignore feminism and the contribution of feminists who have been raising the points they make in their works for several years. Harvey attempts to explain the postmodern condition as the result of space-time-compression, which, for Massey is useful, but inadequate. Of Soja's work she says that it lacks simultaneity because, apart from the opening lines that promises a plurality of voices, it omits themes and voices that differ from his own argument.

Massey points out that non-Marxist geographers, for example, are glaringly absent from Soja's *Postmodern Geographies*. The extent of her critique reaches from the back-blurb that Harvey wrote for Soja and Soja wrote for Harvey,<sup>300</sup> to the aesthetic examples they rely on and the way in which they theorise around these examples. Soja's discussion of the films *Blue Velvet* and *Blade Runner*, by David Lynch and Ridley Scott respectively, are shown to disregard the gendering of the male characters and deny that the processes of identity formation of the women are particular processes of sexual identity formation. His treatment and analyses of the films betrays his 'unwillingness to engage on the terrain of sexual identity'.<sup>301</sup> It is Harvey's use of the paintings of Manet (*Olympia*), Titian (*Venus d'Urbino*), Rauschenberg (*Persimmon*), David Salle's *Tight as Houses* as well as an advertisement from *Citizen's Watch* that draws fierce critique from Massey. She points out that the viewer of these artworks is, time and time again, masculine; in fact they assume a 'complicit male viewer'.<sup>302</sup> Harvey uses these five images to illustrate the shift from modernism with its emphasis on rights and story of progress to postmodernism with its fluidity, plurality and multiplicity. But Harvey never acknowledges the fact explicitly that he chose five images of naked women to bring this point across. It is this silence that surfaces the implicit sexism of Harvey's project. She expands on this one-directional

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<sup>300</sup> Massey D *Space, Place, Gender* 1994 on 212. On the back of Harvey's *The Condition of Postmodernity* Soja wrote: 'Few people have penetrated the heartland of contemporary cultural theory and critique as explosively or as insightfully as David Harvey' and on the back of Soja's *Postmodern Geographies* Harvey wrote: 'One of the most challenging and stimulating books ever written on thorny issues'.

<sup>301</sup> Massey D *Space, Place, Gender* 1994 on 229.

<sup>302</sup> Massey D *Space, Place, Gender* 1994 on 231.



voyeur implicated in Harvey's artworks and draws in Irigaray<sup>303</sup> to make the point about modernism's ocularcentrism (privileging view from an authoritative, masculine, privileged position) and by extension makes Wolff's<sup>304</sup> point that the *flâneuse* is an impossibility precisely because of the one-directional gaze implied in the observational mode of the *flâneur*.<sup>305</sup> Like other authors, she ultimately points out that both these texts are, despite their titles, markedly modernist in their registers. In the introduction I motivate why I rely on Massey's feminist Marxist framework as a theoretical grounding for this project.<sup>306</sup> The work of Soja and Harvey are however still relevant to the spatial turn in law, and in this project I draw on them. Feminist theory geography and feminist theory are not without their blind spots and gaps. Mariana Valverde laments the 'silent abandonment of the domestic scale analyses' in feminist legal thought that occurred over the past few decades.<sup>307</sup> The domestic scale is concerned with the everyday. In the next section, I look at the potential of tactics and everyday practices to disrupt the continuation of space and geographies of power.

## **2.6. The everyday as gendered and tactics as practices of everyday life**

The right to the city of Lefebvre requires a class-conscious understanding of community. Massey radically re-imagines space and argues that the manner in which we think about space matters and that space is gendered through and through.<sup>308</sup>

### **2.6.1. Tactics and the everyday in Schubart Park**

Du Plessis describes in depth the 'array of tactics' that the residents used to protect their home.<sup>309</sup> Auntie N actively participated and described the block saying 'sometimes it was good'. Her son was in prison and she attended his court sessions

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<sup>303</sup> Irigaray L Interview in Hans MF and Lapouge G (eds.) *Les Femmes La Pornographie, L'Erotisme* 1978 on 50.

<sup>304</sup> Wolff J 'The invisible *flâneuse*: women and the literature of modernity' *Theory, Culture and Society* 1985 37-46.

<sup>305</sup> Massey D *Space, Place, Gender* 1994 on 235.

<sup>306</sup> See section 1.5. Approach and methodology.

<sup>307</sup> Valverde M *Chronotopes of Law: Jurisdiction, Scale and Governance* 2015 on 113-117.

<sup>308</sup> These are central tenets of Massey's work, but is articulated expressly in Massey D *for space* 2005 on 6.

<sup>309</sup> Du Plessis R *Factors influencing the Creative Participation of people living in an inner city* 2012 on 82-89.

diligently.<sup>310</sup> When City Property took over the management of the block she, admittedly, did not pay her rent because she 'did not have a contract with City Property.<sup>311</sup> Throughout the layering of Auntie N's narrative, it becomes clear that she is deeply religious. Du Plessis reads Auntie N's story as a victory, someone whose creative participation emerged not despite of but even because of the adversity in Schubart Park, someone who can adapt and fit in and make the best of her circumstances. Mama R on the other hand is not sketched as resilient. She is cast as someone with passive participation. She has moved out and has no desire to go back, even though she still knows people in Schubart Park.<sup>312</sup> Initially she and her young daughter walked together in the mornings; her daughter to school and Mama R to her job at the clinic. When her daughter returned from school, she would travel alone to floor 20. It was mainly her concern for her daughter's safety that initially made Mama R consider leaving Schubart Park. These considerations to leave was compounded when shortly after her second child was born there was a power cut and a stall in the water supply at Schubart Park, but it was only after the evictions and fire at Kruger Park in 2008 that she borrowed money from her colleagues to buy a house in Soshunguve. When her new home in Soshunguve presented transport problems, she moved back into town and rented the house out to her child's father.<sup>313</sup>

### 2.6.2. Lefebvre De Certeau and Butler on the everyday<sup>314</sup>

Depictions of the everyday in the work of Lefebvre draw deeply on the notion of inhabitation, which he relies on to explain the human body's relationship to space and to express the political dimensions of the urban landscape.<sup>315</sup> In the period after World War II Lefebvre wrote *Critique of Everyday Life* in an attempt to address the alienation

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<sup>310</sup> Du Plessis R *Factors influencing the Creative Participation of people living in an inner city* 2012 on 103.

<sup>311</sup> Du Plessis R *Factors influencing the Creative Participation of people living in an inner city* 2012 on 74.

<sup>312</sup> Du Plessis R *Factors influencing the Creative Participation of people living in an inner city* 2012 on 106.

<sup>313</sup> Du Plessis R *Factors influencing the Creative Participation of people living in an inner city* 2012 on 105-106

<sup>314</sup> The thoughts captured in sections 2.6.2. Lefebvre De Certeau and Butler on the everyday and 2.6.3. Maphango have been published in De Villiers I 'Spatial Practices in Lowliebenhof: The Case of *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* *Potchefstroom Electronic Law Journal* 2014 2165-2193.

<sup>315</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 116.

in everyday life through the theories of Marxism.<sup>316</sup> For Lefebvre, his introduction of the notion of the 'everyday', which enabled an account of alienation beyond economic forms of domination, was his most significant contribution to Marxist thought.<sup>317</sup> The post-war period was marked by a shift from inhabitation to habitat. For Lefebvre inhabitation is embodied whereas habitat is functionalist and instrumentalist.<sup>318</sup>

De Certeau's conception of practice is described in terms of art and closely associated with creativity: the 'art of using' or 'making' or 'making do'.<sup>319</sup> In explaining oppositional practices, De Certeau distinguishes between strategy and tactics.<sup>320</sup> Place stands central to the distinction. Strategies assume a specific circumscribed place, but tactics are independent of 'proper' places.<sup>321</sup> To explain the formal structure of practices, he considers on the one hand certain ways of making according to their value for strategy: 'functions that make possible (or permit) everyday practices', and on the other hand he looks at poetic ways of 'making do' for their tactical value: from 'familial practices' to 'the tactics of the art of cooking'.<sup>322</sup> De Certeau furthermore also makes a case for the city walker as a voyeur.<sup>323</sup> Walking in the city has its own logic or 'rhetoric'.<sup>324</sup> The ordinary walkers live on the streets of the city where visibility begins; they live down below as opposed to those who possess a privileged, panoramic view of the city.<sup>325</sup> For him the inhabitants of the city write the urban text and fill the empty space with the life they breathe into it.<sup>326</sup>

In contrast to strategies, tactics, according to De Certeau are calculated actions determined by 'the absence of a proper place'.<sup>327</sup> Strategies seek to establish their own place and are connected to power. They keep the existing power in place and

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<sup>316</sup> Lefebvre H *Critique of Everyday Life: Volume 1* 1947 (transl.) Moore J 1991.

<sup>317</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 5.

<sup>318</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 7.

<sup>319</sup> De Certeau M *The Practice of Everyday Life* 1984 on xv.

<sup>320</sup> De Certeau M 'On the oppositional practices of everyday life' (transl.) Jameson F and Lovitt C 1980 *Social Text* 3 on 5.

<sup>321</sup> De Certeau M *The Practice of Everyday Life* 1984 on xix.

<sup>322</sup> De Certeau M *The Practice of Everyday Life* 1984 on xv.

<sup>323</sup> Under spatial practices he dedicates chapters to 'Walking in the City' (91-110), 'Railway Navigation and Incarceration' (111-114) and 'Spatial Stories' (115-130).

<sup>324</sup> De Certeau M *The Practice of Everyday Life* 1984 on 92.

<sup>325</sup> De Certeau M *The Practice of Everyday Life* 1984 on 94.

<sup>326</sup> De Certeau M *The Practice of Everyday Life* 1984 on 96.

<sup>327</sup> De Certeau M 'On the oppositional practices of everyday life' (transl.) Jameson F and Lovitt C 1980 *Social Text* 3 on 6.

assert power.<sup>328</sup> He calls strategy the ‘calculus (or the manipulation)’ of power relationships, which become possible whenever a subject of will and power can be isolated. This form of making constitutes the manipulation of force made possible by the power of a subject.<sup>329</sup> Strategic rationalization, in management, begins by distinguishing its ‘appropriate’ place from an ‘environment’, that is, the ‘place of its own power and will’.<sup>330</sup>

Tactics on the other hand are determined by the absence of power,<sup>331</sup> and take advantage of opportunities.<sup>332</sup> Within the framework of De Certeau, many everyday practices are tactical: talking, moving about, reading and cooking. The place of tactics is not within itself but in a place located outside of its power. For De Certeau this means that it does not have the possibility of totalizing the adversary in a distinct. Tactics operate ‘blow by blow,... profits from and depends upon “occasions”... It poaches there. It creates surprise.’<sup>333</sup>

Another case besides that of Schubart Park, and set in Johannesburg, illustrating the idea of tactics and everyday practices very well is that of *Maphango v Aengus Lifestyle Properties*.<sup>334</sup> In light of the critique rendered against De Certeau’s redemption of consumption through his understanding of everyday practices, I link his distinction between strategies and practices to Lefebvre’s differentiation between habitat and inhabitation. In the context of the *Maphango* decision this distinction can be translated to the difference between ‘we create the ultimate living spaces’ and ‘these are our homes and we live here’.

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<sup>328</sup> De Certeau M *The Practice of Everyday Life* 1984 on xx.

<sup>329</sup> De Certeau M mentions businesses, armies, cities and scientific institutions as examples of these subjects whose power and will enables strategies. De Certeau M *The Practice of Everyday Life* on 36.

<sup>330</sup> De Certeau M ‘On the oppositional practices of everyday life’ (transl.) Jameson F and Lovitt C 1980 *Social Text* 3 on 5.

<sup>331</sup> De Certeau M *The Practice of Everyday Life* 1984 on 38.

<sup>332</sup> De Certeau M *The Practice of Everyday Life* 1984 on 36.

<sup>333</sup> De Certeau M ‘On the oppositional practices of everyday life’ (transl.) Jameson F and Lovitt C 1980 *Social Text* 3 on 6. ‘Power is bound by its very visibility. In contrast, trickery is possible for the weak... The weaker the forces at the disposition of the strategist, the more the strategy... is transformed into tactics.’

<sup>334</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC).

### 2.6.3. *Maphango*

Lowliebenhof is a block of apartments in the inner city of Johannesburg. It is a ten-story apartment block in Braamfontein and the applicants had different rental agreements in terms of which they lived there.<sup>335</sup> These lease agreements were initially concluded with various landlords and therefore they contained different termination and escalation clauses.<sup>336</sup> The first lease agreement dated back to 1994. The respondent-landlord became involved in the management of Lowliebenhof in 2007 through an associated company.<sup>337</sup> The respondent took transfer of the entire block in 2009, improved the building and wanted to increase the rent while claiming that the upgrading of the apartment block was in line with the 'city's initiative at refurbishing and upgrading the Johannesburg inner city'<sup>338</sup>. The respondent attempted this increase by cancelling the existing rental contracts and offering new contracts on increased rental terms. The *Maphango* case concerned the question whether the landlord was allowed to cancel the leases and evict the tenants in the event that they refused to accept the revised contracts. Even though the revised rental amounts were based on market-related rentals it resulted in a significant increase of the existing rent. For some of the tenants it meant a 100% increase and for others as much as 150%.<sup>339</sup>

The case of *Maphango* case raised a number of interesting questions in its aftermath.<sup>340</sup> The purpose of discussing the case in this chapter is to introduce an overview of practices of everyday life. The central research problem of this project concerns the continuation of space or the reproduction of unequal relations through spaces. Everyday practices or tactics subvert this continuation and presents the possibility of questioning the underlying unequal power relations that produce and are produced by urban spaces in South Africa. Some of the other inquiries sparked by the *Maphango* case include an extensive analysis of rent control<sup>341</sup> and conceptualising

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<sup>335</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at par 6.

<sup>336</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at par 6-8.

<sup>337</sup> In the Supreme court of appeal judgment *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) at par 4, Brand JA explains that 'The respondent purchased the property in 2007, but only became the owner in May 2009...It was not a party to the leases... However, by operation of the common law principle of *huur gaat voor koop*, the respondent became the successor to all rights and obligations deriving from these lease agreements, when it became owner of the building.'

<sup>338</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at par 11.

<sup>339</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at par 88.

<sup>340</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) ('*Maphango*').

<sup>341</sup> Sue-Mari Maass relies on Karl Klare's project of transformative constitutionalism (Klare 'Legal culture and transformative constitutionalism' (1998) *South African Journal on Human Rights* 146) in Maass

an unfair practice regime in landlord-tenant law.<sup>342</sup> The case has also been used for illuminating the complex concept of subsidiarity,<sup>343</sup> for discussions on a culture of commitment to the common law,<sup>344</sup> and to illustrate the ‘two sides of the coin’ that is South African law of lease.<sup>345</sup>

Central to the *Maphango* case is the tension between inner city rejuvenation projects and the interests of those who have made a home in the not-yet-rejuvenated inner city.<sup>346</sup> The focus of this section is the manner in which the constitutional court in the *Maphango* case interpreted the concept of ‘practice’ in the Rental Housing Act<sup>347</sup> and how this in turn reveals the spatial politics of urban spaces. I rely on Michel De Certeau’s<sup>348</sup> theory on the practice of everyday life and bring it in relation to

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S ‘Conceptualising an unfair practice regime in landlord-tenant law’ 2012 *SAPL* 652-670. In light of the possibility presented by the project of transformative constitutionalism to challenge unequal power relationships that undermine constitutional values, she welcomes the Constitutional Court’s interpretation of the Rental Housing Act in *Maphango* because it enables Tribunals to provide increased tenure protection to tenants that are struggling.

<sup>342</sup> Maass S ‘Rent Control: a Comparative Analysis’ 2012 *PER* 15(4) 41-100. She refers to *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) and two other supreme court of appeal decisions: *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2011 4 SA 337 (SCA). All three these cases concerned disputes between low-income tenants and private landlords.

<sup>343</sup> See Van Der Walt A (ed) *Property and Constitution* 2012 57-61.

<sup>344</sup> Michelman, during a public lecture at the Constitutional Court in 2012, referred to the decision as one that ‘may or may not’ be an example of ‘the ways in which the dignity of the common law shows up in South African constitutional adjudications’. Michelman F ‘Expropriation, Eviction, and the Dignity of the Common Law’ (18 July 2012) *Harvard Public Law Working Paper* No. 12-37 He describes this culture of commitment as an ‘inclination of lawyers to defer to the common law, including a reluctance of lawyers to conclude that the words of a statute, or of the Constitution, have actually meant to command a deviation from the common law’. Michelman *Harvard Public Law Working Paper* 3.

<sup>345</sup> Philip Stoop relied on the case to illustrate what he refers to as the two sides of the coin that is South African law of lease. Stoop PN ‘The South African law of lease and socioeconomic rights.’ *International Journal of Private Law* 6.4 (2013): 329-340. On the one hand, Section 26 of the 1996 Constitution of the Republic of South Africa provides that the state must afford access to adequate housing. On the other hand, landlords should be protected as rental housing forms a large portion of the South African housing market. He expresses the concern that if a landlord’s right to dispose of his property as he wishes is continuously eroded by a tenant’s right to access to adequate housing, the sustainability of the rental market will be affected.

<sup>346</sup> The issue of gentrification and city clean-up operations is a well-known problem in Johannesburg. The most recent manifestation of this is the removal of informal traders from the inner city of Johannesburg. See for example Tau S ‘Crackdown on Street Traders’ *The Citizen* 23 October 2013 and SERI’s condemnation of the crackdown at <http://www.seri-sa.org/index.php/38-latest-news/202-seri-condemns-the-crack-down-on-informal-traders-in-inner-city-johannesburg-23-october-2013> (accessed 24 October 2013).

<sup>347</sup> Act 50 of 1999 (*Rental Housing Act*).

<sup>348</sup> See section 2.6.2. Lefebvre De Certeau and Butler on the everyday. De Certeau M ‘On the oppositional practices of everyday life’ (transl.) Jameson F and Lovitt C 1980 *Social Text* 3 3.

Lefebvre's<sup>349</sup> notion of inhabitation.<sup>350</sup> My inquiry in this section is informed by spatial justice and the spatial turn in law.<sup>351</sup> After setting out the facts and litigation background of the case, I discuss the constitutional court's treatment of the concept of practice in the *Maphango* case with brief reference to how Labour Law uses this concept. I investigate the idea of 'practice' from the vantage point of spatial justice, within theories of everyday life discussed in the previous sections.<sup>352</sup> Towards the end of this, section 2.6.3 and as a way of introducing section 2.7, I briefly turn to Massey's<sup>353</sup> 'place called home'.<sup>354</sup>

The litigation history of the applicants living in the block started prior to the respondent-landlord's acquisition of the apartment block as a whole. The landlord before the one that was the respondent in the case issued written notices to vacate in September 2008, upon which the tenants lodged a complaint at the Gauteng Rental Housing Tribunal.<sup>355</sup> In October 2008 a mediation meeting was convened and because the parties could not reach an agreement at this meeting the matter was set down for arbitration to take place in June 2009.<sup>356</sup> In the time between mediation and arbitration the landlord at the time waited for the three month moratorium<sup>357</sup> period to expire and in February 2009 made an application in the Magistrate's court for the tenants to be evicted.<sup>358</sup> However, subsequent to this application for eviction in the Magistrate's

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<sup>349</sup> Lefebvre H *Critique of Everyday Life; Critique of Everyday Life III and The Production of Space*.

<sup>350</sup> See section 2.4. Inhabitation and Habitat above.

<sup>351</sup> Spatial justice acknowledges that space is intertwined with normative production. See for example Philippopoulos-Mihalopoulos A 'Spatial justice: law and the geography of withdrawal' 2010 *International Journal of Law in Context* 6(3) 201-216.

<sup>352</sup> See sections 2.6.1. Tactics and the everyday in Schubart Park and 2.6.2. Lefebvre De Certeau and Butler on the everyday.

<sup>353</sup> Massey D *Space, Place and Gender* 1994.

<sup>354</sup> See also section 3.3.3. Belonging as home and place as fluid, for Massey's 'place called home' in the context of the street name case.

<sup>355</sup> In terms of section 13 of the *Rental Housing Act*. Gauteng Unfair Practices Regulations Provincial Gazette Extraordinary No 124 Notice 4004 of 2001, 4 July 2001 (Gauteng Unfair Practices Regulations). Both the Gauteng Unfair Practices Regulations and the Procedural Regulations purport to be issued under section 15 of the Act, which gives the national Minister of Housing power to make regulations. On this seeming anomaly, see below n 73. 12 The Act provides in section 7 that the Member of the Executive Council (MEC) of a province responsible for housing matters may by notice in the Gazette establish a tribunal in the Province to be known as the Rental Housing Tribunal. The Gauteng Rental Housing Tribunal was established in terms of the Premier's Notice Provincial Gazette No 127 Notice 4216 of 2001, 18 July 2001. *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at par 13.

<sup>356</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at par 14.

<sup>357</sup> Section 13(7) of the *Rental Housing Act* places a three month moratorium on evictions, given that the tenant continues to pay rent.

<sup>358</sup> In terms of section 13(7) of the *Rental Housing Act* a landlord may not evict a tenant who is still paying rent until the Tribunal has made a ruling or a period of three months has elapsed. The three

court, formal transfer took place, the respondent became the owner of the block and the eviction proceedings were withdrawn in May 2009. This withdrawal did not bring about the end of the eviction proceedings though, because the day after withdrawal the new landlord and respondent in this case instituted fresh eviction proceedings, this time in the high court. On 7 May 2010 the high court granted an eviction order in favour of the Landlord.<sup>359</sup>

In the constitutional court the majority formulated question before the court as whether the termination was capable of constituting an unfair practice and not whether the *Rental Housing Act* prohibited the landlord from terminating the tenants' leases in order to secure higher rents.<sup>360</sup> With reference to the case of *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd*<sup>361</sup> Cameron J argued that because this question is not purely a question of fact, but that it also embodies elements of law, and may therefore be introduced and determined at the stage of appeal.<sup>362</sup> Cameron J held that the *Rental Housing Act* applied to the case and had to be interpreted in light of the Constitution. After finding that the landlord's termination of the leases constituted 'unfair practice' in terms of the Rental Housing Act, the majority referred the matter back to the Rental Housing Tribunal. Emphasis

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months start from the date of the complaint. In light of this section it raises questions why an arbitration date was set for a time after three months from the date of the complaint. The complaint was lodged on 17 September 2008 and three months from then would have been 17 December 2008. The decision is silent on the events between the mediation proceedings and the date on which the arbitration was set down for. This period is, in my view, a key factor in the case progressing to the Constitutional Court. The questions can be raised whether this had an influence on the Constitutional Court's decision to refer the matter back to the Rental Housing Tribunal.

<sup>359</sup> The case in the High Court was reported.

<sup>360</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at note 98 attached to par 47. Cameron J explains that the question of whether conduct constitutes an unfair practice is a question of both fact and law. He refers to *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* ('Perskor') 1992 (4) SA 791 (A) and quotes from par 798E-I: 'the definition of an unfair practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects.' In this case the appellate division held that 'a decision of the Court pursuant to [whether the conduct is an unfair labour practice] is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinion.'

<sup>361</sup> *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* ('Perskor') 1992 (4) SA 791 (A).

<sup>362</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at note 98 attached to par 47. Cameron J refers to *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* ('Perskor') 1992 (4) SA 791 (A) and quotes from par 798E-I: 'the definition of an unfair practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects.' The appellate division held that 'a decision of the Court pursuant to [whether the conduct is an unfair labour practice] is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinion.'



was placed on two constitutional court decisions by the court on the right to access to housing,<sup>363</sup> and how the 'right of access to adequate housing ripples out to private rights'.<sup>364</sup>

The minority judgment, per Zondo J, argued that the main judgment did not decide the issue before the court, namely the decision of the supreme court of appeal and not the question of whether the landlord's conduct constituted an unfair practice in terms of the Rental Housing Act.<sup>365</sup> Accordingly the minority judgment the applicants' leases were validly terminated. In a concurring judgment Froneman J, with Yacoob J, agreed with the majority judgment and the decision that the *Rental Housing Act* should apply.<sup>366</sup> Froneman J deemed it necessary to add the following, in response to the arguments of the minority judgment:

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<sup>363</sup> In a footnote Cameron J refers to the leading court cases in the issue of considering all relevant circumstances: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (Lawyers for Human Rights as *Amicus Curiae*) 2012 (2) BCLR 150 (CC); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* 2012 (4) BCLR 382 (CC) and *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* 2012 (4) BCLR 372 (CC).

<sup>364</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at par 34. Specific reference was made to the fact that debt recovery is subject to judicial consideration of section 26 before creditors can levy execution on the home of a debtor. In this regard the court relied on the Constitutional Court's decisions in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) and *Jaftha v Schoeman and Other; Van Rooyen v Stolz and Others* 2005 (2) SA 140 (CC). *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at par 33: 'And while a private landowner cannot be expected to house unlawful occupiers indefinitely, its right not to be arbitrarily deprived of property must be interpreted in conjunction with the constitutional requirement that every eviction be made by court order after considering all the relevant circumstances.'

<sup>365</sup> The right not to be arbitrarily deprived of property is contained in section 25(1) of the Constitution and the Constitutional requirement to consider all relevant circumstances in every case of eviction in section 26(3). See also *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) at par 146.

<sup>366</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) par 158. Froneman J wrote the majority judgment in the *Schubart Park* case decided by the Constitutional Court shortly after *Maphango*. Judgment was handed down on 9 October 2012 in favour of the 'Schubart Park residents, who were evacuated by the Tshwane Metro Council in September 2011 because of an alleged safety risk posed by the dilapidated condition of the high rise apartments. *Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) BCLR 68 (CC). Schubart Park is also an example of struggling tenants in a city high-rise block subjected to the rejuvenation project of the block's owner. Whereas Lowliebenhof in *Maphango* is owned by a business enterprise, Schubart Park is the property of the city. Tshwane 2055 envisages the refurbishment of the Schubart Park complex as part of the Western Precinct project. In *Schubart Park* the tenants triumphed over the City of Tshwane Metropolitan Council and the Council was ordered to meaningfully engage with the residents. Unfortunately the 3000-5000 inhabitants of Schubart Park had, by the time that the judgment was given, already been evicted for a year. In his judgment, Froneman J refers to a number of cases on eviction, but does not refer to *Maphango*.

It is common cause that section 26 of the Constitution is implicated. Interpretation of what constitutes an 'unfair practice' under the Act in light of this is thus inevitably a constitutional issue, a matter of law. Interpretation and application of the law under the Constitution is never a mechanical application of rules; it always involves a value judgment. Our Constitution and law are infused with moral values. The days of denying the value-laden content of law are long gone.<sup>367</sup>

The court was divided on whether judgment in terms of the concept of unfair practice should come into play even though the parties did not expressly place it before the constitutional court. The majority viewed it as a question of law and therefore argued that it should be part of the Court's consideration, while for the minority it was a value judgment that had to be raised by the parties and could therefore not be raised by the Court. The concurring judgment argued that the distinction between questions of law and value judgments is a false dichotomy given the requirements of Constitutionalism in South African jurisprudence. I now turn to the concept of practice.

An understanding of practice as tactics within the context of spatial justice presents a different angle to look at the conduct of both the landlord and tenant beyond the question of the requirement of continuation or repetition. The argument of the main judgment in the *Maphango* case raises a clear link between labour and home, which provides a link between spatial practices and spatial politics.<sup>368</sup> In the context of spatial justice the practices of everyday life is often described as potentially subversive acts that challenge spatial arrangements. The distinctions between house and home corresponds with the differentiation between habitat and inhabitation as raised by Lefebvre. Everyday spatial practices form part of inhabitation and distinguish inhabited places from mere habitats.

Cameron chooses the word 'live' as opposed to 'reside' or 'stay' to describe the tenants' relationship with Lowliebenhof: 'The flats are their homes and they live there'.<sup>369</sup> The use of the word 'live' interlaces the fact of their living with these apartments and with their homes. A February 2010 satellite photo shows an Aengus

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<sup>367</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* [2011] 3 All SA 535 (SCA) at par 151.

<sup>368</sup> This link draws from the work of Lefebvre and his concept of the production of space, which are based on Marxist theories of production and labour.

<sup>369</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* [2011] 3 All SA 535 (SCA) at par 2.

Lifestyle Properties poster at the entrance of Lowliebenhof displaying the words: 'Do you want the ultimate living space?'<sup>370</sup> This creation of 'ultimate living spaces' at the cost of living and 'making do' in the city space stands central to this case. The terms 'live' (verb, inhabit) and 'living space' (habitat) captures the core of the *Maphango* case: life had to make way for ultimate living spaces and homes had to be turned into profitable units. These opposing views of the space of Lowliebenhof relate closely to a difference in spatial practices.

In considering what an interpretation of practice in the context of spatial justice might entail, I rely on the work of De Certeau.<sup>371</sup> In his two-volume book *The Practice of Everyday Life* he approaches the idea of a practice from a different angle.<sup>372</sup> According to De Certeau practice can be classified as strategy or as tactics. I suggest that the same distinction applies to the practices of landlords and tenants. Where the former asserts power, the latter carries the potential to subvert it. De Certeau considers the value of everyday practices as tactics that are available to ordinary people to reclaim their own autonomy from the pervasive power of culture, politics and commerce.<sup>373</sup> The connection between force or power and practices is clear from the outset. In this sense he exposes the seemingly ordinary as something powerful. Power and place are central to De Certeau's conceptualization of practice.<sup>374</sup> Exercises of power are not necessarily acts performed continuously by an individual and a practice can be exercised by a larger community. An individual's participation in these actions, albeit only once, then becomes a practice by virtue of its association with that of the broader group and by extension is then an expression (or subversion) of power.<sup>375</sup> De Certeau's understanding of everyday practices has been criticised from a Marxist perspective for being a 'prevailing 'redemptive' model of the productive consumer'.<sup>376</sup>

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<sup>370</sup><https://maps.google.co.za/maps?ie=UTF-8&q=Lowliebenhof&fb=1&gl=za&hq=lowliebenhof&hnear=0x1e95619cbec65033:0xf66262b07a847b4c,Pretoria&cid=0,0,666638301094739748&ei=8HWDUp-mFdCihgewj4GwDw&ved=0CJgBEPwSMAs>

<sup>371</sup> De Certeau M *The Practice of Everyday Life*; De Certeau M 'On the oppositional practices of everyday life' (transl.) Jameson F and Lovitt C 1980 *Social Text* 3 3.

<sup>372</sup> De Certeau M *The Practice of Everyday Life* (transl.) Rendall 1984 and De Certeau M *The Practice of Everyday Life Volume 2: Living and Cooking* (transl.) Tomasik TJ 1994.

<sup>373</sup> He dedicates the essay to the 'ordinary man. The common hero'. De Certeau M 'On the oppositional practices of everyday life' (transl.) Jameson F and Lovitt C 1980 *Social Text* 3 3 on.

<sup>374</sup> De Certeau M *The Practice of Everyday Life* 1984 on xv.

<sup>375</sup> De Certeau M *The Practice of Everyday Life* 1984 on xiv.

<sup>376</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 8.

Butler, with reference to the work of John Roberts, explains that De Certeau's model bypasses the importance of the everyday for a 'critique of culture' and for 'the development of radical forms of politics'.<sup>377</sup> My focus is therefore not on De Certeau's emphasis on consumption, but rather on his distinction between strategies and tactics and how these practices confirm or subvert power. I bring this distinction in relation to habitat and inhabitation as understood by Lefebvre.

The *Maphango* case considered the conduct of Aengus Propriety Holdings as a practice. The 'practice' of renovating dilapidated inner-city blocks and then charging higher rentals is a well-known strategy of business-driven landlords. De Certeau describes oppositional practices or tactics as an art of the weak: 'The weaker the forces which are subjected to strategic direction, the more they will be vulnerable to wile'.<sup>378</sup>

De Certeau continues by suggesting various ways in which tactical practices of consumers can be considered afresh. He considers activities such as walking, dwelling, reading and cooking as activities that present 'characteristics of tactical ruses and surprises: tricks of the "weak" within the order established by the "strong"'.<sup>379</sup> This approach to practice as tactics links with the idea of inhabitation and therefore with the notion of home. Translating the words of Cameron J in terms of this description it could read: 'The flats are their homes' and they inhabit them, they perform tactical practices of everyday life there. The unfair practice of the landlord belongs to the realm of strategy, confined to space and reliant on power. The everyday practices of the tenants, in their insistence to continue to inhabit the apartments after eviction notices were served,<sup>380</sup> can be described in De Certeau's terms as tactics: not confined to space and aimed at disrupting the power of private property.

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<sup>377</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 107. Butler relies on Roberts J *Philosophizing the Everyday* 2006 2-4.

<sup>378</sup> De Certeau quotes Von Clausewitz K *De la Guerre* 1955 Paris on 212 – 213. De Certeau M 'On the oppositional practices of everyday life' (transl.) Jameson F and Lovitt C 1980 *Social Text* 3 3 on 6.

<sup>379</sup> De Certeau M 'On the oppositional practices of everyday life' (transl.) Jameson F and Lovitt C 1980 *Social Text* 3 3 on 8.

<sup>380</sup> The first applicant, who has given her name to the case, Ntombidzodwa Yvonne Maphango, got married in the time that the application was first brought and its hearing in the Constitutional Court. In the citation of the parties, the words (now Mgidlana) appear next to her name. Life went on and she continued to perform practices of everyday life in spite of the court case.

De Certeau brings his own work in relation to that of Michel Foucault and Pierre Bourdieu.<sup>381</sup> Both of these theorists viewed practices as a way in which to explain society in relationship to structures.<sup>382</sup> Foucault's interest in practices concerned the conditions produced by the practices and Bourdieu on the other hand was interested in the conditions that produced the practices.<sup>383</sup> De Certeau relates strategies to the Foucauldian synonyms for educational, penitential and medical processes: 'instrumentalities', 'techniques', or 'mechanisms'.<sup>384</sup> Procedures that do not have 'their own place on which the panoptic machinery can operate' are the ordinary practices or tactics of De Certeau.<sup>385</sup> Bourdieu's concept of *habitus* or technicity also informed De Certeau's work on practice.<sup>386</sup> A strategy in the Bourdieuan sense is similar to participating in a trick in a card game: it depends on both the hand that has been dealt and the skill or ability to play cards.<sup>387</sup> They are subject to 'implicit principles' or postulates that determine the space of the game and 'explicit rules'.<sup>388</sup> *Habitus* refers to expectations and outlooks of certain social groups that are acquired through participation in everyday life. For purposes of the *Maphango* decision, the link that Bourdieu introduces between *habitus* and *habitat* is of importance. The practices described as *habitus* are all dominated by what De Certeau calls 'an economy of proper place'.<sup>389</sup> The success of the tricks depends on the way in which it manages to reproduce two complementary forms of dwelling, namely wealth in the first place and the body in the second place.<sup>390</sup> A politics of place therefore forms the base of all these strategies.<sup>391</sup> Tactics should use the institutional and symbolic organisation in such an independent and self-governing way that they usurp scientific representations of society.<sup>392</sup> The dwelling provides the *habitus* with its form, but it does not give

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<sup>381</sup> De Certeau thoroughly discusses this in the chapter entitled 'Foucault and Bourdieu' De Certeau M *The Practice of Everyday Life* 1984 on 45-60.

<sup>382</sup> De Certeau M *The Practice of Everyday Life* 1984 on 57.

<sup>383</sup> De Certeau M *The Practice of Everyday Life* 1984 on 58.

<sup>384</sup> De Certeau M *The Practice of Everyday Life* 1984 on 45. He refers in particular to Foucault M *Surveiller et Punir* 1975 *Discipline and Punish* (transl.) Sheridan A 1977. De Certeau further also relies on Bourdieu P *Le Métier de sociologue* 2<sup>nd</sup> ed 1973.

<sup>385</sup> De Certeau M *The Practice of Everyday Life* 1984 on 49.

<sup>386</sup> De Certeau M *The Practice of Everyday Life* 1984 on 51.

<sup>387</sup> De Certeau M *The Practice of Everyday Life* 1984 on 53.

<sup>388</sup> De Certeau M *The Practice of Everyday Life* 1984 on 53-54.

<sup>389</sup> De Certeau M *The Practice of Everyday Life* 1984 on 55.

<sup>390</sup> With this, De Certeau refers to the designation of home as both the house (property) and the family (the genealogical body). De Certeau *The Practice of Everyday Life* 1984 on 215 note 24.

<sup>391</sup> For De Certeau, Bourdieu's theory 'throws a blanket' over tactics 'as if to put out their fire'. De Certeau *The Practice of Everyday Life* 1984 on 59.

<sup>392</sup> De Certeau M *The Practice of Everyday Life* 1984 on 59.

content. Dwelling is therefore 'hidden in the theory under the metaphor of the *habitus*'.<sup>393</sup>

The majority decision in the *Maphango* case presents the possibility of an understanding of home that takes preference over business ventures, tactics over strategy and inhabitation over habitat. The majority decision situates this distinction between business and home by explaining the historical context of the Rental Housing Act.<sup>394</sup> In the minority judgment, considerations of public policy, fairness and the equitability of the rent to both the landlord and the tenant are more important. Zondo J emphasizes the landlord's economic justification for charging market-related rents. Abstract space, habitat and functionalism take preference. It captures an understanding of home in terms of which ownership and market-demands (strategies) turn apartments into business ventures (habitats) and thereby it diminishes the possibility of a home in the city centre of Johannesburg.

The tension between inhabitation and habitat in the *Maphango* case is not only illustrated in the opposing arguments of the parties, but also through the majority and minority decisions of the constitutional court. The constitutional court did not grapple with this tension, but instead referred the matter to the Rental Housing Tribunal. On the one hand, the constitutional court avoided the problem, but in another sense, referring the matter back to the Housing Tribunal is an 'everyday' remedy. My contention is that the majority decision was in support of the tactics of the tenants and encouraged them and other tenants to follow an ordinary, everyday route in addressing rental disputes, namely the procedure through the Rental Housing Tribunals.

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<sup>393</sup> De Certeau M *The Practice of Everyday Life* 1984 on 60.

<sup>394</sup> *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) par 29. The housing shortages after World War 1 lead to the enactment of the Tenant's Protection Act, which formed the centre of later rent control legislation. Cameron J quotes from Rosenow and Diemont *The Rents Act in South Africa* 2nd edition Juta & Co Ltd Cape Town 1950 at 1: the *Tenant's Protection Act* 'provided that as long as a lessee paid the stipulated rent on due date, and performed all other conditions appurtenant to the lease, he or she could not be ejected unless the lessor required the premises for personal accommodation.' The lessee was protected regardless of the amount of rent, as long as she paid the rent she was protected even if the rent was unreasonably low.

Approaching the notion of home from the vantage point of everyday practices as tactics and the political notion of inhabitation resists a romanticised, static and nostalgic conception of home. It inscribes the social relationships that produce of urban spaces (homes in the city) into the understanding of these spaces. Massey's understanding of spatial practices, place and space, as I point out in this chapter,<sup>395</sup> supports a dynamic and contested notion of 'a place called home'.<sup>396</sup> Home need not be single and stable place or space, but could be 'home-places' that become equally complex products of 'the ever-shifting geography of social relations present and past'.<sup>397</sup> Tactics of making do and strategies of increasing rental income related to how the Lowliebenhof as a home-place was perceived and conceived of. The tenants filed a complaint with the Rental Housing Tribunal before the deadline prescribed by the constitutional court,<sup>398</sup> but the case was not followed through.<sup>399</sup> The living spaces in Lowliebenhof are now the homes of other tenants, who can afford to practice everyday life there.

Lefebvre highlights the rationality in the practices of urban planners and city administrators and argues that this leads to a 'bureaucratic society of controlled consumption'.<sup>400</sup> This society is marked by the everyday as structured by the aesthetic and political dominance of technological modernism.<sup>401</sup> Modernism as technological practice (technicity or Bourdieuan *habitus*) and devoid of ideology (politics) contributed to the demise of inhabitation and the rise of habitat.<sup>402</sup>

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<sup>395</sup> See sections 2.5.1. Thrown-togetherness as gendered space 2.5.3. Relational space and rights as relationships 2.5.4. Radical geography and/ as feminist critique and 2.7. Time-space / Space-Time and the Schubart Park case's courts as chronotopes.

<sup>396</sup> Massey D *Space, Place and Gender* 1994.

<sup>397</sup> Massey D *Space, Place and Gender* 1994 on 172.

<sup>398</sup> In May 2012, tenants filed a complaint with the Gauteng Rental Housing Tribunal. A copy of that complaint and subsequent activity on the case are available on the website of the Social and Economic Rights Institute of South Africa, <http://www.seri-sa.org>. The order in *Maphango* at par 70 reads: 'Any of the parties may, if so advised, lodge a complaint in terms of section 13 of the *Rental Housing Act* 50 of 1999 with the Gauteng Rental Housing Tribunal on or before Wednesday 2 May 2012. If a complaint is lodged on or before that date, the Gauteng Rental Housing Tribunal grants the parties leave to apply to the Court within fifteen court days of the ruling by, for further directions or to dispose otherwise of the matter. If no complaint is lodged on or before that date, the appeal is dismissed with costs.'

<sup>399</sup> A telephone call to the Tribunal confirmed that the matter was never heard after the filing of the dispute.

<sup>400</sup> Butler C Henri Lefebvre: *Spatial Politics, Everyday Life and the Right to the City* 2012 on 7.

<sup>401</sup> Butler C Henri Lefebvre: *Spatial Politics, Everyday Life and the Right to the City* 2012 on 7.

<sup>402</sup> Butler C Henri Lefebvre: *Spatial Politics, Everyday Life and the Right to the City* 2012 on 113. Butler quotes from Lefebvre *Critique of Everyday Life III: From Modernity to Modernism* 2005 on 50: 'If the career of modernity as ideology is over, modernism as technological practice is more than ever with

The user's space is *lived* - not represented (or conceived). When compared with the abstract space of the experts (architects, urbanists, planners), the space of the everyday activities of users is a concrete one, which is to say, subjective. As a space of 'subjects' rather than of calculations, as a representational space, it has an origin, and that origin is childhood, with its hardships, its achievements, and its lacks.<sup>403</sup>

Within the spatial practices of tenants and landlords, the tenants' space is lived and the space of the business owner, who is merely interested in higher rental income, is abstract space. The tension between tactics and strategies, inhabitation and habitat, lived and abstract space is aptly captured by the fact that the landlord attempted to justify the evictions by arguing that they were in line with the city's rejuvenation policies. The city of Johannesburg has an extensive fifty-five page Inner City Regeneration Charter.<sup>404</sup> The *Maphango* case illustrates the pulls between the rejuvenation of the city and the poor. The Johannesburg policy manages to capture this tension in stating that '[o]ur Inner City will not be a dormitory for the poor, nor an exclusive enclave of loft apartments, galleries and coffee shops'.<sup>405</sup>

In chapter 4 I expand on the clash between gentrification and spatial justice.<sup>406</sup> In the next section I explore the connection between time and space.

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us... From [the] great confusion... emerges modernism: a clear field for the development of technology and the proclamation of the end of ideologies'.

<sup>403</sup> Lefebvre H *The Production of Space* 1991 on 362.

<sup>404</sup> Available at [http://www.joburg.org.za/index.php?option=com\\_content&task=view&id=1705&Itemid=49](http://www.joburg.org.za/index.php?option=com_content&task=view&id=1705&Itemid=49).

<sup>405</sup> The recent clamp down on informal traders contradicts this section of the Charter and other parts of the Charter that try to acknowledge that 'City efforts have sometimes been seen as localised, fragmented and episodic and have been critiqued as not always sensitive enough to the circumstances of poorer residents and informal businesses'.

<sup>406</sup> See section Similar continuations and hauntings are evident in Post-apartheid grand narratives of the capital city. In the next sections I explore this with reference to the Tshwane 2055 vision and mayoral addresses.

#### 4.4. Post-apartheid grand narratives: Tshwane 2055 and the state of (the) Capital addresses.



## **2.7. Time-space / Space-Time and the Schubart Park case's courts as chronotopes**

Space should not be defined as stasis and therefore completely opposed to time, since this renders space devoid of politics. Massey uses the notation 'space/ time'<sup>407</sup> or space-time,<sup>408</sup> and thereby questions the counter-positioning of space and time.<sup>409</sup> I agree with Massey's insistence on the gender codes at work in the conceptualisation of space and time.<sup>410</sup>

In 'A global sense of place', Massey presents an alternative to common understandings of space and place in a globalised and globalising world. Engagements with space in recent years, she argues, have predominantly followed Marx's prediction of the total annihilation of space through time. Harvey's exposition of space-time-compression is a good example hereof. Notions of the global village, the disappearing of borders and barriers and other expanding and shrinking tendencies associated with the language of globalisation has inevitably lead to an increased uncertainty about place and as such a threat to a sense of place. Because of this fragmentation and disruption of place, the tendency has generally been to attempt to return to or recover or cling to place, leading to reactionary sentiments around place which often involves an antagonism to those who are outsiders or newcomers.<sup>411</sup> I look at this relationship between time and space, the annihilation of space by time and possible ways of perceiving women's time-space.

Despite of Foucault's claim that space is 'the' new obsession, Routledge published another book in the same series as Tally's 2013 *Spatial Turn*, but a year before in 2012 entitled *Temporalities (The New Critical Idiom)* by Russel West-Pavlov. It presents, like Tally's *Spatiality*, a critical overview of how time is treated throughout literature, and even though the author does not make similar claims as Tally (i.e. that

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<sup>407</sup> Massey D *Space, Place, Gender* 1994 in the title of the chapter on 248.

<sup>408</sup> Massey D *Space, Place, Gender* 1994 on 268 she explains this further.

<sup>409</sup> Massey D *Space, Place, Gender* 1994 on 249 – 253. A view of space outside of time leads to space always being mere representation and any attempt at closure. She refers to the work of Ernesto Laclau as an example of this. In his *New Reflections on the Revolution of our Time* 1990 Verso: London, Laclau writes on 68 that 'Politics only exist insofar as the spatial eludes us'. It is space without time that depoliticises space.

<sup>410</sup> Massey D *Space, Place, Gender* 1994 on 6.

<sup>411</sup> Massey D *Space, Place and Gender* 1994 on 147.

there has recently been a turn to time) the sub-title suggests that time is ‘the’ new critical framework. The spatial turn does not necessarily entail a move away from time and towards space, but rather a focus on space from within time and a view that these two concepts are inextricably bound. I explore this close relation through Bakhtin’s notion of the ‘chronotope’, Harvey’s time-space-compression, and Massey’s insistence that space, when separated from time, is depoliticised.<sup>412</sup>

### 2.7.1. Chronotope as timespace and courts as chronotopes

Bakhtin, a Russian literary critic, employs the term ‘chronotope’ to clarify the relationship between geographical space and historical time in literature.<sup>413</sup> In the context of law, Maria Valverde draws on this notion and I look at her treatment of courts as chronotopes later in this section. For Bakhtin, time and space are intertwined and cannot be separated. The two are ‘inextricably bound’ and the chronotope is a ‘formally constitutive category of literature’ that conceptually gathers together genre, space and time.<sup>414</sup> Within this strong link with genre, his understanding of the chronotope has its roots in the development from the ancient Greek romance where space is abstract (what he terms ‘adventure chronotope’) to the ancient Roman novels with more substantial engagements with time filling spaces that are more concrete. Tally avers that Bakhtin is ahead of the spatial turn in literary criticism by already regarding time and space on an equal level to such an extent that they are inseparable in a 1930s essay entitled ‘Forms of Time and of the Chronotope in the Novel: Notes Toward a Historical Poetics’.<sup>415</sup>

References to specific chronotopes in literature establish the narrative and determine ‘the shape of the world’ as it were.<sup>416</sup> The significance of this view is that the author is not simply busy with a series of decisions on what to include or exclude, but is actively<sup>417</sup> involved in a broader cultural process by which the places and moments in

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<sup>412</sup> Connected to this is Foucault’s ‘heterotopias’ that open onto ‘heterochronies’, which I draw on in chapter 4.

<sup>413</sup> I rely chiefly on Tally’s reading of Bakhtin and Bakhtin’s earliest essay on the chronotope.

<sup>414</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 56 with reference to Bakhtin MM *The Dialogic Imagination: Four Essays* (transl. and ed) Emerson C and Holquist M 1981.

<sup>415</sup> Tally does not engage with this essay of Bakhtin, but refers to the concluding remarks that were added to this essay 35 years after its publication. Tally R *Spatiality: The New Critical Idiom* 2013 on 58.

<sup>416</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 58.

<sup>417</sup> Although perhaps unwittingly, writes Tally. Tally R *Spatiality: The New Critical Idiom* 2013 on 58.

and through the novel become more significant.<sup>418</sup> Bakhtin acknowledges that the writer can never represent a world that is chronotopically identical to the world in which the author lives, but is engaged in the creation of a world that is also not completely separate or cut off from that of the author.<sup>419</sup> Literary cartography is tied to genre as the 'aggregate of the means of collective orientation in reality', which is 'capable of mastering new aspects of reality'.<sup>420</sup> I want to link the literary chronotope to the chronotope of law.

The concept of the chronotope finds its origin in relativity theory. In the early twentieth century scientists moved away from Newton's view of space and time as separate dimensions that are objective and real. This was replaced by a model of 'spacetime' that was dynamic, and of course 'relativistic'.<sup>421</sup> Maria Valverde in *Chronotopes of Law: Jurisdiction, Scale and Governance*, extends Bakhtin's notions of 'intertextuality', 'dialogism' and 'chronotope' to law, and in particular to scale and jurisdiction. This expands the study of law and governance spatially by drawing on diverse analytical tools. These notions of Bakhtin are intended to bring space and time considerations together in a fluid, interactive and dynamic framework. It is ultimately an anti-metaphysical way of looking at law. The courtroom can be considered to be a chronotope.<sup>422</sup> It is an illustration of the way in which Bakhtin writes 'time thickens

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<sup>418</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 58.

<sup>419</sup> Bakhtin is also important in the context of gameplay or clowning. According to him the clown creates a context of carnival. Carnavalesque conditions suspend the rules of convention temporarily. 'The rules of the game are themselves subjected to the attitude of gameplay'. See Bakhtin M (transl.) Iswolsky H *Rabelais and His World* 1993. Initially this project envisaged looking at the instantiation of Burgers Park and an annual inner city festival *The Feast of the Clowns* hosted there. The Feast of the Clowns has been part of the city of Tshwane's calendar since 2000. It started as a small street festival, but has since established itself as the only annual festival in the inner city combining celebration and social justice. The feast is organised by Tshwane Leadership Foundation (TLF), a faith-based organisation created in 2003 to strengthen the unfolding inner city movement in the city of Tshwane. The feast usually focuses on different social justice issues, such as on 'Homelessness', 'The rights of Women and Children' and 'Greening the City'. The metaphor of the clown derives from the olden day jester who could communicate social ills in front of the royal court. His position as entertainer saved him prosecution as was the case with any other citizen opposing the monarchy. Further, the Feast of Fools was held particularly on New Year's Day - the Feast of the Circumcision of Our Lord. The Chief location of the festivities was the church itself, and the principal organizers were the lower clergy. The ruling idea of the feast was the reverse order of status. In this way the most important person of the day became the least important. See <http://feast.tlf.org.za/> accessed 15 February 2017.

<sup>420</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 59 with reference to Bakhtin MM and Medvedev PN *The Formal Method of Literary Scholarship* (transl.) Wehlre 1978 on 135.

<sup>421</sup> Valverde M *Chronotopes of Law: Jurisdiction, Scale and Governance* 2015 on 9.

<sup>422</sup> Valverde M *Chronotopes of Law: Jurisdiction, Scale and Governance* 2015 on 16.

space'.<sup>423</sup> It is the sovereign power of the judge that makes the courtroom law's space and the structure and architecture of the court that produces law's time.

[The power of the judge] to start and stop the legal game is what makes the courtroom space a court of law. In turn, the interior design of the courtroom as a space is constitutive of judicial time, the official time of law: if lawyers run into the judge in courtroom coffee shops or other spaces, the spatial location of those speech interactions has the effect of excluding those bits of time from the official written record of the progress of the trial through time.<sup>424</sup>

Below I consider the two courts of the Schubart Park case: the North Gauteng high court and the constitutional court as chronotopes. The high court in Pretoria consists of two buildings: the Palace of Justice constructed in 1893 and the 'new' high court building across the road built in 1990. None of the applications in the North Gauteng high court were granted. These decisions were convincingly overturned in the constitutional court. Located on both sides of Madiba Street, the court is a mere two blocks from Schubart Park. One can imagine the residents running to high court as one would call on one's neighbours for help and shelter. What strikes one instantly, in light of how closely located Schubart Park is to the court, is the fact that the judge relied on abstract 'expert' evidence to determine if the blocks were inhabitable or not instead of doing an inspection in loco.

Looking at these two courts in terms of chronotopes highlights the nature of their pronouncements and the respective effects thereof on the everyday life of the inhabitants. The time of the North Gauteng high court is urgent and fast. It concerns an application for an interdict where the potential harm is immanent. It shares with the inhabitants of Schubart Park both time and space; the immediacy of the eviction and the cityscape of Tshwane/ Pretoria. The constitutional court on the other hand is located in a different city and a different time altogether. Judgment in the favour of the Schubart Park residents was delivered a year after the evictions. By that time, the space of Schubart Park has also shifted and the residents do not occupy these blocks anymore. The judgment in the constitutional court operates in a different chronotope

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<sup>423</sup> Valverde M *Chronotopes of Law: Jurisdiction, Scale and Governance* 2015 on 16-19. See also Valverde M "'Time thickens, takes on flesh": Spatiotemporal dynamics in law' in Braverman I, Blomley N, Delaney D and Kedar A (eds.) *The Expanding Spaces of Law: A Timely Legal Geography* 2014 on 53-76.

<sup>424</sup> Valverde M *Chronotopes of Law: Jurisdiction, Scale and Governance* 2015 on 16.

than that of the residents. Even though there are inter-textual references, it tells a different story. The court buildings can also be considered in terms of their difference in architecture and divergent aesthetics and how it relates to distinct senses of place.

The sense of place is not exclusively determined by the architecture of the buildings in which these courts are situated, but also by the broader space and character of the surroundings. Did the respective senses of place of the North Gauteng high court and the constitutional court influence their decisions? Can a certain sense of place be read from their varying decisions in the *Schubart Park* case? How do the city spaces inform the sense of place of the courts? In this case the courts find themselves in two very diverse cities: one the administrative capital and the other the economic capital of South Africa. These two courts and their varying decisions therefore aptly capture the difference in *genius loci* of Pretoria and Johannesburg. Different functions of the law are fulfilled in these cities: in the one the bureaucratic functions of the administration of the law and in the other the careful art of Constitutional judgment. Law regulates and controls places and it imparts a certain *genius loci*. I expand on the specific meaning and reach of the concept of *genius loci* in chapter 3 with reference to the work of Norberg-Schultz.<sup>425</sup>

The Palace of Justice was designed by one of the first architects in South Africa; Dutch-born Sytze Wierda. He characterized the style as modern monumental, the style of the Italian Renaissance.<sup>426</sup> This spirit of modernity is also present in the *Schubart Park* judgment in the court's reliance on scientific, expert evidence. Wessel Le Roux, who has produced a rich body of work on architecture and law in South Africa, demonstrates how the Palace of Justice further standing of certain individuals in the Republic.<sup>427</sup> The Palace serves as a monument to the Roman Dutch law history of South African Law and so does the 'new' building across the street, inscribing a very specific sense of place, which can be detected in the order of the high court.<sup>428</sup> But

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<sup>425</sup> See section. 3.3.2. A sense of belonging and/ as *genius loci* (spirit of place) as well as 4.6. Legal Culture as *genius loci*.

<sup>426</sup> Available at <http://www.artefacts.co.za/main/Buildings/archframes.php?archid=1892> (accessed 16 November 2012). The website references Du Toit 'Palace of Justice' *Lantern: Journal of Knowledge and Culture* 1978 June 48-55 on 89.

<sup>427</sup> Le Roux W 'Studying Legal History through Court Architecture: Scattered comments on the Palace of Justice, Church Square, Pretoria' (2003) 54 *Codicillus* on 54- 55.

<sup>428</sup> In sections 4.2.1. The lawscape and 4.3.1. Political trials, I look in more depth at Le Roux's work on the architecture of the Palace of Justice. .

Le Roux draws the attention to the work of Martin Chanock, who refuses to found South Africa's legal history in Rome and Renaissance Europe.<sup>429</sup> South African law is haunted by ancient Roman concepts. This possibility to resist the monumental sense of place of law's sites is captured in the architecture of the constitutional court, which Le Roux, following the work of Lourens Du Plessis, has depicted as memorial rather than monumental.<sup>430</sup> The façade of the palace is known for photographs of high-profile political trials, such as the Rivonia trial of the 1960s, which sentenced Nelson Mandela to imprisonment on Robben Island.<sup>431</sup>

The aestheticisation of politics, on a local, regional and national level, links to the modernist connection between a sense of identity (personal and communal) and place.<sup>432</sup> Harvey, generally in his work, treads carefully around Heidegger's connection to Nazism,<sup>433</sup> and it is on this account that Harvey warns that the aestheticisation coupled with the geopolitical turn should be heeded in all earnest.<sup>434</sup> This fact should not be disregarded when considering the destructive geopolitical conflicts that mark the world's history and even though it might be ascribed to capitalism seeking out spatial fixes to the problem of over-accumulation that occurs in the event where capitalism is forced into uneven development in different geographic areas.<sup>435</sup> With reference to Lefebvre, Harvey argues that the introduction of the state is a spatialisation. – because the state 'crushes time by reducing differences to repetitions of circularities'.<sup>436</sup> He draws a distinct link between geopolitics, the aestheticisation of

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<sup>429</sup> Le Roux W 'Studying Legal History through Court Architecture: Scattered comments on the Palace of Justice, Church Square, Pretoria' (2003) 54 *Codicillus* on 55 referring to Chanock M *The making of South African Legal Culture 1902 - 1936: Fear Favour and Prejudice* 2001.

<sup>430</sup> Le Roux W 'War memorials, the architecture of the Constitutional Court and counter-monumentalism' in Van Marle and Le Roux (eds) *Law memory and the legacy of apartheid: ten years after AZAPO v President of South Africa* 2007 on 65.

<sup>431</sup> In section 4.3.1. Political trials, I expand on the significance of the Palace of Justice and its architecture in the Rivonia trial.

<sup>432</sup> Harvey D *The Condition of Postmodernity* 1989 on 273.

<sup>433</sup> Harvey D *The Condition of Postmodernity* 1989 on 208 – 209. Heidegger's move away from Platonic and Judeo-Christian thought to pre-Socratic classicism, the influence of Nietzsche on his thinking (although coupled with a conviction that Nietzsche's ideas lead to an unacceptable and total nihilism), along with his rejection of machine rationalism's myth and internationalism are all factors that lead, according to Harvey, to Heidegger's aestheticisation of politics and his embrace of the manner in which Nazism embraces politics as aesthetics.

<sup>434</sup> Harvey D *The Condition of Postmodernity* 1989 on 210.

<sup>435</sup> But social theory's conjunction with aesthetics is not Harvey's project and the issue does not receive a full expansion save for a quote by Eagleton criticising Lyotard's postmodernism. Harvey D *The Condition of Postmodernity* 1989 on 210.

<sup>436</sup> Harvey D *The Condition of Postmodernity* 1989 on 273 with reference to Lefebvre 1974.

politics and modernity - the age of the annihilation of space.<sup>437</sup> 'geopolitical argument has to resort ... to aesthetic, rather than social values in its search for legitimacy'.<sup>438</sup> The spatialisation of time, opposition to modernism and the aestheticisation of politics are synonymous for Harvey.<sup>439</sup>

For Harvey this represent two ways of dealing with space-time compression. The first is through a clean break with the past (internationalism) and the other is through a nationalist embrace of the regional (localism). He illustrates this with reference to two late nineteenth century architectures of Vienna: Camillo Sitte and Otto Wagner. Sitte was intent on designing ample public space – interior plazas and squares for restoring, creating and preserving a sense of community. This shows how an initial reaction to commercialisation, utilitarian rationality, functionalism and internationalism were utilised for fanatical localism.<sup>440</sup> Harvey also argues that this architecture emphasised 'the potential connection between projects to shape space and encourage spatial practices... and political projects that can be at best conserving and at worst downright reactionary'.<sup>441</sup> He repeats that these were the sentiments of place that lead Heidegger to national-socialism. On the other hand, Otto Wagner, in contrast to his contemporary Sitte, embraced the efficient rationality offered by the machine of modernity. Localism and internationalism, argues Harvey, clashed in the global war of 1914-1918.<sup>442</sup> He shows that there is not necessarily a distinction between universalism and particularism (in the context of colonisation).<sup>443</sup> The evolution in the artworks of Beckmann, Kandinsky and Picasso illustrate, for Harvey, a shift in and the influence of the two world wars on space perception.<sup>444</sup> I turn now to his notion of time-space compression as one way of capturing the relationship between time and space.

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<sup>437</sup> Harvey D *The Condition of Postmodernity* 1989 on 273.

<sup>438</sup> Harvey D *The Condition of Postmodernity* 1989 on 273.

<sup>439</sup> He does not view these moves as positive, but in fact connects it to the second world war and links aspects such as nationalism and exaggerated localism that contributing to Nazism. Harvey D *The Condition of Postmodernity* on 279 – 283.

<sup>440</sup> Harvey D *The Condition of Postmodernity* 1989 on 277. The Internationalist style later became popular with the likes of Le Corbusier, Gropius and Mies van der Rohe.

<sup>441</sup> Harvey D *The Condition of Postmodernity* 1989 on 277. The Internationalist style later became popular with the likes of Le Corbusier, Gropius and Mies van der Rohe.

<sup>442</sup> Harvey D *The Condition of Postmodernity* 1989 on 278.

<sup>443</sup> Harvey D *The Condition of Postmodernity* 1989 on 279.

<sup>444</sup> Harvey D *The Condition of Postmodernity* 1989 on 279.

### 2.7.2. Time-space-compression

In a literal sense, Schubart Park, the apartment blocks as city space, have been annihilated over time. Because too much time elapsed between the evacuation/eviction and the victory in the constitutional court and an even longer period between the ruling and plans to reconstruct the blocks, they cannot be inhabited anymore; they are structure without use. Is this however, what it means for space to be annihilated through time if we follow Harvey's 'time-space-compression' or 'space-time-compression'?<sup>445</sup> With space-time compression he means certain events and processes that so revolutionised the objective attributes of space and time that it compelled us to look at and represent our world differently. He walks through the experience of time during the enlightenment, time and space in modernism as cultural project and then space-time compression as a postmodern condition.<sup>446</sup> He places the most disorienting phase of space-time compression in the last two hundred years and therefore equates it to the postmodern condition. Under conditions of space-time compression reality is created, rather than interpreted.<sup>447</sup>

Certain social theories, according to Harvey, privilege time over space. This is an accurate observation. In this respect he refers in particular to the theories of Weber, Marx, Smith and Marshall.<sup>448</sup> He accuses these theories of taking for granted a pre-existing spatial order and ascribes it to the 'compartmentalisation' of Western thinking.<sup>449</sup> He rejects the 'natural' appearance of seemingly common-sense ideas on space and time and draws attention to underlying contradictions.<sup>450</sup> For him modernity and the emphasis on time is connected as follows: 'Since modernity is about the experience of progress through modernisation, writings on that theme have tended to emphasise temporality, the process of *becoming*, rather than *being* in space and place'.<sup>451</sup> Harvey extends the distinction between being and becoming to the differentiation between Kant and Heidegger. Whereas Kant's aesthetic judgment mediates between subjective moral judgment and objective science Heidegger rejects the distinction between subject and object. For Harvey, aesthetic judgment already

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<sup>445</sup> He first used the term in *The Condition of Postmodernity* 1989.

<sup>446</sup> Harvey D *The Condition of Postmodernity* 1989 Chapters 15-17.

<sup>447</sup> Harvey D *The Condition of Postmodernity* 1989 on 303.

<sup>448</sup> Harvey D *The Condition of Postmodernity* 1989 on 205.

<sup>449</sup> Harvey D *The Condition of Postmodernity* 1989 on 205.

<sup>450</sup> Harvey D *The Condition of Postmodernity* 1989 on 205.

<sup>451</sup> Harvey D *The Condition of Postmodernity* 1989 on 205.



favours the spatial above time and introduces the political and social significance of a turn towards space. According to Harvey, Heidegger's insistence on 'Being' (enduring) as opposed to 'Becoming' (transitory) can be linked to space (masculine) as opposed to time (feminine).<sup>452</sup>

Massey makes it clear that 'contrary to popular opinion space cannot be annihilated by time'.<sup>453</sup> She is very critical of Harvey's formulation. Massey questions this necessary reactionary connection to place and calls for a sense of place that can accommodate the space-time compression of our world, a sense of place that can be progressive and 'outward-looking' as opposed to one that is 'defensive' and 'enclosing'.<sup>454</sup> In her search for this understanding of place, she contests understandings of time as fluid, open as opposed to space as stasis, fixed. She therefore argues for the inseparability of time and space. I suggest that establishing a sense of place through spirit of place could ultimately also open up notions of place and rid it of the confined necessarily reactionary associations. It is not only on the issue of space-time-compression that Massey departs from Harvey's work, she has also held sustained critique of the work of Soja and Harvey for their masculine and anti-feminist approach.

### 2.7.3. *Pacha*

The relationship between time and place and time and space and their interconnectedness are illustrated, argues Sarah Skar, in the language of the Matapuquio of Peru, who uses the word *pacha* to refer to both time and space.<sup>455</sup> She explains that the word *pacha* is not simply the only word for the English equivalents space or time, but reflects instead an entirely different world view in that it connects space to time and therefore can best be translated as 'space/time' ('mundo/tiempo').<sup>456</sup> Through her studies conducted on Andean women, Quechua Indians from

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<sup>452</sup> For a critique of these 'essentialisms', see Massey D *Space, Place, Gender* 1994.

<sup>453</sup> Massey D for space 2005 on 90.

<sup>454</sup> Massey D *Space, Place and Gender* 1994 on 147.

<sup>455</sup> Skar S 'Andean Women and the Concept of Space/Time' in Ardener Shirley (ed.) *Women and Space: Ground Rules and Social Maps* 1981 35-49.

<sup>456</sup> Skar S 'Andean Women and the Concept of Space/Time' 1981 on 36. Another translation is that of 'earth/time' and can be found at <http://www.pachamama.org/>, which is the official site of the Pachamama Alliance, a global community that lobbies for the rights of nature. Pachamama is the earth/time mother and the name was selected based on engagements and collaborations with the Equadorian people and indigenous communities of the Amazon rainforest. .

the Peruvian Andes, she argues that the concept of *pacha* demonstrates a whole different world view. Her research was done on the effect of Peruvian Land Reform legislation on the indigenous communities and specifically the extent to which it had an impact on the position of women in society.<sup>457</sup> She refers to various English translations of the concept: ‘circumstances’, ‘conditions’, ‘world’, ‘earth’ or ‘era’ and also to one Spanish translation of *pacha* as *mundo*, meaning ‘a people’, ‘a real’, or ‘a society’.<sup>458</sup> These translations are, to Skar, all unsatisfactory and she prefers the notation space/time as used in Guardia’s dictionary as the best translation for *pacha*. This, she argues, is preferable because it captures the manner in which time and space are not seen as two separate abstractions by the Quechua, but instead as the same phenomena. In the same edited volume Shirley Ardener refers to the work of Drid Williams on the routine of a Carmelite nun.<sup>459</sup> Williams presents data from a Carmelite convent in England by paying specific time to the space and time circuits and cycles that structure the ordinary everyday life of the nuns.<sup>460</sup> These pieces all shed light on the possibility of a feminine connection between (cyclical) time and (relational) space.

## **2.8. Conclusion**

Schubart Park apartment complex and Massey’s concept of simultaneity are the central focus points of this chapter. It starts with the court cases in the North Gauteng high court and the constitutional court. The protests of the Schubart Park inhabitants invoked the right to the city. I look at the right to the city as a cry and a demand, the right to the city as the right to difference and the right to the city as the right to urban life. Following the insistence on urban life, I investigate the distinction between inhabitation and habitat and how this distinction and focus on habitat are associated with violence and politics. In the case of Schubart Park this violence can be found in the construction of the blocks in the seventies, the handing over of the block to a semi-private management company, the evictions of the city, as well as the judgements and proceedings in the high court. To a certain extent, it is also found in the absence of stories and lack of acknowledgement of inhabitation in the case in the constitutional

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<sup>457</sup> Skar S ‘Andean Women and the Concept of Space/Time’ 1981 on 35.

<sup>458</sup> Skar S ‘Andean Women and the Concept of Space/Time’ 1981 on 36.

<sup>459</sup> Williams D ‘The Brides of Christ’ Ardener S (ed.) *Perceiving Women* 1975 105-125.

<sup>460</sup> The convent was a female discalced convent, meaning that it was a barefoot convent for nuns.

court. Schubart Park is a gendered space. This does not only ask for the acknowledgement of the stories of the women who inhabited Schubart Park, but also looking at the apartment complex differently. I explore how the idea of throwntogetherness and other concepts in Massey's feminist geography give content to relational space. In addition to sketching a conceptually gendered understanding of Schubart Park, I include the stories of some of the women who lived in the block. I found their stories in court papers (Anita Watkins), in the media (Lizzie Steenkamp), and in a study done in occupational therapy (Auntie N and Mama R). One way of gendering space is by looking at everyday practices. I look at tactics and the possibility of subverting abstract space through everyday practices and apply these ideas to the *Maphango* case. Finally, the case of Schubart Park calls for a historical approach to space, a connection between time and space. I look at how the relationship between time and space is captured by different theories.

The case of Schubart Park illustrates the lingering or the continuation of space. The city's and courts' approach to space as abstract played a significant role in the eviction of the residents. Spatial justice concepts such as the right to the city, simultaneity, a focus on inhabitation and the everyday stories of inhabitants challenge a notion of space as abstract. Space is gendered and such a view of space also challenges abstract space in that it insists on acknowledging the relations that structure and uphold spaces. My hope is that theoretical concepts of time-space (and space connected to time) present an alternative to abstract (dead) space that will take account of lived experiences, inhabitation and heed the call for the right to the city.

The case of Schubart Park, apart from the aspects that I cover in this chapter, also raises the question of who belongs in the city. In the following chapter, I look at the notion of belonging against the backdrop of the street names cases.

## Chapter 3

### Drawing lines: street names, mapping and a sense of belonging



A picture showing the lawscape: new and old street names in an artwork of lines.  
(Photograph taken during winter 2013).

The effects of the system of racial, ethnic and tribal stratification of the past must thus be destroyed and buried permanently... That would be achieved partly... by removing some innocuous names that give recognition only to the history, language, culture or people of one race, so as to make way for the heritage and deserving heroes and heroines of the previously excluded. This is to be done sensitively and in pursuit of inclusivity, unity in diversity and recognition of the need for a sense of belonging for all.<sup>461</sup>

### **3.1. Introduction**

The central research problem of this project concerns the relationship between law and space and in particular the way in which spaces endure and continue after the laws that have produced these spaces cease to exist. In this chapter, I look at the way in which the law draws on the landscape,<sup>462</sup> the role of representation in the exercise

<sup>461</sup> Chief Justice Mogoeng in *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 at par 8.

<sup>462</sup> 'Drawing' in the sense of producing a picture or a diagram.

of power and the notion of *genius loci* (spirit of place). A discussion of the series of judgments around changed street names in the city of Tshwane/ Pretoria forms the backdrop for exploring these concepts.

In 2012, the City of Tshwane Metropolitan Council replaced 28 old street names with new ones.<sup>463</sup> The changes were first announced in 2008 and at that time the spokesperson for the city council, Khorombi Dau, announced 28 street names, which were offensive because of their connection to South Africa's apartheid or colonial past, to be changed in order for the capital city to reflect a shared identity, history and future.<sup>464</sup> After a public participation process, Pretorius and Paul Kruger remained the same, while the rest of the street name changes were accepted.<sup>465</sup> The new street names were installed during July 2012.<sup>466</sup> Initially there were red lines drawn through the old street names with the new street names installed alongside the old ones. The city council removed the old, struck-through, names during April 2013.<sup>467</sup> The new

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<sup>463</sup> These street name changes are in addition to the contention around the name of the city itself. The broader metro is referred to the City of Tshwane whereas the central town district is still Pretoria. There are calls to also change Pretoria to Tshwane. This debate about the name of the city has also featured in the student protests of 2015 and 2016 at the University of Pretoria with students calling for the University's name to change to the University of Tshwane.

<sup>464</sup> <http://www.news24.com/SouthAfrica/News/Pta-street-names-to-be-changed-20080911> accessed 16 February 2017. There were 28 new names and 28 old names were removed. Some sources give the number as 27 street names or even 25 street names. The 2012 court case refers to 'replacing' 25 names and the 2013 case to 'change the name of 27 of the best-known and most widely used streets in Pretoria. Later the number of streets was reduced to 25'. The reduction refers Paul Kruger and Pretorius that were kept, but the reason for this discrepancy between the exact number of streets could be that some streets used to have multiple names and was replaced by a single name and in other cases streets had a single name and was replaced by multiple names. Church street was replaced with four new names (Stanza Bopape, Helen Joseph, WF Nkomo and Elias Motswaledi) and Charles and Walker streets (used to be one street with two names) were replaced with Justice Mahomed, also, Mears, Beatrix, Voortrekkers (used to be one street with three names) was changed to Steve Biko. The number is not really of essence here, but a count on the list of the city confirms the number of 28 replaced with 28 new names. [http://www.tshwane.gov.za/Sites/About\\_Tshwane/MapsAndGIS/Documents/pdfs/These%20are%20the%20new%20street%20names%20that%20represent%20all%20racial%20groups.pdf](http://www.tshwane.gov.za/Sites/About_Tshwane/MapsAndGIS/Documents/pdfs/These%20are%20the%20new%20street%20names%20that%20represent%20all%20racial%20groups.pdf) and <http://www.ilovepretoria.co.za/2012/05/street-names-new-names-explained.html> accessed September 2013.

<sup>465</sup> Mayor Kgosientso Ramakgopa's sentiment regarding the public participation process was that '[e]veryone's history should be reflected in the city, and nobody is going to end up 100% happy with the process,' <http://www.news24.com/Archives/City-Press/Pretoria-to-stay-street-names-to-change-20150429> accessed 16 February 2017.

<sup>466</sup> For a photo-essay displaying some of the photographs taken of the change-process see Kesselring R and De Villiers I 'What's in a Name? Street Names and the Fine Line between Silencing and Predicating History' *Tsantsa Zeitschrift der Schweizerischen Ethnologischen Gesellschaft* 2014 19 150-163.

<sup>467</sup> 'Pretoria's old street names stay for now' 2013-04-17 <http://www.news24.com/SouthAfrica/News/Pretorias-old-street-names-stay-for-now-20130417> accessed 16 February 2017.

names as well as the removal of the old names gave rise to on-going legal disputes. The 2013 litigation between Afriforum and the City arose because the City removed the old signposts. The North Gauteng high court ordered the Metropolitan Council to re-install the dual name signage, but the Metropolitan Council lodged an appeal against the order in July 2013 and judgment was handed down by the constitutional court in July 2016. The court ordered the re-instatement of the old names on the ground that there was a pending application for a review of the new names altogether. This review application was brought by Afriforum in April 2012 after the Metropolitan council started to change the names. The North Gauteng high court, on 30 April 2012 in the case of *Afriforum v City of Tshwane Metropolitan Municipality* under case number 21681/2012, dismissed the urgency of Afriforum's interdict and the Metropolitan council undertook to keep the old street names for a period of six months.

I do not support the arguments of Afriforum in this case, nor do I support their politics or their litigious approach and use of the law to protect conservative Afrikaner ideas in their numerous and multifarious cases against the state. That the constitutional court has linked the street names to belonging is significant. In this chapter, I take a hard look at street names, maps and other symbols that cartographically and otherwise depict and choreograph the lawscape. I suggest that the palimpsestic nature of the dual signage created more possibilities and opened up different spaces. It was a form of rogue urbanism that presented a reminder of the past along with the promise held in the present. I caution against using the street names as spectacle and subsequently ask how we memorialise the ordinary inhabitants of the city of Tshwane/ Pretoria.

In this chapter, I firstly discuss the background of the street cases in the North Gauteng high court and the constitutional court. Two main themes of spatial justice form the basis of this chapter: belonging and mapping. Chapter 2 focuses on space as relational and mainly draws from radical geography and feminist theory, this chapter relies on concepts in art and literature and phenomenology. I ask what it means to have a sense of belonging in the city and then turn my attention to mapping and how it relates to belonging in the city. The aspects investigated include belonging as a culture of place and spirit of place. Furthermore, I am also interested in a notion of home that will support a sense of belonging in the city and the way in which this sense of belonging and the limits thereof are captured by the street name cases and by the

*Hattingh* case. On the concept of mapping I look at the rise and fall of cartography, how art interacts with drawing lines and mapping. I consider what literary concepts such as cognitive mapping and mapping loss can contribute to an understanding of mapping tentatively. What brings all of these questions and concepts together is the street names case, which I expand on in the sections below.

### **3.2. Street names: cases overview**

Three judgments in the North Gauteng high court between the city of Tshwane and the conservative (and litigious) Afriforum have shaped the street name debate in the city of Tshwane/ Pretoria. In 2012 Afriforum successfully brought an urgent interdict to prevent the city council from changing the names.<sup>468</sup> The interdict was not granted. A second case in 2013 sought that the city council would be prevented from removing the old and crossed-out street names.<sup>469</sup> The finding was in favour of Afriforum. The city council lodged an appeal against the finding of the 2013 case and the third judgment in 2015, dismissed the city council's appeal against the judgment that prevented them from changing the names and removing the old and crossed-out names.<sup>470</sup> Below I discuss each of these cases.

#### **3.2.1. 2012 case in the North Gauteng high court**

The 2012 case concerned an urgent application for an interim interdict and therefore the court had to consider both the issue of urgency as well as the question of whether there was apprehension of irreparable injury without a remedy. On the issue of urgency: to the city's argument that Afriforum was the cause of the urgency of the matter because they failed to institute action earlier and then Afriforum's response that they were not able to bring the application earlier because they were waiting for the

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<sup>468</sup> The case is not reported, but was lodged under case number 21681/2012 and is available at <http://www.saflii.org/za/cases/ZAGPPHC/2012/71.pdf> (accessed 29 August 2013). I refer to this judgment as *Afriforum v City of Tshwane* 21681/2012. Judge Tuchten presiding.

<sup>469</sup> The case is not reported, but was lodged under case number 20665/2013 and is available at <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPPHC/2013/556.html> (accessed 11 January 2014). I refer to this judgment as *Afriforum v City of Tshwane* 20665/2013. Judge Prinsloo presiding.

<sup>470</sup> The case is not reported, but was lodged under appeal case number A811/2013 and is available at <http://www.saflii.org/za/cases/ZAGPPHC/2015/1056.pdf> (accessed 12 May 2016). This is an appeal of the 2013 case (20665/13). I refer to the judgment in the appeal case as *City of Tshwane v Afriforum* A811/2013. Judges Jordaan, Pretorius and Molefe presiding.

city to respond. The judge, after setting out the delaying tactics on both sides, made the following curious remark: 'All's fair in love and war, according to the poet,<sup>471</sup> and, perhaps, that is so in politics as well. But not in litigation'.<sup>472</sup> It is not altogether clear what the judge insinuated with this remark. Presumably he was referring to the fact that the city went ahead with installing the new street names, despite Afriforum's request to review the decision and without any notice that they were going ahead to do so. As I state above; I very strongly distance myself from Afriforum, which does not mean that the City of Tshwane acted justly in this matter. What judge Tuchten validly points out here is the city council's tendency to go ahead without any regard to required procedures, as we see in the case of Schubart Park. The modus operandi of the city council has often been to force their will through and to deal with the legal consequences later, in the hope that the consequences will follow so long after the fact (as in Schubart Park) that it will be irrelevant. With reference to rule 6(12)(a) of the high court Rules judge Tuchten allowed the matter to be heard as one of urgency.<sup>473</sup> Because the city undertook to put up the new street signs, while still keep the old signs intact, the judge found that there was not a threat of immanent harm.<sup>474</sup> It is important to note that the City's undertaking was only for six months, but this period was deemed to be sufficient time for the pending review of the City's decision to be finalised. The application for the interdict was brought in April 2012 and it was expected that the review would have been completed in August of 2012. In fact, the judge's argument that there was no immanent harm rested on the expectation that the court will pronounce finally on the rights of the parties during the period that the City will leave the old names in place.<sup>475</sup>

Afriforum was not satisfied with the situation of having two names and claimed that it would cause confusion. The judge disagreed with this fear of chaos and responded as follows:

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<sup>471</sup> Judge Tuchten presumably refers to John Lyly's novel 'Euphues: The Anatomy of Wit,' published in 1579.

<sup>472</sup> *Afriforum v City of Tshwane* 21681/2012 at par 9.

<sup>473</sup> *Afriforum v City of Tshwane* 21681/2012 at par 9.

<sup>474</sup> *Afriforum v City of Tshwane* 21681/2012 at par 15.

<sup>475</sup> 'Because it may be expected that the court will pronounce finally on the rights of the parties during the period in which the City will leave the old name boards in place, there is no threat of imminent harm.' *Afriforum v City of Tshwane* 21681/2012 at par 15.



In the multi-lingual, multi-ethnic empires of old central and eastern Europe, it was the norm for towns to have more than one name. The name used by any particular person, depended in large part on the community with which he or she associated himself or herself.<sup>476</sup>

In this regard, he mentioned specifically Bratislava, in present day Slovakia that was also known as Pressburg by German language speakers. The example that towns have/ used to have dual names in European countries might not be an entirely suitable analogy for street names in post-Apartheid South Africa given the fact that the whole impetus behind changing some of the street names was for Pretoria to move away from our colonial, European past. Justice Mogoeng in the constitutional court judgment mentions explicitly that 'South Africa still looks very much like Europe away from Europe'.<sup>477</sup> I link this claim of disorientation and confusion with the concepts of way-finding and cognitive mapping and look at how notions of rogue urbanism, countertopography, and place as fluid challenges the idea of fixing place through street names and maps.<sup>478</sup>

### **3.2.2. 2013 case and 2015 appeal in the North Gauteng high court**

Following the judgment of the 2012 case on 30 April 2012, the city council undertook not to remove the old street names for a period of 6 months and Afriforum in turn committed to bring an application for review of the decision to change the names within two weeks. The 2012 judgment was based on both parties' dedication to resolve the review process swiftly, as this removed the urgency in the initial application and therefore the interdict was not granted. The review application was not brought within two weeks, but instead there were attempts at discussions to resolve the matter amicably. It seems as if the central bargaining chip during the negotiations was the name of the city itself.<sup>479</sup> Afriforum would agree to the name changes given that the name of the city would remain Pretoria. When it became clear to Afriforum that the city council was still intent on changing the name of the city the negotiations broke down. This was a result of communication received in October 2012 and subsequently the

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<sup>476</sup> *Afriforum v City of Tshwane* 21681/2012 at par 16.

<sup>477</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 12.

<sup>478</sup> See section 3.4. Mapping, below.

<sup>479</sup> Interestingly, all the court judgments in the street name cases refer to 'Pretoria' and not to the 'City of Tshwane', except when they refer to the city council as a party to the dispute.

main review proceedings were instituted in December 2012.<sup>480</sup> According to the first 2012 judgment the city would not remove the old names before the completion of the review procedures, but the signs were removed some four months after the review proceedings were instituted. The review proceedings were accompanied by a request to the city council not to remove the old signs before the review procedures were finalised, which request was ignored and the signs removed in the next year.<sup>481</sup> The city council started removing names shortly after mayor Kgosientso Ramakgopa's state of the city address on 4 April 2013 during which he announced that the signs will be removed.<sup>482</sup> The 2013 case was therefore another urgent interdict brought by Afriforum, this time to prevent the city council from removing the old names. By the middle of May 2013, a little more than a year after the first 2012 judgment, all the old signs had been removed and a service provider instructed to produce the green and blue signs that will only show the new names.

The underlying, albeit not directly articulated, questions in the 2013 case are whether Afriforum was simply using the legal procedures as a stalling strategy, or whether the city council pushed their decisions through without any regard to the legal procedures. It does not appear from the 2013 judgment that any of the two parties were sincerely committed to deliberations.<sup>483</sup> The dissenting judgment of justice Cameron and justice Froneman in the constitutional court case emphasises the importance of public participation around issues that affect a sense belonging. The city council, in April 2002, adopted Policy Guidelines for the Naming of Public Places and Streets.<sup>484</sup> The 2002 policy was revised in 2009 and replaced by a 2010 version of the policy can be accessed on the city council's website. According to the 2010 policy the public participation process is facilitated by the office of the speaker, the proposed changes must be publicised and marketed widely and then there is a 30 day period during which objections can be lodged. All objections are then forwarded to the department for

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<sup>480</sup> *Afriforum v City of Tshwane* 20665/2013 on page 4.

<sup>481</sup> *Afriforum v City of Tshwane* 20665/2013 on page 5.

<sup>482</sup> *Afriforum v City of Tshwane* 20665/2013 on page 5. I expand on the mayor's state of the city addresses in chapter 4.

<sup>483</sup> See the timelines and dates covered extensively in *Afriforum v City of Tshwane* 20665/2013 on pages 2-8.

<sup>484</sup> Section 10 of this policy governs street name changes. The policy can be accessed on the city council's website. [http://www.tshwane.gov.za/sites/Departments/City-Planning-and-Development/Documents/Local%20Geographical%20Names%20Policy%20\(City%20of%20Tshwane\).pdf](http://www.tshwane.gov.za/sites/Departments/City-Planning-and-Development/Documents/Local%20Geographical%20Names%20Policy%20(City%20of%20Tshwane).pdf) (accessed 13 February 2017).

inclusion into the ultimate report sent to the Local Geographical Names Committee, which considers the changes. There is no reference to an extensive deliberative process or public consultations or meetings that are required in terms of this policy. The current policy is a far cry from the 2002 policy described in the judgment of the appeal case of 2015 as ‘comprehensive, thorough policy ensuring the promotion of the spirit of democracy, proper public participation and the involvement of the persons affected’.<sup>485</sup> The 2002 policy included the following provision: ‘In the spirit of democracy at least 51% of the registered voters who live in a street must agree in writing to a change of the street name’.<sup>486</sup> Afriforum’s insistence on this 51% requirement is over-ambitious since the streets in question are mostly in the inner-city and therefore not where their members reside.<sup>487</sup> A resolution taken in 2007 amended the 51% requirement and subsequently there were consultative meetings held in 10 of greater Pretoria’s 76 wards.<sup>488</sup> The 2002 policy was revised due to ‘practical experience’ and changes in legislation.<sup>489</sup> It is clear that a reduced required level of public participation was the result of the amendment. The 2015 appeal case dismissed the appeal by the city council with a punitive cost order. The main reason for dismissing the appeal was that the full bench of the North Gauteng high court agreed with Afriforum that there was insufficient public participation and that the requirements for an interdict were satisfied.<sup>490</sup> In terms of notions of spatial justice, the question regarding public participation cannot be limited to the question whether the city council complied with existing or amended principles and rules in place. The question should rather be whether there is a robust public participation that activates the right to the city as the right to difference and the right to differ.<sup>491</sup> The city council, as seen in Schubart Park, has not proven an overwhelming willingness to engage its inhabitants on matters affecting their sense of belonging in the city of Tshwane.

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<sup>485</sup> *City of Tshwane v Afriforum* A811/2013 at par 4.1.

<sup>486</sup> 6.4 of the 2002 policy as quoted in *City of Tshwane v Afriforum* A811/2013 at par 18.

<sup>487</sup> Of their 50 000 members approximately 10 000 are from Pretoria.

<sup>488</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 21.

<sup>489</sup> <http://www.tshwane.gov.za/sites/Council/Council%20Resolutions/47.%20Council%2031%20March%202011/07.%20Revised%20Policy%20on%20the%20naming%20of%20public%20places%20and%20streets.pdf> (accessed 13 February 2017).

<sup>490</sup> *City of Tshwane v Afriforum* A811/2013 at par 101-104.

<sup>491</sup> See chapter 2. Section 2.3.2. The right to difference and the right to urban life.

The renaming of the city has not been finally decided yet, but the argument of a lack of public participation also surfaces there. In March 2012 the (then) minister of arts and culture Paul Mashatile asked the city council to broaden their consultation process on the matter of renaming the city to Tshwane.<sup>492</sup> The mayor, Kgosientso Ramakgopa, responded by saying that he was not sure what Mashatile meant by this, but that discussions were already underway with various political parties.<sup>493</sup> Both Ramakgopa and Mashatile were speaking at the declaration of the Voortrekker Monument as a national heritage site. Being in that space, next to the Afrikaner monument and amidst the probably mostly Afrikaner interests in attendance, was probably what moved the minister to call for greater participation in the name change decision. In the 2013 case, all of Afriforum's pleadings are in Afrikaans and judge Prinsloo quotes extensively from them, resulting in large parts of his judgment being in Afrikaans. The protection of the names of the streets, the name of the city and the language of Afrikaans are closely tied together in this case.<sup>494</sup> The interdict in the 2013 case was granted, but it did not have much effect since the street names had already been removed at the time of the judgment.

Judge Prinsloo focuses on the nature of the old street names and the question whether they are offensive or not. In this regard, he relies on the work of Andrews and Ploeger.<sup>495</sup> The general trend when considering the biographical details of the others largely corresponds with the details, which I have briefly quoted. They are generally people from days gone by and they played a central role in founding and developing this City. In all these circumstances, in my view, there are clear signs of a bona fide arguable case.<sup>496</sup> The judge quotes from the book the history of some of the street names that were changed by the city and does so by providing a short biography of

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<sup>492</sup> 'In the interest of openness and in order to promote the inclusive process of decision making, I have asked the mayor of Tshwane to broaden the consultation process of the issue of the renaming of Pretoria to Tshwane' <http://www.sanews.gov.za/south-africa/tshwane-asked-broaden-scope-renaming-issue> (accessed 13 February 2017).

<sup>493</sup> <https://www.dailymaverick.co.za/article/2012-03-29-south-africa-the-return-of-the-name-changing-cliffhanger/#.WNPN82-GPIU> (accessed 13 February 2017).

<sup>494</sup> Prinsloo J refers to 25 street names throughout the case. The reason for this is that he groups together Mears/ Beatrix/ Voortrekkers and Charles/ Walker. The initial decision taken in September 2007 included Paul Kruger and Pretorius.

<sup>495</sup> Andrews T and Ploeger J *Street and Place Names of Old Pretoria* 1989. Prinsloo writes that Tom Andrews and Jan Ploeger, who researched the street and place names of old Pretoria, are generally acknowledged as authoritative on the subject. *Afriforum v City of Tshwane* 20665/2013 on page 16.

<sup>496</sup> *Afriforum v City of Tshwane* 20665/2013 on page 17.

the person after whom the street was initially named, as Andrews and Ploeger do in their book.<sup>497</sup> He quotes from the pleadings of Afriforum, which do not include the introduction to the book. Andrews and Ploeger's introduction highlights the underlying problem with these street names and even those that are not obviously offensive. They remark of the naming tradition of Pretoria: 'These names [of streets, farms, passes, rivers, streams, mountains, fords and valleys] were in the past not given, as often today is the case, as the result of a whim or fad, but because it expressed something that belonged to the place or thing'.<sup>498</sup> This quote links a sense of belonging to a sense of place. The place carries the name of that which belongs to it and in turn, this belonging (these belongings) and the reminder thereof through the name of the place preclude or produce a sense of belonging for those who inhabit it. They continue, by quoting historian Gustav Preller:

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<sup>497</sup> *Afriforum v City of Tshwane* 20665/2013 on page 15-18. Prinsloo J quotes from Afriforum's pleadings he writes that Tom Andrews and Jan Ploeger, who researched the street and place names of old Pretoria, are generally acknowledged as authoritative on the subject: Kerkstraat or Church Street is about 12 kilometres long. It is generally accepted that the origin of this street is coupled with Church Square where the name also originates from because one of the first churches in Pretoria was built on the Church Square. Michael Brink was born in the Cape in 1889 and he stayed in the present Rietfontein for more than 25 years. He was the Mayor of Innesdale for 9 years and a member of the provincial council. He was clearly a prominent and important citizen of this City and there is no connection between him and the last apartheid government. Zambezi Street is a street named after the Zambezi River, the fourth longest river in Africa, and it is not clear, says Prinsloo J, on what basis that name had to be changed. Beatrix is named after Beatrix Dori Meintjies, born in 1885, the eldest daughter of Edward Phillip Arnold Eddy Meintjies the son of Stephanus Jacobus Meintjies 1819-1887. Stephanus Meintjies was an attorney and later an advocate of this court. Mears street is named after James Edward Mears who landed in Durban from London in 1840. Mears came to Pretoria in 1870 and bought a portion of the farm Elandspoor where he surveyed or founded Pretoria's first suburb, Sunnyside, in 1875. Mitchell Street is named after George Mitchell of Edinburgh Scotland who was a surveyor responsible for surveying Pretoria West. Schoeman Street is named after Commandant-General Stephanus Schoeman 1810 to 1890. Van der Walt Street is named after Andries Petrus Jacobus van der Walt born in 1814. Andries Street is named after Generaal Andries Wilhelmus Jacobus Pretorius voortrekker leader 1798 to 1853. Skinner Street is named after William Skinner born in 1828 who came to South Africa in 1840 and built the Raadsaal in 1857. Jacob Mare is named after Jacobus Phillipus Mare, member of the Transvaal Volksraad who lived between 1823 and 1900. Esselen is named after Ewald August Esselen 1858 to 1918 a jurist, politician and also a member of the Volksraad for Potchefstroom. Vermeulen is named after the Brothers Vermeulen, Jacob, or Kooitjie and Hendrik. Hendrik was a mason who worked in the Pretoria area in 1848 and was involved with surveying the town and Jacob was the first vegetable and cattle farmer. Schubart was named after Anton Frederik Schubart 1830 - 1898 a Dutch immigrant who came to Pretoria or to Cape Town in 1854. He later settled in Potchefstroom and did valuable work as a secretary of a school committee and later as secretary of State. Proes was named after Bernard Cornelius Ernst Proes an advocate and general agent from the Netherlands who lived from 1831 to 1872.

<sup>498</sup> Andrews T and Ploeger J *Street and Place Names of Old Pretoria* 1989 on 1. Quoting HC Marias the brother of poet, author and journalist Eugene N Marais. For a further study on the naming of farms around Pretoria, see Strydom S 'n *Ondersoek na die plek- en plaasname van die Groot Moot* Doctoral thesis completed at the University of Pretoria in 1955 and available as part of the University's Van der Waal collection.

Naming is, after all, the privilege only of those who in the first place feel the need for such... naming. And... those who, because of arrogance, ignorance and lack of respect, would rush in to exchange old, established names for others... [is] “thankless vandalism of the worst kind”.

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Even though Andrews and Ploeger refer in the introduction to oral transmissions coupled to the genealogical histories of the black people who inhabited the area around the Apies river, in certain cases with information dating 1500 years ago, these histories remain unwritten in the street names they cover in the book. Their introduction tells of the Bakwena people, Mosilikatse (Silkaats, Mzilikazi) the Matabela king and one of his strongholds, enKungwini, on the right bank of the Apies river,<sup>500</sup> but these oral histories remain unwritten. The content of the book, through the street names covered, tells a single story, the white story, of Pretoria.<sup>501</sup> This is the single story that Chimamanda Adichie warns against.<sup>502</sup> A single story is created by showing a people (or a place) as only one thing, over and over.<sup>503</sup> But stories matter, and in fact, ‘many stories matter. Stories have been used to dispossess and to malign, but stories can also be used to empower and to humanize’.<sup>504</sup> The argument in favour of stories and narratives in this thesis is aware that ‘stories can break the dignity of a people’,<sup>505</sup> but I still insist on stories because, as Adichie asserts, ‘stories can also repair that broken dignity’.<sup>506</sup> Adichie ends her presentation with a thought that connects place and belonging to why we need different stories: ‘when we reject the

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<sup>499</sup> Andrews T and Ploeger J *Street and Place Names of Old Pretoria* 1989 on 1 quoting Preller G *Old Pretoria: brief story of the city's Voortrekker Period* 1938. On the point of ‘vandalism of the worst kind’ many of the new signs were initially vandalised. During a photographing drive in 2012 when the new signs were installed, signs were vandalised, notably Nico Smith in Rietondale and January Masilela. The vandalised Masilela sign was situated in a wealthy suburb in Pretoria east (as is evidenced by the rather pretentious Beethoven Street crossing it). General Louis Botha was the first prime minister of the Union of South Africa (created in 1910) and Masilela was a former Secretary of Defence who was allegedly assassinated in 2008 because he ‘knew too much about the murky world of arms deals’. It is clear from these vandalised signs that the retention of Pretorius and Kruger did not satisfy all those disgruntled with the changes.

<sup>500</sup> Andrews T and Ploeger J *Street and Place Names of Old Pretoria* 1989 on 2-3.

<sup>501</sup> Initially called Pretoria Philadelphia – the brotherhood of Pretorius (in memory of Andries Wilhelmus Johannes Pretorius) when the congregation was of the Nederduits Hervormde Church was established on the farms Elandspoor and Daspoort in 1854. This change from church farm to capital city is captured in the book Rex HM *Pretoria: van kerkplaas tot regeringsetel* 1960.

<sup>502</sup> Adichie Chimamanda Ngozi ‘The danger of a single story’ available at [http://www.ted.com/talks/chimamanda\\_adichie\\_the\\_danger\\_of\\_a\\_single\\_story/transcript?language=en](http://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story/transcript?language=en) accessed 24 November 2016.

<sup>503</sup> Adichie Chimamanda Ngozi ‘The danger of a single story’ 09:25.

<sup>504</sup> Adichie Chimamanda Ngozi ‘The danger of a single story’ 17:35.

<sup>505</sup> Adichie Chimamanda Ngozi ‘The danger of a single story’ 17:35.

<sup>506</sup> Adichie Chimamanda Ngozi ‘The danger of a single story’ 17:35.

single story, when we realize that there is never a single story about any place, we regain a kind of paradise'.<sup>507</sup> We need new stories and we need new names.<sup>508</sup> On one reading, that is exactly what the constitutional court's majority judgment presents: new names and new stories. On a different reading, it can be another single story, the story of heroes and heroines to the exclusion of the stories of the ordinary everyday inhabitants of the city.<sup>509</sup>

### 3.2.3. Constitutional court case

There is a tension in the judgments of the constitutional court between the very technical procedural questions of whether an interim interdict is appealable, whether common law principles of appeal-ability apply to the constitutional court and the broader value laden question of 'a sense of belonging to the place where one lives'. In the constitutional court chief justice Mogoeng wrote the majority judgment with 8 judges concurring, a dissenting judgment was written by justice Froneman and justice Cameron and a separate judgment by justice Jafta.

Justice Mogoeng makes a 'passionate'<sup>510</sup> argument in the majority judgment. The main gist of the majority judgment entails that the sense of belonging that Afriforum is contending for is 'highly insensitive' to other cultures' and races' sense of belonging.<sup>511</sup> In the view of the majority judgment they failed to prove harm. Furthermore, even if the removal of the street signs, which hamper their preferred enjoyment of the cultural rights constitute harm, then this harm is not irreparable. The appeal was therefore

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<sup>507</sup> She derives the idea of a paradise regained from a story related by American writer Alice Walker writing about her Southern relatives who had moved to the North. At 17:55 'She introduced them to a book about the Southern life that they had left behind. "They sat around, reading the book themselves, listening to me read the book, and a kind of paradise was regained."

<sup>508</sup> See the references to Noviolet Bulawayo's book *We Need New Names* below.

<sup>509</sup> Or the single story of the ruling party, as was the case with the proposed name changes in the eThekweni municipality. Patel K 'South Africa: The return of the name-changing cliff-hanger' in *Daily Maverick* 29 March 2012 'Many perceived the proposed street name changes as an attempt by the ruling party to rinse history clean of the contribution of liberation movements that did not bear the insignia of the ANC. One proposal to rename the Mangosuthu Highway, named after Inkatha Freedom Party leader Mangosuthu Buthelezi, after ANC activist Griffiths Mxenge led to one IFP official warning that there would be "blood, and a lot of it" if the ANC proceeded with the change.'

<sup>510</sup> Called as such by Froneman J and Cameron J: 'The wounds of colonialism, racism an apartheid run deep. Understandably so, as the Chief Justice's judgment (first judgement) so passionately shows. *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 79.

<sup>511</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 58.

dismissed, because Afriforum failed to prove irreparable harm and the interim interdict should not have been granted in the first place.

The main review application in the street name saga is still pending. In the 2016 decision, the constitutional court (only) had to decide whether the interim interdict obtained by Afriforum can be appealed. Justice Mogoeng did however summarise the essence of the review application and identified four issues at the core of the review.<sup>512</sup> The first issue concerns the extent of section 31 of the Constitution's right to cultural enjoyment.<sup>513</sup> The second pertains to the requirements of public participation processes and if this can be demanded in terms of section 152 of the Constitution.<sup>514</sup> The third crucial element of the review proceedings is the right to just administrative action and the fourth relates to issues of separation of powers.<sup>515</sup>

The dissenting judgment shifted the emphasis of Afriforum's claim from a demand to have the signs displayed in perpetuity (the reading of the majority judgment) to a demand for participation in the place where they live, as linked to a sense of belonging. They however disagree severely with Afriforum, their view of history and their approach to the matter. They do not mince their words in showing their contempt for what Afriforum terms 'so-called apartheid' and 'so-called historical injustices' in their pleadings: 'So called! This embodies the kind of insensitivity that poisons our society.'<sup>516</sup> Denying the realities of a historical advantage rooted in the acquisition of property by white people and the continuing systemic privilege and injustice connected thereto

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<sup>512</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 34.

<sup>513</sup> Section 31 of the Constitution of the Republic of South Africa: Cultural, religious and linguistic communities.--(1) Persons belonging to a Cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practise their religion and use their language; and (h) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

<sup>514</sup> Section 152 of the Constitution of the Republic of South Africa: Objects of local government.--(1) The objects of local government are- (a) to provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government.

<sup>515</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 34.

<sup>516</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 121.



‘seeks to protect... not culture, but a heritage rooted in racism’.<sup>517</sup> They also suggest that white Afrikaans people should ‘find their sense of place and belonging, not only in the past, but also in a shared future, one the Constitution nurtures and guards for all of us, together, united in our diversity’.<sup>518</sup> Within this acknowledgment of the further indignity and injustice that such a denial and insensitivity to the ‘continuing wounds’ by exactly those who were not subject to the very indignities that caused the wounds can cause, they submit that they acknowledge the injustices and racism and dissent with humility.<sup>519</sup>

Jafta J writes his separate judgment mainly to respond to the second judgment; that of Froneman J and Cameron J. He agrees that leave to appeal should be granted, but furnishes his own reasons for this finding.<sup>520</sup> He furthermore disagrees that the majority judgment extends the existing doctrine or that it diminishes well-established rules and principles regarding the granting of appeals against interim interdicts, as argued in the dissenting judgment. In addition Jafta J also makes it very clear that the Constitution cannot be expected to recognise cultural traditions rooted in the racist past and that ‘there can be no justification for recognition of cultural traditions or interests “based on a sense of belonging to the place where one lives” if those interests are rooted in the shameful racist past’.<sup>521</sup> What is interesting about all three judgments is that they all ‘go beyond the question whether the Full Court’s order was appealable’.<sup>522</sup>

The separate judgment of Jafta J is starkly opposed to the dissenting judgment of Froneman J and Cameron J. The latter suggests on a few occasions that they have been misread. Jafta J argues that the common law principles governing the question

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<sup>517</sup> <sup>517</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 122.

<sup>518</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 123.

<sup>519</sup> <sup>519</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 79.

<sup>520</sup> Jafta J refers to the majority judgment of Mogoeng J as the first judgment and the dissenting judgement of Froneman J and Cameron J as the second judgment. I refer to the majority judgment and the dissenting judgment.

<sup>521</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 163.

<sup>522</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 172.

whether interim interdicts are appealable do not apply whatsoever to the constitutional court, since it is determined exclusively by the interests of justice as determined by Section 167(6) of the Constitution.<sup>523</sup> Jafta J also fiercely rejects that the Constitution can recognise any sense of belonging that is rooted in oppression.

The judgments differ on what Afriforum is asserting: a right or an interest. The majority judgment and separate concurring judgment interpret Afriforum's demand as one that insists that the street names should remain unchanged in perpetuity whereas the dissenting judgments reads it as a demand to participate in discussions around the changing of the names. Meaningful consultation could have changed the fate of the residents in the Schubart Park case and the constitutional court had harsh words for the city council's failure to do so.<sup>524</sup>

Consultation can however also be used as a way to simply prevent transformation, as is evident in the case of the Valhalla mosque.<sup>525</sup> A brief overview of the incident follows here. During April 2016 there was wide news coverage about a Valhalla-community in the city of Tshwane that resisted the building of a Mosque in a predominantly white neighbourhood.<sup>526</sup> The main claim of the community forum (and supported by Afriforum) is that there was insufficient consultation on this project and that the community was not invited to present their views on the erection of the Mosque.<sup>527</sup> Through the interview the interviewer skilfully makes it apparent that the demand for a correct legal procedure (public consultation process) merely masks a deep underlying racist fear of the 'invasive nature of Islam'. The community spokesperson

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<sup>523</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 179-180. Section 167(6) of the Constitution provides: 'National legislation or rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court— (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court.' Jafta J therefore states that: '[a]lthough the Constitution permits legislation and the rules to regulate access to the Court, significantly the constitutional injunction is that such legislation or rules must allow a litigant to bring a matter to this Court subject to two conditions only. These are the interests of justice and the leave of the Court.'

<sup>524</sup> See Froneman J's words as quoted chapter 2, section 2.2.2. Court cases in the North Gauteng high court and the constitutional court.

<sup>525</sup> I discuss this case in more depth in 3.3.

<sup>526</sup> Raborife M 'Valhalla mosque protests pure racism - Tshwane Islamic trust' 2016-04-21 *News24* available at <http://www.news24.com/SouthAfrica/News/valhalla-mosque-protests-pure-racism-tshwane-islamic-trust-20160421>, Pretorius W 'Valhalla mosque Islamophobia claim referred to CRL Commission' 2016-05-11 *News24* available at <http://www.news24.com/SouthAfrica/News/valhalla-mosque-islamophobia-claim-referred-to-crl-commission-20160511>.

<sup>527</sup> The interview is available at <http://www.news24.com/Live/SouthAfrica/News/sabc-journalist-challenges-valhalla-community-leader-over-mosque-20160419> accessed 24 April 2016.

who is interviewed, Richard Botha, refers to the example of Laudium, where people were ‘forced out of the area’ because of the ‘expansionist way in which the Muslims take over’. Usually, before state land is alienated notices go up, and a process of public participation is put in place. This example of the mosque in Valhalla serves as a reminder in which the law can be used to entrench and reproduce racial stereotypes and spatial injustice. The formal processes of the law can in this instance be used to counter substantial attempts at redress and reconciliation.

The key difference between justice Mogoeng in the constitutional court and judge Prinsloo in the North Gauteng high court, is that Prinsloo J looks at the existing street names, whereas Mogoeng J emphasises the empty spaces. Prinsloo reaches the conclusion that these names are not necessarily offensive as such or related to people who were actively or obviously part of driving the project of apartheid or colonialism, while Mogoeng points out the silences and the absence of names to show how the exclusive use of white people’s names in the contested street names is what makes them offensive and rooted in an oppressive, racist history. Zambezi, Beatrix and even Proes, Mears, Charles, Walker and Schubart are not strictly speaking icons or ‘heroes and heroines’ of apartheid and colonialism like Hendrik Verwoerd, DF Malan, Voortrekkers and Queen Wilhelmina are. They should however make space for other names. Pretorius and Paul Kruger, the only two names on the initial list that remained unchanged, can however be described as ‘heroes’ of the oppressive and racist project that produced Pretoria.

Justice Mogoeng in his judgment points out that creating a sense of belonging for all would require two things when it comes to the names of cities, towns, institutions and streets (he also mentions parks and game reserves).<sup>528</sup> Firstly by removing names that celebrate aspects of our history that can again open the ‘supposedly healing wounds’ or cause anguish to other race groups and secondly to remove inoffensive names so as to open up spaces in order to recognise the untold history and to include the heritage of those previously excluded by the systems of apartheid and colonialism.

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<sup>528</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 8.

It is therefore not only about removing offensive names, but also names that can make way for telling a more diverse story.<sup>529</sup>

The fact that Pretorius and Kruger remained is an indication that the single story of 'heroes and heroines' is preferred above a story that removes the names that bring back memories of the oppressive past. Both Pretorius and Paul Kruger streets were on the initial list of proposed names to change, but they were not changed in the end.<sup>530</sup> Their racial and oppressive connotation cannot be overlooked and they were definitely not kept because of their non-contentious nature. Was this part of some settlement or another compromise to ensure that the 'racial harmony and cohesion' envisioned by the name change project was not sabotaged by a right wing reaction?<sup>531</sup>

Pretorius refers to both voortrekker leader Andries Pretorius and his eldest son Marthinus Wessel Pretorius who, after buying portions of the farms Daspoort and Elandspoort, established Pretoria. Although Andries street has been changed, the name change of Pretorius street would probably have signalled the final word on the looming change of the name of the city itself. Pieter Labuschagne explains that 'Pretoria may be named after voortrekker leader Andries Pretorius, but its strongest association has been with only one man: Paulus Stephanus Johannes Kruger'.<sup>532</sup> Arguments around the retention of these names based purely on their historical importance should be approached with caution as they are easily presented as detached from the politics behind them and Labuschagne's article is one such an example. He insists on the historical value of the statue of Paul Kruger that currently still stands in church square. Labuschagne laments the 'present volatile political climate, fuelled as it is by political opportunism and historical ignorance' and argues

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<sup>529</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 8.

<sup>530</sup> Some framed this as a compromise, while others suggested that the city kept its name (Pretoria) in exchange for the 25 names to change see for example <http://www.news24.com/Archives/City-Press/Pretoria-to-stay-street-names-to-change-20150429> accessed 16 February 2017: 'Pretoria looks set to keep its name, but about 27 street names in the capital will change. This is the ANC's "offer" in behind-the-scenes negotiations currently underway in the controversial name change battle, Beeld newspaper reported.'

<sup>531</sup> [tshwane.gov.za](http://tshwane.gov.za).

<sup>532</sup> Labuschagne P 'Memorial complexity and political change: Paul Kruger's statue's political travels through space and time' *South African Journal of Art History* 2011 26(3) on 151.

for the statute to remain in the square.<sup>533</sup> Paul Kruger's name has been removed in other parts of the country and the world because of his connection with racism and projects of racial segregation. It is interesting to note that the street Paul Kruger in Pretoria was only changed in 1938. Prior to this, it was simply called Market street, which ran from the railway station straight to church square. The statue of Kruger was also only recently placed in Church Square (in 1954 and despite the fact that Kruger himself suggested that it should be placed in Burgerspark) and before this it stood on the other side of Market Street, on the railway station. The silence around Paul Kruger, his statute and his name, raises many questions.<sup>534</sup> Most of these questions fall outside of the scope of this project, but the question of belonging and how it relates to the street names I discuss here.

### **3.3. Belonging**

The right to cultural, religious and linguistic communities as contained in section 31 of the Constitution stands central to the street name case. Froneman J and Cameron J however argue that the existence of a right or interest based on a sense of belonging and sense of place is sufficient. Whether the right to participate in decisions that influences one's sense of place falls strictly within the ambit of cultural, environmental and citizenship rights as envisioned by section 31, remains an open question and is not required for the street name case. This broader interest of culture and how it is connected to a sense of belonging is also the interest of this section, rather than a narrow exploration of the strict confines of the Bill of Rights. More specifically, I look here not at culture and place as separate, but at belonging as a culture of place and belonging as *genius loci*.

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<sup>533</sup> Labuschagne P 'Memorial complexity and political change: Paul Kruger's statue's political travels through space and time' *South African Journal of Art History* 2011 26(3) on 153.

<sup>534</sup> A street in the Swiss town of St. Gallen was named after Kruger, who passed away in Clarens, Switzerland. In 2009 this name was changed due to the racist connotations and demands from lobby groups to change the name. <http://in.reuters.com/article/idINIndia-39839120090524> 'In the context of the time, naming a street after Paul Krueger can be understood,' the St. Gallen town council said in a statement, 'but today it can no longer be justified.' The street was renamed after Swiss author and dramatist Friedrich Duerrenmatt.

### 3.3.1. Belonging as a culture of place

Belonging as a culture of place is what is handed down to you from the ancestors. bell hooks provides an understanding of belonging as a culture of place.<sup>535</sup> Her spatial contribution lies mainly in how she unpacks one's place in the world; the politics of identity and belonging. For hooks, identity is shaped in accordance with 'white supremacist capitalist patriarchy'. Her rich body of work draws from several different authors who contemplate black experiences and knowledges with reference to oppression on economic, sexual and racial levels.<sup>536</sup> In *Belonging: a culture of place* hooks speaks to geographical knowledge by addressing issues relating to landownership, territory, race, gender, economy and home. She challenges social theorists and geographers by outlining social injustices and the manners in which they are expressed spatially. hooks dedicates the entire book to a justification of why she returned to her Kentucky home of her childhood from the city. Within this journey she defines belonging as follows:

Leaving Kentucky, fleeing the psycho history of traumatic powerlessness, I took with me from the sub-cultures of my native state a positive understanding of what it means to know a culture of belonging, that cultural legacy handed down to me by my ancestors.<sup>537</sup>

This rootedness in place is a strong feature of her work. When she refers to culture in relation to belonging, she invokes a culture based on anarchy and explains that the starting point of their 'counter-hegemonic black culture' was in fact nature.<sup>538</sup> The lyrics of Tracy Chapman, which she quotes in the preface, 'I wanna wake up and know where I am going', echoes through the whole of the book. Throughout she reflects on her return to Kentucky; the place where she grew up. She is saddened and at the same time comforted by the many things that remained the same. She opens the book by lamenting the fact that so many people do not feel any sense of place. Instead of a sense of place, she says, many people only have 'a sense of crisis, of impending

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<sup>535</sup> hooks b *Feminist theory: from margin to centre* 1984. The thinking of bell hooks is particularly significant in the context of space and place and how they intersect with identity. Her work on the margin and centre highlights the way in which spatiality relates to conceptualised places and underscores the politics of space.

<sup>536</sup> Toni Morrison, Audre Lorde, Paulo Freire, Cornel West and Frantz Fanon are just some of the key thinkers underlying her work.

<sup>537</sup> hooks b *Belonging: a culture of place* 2009 on 13.

<sup>538</sup> hooks b *Belonging: a culture of place* 2009 on 8.

doom'.<sup>539</sup> It is this absence of belonging that she tries to unpack. The essays focus mostly on land and land-ownership and focuses on the fact that close to ninety percent of black people in America lived in the agrarian South before there was a mass migration movement and urbanisation to the cities in the north of America at the start of the twentieth century. Belonging as a culture of place takes memories and the past as sources of belonging.<sup>540</sup> Our struggle, hooks writes, is also 'a struggle of memory against forgetting'.<sup>541</sup> Self-determination, self-reliance and making one's own rules are integral to a sense of belonging and also what distinguishes hooks' Kentucky home from her experience in the city, where boundaries dictate and demarcate.<sup>542</sup> Our sense and our sensibilities are 'deeply informed by the geography of place'.<sup>543</sup> hooks emphasises the importance of habits in shaping a sense of place and belonging. She writes about exile: 'exile can... change your mind, utterly transform one's perception of the world of home. The differences [that] geographical location imprinted on my psyche and habits of being became more evident away from home'.<sup>544</sup> It is specifically the habits of opposition (non-conformation, resistance to racism), which hooks acquired during her childhood that cemented a strong bond to her native place that could not be broken. She remembers how growing up the unique 'habits of thinking and being that were in resistance to the status quo' could only be nurtured by those who were able to perceive of the natural environment as a space outside of manmade constructions and a culture of domination.<sup>545</sup> Remembering the past can be an exercise in 'mapping the territory' a way of discovering ourselves and 'finding homeplace'.<sup>546</sup> It is important to draw the link between geographical location and psychological states of being.<sup>547</sup> What is striking is the manner in which she captures a sense of belonging in terms of resistance to racism and the status quo. The right to culture or at least the broader interest in a culture of place, as captured in the street name case, should therefore be defined not with reference to the status quo preserving

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<sup>539</sup> hooks b *Belonging: a Culture of Place* 2009 on 1.

<sup>540</sup> hooks b *Belonging: a Culture of Place* 2009 on 5.

<sup>541</sup> hooks b *Yearning: Race, Gender, and Cultural Politics* 2015 on 147. She refers to South Africa's *freedom Charter* and this oft repeated phrase.

<sup>542</sup> hooks b *Belonging: a Culture of Place* 2009 on 8.

<sup>543</sup> hooks b *Belonging: a Culture of Place* 2009 on 9.

<sup>544</sup> hooks b *Belonging: a Culture of Place* 2009 on 13.

<sup>545</sup> hooks b *Belonging: a Culture of Place* 2009 on 19.

<sup>546</sup> hooks b *Belonging: a Culture of Place* 2009 on 15.

<sup>547</sup> hooks b *Belonging: a Culture of Place* 2009 on 19.

notion of culture envisioned by Afriforum, but instead one that is based on a resistance to racism and oppression.

This line of thinking can also be found in the African post-colonial political analysis of Patrick Chabal. He starts out by highlighting that there is not a clear distinction between what constitutes society and that which constitute an individual. This is firstly so because the mere distinction between these two entities particularly presupposes a relationship between them. But Chabal lists a second reason for the blurring of lines between the constituencies of and individual and society, namely that the term 'individual' is biologically problematic, as 'humans are contextually constructed'.<sup>548</sup> He draws a direct line between being and belonging and thereby connects origin, location and locality. He emphasises that this connection between locality, identity and origin is common to all African societies. With 'being' he means the 'place and role of individuals within' their environment and belonging for him is inextricably linked to this, it is the other side of the same coin.<sup>549</sup> He continues to argue that the close link between ethnicity and origin in the study of African politics flows from a colonial view of Africans as 'primarily tribal'. Origin is therefore usually expressed as tribal identity and for this reason, he makes a distinction between origin and identity in order to 'deploy a thicker analysis of issues that are central to human beings and elsewhere'.<sup>550</sup>

In a broader sense Chabal divides being into origin, identity and locality. Under origin he groups land, ancestors and religion, identity he breaks up into ethnicity and religion and locality (or community) is divided into gender, age and authority. For purposes of this thesis I am concerned with how this approach ties a sense of place (belonging) to the spirits of the place (ancestors, origin). Origin concerns two issues, namely the specific location of origin, that is firstly one's place of birth or place of family origin, and then secondly a link to the actual geographical site. He starts by relating an example that illustrates the difference between the French, who (historically) attach value to their place of origin, while it is of less importance to Americans. The difference, he explains, lies in differing views on the importance of birth for these two Western

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<sup>548</sup> Chabal P *Africa: The Politics of Suffering and Smiling* 2009 on 25.

<sup>549</sup> Chabal P *Africa: The Politics of Suffering and Smiling* 2009 on 25.

<sup>550</sup> Chabal P *Africa: The Politics of Suffering and Smiling* 2009 on 26.



societies. In Africa, birthplaces and burial places are, for sociological, cultural and religious reasons, very important.<sup>551</sup>

The place of origin, as community marker rather than an indicator for ethnic identity concerns three important dimensions, according to Chabal: land, ancestors and belief system.<sup>552</sup> In this sense land (place) is much more than a physical feature, instead it is 'constitutive of what being means – it provides a context within which people define and organise themselves in socio-political terms'.<sup>553</sup> Even though land is a central aspect to the sense of identity, the relationship between the dead and the living is 'by far the most significant aspect of origin' also understood as the relationship to the ancestors.<sup>554</sup> The ancestors are tied to a geographical location, this link cannot be severed or changed. Chabal accuses anthropologists (who have produced most of the work on ancestors in Africa) of misunderstanding and missing the point around the role ancestors play. One of the results of this misappropriation has been that African religions are deemed more primitive based on a misunderstanding that Africans believe in the ancestors. Related to this, is another misperception that the literal geographical location can be questioned by arguing that, for example, earlier ancestors could not possibly have been interred at an exact location. Instead, Chabal clears these misperceptions by highlighting that the role played by the ancestors is a relational role that captures the relationship between the land and the group. At the same time, the 'sense of origin' is rooted in the place of burial and propitiation of the ancestors. Regardless of where the ancestors are buried, it is the link to them that is central to the meaning of origin and the 'texture of identity'.<sup>555</sup>

Belonging seen as a culture of place and identity connected to belonging encompass a different kind of relationality to what I have unpacked under Massey's politics of relationality and Nedelsky's rights as relations in chapter 2.<sup>556</sup> It represents interrelations with the ancestors, between the yet-to-be-born, the living and the living dead. I look now at a sense of place (belonging) as a spirit of place.

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<sup>551</sup> Chabal P *Africa: The Africa: The Politics of Suffering and Smiling* 2009 on 27. He refers to Cohen and Odhiambo *Burying SM: The Politics of Knowledge and the Sociology of Power in Africa* 1992.

<sup>552</sup> Chabal P *Africa: The Africa: The Politics of Suffering and Smiling* 2009 on 27.

<sup>553</sup> Chabal P *Africa: The Africa: The Politics of Suffering and Smiling* 2009 on 27.

<sup>554</sup> Chabal P *Africa: The Africa: The Politics of Suffering and Smiling* 2009 on 28.

<sup>555</sup> Chabal P *Africa: The Africa: The Politics of Suffering and Smiling* 2009 on 29.

<sup>556</sup> See section 2.5.3. Relational space and rights as relationships.

### 3.3.2. A sense of belonging and/ as *genius loci* (spirit of place)

I want to link spatial reproduction, spatial endurance or continuation to haunting.

Their historical advantage in acquiring property in the past dwells on, in deep systemic privilege and injustice.<sup>557</sup>

The colonial masters and their worst laws may have gone, but they are buried in the 'DNA', as it were, of the cities of the global south – a kind of hauntology of colonialism.<sup>558</sup>

*Genius loci* or 'spirit of place' (sometimes 'sense of place') is an ancient Roman belief that entailed that every independent being had its guardian spirit, or *genius*.<sup>559</sup> Norberg-Schulz explains *genius loci* as 'the 'spirit of place' which the ancients recognised as that 'opposite' that humans have come to terms with in order to dwell.<sup>560</sup> He opens his book with a quote from Kafka's *The Trial* as background to his claim that our everyday life-world consist of tangible and intangible phenomena.<sup>561</sup> It is a life-giving spirit that determines the essence or identity of things. Even the gods were believed to possess a *genius*. It determined both the being and the becoming of things.<sup>562</sup> During these times survival depended on a good physical and psychic

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<sup>557</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 122.

<sup>558</sup> Home R 'Legal histories of planning and colonialism' in Parnell S and Oldfield S (eds.) *Routledge Handbook on Cities of the Global South* 2014 on 83.

<sup>559</sup> I have started questioning whether this ancient Roman concept of a guardian spirit of a place is the most appropriate (in fact if it is at all necessary to refer – again – to Roman concepts) in a South African (or perhaps global south) context where there already is a rich history of ancestral spirits that remain in a space or at a place. I discuss the *genius loci*, which, much like our system of law, has roots in ancient Roman civilisation, relying mainly on Norberg-Schulz along with some of the publications that followed in the wake of these authors. I also explore the ideas of specters and hauntology.

<sup>560</sup> Norberg-Schulz C *Towards a Phenomenology of Architecture* 1980 on 11. In the context of literature, *genius loci* features in the work of DH Lawrence (earlier references than Norberg-Schulz). 'Every continent has its own great spirit of place. Every people is polarized in some particular locality, which is home, the homeland. Different places on the face of the earth have different vital effluence, different vibration, different chemical exhalation, different polarity with different stars: call it what you like. But the spirit of place is a great reality'.<sup>560</sup> Lawrence DH *Studies in Classic American Literature* 1923 on 5-6, as quoted by Tally R *Spatiality: The New Critical Idiom* 2013 on 81.

<sup>561</sup> Norberg-Schulz C *Towards a Phenomenology of Architecture* 1980 on 5-6. He quotes from Kafka: 'Logic is doubtless unshakable, but it cannot withstand a man who wants to live'. Norberg-Schulz followed a phenomenological approach to architecture, which attempted to respond to the internationalist style that brought about the triumph of modernism in urban architecture and the final demise of the traditional more community oriented structure of cities.

<sup>562</sup> 'The genius thus denotes what a thing *is* and what it *wants to be*' Norberg-Schulz C *Towards a Phenomenology of Architecture* 1980 on 18.

relationship to the place. The notion *genius loci* also translates and interprets as ‘sense of place’. It connotes our systems of orientation and is therefore interwoven with the five senses. It is when our system of orientation is weak that we lose our sense of place and feel lost.<sup>563</sup>

In his work, Norberg-Schulz stands critically towards a mere scientific or purely functional approach to art and architecture and insists on an existentialist approach.<sup>564</sup> I render the same critique against an approach to law as the product of enlightenment-rationality and against the over-stated scientification of law. Norberg-Schulz points out that modernity has created the illusion of freedom from place. He laments the belief that science and technology has made us independent from places, and from our senses, and argues that pollution and environmental chaos have rightfully brought a renewed emphasis on place.

The term ‘taking place’, which is usually understood in a quantitative, ‘functional’ sense, with implications such as spatial distribution and dimensioning, captures the very importance of place is captured in. These ‘functions’, although ostensibly inter-human, are not necessarily similar everywhere.<sup>565</sup> Norberg-Schultz explains that what is considered ‘similar functions’ or everyday activities, such as sleeping, eating and for our purposes judging, take place in very different ways. It depends on culture and tradition. The functional approach is therefore not ideal as it does not account for the identity of a place. The term *genius loci* attempts to capture this identity. According to Norberg-Schultz, the complex qualitative totalities cannot be described in terms of analytical or scientific concepts. Rather, he argues, this identity of place can only be captured through the method of phenomenology.<sup>566</sup> The ‘return to things’ conceived by phenomenology enables a return to the everyday lifeworld as opposed to abstract analytical scientific constructions.<sup>567</sup> In this regard, Norberg-Schultz turns to the work of Heidegger and more specifically his work on the notion of ‘dwelling’.<sup>568</sup> ‘The place

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<sup>563</sup> Norberg-Schulz C *Towards a Phenomenology of Architecture* 1980 on 19.

<sup>564</sup> Norberg-Schulz C *Towards a Phenomenology of Architecture* 1980 on 5 and 195.

<sup>565</sup> Norberg-Schulz C *Towards a Phenomenology of Architecture* 1980 on 8.

<sup>566</sup> Norberg-Schulz C *Towards a Phenomenology of Architecture* 1980 on 8.

<sup>567</sup> The concept ‘lifeworld’ (the German ‘Lebenswelt’) was introduced by Edmund Husserl in *The crisis of European Sciences and Transcendental Phenomenology* (transl.) Carr D 1954..

<sup>568</sup> Heidegger ‘Building Dwelling Thinking’ and ‘Language’ in Hofstadter Albert (ed.) *Poetry, Language, Thought* 1971 as referred to in Norberg-Schulz C *Towards a Phenomenology of Architecture* 1980.

is the concrete manifestation of man's dwelling, and his identity depends on his belonging to places.<sup>569</sup> In order to dwell, we need to gather the world through the senses, as a concrete thing. Norberg-Schultz notes that art concretises whereas science operates in the realm of abstraction and then argues that 'Architecture belongs to poetry; to art'.<sup>570</sup> Taking this lead, I want to call for a law that belongs to art and not to science.

Dwelling, in the existential sense of the word, depends on the functions of settling, namely: visualization, symbolization and contemplation.<sup>571</sup> Identification with the environment through the senses is a requirement for dwelling in this sense. This is illustrated by Heidegger through the image of the bridge, which visualizes and gathers the world into a unified whole. 'The bridge gathers "being" into a certain location that we may call "place"'.<sup>572</sup> It captures the total relationship to place. The 'here' where we 'dwell' goes beyond the house and comprises the whole world we inhabit.<sup>573</sup> All places have character, which can be defined as distinctive features such as: 'festive', 'solemn', 'protective' for buildings or 'barren', 'fertile', 'threatening' etc. for landscapes. In the work of Ancient Greek philosopher Empedocles the word *pagamai* means flat of the hand or gripper and he uses it to refer to the senses in general. The idea of the senses grasping their objects like hands is a common thread through Greco-Roman natural philosophy. Empedocles also developed the connection between elements (space) and the sense organs, as seen in the ancient Indian and Chinese traditions, which Aristotle developed further.<sup>574</sup> In the context of Norberg-Schultz's sense of place, he describes dwelling as a process of 'gathering the world as a concrete thing'.<sup>575</sup> Gathering or grabbing is a concrete phenomenon. I am here reminded of the calls of both Butler and Philippopoulos-Mihalopoulos to see law as 'concrete abstraction',<sup>576</sup> and the space of law to be social space, in terms of Lefebvre's

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<sup>569</sup> Norberg-Schultz C *Towards a Phenomenology of Architecture* 1980 on 6.

<sup>570</sup> Norberg-Schultz C *Towards a Phenomenology of Architecture* 1980 on 23.

<sup>571</sup> Norberg-Schultz C *Towards a Phenomenology of Architecture* 1980 on 18.

<sup>572</sup> Richardson WJ *Heidegger. Through Phenomenology to Thought* 1947 on 585, as referred to by Norberg-Schultz C *Towards a Phenomenology of Architecture* 1980.

<sup>573</sup> Strecker I 'Genius Loci of Hamar' *Northeast African Studies* 7.3 2000 85 on 88, as referred to by Norberg-Schultz C *Towards a Phenomenology of Architecture* 1980.

<sup>574</sup> Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 33.

<sup>575</sup> Norberg-Schultz C *Towards a Phenomenology of Architecture* 1980 on 23.

<sup>576</sup> See the concept of law as 'concrete abstraction' in section 1.4. Leibniz and Lefebvre: the importance of relative space in the Introduction chapter. See in particular footnotes 56 and 57.

understanding of social space as ‘concrete abstraction’.<sup>577</sup> Concrete abstraction, explains Butler, means a ‘material inscription on the social world and in the practices of living bodies’.<sup>578</sup>

Quite early in the Western, Indian and Chinese traditions, the number of senses was five. The number five has a rich symbolic meaning in all of these cultures.<sup>579</sup> In India for example we find the doctrine of five fires and in China the five points of compass. A pentagram has five points and is drawn by five lines. In antiquity this shape used to represent the first letter of the Greek alphabet and later came to symbolise the harmony of the cosmos. Furthermore there is the Five Pillars of Islam and the Jewish written law, the Torah, consists of the first five books of the Old Testament (Pentateuch). In Christianity we find the parable of the five foolish virgins and the five wounds of Christ as a symbol of the salvation of the world. The church fathers followed Aristotle who clearly stated, unlike Plato who did not clarify whether there were four or five senses, that ‘there is no sixth sense in addition to the five enumerated – sight, hearing, smell, touch’.<sup>580</sup> The concept ‘sixth sense’ only came to refer to ‘extra sensory perception’ at the end of the eighteenth century. Before this, the number classically ranged between four and eight, and could be largely attributed to different aspects of the sense of touch enumerated individually.<sup>581</sup> Saadia ben Joseph, a Jewish scholar wrote towards the end of the first millennium that the number of senses throughout history varied and there had always been attempts to increase it. He suggested that perceiving lightness or heaviness should be considered a sense in itself.<sup>582</sup> Examples of these beginnings of a sixth sense as something beyond the perceptible are ‘to steal the sixth sense from nature’s secret storeroom’, ‘a sense to prove the reality of the objects with which the world of spirits has been populated’, the ‘sense of beauty’ and

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<sup>577</sup> Lefebvre H *The Production of Space* 1991 on 26-27. ‘Is this space an abstract one? Yes, but it is also ‘real’ in the sense in which concrete abstractions such as commodities and money are real. Is it then concrete? Yes, though not in the sense that an object or product is concrete. Is it instrumental? Undoubtedly, but, like knowledge, it extends beyond Instrumentality. Can it be reduced to a projection — to an ‘objectification’ of knowledge? Yes and no: knowledge objectified in a product is no longer coextensive with knowledge in its theoretical state.’

<sup>578</sup> Butler C *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* 2012 on 6.

<sup>579</sup> Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 54-55.

<sup>580</sup> Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 55 quoting Aristotle in *De anima* (424b, 22ff).

<sup>581</sup> Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 55.

<sup>582</sup> Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 56 quotes David Kaufmann *Die Sinne: Beiträge zur Geschichte der Physiologie und Psychologie im Mittelalter aus bebräisichen und arabischen Quellen* 1884 Leipzig at 41.

the 'sex drive'.<sup>583</sup> Scientists claimed the discovery of a new sense – the so called 'muscular sense', with which one detected weight heaviness. Ernst Heinrich Weber, born at the end of the eighteenth century, described the muscular sense in precise terms for the first time as a sense that enables humans to discern between barely perceptible differences in weight.<sup>584</sup> This illustrates how the additional senses that were claimed, were usually variations on or nuances of the sense of touch.

Biologists and psychologists at the beginning of the nineteenth century speculated about an additional sense of heat or temperature and even a sense comparable to that of a bat.<sup>585</sup> Importantly, in an essay dated 1709 entitled *An Essay Towards a new Theory of Vision*,<sup>586</sup> Berkeley challenged Locke's sensualistic approach. According to John Locke, a practicing medical doctor, all experience came from only two sources: 'sensations' and 'reflections': 'this great Source, of most of the *Ideas* we have, depending wholly upon our Senses, and derived by them to the Understanding, I call sensation'.<sup>587</sup> Berkeley critiqued the sensualistic method by naming space as an example of a perception that 'did not simply take place by means of the senses'.<sup>588</sup>

The spirit of place can be established through the senses. A phenomenological approach to law is one that focuses on the everyday life-world of law and of sites of law-making. According to Norberg-Schultz the *genius loci* of a place does not necessarily change or get lost, regardless of whether the place changes.<sup>589</sup> Legal culture remains in spite of changes in the content of law.<sup>590</sup> The content of law can be

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<sup>583</sup> These instances, according to Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 56, can be respectively attributed to Friederich Maximilian Klinger (1752 – 1831), Christoph Martin Wieland's 1799 novel *Agathodämon*, as well as Herder and Georg Foster.

<sup>584</sup> Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 22.

<sup>585</sup> Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 58.

<sup>586</sup> Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 127 quoting Berkeley in Hamlyn DW *A History of Perception* 1961 at 104ff.

<sup>587</sup> Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 127 quotes John Locke *An essay Concerning Human Understanding* led Peter H. Nidditch 1975 Oxford at 105.

<sup>588</sup> Jütte R *A History of the Senses: From Antiquity to Cyberspace* 2005 on 127 quoting Berkeley in D.W. Hamlyn *A History of Perception* 1961 at 104ff.

<sup>589</sup> Norberg-Schultz C *Towards a Phenomenology of Architecture* 1980 on 40-42.

<sup>590</sup> For a thorough discussion of the notion of legal culture in a South African context see Karl Klare 'Legal Culture and Transformative Constitutionalism' *South African Journal on Human Rights* 1998 14 146. What Klare means by legal culture is 'professional sensibilities'. This would not only imply a current observable ideology, but also a susceptibility or predisposition towards a certain way or method of thinking, reasoning and arguing. Klare describes it as 'habits of mind and intellectual reflexes', and also 'rhetorical' and 'argumentative' strategies. Legal culture would determine that valid arguments are those that feature again and again in legal discourse, forming and reinforcing

changed easily, but the context remains. Norberg-Schultz distinguishes between space, place and character. In his terms space is what is described and experienced in the context of pronouns (under, above, beside) while character can be placed within that which is described with adjectives (quiet, calm, busy etc). Place is the coming together of space and character in nouns (river, home, forest). The experienced totality of place can be analysed through the aspects of space and character. Above I discuss Massey's distinction between place and space, which differs from that of Norberg-Schultz.<sup>591</sup> In this thesis, I support, following Massey, a sense of place that does not see place as fixed and does not attach more meaning to place than to space. Place has multiple identities and cannot be fixed with a static character. Place is not frozen in time, but rather consists of processes. Place cannot be seen as an enclave with a clear outside and inside. There is a danger in Norberg-Schultz's distinction between space, place and character,<sup>592</sup> to fix place and to over-romanticise the safety and familiarity of place. To keep place open and in flux and radically heterogeneous, as Massey calls for, I want to emphasise the 'spirit' in *genius loci*, reading it as spirit of place, rather than sense of place. Accordingly I turn to hauntology.

*Genius loci* can also be understood within the framework of hauntology. In *Specters of Marx: the State of the Debt, the Work of Mourning and the New International*, Jacques Derrida, asks 'what is living and what is dead in Marxism'.<sup>593</sup> In answering the question he takes position for a certain spirit of Marxism while distinguishing between a spirit and a ghost. Invoking Derrida's *Specters of Marx* is poignant in a South African context as he dedicates the lecture on which the volume is based to Communist Party leader Chris Hani, who was assassinated in his driveway in April 1993 by Janus Wallus and Clive Derby Lewis. In this dedication, Derrida speaks of apartheid as metonymic in the sense that what was happening in South Africa at the time could be translated to what was taking place elsewhere.<sup>594</sup> His distinction between the spirit and the spectre also informs the interaction between *genius loci* as both spirit of place and sense of place.

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that culture. The presupposed commitments of the profession results in intuitive understandings of and assumptions about politics, ethics, and social life in general as well as a specific vision of justice.

<sup>591</sup> Norberg-Schultz's sense of place, sees dwelling as a process of 'gathering the world as a concrete thing'.

<sup>592</sup> The lurking danger in phenomenological approaches to space in general.

<sup>593</sup> Derrida J *Specters of Marx: the State of the Debt, the Work of Mourning and the new International* 1994 on ix.

<sup>594</sup> Derrida J *Specters of Marx: the State of the Debt, the Work of Mourning and the new International* 1994 on xiv.

'The ghost is the phenomenon of the spirit',<sup>595</sup> the haunted nature of Schubart Park is the apparition form of the spirit of place, which is the phenomena of the senses. For Derrida the difference between the spirit and the ghost is a *differance* as the ghost is a deferred spirit. The phenomenological 'conjuring trick... plays between the spirit (Geist) and the specter (Gespenst), between the spirit on the one hand, the ghost or the revenant on the other'.<sup>596</sup> It is at the apparition of the in-apparent that the spirit shows itself as a ghost as 'the specter is of the spirit'.<sup>597</sup>

No, once this autonomization is effected, with the corresponding expropriation or alienation, and only then, the ghostly moment comes upon it, adds to it a supplementary dimension, one more simulacrum, alienation, or expropriation. Namely, a body! In the flesh (Leib)! For there is no ghost, there is never any becoming-spectre of the spirit without at least an appearance of flesh, in a space of invisible visibility, like the dis-appearing of an apparition. For there to be ghost, there must be a return to the body, but to a body that is more abstract than ever.<sup>598</sup>

According to Derrida, it is from the moment that no ethics and no politics seems thinkable that it becomes 'necessary to speak *of the ghost*, indeed *to the ghost*'.<sup>599</sup> The fact that there are some spirits, is a given and we have to reckon with them, we 'cannot not have to', we 'must not be able to reckon with them'.<sup>600</sup>

How do we 'reckon with them', and perhaps more specifically, how do we reckon with a haunting sense of place where South African spaces are still characterised by apartheid and colonial interventions? Here I turn to South African writer Mamphela Ramphele's book *Laying Ghosts to Rest*.<sup>601</sup> She narrates her childhood years growing up in an idyllic village and her terrible fear of the darkness. There was no electricity and fetching, which often fell on girls, water often involved having to venture in the

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<sup>595</sup> Derrida J *Specters of Marx: the State of the Debt, the Work of Mourning and the new International* 1994 on 169.

<sup>596</sup> Derrida J *Specters of Marx: the State of the Debt, the Work of Mourning and the new International* 1994 on 156.

<sup>597</sup> Derrida J *Specters of Marx: the State of the Debt, the Work of Mourning and the new International* 1994 on 157.

<sup>598</sup> Derrida J *Specters of Marx: the State of the Debt, the Work of Mourning and the new International* 1994 on 158.

<sup>599</sup> Derrida J *Specters of Marx: the State of the Debt, the Work of Mourning and the new International* 1994 on xiv.

<sup>600</sup> Derrida J *Specters of Marx: the State of the Debt, the Work of Mourning and the new International* 1994 on xx.

<sup>601</sup> Ramphele M *Laying Ghosts to Rest: Dilemmas of the transformation in South Africa* 2008.



dark. She explains that her fear of darkness came from the many ghost stories often told in the community. One of the most ‘spooked’ places was a thorny-bush forest close to their settlement. The Seakamela clan was living in the forest until they were forcibly removed by the apartheid government. They were re-settled in a remote and dry area. The graves of the ancestors remained in the forest and, according to legend; they became furious ghosts because of the injustice caused to their people. There was however, a man in the village who could address her fear of the dark. Uncle Paulos ‘was an effective mediator between the living and the dead’.<sup>602</sup> He would confront the ghost by name and then plead with it to make peace with what was troubling him and to find rest. For ghosts that were particularly resistant to his asking nicely, he would employ a different tactic. For them ‘he would become quite aggressive and command it to... stop frightening the children’.<sup>603</sup> She explains further that she was in complete awe of Uncle Paulos and had and was always acutely aware that ‘ghosts could be laid to rest by calling them by name’. She calls the (stubborn) ghosts of racism, ethnic chauvinism, sexism and authoritarianism by name.<sup>604</sup> In her chapter on the ghost of HIV/Aids she expressly links the pandemic to spatial organisations that originated in apartheid, and focuses on the migrant labour system as the most significant ‘point of entry’ of the virus.<sup>605</sup> With reference to a previous work of hers, *A Bed Called Home*,<sup>606</sup> she highlights the impact that living conditions had on the migrant workers whose ‘dignity was under assault on a daily basis’.<sup>607</sup> ‘Devastating’ is the term she appropriately uses to describe the effect that the limitations on physical space imposed by apartheid had on the psychological well-being of black people. Through this, she argues how the pandemic spread to rural and previously non-infected areas and maps the terrain of the virus. She illustrates how the sense of place during apartheid haunts the present as a spirit of place. The *genius loci* of the migrant labour system remains, just as the *genius loci* of forced removals during apartheid remains, and the *genius loci* of a high-rise housing complex built for civil servants in the capital city of the apartheid state.

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<sup>602</sup> Ramphele M *Laying Ghosts to Rest: Dilemmas of the transformation in South Africa* 2008 on 9.

<sup>603</sup> Ramphele M *Laying Ghosts to Rest: Dilemmas of the transformation in South Africa* 2008 on 9.

<sup>604</sup> Ramphele M *Laying Ghosts to Rest: Dilemmas of the transformation in South Africa* 2008 in chapters 4-7.

<sup>605</sup> Ramphele M *Laying Ghosts to Rest: Dilemmas of the transformation in South Africa* 2008 on 228.

<sup>606</sup> Ramphele M *A Bed Called Home* 1991.

<sup>607</sup> Ramphele M *Laying Ghosts to Rest: Dilemmas of the transformation in South Africa* on 228.

### 3.3.3. Belonging as home and place as fluid

A sense of belonging is attached to home, feeling at home, coming home and therefore also closely linked to notions of home. The ways in which we think about space and home matter and that space is gendered through and through.<sup>608</sup> The distinction between space and place should be interrogated. For some, place is the sphere of the everyday; of real and valued practices while for others a retreat to place' represents a protective pulling-up of drawbridges and walls.<sup>609</sup> Place, on this reading, is the locus of denial and attempted withdrawal. Massey therefore calls for refusing the distinction between place (as meaningful, lived and everyday) and space (as the outside, the abstract, the meaningless). Place as an ever-shifting gathering of lines of flight poses the question of our 'throwntogetherness', as Massey explains. For her, space is the dimension of the social, radical simultaneity, multiplicity and it presents contemporaneous existence. Her understanding of the relationality of space relies on the premise that all things are flux, but this should not be construed as a general state of evanescence, because entities can endure.<sup>610</sup> A relational politics of the spatial is an 'attempt to urge an understanding of place as permeable, to provoke a living of place as a constellation of trajectories, both natural and cultural, where the question of 'belonging' has to be framed in a different way'.<sup>611</sup> This different conception of belonging based on alternative conceptions of space and place is what I explore here, linked to the ways in which the 'sense of belonging connected to the place where one lives' features in the street name case. Afriforum invokes a sense of belonging and a right to the city that are not built on difference. The concept of community as difference, as covered in chapter 2,<sup>612</sup> connects to a sense of belonging and ties in with certain (open) notions of space and place.

The terms space and place are often ill defined and conflated or confused in the social sciences, in humanities and also in the context of law's spatial turn. In everyday use, the concepts are often used interchangeably to refer to something like environment, location, area, region, landscapes and other loose geographical signifiers. These two

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<sup>608</sup> Massey D *for space* 2005 on 6.

<sup>609</sup> Massey D *for space* 2005 on 10.

<sup>610</sup> Massey D *for space* 2005.

<sup>611</sup> Massey D *for space* 2005 on 149.

<sup>612</sup> See section 2.3.2. The right to difference and the right to urban life.

terms are distinct and should not be treated as synonyms.<sup>613</sup> Human or cultural geographers, as a rule, distinguish between the two concepts because of the important difference in the background to the two terms in geographic inquiry. Hubbard attributes the distinction to the difference between humanistic and materialistic accounts of geography.<sup>614</sup> Humanist accounts of geography are based mainly on existentialism and phenomenology. Their emphasis falls acknowledging the 'sense of place' implicit in all settings and focuses on lived-in place in an attempt to replace the people-less geographies brought about by positivist spatial sciences.<sup>615</sup> Place is seen as distinctive and bounded. On the other hand, materialist approaches to geography draw on Marxist theories of space, and are considered to be a response to the empirico-physical conception of spatiality that viewed the world as a clean slate and accounted for colonial conceptions of *terra nullius*. Marxist or materialist accounts of geography focus on space and the power relationships produced by and in space. The emphasis falls not only on the social production, but also the social consumption of space.<sup>616</sup> Massey's idea of a 'progressive sense of place' challenges the distinction between space and place altogether.<sup>617</sup> She suggests that place is the coming together of flows and therefore not bound spaces. Both Humanist and Marxist geography were popular during the 1970s as critical responses to the geographical positivism that dominated the discourse up to then. According to the empirical and physical focus of spatiality that formed the foundation of geography at the time, the world, rather than actively creating social life, was instead an empty container. It was

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<sup>613</sup> Phil Hubbard argues strongly for a separation between the two. Hubbard P 'Space/place' in Atkinson D *et al. Cultural Geography: A Critical Dictionary of Key Concepts* 2005. An example of how these terms are used interchangeably can be found in Rob Shields's work. He uses the concept 'Space myths' and 'place myths' to have the same meaning. On the distinction (or non-distinction) of space and place Mogobe Ramose links the notion of place and its attendant associations of being fixed to that place and having a sense belonging to the term 'moipei'. Moipei is the singular form of 'baipei', those who do not claim the right to a space or to the whole of South Africa, but rather asserts a right to a place. He continues, by quoting Brueggemann that 'it is space which has historical meaning, where some things have happened which are now remembered and which provide continuity and identity across generations. Place is space in which important words have been spoken and which have established identity, defined vocation and envisioned destiny ... a yearning for a place is a decision to enter history with an identifiable people in an identifiable pilgrimage.'<sup>613</sup> Ramose MB 'An African perspective on justice and race' polylog: Forum for Intercultural Philosophy 3 (2001) <http://them.polylog.org/3/frm-en.htm> at par 24.

<sup>614</sup> Hubbard P 'Space/place' in Atkinson D *et al. Cultural Geography: A Critical Dictionary of Key Concepts* 2005 on 41.

<sup>615</sup> Hubbard P 'Space/place' in Atkinson D *et al. Cultural Geography: A Critical Dictionary of Key Concepts* 2005 on 42.

<sup>616</sup> Hubbard P 'Space/place' in Atkinson D *et al. Cultural Geography: A Critical Dictionary of Key Concepts* 2005 on 41.

<sup>617</sup> Massey D *Space, Place and Gender* 1994.

seen as a surface on which events could take place and within which relationships could be formed. Materialism rose in the early 1970s and manifested in history and geography. It was marked by an insistence on an alternative understanding of spatiality, namely that space was produced and consumed by social relations.<sup>618</sup> In Lefebvre's work place becomes a specific type of space. Place is made through naming and other acts of imagination that connect to social spaces.

The humanist view in geography, as opposed to the materialist focus on social space, moves the emphasis of their analysis to lived-in place. These perspectives are mainly founded on existentialism and phenomenology. Their response to geography as positivist science on space was to introduce the ways in which space is experienced. One of the key proponents of this line of thinking, Yi-Fu Tuan, suggested in his 1977 book *Space and Place* that place comes from the various 'fields of care' related to people's emotions, attachments to and associations with space. The existence, emergence and maintenance of space is therefore not a matter of scale (place small, space big) but rather a question of levels of care. He stated that knowledge of a place is easy to obtain, but in order to get a 'feel' for a place one needs to take a lot more time.<sup>619</sup>

Place is a center of meaning constructed by experience. Place is known not only through the eyes and mind but also through the more passive and direct modes of experience, which resist objectification. To know a place fully means both to understand it in an abstract way and to know it as one person knows another. At a high theoretical level, places are points in a spatial system. At the opposite extreme, they are strong visceral feelings. Places are seldom known at either extreme: the one is too remote from sensory experience to be real, and the other presupposes rootedness in a locality and an emotional commitment to it that are increasingly rare.<sup>620</sup>

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<sup>618</sup> Hubbard P 'Space/place' in Atkinson D *et al.* *Cultural Geography: A Critical Dictionary of Key Concepts* 2005 on 42.

<sup>619</sup> Tuan Y-F *Space and Place* 1977 on 183.

<sup>620</sup> Tuan Y-F 'Place: An experiential perspective' 1975 on 152. Other works of importance, according to Hubbard, on the matter of place (versus space) is Edward Relph's *Place and Placelessness* that takes issue with the requirement of a deeply rooted bond for a sense of place, belonging and community. He argues that modern architecture, such as Le Corbusier's internationalist style created placeless environments in cities. Relph E *Place and Placelessness* 1976. See also Marc Augé's 'non-places' Augé M *Non-places: Introduction to an Anthropology of Supermodernity* 1996 and Zygmunt Bauman's 'places without place'. Bauman Z 'Urban Battlefields of time/space wars' *Politologiske Studier* 2000. These concepts ('placelessness', 'non-place', and 'place without place') seem to suggest that place is replaced by space or more specifically by a space of flows. Hubbard

In summary, the humanist perspective sees (bounded) places as essential for notions of belonging and therefore construct a strong link between the personality (feel) of places (sense or spirit of place) and the cultural identities of those who live in these places. In contrast to this, the view of the materialists is that cultural clashes produce inequalities in the way in which spaces are lived. Because of these divergent views Hubbard avers that space and place are oppositional concepts.<sup>621</sup>

The divergence and convergence of space and place is complex.<sup>622</sup> Places encompass the coming together of flows, which responds to the idea of place as bounded space. Mobility constitutes, rather than threatens place and for Massey 'place is more about routes, than roots'.<sup>623</sup> The central, and very basic, thesis of her work is that 'space matters' and that it matters how we think about it.<sup>624</sup> Not only does she highlight the ways in which space matters, but she also challenges broadly accepted ways of thinking why and how space matters. Another important premise of her work is that space is gendered. Because space is gendered through and through, this will impact on how we perceive of space to matter; the gendered way in which we think about space matters. Massey, as a radical geographer, relies on Marx to argue that unequal gender relationships produce spaces. These gendered spaces in turn reproduce unequal gender relationships and other spaces within which the same imbalances are continued.

The concerns related to the notion of place, correspond with the most pertinent questions at the heart of the post-colonial experience.<sup>625</sup> These are questions relating to how place differs from space, 'how place it is conceived, how it enters into and

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P 'Space/place' in Atkinson D *et al.* *Cultural Geography: A Critical Dictionary of Key Concepts* 2005 on 43.

<sup>621</sup> Hubbard P 'Space/place' in Atkinson D *et al.* *Cultural Geography: A Critical Dictionary of Key Concepts* 2005 on 43. Phil Hubbard and Rob Kitchin's book *Key Thinkers on Space and Place* lists key theorists in spatiality. These thinkers are mostly geographers, mostly male and from the global north, but some of the authors they list could be classified as doing specifically feminist spatial work: Judith Butler, J.K Gibson-Graham, Donna Haraway, bell hooks, Cindi Katz, Doreen Massey, Linda McDowell, Gillian Rose, Guyatri Spivak and Iris Marion Young. For this project I have chosen Massey and her work forms the foundation of many of the theoretical explorations.

<sup>622</sup> Massey D 'The political place of locality studies' *Environment and Planning* 1991 23 267-281.

<sup>623</sup> Cresswell T 'Place' in Thrift Nigel and Kitchen Rob (eds.) *International Encyclopaedia of Human Geography* 2009 8 169-177 on 176.

<sup>624</sup> Allen J and Massey D *Geography matters! A reader* 1984 and Massey D *for space* 2005 on 15.

<sup>625</sup> Ashcroft B *Post-Colonial Transformation* 2001 on 15.

produces cultural consciousness, how it becomes the horizon of identity'. These questions include: Where is the place that one can call one's own and what happens to the notion of home when the home is colonized; 'when the very ways of conceiving home, of talking about it, writing about it, remembering it, begin to occur through the medium of the colonizer's way of seeing the world'.<sup>626</sup> Bill Ashcroft makes a strong case that inhabiting is not only about stating and shaping one's identity, but also a way of transforming one's own living conditions. The move from space to place, in his view is a 'conceptual shift from 'space' to 'place' which occurs as a result of colonial experience' and it corresponds with a shift from empty space to a lived, social and human space that derives its physical and ideological identity from inhabitation. Therefore, inhabitation (or habitation in Ashcroft's terms) reconfigures the ideas around space and challenges the most fundamental principles of Western epistemology, namely an affinity to boundaries and the habitual move to enclosure and enclaves in the imaginary and culture.<sup>627</sup> In the case of Afriforum's assertion of belonging and sense of place, the notion of place that they have in mind is that of an enclave; a safe enclosed and bounded space to which they can retreat. It has in mind place that is static; a home that remains the same. This is also clear from the Valhalla mosque case.<sup>628</sup> The idea of the static home is gendered. It is often held by those who leave the home (men) and expect to find it unchanged upon return. It is usually women (often by force) who are tasked with staying behind and preserving a static home.<sup>629</sup>

This association of place and home with enclave and inertia is responsible for the negative connotation to locality. The hostile reactions to locality studies, for Massey, can be grouped into two lines of resistance. The first is based on an assumption that the universal class struggle is more important than or covers already the so-called 'local issues', such as gender and race. The second line is based on specific (and supposedly negative) associations of stasis, nostalgia and memory with place. In

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<sup>626</sup> Ashcroft B *Post-Colonial Transformation* 2001 on 15.

<sup>627</sup> Ashcroft B *Post-Colonial Transformation* 2001 on 15-16.

<sup>628</sup> See section 3.2.3. Constitutional court case.

<sup>629</sup> Massey D *Space, Place and Gender* 1994 on 118. A classic illustration of this can be found in Homer's *Odyssey*. See also Njabulo Ndebele's *The Cry of Winnie Mandela* (2003) which engages inter-textually with the story of Penelope, home, waiting and return. On 79-82 (an imaginary) Winnie muses about the return of Nelson Mandela to her home, where he will not crouch into a mud hut upon his return (like when he left), but walk upright through the door. She cautions to remain a woman of detachment, who observes and keeps her options open.

terms of the first line of critique of locality studies, feminist and anti-racist issues and concerns for the environment were reduced to 'merely' local struggles, parochial concerns, 'simply' context-specific problems. Against these 'local' issues was pitted the 'weightier' universal and global issue of class. Massey emphasises that the concerns of the localities debate were, practically speaking, raised by feminism, postmodernism and post-colonial studies, and not necessarily by geography.<sup>630</sup> If the first line of resistance came from a scepticism regarding race and gender as 'only local issues' that missed the broader global point of class struggle, the second line of resistance was connected to associations with place as such. This entailed the view of place as stable and immobile and place as the site of nostalgic memories. For the sceptics it signalled a sliding back into 'Being' (considered to be a comfort-zone) and reversing from the advancement of the project of 'Becoming' (assumed to be progressive). Massey's critique of this reaction to locality studies is that it is inherently gendered. It ignores the underlying link drawn between stability, 'Being' and femaleness. Her response then to both lines of critique on locality studies (focus on place) is to rethink the idea of place altogether. She does so through the concept of 'a global sense of place' and her writings on 'a place called home'.<sup>631</sup> Conceptualising place in these ways is connected to the notion of space as relational. Massey suggests thinking of social space in terms of 'the articulation of social relations social space in terms of social relations' that inevitably have a 'spatial form in their interactions with one another'.<sup>632</sup> She continues:

If this notion is accepted, then one way of thinking about place is as particular moments in such intersecting social relations, nets of which have over time been constructed, laid down, interacted with one another, decayed and renewed.<sup>633</sup>

A place called home represents a dynamic and contested notion of space and place.<sup>634</sup>

Massey quotes bell hooks:

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<sup>630</sup> Massey D *Space, Place and Gender* 1994 on 119.

<sup>631</sup> Mamphela Ramphele's *A Bed Called Home* 1991 plays effectively with the well-known phrase of 'a place called home'. Ramphele looks at accommodation for migrant labourers and hostel accommodation during apartheid – where only a bed was what workers had to call (still calls) home.

<sup>632</sup> Massey D *Space, Place and Gender* 1994 on 120.

<sup>633</sup> Massey D *Space, Place and Gender* 1994 on 120.

<sup>634</sup> Massey D *Space, Place and Gender* 1994.

Home is no longer just one place. It is locations. Home is that place which enables and promotes varied and ever-changing perspectives, a place where one discovers new ways of seeing reality, frontiers and difference.<sup>635</sup>

I am wary here. It might be insensitive and naive to assert that home must be a fluid concept in a country marked by forced removals and violent unhoming during colonialism and apartheid. I do not read Massey or her approach as one that tries to redeem projects of upheaval and displacements by looking at home as fluid and because home can be anywhere, that the violence of deracination do not really matter or should not really matter so much to those affected by them. Instead, what she tries to point out and what I want to underscore here is the very sense of a fixed home that underlie the violence of dislocation. Home need not be single and stable place or space, but could be 'home-places' that become equally complex products of 'the ever-shifting geography of social relations present and past'.<sup>636</sup> The sense of place asserted by Afriforum in the street name case is one that should remain static to foster belonging. This is clearly problematic and the constitutional court also points that out in all three judgments. Whether the city council's conduct reflect a sense of place as open and fluid is however also not clear. Is the city council not also intent on fixing another version of the city of Tshwane/ Pretoria as place?<sup>637</sup>

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<sup>635</sup> hooks b *Yearning: Race, Gender and Cultural Politics*, as referenced in Massey *Space, Place and Gender* 171.

<sup>636</sup> Massey D *Space, Place and Gender* 1994 on 172. See also footnote 397 and section 2.6.3. Maphango.

<sup>637</sup> The city council claims on the metropolitan council's official website that the street names represent all racial groups'. Clearly not all racial groups in the greater Tshwane region is represented. Robert Sobukwe Street serves (at least) as a counter argument to claims that the new street names only encompass pro-ANC historical figures. Robert Sobukwe, like Biko, had his disagreements with the African National Congress. He joined the ANC Youth League as a student and was later secretary of the ANC Standerton branch, but when he became the editor of *The African* he began criticising the ANC for liberal left multi-racialism. Based on his support for non-racialism rather than multi-racialism he was a key figure in the creation of the breakaway Pan African Congress and was elected as its first president.) His name is connected to what is colloquially referred to as 'The Sobukwe Clause'. He was charged and sentenced for incitement in relation to the protest which led to the Sharpeville massacre, where police simply opened fire on the crowd of demonstrators and killed around 70 people. In May 1963, after he served his three year prison sentence, the parliament passed a provision in the *General Law Amendment Act* that enabled the Minister of Justice to extend any prison sentence indefinitely. The clause was never applied to anybody else apart from Sobukwe and ensured that he was moved to Robben Island for another six years. His name is now in the place of Esselen's. Ewald Esselen, standing as it were beside Sobukwe, was a lawyer, advocate, member of the Legislature and a supporter of the notorious Afrikaner Bond.  
<http://www.tshwane.gov.za/AboutTshwane/MapsandGIS/Street%20Maps%20Documents/These%20are%20the%20new%20street%20names%20that%20represent%20all%20racial%20groups.pdf> (last accessed 7 January 2014). They are also not necessarily opening up space for different



I am not entirely convinced by the constitutional court's reading of the city's conduct. The very court that had harsh words for the Tshwane city council in the Schubart Park case is now praising them while there are some indications of a similarity in their approach, at least to the extent that they do not adhere to court rulings. On the other hand, there was much greater inequality in the power relations between the city council and the inhabitants of Schubart Park than between the parties in the street name case. The meaningful engagement was a constitutional requirement in the case of Schubart Park, while in the street name case it was provisionally included in city policy and also, most probably, just used as a stalling tactic and ground for litigation by Afriforum. The varying attitude of the constitutional court towards the city council is therefore warranted.

The majority judgment, if read as calling for a disruption of the single story, does open up the possibility of place as open and fluid. If too much emphasis is placed on fixing the story of heroes and heroines, place as enclave creeps in again. The presence of the old names with a red line through them was however more effective in bringing across an idea of place as contingent on relations and as ever-shifting.

### 3.3.4. Belonging and relationality

In search of fluid understandings of belonging, place and home and their complex relationships to law, segregation and exclusion, I look at family and how this can be connected to a fluid understanding of home. I read Zoë Wicomb's latest novel *October* and her inter-textual conversation with the novels *Home* by Toni Morrison and Marilynne Robinson.<sup>638</sup> Wicomb writes that home is 'no more than a word, its meaning hollowed out by the termites of time'. I also look at the case of *Hattingh*. The novels and the case present valuable perspectives on the notion of home as not automatically linked to a sense of place, and family as not necessarily connected to a sense of belonging.

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stories to be told. This is clear in another street called after Nelson Mandela: Madiba Street. While there is already a Nelson Mandela street in the city of Tshwane/ Pretoria as in many other cities.

<sup>638</sup> Robinson M *Home* 2008, Morrison T *Home* 2013, Wicomb Z *October* 2014.

### 3.3.4.1. *Home: three novels*

Wicomb's *October*, a novel about deracination and the elusiveness of home, plays with different modes and notions of representation and self-representation illustrates this aptly.<sup>639</sup> It tells the story of Mercia, a 52 year old English lecturer living in Glasgow, born in Namaqualand. Mercia, or Mercy as she was originally named, is also a left woman, a woman whose partner of 24 years has departed. In this space of coming to terms with her singleness she receives a letter from her alcoholic brother Jake, the 'rotten egg of the family', to please come home to take care of his child. She travels to Kliprand, the town of her childhood, and after several days that Jake ignores her, she manages to get him out of bed, to speak to her and to confess that the child he has with his wife Sylvie, is actually their father's child. Mercia manages to admit Jake to a rehabilitation centre and leaves Kliprand with a promise to Sylvie that she will take care of Nicky, the son of Sylvie and Mercia's father. When Mercia returns it is for the funeral of her brother who committed suicide in the rehabilitation centre and it becomes clear that she misunderstood Jake's drunken letter and that Sylvie has no intention of giving up Nicky. The novel can be said to be autobiographical to the extent that the central character, Mercia, shares several traits with the author: she lives in Scotland, is a lecturer who originally comes from South Africa and apart from these surface similarities there are also a few other more subtle overlaps. But with the acknowledgment that all works of fiction are autobiographical, because they always already emerge from the totality that constitutes the author, comes the conclusion that *October* is a work of fiction. Sylvie is a character whom we get to know, as we do with most characters, through representation and self-representation. She is represented as Jake's wife (Jake is Mercia's alcoholic brother) as Nicky's mother, as the child of a white 'master'. Even though these representations already present discords and discrepancies, it is Sylvie's self-representations through her self-portrait photographs that present striking surprises and incongruities and leaves the reader with many questions on who and how Sylvie (really) is.

Amongst the themes of shame and guilt and complicities, *October*, with intertextual references to Robinson and Morrison's novels *Home* also touches on themes of memory, belonging, family, deracination, sibling-ship. The novels all move between

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<sup>639</sup> Wicomb Z *October* 2014.

the city and the rural. Belonging is both located and lost in the more rural, town home and in the city. These books are as much about family, home and belonging as they are about unhoming, deracination, exile and migration. The three novels are set in three different homes, three places: Lotus in Georgia, Gilead in Iowa and Kliprand in the Klein Namaqualand, Northern Cape. These novels all capture the complicated relationships between three brother-sister pairs: Frank and Cee (Yicindra) in Morrison's *Home*,<sup>640</sup> Jack and Glory in Robinson's *Home* and Jake and Mercia in Wicomb's *October*. They are all written from the vantage point of third person narrators.<sup>641</sup> The places where the novels are set, are similar in that they are all ostensible very unhomey and almost alienating spaces. Morrison's Lotus 'sure [doesn't] look like any place you'd want to be. Maybe a hundred or so people living in some fifty spread-out rickety houses. Nothing to do but mindless work in the fields you didn't own, couldn't own'.<sup>642</sup> Similar to this, Robinson's Gilead is 'dreaming out its curse of sameness, somnolence. How could anyone want to live here? That was the question they asked one another, out of their father's hearing, when they came back from college, or from the world. Why would anyone stay here?'<sup>643</sup> Wicomb's Kliprand is a small town in 'klein Namaqualand'.<sup>644</sup> About this tiny place she writes: 'Kliprand. Hardly more than a village. How could anyone want to live there? Why would anyone stay there?'<sup>645</sup> It would therefore seem like these novels all invoke a notion of home that does not necessarily coincide with belonging, warmth or welcoming. Despite all the similarities between the novels (explicit references, names, plots, characters),<sup>646</sup> Wicomb also makes sure to distinguish hers as a story situated specifically in South Africa. Hereby she highlights a North/ South distinction, especially as Mercia finds herself in what she calls 'exile' in the North.

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<sup>640</sup> Morrison's *Home* is set in the mid to late 1950s, after the Korean war of 1950-1953, Frank is a 24 year old Veteran of the war.

<sup>641</sup> Apart from Morrison's *Home* where Frank, occasionally, in the first person, addresses the author, the narrator of his story.

<sup>642</sup> Morrison T *Home* 2013 on 83.

<sup>643</sup> Robinson M *Home* 2008 on 281.

<sup>644</sup> The protagonist matriculated in 1977 and is now 52, so she was probably born around 1960, which means that the book is set in present day SA or around 2012.

<sup>645</sup> Wicomb Z *October* 2014 on 14.

<sup>646</sup> In Wicomb's book there are epigraphs, from both books, correspondence to names and characters, as well as a remix of events in a completely different setting. There are even some direct references – see Wicomb Z *October* 2014 on 21. In the book Mercia orders Robinson's *Home* online and it arrives with her brother, Jake's letter, begging her to come home.

In Morisson's home familiarity and its link to home and belonging is presented as a question in the epigraph to Morrison's – an earlier song cycle by Morisson:

Whose house is this?  
Whose night keeps out the light  
In here?  
Say, who owns this house?  
It's not mine.  
I dreamed another, sweeter, brighter  
With a view of lakes crossed in painted boats;  
This house is strange.  
Its shadows lie.  
Say, tell me, why does its lock fit my key?

The way in which Wicomb interacts with the other two novels highlights the complexities of both family and familiarity. Wicomb's October creates a semblance of the familiar, the other two novels resounds and resembles in hers, but it is an uncanny similarity, one that keeps on reminding you that this novel, despite its surface claims with correspondence to the others are distinct and in many ways not at all similar to the others. Her style of invoking the familiar, only to drop and twist it through the narrative, in itself raises questions of what we consider as familiar, as known and in a way also belonging.

Familiarity and not necessarily family, is found at the endings of the books. Mercia will return to Scotland, her city home, Ycindra has been nursed back to live by the god-fearing women of her home-town, Grace accepts the burden of the inheritance of the family home as a burden that she has to carry on behalf of the other children. Yicindra's finding of belonging in the community of women and Sylvie's return to the aunties who raised her can be connected to bell hooks's belonging as a culture of place. I now look at the concept of family as connected to home and belonging by looking at the right to family life in the *Extension of Security of Tenure Act* 62 of 1997 (ESTA) and how it was unpacked in the *Hattingh* case.

### 3.3.4.2. *Hattingh v Juta*<sup>647</sup>

Subsequent to the decision of the constitutional court in March 2013 in *Hattingh v Juta*, there have been some engagements with the case in the context of evictions and security of tenure with some attention in the field of legal pluralism. The narrow angle of this section is to analyse the case based on feminist theories of spatial justice. Three central notions underpin this reading: rights as relationships (Nedelsky – see chapter 2), space as relational (Massey – see chapter 2) and property understood as a spatially contingent relation of belonging (Keenan). The series of judgments in *Hattingh*,<sup>648</sup> because of the very clear relational nature of the matter, aptly illustrates the way in which relationships produce and reproduce space. The question that I pose here is whether the *Hattingh* matter can be cited as an example of spatial justice that embraced space as relational or whether an opportunity to acknowledge the layered and gendered relations of space was missed.

In 2012 Magrieta Hattingh (67) was living in a cottage with her three sons: Michael Hattingh (29), Pieter Hattingh (37) and Ricardo Hattingh.<sup>649</sup> With them lived Michael's wife Edwina Junita Hattingh and their two minor children Micayla Hattingh (12) and Elvino Hattingh (6) as well as an adopted daughter Lédre Fourie (9).<sup>650</sup> They had been living together in the cottage since December 2002. The cottage has two bedrooms and is situated on a smallholding called Fijnbosch in Stellenbosch. At the time when they moved into the cottage, Michael Hattingh senior, Magrieta Hattingh's husband, was still alive and they all lived together until he passed away in 2006 from lung cancer. Ricardo Hattingh, who is the youngest of the children of Magrieta Hattingh, did not live with the family from the start, but moved in later after he finished school and when he did not have any accommodation with his employer any longer.<sup>651</sup> Magrieta Hattingh

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<sup>647</sup> *Hattingh and Others v Juta* 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC).

<sup>648</sup> The matter was also heard in the Magistrate's Court, the Land Claims Court and the supreme court of appeal. *Laurence Edward Juta v Michael Hattingh and Others*, Case No LC 145/2010, 30 March 2011, unreported and *Hattingh and Others v Juta* 2012 (5) SA 237 (SCA).

<sup>649</sup> Because everyone has the same surname, I include full first names instead of only referring to Mr or Mrs Hattingh. On a related note, the legal representative of the Hattingh children, Marion Hattingh of the Stellenbosch University law Clinic, deposed to the founding affidavit used in the Constitutional Court. Conscientious and wary of the importance of family, and the surname as signifier of such, in the case, she disclaimed: 'Although I share the same surname as the applicants, it is coincidental and I am not related to them'. Founding affidavit in the Constitutional Court par 3.

<sup>650</sup> Founding affidavit in the Constitutional Court par 15. Ages given are the ages at the time of the Constitutional Court hearing in 2012.

<sup>651</sup> *Hattingh and Others v Juta* 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) par 4.

is not healthy. She suffers from high blood pressure and struggles to move around and she frequently falls ill. Her deteriorating health is also the reason that she is not working for Laurence Edward Juta anymore, the man who owns the smallholding Fijnbosch. At some stage after the Hattinghs had already moved into the cottage on Fijnbosch, Juta employed a new farm manager, Gert Willemse, and wished to accommodate the farm manger on the smallholding instead of the manager travelling sixteen kilometres with his bicycle to and back from work daily. When the Hattingh children moved in with their parents in 2002, Juta converted the cottage. The cottage initially consisted of two units linked by a wall and Juta joined the units by installing a door in the wall. He wanted to close the cottage off again for Willemse to occupy one part and therefore needed the Hattingh children to move out of the cottage. Magrieta Hattingh's continued occupation of the cottage was never at issue and Juta did not attempt to evict her.

The central question in the *Hattingh* case concerned the interpretation, meaning and extent of the 'right to family life in accordance with the culture of that family' as contained in section 6(2)(d) of ESTA. The eviction procedures already commenced in July 2006 when Juta served the Hattingh children with eviction notices. It is not clear from the judgments and papers whether this was before or after the death of Michael Hattingh, the father. The application for evicting the Hattingh children was brought in June 2008 and first heard in the Stellenbosch Magistrate's Court, where it was dismissed on 10 May 2010. Juta appealed to the Land Claims Court where the decision of the Magistrate's Court was overturned and the Hattingh children were ordered to evacuate the premises by 20 May 2011. On 30 May 2012 the supreme court of appeal dismissed the appeal of the Hattingh children, after which they turned to the constitutional court. Their eviction was finalised when the constitutional court delivered judgment in Juta's favour on 14 March 2013, almost seven years after the initial proceedings commenced.

The different forums approached the right to family life in divergent ways. Only the Magistrate's Court found that the right to family life indeed extended to the adult children and grandchildren of Magrieta Hattingh and that this entitled them to continue living in the cottage. The finding of the Magistrate's Court was based on a report in terms of section 9(3) of ESTA. The report stressed the lack of alternative shelter, the

need for housing in Stellenbosch and the absence of appropriate housing and care for the elderly, the negative impact that the eviction will have on the academics of the minor children as well as the willingness of the Hattingh children to pay rent. Neither the supreme court of appeal, nor the constitutional court referred to the report.

The Land Claims Court framed the central issue before it as follows: ‘is an eviction order competent against the major children of an occupier under the Act, in circumstances where the occupier, their mother, is not being sought to be evicted, and relies on her right to family life’.<sup>652</sup> The Land Claims Court considered what the content of the right to family life in section 6(2)(d) of ESTA entailed and whether this enabled Magrieta Hattingh’s adult children to continue living with her on property that belongs to Juta. Meer J referred to the *Certification* judgment and other constitutional court cases that concerned the right to family life,<sup>653</sup> but maintained that despite these references to family life, there appeared to be ‘no definition of the substance of the right and hence no insight as to the content of this right’.<sup>654</sup> It seems that the Hattingh children’s biggest problem in the Land Claims Court was a lack of evidence. The court identified three aspects on which the Hattingh children failed to produce sufficient proof:<sup>655</sup> insight into the right to family life; that their culture entailed adult children living with their parents, and medical evidence that their mother was ill and needed them to care for her. Meer J conceded that the concept of family in the right to family life might extend beyond merely a spouse and dependants. However, she found that in balancing the right of the landowner and that of the occupier in the current case in addition to the lack of evidence, the restriction of family members to dependants and spouses was ‘an equitable formulation’.<sup>656</sup> In reaching this conclusion, she relied on section 8(5) of ESTA, which refers specifically (only) to the protection offered to a ‘spouse’ and ‘dependants’ after the death of an occupier. The intention of the

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<sup>652</sup> *Laurence Edward Juta v Michael Hattingh and Others*, Case No LC 145/2010, 30 March 2011, unreported (Land Claims Court judgment) <<http://www.saflii.org/za/cases/ZALCC/2011/23.html>> (accessed 08-20-2015).

<sup>653</sup> *Laurence Edward Juta v Michael Hattingh and Others*, Case No LC 145/2010 n2. See *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 99; *Du Toit and Another the Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* ZQ03 (2) SA 198 (CC) at par 19.

<sup>654</sup> *Laurence Edward Juta v Michael Hattingh and Others*, Case No LC 145/2010 at par 12.

<sup>655</sup> *Laurence Edward Juta v Michael Hattingh and Others*, Case No LC 145/2010 at par 13.

<sup>656</sup> *Laurence Edward Juta v Michael Hattingh and Others*, Case No LC 145/2010 at par 14.

legislator, she found, could not have been to place an 'onerous and intolerable burden of housing adult members of occupiers' extended families indefinitely'.<sup>657</sup>

The supreme court of appeal's take on the right to family life followed that of the Land Claims Court, but focused more on the concept of 'culture of a family' and what constitutes a 'cultural practice'. The right to family life was said to be inherent in the fundamental right to human dignity enshrined in the Constitution.<sup>658</sup> As far as 'culture' was concerned, the supreme court of appeal relied on the judgments in the case of *Pillay*<sup>659</sup> and concluded that culture, as envisaged by the Constitution, 'is clearly not a matter of such person's individual practice but a matter of association and practices pursued by a number of persons as part of a community'.<sup>660</sup> Leach JA described the right in ESTA to family life in accordance with the culture of that family, as a right that gave content and extended the section 30 and section 31 Constitutional rights to participate in the cultural life of one's choice and to enjoy one's culture with other members of a cultural, religious or linguistic community.<sup>661</sup> Cultural rights must be associative, found Leach JA, and not, as the Hattinghs claimed, 'non-associative' and 'to be determined solely by the manner in which Magrieta Hattingh and her extended family lived their lives'.<sup>662</sup> The supreme court of appeal therefore required a family life culture to be shared with a community in order for it to be recognised in terms of ESTA.<sup>663</sup>

The constitutional court did not give much attention to the concepts of 'family life' or 'culture of that family'. Instead, the constitutional court merely indicated that families come in all shapes and sizes, need not be limited to the nuclear family and in the context of ESTA could not only mean a spouse or dependants.<sup>664</sup> At first glance, this remark favours the Hattingh children, but the constitutional court ultimately found that it was unnecessary to determine the meaning of "in accordance with the culture of that

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<sup>657</sup> *Laurence Edward Juta v Michael Hattingh and Others*, Case No LC 145/2010 at par 15.

<sup>658</sup> *Laurence Edward Juta v Michael Hattingh and Others*, Case No LC 145/2010 at par 17.

<sup>659</sup> Leach JA referred to Langa CJ's majority judgment as well as to O'Regan J's partial dissent in *MEC for Education, KwaZulu-Natal & others v Pillay* 2008 (1) SA 474 (CC).

<sup>660</sup> *Hattingh and Others v Juta* 2012 (5) SA 237 (SCA) at par 20.

<sup>661</sup> *Hattingh and Others v Juta* 2012 (5) SA 237 (SCA) at par 21.

<sup>662</sup> *Hattingh and Others v Juta* 2012 (5) SA 237 (SCA) at par 21.

<sup>663</sup> This relates to the determination of whether something constitutes a 'practice' in terms of the *Rental Housing Act* and *Labour Relations Act* in establishing unfair practices.

<sup>664</sup> *Hattingh and Others v Juta* 2012 (5) SA 237 (SCA) at par 19.



family”. This was because the only relevant question was whether it would be just and equitable for the occupier to live with her family when the landowner’s rights were balanced against the occupier’s right to family life. Even though the constitutional court ostensibly extended the meaning of family further than the supreme court of appeal and the Land Claims Court, by expressly stating that it extends beyond the nuclear family, the idea of family was restricted. Family was defined with reference to the rights of the landowner and thereby the definition of family was subjected to the relations of property. I return to this idea later, with reference to the work of Keenan.

The different approaches of the courts can be summarised as follows: the Stellenbosch Magistrate’s Court acknowledged the right to family life, ruled that it extended to the Hattingh children and grandchildren and that they could stay on with Magrieta Hattingh at Fijnbosch. The Land Claims Court focused on the lack of evidence presented by the Hattinghs that they living with their mother was in fact in accordance with their culture, the Land Claims Court further ruled that restricting family to spouses and children in the context of ESTA is an equitable reading. The supreme court of appeal analysed the interpretation of ‘culture’ and with reference to former constitutional court decisions found that the fact that the Hattingh family functioned in a particular manner, was insufficient to establish a culture; there had to be recognition of this family structure by a broader community.

The judgments in the Magistrate’s Court, Land Claims Court and supreme court of appeal all engaged with the meaning and extent to the right to family life in accordance with the culture of that family. In the constitutional court however, the emphasis was shifted away from the family, the right to family life and the meaning of the culture of that family. More weight was afforded to Juta’s rights as landowner in the determination of whether it would be just and equitable for Magrieta Hattingh to continue living with her children and grandchildren in the cottage.

One reading of the judgment of the constitutional court is that it is positive that the notion of family was not thoroughly defined or engaged with, because the meaning of family was not unnecessarily curtailed. Another reading is that, by ruling that “what matters is what is just and equitable when the rights of the occupier are balanced with

those of the landowner”,<sup>665</sup> the constitutional court effectively found that the concept of family is not of primary importance. On such a reading, the constitutional court’s decision means that the culture of family matters less than established relations of ownership and thereby existing unequal social relationships and structures of belonging were reproduced.

A radical concept of spatial justice is inseparably linked to a relational understanding of space. Understanding space as that which produces and is produced by (unequal) social relationships insists on space as political and departs from a view of space as neutral and abstract. Massey insists on thinking of space as always already connected to time. Thinking of space-time is based on viewing space as relational. Spatial justice should be more than social justice in spaces, and should also open up to a radically different view of space. In addressing the broader research problem of this project, I suggest that such a different view should encompass a feminist view of space as relational. Social relationships, explains Massey, are never static; they change and shift constantly. Accordingly, ‘the spatial’ is not dead nor still, but rather inherently dynamic.

The way in which I approach spatial justice in light of the *Hattingh* case, is a distinctly feminist endeavour. This claim is in step with Nedelsky’s assertion that relational analyses are feminist.<sup>666</sup> Rights should be thought of in terms of connectedness and not separateness.

For the *Hattingh* case, this means not viewing Hattingh household in terms of fragments suspended in the abstract space which is Juta’s smallholding, and in terms of which he has rights of ownership, but keeping in mind all of these intersecting racial, gendered, class and power relations; all the throwntogetherness on Fijnbosch.<sup>667</sup> Relationships, for Nedelsky, can undermine or enhance autonomy. The *Hattingh* case

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<sup>665</sup> *Hattingh and Others v Juta* 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) para 40.

<sup>666</sup> Nedelsky *J Law’s Relations* 2011 on 85.

<sup>667</sup> For more on the concept of ‘throwntogetherness’ see Massey *D for space* 2005 on 149-162. Massey connects the concept of simultaneity to her distinction (non-distinction) between space and place and also to what she terms our ‘throwntogetherness’. If space is rather a simultaneity of stories so far, says Massey, then places are collections of those stories, articulations within the wider power-geometries of space. Place as an ever-shifting constellation of trajectories poses the question of our throwntogetherness as the chance of space may set us down to the unexpected neighbour

concerns not only family relations, but also the relationships between employees and employers, landowners and occupants, people and the places they inhabit. Reading the *Hattingh* case against the backdrop of spatial justice entails an insistence on the notion of relationality.<sup>668</sup> The 'spatial' regards space not only in terms of geographical location or physical place, but space is seen as that which produces and is produced by social relationships. In terms of Nedelsky's approach, property rights are not in the first instance about 'things', in fact, property rights are primarily about 'people's relations to each other as they affect and are affected by things'.<sup>669</sup> On this reading, the questions of Juta's property rights and rights as an owner could not have been considered without fully appreciating the relations between the members of Hattingh family and between Juta. The right to family life could have defined his ownership rights instead of the other way around. This possibility of a different prioritisation of the relationships in the Hattingh case illustrates Nedelsky's relational approach. The question is one of a point of departure: does the right to property define the Hatting's family relations or does the Hatting's right to family life define the relation of ownership. Below I show how Keenan expresses this distinction in starting point in terms of belonging and belongings and how Massey insists on keeping space open and heterogeneous.

Massey's view of space insists on the inherent dynamism of the spatial, she insists on viewing space as the coming together of stories thus far, not because it is more consistent with physics or more correct even, but because, she claims, it has 'important characteristics which lend it an especial appropriateness for debates of the moment'.<sup>670</sup> She challenges the view of space as merely the 'other' of time and insists that space must be connected to the social and to power. This views time not as the absence of space, but sees space as intricately connected to time: space-time is the term that Massey uses. Space seen as 'stretched-out social relations' provokes a

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<sup>668</sup> Massey D *Space, place and gender* 1994 on 4. "The spatial' then... can be seen as constructed out of the multiplicity of social relations across all spatial scales, from the global reach of finance and telecommunications, through the geography of the tentacles of national political power, to the social relations within the town, the settlement, the household and the workplace. It is a way of thinking in terms of the ever-shifting geometry of social/power relations, and it forces into view the real multiplicities of space-time.'

<sup>669</sup> Nedelsky J *Law's Relations* 2011 on 237.

<sup>670</sup> Massey D *Space, place and gender* 1994 on 4.

pivotal issue of the 'spatiality of power itself'.<sup>671</sup> Strikingly absent from the *Hattingh* judgments (in all the courts) are the accounts of the other complex relationships at play in the connections between the Hattinghs and Juta. The race, class and gendered power relationships that mark the history of property in colonial and apartheid South Africa are silent. Zondo J admittedly gives a nod in this direction when he refers to the preamble of ESTA.<sup>672</sup> There must be a strong relationship between Magrieta Hattingh and Juta. One of the factors in Juta's favour, namely that he and his wife are willing to transport Magrieta Hattingh to and from hospital when it is needed, gives an indication of the relationship between the Jutas and Magrieta Hattingh. The genre of the court judgment is too limited to capture a more intricate sketch of the subtle social relationships underlying the decisions of the Courts and therefore detracts from the political nature of the judgments on space and the social relations that produce them. Some questions that come to mind when reading the pleadings, is where Magrieta Hattingh and Ricardo Hattingh stand in this. Why was Magrieta Hattingh not joined as a party? How does she feel about the applicants' claim to their right to a family life under the same roof as her? What is the nature of the relationship between Juta and Ricardo Hattingh that lead to Juta firstly laying a criminal charge of trespassing against him, and then later not only withdrawing the charge, but also not pursuing any eviction action against him? How did attitudes toward the Hattingh children change after Michael Hattingh senior passed away. How is the relationship between Juta, his wife and Magrieta Hattingh gendered and what role does her working for him and his wife as a domestic worker play? What is the relationship between the Hattingh children? How do race and class impact the relations between Juta and the other Hattingh children? The heads of argument and founding affidavit of the applicants in the constitutional court clarifies why Magrieta Hattingh is not a party to the proceedings. 'The application was to evict the applicants in their capacities as occupiers, not in their capacity as members of Magrieta Hattingh's family. The respondent did not make out a case against the Hattingh children in their capacity as family members of Magrieta Hattingh, which would have required the joinder of Magrieta Hattingh because her right to family life is protected by section 6(2)(d)'.<sup>673</sup> The founding affidavit reveals that the

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<sup>671</sup> She expands: 'from the global reach of finance and telecommunications, through the geography of the tentacles of national political power, to the social relations within the town, the settlement, the household and the workplace'. Massey D *Space, place and gender* 1994 on 4.

<sup>672</sup> *Hattingh and Others v Juta* 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) at par 35.

<sup>673</sup> Applicants' Heads of Argument in the Constitutional Court at par 25.

older Hattingh children do not think that Ricardo can look after their mother and they insist that she is dependent on their care.<sup>674</sup> There are several unspoken relations of power and subordination underlying the *Hattingh* case (gender, class, race) that are neither explicitly surfaced in the pleadings, nor in any of the judgments of the different courts.

What Massey defines as ‘the spatial’ is built by a multiplicity of social relationships; ‘it forces into view the real multiplicities of space-time’.<sup>675</sup> The danger of viewing space as the opposite of history (time) is that space is then depoliticised, it becomes flat and stagnant. The spatial, she writes, is ‘both open to, and a necessary element in, politics in the broadest sense of the word’. To view the *Hattingh* case from a perspective of spatial justice, is to acknowledge the power and social relationships that shaped the judgment. The hierarchy that was set up between the family relationship and the owner-occupier relationship is a highly politicised relationship.

These ideas in Massey’s work underlie Keenan’s *Subversive Property: Law and the Production of Spaces of Belonging*. Keenan also insists that space is politically important. The spatial turn in the context of property involves shifting the focus from the subject to the spaces inhabited by the subject. While conceding that legal geographers, such as David Delaney and Nicholas Blomley, have, to an extent, brought the spatial turn to law, Keenan goes further and draws chiefly from critical geography and phenomenology.<sup>676</sup> Her biggest theoretical contribution is to challenge any suggestion that the subject can be seen as separate from her context. She therefore calls for acknowledging the embedded subject, not as discreet actor, but in fact as inseparable from the spaces from which she moves. She writes compellingly on how a subject ‘takes space with her when she moves’.<sup>677</sup> Another key concept that underpins Keenan’s work is an assertion that property must be seen as a relation of belonging that is dependent on space. The belonging relation, she explains, can exist between a subject and an object or between a part and a whole. A relation of belonging

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<sup>674</sup> Applicants’ founding Affidavit in the Constitutional Court at par 23 ‘There is no evidence as to whether Ricardo is capable of caring for Mrs Hattingh or whether that is her wish.’

<sup>675</sup> Massey D *Space, place and gender* 1994 on 4.

<sup>676</sup> She relies in particular on Sarah Ahmed’s feminist work on the intimacy of bodies and their dwelling places in her book *Queer Phenomenology: Orientations, Objects, Others* 2006.

<sup>677</sup> Keenan S *Subversive Property* 2015 on 15.

between a subject and object is how we traditionally understand property, we use the term 'belong' to capture ownership, belonging in this sense indicates the property that she owns. Part-whole relationships of belonging points to the ways in which individual's identities are shaped through the groups that they belong to and shape in their turn. Examples are the relationship between men and masculinity or a white person and whiteness, or, in the *Hattingh* case, the relationship between Edwina Junita Hattingh and the Hattingh family. In this context the term 'belonging' is used to signify a person's place within a broader group. Keenan, by insisting on the connection between 'belonging' and 'belongings', shows how the 'property of the subject (her belongings) and properties of the subject (characteristics that determine where and/or to what social group she belongs)' function in similar ways and that the one flows into the other.<sup>678</sup> This also links property and propriety in new and interesting ways. In families both property and propriety are handed down.<sup>679</sup> Belongings are passed on through inheritance (subject-object belonging) and members of a family share certain values and ideas because they find themselves in the same time and space (part-whole belonging).<sup>680</sup> Not all relations of belonging are upheld however.<sup>681</sup> In the case of the Hattingh children their membership to the Hattingh family, and their connection to Magrieta Hattingh were outweighed by Juta's subject-object relation of landownership and his subject-subject relation to Magrieta Hattingh.

Through individual cases Keenan illustrates that 'legal connections... between space and the subject do not accurately reflect the lived conceptual, social and physical connections that subjects in fact have and through which they live'.<sup>682</sup> Along these lines Keenan draws attention to the possibility that law and legal processes can lead to property as a relationship of belonging. Relationships of belonging are produced by law in very similar ways to how political, spatial and cultural produce belonging relations. The *Hattingh* case is an appropriate example of the way in which the law shapes relations of belonging. The series of court cases had the result that one of the

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<sup>678</sup> Keenan S *Subversive Property* 2015 on 17.

<sup>679</sup> Keenan S *Subversive Property* 2015 on 45. With reliance on O Lobel 'Family Geographies: Global Care Chains, Transnational Parenthood, and New Legal Challenges in an Era of Globalization' in J Holder & C Harrison (eds.) *Law and Geography* 2003.

<sup>680</sup> Keenan S *Subversive Property* 2015 on 45-46.

<sup>681</sup> Keenan S *Subversive Property* 2015 on 165.

<sup>682</sup> Keenan S *Subversive Property* 2015 on 30. See also Nedelsky J *Law's relations* 2011 32: 'People are relational'. Nedelsky notes specifically that she does not mean that only women are relational, but that she includes men when she refers to 'relational selves'.

children, Ricardo, could remain on the smallholding and remain part of the family home, whereas the other children and grandchildren had to move out. Property as a relationship of belonging draws attention to the role that law plays in enforcing cultural and social particularity of orthodox understandings of property.<sup>683</sup> Law's tendency to produce and reproduce 'dominant networks of belonging' is very clear in postcolonial contexts, but, as Keenan shows, can also be discerned in contexts where there are 'competing networks of belonging'.<sup>684</sup> Keenan's example is postcolonial New Zealand, where the effects of the Anglicisation of the Maori property regime (which is largely based on use-rights and not a determinate physical space) that was at the heart of the colonial project produced a certain relation between the Maori people and the land and therefore greatly influenced their political, social and cultural organisational structures. Because the colonial property system is largely maintained, it still perpetuates a position of subordination of the Maori people.<sup>685</sup> She also uses the example of the Aboriginal town camps in Australia where open fires and large groups are prohibited through leasing terms and thus these terms prevent Aboriginal people to practice their traditional cooking methods and keeps them from having contact with their families who 'live out bush'.<sup>686</sup> In the *Hattingh* case the extent of family relations were defined (produced) by the dominant narrative on property in postcolonial and post-Apartheid South Africa. The relationship between the subject and space must be reconsidered. One way in which the relation could have been reconceived is by prioritising other relations and producing other structures of belonging; other than the dominant landowner-occupier network.

The relational nature of rights and space lie at the heart of the *Hattingh* case. The series of court cases that commenced in the Magistrate's Court and ended in the constitutional court concerned the right to 'family life in accordance to the culture of that family' of occupiers in terms of ESTA. The lower courts all took issue with the meaning and ambit of the right to family life, the definition of family and the meaning of culture, but the constitutional court interpreted family life with reference to the landowner's rights. An approach that takes spatial justice seriously will be acutely

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<sup>683</sup> Keenan S *Subversive Property* 2015 on 428.

<sup>684</sup> Keenan S *Subversive Property* 2015 on 429.

<sup>685</sup> Keenan S *Subversive Property* 2015 on 122.

<sup>686</sup> Keenan S *Subversive Property* 2015 on 123.

conscious of the way in which rights and space produce and reproduce relationships. Not only should a spatial justice approach take cognisance of the ways in which relationships are structured by rights and space, but it will also challenge dominant spatial structures and systems of belonging(s) produced and reproduced by the status quo. The *Hattingh* case has received some attention in the context of property law and even less in the field of family law. One of the valuable contributions that comments on the case is by Juanita Pienaar,<sup>687</sup> who suggests that the constitutional court, by avoiding a technical tick-box approach to family and the family life, kept the right to family life more fluid and open. Although I agree that an approach that keeps the notion of and right to family life open, rather than set down a technical list of criteria, is preferable, the constitutional court in *Hattingh* did not keep the right to family life fluid. It was limited and with reference to the right of the landowner. In a system with competing systems of belonging, the court firmly upheld the status quo and gave preference to the subject-object relation of the landowner and property. This can be seen most clearly in the way in which the constitutional court treated the fact that the *Hattingh* children were of the age of majority and had their own children. In defining the term 'family' Zondo J remarked that being independent and not being a minor anymore do not detract from the extent of which a person would be considered as part of her parents' family.<sup>688</sup> This observation was repeated in the discussion of the meaning of family life.<sup>689</sup> Against the backdrop of these two remarks and if the family relations were considered to be the primary relations in the case, the age of the children should not have been a factor. But since the main consideration was instead whether it was just and equitable that Magrieta *Hattingh* continued to live with her children and grandchildren, this opened a gap for the age and independence of the children to count against the *Hattinghs*. Zondo J cited the fact that the applicants were adults and independent of Magrieta *Hattingh* as one of the factors that counted in Mr *Juta's* favour.<sup>690</sup>

By avoiding a discussion of the 'the culture of that family' the right to family life was limited and not kept fluid. Even though it was not limited through a tick-box technical

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<sup>687</sup> Pienaar J *Land Reform* 2014. A detailed engagement with the case is found on 425-431 of the book.

<sup>688</sup> *Hattingh and Others v Juta* 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) at par 34.

<sup>689</sup> *Hattingh and Others v Juta* 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) at par 40.

<sup>690</sup> *Hattingh and Others v Juta* 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) at par 42(i).



process, it failed to acknowledge space as complex and layered relations of power and property as a structure of belonging. Drawing on Nedelsky's work, it becomes clear that the court could have restored or produced other relations through applying the right of an occupier to family life. The way in which the constitutional court applied this right weighed in favour of the landowner's relation to property (subject-object relation in Keenan's terms). The fluidity of the meaning of family was therefore in fact curtailed by the parameters of ownership and the extent to which existing landowner-land relations fail to contain and accommodate the extended family in postcolonial South Africa. In the context of South Africa there are several historical relational structures produced and reproduced through rights and space. These include race, gender and class relations, relations of subordination and relations of belonging. It is with this in mind that a pluralist approach, which gives regard to the complex and layered simultaneity of spatial relations, will be valuable. From the sense of belonging as connected to a culture and spirit of place and belonging, family and home as fluid concepts, I now look at belonging and mapping.

### **3.4. Mapping**

Mapping, modernity, conquest and unhoming go hand in hand. The Berlin conference, for example, was ultimately an exercise of drawing and mapping. Mapping is a view of the world that produces a world view. The world as image and its relation to power is captured in Heidegger's statement that 'the basic process of modern times is the conquest of the world as picture'.<sup>691</sup>

The importance and power of mapping is aptly illustrated by the tale of a small sovereign that recently became a member of the United Nations in the 1970s.<sup>692</sup> The official stance in the UN is that every state has one vote, despite its influence. Even though this was the formal position, the actual practice entailed a definitive hierarchy in the decision-making process. The more affluent the state, the more influence it yields. As the story goes, the small sovereign state's freshly elected delegate, being

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<sup>691</sup> The idea of world view as a view of the world connected to the worlding of the global South is eloquently unpacked in Roy 'Worlding the South' in Parnell Susan and Oldfield Sophie (eds.) *The Routledge Handbook on Cities of the Global South* 2014 9-19. Roy quotes from Heidegger M 'The age of the world view' 1976 (transl.) Grene M in *Boundary* 1976 [1951] on 353.

<sup>692</sup> For one version of this story see chapter 1 in Mansell W, Meteyard B, Thompsom A (eds.) *A Critical Introduction to Law* 2004.

unaware of how the actual hierarchy works, held lengthy debates on each aspect. Acting under the impression of the formal equality he continued, much to the irritation of the bigger (and more powerful) states. One of the representatives of the more powerful states therefore saw it fit (and indeed urgent) to enlighten this delegate of how things work and in order to do so, pointed him to a map that indicated the large territories of states such as Canada, Ghana and the United States of America. The obvious response of the representative of the small state to that question was: 'Who drew that map?'<sup>693</sup>

In this section the rise and power of geography is followed by drawing lines, cognitive mapping, rogue urbanism, countertopographies and unmapping, literary cartography and a novel by Buluwayo.

### 3.4.1. The rise and power of cartography

The story of the invasion of Tenochtitlan (Mexico City) by Hernan Cortes is told by a work called the Codex Xolotl. It is a map of some kind, or rather, as Massey says, a 'hybrid construction'.<sup>694</sup> It is a map that tells a story rather than a diagram that represents figures and shapes purporting to be a representation of the physical world. In the 'map' events are linked by footsteps and places are connected through a dotted line. For Cortes it is the year 1519 and for Moctezuma it is the year one reed. The Aztec map shows how they see god, time and space as inextricably linked. She then translates Soustelle's *lugares momentos* as 'place moments'.<sup>695</sup> A quote from Soustelle aptly captures what these place moments mean:

Mexican thought did not recognise an abstract space and time, but rather concrete complexes of space and time, heterogeneous and singular sites and events; 'place moments' (*lugares momentos*).<sup>696</sup>

Massey continues and explains that we generally assume that Western maps today are representations of space, but, she highlights, these maps, and so also the

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<sup>693</sup> Mansell W Meteyard B Thompspon A (eds.) *A Critical Introduction to Law* 2004 on 1-3.

<sup>694</sup> Massey D *for space* 2005 on 5.

<sup>695</sup> Soustelle J *La vida cotidiana de los Aztecas en visperas de la conquista Fondo de Cultura Economica: Mexico City* 1956 on 120.

<sup>696</sup> Massey D *for space* 2005 on 7.

European *mappae mundi*, are ‘representations of space and time together’.<sup>697</sup> Literature presents the best illustrations of place moments are capture; literature captures very well the simultaneous representation of time and space, or the chronotope, a concept I explain above in 2.8. Ashcroft notes that the Eurocentric control of space takes place through representation.<sup>698</sup> It lies in the cartography, the ocular-centrism, the way in which perspective was developed, the methods of surveillance and also within the language of the colonial project. He describes it as ‘the most difficult form of cultural control faced by post-colonial societies’.<sup>699</sup> Prevailing assumptions regarding spatial location and the identity of place has mostly been resisted through inhabitation. Above I expand on the distinction between habitat and inhabitation, as captured by Lefebvre.<sup>700</sup> For Ashcroft inhabitation is a ‘way of being in place, a way of being which itself defines and transforms place’.<sup>701</sup> The power of inhabitation lies precisely in the fact that global and colonial forces cannot respond to it. Chapter 2 focuses more on the way in which living and inhabitation subvert the perceived and conceived matrix of first- and secondspace through tactics.<sup>702</sup> Here I elaborate on the power of representation and how it has assisted in the closing of space and in seeing space and place in particular (and often exclusive) ways.

The history of spatiality highlights the important link between perception and representation. With reference to the development of linear perspective in art and architecture, Tally says that ‘it is not that the physical world or human binocular vision had changed, but that the newly forged social relations in the early modern period called for new ways of seeing’.<sup>703</sup> He extends this to the development of the map of the world from T&O maps, the first globe (*Erdapfel*)<sup>704</sup> to the visual representations of our world that we currently know, albeit still not uncontested representations. Tally

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<sup>697</sup> Massey D *for space* 2005 on 7.

<sup>698</sup> Ashcroft B *Post-Colonial Transformation* 2001 on 15.

<sup>699</sup> Ashcroft B *Post-Colonial Transformation* 2001 on 16.

<sup>700</sup> See section 2.4.1. Dwelling and the shift from habitat to inhabitation.

<sup>701</sup> Ashcroft B *Post-Colonial Transformation* 2001 on 16-17.

<sup>702</sup> See section 2.6. The everyday as gendered and tactics as practices of everyday life.

<sup>703</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 18.

<sup>704</sup> The German geographer Martin Behaim constructed the first globe in 1492. It was called an *Erdapfel* (earth-apple) and included (only) the continents of Europe and Asia along with the islands of Japan and Java and notably also the phantom island of Saint Brendan, which was according to a myth discovered by the Saint in the sixth century during a mission to evangelise the islands. America as a separate continent was only included in depictions years later. The first record of this was a 1507 map by Martin Waldseemüller called *Universalis Cosmographia*. See Tally R *Spatiality* on 20 – 22.

focuses predominantly on the spatial turn in literary and cultural theory and situates the advent of an enhanced focus on the spatial in these disciplines in the aftermath of world war two. Through the development of the representations of space in art and geography he illustrates how ‘the perception and the experience of space combine... in transforming the geographical reality of human existence’ and how this in turn effected the interpretation of the reality in which the existence took place.<sup>705</sup> Below I briefly summarise the development of these representations.

Linear perspective is the system that was developed to create the impression of depth and distance in a painting or drawing. The aim of the system was to project three-dimensional space onto a two-dimensional surface. Before the discovery of linear perspective in the world of art, pictorial representations did not, or rather could not, indicate volume, depth or layers. All pictures were flat and all elements of the picture were on the same level. This is not to say that volume, depth or layers did not exist or could not be observed in medieval Europe, but that it was probably not as important to depict the observable world. Artist during the Middle Ages in Europe were mostly concerned with depicting Christ and other religious images and symbols. With an increased interest in the world came the increased importance to translate the third dimensional outside world into two dimensional paintings. Linear perspective was invented in order to create the illusion of reality. It created the illusion of an actual space. Its theoretical documentation is generally attributed to Leon Battista Alberti in his painting manual of 1435 and its (re)discovery to the experiments of Filippo Brunelleschi in Florence around 1420. It introduced both scale and relation through representations. It is accepted that the Greeks and Romans understood linear perspective, but that the knowledge was lost during the Middle Ages. Artists could now create space by creating the illusion of space through the use of dimensions. A key result of linear perspective was that it eliminated multiple perspectives, it aimed to represent from a single viewpoint as opposed to a God’s eye view.

This function of sight has been automated early on through the introduction of different perspective techniques and technologies. Some examples include descriptive and perspective geometry, machines for perspective and of course photography. It was

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<sup>705</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 23.

however only with the development of digital computers that the large-scale automation was enabled, including visual nominalism.<sup>706</sup> Along with the mechanical clock invented in the fourteenth century, the re-discovery of linear perspective enabled the ‘rather mechanical Newtonian vision of the universe, in which the presumed absolutes of homogeneous time and space formed limiting containers to thought and action’ that marked the Renaissance.<sup>707</sup> The linear perspective technique was not without its limits and besides the problems it presented, artists tired of it after a while. The demand for more ‘accurate’ pictorial representations during the renaissance is indicative of a different awareness and in turn established a new consciousness. The introduction of a third dimension on a two-dimensional surface urged a new vision of the world.<sup>708</sup> Tally refers to American scholar Leonard Goldstein’s arguments that linear perspective corresponds to a stage in the development of capitalism.<sup>709</sup> For Goldstein space acquires three attributes when approached from linear perspective: 1. space is continuous, isotropic and homogeneous, 2. it is quantifiable and 3. It is perceived from the point of view of a single and central observer. These attributes contributed to the idea that space can be divided and quantified and therefore also bought and sold and, importantly, controlled by an individual who could theoretically be a ‘sovereign ruler of what he surveyed’.<sup>710</sup> The social relations of the early modern period called for new ways of seeing, interpreting and representing space. To Goldstein it is the increased level of control presented by the three dimensional representations of linear perspective that made it superior to the previous iconographic mode.<sup>711</sup> He extends the fact that linear perspective brought about a new interpretation of the world to a new image of the individual. The mathematically ordered nature of space perspective in the fifteenth century viewed space as isotropic and homogeneous and enabled the arrival of linear perspective.<sup>712</sup> Tally also refers to art historian Samuel Edgerton who connected linear perspective with the invention of the

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<sup>706</sup> Harvey D 1989 on 252.

<sup>707</sup> Harvey D 1989 on 252.

<sup>708</sup> It could be interesting to ask which consciousness influences recent trends to introduce 3D movies especially in children’s animation movies.

<sup>709</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 18 refers to Goldstein Leonard *The Social and Cultural Roots of Linear Perspective* 1988 MEP Publications Minneapolis on 20-21 and 135.

<sup>710</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 18.

<sup>711</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 18 with reference to Goldstein Leonard *The Social and Cultural Roots of Linear Perspective* 1988 MEP Publications Minneapolis on 151.

<sup>712</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 19 with reference to Goldstein L *The Social and Cultural Roots of Linear Perspective* 1988 on 159.

printing press to argue that these revolutions combined altered the manner in which people viewed and experienced space.<sup>713</sup>

The medieval Latin term *mundi* means ‘of the world’ and in Europe during the so-called ‘Age of discovery’ *mappa* or ‘cloth’ was used to make representations of the world. These *mappamundi* were marked by their references to religious symbols and Biblical places. Before the development of the compass and the technology of the magnetic north, the T-and-O (*orbis terrarum*) maps were structured with Asia as the east in the top half circle above the horizontal dividing line, which accounts for the etymology of the ‘orientation’: facing east or, ‘finding ones bearings’.<sup>714</sup> Africa and Europe were placed either sides of the vertical line drawn from the middle of the horizontal line to the bottom edge of the circle and Jerusalem was placed right at the centre of the circle, were the two lines of the T inside the O met. Some early maps included the Garden of Eden or other biblical references and sometimes other imaginary lands were included for the mere sake of symmetry.<sup>715</sup> The importance of symmetry during the Renaissance seems almost intuitive, as a good omen or aesthetic blessing that played a role in mathematical and scientific discoveries. One of the most well-known examples from the Renaissance is Leonardo Da Vinci’s *Vitruvian Man*, but other mathematical discoveries also relied on symmetry. Maps have therefore never solely been a representation of reality, in fact in some instances reality was purposefully altered for pragmatic reasons. This was the case with maps drawn with the use of Mercator’s projector. Gerhard Mercator in the sixteenth century devised a formula to solve the problem of depicting a round object onto a flat surface.<sup>716</sup> This projection led to the difference between actual sizes and depicted sizes of the continents, markedly the grotesquely enlarged northern hemisphere, mainly to better address navigation needs.<sup>717</sup>

Mercator’s projection is still used for drawing some maps and this can be seen in maps where Greenland is approximately the size of South America. Critical engagements

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<sup>713</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 19 with reference to Edgerton Samuel Y 1975 on 159-164.

<sup>714</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 20.

<sup>715</sup> One such an example was the *terra australis incognita*, see Tally R *Spatiality: The New Critical Idiom* 2013 on 21.

<sup>716</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 24.

<sup>717</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 24.

with cartography challenge both the proportions (sizes) of the continents and the orientation of contemporary world maps. There have been many responses and critiques to these maps and also challenges to the broadly accepted north-on-top maps.<sup>718</sup> East used to be the orientation of maps, and in the same vein having north on top is merely a convention and therefore world maps can theoretically also be represented with the south on top. The Gall–Peters projection was one of the first maps to represent a more accurate picture of the sizes of the continents. Named after James Gall and Arno Peters (sometimes only ‘Peters maps’) these maps are also not without contention, since Peters suggested the map, but did not acknowledge that it was based on Gall’s earlier projection. Building on this, the Hobo-Dyer Equal Area Map based on the Hobo-Dyer projection shows less elongation than the Peters-Gall maps, but still aim to depict the sizes closer to reality than that of the Mercator projection and are also turned ‘upside-down’ or ‘right-side-up’ with north on top, while keeping Africa central.<sup>719</sup> The map, based on an adaptation of the 1910 Behrman projection, was commissioned by Bob Abramms and Howard Bronstein and drafted by Mick Dyer, a cartographer. Stuart McArthur’s Universal Corrective Map turns the world map with north on top and places Australia at the centre. Various controversies around maps that deviate from the Mercator projector maps illustrate the hegemonic nature of mapping, notably Google maps still uses mainly the Mercator projector maps.

It is interesting in tracing the development of cartography to see how maps became the foundation of practically all professions and disciplines over the course of two centuries. With very few maps at the beginning of the fifteenth century, the rise of cartography, backed by the development of linear perspective, exploration journeys all over the world, technological advances, increased use of quantitative methods, made the map a ‘preeminent form of knowledge and power in the early modern era, and its pre-eminence continues on in twenty-first century societies’.<sup>720</sup>

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<sup>718</sup> For a useful collection and summary of these engagements see the edited volume of and introduction to Okoth Opondo S and Shapiro MJ (eds.) *The New Violent Cartography: Geo-Analysis After the Aesthetic Turn* 2012.

<sup>719</sup> For an overview of the development of different projections see Harwood J *To the Ends of the Earth: 100 Maps that Changed the World* 2012.

<sup>720</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 25.

Mapping is traditionally a way of capturing space and denying space as a 'discrete multiplicity of inert things' despite it all being interrelated. Space constantly disconnects because of new arrivals and is constantly in a state of being determined, being made, being produced. Dynamic simultaneity presents space as loose ends and on-going stories.<sup>721</sup> It is not space as a surface or as terra firma. Maps struggle to capture space as loose ends and as on-going stories, because they aim to close down, to represent a slice through time. Massey asserts convincingly that Western notions of mapping have contributed largely to the 'taming' of space.<sup>722</sup> Feminist and postcolonial reimaginings of the map attempt to critique maps as technologies of power. Within this opening up of the concept of the map, Massey engages with the metaphor of the palimpsest as a way to look at the manner in which the colonial text has written over and obliterated and forgot the other. She quotes Spivak: the colonisers' 'necessary yet contradictory assumptions of the uninscribed earth'.<sup>723</sup> But the palimpsest, as seeing geography as a series of erasures and overwriting presents an issue for Massey. She argues that this metaphor sees space in terms of layers and while it accounts for the historic silences and erasures it fails to present a critique of the co-existing silences. For her the palimpsest does not capture coevalness, despite the fact that it might point towards coevalness in a sense. The archaeological nature of the palimpsests brings about that the blind spots and erasures are usually from the past and not the same as the 'discontinuities of the multiplicity in contemporaneous space'.<sup>724</sup> These gaps in representation are the marks of 'the coexistence of the coeval'.<sup>725</sup> The palimpsest imagines that space is mapped 'as the product of superimposed horizontal structures rather than full contemporaneous coexistence and becoming'. Despite Massey's wariness of the metaphor of the palimpsest, I still find it a productive way of envisioning the legal landscape that is the city of Tshwane and will elaborate on this in chapter 4.<sup>726</sup>

The notion of coevalness, as stated with reference to Chakrabarty, is however useful when looking at development and progress and in an attempt to spatialised the history

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<sup>721</sup> Massey D *for space* 2005 on 107.

<sup>722</sup> Massey D *for space* 2005 on 106.

<sup>723</sup> Massey D *for space* 2005 on 110 with reference to Spivak G 'The Rani of Sirmur' in Barker F, Hulme P, Iverson M and Loxley D (eds.) *Europe and its Others* 1985 on 133.

<sup>724</sup> Massey D *for space* 2005 on 110.

<sup>725</sup> Massey D *for space* 2005 on 110.

<sup>726</sup> See sections 4.3.1. Political trials and 4.5. Spatial Justice.



of modernity. Modernity does not only divide space into different places, but also establishes a certain system of differentiation which is conceived of temporally. This means that Africa is not really different from the West, but that it is merely behind and will with time catch up to the West. This denies Africa's coeval existence. With reliance on Fabian, Massey argues that the modern conception of space denies coevalness. She quotes Fabian's explanation of coevalness: 'coevalness aims at recognising contemporality as the condition for truly dialectical confrontation'<sup>727</sup> and shows that what is different is not 'the same societies at different stages of development, but different societies facing each other at the same Time'.<sup>728</sup> Coevalness, therefore, is an imaginative space of interaction. If mapping and drawing can incorporate coevalness, then it might be possible to draw differently; to trace; to map with humility; to draw with different lines: with shadow lines<sup>729</sup> and with red lines.<sup>730</sup>

### 3.4.2. Drawing lines differently – mapping, tracing, humility

It is clear that new names were installed alongside, almost juxtaposed, to the old names, through which red lines were drawn. This is a common practice in name changes that have taken place in South Africa and elsewhere in the world. The old names are not entirely removed, they remain present, albeit they are not allowed to 'speak' anymore. Being confronted with these red lines I want to join South African scholar Carol Clarkson in asking: 'What is in a line?' She engages with the notion of drawing lines with specific reference to the artworks of contemporary South African artist Willem Boshoff, whose work is often concerned with themes of tension and 'defies ready categorization'.<sup>731</sup> She explores the ethical implications of the redrawing of lines of the landscape that used to be apartheid South Africa. What are the ethical implications of the redrawing of the street names? Clarkson refers specifically to

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<sup>727</sup> Massey D *for space* 2005 on 69 quoting Fabian J *Time and the Other: how anthropology makes its object* 1983 Columbia University Press: New York on 154

<sup>728</sup> Massey D *for space* 2005 on 69 quoting Fabian J *Time and the Other: how anthropology makes its object* 1983 on 155.

<sup>729</sup> Ananya Roy relies on the novel by Amitav Ghosh *The Shadow Lines* 1988 Bloomsbury Publishing Ltd: Great Britain, as a metaphor of worlding the South. Drawing on how the character draws new worlds with an old and rusty compass on a tattered atlas, he is drawing shadow lines; fleeting worlds. Roy A 'Worlding the South' in Parnell Susan and Oldfield Sophie (eds.) *The Routledge Handbook on Cities of the Global South* 2014 on 17-18.

<sup>730</sup> Like the red lines across the old street names.

<sup>731</sup> Clarkson C *Drawing the Line: Justice and the Art of Reconciliation* 2008 in Du Bois F and Du Bois-Pedain A (eds.) *Justice and Reconciliation in Post-Apartheid South Africa* on 269.

Boshoff because he uses language as his medium and labels these language-artworks as ‘three-dimensional dictionaries: sequences of words in wood, sand or stone’.<sup>732</sup> The street names with the combination of letters and red diagonal lines could be deemed artworks in a post-Apartheid South Africa attempting to redraw lines. Could these street names be sequences of words in metal, dust and crowds? They should be interpreted to constitute, as Clarkson suggests Boshoff’s artworks do, the merging of two lines of force: ‘the force of law and the force of art’.<sup>733</sup> Mapping with force as opposed to mapping with humility relates to the distinction between mapping and tracing.

Thinking about the new street names and the old street names that were crossed out and displayed alongside the new ones, but later removed it is useful to distinguish between tracing and mapping.<sup>734</sup>

What distinguishes the map from the tracing is that it is entirely orientated toward an experimentation in contact with the real...The map has to do with performance, whereas the tracing always involves an alleged ‘competence’.<sup>735</sup>

A rhizome resists the process of tracing and rather encompasses mapping. This is again contra tree logic which is a logic of ‘tracing and reproduction’ and the rhizome is a map and not a tracing.<sup>736</sup> The way in which Deleuze and Guattari use the term rhizome relates to botanical rhizomes, such as tubers, ginger and other bulbs. Rhizomes are distinct from the structures of trees and roots in that it is something with ‘no point or position... only lines’.<sup>737</sup> They use the concept of a line of flight to explain a rhizome. What is the value of rhizomatic thought, as opposed to arborescent logic, for thinking in law? How can we approach the relationship between space and law in

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<sup>732</sup> Clarkson C *Drawing the Line: Justice and the Art of Reconciliation* 2008 in Du Bois F and Du Bois-Pedain A (eds.) *Justice and Reconciliation in Post-Apartheid South Africa* on 274.

<sup>733</sup> Clarkson C *Drawing the Line: Justice and the Art of Reconciliation* 2008 in Du Bois F and Du Bois-Pedain A (eds.) *Justice and Reconciliation in Post-Apartheid South Africa* on 279.

<sup>734</sup> With reference to Joyce and Nietzsche they explain how these authors shatter the linear unity of the word and knowledge to posit a cyclic unity. This happens whenever a multiplicity is taken up into a system and they refer to such a system as a rhizome. Deleuze G and Guattari F *A thousand plateaus: capitalism and schizophrenia* (trans.) Massumi B 2004 on 21.

<sup>735</sup> Deleuze G and Guattari F *A Thousand Plateaus: Capitalism and Schizophrenia* (trans.) Massumi B 2004 on 12.

<sup>736</sup> Deleuze G and Guattari F *A Thousand Plateaus: Capitalism and Schizophrenia* (trans.) Massumi B 2004 on 11.

<sup>737</sup> Deleuze G and Guattari F *A Thousand Plateaus: Capitalism and Schizophrenia* (trans.) Massumi B 2004 on 4.

terms of a rhizome? The rhizome encompasses the related principles of connection, multiplicity, asignifying rupture and the principles of (anti)cartography and decalcomania.<sup>738</sup> Asignifying means that a rhizome can break out of its boundaries (or de-territorialise) and start again on new lines and points to the subversion of signification. It corresponds with anti-cartography. Maps should be rhizomes. Massey views this rhizomatic thinking as one of the ways in which recent thinking is ‘wrestling to open up the order of the map’.<sup>739</sup> It counters the dominant understanding of Western maps today, namely that it should be a representation that leaves no surprises and predicts accurately what one might find without getting lost or losing your way (there be no dragons!). Therefore, this kind of rhizomatic map also challenges a view of space is as stable and closed.<sup>740</sup> Mapping with humility is mapping with lines of flight; with shadow lines. To continue this line of thinking I explore the concept of cognitive mapping.

### 3.4.3. Cognitive mapping

Furthermore, confusion would reign consequent upon the placement of only new names since tourists, residents and business people would find it difficult to locate their destinations pending the drafting of new directional maps with new street names or updating the GPS. Business people would also have to change their stationery at great expense and if the review succeeds change it back to what it was.<sup>741</sup>

Jameson’s cognitive mapping, albeit somewhat controversial, has had a significant impact on the spatial turn and literary criticism. He introduced the concept in a 1983 essay entitled ‘Postmodernism, or, the Cultural Logic of Late Capitalism’,<sup>742</sup> which was later republished as a chapter in his 1991 book.<sup>743</sup> For Tally, the idea of cognitive mapping stands central to Jameson’s project in creating a theory on the relationship

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<sup>738</sup> Deleuze G and Guattari F *A Thousand Plateaus: Capitalism and Schizophrenia* (trans.) Massumi B 2004 on 7.

<sup>739</sup> Massey D *for space* 2005 on 110.

<sup>740</sup> Massey D *for space* 2005 on 106-110.

<sup>741</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Evert van Dyk* 2016 (6) SA 279 (CC) at par 28.

<sup>742</sup> Published in Foster H (ed.) *The Anti-Aesthetic* 1983 .

<sup>743</sup> Jameson F *Postmodernism, or, the Cultural Logic of Late Capitalism* 1991 on 54-92.

between social formations and literary forms and informs his broader critique of late capitalism and globalization.<sup>744</sup> Jameson defines cognitive mapping as follows:

Cognitive mapping involves the practical reconquest of sense of place and the construction or reconstruction of an articulated ensemble which can be retained in memory and which the individual subject can map and remap along the moments of mobile, alternative trajectories.<sup>745</sup>

One of the points of departure for Jameson's cognitive mapping is the way in which existentialism has illustrated how the imagination can aid in navigating social spaces and by extension, how the imagination is a way of making sense of the world and therefore a form of mapping. Existentialism shares close ties with existential angst, related to the uncanny, Heidegger's *unheimlich*, or Lucáks' transcendental homelessness, which I elaborate on under the concept of *genius loci*. Existential angst, associated with the rise of modernity and its growing alienation through industrialisation and urbanisation, can, according to Satre, only be dealt with by giving meaning to our existence through the projects we embark on, in this sense one's project defines one's existence. Cognitive mapping, in accordance with Jameson's use of the term, can therefore be one way to overcome the existential alienation of modern life.<sup>746</sup> Tally describes Jameson's lifelong project as an attempt to theorise a relationship between literary forms and social formation.<sup>747</sup> The term, not used by Jameson anymore, meant a variety of things over the course of time. In terms of one of these meanings its focus was on the individual subject, and it referred to the way in which an individual subject finds her spatial orientation within a broader social context amidst a complex spatial setting.<sup>748</sup> In terms of another meaning of cognitive mapping, as used by Jameson in the context of the broader late capitalist multinational world system, it cannot be limited to the perspective of an individual subject. In these cases the term implies a supra-individual within the abstract or objective production of space.<sup>749</sup> Jameson's notion of cognitive mapping is (mostly) derived from the works of Kevin Lynch and Louis Althusser, with Lynch providing a practical framework for the concept and Althusser a theoretical structure. A short summary of these two authors

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<sup>744</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 66.

<sup>745</sup> Jameson F *Postmodernism, or, the Cultural Logic of Late Capitalism* 1991 on 51.

<sup>746</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 67.

<sup>747</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 66.

<sup>748</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 68.

<sup>749</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 68.

shed some more light on the rubrics used by Jameson to formulate the concept of cognitive mapping. Jameson equates cognitive mapping to what Althusser defines as ideology, i.e. 'a representation of the imaginary relationship of individuals to their real conditions of experience'. This view is also important in the discussion of space as relational. Notions of wayfinding and imagability are introduced by Lynch, who argues, in his 1960 work *The Image of the City*, which book empirically compares Boston, Jersey City and Los Angeles, that the lack of traditional markers (distinctive borders, demarcated downtown areas, significant landmark buildings) lead to a reduced imagability. Jameson discusses three moves in history as examples of cognitive mapping that were central to postmodernism/ late capitalism.<sup>750</sup> These three examples are firstly, the ancient sea charts or *portolans* that were used to find harbours, secondly, and as technology developed, the sextant and compass that related to a universal relationship, the relationship between an individual and an objective condition (in this regard he mentions the example of one's relationship to the stars and their constellations) and thirdly the unsolvable dilemma of projecting a round object onto a flat surface.<sup>751</sup> This third move is, for Jameson, a watershed moment because the perfect realistic representations of space (mimetic maps) were exchanged for more practical, but figurative maps. Jameson in his later works concedes that cognitive mapping is a code for class-consciousness and acknowledges that looking at cartography in terms of Lynch's imagability or wayfinding is in a sense pre-cartographic and corresponds more readily to the making of itineraries than to map-making. Tally explains the distinction between itineraries and maps with reference to the point of view from which they are produced. Itineraries represent the subject-centred position in the form of diagrams that note important places on the existential journey of the individual, and maps, on the other hand require a synoptic perspective that is broader than that of the individual. He calls Lynch's mode of mapping in terms of imagability and wayfinding 'cartographic digression'.<sup>752</sup> This distinction between itinerary and map aside, Tally argues that a cartographic project is needed, whether it is for representing an international social class that escapes representation or whether

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<sup>750</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 73.

<sup>751</sup> Jameson F *Postmodernism, or, the Cultural Logic of Late Capitalism* 1991 on 51-53.

<sup>752</sup> Jameson F *Postmodernism, or, the Cultural Logic of Late Capitalism* 1991 on 52.

it is 'to situate one's position relative to others in a vast, seemingly unrepresentable social space'.<sup>753</sup>

Poor imagability or difficulty in wayfinding, to use Lynch's terms, can be ascribed to a failure to form a clear mental diagram of the city and leads to an increased feeling of an alienated city, which alienation manifests as a difficulty to navigate or form a clear image of the surroundings even while making one's way through the space. The fact that cities cannot truly be demarcated, imagined or cognitively mapped, could also be attributed to chaos, disorder, unruliness or rogueness. I look next at rogue urbanism, unmapping, countertopographies and the figure of the 'sphinx' in the city to challenge this dichotomous relation between disorder and alienation on the one hand and order and belonging on the other.

#### **3.4.4. Rogue urbanism, unmapping, countertopographies and the 'sphinx' in the city**

Belonging is usually associated with order and safety, while chaos and danger calls to mind alienation and unhoming. Some concepts in urban studies, geography and feminism dispel this easy association.

Rogue urbanism entails that historical traces cannot be comprehended as a 'neat teleological story that flows from pre-colonial to colonial to post-independence temporalities. Instead, 'there is an ebb and flow of times, social registers, political imperatives, symbolic economies and spatial imaginaries that accumulate unruly fragments of modernity along the way'.<sup>754</sup> The concept encapsulates the notion of diversity and builds on Nuttall and Mbembe's *Johannesburg: The Elusive Metropolis*. In the introduction the editors refer to the project as an 'unruly programme of engagement'<sup>755</sup> Even though the term 'African' is a construct devoid of a particular meaning due to the diversity across the continent, Pieterse and Simone draw some commonalities based on similar pressures, historical lineages, colonial oppression and

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<sup>753</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 74.

<sup>754</sup> 'Rogue urbanism' makes its appearance in a recent edited volume by Pieterse and Simone as a project of the African Centre for Cities at UCT. The collection of essays asks whether there is something unique to be discerned in African cities. Pieterse E and Simone A (eds.) *Rogue Urbanism* 2013 on 14.

<sup>755</sup> Pieterse E and Simone A (eds.) *Rogue Urbanism: Emergent African Cities* 2013 on 13.

postcolonial perversion. Rogue urbanism 'is a significant part of the story that makes African urbanism so rogue and tempestuous'.<sup>756</sup>

Palimpsests are important features of rogue cities. It reminds us that the 'contemporary urban condition cannot be understood or fully re-imagined without a spatially informed obsession with historical antecedents'.<sup>757</sup> A palimpsestic approach to space (and law) provides insight into the ways in which territory, the built form, classificatory registers and regulatory systems all trace back deep into the heartland of the colonial project with some aberrant manifestations in the contemporary era. The concept of rogue urbanism more broadly entails the idea that historical traces cannot be comprehended as a 'neat teleological story that flows from pre-colonial to colonial to post-independence temporalities'.<sup>758</sup>

The tension between topographies and countertopographies further disrupts the idea that home and belonging should necessarily be predictable and ordered.<sup>759</sup> Although I have not thoroughly explored the work of Katz, I find the following concepts and metaphors useful in building a vocabulary on spatial justice that is open to the radical uncertainties of space. These include 'capital as placeless vagabond', 'topographies', 'countertopographies' and 'contour lines'.<sup>760</sup> Capital is a vagabond that moves around and does not have a fixed home, it stalks the world without accepting responsibility for its deeds and distances itself in particular from the activities of social reproduction that are placed or placed in. With topographies she implies capturing in detail 'a particular location and the totality of the features that comprise the place itself'.<sup>761</sup> 'Countertopographies are drawn from topography as a critical methodology and provide ways of envisioning and creating a 'translocal politics' which can stand in

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<sup>756</sup> Pieterse E and Simone A (eds.) *Rogue Urbanism: Emergent African Cities* 2013 on 14.

<sup>757</sup> Pieterse E and Simone A (eds.) *Rogue Urbanism: Emergent African Cities* 2013 on 3.

<sup>758</sup> Pieterse E and Simone A (eds.) *Rogue Urbanism: Emergent African Cities* 2013 on 4.

<sup>759</sup> Cindi Katz initially studied to become a medical doctor and only shifted to geography in the third year of her studies. Her fieldwork in a rural village of Sudan, fictionally named Howa, formed the basis of her doctoral thesis and also the foundation of her most important contributions on social production. Katz C 'Vagabond Capitalism and the necessity of Social Reproduction' in *Antipode* 2001 33 (4) 708-727.

<sup>760</sup> Katz C 'Vagabond Capitalism and the necessity of Social Reproduction' in *Antipode* 2001 33 (4) 708-727.

<sup>761</sup> Katz C 'Vagabond Capitalism and the necessity of Social Reproduction' in *Antipode* 2001 on 708 and 720.

opposition to oppressive forms of social production, such as global capitalism.<sup>762</sup> The contour line is one of the central metaphorical associations of topography that is highlighted and enhanced through the concept and countertopographies.<sup>763</sup> Contour lines are the links between places, they draw connections between places that are situated at the same altitude and thereby presents a three dimensional representation of the area. Katz invokes the concept of contour lines in order to ‘imagine a politics that simultaneously retains the distinctness of the characteristics of a particular place and builds on its analytical connections to other places along ‘contour lines’ marking, not elevation, but rather a particular relation to a process’.<sup>764</sup> Contour lines are not the lines drawn through the old street names, nor are they the lines of the treaty of Tordesillas or the treaty of Zaragoza.<sup>765</sup> But they are the whispers of simultaneity and of interconnectedness.

Street names are items on maps and lines in roads, but seen as a different cartographical tool, they could present the interconnection between places and people and stories that are vastly different and were artificially made distinct through geography and history. Therefore, they remain discreet through the way in which they produce themselves differently despite their shared political-economic and sociocultural experiences. Drawing contour lines entails drawing links, finding connections and seeing relations. But it also means challenging existing links and drawing fresh connections. Katz argues that national boundaries are becoming increasingly meaningless as capitalism ensures that goods are produced in a ‘cyborgian’ fashion anywhere and everywhere. She takes care to indicate that national boundaries may not be significant for the movement of capital, but it matters ‘when you live someplace – and everybody does’.<sup>766</sup> She imagines mapping places along contour lines to mark the area of translocal politics. I find this idea of critical counter-topographies and mapping along contour lines particularly productive in the context of law, where a boundary map cannot necessarily show the connections between

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<sup>762</sup> Katz C ‘Vagabond Capitalism and the necessity of Social Reproduction’ in *Antipode* 2001 on 709.

<sup>763</sup> Katz C ‘Vagabond Capitalism and the necessity of Social Reproduction’ in *Antipode* 2001 on 721.

<sup>764</sup> Katz C ‘Vagabond Capitalism and the necessity of Social Reproduction’ in *Antipode* 2001 on 721.

<sup>765</sup> The treaty of Tordesillas was signed towards the end of the 15<sup>th</sup> century and is basically straight lines dividing the newly ‘discovered’ South Americas between Spain (Crown of Castile) and Portugal and some decades later the other side of the world was similarly divided with a straight line through the treaty of Zaragoza. <http://www.nationalgeographic.org/thisday/jun7/treaty-tordesillas/> accessed March 2014.

<sup>766</sup> Katz C ‘Vagabond Capitalism and the necessity of Social Reproduction’ 2001 on 716.



locations affected by the law, but thinking in terms of elevation (or absence thereof) can map law and its hauntology in ways that could reveal different connections and ruptures. In topographical maps contour lines can be drawn without having to measure every centimetre of the terrain. Places are not affected in the same way by globalising capitalist production and consumption is also not changed and affected in similar ways. The questions and concerns 'that arise from place to place can vary and play out differently depending upon the constellations of social relations encountered in various locations'.<sup>767</sup>

In a similar way, colonialism and apartheid impacted on different places and locations in South Africa differently because of certain social relations present in the different places. The focus on the interconnected web of social relations and their reproduction in certain places are useful for the South African context. The work of Katz is also particularly helpful in illustrating social production. She insists on the importance of social production particularly because it contains the potential for significant relational, material and structural change.<sup>768</sup> The notion of everyday life is important as a 'critical concept' and not as a notion that simply describes the mundane and dull practices through which society is produced and identities constructed. Seeing the everyday differently; namely as a critical concept, opens up the possibility for rupture, transformation and collapse.<sup>769</sup> The work of Katz also exposes the dichotomy of order/ masculine and disorder/ feminine. This is something more directly explored by Elizabeth Wilson's *Sphinx in the City*.<sup>770</sup>

For Wilson the sphinx represents female sexuality, which as such represents a challenge to the patriarchal order. The regulatory aspects and techniques of observation of city life have mostly been aimed at women.<sup>771</sup> City life, per se

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<sup>767</sup> Katz C 'Vagabond Capitalism and the necessity of Social Reproduction' 2001 on 722.

<sup>768</sup> Holloway L 'Donna Haraway' in Hubbard P and Kitchin R *Key Thinkers on Space and Place* 2011 on 266.

<sup>769</sup> She provides a strong critique of globalised capitalist production and argues that their consequences are mostly hidden. These processes, due to their overemphasis on finance, production and the economy, merely serve to hide the material practices of social reproduction.

<sup>770</sup> Wilson E *The Sphinx in the City: Urban Life, the Control of Disorder, and Women* 1991. Massey refers to Wilson in order to interrogate the distinction between place and space and also to question the automatic association of place as fixed and certain as opposed to space as open, fluid and uncertain. Massey D *Space, Place and Gender* 1994.

<sup>771</sup> Wilson E *The Sphinx in the City: Urban Life, the Control of Disorder, and Women* 1991 on 7.

challenges patriarchy. Wilson's book however laments the dichotomy between the urban and the rural and the corresponding association of the rural as feminine and the city as masculine. The city is caught in a continuous battle between order and rigid routine on the one hand and delightful anarchy on the other. Wilson applies the man/women dichotomy rather simplistically to various attributes of the city. She describes the masculine attributes in the city as its 'triumphal scale, its towers and vistas and arid industrial regions' and then continues to name the feminine aspects as the city's 'enclosing embrace...indeterminacy and labyrinthine uncentredness'.<sup>772</sup> According to Wilson the regulatory aspects and techniques of surveillance of city-life has always been aimed at women. The problem of the city, according to her, will never be solved unless we embrace the city-ness of it. It echoes Lefebvre's call for the Right to the City as both a cry and a demand – not a right to visit a manicured city as tourist, but rather a renewed and changing right to city life, in the form of inhabitation of the city and not the city merely as habitat.<sup>773</sup>

I want to extend her critique of this association to notions of home as place, as fixed, ordered and secure, as opposed to the city as uncertain, chaotic and fluid. Massey asserts that a view of place that is constantly in search of a lost authenticity leads to a reactionary politics, and ultimately brings about a certain cultural reading of 'Woman' that cannot be reconciled with the lived lives of women. Within this context of gender the formation of gender roles, and given the difficulty of escaping these norms, Wilson embraces the possibilities of the life in the big city (coupled with the possible dangers) as opposed to life in a small community.<sup>774</sup> One of the gender-disruptive messages from Wilson's work – in relation to both identity and space – is captured by her call for continuous movement. The challenge remain how to answer this call of constant movement while simultaneously acknowledging your body and emplacement and accepting responsibility for it. Therefore Wilson argues that women, apart from a few exceptions of course, in small scale establishments, where control is exercised with

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<sup>772</sup> Wilson E *The Sphinx in the City: Urban Life, the Control of Disorder, and Women* 1991 on 7.

<sup>773</sup> The image of the sphinx could resonate with the Oedipus tale by Sophocles and the riddle of the sphinx, but Wilson's title is actually in reaction to right-wing French sociologist Gustave Le Bon – who is known for his work *The Crowd: A Study of the Popular Mind*. He writes that: 'Crowds are like the sphinx of ancient fable; it is necessary to arrive at a solution of the problems offered by their psychology or to resign ourselves to being devoured by them' Wilson E, *The Sphinx in the City: Urban Life, the Control of Disorder, and Women* 1991 on 7.

<sup>774</sup> Wilson E *The Sphinx in the City: Urban Life, the Control of Disorder, and Women* 1991 on 3.

relative ease, do not pose a great threat for men.<sup>775</sup> The scale and complexity of the city makes control a more arduous task and therefore the presence of women in cities, especially in city streets, is seen as a threat. Wilson refers specifically to Woolf and Richardson who, as opposed to Kafka and Musil, appears to be less daunted by the dangers of the city, but rather embraces the potential presented by the chaos.

I do not share Wilson's optimistic view of the city and its feminine possibility, since the reality is still that women are most vulnerable in city spaces. In the *Schubart Park* case for example, former residents tell of how men who were evicted could bide their nights in clubs, but mothers had a harder time with no water or facilities to prepare bottles for their children. The image of the sphinx though presents a challenge to the agenda of organising, regulating of the cleaning operations at the turn of the century in apartheid and current-day Tshwane/ Pretoria. Of further value for answering the research question in this chapter, is how she looks at literature to identify the different ways in which authors respond to the 'chaos' of the city. She refers to only a few authors and therefore the argument that women writers (and therefore women) are less daunted by the city's disorderliness than male writers (and by extension men), is insufficiently motivated and hasty. But yet, it is interesting to look at city novels and literary texts on home and belonging against the backdrop of order, chaos and the sphinx. I now look at literature and how it can introduce mapping loss as another alternative form of mapping that aims to counter the hegemony of cartography and the single story of street names. One such an author, who engages with the confusion of the Pretoria city-scape, is Fransi Phillips, who with her postmodernist style embraces the flow and unstableness of Pretoria.<sup>776</sup> I reiterate that I rely on rogue urbanism, countertopographies and the sphinx in this section not to celebrate or over-romanticize the lack of infrastructure and disorder in the way in which townships in South Africa

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<sup>775</sup> Wilson E *The Sphinx in the City: Urban Life, the Control of Disorder, and Women* 1991 on 7.

<sup>776</sup> See in particular Phillips F *Net n Lewe* 2011, Phillips F *Sewe-en-sewentig stories oor 'n clown* 1985, Phillips F *Die horlosie se wysers val af* 1983. Her verses seem disjunctive, but there is a recurring theme that signals a very clear direction, like a compass, amidst the chaos. In *Sewe-en-sewentig stories* the obsession with germs, infestation and chaos turns into the carnivalesque: 'As ek vir die clown vra om vir my n liedjie te sing, sing hy n liedjie oor kieme. As ek vir hom vra om vir my n storie te skryf, skryf hy: kieme kieme kieme kieme kieme... Een van die mans in die strate gee vir die clown n silwer munstuk. Die clown vat die munstuk en loop na Checkers. By Checkers koop die clown vir hom `n stuk sy. Hy gaan na sy huis en maak vir hom n rok van die sy. Hy skilder kieme op die rok. Party van die kieme lyk soos clowns en ander lyk soos perde, honde, voels, visse en slange. Die clown trek die rok aan. Hy klim in sy kar en gaan na n karnaval' (on 3-5). The protagonist in *Net n Lewe* also relishes in the disorder of the city.

were planned (or not planned). Nor do I with these concepts want to redeem the violent confusion and disarray brought by colonial displacements and apartheid forced removals. The contrary aim of unpacking these terms is two-fold: firstly to expose law's constant drive for order, its tendency to close rather than open up, and its inability to creatively interrelate to disorder and secondly to highlight exactly the ways in which disorder and chaos is created in lived space through the ostensible ordering of abstract space. This is illustrated through Schubart Park and can also be seen in the sanitation syndrome covered in section 4.2.4. The following section is on literature and its possible contribution to spatial justice and for understanding and disrupting spatial production and reproduction through law.

### 3.4.5. Literature

Representation is closely linked to gaze. Literature has known this for a long time. The history of cartography shows that representations do not always attempt to be real or to accurately represent the real world, sometimes they fail on purpose for pragmatic or other reasons, but most of the time reality simply refuses to be accurately captured and represented in its full complexity. Barbara Piatti captures this dilemma in her distinction between 'geospace' (real space) and imagined space (of the novel).<sup>777</sup> Literature as a form of representation faces the same difficulty and choices and therefore Tally's choice of literature as a 'projection of the world' seems an apt phrase to describe the role of literature and its relation to space. It is from the protagonist Oedipa Maas in the 1966 novel *The Crying of Lot 49* by Thomas Pynchon that he borrows the phrase.<sup>778</sup> The character is faced with making sense of a deceased person's estate (any law student would agree that trying to make sense of the law of succession could be a daunting task) amidst other calamities and challenges: bizarre characters and a global conspiracy amongst others. It is when she resolves to reread the will in order to understand what precisely her task entails that she views herself as a dark machine in the middle of a planetarium that must project a world onto a dome. She expresses the hope to 'bring the estate into pulsing stelliferous meaning'.<sup>779</sup> Tally

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<sup>777</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 52 quoting from Piatti B *Die Geographie der Literatur: Schauplätze, Handlungsräume, Raumphantasien* 2008 Wallstein Verlag: Göttingen on 22-23.

<sup>778</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 42.

<sup>779</sup> Pynchon T *The crying of Lot 49* 1966 J.B. Lippincott: Philadelphia on 82 as quoted by Tally R *Spatiality: The New Critical Idiom* 2013 on 42. The quote continues as follows: 'Shall I project a

concedes that literature is a means of understanding the world in the sense that it organises data collected from life itself according to some plan, but he agrees with Lefebvre, Jameson and Harvey that 'the material, historical bases underlying human social relations have also produced different spaces' and that these different spaces require different modes of engaging with them.<sup>780</sup> Literature and cultural studies find themselves in the midst of things and when approached from the vantage of spatiality studies could 'uncover or invent new means of making sense of the way we make sense of the world'.<sup>781</sup> The direct influence and value of literature to the spatial turn in general, but also to law's spatial turn becomes clear here. Without discussing the development of the Law and Literature movement extensively or aligning myself to a specific branch or view (Law in Literature v Law as Literature), the role of literature can be captured along the following lines. Law as a discipline is a humanity rather than a science, spatiality (the spatial turn) is an aesthetic sensibility rather than a geometric or scientific approach to space. Literature aptly captures, convey and expresses this aesthetic sensibility and has increasingly done so, therefore, if law is to have more (or rather a different) spatial awareness, then we would be able to trace such sensibility in literature (like in other art forms).

Below I provide a brief summary of Tally's understanding of spatiality as critical idiom and the spatial turn in regards to literature. He addresses literary cartography, literary geography and geocriticism. In these divisions I am particularly interested in notions of the writer as mapmaker, the concept of the spirit of place as captured and explained in literary studies, literary engagements with the country and the city, and the production of space. I deal here in summary form with these ideas via Tally and apply them respectively to the context of law and more specifically the urban space of the city of Tshwane/ Pretoria.

#### **3.4.6. Literary cartography (writing as mapping and writer as mapmaker)**

Both literature and cartography create worlds and represent reality figuratively. Law on the other hand, does so both figuratively and literally. Novels can also be single

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world? If not project then at least flash some arrows on the dome to skitter among the constellations and trace out your Dragon, Whale, Southern Cross. Anything might help.'

<sup>780</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 42.

<sup>781</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 43.

stories and present only one view of the world. Single stories are dangerous because they create 'stereotypes and the problem with stereotypes is not that they are untrue, but that they are incomplete'.<sup>782</sup> This is the result of the single story: 'It robs people of dignity. It makes our recognition of our equal humanity difficult'.<sup>783</sup> The single story ignores interrelations. Therefore, drawing on literature should not be a way of presenting another grand narrative, but rather a way to untangle and disrupt the single stories of law and power. For this critical engagement with literature in the context of spatiality, I draw from the literary concept of 'mapping loss'. The idea of literary cartography relates to the notions of 'cognitive mapping' and 'mapping loss'. I give an overview of cognitive mapping above in 3.4.3 and cover 'mapping loss', here in order to link with one of the broader aims of this project, namely to draw a link between spatial representation in cartography, literature and law.

Graham invokes the figurative and literal modes of mapping of the apartheid and colonial past and argues for the acknowledgement of the palimpsestic nature of South Africa's spaces and places. With reference to post-TRC poetry, plays and memoirs, and South African novels on urban and rural themes, he highlights the importance of the remapping of social space. The Khulumani support group's play 'The story I am about to tell', 'He left quietly' by Duma Kumalo as well as the Handspring Puppet Company's 'Ubu and the Truth Commission' are the plays that, according to Graham, are post-apartheid works that should be 'a new roadmap'.<sup>784</sup> At the very least, he proposes these as a minimum 'a repertoire of social-cartographic tools' that can be used to produce different spaces.<sup>785</sup> The use of space and the disconnections within the theatre space are key features of these plays. Along with the plays, he also

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<sup>782</sup> Adichie CN 'The danger of a single story' on 86 available at [http://ngl.cengage.com/21centuryreading/resources/sites/default/files/B3\\_TG\\_AT7\\_0.pdf](http://ngl.cengage.com/21centuryreading/resources/sites/default/files/B3_TG_AT7_0.pdf) accessed November 2016.

<sup>783</sup> Adichie CN 'The danger of a single story' on 86 available at [http://ngl.cengage.com/21centuryreading/resources/sites/default/files/B3\\_TG\\_AT7\\_0.pdf](http://ngl.cengage.com/21centuryreading/resources/sites/default/files/B3_TG_AT7_0.pdf) accessed November 2016.

<sup>784</sup> Graham S *Mapping Loss: South Africa after the Truth commission* 2009 on 9.

<sup>785</sup> Graham S *Mapping Loss: South Africa after the Truth commission* 2009 on 9.

discusses the urban novels of Dangor,<sup>786</sup> Vladislavić,<sup>787</sup> Mpe,<sup>788</sup> Duiker<sup>789</sup> and Hassim.<sup>790</sup> He describes these works as having the ability to reconfigure certain modes of special mapping in that the works record the movement of city inhabitants through spaces over time while describing the physical spaces and built environment of the city. A map of loss is not simply a representation or a model that purports to correspond with reality.<sup>791</sup> It shows both the fixed locations in space and the trajectories through time-space and is therefore simultaneously a tracing and a map. South Africa's negotiated legal revolution inaugurated not only a change in the physical landscape, but also in the social landscape. This requires new forms of literal and figurative mapping, in literature as in law.<sup>792</sup> Graham's point of departure is that colonisation, modernisation, and apartheid all ruptured the connections between places and people in South Africa.<sup>793</sup> Viewing the law as palimpsest acknowledges the impact of law on places and spaces over time.

A map of loss must be a palimpsest. If mapping in legal culture envisions a form of mapping that corresponds with a view of space as abstract and disconnected to time, it runs the risk of becoming another form of formalist error. Viewing space as palimpsest and mapping loss require the connection of space and time and therefore to Massey's 'space-time' and Bakhtin's 'chronotope' as covered in section 2.8 above.

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<sup>786</sup> Dangor A *Bitter Fruit* 2001 Kwela books: Cape Town, Graham *Mapping Loss: South Africa after the Truth commission* 2009 on 94-102.

<sup>787</sup> Vladislavić I *The Exploded View* 2004 Random House: Johannesburg, Graham *Mapping Loss: South Africa after the Truth commission* 2009 on 103-119. Although Vladislavić writes mainly about Johannesburg, he was born in Pretoria and some of his earlier short stories are set in Pretoria. Particularly the anthology *Flashback hotel* 2010 contains several city of Tshwane/ Pretoria stories: 'The prime Minister is dead' takes place in Verwoerdburg (now Centurion) and follows the procession of the body of Hendrik Verwoerd into Pretoria, 'We came to the monument' gives voice to statues and freezes in the Voortrekker Monument and 'Propaganda by Monuments' is a story of a Restaurant owner in Atteridgeville who orders a massive monument of Lenin from Russia. These stories deserve further exploration in the continuation of this project.

<sup>788</sup> Mpe P *Welcome to our Hillbrow* 2001, Graham S *Mapping Loss: South Africa after the Truth Commission* 2009 on 114-119.

<sup>789</sup> Duiker S *Thirteen Cents* 2000, Graham S *Mapping Loss: South Africa after the Truth commission* 2009 on 120-126.

<sup>790</sup> Hassim A *The Lotus People* 2002, Graham S *Mapping Loss: South Africa after the Truth commission* 2009 on 127-132

<sup>791</sup> Graham S *Mapping Loss: South Africa after the Truth Commission* 2009 on 182.

<sup>792</sup> Graham S *Mapping Loss: South Africa after the Truth Commission* 2009 on 1-12.

<sup>793</sup> Graham S *Mapping Loss: South Africa after the Truth Commission* on 5.

Towards a conclusion of this chapter, through a work of literature I want to look at and question the symbolic value of names. Noviolet Bulawayo's novel *We Need New Names* starts with a gang of young children looting guavas in an affluent suburb in Zimbabwe.<sup>794</sup> The children, on the other hand, live in an informal settlement, 'the shacks', called Paradise, where the nearby hill on which lengthy church sermons and rituals are conducted, is called Heavenway. As readers get to know the members of the gang they learn that Chipo, a very young teenage girl, is pregnant. The giving and changing of names is a central theme. 'Country game' is a game that the children play by turning patches of dirt into countries by naming.<sup>795</sup> Each member of the gang can claim a piece of land, name it and then has to defend it as if it is America or South Africa. Some patches are of course more wanted than others and the object of the game is to obtain/ name and successfully defend more of these desirable countries than the other players. Another significant aspect around names in the book is when Chipo names her new-born baby Darling, the narrator and one of the members of the gang who by the time the baby is born had moved to live with her aunt in America.<sup>796</sup> The girls in the gang decide that Chipo will die from giving birth because she is too young and therefore they offer to save her life by performing an abortion. One of the members of the gang, Sbho, insists that they need new names to perform the task.<sup>797</sup> She suggests that they should use the names of the doctors on E.R; a TV show she once saw on a TV in Harare. Dr. Cutter, Dr Roz and Dr. Bullet are promptly assigned and they realise that it works just like country game. MotherLove, a matronly figure of Paradise, arrives on the scene and puts a stop to the abortion before it can start.<sup>798</sup> Chipo, herself still a child, has to carry the child. When she gives birth, she does not die, but survives and gives birth to a girl. With Bulawayo's title, I can just underscore how important and simultaneously painful new names are. Naming assigns power; over the country and over the body. That Chipo's child is named after Darling does not erase or correct the fact that she was raped and had to give birth to the child, but instead it establishes an unlikely interrelation across the borders of Zimbabwe and America.

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<sup>794</sup> Bulawayo N *We Need New Names* 2013.

<sup>795</sup> Bulawayo N *We Need New Names* 2013 on 42-57.

<sup>796</sup> Bulawayo N *We Need New Names* 2013 on 210: 'Darling is Chipo's daughter; they claimed they decided to name her after me so there would be another Darling in case something happened to me in America'.

<sup>797</sup> Bulawayo N *We Need New Names* 2013 on 78-88.

<sup>798</sup> Bulawayo N *We Need New Names* 2013 on 86.



### **3.5. Conclusion**

The street name cases in the high court as well as in the constitutional court form the basis of this chapter. This case raises the question of belonging. Massey's understanding of a sense of place guides the direction of the ideas that I express here. I start with the cases heard in the North Gauteng high court and show how an idea of place as fixed formed the foundation of the findings in these cases. Next I discuss the judgments in the constitutional court and even though I welcome the emphasis on belonging in the majority judgment, I caution against the broad strokes with which the judgment paints place, which runs the risk of again fixing place, albeit in a different way. From the findings in the court case I explore the idea of belonging from different theoretical vantage points: as a culture of place, in terms of the phenomenological concept of *genius loci*, and as a fluid understanding of home. I also draw on three novels to illustrate this contingent view of belonging. The case of *Hattingh v Juta* looks at belonging within a context of law that privileges ownership over family life. The street name case presents an interesting instance of mapping. Mapping is a form of place making, but it is also an exercise of power. The rise and power of cartography illustrate how lines are drawn and calls for lines to be drawn differently. In this regard art and literature heavily influences my ideas on mapping and place-making. A novel has the final say on the need for new names.

The production and reproduction of space as unequal social relationship through law have severe impacts on one's a sense of belonging. The street names cases in the city of Tshwane/ Pretoria engages with and expose the gaps in belonging in the city. Sense of belonging is connected to a spirit of place. Mapping and the drawing of lines simultaneously foster and foreclose a sense of belonging in the city. Mapping tentatively, by drawing lines of flight, challenges mapping as a way of fixing place. Related to this rogue urbanism, as a form of mapping African cities, contribute to a different and much needed sense of belonging in cities. Art and literature critically engage with law's approach to space as abstract in order shape belonging differently and consciously in post-Apartheid South Africa.

In the next chapter, I look at the grand narratives that (also) draw and map the city of Tshwane/ Pretoria and draw specific attention to the layers of lines that constitute the lawscape.

## Chapter 4

### Grand narratives in the Capital City



A picture showing the lawscape: Church Square with the towering figure of Paul Kruger, which has been freshly fenced.

(Photograph taken during summer 2016).

'The facetious question, therefore, whether the law dictates the city or the city dictates the law is to be answered with a stentorian circularity'.<sup>799</sup>

#### **4.1. Introduction**

The overarching problem that this project addresses is the relationship between space and law. This is not a relation that is swiftly severed when the law that produced spaces subside. Instead there is an endurance of law through the spaces that it created. This final substantive chapter is situated in the lawscape and is as such based on the idea and concept on the mutual interaction between the law and the city. In this chapter my focus falls specifically on the city of Tshwane/ Pretoria as administrative capital and

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<sup>799</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 9. He refers to a similar question posed by David Harvey in *Harvey D Spaces of Hope* 2000 Edinburgh University Press: Edinburgh. Harvey formulates the question with society instead of law, i.e. whether society dictates the city or the city society.

what this legal function, of meticulous bureaucratic processes, contribute to the lawscape. As administrative capital the lawscape is marked by grand narratives, grand gestures, overt displays of power and more subtle exercises of power through policy and administrative processes. The central research question of this chapter concerns the way in which the administrative function of law in the city of Tshwane/ Pretoria has over time shaped the lawscape and how there is a continuing reproduction of space. I focus on different time-spaces in the capital city. I start with the colonial and apartheid time-space and answer the research question by drawing from the lawscape of Pretoria as a site of political trials, and executions. I also look at the cluster of acts that orchestrated dispossession and spatial violence and turn to the sanitation syndrome as it played out in colonial and apartheid Pretoria and can still be discerned in the present-day city of Tshwane/ Pretoria. I then look at current-day grand narratives in the post-Apartheid city by looking at the *Tshwane 2055* policy and the state of the city addresses of the former mayor, Kgosietso Ramakgopa. After touching on the sheer spatial injustices that have written this capital city into being, I turn to the key concepts in spatial justice. Towards the end of the chapter, the linkages between the administrative function of the law, the city and the endurance of the lawscape is connected to the idea of legal culture and the continuation (reproduction) of a formalistic legal culture. I conclude the chapter by critically looking at the possible dangers of further continuation of formalism and positivism through the (new) lens of spatial justice.

## **4.2. Bio-power and the lawscape**

### **4.2.1. The lawscape**

The significance of the concept lawscape, as opposed to law and space, is the tautological nature thereof. Philippopoulos-Mihalopoulos explains that the ‘and’ of the title *Law and the City* does not institute a continuum between the law and the city, but it rather opens the law up to the city.<sup>800</sup> He continues that the ‘and’ is an indication of how ‘the two have always-already been co-extensive’ while on the other hand the ‘and’

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<sup>800</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 8.

also bears the responsibility of inscribing difference between the law and the city.<sup>801</sup> This is the lawscape, he writes: 'neither a tautology, nor a simple disciplinary coincidence, lawscape is the ever-receding horizon of prior invitation by the one to be conditioned by the other'.<sup>802</sup>

The lawscape initiates a discussion on how the city appropriates the law and the law the city. This relationship between the law and the city builds on the intellectual heritages of Law and Geography, Law and Space, Law and Architecture and surely also on what Le Roux has described as the Aesthetic Turn in South African post-apartheid jurisprudence. An edited collection of essays around the interaction between law and the city brings together various 'vantage points', most notably feminism,<sup>803</sup> bio-politics and aesthetics.<sup>804</sup> The lawscape can be placed within a feminist understanding and use of urban space because of its possibility to encompass 'specifically gendered sexual reality'. This possibility lies within the way in which feminism has explored the relationship between 'space, place, bodies and the law' within a broader identity project that questions the 'prioritisation of the male, the mind the public domain, time and reality' in an attempt to bring forward their relation with 'the female, the body, the private, space and the imaginary'. Understanding the law-city relationship from a bio-political vantage point presents the opportunity of understanding it through a 'phenomenology of urban movement', a 'sensualisation of the quotidianity of law', a 'legal mapping of sexuality', a 'criminological analysis of space', or an exploration of the 'cognitive unconscious'.<sup>805</sup> The lawscape as aesthetic engagement offers the possibilities brought about by situationists (the likes of Guy Debord, Lefebvre and others) highlighting the relation between 'the urban, the legal and the political'.<sup>806</sup>

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<sup>801</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 7-8: 'In the receding circularity of the lawscape' we find both the 'performativity of the legal meaning of space' and the 'spatial meaning of the law'.

<sup>802</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 8.

<sup>803</sup> The concept draws on feminists explorations of the body, the female, space and the imaginary in a way that questions the 'prioritisation of the male, the mind the public domain, time and reality' in an attempt to bring forward their relation with 'the female, the body, the private, space and the imaginary'. See Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 7.

<sup>804</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 5.

<sup>805</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 5.

<sup>806</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 5.

There is a shift of emphasis in this last chapter; from the radical geographers in chapter 2 and the mainly phenomenological and literary exploration in chapter 3 to the lawscape from a bio-political point of view. This chapter does not however stand on its own and therefore draws from and incorporates many of the concepts covered in the previous two chapters, such as *genius loci*, relationality and spatial continuation. The bio-political angle is therefore precisely that: merely an angle of approach and not a wholesale shift in the project to a Foucauldian understanding of the lawscape.

#### 4.2.2. Bio-politics and heterotopias

The sovereign in classical times was marked by its power over life and death.<sup>807</sup> This power was never an absolute power, but rather legitimised by the need for the sovereign to survive. Life could be taken from those who placed the sovereign in danger (as punishment), or lives could be offered in protecting the sovereign (waging wars).<sup>808</sup> The power over life and death therefore lay in the right to kill or not to kill. Foucault's argument is that since classical times these mechanisms of power in the West has undergone transformation and the power over life and death now encompasses life-administering powers. The point of departure that the sovereign must kill to live remained a strategy of the state. In a bio-political conception it is no longer the juridical existence of the sovereign but the biological existence of the population at stake. In the lawscape of the administrative capital we see the power over life and death through the mechanisms of law in the colonial and apartheid Pretoria as well as in contemporary city of Tshwane. It is evident in the exercise to kill or not to kill as illustrated through the political trials and capital punishment, but new mechanisms of power can also be discerned in the bio-political control through the sanitation syndrome, clean-up missions and the grand narratives of development and increased power.

Bio-politics is not the only Foucauldian rubric that serves as an angle of approach for this chapter. He also attempts to establish how it came about that space is associated with 'the dead, the fixed, the undialectical, the immobile' and time on the other hand is

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<sup>807</sup> Rabinow P (ed.) *The Foucault Reader: An Introduction to Foucault's Thought* on 258.

<sup>808</sup> Rabinow P (ed.) *The Foucault Reader: An Introduction to Foucault's Thought* on 258.

attributed with as 'richness, fecundity, life, dialectic'.<sup>809</sup> In Foucault's 1967 lecture, he explained that the view of history as linear and culminating to a climax (ever-accumulating) was the preoccupation of the nineteenth century and claimed that the 'essential mythological resources' of that century was found in thermodynamics' second principle.<sup>810</sup> One of the traits of earlier times is that science and philosophy and law used to be much closer and influenced one another more directly as mathematicians and scientists were often also jurists or philosophers and the very strict distinctions did not stand yet. Thermodynamics has four principles of physics that describe how temperature, energy and entropy behave under various circumstances.<sup>811</sup> The second principle, which Foucault refers to, deals with thermal equilibrium or the state of maximum entropy (also referred to as chaos). According to this principle any isolated system that is not in thermal equilibrium, i.e. has not reached maximum entropy, will always naturally evolve towards a condition of thermal equilibrium (or maximum chaos). This law presents a linear understanding of time and embodies the notion of historical progression that was popular especially after the French, industrial and scientific revolutions.<sup>812</sup> The principle also underscores the fact that natural processes cannot be reversed and it leads to an idea of an ultimate state of homogeneity in matter and energy within space. Even though this principle applies to thermal systems, for Foucault it had a mythical quality in terms of space and time. He suggests that during the nineteenth century space was only seen as a vessel in which history took place.<sup>813</sup> What marks the epoch of space is that the world is not experienced as 'a long life developing through time', but rather that it is seen as a 'network that connects points and intersects with its own skein'.<sup>814</sup> But apart from the shift of focus from time to space, Foucault also proposes a specific mode in which time and space interact in this epoch of simultaneity and of interconnectedness. The fourth

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<sup>809</sup> Rabinow P (ed.) *The Foucault Reader: An Introduction to Foucault's Thought* on 70.

<sup>810</sup> Foucault M 'Of Other Spaces Utopias and Heterotopias' (transl.) Miskowiec Jay *Architecture /Mouvement/ Continuité* October 1984 on 1.

<sup>811</sup> The zero<sup>th</sup> law of Thermodynamics states that where two systems are in thermal equilibrium with a third system, then the two systems are also in thermal equilibrium with one another. The first law of thermodynamics determines that as heat flows through a system, the internal energy changes because of the principle of conservation of energy. The third law states that as the temperature of a pure substance in thermodynamic equilibrium approaches zero, the entropy of that pure substance also approaches zero, where entropy is often a measure of disorder and refers to the number of ways in which a thermodynamic system may be arranged.

<sup>812</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 32.

<sup>813</sup> Tally R *Spatiality: The New Critical Idiom* 2013 on 30.

<sup>814</sup> Foucault M 'Of Other Spaces Utopias and Heterotopias' (transl.) Miskowiec Jay *Architecture /Mouvement/ Continuité* October 1984 on 1.

claim in his address entails that heterotopias are usually linked to slices in time, which slices in time he calls heterochronies.<sup>815</sup> When one looks into a mirror, the mirror is a utopia, a place without place,<sup>816</sup> because you can see yourself in a place where you are not, a place from which you are absent. But, Foucault continues, the mirror is also heterotopic in the sense that the mirror really exists and reconstitutes oneself in a different place.<sup>817</sup> Heterotopias can be described as ‘simultaneously mythic and real contestation[s] of the space in which we live’.<sup>818</sup> These heterotopias open onto heterochronies, and these pairs are structured in a rather complex manner. Museums and libraries are examples of ‘heterotopias of indefinitely accumulating time’ with the concept of gathering or accumulating time in one place a distinct feature of modernity.<sup>819</sup> Heterotopias that are not aimed at the eternal, but that are rather temporal link to ‘time in its most flowing, transitory, precarious aspect, to time in the mode of the festival’.<sup>820</sup> And then, more and more these two combine in heterotopias: festival time and eternal time, vacation villages aimed at taking one back to how things were before capture the coming-together of these two heterochronies.<sup>821</sup>

Pretoria is the administrative capital of South Africa and because of a high concentration of government officials, state functionaries and bureaucratic bodies, a

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<sup>815</sup> Foucault M ‘Of Other Spaces Utopias and Heterotopias’ (transl.) Miskowiec Jay *Architecture /Mouvement/ Continuité* October 1984 on 6.

<sup>816</sup> ‘Utopias are sites with no real place. They are sites that have a general relation of direct or inverted analogy with the real space of Society.’ Foucault M ‘Of Other Spaces Utopias and Heterotopias’ (transl.) Miskowiec Jay *Architecture /Mouvement/ Continuité* October 1984 on 4.

<sup>817</sup> Foucault M ‘Of Other Spaces Utopias and Heterotopias’ (transl.) Miskowiec Jay *Architecture /Mouvement/ Continuité* October 1984 on 4.

<sup>818</sup> Foucault M ‘Of Other Spaces Utopias and Heterotopias’ (transl.) Miskowiec Jay *Architecture /Mouvement/ Continuité* October 1984 on 4. He distinguishes between crisis heterotopias (honeymoons and boarding schools – for individuals in ‘crises’) and deviation heterotopias (prisons, old age homes, psychiatric institutions).

<sup>819</sup> ‘...whereas in the seventeenth century, even at the end of the century, museums and libraries were the expression of an individual choice. By contrast, the idea of accumulating everything, of establishing a sort of general archive, the will to enclose in one place all times, all epochs, all forms, all tastes, the idea of constituting a place of all times that is itself outside of time and inaccessible to its ravages, the project of organizing in this way a sort of perpetual and indefinite accumulation of time in an immobile place, this whole idea belongs to our modernity.’ Foucault M ‘Of Other Spaces Utopias and Heterotopias’ (transl.) Miskowiec Jay *Architecture /Mouvement/ Continuité* October 1984 on 4.

<sup>820</sup> ‘Such, for example, are the fairgrounds, these marvellous empty sites on the outskirts of cities that teem once or twice a year with stands, displays, heteroclitic objects, wrestlers, snakewomen, fortune-tellers, and so forth.’ Foucault M ‘Of Other Spaces: Utopias and Heterotopias’ (transl.) Miskowiec Jay *Architecture /Mouvement/ Continuité* October 1984 on 7.

<sup>821</sup> Foucault M ‘Of Other Spaces Utopias and Heterotopias’ (transl.) Miskowiec Jay *Architecture /Mouvement/ Continuité* October 1984 on 7. Foucault specifically cites ‘Polynesian villages that offer a compact three weeks of primitive and eternal nudity to the inhabitants of the cities.



biopolitical understanding of the lawscape suitably frames Pretoria's lawscape. For Philippopoulos-Mihalopoulos, an understanding of the law-city relationship from a biopolitical vantage point presents the opportunity of understanding it through 'a phenomenology of urban movement... a sensualisation of the quotidianity of law... a legal mapping of sexuality... a criminological analysis of space, or an exploration of the "cognitive unconscious"'.<sup>822</sup> Pretoria is the capital of administration and bureaucratic functioning of government as well as the capital of executions. Both of these attributes are represented in a biopolitical perspective and therefore also present in the lawscape. Foucault illustrates the ways in which architecture and law are intertwined and the ways in which the city's construction, its buildings, monuments and lay-out constructs both the nature and the behaviour of the subject.<sup>823</sup> As examples of this control over the nature and behaviour of the subject, Philippopoulos-Mihalopoulos directs our attention to law's obsession with naming, categorising, organising and tidying. These activities are revealed in the city's social and spatial working order. On the other hand, the city's 'multi-polarity and social differentiation' assist in highlighting law's material side: its relation to violence in the sense of its force of application.<sup>824</sup>

[T]he city reveals, palimpsestically (i.e. by burying the old under new layers) its fractured, conflictual and piecemeal nature. The practical question, ultimately, is how to see through these layers and acquire a sense of spatialised history of the manifestations of the law...<sup>825</sup>

The lawscape calls for recognition of the layered nature of law and city. These layers capture the ostensible breaks and underlying continuities and it engages the ghosts in the lawscape. In a literal sense it is haunted by the memories of those sentenced to death and executed in the Pretoria prison. In the lexicon of the lawscape it is haunted by the old buried under new layers in a palimpsestic manner. The layers are not necessarily visible at first glance, but are revealed in references and representations. Many other political trials form the layers in the lawscape of Pretoria, leaving behind traces that will be re-called, re-membered and re-deployed in ways that neither the law nor city has anticipated. Reflecting on the legacies of these remainders, Catherine Cole quotes H el ene Cixous:

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<sup>822</sup> Philippopoulos-Mihalopoulos *A Law and the City* 2007 on 5.

<sup>823</sup> Foucault M *Discipline and Punish: The Birth of the Prison* (transl.) Sheridan A 1991 Penguin: London.

<sup>824</sup> Philippopoulos-Mihalopoulos 2007 at 8.

<sup>825</sup> Philippopoulos-Mihalopoulos *Law and the City* 2007 at 10.

And before June 12, 1964, there was November 7, 1962. And before November 7, 1962, there was March 21 1960, and before the day in Sharpeville and before and before there was December 1952, and before the trial for treason there was 1948, and before the infamous apartheid laws there were so many before. And Nelson was born July 1919. And afterward there was Wednesday June 16 1976. And after the day of Soweto, there was September 1977. And after the death of Steve Biko, there had been ....<sup>826</sup>

Most of these dates can be mapped out on the lawscape of Pretoria. 134 political prisoners walked the 52 steps to the gallows at Pretoria central, now Kgosi Mampuru II Prison, they walked the steps and were silenced by the apartheid government. capital punishment, but also by the city of capital and privilege very well. The question is how these ghosts in the lawscape still haunt the city of Tshwane/ Pretoria. To answer this question more fully I now turn to different time-spaces.

The road to Pretoria was the road to political trials and executions. Most executions were carried out in Pretoria Central Prison. The city had to serve as a symbol of the exercise of state power. How much of this image has remained in the administrative capital? The city of Tshwane/ Pretoria has layers, just like any other city. These layers exist together, simultaneously producing the current-day space and social relations within the city. Despite Massey's critique of the palimpsest that it is too archaeological and denies the coexistence of the coeval,<sup>827</sup> I persist with the metaphor of the palimpsest. Even though it might not accommodate the coevalness of Pretoria and Johannesburg and their different trajectories, the palimpsest presents an accurate framework for interrogating what has been erased and what has been written.

I start with the layered lawscape of Tshwane/ Pretoria and delve into its colonial and apartheid history. How did political trials contribute to and shape the lawscape? What role did it play that most of the political executions took place in Pretoria? Two poems capture the *genius loci* of Pretoria as city of capital punishment, but also city of capital and privilege very well. I start with these two poems, then look at an article by Bernstein on one of the women on death row (the only female political prisoner). Still looking at

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<sup>826</sup> Cixous H 'The parting of the cake' in Derrida J and Tlili M *For Mandela* 1987 on 213 as quoted in Cole CM *Performing South Africa's Truth Commission: Stages of Transition* 2010 on 28.

<sup>827</sup> See a thorough discussion of this critique of Massey in section 2.5.4 above.

the layers of the city I turn to the sanitation syndrome in the lawscape; during colonialism, apartheid and present-day Tshwane/ Pretoria. I then move on to the post-Apartheid lawscape and look at two grand narratives; that of *Tshwane 2055* and the state of the city addresses by Kgosientso Ramkgopa during his last years of office. The last three sections of the chapter cover three aspects: firstly, the way in which a theory of spatial justice address these continuing exercises of power over life and death, secondly, how legal culture forms part of the spatial reproduction covered in chapters 2-4 and thirdly, the possible gaps or dangers in the spatial turn in law?.

### **4.3. Apartheid and colonial master narratives: a cluster of acts, political trials, capital punishment, the sanitation syndrome**

South Africa's history is marked by the unequal organisation and production of spaces by law. The geographical and built-environment stories of South African are stories of social control through segregation along racial and linguistic lines. Sachs specifically refers to the *Prevention of Illegal Squatting Act* passed in 1951.<sup>828</sup> By referring to the cluster of statutes he invokes the ghosts of a carefully crafted web of space-regulating legislation. If we were to give content to Sachs's cluster, we can start with the *Natives Land Act* of 1913, one of the foundational pieces of legislation in the project of spatial division. Before 1913, the 1905 *General Pass Regulations Bill* and the *Asiatic Registration Act* of 1906 inaugurated the notorious pass system and set the tone for social control. The journey from 1913 to the National Party's victory in 1948 includes the following legislation landmarks: the *Natives in Urban Areas Bill* of 1918 that introduced forced removals to 'locations', the 1923 *Urban Areas Act* that brought about residential segregation and the *Native Administration Act* of 1927 that complemented the *Native Lands Act*. The *Asiatic Land Tenure Bill* of 1946 banned any land sales to Indians. This cluster represents more than just names and dates. If we view the post-apartheid society as palimpsest, our spatial memory has many layers of foundations and these acts all contributed to the encoding of a particular socio-spatial memory. The National Party's success in the whites-only 1948 election was the beginning of a

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<sup>828</sup> 'In the pre-democratic era, the response of the law to a situation like the present would have been simple and drastic. In terms of the *Prevention of Illegal Squatting Act* 52 of 1951 (PISA), the only question for decision would have been whether the occupation of the land was unlawful. Expulsion from land of people referred to as squatters was, accordingly, accomplished through the criminal and not the civil courts, and as a matter of public rather than of private law.' *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at par 8.

deepened process of racial segregation and spatial determination.<sup>829</sup> At the core of this intensified project were the *Population Registration Act* and the *Group Areas Act*, both passed in 1950. This era also saw the passing of the 1953 *Separate Amenities Act*, which changed public spaces such as beaches and parks into exclusive spaces for 'whites only'.<sup>830</sup>

People were not only located according to how they were classified, but were also classified according to their location, resulting in clear links between identity and space.: for example, a 'native' was defined by the *General Law Amendment Act* 102 of 1967 to include someone legally living in a location. As discussed earlier, 'location' carried a specific meaning and was defined as follows in the *Black Administration Act* 38 of 1927:

Location means and includes:

- a) any area reserved or kept aside for common ownership by Blacks;
- b) any area (except a municipal location) set aside or reserved and made available for the ownership by blacks;
- c) land obtained by Blacks to be owned by their tribe
- d) any area declared as a location by the Governor-general for purposes of this act.

This definition was later changed by *Demolition of Race-Based Land Arrangements Act* 108 of 1991. Despite this act and all the others that demolished and repealed apartheid and colonial legislation, something remained in the spaces of South Africa.

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<sup>829</sup> For a broader discussion of the legislation passed by the National Party, see Graham S *South African Literature after the Truth Commission* 2009 on 4-8. In 1905 the *General Pass Regulations Bill* deprived all black people of the right to vote, it limited people to fixed areas and initiated the notorious pass system. In 1906 followed the *Asiatic Registration Act* requiring all Indians to register and carry passes. The *Native Land Act* was passed in 1913 and prevented all black people, from buying land outside designated 'reserves' (the Act made an exception for black people living in the Cape). The aim of the *Natives in Urban Areas Bill* of 1918 was to restrict black people to reside in 'locations', the *Urban Areas Act* passed in 1923 introduced separate residential areas for white and black people and this act also ensured cheap labour for the benefit of white people who led the industry. The British Crown enacted the *Native Administration Act* of 1927, which made it, rather than paramount chiefs, the supreme head over all African affairs. Many conferences and seminars were held in 2013 in commemoration of the hundred years of the 1913 *Native Land Act*, which was followed by the *Native Land and Trust Act* passed in 1936, along with the *Representation of Natives Act* in the same year. This act targeted the voter's roll of the Cape and removed all previous black voters from it. Another piece in the puzzle, was an act that made any land sales to Indian people illegal, it was the *Asiatic Land Tenure Bill* of 1946, it was one of the first acts to be passed by the Jan Smuts government, which lost the 1948 election to the National Party.

<sup>830</sup> This section has been published in Beukes E, De Villiers I and Van Marle K 'Memory, Space and Gender: Re-Imagining the Law' *South African Public Law* 2012 27 559-574.

The social relations produced by the spaces reproduced the same spaces. The spirit of the unjust laws lingers and haunts our spatial landscape even after colonialism and after the end of formal apartheid.

#### 4.3.1. Political trials

The lawscape presents many different points of view from which to consider the law and the city, both separately and collectively. I focus on two aspects of the lawscape: its interaction with aesthetics and its insistence on the city and the law as palimpsests. Though the overarching theme here is the spatial dimension of the political trial and its relationship with the city, this section also considers the geometric space of the courtroom and the architectural designs and external settings of Pretoria's lawscape: the old Synagogue, the Palace of Justice, the church square and other scenes of significance.<sup>831</sup> Central to these considerations is the question of the political trial as place, as opposed to space, as resistance. I expand on this distinction and its importance below.

In using the lawscape as an explanatory framework for understanding the relationship between Pretoria as city, as Pitoli,<sup>832</sup> and as Tshwane,<sup>833</sup> and the Rivonia trial, this section moves beyond the physical space of the courtroom to the meta-level political space produced and enabled by the strategic encounter between the city and its political trials. The following questions shape this section: How did Pretoria and Rivonia reciprocally shape and inform each other? In other words, what did these trials contribute to the lawscape of Pretoria and what role did Pretoria's cityscape play in our understanding of these trials?

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<sup>831</sup> Also see section 2.7.1. Chronotope as timespace and courts as chronotopes.

<sup>832</sup> *Siyaya ePitoli* is an important struggle slogan meaning 'We are marching to Pretoria' and signifying all the petitioning marches to the Union Buildings in Pretoria. See *State of the capital city address* by the executive mayor of Tshwane, councillor Kgosientso Ramokgopa on 3 April 2014 at 1:1 'At the height of our peoples' final march to freedom, they sang a song that rallied all behind a call to go to Pretoria – they sang 'Siyaya ePitoli' – 'We are going to Pretoria'. Theirs was not only an announcement of an eminent arrival in Pretoria – it was also a declaration of their path to power and their state of readiness to govern, and it had to start in Pretoria – the capital of apartheid South Africa'.

<sup>833</sup> The name of the city is the subject of on-going debates. As things currently stand, the broader metropolitan area is called 'Tshwane', while the central business district is (still) referred to as 'Pretoria'. Throughout this thesis I use the term 'city of Tshwane/ Pretoria'. In this section 'Pretoria' (only) is used in some instances where the references relate to the city before 1994 (and before the process of the name-change).

The courtroom as space is not simply an empty receptacle within which trials merely take place, it is not a vacuum for the characters involved in the trial to simply perform their roles within the trial. Instead, the trial is a space with a character itself and this character shapes and is shaped by the broader lawscape, in turn formed by the character of the city within which the court is placed. In the case of the Rivonia trial it is the character of Pretoria. The characteristics of cities are marked by spatial inertia, and Pretoria is no exception as the descriptions of the Pretoria lawscape above show. Therefore, resistance in the lawscape more often takes the shape of resistance to change than resistance understood as an opposition to the status quo. But, since the lawscape is not only the influence of the city on the law, but also the impact of the law on the city, the alternative truth heard during political trials get taken up in the lawscape, haunt the city and reciprocate the city's resistance to change to form a lawscape within which competing lines of resistance co-exist.

The Rivonia trial represents a watershed moment in South Africa's struggle for freedom and democracy. Named after a Johannesburg suburb that once served as 'the nerve centre of the liberation movement' where leading members of uMkhonto we Sizwe were arrested, Rivonia entered the South African popular consciousness as a significant moment that laid the foundation for a 'free and democratic society.' In the words of Lord Joel Joffe, it is 'the trial that changed South Africa'.

Even though the accused were arrested on Liliesleaf farm in Johannesburg, currently an award winning state of the art heritage site dedicated to the commemoration of South Africa's long march to freedom<sup>834</sup>, the trial did not take place in Johannesburg. Both the Treason Trial and the Rivonia trial took place in Pretoria,<sup>835</sup> as did several other important apartheid era political trials.<sup>836</sup> As apartheid's capital city, the city of

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<sup>834</sup> <http://www.liliesleaf.co.za/> accessed June 2014.

<sup>835</sup> Subsequent use of the term 'treason trial' refer to this trial from 1956 to 1961. The trial is formally reported as *Regina v Farid Adams and Others*. Because of the length of the trial and a re-indictment in 1959, many of the initially accused were acquitted during the course of the trial.

<sup>836</sup> As well as in post-apartheid South Africa, as Le Roux's contribution to the conference on the Rivonia trial pointed out. The conference, *The Rivonia Trial 50 Years On: the Courtroom as a Space of Resistance*, took place at the University of Pretoria 18-19 June 2013. Le Roux's paper was entitled 'Democracy and architectural dissonance: The Palace of Justice from the Rivonia to the Boeremag trial (1963–2003)', and focused on the architecture of the Palace of Justice. He drew specific attention to the significance of Mandela's placement (position) in the court when he delivered his

both executions and civil servants, Pretoria represents a palimpsest that carries the traces of its complex relationship with the political trials of that period. Drawing on Philippopoulos-Mihalopoulos's formulation of the notion of 'lawscape', I want to investigate the uncanny relationship between the Rivonia trial and the lawscape of Pretoria. According to Philippopoulos-Mihalopoulos, the city is law's greatest testing ground, 'its loudspeaker and its gaming table' – the biopolitical relationship between law and the city illustrates a uniquely spatial dimension of juridical power. Following this spatial reading of law and the legal domain, I want to explore the simultaneously repressive and productive relationship between the Rivonia trial and the lawscape of Pretoria.<sup>837</sup>

My central argument in this section is that the lawscape of Pretoria shaped the outcome of the Rivonia trial and that the Rivonia trial, along with other political trials, influenced the lawscape of the administrative capital. The notion of the city as palimpsest presents one way of capturing the tautology of the term lawscape. Through the palimpsestic layers of the past and the uncanny I explore how the city of Pretoria was (as it still is) haunted by other political trials which contributed to a certain legal culture and influenced the Rivonia trial in a certain way. The Rivonia trial in turn also haunts the subsequent cases decided in the city and therefore forms part of Pretoria's lawscape.

The function of the Rivonia trial court, according to Justice Quartus de Wet, was to 'enforce law and order and to enforce the laws of the state within which it function[ed]'.<sup>838</sup> Upon reflection, the role of the Rivonia trial was, as is the case of most political trials, much broader than what Justice De Wet expressed in his judgment

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speech not from the witness stand, but from the dock. Le Roux drew links between the Rivonia trial and the more recent Boeremag trial, also a treason trial that was heard in the Palace of Justice. Twenty of the members of the Boeremag (a group of far-right white Afrikaner men who, amongst other things, planned the assassination of then President Nelson Mandela and planted bombs in Soweto during 2002) were convicted of treason and sentenced in October 2013. Sentences ranged from 5-30 years. <https://mg.co.za/article/2013-10-23-boeremag-members-to-be-sentenced/> (accessed 3 March 2017).

<sup>837</sup> Philippopoulos-Mihalopoulos *A Law and the City* 2007 on 9.

<sup>838</sup> 'Remarks in Passing Sentence' In the supreme court of South Africa (Transvaal Provincial Division) Before: The Honourable Mr Justice De Wet, Judge President. In the matter of: *The State vs. Nelson Mandela and Others*. 12<sup>th</sup> June 1964. Transcript sourced from Rivonia Trial Collection, Historical Papers, University of the Witwatersrand, Johannesburg.

fifty years ago. In the case of political trials the role of the trial court is particularly complex. As Martti Koskenniemi points out, political trials are caught up in a paradox: in order to convey an undisputed truth, the accused should not be allowed the opportunity to speak, since allowing the accused to deliver his version of events will inevitably present a challenge to the truth that the trial started out to present.<sup>839</sup> This is a paradox because silencing the revolutionary truth of the accused, which will necessarily relativise the prosecutor's version and the accused's guilt, will turn the trial into a show trial.<sup>840</sup> This tension of the political trial opens up a possibility of the courtroom as space of resistance.

A recent example of this mapping of history can be found in the Afrikaans film *Verraaiers (Traitors)* released in 2013 and coinciding with the fifty-year commemoration of the Rivonia trial. It tells the story of a father, his son and two sons in law accused of high treason during the Anglo Boer war. The film is based on the book *Boereverraaier* by Albert Blake, a lawyer in Roodepoort.<sup>841</sup> The opening scene presents the delivery of judgment in a 1953 treason trial in the Palace of Justice in Pretoria and the film closes with a scene in Church Square, opposite the court. In between it tells the story of the trials and executions of so-called traitors during the Anglo Boer war in temporary make-shift military courts during the first years of the 1900's. A commander convinces his sons to lay down their weapons in the face of the scorched earth strategy. Despite the fact that Blake clearly argues that retrospective arguments claiming that the conduct of the traitors was justifiable, is speculative and historically incorrect, the film succeeds in getting the viewer to sympathise and side with the traitors against the legal and court systems of the time.<sup>842</sup> It manages to

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<sup>839</sup> Koskenniemi M 'Between Impunity and Show Trial', in Frowein JA and Wolfrum R (eds.) *Max Planck Yearbook of United Nations Law* 2002 6 Kluwer Law International: Netherlands on 35. With reference to the context of the Milosevic trial in The Hague, that international criminal law switches between the aim to punish individuals who are responsible for large-scale harms against humanity and the 'danger of becoming a show trial' on 1.

<sup>840</sup> Koskenniemi M, 'Between Impunity and Show Trial' 2002 at 35.

<sup>841</sup> Blake A *Boereverraaier: Teregstellings tydens die Anglo-Boereoorlog* 2010.

<sup>842</sup> Blake A *Boereverraaier: Teregstellings tydens die Anglo-Boereoorlog* 2010 on 11. In this respect both the book and the film can be seen as nostalgic renditions of the executions of Boer war traitors. Blake rekindles the Afrikaner sentiment that was set on fighting for Republics they believed were theirs, and the film romanticises the circumstances under which these executions took place. Nonetheless, both sources present valuable accounts of the Pretoria lawscape and the haunting effect that these hearings and executions had on the South African legal system.



convey the complexity of the decision to withdraw from a war that (apparently) had been lost already and the ambivalence of the term traitor.

Although the film raises interesting questions on the theme of war, for purposes of this piece I am interested in the opening and closing scenes of the film and the way in which these scenes invoke the Pretoria lawscape. Both these scenes are filmed in Church square. The fact that this film was released to coincide with the fiftieth year after the Rivonia trial is uncanny in itself specifically because the film explicitly avoids and accordingly denies this coincidence. It engages with themes of resistance to power, treason and sabotage, but as a period film escapes any inter-textual references to the Rivonia trial. One is tempted to follow the references in the film and see how they relate to the lawscape of Pretoria and more broadly South Africa. However, what is troubling about the film is the attempt to present its theme in a vacuum, as if to avoid political trials subsequent to those during the Anglo-Boer war. In respect of the amnesia of the Anglo-Boer war trials, Blake asserts that even though the detail of the treason killings during this time have been forgotten, the legacy of the treason is still deeply engrained in the psyche of the Afrikaner, and definitely was during the years of apartheid.<sup>843</sup> He aims to counter this ostensible blankness of the treason hearings during the Anglo-Boer war and gives an account from the point of view of law by elaborating on the legal principles, based on Roman Dutch law, that were used to prosecute the traitors during the Anglo-Boer war.<sup>844</sup>

These principles were subtly woven into the South African lawscape and remains. The indictment in the Rivonia trial was mainly based on contravention of specific acts in legislation,<sup>845</sup> but Justice de Wet made several references to common law in the final judgment.<sup>846</sup> The judge also relied on the case of *Mouton and Others v. Beket*, 1918

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<sup>843</sup> A *Boereverraaier: Teregstellings tydens die Anglo-Boereoorlog* 2010 on 8.

<sup>844</sup> See Chapter 16 on 231- 246 of Blake A *Boereverraaier: Teregstellings tydens die Anglo-Boereoorlog* 2010.

<sup>845</sup> The Act allowing 90 days' detention without trial was passed just before the commencement of the Rivonia trial. Count 1 and 2 were sabotage in contravention of Section 21(1) of Act No.76 of 1962, count 3 was the Contravention of section 11(a), read with sections 1 and 12, of Act No. 44 of 1950, and count 4 the contravention of section 3(1)(b), read with section 2, of Act No. 8 of 1953.

<sup>846</sup> The basis of liability of a *socius criminis* in our law is laid down in *Rex v. Peerkhan and Laloo*, 1906 T.S. 798 at p. 802 as follows: '...The true rule seems...to be that the common law principles which regulate the criminal liability of persons other than acts of perpetrators should apply in the case of statutory as well as of common law offences...' In *Rex v. Longone*, 1938 A.D. 532 at page 537: '...The requirement of knowledge is important because it supplies the *mens rea* – the guilty mind –

A.D. 181 and specifically the common law principle on page 192 of this judgment, which concerned a Vecht-Generaal during a rebellion. He relied on this case to reach the conclusion that Nelson Mandela, since he ‘was one of the leaders of the Umkonto’<sup>847</sup> and because he ‘had set certain machinery in motion’,<sup>848</sup> was found guilty even though he was serving jail time when some of the alleged offenses were committed.<sup>849</sup> Justice De Wet acknowledged Mandela’s presence in spirit. The notion of haunting should not be seen as merely temporal, but rather the uncanny and ghostly appearances should be situated within space as well as time. Hilda Bernstein’s novel *The World that Was Ours* and Troup invoke the ease of exercising control in Pretoria as one of the reasons that political trials were held in Pretoria and not Johannesburg, and the sheer proximity of the gallows to the courtroom added to the Pretoria panopticon, haunting the trial as a presence and a constant unspoken threat.

The edited collection *Popular Ghosts* aims to re-establish the balance between space and time in everyday hauntology.<sup>850</sup> The editors remind us of the specificity of ghosts, meaning that they appear in a particular place at a particular time. Arno Meteling’s chapter, ‘*Genius Loci*: Memory, media, and the Neo-Gothic in Georg Klein and Elfreide Jelenik’ explores the value of the concept of *genius loci*, or spirit of place, for conceptualising ideas on haunting that places haunting in space and time. Meteling connects *genius loci*, theatre and the uncanny through the medieval technique of ‘mnemonics’. The most important feature or image of mnemonics is the ‘method of loci’ also called ‘memory palace’ or ‘theatre of memory’. These theatres, Meteling explains, organize and help to remember things by putting the images of memories in certain imaginary storage rooms, thus giving mental spaces discrete addresses

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required for criminal responsibility. ...when [the accused] is charged as a *socius* in a crime the extent of his criminal responsibility must be judged by his own *mens rea*. This is clear from the case of *Rex v. Parry* 1924 A.D. 402 [at] page 406; ‘The true position is that though such a *socius* is equally guilty his guilt results from his own act and his own state of mind. It is the existence of criminal intent in each of those who jointly committed a crime which entails on each a criminal responsibility.’ *The State v Nelson Mandela* Judgment on 67. Available from the electronic Rivonia Trial Collection, number AD1844, item number A31.2.

<sup>847</sup> *The State v Nelson Mandela* Judgment on 37.

<sup>848</sup> *The State v Nelson Mandela* Judgment on 38.

<sup>849</sup> *The State v Nelson Mandela* Judgment on 37-38.

<sup>850</sup> See in general the introduction to Del Pilar Blanco M and Peeren E *Popular Ghosts: the Haunted Spaces of Everyday Culture* 2010, specifically on xi where the editors argue that Derrida’s *Spectres of Marx* acknowledges only the temporal aspect of ghosts.

(*loci*).<sup>851</sup> In order to retrieve the facts, the memory artist only has to walk through the imaginary palace or theatre and look where the different objects, persons, or events are deposited. Ideally, everything remembered is unified in a single, complex memory building. Semeiotically these mental memory spaces can be read as haunted spaces, inhabited by the ghosts or imaginary representations of the referential objects, persons or events.<sup>852</sup>

Anthony Vidler gives an account of the notion of haunted spaces in his book *The Architectural Uncanny* and links the possibility of the uncanny to theatre.<sup>853</sup> Apart from the theatrical role of architecture, the uncanny is also present in a more analogical way that demonstrates a 'disquieting slippage between what seems homely and what is definitively unhomely'.<sup>854</sup> He explains how the uncanny found its first home in the short stories of Hoffman and Poe and that Walter Benjamin later noted that the uncanny was also born out of the rise of great cities. Part of the *genius loci* or spirit of place is the fact that it was used as a military hospital for British troops during the Anglo-Boer war at the beginning of the 20th century.<sup>855</sup>

The opening scene of the film *Verraaiers* shows a clerk of the court stomping through the columns of the Palace of Justice. The date is apparently 1953. The court orderly knocks on the door of a Judge, who is busy preparing for the delivery of judgment in a high treason case. The judgment he reads out loud is actually an excerpt from the case of *R v Leibbrandt & Others* 1944 AD 253 where the court had to establish what constituted treason. Leibbrandt was a boer rebel who endeavoured to assist the German war effort during World War two and was accused of committing acts of sabotage during wartime that were intended to weaken the resistance of the state. In the *Leibbrandt* case, the Appellate Division quoted with approval the words of Judge Schreiner of the court a quo who remarked as follows:

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<sup>851</sup> Meteling A "'Genius Loci': Memory, media, and the Neo-Gothic in Georg Klein and Elfreide Jelenik' in Del Pilar Blanco M and Peeren E (eds.) *Popular Ghosts* 2010 on 188.

<sup>852</sup> Meteling A "'Genius Loci': Memory, media, and the Neo-Gothic in Georg Klein and Elfreide Jelenik' in Del Pilar Blanco M and Peeren E (eds.) *Popular Ghosts* 2010 on 188.

<sup>853</sup> Vidler A *The architectural uncanny: essays in the modern unhomely* 1992.

<sup>854</sup> Vidler A *The architectural uncanny: essays in the modern unhomely* 1992 on 6.

<sup>855</sup> See section 2.7. Time-space / Space-Time and the Schubart Park case's courts as chronotopes, above.

The typical act of treason, historically, may be the adherence to or the furnishing of aid to a foreign foe, so that in war time it may be stated more directly that any act which is designed to assist the enemy either positively, by giving him help of any kind, or negatively, by obstructing or weakening the forces arrayed against him, is an act of high treason.

The judge in the film, after quoting the above section, continues in Afrikaans:

The honourable motives that persuade an accused to commit a negative act of treason are irrelevant to the determination of guilt, but takes prominence when an appropriate sentence is to be imposed. This makes it difficult to establish an appropriate sentence. Because war is insanity and treason is a broken word.<sup>856</sup>

It is uncertain what the date of 1953 refers to in the film: whether it refers to the treason trials during the fifties in general or whether it, by deliberately not stating which specific trial it has in mind, recalls all the treason trials during apartheid in order to bring it in relation with the Anglo-Boer war treason trials. The same quote from the *Leibbrandt* case features prominently in the Delmas treason trial that took place from 1985 to 1989.<sup>857</sup> The film therefore enters into an inter-textual conversation with this later trial, which took place during the height of the state of emergency. The trial was an attempt to silence the United Democratic Front. The state applied security laws to prosecute more than twenty activists, including the three most senior leaders of the United Democratic Front, namely Popo Molefe, Frank Chikane and Mosiuoa Lekota. The trial, like the Rivonia trial, took place in the Palace of Justice in Church Square. What marked this trial in history is the tragic and disturbing killing spree of Barend Strydom – a former police officer – on the day that judgment was handed down in the Delmas Treason trial. Later known in the media as ‘die wit wolf’, Strydom testified how he was waiting outside of the Palace of Justice where he expected various church leaders, ambassadors, members of the press and the legal representatives and family members to gather for the verdict. Strydom testified that he was looking for ‘someone black to kill’.<sup>858</sup> During his cold-blooded overtly racist quest, he killed eight people and injured another sixteen. Some writers claim that there are parallels between

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<sup>856</sup> Own translation. The last sentence ‘Because war is insanity and treason is a broken word’ forms the leitmotif of the film and displays some of the sentimentality alluded to earlier.

<sup>857</sup> A transcript of this trial can be obtained at [http://www.historicalpapers.wits.ac.za/inventories/inv\\_pdfo/AK2117/AK2117-L05-01-jpeg.pdf](http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AK2117/AK2117-L05-01-jpeg.pdf) (accessed 14 June 2013).

<sup>858</sup> His trial commenced on 15 May 1989.

Leibbrandt's trial and Strydom's trial. Strydom acknowledged Leibbrandt as one of his heroes.<sup>859</sup>

Literary critic and author Jeanette Ferreira in 1989,<sup>860</sup> at the time of the Barend Strydom killings, hinted at links between Strydom's acts and a short story by Eugene Marais. The story was first taken up in a newspaper in 1933 and later published posthumously.<sup>861</sup> In this story, Marais sketches an apocalyptic view of Pretoria and tells the story of Willem, a white Afrikaner, who tells his account of the ecological disaster that hit earth.<sup>862</sup> All the water dries up and Willem is the only person in town to survive this, due to a mountain source that he discovers. After the first rain falls again he starts to make his way back to the deserted Pretoria, where he encounters the only other survivor of the drought: Marie de Lange who lived from a reservoir in the office block in the city where she worked. Like a 'postapocalyptic Adam and Eve, the two of them embarked on a new life together'.<sup>863</sup> Marie is traumatised by, and tells Willem the story of, the killings that happened in Pretoria when the water crisis got worse. The all-white city council killed all the black inhabitants, but died out soon thereafter. One day Willem and Marie wake to the singing of three black men who are walking through the city of Pretoria singing: 'white people where are you, you who have repressed us for so long? We are looking for you all – you who are seeking death.'<sup>864</sup> Marie and Willem decide that they will not share the earth with black people and kill them; ignoring their desperate pleas. Directly after the killing scene the narrator, Willem, withdraws and reflects on the events, he concludes with the following words:

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<sup>859</sup> Marsh R *Famous South African Crimes* 1991 on 106-109.

<sup>860</sup> Ferreira J 'Swartes uitgemoor in Marais se verbeelding' *Vrye Weekblad* 2 June 1989 on 17.

<sup>861</sup> Marais EN. *Keurverhale van Eugène N. Marais*. Johannesburg: Afrikaanse Pers-Boekhandel, 1948.

<sup>862</sup> Visagie A 'The Function of Genocide in Post-Apocalyptic Fiction: "Ondergang Van Die Tweede Wêreld" ("Destruction of the Second World") by Eugène N. Marais (1933)' *English Studies in Africa* 2015.

<sup>863</sup> Visagie A 'The Function of Genocide in Post-Apocalyptic Fiction: "Ondergang Van Die Tweede Wêreld" ("Destruction of the Second World") by Eugène N. Marais (1933)' *English Studies in Africa* 2015 on 100.

<sup>864</sup> Marais EN *Versamelde werke I & II*. Ed. Leon Rousseau 2006 on 941; all translations from Visagie A 'The Function of Genocide in Post-Apocalyptic Fiction: "Ondergang Van Die Tweede Wêreld" ("Destruction of the Second World") by Eugène N. Marais (1933)' *English Studies in Africa* 2015. Original Afrikaans: 'Ek vra, ek vra, waar is julle wit mense almal wat ons so lang, so lank vertrap het? Ons soek julle almal – julle wat die dood soek.'

And now I no longer know if I had seen all of this through the 'periscope' and if it had actually happened. But what does it matter? There is no future; if I had seen it through the Angell instrument or if I had experienced it in actual fact, all amounts to the same thing. All has come to pass already; therefore everything that I have written is true.<sup>865</sup>

Ferreira did not outright state that Marais' story and its main character served as a hero to Strydom, but it does raise serious questions about the sentimental way in which the church square and events around it are venerated in the film *Verraaiers*.

The film, through the imagery of the Palace of Justice and the quote from the Leibbrandt case connects the political trials in the Pretoria lawscape: early Anglo Boer war trials, treason trials under the Union, trials in the new republic and political trials during the last period of the apartheid regime.<sup>866</sup> The film ends with a scene at the base of the statue of Paul Kruger (which is still in Church Square). In the sanitised representation Pretoria resembles the familiar, but the clean and empty church square is so detached from its real image that it becomes an uncanny space that invokes the political images of the Rivonia trial despite the sentimental book-ending.

Bernstein assigns the *genius loci* of Pretoria in those days to the administrative function of the city, the seat of civil service as a 'preserve of Afrikaans speaking whites'. She also mentions the University of Pretoria and the statue of Paul Kruger as factors contributing to the culture of Pretoria. Of Kruger she says: 'In his long-tailed frock-coat and high top-hat, stern and unrelenting, he *is* Pretoria'.<sup>867</sup> If this unrelenting spirit of place is what the lawscape of Pretoria represents and if this is the significance of the fact that the Rivonia trial was held in Pretoria and not in Johannesburg, the question remains: how could the Pretoria lawscape be a space of resistance?

In a chapter titled 'The Pretoria Road', Bernstein captures the symbolic value of the fact that the Rivonia trial took place in Pretoria. The road between Johannesburg and

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<sup>865</sup> Marais EN *Versamelde werke I & II*. Ed. Leon Rousseau 2006 on 942: 'En nou weet ek nie of ek dit alles deur die 'periskoop' gesien het en of dit werklik plaasgevind het nie. Maar wat maak dit saak? Daar is geen toekoms nie; of ek dit deur die Angell-toestel gesien het of werklik beleef het, kom op dieselfde neer. Alles het reeds gebeur; daarom is alles wat ek geskrywe het waar.'

<sup>866</sup> Of which the Delmas trial was one. The bail application of the Delmas trial was reported as *S v Baleka and Others* 1986 (1) SA 361 (T).

<sup>867</sup> Bernstein H *The World that was Ours* 2007 on 170.

Pretoria embodied for her the gradual introduction to a different spatiality. She describes this journey from the city that she considers to be home, to the city that is a threat to her home, through carefully describing the landmarks she passes on the road. Meticulously she records the suburban houses she passes from her house to Louis Botha, the main road to Pretoria at that time. She lists the small industries along the road, tells about the traffic, notes the roadhouses and garages along the way and makes reference to Alexandra Township. The township she sees is one where the population has been reduced by half on account of forced removals, 'the families destroyed, the backyards emptied, the smoke so much thinner, as though even the haze that obscures Alexandra morning and evening has also been 'endorsed out'.<sup>868</sup> Bernstein renders visible the force of the law and the pervasiveness of the destruction along the journey. Her account of Alexandra stands in stark contrast to the country estates of Kelvin and Buccleugh 'where tired Johannesburg businessmen build their luxury homes in acres of grounds'.<sup>869</sup> Later in the book Bernstein describes a different journey on the road to Palapye, a village with a landing strip, as Hilda, Rusty and their children flee out of South Africa.<sup>870</sup> Spaces remember and are sluggish to change and due to spatial inertia, much of Bernstein's description can still be identified on the present Pretoria road.

The Rivonia trial commenced in the Palace of Justice and continued in the old Synagogue. The Synagogue was appropriated by the state and converted into a court for purposes of the treason trial of the 1950s. Judgment was again handed down in the Palace of Justice. The high court in Pretoria consists of two buildings: the Palace of Justice constructed in 1893 and the 'new' high court building across the road built in 1990. The high court building was constructed to accommodate jurisdictional changes in the 1990s. The pilasters and windows on the outside of the Palace of Justice is of a neo-classical style reminiscent of the buildings in Washington DC. The 'new' high court on the other hand, is of modernist typology, like many of the buildings in Pretoria.<sup>871</sup>

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<sup>868</sup> Bernstein H *The World that was Ours* 2007 on 122.

<sup>869</sup> Bernstein H *The World that was Ours* 2007 on 123.

<sup>870</sup> Bernstein H *The World that was Ours* 2007 in Chapter 23 on 364.

<sup>871</sup> See section 2.7.1. Chronotope as timespace and courts as chronotopes above for a discussion of the Palace of Justice.

The Palace of Justice is still used as a court, and connected to the new high court through an underground tunnel. The Old Synagogue however stands empty and desolate as a heritage site awaiting its fate in the project of gentrification of the administrative capital. Fran and Barbara Buntman argue that an inclusive heritage vision for the Synagogue can bring together and shape 'new publics'.<sup>872</sup> They consider how traces of the past inform the history and memory of South Africa. For the Synagogue these traces include its Jewish origins, its use as a court for political trials during apartheid, its bureaucratic decline and finally its abandonment. These traces, according to the authors, require conscious effort to remain embedded in a site where history and memory need to be interpreted. The article sets out a thorough history of the building and dramatic architecture of the court. They argue convincingly with reference to Nelson Mandela's autobiography, various newspaper reports on the Steve Biko inquest, and Mogane Serote's novel *To every Birth in Blood*, that the name of the Old Synagogue stuck even though it was no longer used as Synagogue, but as a court.<sup>873</sup>

This is also evident in another aesthetic element of the Rivonia trial, in the form of Alan Paton's testimony in mitigation of sentence. Paton claimed during his testimony that he was there 'because [he] felt it was [his] duty to come' and also 'because [he was] a lover of [his] country'.<sup>874</sup> During Paton's cross-examination by prosecutor Percy Yutar, Yutar confronted his support of the convicted by asking: 'Did you approve of the bombing of the Old Synagogue, just because it was used as a special criminal court?'<sup>875</sup> To this Paton replied that he did not approve of any bombing whatsoever. The core of his testimony in mitigation was that he associated none of the accused with violent behaviour. This was important because everyone expected that the death penalty would be given in the Rivonia trial.

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<sup>872</sup> Buntman F and Buntman B "Old Synagogue' and Apartheid Court: Constructing a South African Heritage Site' 2010 *South African Historical Journal* 62:1 183-201 at 183.

<sup>873</sup> Buntman F and Buntman B "Old Synagogue' and Apartheid Court: Constructing a South African Heritage Site' 2010 *South African Historical Journal* at 191.

<sup>874</sup> Testimony of Alan Paton, Liberal Party member and author of bestseller *Cry, the Beloved Country*, in mitigation of sentence. Available at <http://law2.umkc.edu/faculty/projects/ftrials/mandela/patonItestimony.html> accessed 20 09 2013.

<sup>875</sup> Even though Yutar refers to the court as the Old Synagogue here, Justice De Wet, on page 33 of the judgment, refers to the same bombing incident, but in the following terms: 'bombing by the Umkhonto organization and that one in Pretoria relating to the special criminal court building also complied with the directions of the Umkhonto organization'.



The city can be seen as law's measure and, vice-versa, the law is the '(in)flexible (un)reliable metallic ruler that makes its presence felt through inches and centimetres of propinquity and distance' in the city.<sup>876</sup> The Rivonia trial, and other political trials, were held in Pretoria for the sake of control, order and security. Hilda Bernstein explains that bringing leading members of the African National Congress to court in Johannesburg would have caused 'tremendous crowds to gather at the courtroom'.<sup>877</sup> This was the case with the treason trial, which commenced in Johannesburg, but was later moved to Pretoria. All the accused in the treason trial were acquitted on 29 March 1961. The court found that the prosecution did not discharge its onus to prove satisfactorily that the policy of the African National Congress was violent. Because of this, all the accused were acquitted and it was unnecessary for the defence to answer to the prosecution's case. Since the prosecution failed in the treason trial because of a lack of evidence of violence, the arrests at Liliesleaf and the documents on operation Mayibuye that were seized during the arrests were key, because the prosecution now had evidence of violent operations planned by uMkhonto. In a way, and this is evident from the narratives and recorded interviews at the Liliesleaf museum, the Rivonia arrests and documents seized during the arrest were exactly what the apartheid state was waiting for. This is ironic in light of the fact that operation Mayibuye was rejected at the meeting that was underway when the accused in the Rivonia trial were interrupted and arrested by the police. In many ways the Rivonia trial was the prosecution's reaction to the failures of the treason trial. The Rivonia trial was held in Pretoria from the start, unlike the treason trial that first started in the Drill Hall in Johannesburg at the beginning of 1957. Both the Drill Hall and the Synagogue in Pretoria were prepared specifically for purposes of this and other political trials.

These special courts, created for the 1956 treason trial, could have been on account of the sheer numbers of the accused and the volumes of evidence used. The response of the prosecutor and the judges in the Synagogue, to the application by the defence for the treason trial to be held in Johannesburg, exposes however a deeper political

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<sup>876</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 9.

<sup>877</sup> 'Even with the ban on gatherings, even with police dogs and the display of military might, people will come – this is the experience of previous political trials.' Bernstein H *The World that was Ours* 2007 on 169.

agenda and another form of spatial engineering by the state. The attack on the venue of the treason trial came in January 1959 after the remaining group of 91 were re-indicted in two separate groups. The defence applied for the trial to be conducted in Johannesburg instead, where all the accused (and the defence counsel) resided. Writing in the third year of the Treason trial, Freda Troup sets out the conditions of the treason trial and also explains the arguments surrounding the moving of the venue.<sup>878</sup> The defence argued that the venue prejudiced the accused on the grounds that the hours spent on travelling was a hardship, they also argued that this affected the time for consultation between the accused and their counsel, and the time spent on commuting reduced the hours available for employment.<sup>879</sup> The prosecution supported its opposition to the application to move the trial by referring to ‘disturbances which occurred in Johannesburg in the early days of the preparatory examination’ and arguing that ‘large cities are ‘nothing short of dynamite’’.<sup>880</sup>

This argument indicates that the city of Johannesburg seemed larger than Pretoria in a more figurative way, which points to the lack of control, surveillance and power to regulate crowds and attendees of the trial in Johannesburg as opposed to Pretoria. It could also allude to the fact that there were more supporters (larger groups) of the African National Congress in the surroundings of Johannesburg than in the much more conservative area of Pretoria.<sup>881</sup> According to population statistics in 1960, Johannesburg’s population was already more than a million, with Pretoria’s population just below half a million. Still, it is interesting that the prosecution did not regard Pretoria as a ‘large city’ for purposes of this argument.

Bernstein captures the difference between Johannesburg and Pretoria (and the resistance of the lawscape) by referring to the geography of the two cities. Pretoria,

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<sup>878</sup> Troup F ‘The Treason Trial – Forever?’ in *Africa South* 1959.

<sup>879</sup> Troup F ‘The Treason Trial – Forever?’ in *Africa South* 1959 on 62.

<sup>880</sup> Troup F ‘The Treason Trial – Forever?’ in *Africa South* 1959 on 62.

<sup>881</sup> Wessel le Roux captures the (current) difference between the two cities in the symbolism of the Union Buildings versus that of the Constitutional Court. The Union buildings were designed by Herbert Baker and are situated on Meintjies Kop in Pretoria. These buildings are still the home of the executive branch of the government of South Africa. Le Roux writes: ‘The [Constitutional Court] complex is not a grand singular object to be appreciated at a distance, as was the dream of the acropolitan Union Building complex, but an urban environment encouraging participation in a street-life.’ Le Roux W ‘From acropolis to Metropolis: the New Constitutional Court Building and South African Street Democracy’ 2001 16 *South African Public Law* 139-168 on 161.

she explains, is like its climate. Whereas the trial would become intrinsically involved with Johannesburg and would not be easily separated from the city, Pretoria would just 'smother' the trial instead of reacting to it.<sup>882</sup> Pretoria's setting in a ring of hills protects it, closes it in and accounts for the warmer climate: 'When Johannesburg is warm, Pretoria is hot. When Johannesburg is hot, Pretoria swelters'.<sup>883</sup> This juxtapositioning of the two cities also appears later in the novel:

From now on for nearly a year I will travel to Pretoria and back at least once a week, usually more, sometimes every day, and come to know every inch of it; outwards from Johannesburg with intense anticipation; back again with flat resignation. It will seem sometimes that a great portion of my life is consumed with the petrol along those forty miles of the road to Pretoria.<sup>884</sup>

Despite the defence's application to move the treason trial (back) to Johannesburg, it ran and ended in the old Synagogue that was converted into a special criminal court in Pretoria. Apart from the treason trial and Rivonia trial the Synagogue also hosted Nelson Mandela's incitement trial in 1962 and the inquest into Steve Biko's death in 1977. The performativity associated with these courtroom spaces echoes in the 'performativity of the legal meaning of space and the spatial meaning of law'.<sup>885</sup> Philippopoulos-Mihalopoulos calls the performativity of the lawscape 'a process of receding collaborative performativity'.<sup>886</sup> This means that the act of naming in the city includes acts of exclusion, categorising, the institution of boundaries and, in the context of the political trial, the act of naming someone guilty or not guilty. All of these acts, seen as part of the lawscape, instantaneously 'name[s], perform[s] and imbue[s] the urban with a universe of legal mythology'.<sup>887</sup> On the other hand, where the lived spatiality of the city relies on these legal mythologies it similarly 'names, performs and imbues law with a universe of urban narrative'.<sup>888</sup> The courtroom (political trial) as space therefore constitutes and becomes the city as space and the resistance of the political trial is both curtailed and made possible by the courtroom/ city. The lawscape as *ou-topos*, a place of no place, is the collective imagination of the law and the city.<sup>889</sup>

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<sup>882</sup> Bernstein H *The World that was Ours* 2007 on 169.

<sup>883</sup> Bernstein H *The World that was Ours* 2007 on 169.

<sup>884</sup> Bernstein H *The World that was Ours* 2007 on 122.

<sup>885</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 10.

<sup>886</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 10.

<sup>887</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 10.

<sup>888</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 10.

<sup>889</sup> In providing an overview of the different chapter contributions, Philippopoulos-Mihalopoulos explains that 'the lawscape is observed from a position of utopia'. See *Law and the City* 2007 on 10-13.

In the next section I explore the imagination of the lawscape through different aesthetic engagements with political trials.

#### 4.3.2. Capital punishment

The death penalty was the expected penalty in the Rivonia trial and all testimony in mitigation of sentence was therefore of extreme importance. The manner in which the past is invoked when referring to the Synagogue by its old name suggests the layered nature of the city: new names are given, new buildings are built, but the old remains in ways that bring to the surface the uncanny and reveal the spirit of place that lingers in the lawscape.

The world that produces and is produced by the political trial is the 'lawscape'. It is an interaction between the city and the law. In the case of the Rivonia trial, it is the interaction between Pretoria, apartheid's capital city and city of executions, and the law. The possibility of resistance in the courtroom as space lies in the way in which the trial resists the lawscape by changing it and contributing to it. The political trial finds itself within the lawscape and yet, it has the ability to change the lawscape. Many refer to the Rivonia trial as the trial that changed the course of South Africa. Even though legal culture is often expressed in terms of continuation or inertia, the political trial can in some ways break with the lawscape in resisting the dominant legal culture or at least presenting a challenge to the lawscape by having a lasting impact on it.

#### Onthoofstad<sup>890</sup>

Van Januarie tot Desember beier  
Kerkklokke brutale aankondigings  
Van 'n gesinkroniseerde bronstigheid.  
O, die klokke dans in die stad.  
Die klepels bons soos bruin vuiste.  
O, dis 'n dansende stad op bene  
Bruin van son en lank van teelt.

#### Capital (punishment) city

From January to December toll  
Church bells brutal announcements  
Of synchronised oestrous ness  
O, the bells dance in the city.  
The clappers like bouncing brown fists  
O, it's a city dancing on legs  
Brown from the sun and long of breeding

<sup>890</sup> Stockenström W *Spieël van water* 1973



En soms op 'n weeksdag, sonop,  
Mag jy lees van 'n spektakeldans  
Wat alles in hom verenig van lus en angs,  
Asof die styfskop van verrukking  
En die styfskop in barensnood  
Paar om aan die dood geboorte te gee  
Soms op 'n weeksdag, sonop.

And sometimes, on a weekday at sunrise  
You might read of a spectacle dance  
That unites all of lust and angst  
As if the contraction of ecstasy  
And the contraction in labour  
Mate to give birth to death  
Sometimes, on a weekday at sunrise

Pretoria<sup>891</sup>

Slaap my vet wit ruspetjie, slaap sag  
Die diender en die dominee hou oor jou die wag  
Daarbuite in die miershope  
wag die swart miertjies vir jou  
Lank lank gelee was die miere 'n groot swart klad  
Nou woon hul wettig in hope reg rondom die stad.  
Slaap rustig, mamma se ruspetjie, slaap sag.

Pretoria

Sleep, my little fat white caterpillar, sleep softly  
The servant and the minister are watching over you  
Outside in anthills  
little black ants are waiting for you  
Long long ago the ants were a big black stain  
Now they live legally in hills right round the city  
Sleep, mommy's little caterpillar, sleep softly.

The first poem tells of how the executions are almost celebrated in the city of Pretoria, as the apartheid government is strengthened through each death. The second poem captures the idea of white privilege that is entrenched through the white enclave of the city with the 'native locations' on the margins. A touching account and exposure of Pretoria as city of capital punishment is captured in the story of Theresa Ramashamola. She was the only woman among forty-four people on death row here in Pretoria in 1988, awaiting execution for overtly political crimes. She was one of a group known as the Sharpeville Six, five men and one woman sentenced to death for the killing (it is alleged) of Khuzwayo Dlamini, a local councillor in Sharpeville. Bernstein asks 'Who will sing for Theresa'.<sup>892</sup> By the time Bernstein wrote the article, Theresa's time had run out. The final appeal to the supreme Court was rejected in December 1987. She was the first woman in South Africa to be sentenced to death for a political crime. But who will sing for Theresa?, asked Bernstein. Men and women always used to be housed in separate prisons.

<sup>891</sup> Stockenström W *Vir die bysiende leser* 1970.

<sup>892</sup> Bernstein H 'Who Will Sing for Theresa' *Feminist Review* No. 29 1988 on 5-9.

Where had she been those two long years since she was sentenced to death? Who was there to keep vigil for her? Would she go to the gallows alone, or would the Pretoria regime broadmindedly lower the sex barriers to permit her to hang with the other five? And if we, the women, are not prepared to raise our voices, to overcome the difficulties of distance, the impediments of isolation, then what voice will there be to cry out for Theresa, and for all those like her who are condemned to die because they demand the right to live?<sup>893</sup>

Bernstein raised these questions in May 1988. After spending four years in prison, on 11 July 1988 – just fifteen hours before they were to be executed – the Sharpeville six were granted an indefinite stay of execution. The fact that Theresa Ramashamola was one of the accused, and the first woman to be sentenced to death for a political offence, drew added attention to the trial. All were eventually released with the amnesty granted to all political prisoners in 1991.

Bernstein recalls the description of Jeremy Cronin, who had to serve seven years in prison after being convicted of 'terrorism'. He described his experience in Pretoria Maximum Security where those condemned to a death sentence are also kept.<sup>894</sup> Those on death row received a notice of the date and time of their execution forty-eight hours before the execution. Executions took place on a Wednesday morning at 7 a.m. sharp. After the note, the singing began and it continued until the time of execution for the full duration of the two-days. It was like a 'vigil kept by those about to be hanged and those still waiting...unbroken for forty-eight hours, sometimes frenetic, sometimes soft'.<sup>895</sup>

Tshwane/ Pretoria is the city of silencing, the city of silences, but also the city of protests and petitions, usually to the Union Buildings. One such a march was the Women's march in 1956 against the extension of the apartheid pass laws to women. The march ended with thirty minutes of complete silence. Lilian Ngoyi initiated this muted half hour. It was a quest for meditating on what kind of society South Africans aspire to live in. Muted signs, such as a 30 minutes' silence, but also the removal of a

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<sup>893</sup> Bernstein H 'Who Will Sing for Theresa' *Feminist Review* No. 29 1988 on 9.

<sup>894</sup> Bernstein recalls the description of Cronin without providing a reference. I gather that it was during a conversation with Cronin that he related this information. Bernstein H 'Who Will Sing for Theresa' *Feminist Review* No. 29 1988 on 9.

<sup>895</sup> Bernstein H 'Who Will Sing for Theresa' *Feminist Review* No. 29 1988 on 9.

monument, or the silences in the testimonies of victims and perpetrators before the South African Truth and Reconciliation Commission of the mid-1990s, are signifiers for many unresolved societal issues. On the other hand, though, many have tried to give expression to the horrors of the apartheid past: there are new streetnames, new monuments have been erected (e.g. the Freedom Park at Salvokop) and many have bravely given words to their experiences under apartheid rule. Both silence and silencing can be the basis for a societal discussion of the past, the present and the future.

The lawscape explores the law's spatiality in which the city is seen as a multiple locality where the law is incorporated in its making and existence while at the same time presenting a 'phenomenon that escapes the dimensionality of geography' and expands to a 'utopian no-place' where law and city are inextricably bound.<sup>896</sup>

As the blind spot of urban reality, utopia offers an interesting vantage point, paradoxically both in (as destination) and out (as critique) of the lawscape, rendering the emplaced observer both aware of the utopian probability and unaware of the utopian impossibility.<sup>897</sup>

If a city can be described as a just city, it means that it is a city that no longer requires law. Similarly, if justice is the utopia of law, then it means that justice no longer needs law and the loss of law signifies law's utopia.<sup>898</sup> In his own contribution to *Law and the City*, Philippopoulos-Mihalopoulos uses the perspective from an aeroplane and the metaphor of landing to capture the title of the chapter 'Brasília: Utopia Postponed'. He argues that where society suspends itself in the form of self-criticism the result is a reaction against itself. This reaction against 'its very self' can manifest as utopia.<sup>899</sup> Looking at the lawscape from the position of utopia reveals some of the blind spots of the city and of law and connects to the lawscape as aesthetic.

The lawscape, as aesthetic engagement, offers the possibilities brought about by the Situationist International in that this approach highlights the relation between 'the

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<sup>896</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 1.

<sup>897</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 11.

<sup>898</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 246-247.

<sup>899</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 247

urban, the legal and the political'.<sup>900</sup> The city presents a visual representation of the materiality of law and illustrates, through its physical and discursive environment, the signifying power of law and its entanglement with violence and strategies of control.<sup>901</sup> The violence, power and control of the city are made visible in the political trial where these displays are an integral part of the proceedings. James Boyd White writes, in the preface to *The Legal Imagination* that 'law makes a world'.<sup>902</sup> In its insistence on law's spatiality, the legal imagination here converges with the lawscape. Herefers to different works of literature to illustrate similarities and differences between lawyers, poets and historians and argues that law's greatest power lies in the coercive aspect of its rhetoric. Language, like law, creates worlds and with reference to Bernstein's novel, I look at this world created by the law and at the world that created the law, i.e. the lawscape.

The account of the treason trial by Troup traces the proceedings by drawing various analogies between the evidence of the treason trial, forms of literature, theatrical imagery.<sup>903</sup> The large cage, Troup writes, which enclosed the accused on the first day of the trial in the Drill Hall gave it elements of fantasy and farcical qualities.<sup>904</sup> The cage was removed after the vehement objections raised by the defence, but the 'theatrical vaudevillian' atmosphere remained.<sup>905</sup> There was a 'clubby cosiness', according to Troup, brought about by the various activities and the strange décor of the Hall: 'deck chairs, correspondence course lectures, cross-words, and knitting through the sessions; and in adjournments: darts, fraternising across the court room and colour bar, choir practice and poker'.<sup>906</sup> The seriousness of the offence and the fact that it carried capital punishment as a sentence cast these close-to carnival components of the trial in a dark shadow that was the injustice of the hearing. The artistic comparisons were continued by 'zealous reporters', who showed that the evidence for the trial from the 10 000 documents submitted and the 2.5 million words delivered during evidence given filled 8000 pages, 'or as much as would be required

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<sup>900</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 7.

<sup>901</sup> Philippopoulos-Mihalopoulos A *Law and the City* 2007 on 8.

<sup>902</sup> See also section 4.4. White JB *The Legal Imagination* 1973 on xiii.

<sup>903</sup> Troup F 'The Treason Trial – Forever?' in *Africa South* 1959 on 57-63.

<sup>904</sup> Troup F 'The Treason Trial – Forever?' in *Africa South* 1959 on 59.

<sup>905</sup> Troup F 'The Treason Trial – Forever?' in *Africa South* 1959 on 59.

<sup>906</sup> Troup F 'The Treason Trial – Forever?' in *Africa South* 1959 on 59- 61.



by 33 novels'.<sup>907</sup> Troup writes that the recorded evidence would have taken 35 hours to listen to – or the length of 15 full-length films.

These comparisons to literature and films are striking, but not surprising. The magnitude of the hearing captured the imaginations of those who endeavoured to describe the scale of it. It was unprecedented in size and because of this, Troup argues, writers had to revert to the realm of fiction and art to capture it.<sup>908</sup> From the records and responses it appears however that the judges, prosecutors and witnesses for the state remained unmoved by the theatrical elements and that it illustrated something of the inability of the law to imagine, and exposes the politics of law in political trials.

Bernstein highlights the link between politics and law and the relationship between the law and space as she describes the raid immediately after the arrests on Liliesleaf farm.

Our house in Regent street, Observatory, Johannesburg had been altered to suit our needs fourteen years before when we moved in: ... The front door and sidelights were glazed with ribbed glass through which forms could be seen and even identified; it opened directly into our living room without the intervention of a passage or hall – we had removed the wall between... before the Nationalists had come to power when circumstances had not yet made us aware that political conditions could dictate architectural needs. What the house really needed now was a high surrounding wall and a locked and solid gate; windows with sills above head level, none overlooking the entrance area; an entrance hall completely detached from the house; and an incinerator.<sup>909</sup>

Bernstein's description of their house in the quotation above effectively explains how the law seeped into and shaped private spaces during apartheid. The flip side is also important: the manner in which space, spatial codes and spatial configurations shaped (and still shape) the law. The photographs, stage productions and books that followed in the wake of the Rivonia trial aesthetically represent the Pretoria lawscape. In 2010 a four hour production of the Rivonia Trial was staged in the state theatre, a few blocks from the Palace of Justice where the trial took place. In 2011 the play ran again, but

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<sup>907</sup> Troup F 'The Treason Trial – Forever?' in *Africa South* 1959 on 59.

<sup>908</sup> Troup F 'The Treason Trial – Forever?' in *Africa South* 1959 on 59.

<sup>909</sup> Bernstein H *The World that was Ours* 2007 on 21-22.

this time it was cut to two and a half hours to, in the words of the director, 'allow for the drama to unravel itself only through the eyes of the witnesses and that of Winnie Mandela, Albertina Sisulu and Hilda Bernstein'.<sup>910</sup> Albertina Sisulu received a place in the lawscape recently with name changes that were undertaken to replace street names.

#### **4.3.3. Sanitation syndrome in the lawscape: Lady Selborne, Schubart Park and clean-up missions**

In this part I draw links between the sanitation syndrome that played a large role in the formation of racially segregated colonial cities in South Africa at the end of the nineteenth century and the rhetoric around 'world-class' cities that dominates the formation of South Africa's administrative capital today. I focus closely on the sanitation syndrome, how it produced colonial cities and how this syndrome still produces the urban spaces in South Africa.

During colonial rule, public health concerns were used to justify the removal of African, Asian and Indian inhabitants from the white city centre. What the smallpox epidemic of 1882 and 1883, the bubonic plague of 1900 and influenza of 1918 all have in common is the way in which they served as the basis for legal instruments that sanctioned racial segregation in urban areas. These measures, which had the tendency at the time to associate 'natives' with unhealthy and unsanitary conditions, were unfounded. Racist segregation laws were backed by justifications based on health concerns. These preconceived associations on which urban segregation took place, were set forth in the legislation of the Union of South Africa. An example of this is the *Public Health Act 36 of 1919*.

Presently, the same metaphoric power of sanitation is employed in the service of removing the poor from the city and granting the right to the city only to those who can afford its high price. Businesses, investors and their preferences rule the imaginary of the city planners who are at the helm of policy in the city of Tshwane. This can be seen both in the case of Schubart Park and also in the numerous 'clean-sweep' operations executed in the city centre. Robert Home in the *Routledge Handbook on Cities of the*

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<sup>910</sup> Programme of *Rivonia Trial Back by Popular Demand* 2011.

*Global South* investigates the symbolic nature of sanitation and its link to racialised urban planning practices.<sup>911</sup> He relies on the genealogical method of Foucault to understand how institutions, practices and discourses evolve within their specific places, and maps a genealogy of the colonial city.<sup>912</sup>

I look in particular at how the sanitation syndrome it featured, in the creation and demolition of Lady Selbourne. Thereafter I turn to present-day city of Tshwane and the way in which the sanitation syndrome as metaphor still lives on in the imaginary of city planners and municipal officials. I also argue that this mode of viewing the city leads to ‘places-without-place’ and precludes a certain sense of belonging in the city, which by extension constitutes a denial of the right to the city. I focus on the role that cleanliness played in the justification that the city gave for the eviction of the members of Schubart Park and also at the operation of the metaphor of sanitation in the various ‘clean-up’ missions around the city of Pretoria and Gauteng. It seems as if the imagery of urban sanitation cannot be directly associated with racial segregation, but operates in furthering the city’s economic and capitalist spatial politics, as the projects are all clearly levelled at the poor in the city. Given the demographics of South Africa however, and the continuation of poverty along certain racial lines, these operations still has an effect of segregating and excluding on the basis of race and the victims of the city’s anti-poor policies are predominantly black. Maserole Christine Kgari-Masondo draws the link between the Lady Selborne removals in Pretoria in the 1961 by the apartheid government and the strategies underlying the formation of Ndabeni in the Cape Colony in 1901.<sup>913</sup> I concede that the provision of sanitation services is central to the question of what can be considered dignified living and the lack of literal provision of these services contribute to the intersected and layered nature of poverty and precarious living. My interest however is in sanitation as colonial metaphor and the extent to which it created a discourse around city planning that reverberates in current-day rejuvenation projects and ‘city-clean-up’ missions.

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<sup>911</sup> Home R ‘Shaping Cities of the Global South: Legal Histories of Planning and Colonialism’ in Parnell S and Oldfield S (eds.) *The Routledge Handbook on Cities of the Global South* 2014 75-85.

<sup>912</sup> Home R ‘Shaping Cities of the Global South: Legal Histories of Planning and Colonialism’ in Parnell S and Oldfield S (eds.) *The Routledge Handbook on Cities of the Global South* 2014 on 75.

<sup>913</sup> Kgari-Masondo MC ‘A home makes one Motho – the idea of “Humanness”: “Home” and “History” in Lady Selborne’s forced removals, circa 1905 to 1977’ *Historia* 532 2008 70-97 and Kgari-Masondo MC ‘The usable past and socio-environmental justice: From Lady Selborne to Ga-Rankuwa’ *New Contree* 66 July 2013 71-96.

Carlos Vainer, in the *Routledge Handbook on Cities of the Global South*,<sup>914</sup> investigates how coloniality and broad histories of power have shaped what is considered 'best practice' currently in urban design. He reiterates the well-known argument that city planning is political. Vainer shows how colonialism influenced the training of urban planners in a way that enabled the reinvention of cities. It liberated planners from the 'competitive planning models and urban marketing that dream of making metropolises on the capitalist periphery into 'global cities', or, as is it is now fashionable to say, 'world-class cities''.<sup>915</sup> He shows how places and spaces have been built and conceptualised based on imported examples. The colonial project included the building of the coloniser's idea of a town in a newly conquered area in the form of new settlements in open territories or displacing existing towns by superimposing new models upon existing frameworks. Importantly he shows how this process initially started out under pretexts of beautifying and was initially about an art or a style, but with the turn to hygiene the 'modern' town was initiated and old neighbourhoods were demolished to make way for 'wide boulevards of a clean, disciplined and disciplinary town with sanitation'.<sup>916</sup> With reference to the French missions in Rio de Janeiro in the nineteenth century, he shows how the project initially was in the hands of architects and landscape designers. With the rising influence of Haussman and his reconstruction of Paris, the project shifted to that of town planning and increasingly focused on structure, control and the separation and division required for these purposes.<sup>917</sup>

Several theoretical frameworks inform Home's contribution on the sanitation syndrome in Parnell and Oldfield's *The Routledge Handbook on Cities of the Global South*. He relies on the genealogical method of Foucault to understand how institutions, practices

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<sup>914</sup> Vainer C 'Disseminating 'Best Practice'. The coloniality of urban knowledge and city models' in Parnell S and Oldfield S (eds.) *The Routledge Handbook on Cities of the Global South* 2014.

<sup>915</sup> Vainer C 'Disseminating 'Best Practice'. The coloniality of urban knowledge and city models' in Parnell S and Oldfield S (eds.) *The Routledge Handbook on Cities of the Global South* 2014 on 48.

<sup>916</sup> Vainer C 'Disseminating 'Best Practice'. The coloniality of urban knowledge and city models' in Parnell S and Oldfield S (eds.) *The Routledge Handbook on Cities of the Global South* 2014 on 48.

<sup>917</sup> Vainer C 'Disseminating 'Best Practice'. The coloniality of urban knowledge and city models' in Parnell S and Oldfield S (eds.) *The Routledge Handbook on Cities of the Global South* 2014 on 48.

and discourses evolve within their specific places.<sup>918</sup> Furthermore he shows how the urban space can be viewed as ‘negotiated from below’ by using subaltern theories and the concept of the ‘gaze of power’ with reliance on the work of Mitchell 1989, Myers 2003, and Yeoh 2003. I am particularly interested in his reliance on the re-reading of Foucault as done by Golder and Fitzpatrick 2009 that identifies law as ‘one of the modalities of power’. In doing this Home maps a genealogy of the colonial city. Colonial cities were initially created for the exclusive use of the colonisers. When the secretary of the British colonies expressed his concern in 1913 over the possible racial discrimination in the new settler colony in Kenya, the local British officers justified it with the following words:

Behind this stilted bureaucratic language lies perhaps the most striking difference between colonial cities of the south and cities of the north: the attempt of colonialists to keep these towns for themselves by excluding the indigenous peoples as much as possible. Physical separation of the ‘races’ became ‘a general rubric of sanitary administration set by the Imperial government for all tropical colonies in this period’.<sup>919</sup>

It is this link between segregation and city planning and how it connects to the metaphor of sanitation that is of particular interest to me. The sanitation syndrome provided a justification of the separation of inhabitants based on a fear for the spread of malaria, the plague and other illnesses. The recommendation to create building-free areas around European-only residences came from Dr William Simpson, a prominent doctor during the 1890s and a professor at the New London School of Hygiene and Tropical Medicine who became infamous for blaming the ‘dirty native’ and ‘Asians’ for causing various illnesses.<sup>920</sup> The co-incidence of the perception of sanitation and separation can be seen in the calculation of the size of these build-free-areas which marginally exceeded the distance that the average mosquito was deemed

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<sup>918</sup> Home R ‘Shaping Cities of the Global South: Legal Histories of Planning and Colonialism’ 2014 on in Parnell S and Oldfield S (eds.) *The Routledge Handbook on Cities of the Global South* 2014 on 75.

<sup>919</sup> Dumett RE ‘The Campaign Against Malaria and the Expansion of Scientific, Medical and Sanitary Services in British West Africa, 1898–1910’ *African Historical Studies* 1968 I: 153–97 on 171, as referenced in Home R ‘Shaping Cities of the Global South: Legal Histories of Planning and Colonialism’ in Parnell S and Oldfield S (eds.) *The Routledge Handbook on Cities of the Global South* 2014.

<sup>920</sup> Home R ‘Shaping Cities of the Global South: Legal Histories of Planning and Colonialism’ in Parnell S and Oldfield S (eds.) *The Routledge Handbook on Cities of the Global South* 2014 on 80.

to be able to fly.<sup>921</sup> This meticulous, yet bizarre and often unfounded, obsession with health, or at least what was deemed to be health, echoes the sanitary order proclaimed by the formal legal system in the way in which it juxtaposes itself against a more robust, rogue and unpredictable sphinx. This illustrates the exercise of power through the creation of order and the claim to sanitation, improvement.

Home draws from a 1977 article by Maynard Swanson on the effect of the metaphor of infectious diseases in the creation of colonial towns.<sup>922</sup> Central to Swanson's article is the argument that the years around 1900 in South Africa were marked by public authorities and medical administrators who were devoted to the powerful 'imagery of infectious disease as a societal metaphor', connected to this imagery were the attitudes towards race held by both the British and South Africans. This metaphor of disease greatly influenced the policies and led to the segregation laws of that period.<sup>923</sup> What I show is how this metaphor is still at work in present day South African cities and can be detected in the various injustices conducted under the guise of a 'cleaning-up' drive in the city of Tswane. Through Swanson's text it becomes clear how the sanitation syndrome formed an ostensible contradicting, but ultimately close bond with the need for and primacy of cheap labour to be close to city. Although from different angles, both of these aspects played a crucial role in the development of locations and mentality around cities that are prevalent today. Swanson looks at the notions of public health and infectious disease as 'societal metaphors' and investigates the link between these concepts and segregation in South Africa's cities.<sup>924</sup> He argues that the creation of locations in the years between 1900 and 1904 can be attributed to the bubonic plague and the mass-removal of Africans from the city-centres on the advice of medical officers and other government authorities. He also shows how the response to the outbreak of smallpox had a similar segregating effect on the white and black populations of South African cities in the early years of the twentieth century. The emergent policy in respect to cities from the 1890's in South Africa was cemented

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<sup>921</sup> Home R 'Shaping Cities of the Global South: Legal Histories of Planning and Colonialism' in Parnell S and Oldfield S (eds.) *The Routledge Handbook on Cities of the Global South* 2014 on 80.

<sup>922</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 13(3) on 387–410.

<sup>923</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 13(3) on 387.

<sup>924</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 410.

into legislation and administration by the bubonic plague episode, specifically in the Cape Colony. Emergency provisions were put in place and legislation governing health issues relied on to justify the hasty establishment of locations. Swanson refers to Cape Town and Port Elizabeth and the respective locations of Ndabeni and New Brighton respectively to illustrate how this process took place, but also how practical and human issues frustrated the processes of location. The loss of property rights were resisted by a black middle class who insisted on social mobility and legal independence, this was particularly evident in Port Elizabeth where peri-urban settlements that were independent emerged.<sup>925</sup>

In Port Elizabeth the situation was a bit harder since there were many peri-urban settlements and administrators and politicians operated within 'an administrative and legal quagmire'.<sup>926</sup> In these areas the white employers and the black migrants were reluctant to accept the locations that were structured and built around the concept of quarantine. But, as Swanson points out, it was the 'sanitation syndrome' that drew parallels between black urban settlements and public health hazards, between the working and living conditions of black migrants in the city to health risks. These parallels ultimately came to dominate the official and administrative imagination of the day and 'buttressed a desire to achieve positive social controls, and confirmed or rationalized white race prejudice with a popular imagery of medical menace'.<sup>927</sup> Swanson furthermore highlights the continuation of this tendency established in the 1890s and the way in which these same logics were applied to the influenza epidemic of 1918 and at the time when policies for the Union were set down pre and post the First World War.<sup>928</sup>

From the 1870s there was a growing tendency in Natal and Transvaal to use the anxiety over smallpox, bubonic plague and cholera as a rational basis for the

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<sup>925</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 410.

<sup>926</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 410.

<sup>927</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 410.

<sup>928</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 410.

segregation of Africans and also of Indians in locations under the control of municipal authorities.<sup>929</sup>

In the early 1890s Durban leaders tried again to impose municipal locations upon Indians in order to achieve, in the words of its Mayor, 'the isolation with better hopes of cure of this our social leprosy'.

In Transvaal the sanitation syndrome plays out in the Transvaal Law 5 of 1885, which deprived 'Asiatics' of the right to vote and to own property 'except in such. . . locations as the government for purposes of sanitation shall assign them'.<sup>930</sup> Leyds, who was the State Secretary of Transvaal during the period preceding the Boer War defended this provision by referring to the importance of public health. After the Boer war the administrator of the British, one Sir Godfrey Lagden, in his turn defended this vigorously by stating that 'the lower castes... are as a rule filthy in habit and a menace to the public health'.<sup>931</sup> Swanson looks at the smallpox epidemic of 1882 and 1883, the bubonic plague of 1900 and influenza of 1918 and traces how many of the legal instruments that sanctioned segregation in urban areas were backed by justifications based on health concerns. He also points out that the tendency at the time to associate 'natives' with unhealthy and unsanitary conditions were unfounded. These preconceived associations on which urban segregation took place were set forth in the legislation of the Union of South Africa. Examples of this same modus operandi can be found in the *Public Health Act* 36 of 1919. Its predecessor in the Cape of Good Hope colony, the *Public Health Act* 4 of 1883 provided, for instance, in section 15:

In cases of urgent necessity arising from the prevalence or threatened outbreak in any district of infectious disease... it shall be lawful for the Minister to make and proclaim such regulations to be in force within such districts as may be required to prevent the outbreak, or check the progress of, or eradicate such disease.<sup>932</sup>

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<sup>929</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 391 from Natal Mercury, 24 Mar., 13 Dec. 1870; Durban Mayor's Minutes 1891, and 1870-93 passim.

<sup>930</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 391.

<sup>931</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 391 quoting from Huttenback, Gandhi, 107 ff. and 128; Joshi, Tyranny, 50 ff.

<sup>932</sup> Cape of Good Hope, Acts of Parliament 3741-70.



In a similar vein the 1919 act of the Union determined the powers of the Minister in section 69(1) as follows:

The Minister may make regulations(b) with venereal disease on magistrates, district surgeons and other Government medical or other officers, local authorities, medical officers of health, employers of labour, owners of land on which reside natives or coloured persons, and native chiefs or headmen <sup>933</sup>

Where local authorities are defined in section 7 of the *Public Health Act* of 1919 and includes rural and urban authorities,<sup>934</sup> and urban authorities is furthermore defined as follows:

An urban local authority includes any municipal or borough or town or village council, town board, local hoard, village management board and also any board of management or committee or other body (not being a rural authority) which is constituted in accordance with any law and which under any law is endowed with sanitary powers for safeguarding the health of the inhabitants of its district.<sup>935</sup>

The reaction of the Cape Colony to the plague differed from the response to the smallpox epidemic, because the measures of the public health laws were not to the disposal of authorities. The smallpox epidemic of 1882-1883 first initiated the Public Health Act. But the public health laws of 1883 and 1897 required 'urgent necessity' and the *Native Labour Locations Act* of 1899 only found application in 'private industrial locations'.<sup>936</sup> Many more people passed away from the smallpox in the 1880s than from the 1901 plague and was mostly Malay Capetonians, since there were not many Africans who had settled in the Cape by then.<sup>937</sup> The first response of the government of the Cape Colony to the bubonic plague was to move for a mass removal of all Africans from Cape Town and therefore made haste to create a native location in terms of the Public Health act. This location, called ironically named Uitvlugt, were

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<sup>933</sup> *Public Health Act* 36 of 1919 in s69(1)(b) Union Gazette Extraordinary, 24th June, 1919

<sup>934</sup> Section 7(2) of the *Public Health Act* of 1919 (2) The local authorities are urban local authorities and rural local authorities,

<sup>935</sup> Section 7(3) of the *Public Health Act* of 1919 (2).

<sup>936</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 397.

<sup>937</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 393.

established on a sewage farm on the Cape Flats.<sup>938</sup> The Cape Flats is several miles out of Cape Town and the legacy of this move still remains in the city of Cape Town. This mass removal could not be effected in terms of any other legislation applicable to municipalities at the time. Swanson ascribes the different responses to smallpox and the plague not only to the fact that public health administration and the powers of government had developed from the smallpox epidemic to the plague, but because of 'readiness by the 1900s of Cape authorities to turn to territorial segregation in dealing with the black presence in urban areas'.<sup>939</sup>

Kgari-Masondo,<sup>940</sup> in her work points to the role that the 'health hazard stereotype' played in the forced removals:

The National Party government promised to destroy Lady Selborne, portraying the township as an overpopulated health hazard, and delegated the task to the Pretoria city council, which had already made such a proposal (NAR TES4134, Report of the Departmental Committee, 'Statement embodying particulars and survey of the affairs of Lady Selborne', 1949) - Its argument was essentially that the area was a 'Black Spot', unwanted so close to whites.<sup>941</sup>

The irony is that both the overpopulation and the health hazards can actually be attributed to the city council. Lady Selborne was integrated into the municipal area of Pretoria in 1949. At that time there were approximately 2000 registered properties. Residents complained about the high rates and underdevelopment, but these calls were ignored. At the same time, the prices of properties in Lady Selborne were overstated. These exaggerated prices encouraged the owners of the land to lease out their homes or to build extra rooms for renting, which brought about added overcrowding. The Nationalist government used the conditions to depict Lady

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<sup>938</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' 1977 on 393. Approximately 7000 Africans were moved around this period. Uitvlugt later became known as Ndabeni, which is currently an industrial area in Cape Town. Swanson M.W. 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 at 393.

<sup>939</sup> Swanson MW 'The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–1909' in the *Journal of African History* 1977 on 393.

<sup>940</sup> Kgari-Masondo MC 'A Superstitious Respect for the Soil: Environmental history, social identity and land Ownership: a case study of forced removals from Lady Selborne and their ramifications, c.1905 to 1977'. Dissertation presented for the degree of Doctor of Philosophy in History at the University of Stellenbosch March 2008.

<sup>941</sup> Kgari-Masondo MC 'The usable past and socio-environmental justice: From Lady Selborne to Ga-Rankuwa' *New Contree* 66 July 2013 on 78 referencing Horrell M *The Group Areas Act – Its effects on human beings* 1956 on 48.

Selborne as a location that was a health hazard due to its overpopulation. In essence, the argument of the government at the time entailed that the area was a 'Black Spot', which was undesirable and in too close proximity to the white areas. Health was used as a justification to dispossess the people of Lady Selborne of their land.<sup>942</sup>

What follows is a brief overview of some of the recent clean-up operations in the City of Tshwane as covered in the media. In 2012 the mayor of the City of Tshwane, Kgosietso Ramokgopa, characterised clean-up missions as a necessary evil. His words sound familiar if one considers the motives of the colonial town planners. 'Efforts to clean up Pretoria city centre will be a painful process that must be tackled', he said.<sup>943</sup> In the same interview that he revealed this sentiment regarding the cleaning-up of the city, he also told reporters about Tshwane 2055, a strategic planning document that was in the making at that time and which he saw as a 'long-term strategy... to overthrow 'anarchy' in the capital city'.<sup>944</sup> He accepted the fact that this long term plan would be a 'very painful exercise' and also stated that 'there will be casualties'<sup>945</sup>. It is clear that the casualties he had in mind would be in favour of the rich, he explained: '[w]e want to bring life into the inner city... We want to have some residential character - where people can wine and dine'.<sup>946</sup> This is the nature of current-day cleaning up operations – it is aimed at removing the poor from the city and creating a space for capital and for the rich. This rhetoric of 'bringing people back into the city' while there are many people already in the city is a well-known one, and a clear indication that the city authorities only consider those who are affluent as 'people enough' to be 'brought back into the city'. The mayor's remark in July 2012 was preceded by a report drafted by a project team under the direction of Subesh Pillay,

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<sup>942</sup> Kgari-Masondo Maserole Christina "'A Superstitious Respect for the Soil": Environmental History, Social Identity and Land Ownership: a Case Study of Forced Removals from Lady Selborne and their Ramifications, c.1905 to 1977' 2008 2008 on 140.

<sup>943</sup> 'Cleaning up Pretoria painful – mayor', *News24*, 16 July 2012, accessed at <http://www.news24.com/SouthAfrica/Politics/Cleaning-up-Pretoria-painful-mayor-20120716> on 20 February 2015.

<sup>944</sup> 'Cleaning up Pretoria painful – mayor', *News24*, 16 July 2012, accessed at <http://www.news24.com/SouthAfrica/Politics/Cleaning-up-Pretoria-painful-mayor-20120716> on 20 February 2015.

<sup>945</sup> 'Cleaning up Pretoria painful – mayor', *News24*, 16 July 2012, accessed at <http://www.news24.com/SouthAfrica/Politics/Cleaning-up-Pretoria-painful-mayor-20120716> on 20 February 2015.

<sup>946</sup> 'Cleaning up Pretoria painful – mayor', *News24*, 16 July 2012, accessed at <http://www.news24.com/SouthAfrica/Politics/Cleaning-up-Pretoria-painful-mayor-20120716> on 20 February 2015.

the mayoral committee member for city planning and economic development. According to this report, the city was dominated by vehicles and there should be interventions to make it friendlier for use by pedestrians. Notably, the underlying motivation for increased pedestrian safety was ultimately economically driven. The report claimed that it will lead to 'successful retailing, "as witnessed by the success of pedestrian-friendly shopping malls in other cities and at Menlyn"'.<sup>947</sup> The report said that being able to walk safely and freely in the city was one of the basic requirements for a 'successful urban fabric'.<sup>948</sup> The painful process of cleaning up Pretoria's city centre did not entail the building of more pedestrian walkways, the declaration of some streets as walkways and when the A re Yeng bus service was built, the large-scale building project did not include the building of a bicycle lane, instead the reaction was to target informal traders and informal taxi transport. Again, the city made it clear that their clean-up was aimed at those who are not perceived to contribute to 'successful retail'. In August 2012 the metro police clamped down on informal traders by using rubber bullets and a water cannon. A news report explained the rationale behind this fierce action as follows: 'Hawkers must not hold the city at ransom. The city needs to regulate street trading and they have to work within the framework of the law'.<sup>949</sup> According to the mayor, the plan was to follow the Johannesburg model and move hawkers to other areas 'as part of a plan to clean up the city'.<sup>950</sup> However, in the same report, it becomes clear that the problem is complex and it is not only the informal traders who are contributing to the perceived unsanitary conditions in Marabastad. After a walk-about in Marabastad with the Gauteng Provincial Community Police Board, Andy Mashaile, and local police chiefs, Mashaile stated that '[t]he business community remains anxious and I hope there will be an urgent solution to the dispute with the hawkers. At the same time, there needs to be a clean-up of the city, especially

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<sup>947</sup> Hlahla P 'City cleaning up its inner city act', *Pretoria News*, 21 June 2012 accessed at <http://www.iol.co.za/pretoria-news/city-cleaning-up-its-inner-city-act-1.1324527#.VQKLKY6VluF> on 20 February 2015.

<sup>948</sup> Hlahla P 'City cleaning up its inner city act', *Pretoria News*, 21 June 2012 accessed at <http://www.iol.co.za/pretoria-news/city-cleaning-up-its-inner-city-act-1.1324527#.VQKLKY6VluF> on 20 February 2015.

<sup>949</sup> 'Hawkers must comply with law on street trading' *Pretoria News* 28 August 2012, accessed at <http://www.iol.co.za/pretoria-news/opinion/hawkers-must-comply-with-law-on-street-trading-1.1371140#.VQKLIY6VluF> on 20 February 2015.

<sup>950</sup> 'Hawkers must comply with law on street trading' *Pretoria News* 28 August 2012, accessed at <http://www.iol.co.za/pretoria-news/opinion/hawkers-must-comply-with-law-on-street-trading-1.1371140#.VQKLIY6VluF> on 20 February 2015.

Marabastad'.<sup>951</sup> But the journalist observes how the area has been neglected by the municipality: Street pavements are dirty; there is even sewage flowing in some streets and the stench is simply unbearable. Many buildings and shacks that have been erected pose health and fire risks'. He then shifts his attention to the taxi drivers: 'some taxi drivers are a law unto themselves. They stop and park as they wish'.<sup>952</sup> The question that remains relate to how the cleaning-up project is perceived, and why, when the city is cleaned up, it is only the poor and informal traders who are targeted and removed and not the city that increases its service delivery. One response could rely on the colonial power of the sanitising metaphor and the ability of health issues and clean-up missions to justify the removal of what the city deems 'unwanted elements' from the city, without these people necessarily being the cause of unsanitary conditions or a threat to public health. A perceived threat or metaphorical threat is sufficient for the machinery of law and public administration to target the poor in the formation of the successful world-class city, in the same way that 'Africans', 'Indians' and 'Asians' were targeted in broad categories during the bubonic plague, smallpox and typhoid epidemics in the formation of the colonial city. The process initiated in 2012 encouraged the formation of the Barekisi forum – an association for informal trades in the city of Pretoria and the abuse of the traders by the metro police increased and the informal traders started to protest against the harassment. It reached critical proportions in 2014 when Foster Rivombo, a trader, lost his life during a police raid. 'Rivombo, a vegetable vendor, was shot dead in the city for refusing to hand over his stock to Tshwane Metro police'.<sup>953</sup> In response to this attack the City of Tshwane spokesperson Blessing Manale said he would not describe the conduct of the police 'as heavy handed, it's one of those isolated cases with the metro police where live ammunition is used'.<sup>954</sup> Women vendors in particular highlighted the cruel treatment

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<sup>951</sup> 'Hawkers must comply with law on street trading' *Pretoria News* 28 August 2012, accessed at <http://www.iol.co.za/pretoria-news/opinion/hawkers-must-comply-with-law-on-street-trading-1.1371140#.VQKLIY6VluF> on 20 February 2015.

<sup>952</sup> 'Hawkers must comply with law on street trading' *Pretoria News* 28 August 2012, accessed at <http://www.iol.co.za/pretoria-news/opinion/hawkers-must-comply-with-law-on-street-trading-1.1371140#.VQKLIY6VluF> on 20 February 2015.

<sup>953</sup> Maromo J 'Pretoria hawkers protest against alleged abuse by police' *Mail and Guardian* 17 June 2014.

<sup>954</sup> 'Hawkers demand justice for slain trader' *ENCA* 11 January 2014 accessed at <http://www.enca.com/south-africa/hawkers-demand-justice-slain-trader> on 20 February 2015. See also Cronje M 'Tshwane metro police attack hawkers, confiscate goods' *Mail and Guardian* 10 January 2014.

of the police.<sup>955</sup> Metro police officers confiscated the trading licence of Juliet Ngobeni, one of the women vendors, and ordered her not to trade.<sup>956</sup> In an interview she exclaimed:

The municipal officials inspected my selling spot before they gave me the licence. Now they said they are cleaning the city because the mayor's offices (Pretoria city hall) are going to be close by. I am trying to raise university fees for my child. I am really angry. If I were to see the mayor, I have tough questions for him. [Kgosientso] Ramokgopa has a mother and he should behave like a human.<sup>957</sup>

Similar continuations and hauntings are evident in Post-apartheid grand narratives of the capital city. In the next sections I explore this with reference to the Tshwane 2055 vision and mayoral addresses.

#### **4.4. Post-apartheid grand narratives: Tshwane 2055 and the state of (the) Capital addresses**

##### **4.4.1. Tshwane 2055<sup>958</sup>**

*Tshwane 2055* refers in many instances to the concept of spatial justice and presents the possibility of spatial justice for the City of Tshwane. However, amidst messages of upliftment, rejuvenation and gentrification, the concept of spatial justice is appropriated and co-opted in a larger project of spatial reform along capitalist, neo-liberal lines to the exclusion of the voices of the poor. The Schubart Park project (meaning the city council's many failed unfulfilled plans to ensure that the residents are reinstated in their homes) serves as an example of this, exposing the impossibility of a radical and transformative concept of spatial justice.<sup>959</sup>

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<sup>955</sup> 'Pretoria female vendors allege police harassment' 21 August 2014 accessed at <http://www.news24.com/SouthAfrica/News/Pretoria-female-vendors-allege-police-harassment-20140821> on 20 February 2015.

<sup>956</sup> 'Pretoria female vendors allege police harassment' 21 August 2014 accessed at <http://www.news24.com/SouthAfrica/News/Pretoria-female-vendors-allege-police-harassment-20140821> on 20 February 2015.

<sup>957</sup> Ngobeni is a trader in Minnaar street. 'Pretoria female vendors allege police harassment' 21 August 2014 accessed at <http://www.news24.com/SouthAfrica/News/Pretoria-female-vendors-allege-police-harassment-20140821> on 20 February 2015.

<sup>958</sup> My engagement with the *Tshwane 2055* plan included under this heading has been published in De Villiers I 'Tshwane 2055 and the (Im)possibility of Spatial Justice' *De Jure* 2014 47 202-217.

<sup>959</sup> *Tshwane 2055* on 215 refers to the UN-HABITAT report: 'A[n] UN-HABITAT report indicated that despite government's attempt to address issues of poverty and underdevelopment, South Africa still remains one of the most unequal societies in the world. In most emerging economies, the levels of

*Tshwane 2055* is a policy document consisting of 135 pages. It contains several references to spatial justice and sets out the consultation process that was followed in its making. It envisages collaborative development based on the Freedom Charter slogan: 'The people shall govern'. Furthermore, it acknowledges spatial injustices of the past, the deep divides of the city and the need for 'addressing the needs of the poor first, rather than last'.<sup>960</sup> It states an awareness of how societal fragmentation is usually reflected in the manner in which opportunities and spaces are appropriated, transformed, produced and used. It calls for improved public spaces to enhance cohesion, civic identity and quality of life. These aspects all present the possibility of spatial justice as understood through the theories of Lefebvre and Massey. It acknowledges that unequal relationships produce and are produced by space and takes cognisance of our 'throwntogetherness'. What presents the impossibility of spatial justice in *Tshwane 2055* is not the fact that its implementation will not do justice to its aims. The argument is not that *Tshwane 2055* is a flawless policy, but that it will fail on implementation level. It is not in the future of the policy that the impossibility is lurking, but already in its present and in its past. Instead, spatial justice is an impossibility because of the already existing and underlying inconsistencies between the aims of a 'city of excellence' and spatial justice.<sup>961</sup>

According to *Tshwane 2055* the engagement process commenced immediately after the launch of the *Tshwane 2055* Discussion Document and the stakeholder consultation process started from 31 July. The document claims that this consultation process demonstrated the City of Tshwane's 'commitment to being a progressive developmental metropolitan government capable of being a change partner and leader of society'.<sup>962</sup> However, at the same time that these consultations were taking place, the constitutional court, on 23 August 2012, hear arguments from the City that attempted to justify the eviction of the Schubart Park residents in lieu of any

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inequality have increased in both urban and rural areas, whereas in South Africa the level has increased more in urban areas than rural areas due to urban migration. Thus, while in comparison to other municipal areas in the Gauteng Province the City of Tshwane had the lowest level of poverty at 22% in 2010, it is unacceptably high'.

<sup>960</sup> *Tshwane 2055* on 215

<sup>961</sup> Just like in the Schubart Park case, as set out in chapter 2 above. The claims that there was public participation in the drafting of the *Tshwane 2055* policy did not encompass the involvement of the working class as envisioned by Lefebvre in his right to the city. See 2.3 above.

<sup>962</sup> *Tshwane 2055* on 29.

consultation with the inhabitants. Schubart Park shows how litigation by and within the city echo its policy and exposes the true sentiments of a city.

Similar to the UN's policy and *Joburg 2030*, the *Tshwane 2055* policy presents both the possibility and impossibility of inhabitation and therefore of justice and injustice. It seems as if a vigorous notion of spatial justice sits uncomfortably amidst the language of rejuvenation, gentrification and redevelopment. In their uncritical application and high-level execution, policies that primarily envisage these aims (rejuvenation, gentrification and redevelopment), lead to spatial injustice. This is despite the fact that there are several references to spatial justice in these policies as well as aspirations to address South Africa's very unjust spatial history. The founding narrative of the *Tshwane 2055* plan is that of renewal at the expense of inhabitants in the city. These kinds of policy documents should be informed more radically by alternative voices and knowledges in the city in order to change the dominant discourses that underlie them.

The *Tshwane 2055* policy envisages the '[r]emaking of South Africa's Capital City'.<sup>963</sup> It has in mind a city that 'is liveable, resilient and inclusive, whose *citizens* enjoy a high quality of life, have access to social, economic and enhanced political freedoms'.<sup>964</sup> The vision also refers specifically (exclusively) to 'citizens' that should be 'partners in the development of the African Capital City of excellence', while it acknowledges that one of the obstacles in the development of the city would be the 'continued spatial imbalances of the past'.<sup>965</sup> The vision is phrased within the metaphor of a 'game':

These choices of action to influence the future will have to take into account the following options: Playing the game better: implementing incremental changes using the current rules of the game and becoming more efficient and effective; Playing the game differently: lessons from two decades of democracy therefore a need [for] rapid implementation; and [p]laying a different game: implementing strategic actions that are aimed at driving development, increasing the competitiveness of the economy and strengthening the city's sustainability capacity.<sup>966</sup>

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<sup>963</sup> *Tshwane 2055* on 6.

<sup>964</sup> *Tshwane 2055* on 6. Own emphasis.

<sup>965</sup> The vision continues: 'Further, the challenges include rising unemployment, urbanisation, population growth, inequality, poverty, and accommodation conundrum, huge infrastructure backlogs and continued spatial imbalances of the past, among others'.

<sup>966</sup> *Tshwane 2055* on 7.



Spatial justice is defined as one of the key terms used in the *Tshwane 2055* document:

Spatial justice is about reversing the historic policy of confining particular groups to limited space, as in ghettoisation (sic) and segregation, and the unfair allocation of public resources between areas, to ensure that the needs of the poor are addressed first rather than last.<sup>967</sup>

The document acknowledges the historical development of spaces in South Africa and presents the possibility of spatial justice:

While the City of Tshwane is home to a number of government departments, embassies, tertiary and research institutions, and several heritage sites, the City's historical spatial development approach has resulted in the: *apartheid-bound experience* of social and economic exclusion of the larger part of residents from the city space; *[p]ersistence of apartheid-bound settlement patterns* of residents in the City which continues to define the city space; and *[the] City's historical identity* as an unreachable social space.<sup>968</sup>

In light of this the process of remaking, the *Tshwane 2055* plan claims to intervene in the transformation of 'human settlements, space economy as well as the creation of functioning nodes'.<sup>969</sup> The plan includes references to the Reconstruction and Development Programme and in reiterating the call for the 'eradication of apartheid geography' states that Tshwane's remaking will be 'premised on achieving the principles of spatial justice, spatial sustainability, spatial resilience, spatial quality, and spatial efficiency'.<sup>970</sup> The doubt in the radical and transformative potential of the

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<sup>967</sup> *Tshwane 2055* on 14.

<sup>968</sup> *Tshwane 2055* on 83. Own emphasis.

<sup>969</sup> *Tshwane 2055* on 87.

<sup>970</sup> These concepts are all defined in the document and categorised as 'Spatial Transformation Principles' – see Box 3.1. The definitions are derived from the 'National Development Plan Vision 2030: Our future – make it work' at page 277. 'Spatial sustainability is about promoting living environments whose patterns of consumption and production does not damage the natural environment. Spatial resilience is about building the capacity to withstand vulnerability to environmental degradation, resource scarcity and climatic shocks. Spatial quality is about improving the aesthetic and functional features of housing and the built environment to create liveable, vibrant and valued places that allow for access and inclusion of people with disabilities. Spatial efficiency is about supporting productive activity and jobs and reducing burdens on business. Efficient commuting patterns and circulation of goods and services should be encouraged and ensure that regulatory procedures do not impose unnecessary costs on development'. This combination also appears on page 26: 'Coupled with this new paradigm is the implementation of spatial development approaches geared towards the realisation of spatial justice, spatial sustainability, spatial resilience, spatial quality and spatial efficiency'. The rest of the context is as follows: 'To achieve Tshwane Vision 2055, a new growth path resilient to future shocks must be adopted not only from government, but also sectors of society partnering with the City... Furthermore, the key message of the Freedom Charter is that working together, as the residents and communities of the City, the government, civil society

spatial justice espoused by *Tshwane 2055* comes with the other terms that it is used in conjunction with, apart from this combination of justice, sustainability, resilience, quality and efficiency it is also grouped with ‘Smart living’ and ‘Informal settlements transformation’. Marie Huchzermeyer exposes similar tensions in the United Nation’s UN-HABITAT policy,<sup>971</sup> which, she claims, was aimed at improving the lives of slum dwellers, but instead led to forced removals in efforts to fulfil the misunderstood target of the policy, namely to free cities of slums.

*Tshwane 2055* places emphasis on being a ‘citizen’ in the city and connects spatial justice to the status of citizen: ‘Spatial justice and transformation is central to ensuring social inclusivity. This is about the City providing access to all the necessary services one needs to be an equal citizen in the City’.<sup>972</sup>

Towards the end of the document, it is clear that *Tshwane 2055* has in mind a specific notion of spatial justice and one that will be ‘re-engineered’ in order to give effect to the grand plans of the document.<sup>973</sup> As law has become more and more comfortable with the vocabulary of space, the idea of spatial justice emerged in various forms. The underlying research problem of this thesis requires a radical and critical understanding of spatial justice, one that would not necessarily fit with the other visions of *Tshwane 2055*.

The critical potential of spatial justice can only fully be harnessed if it entails a fundamental rethinking of justice that encompasses the ‘peculiar characteristics of space’.<sup>974</sup> What are the peculiar characteristics of space and to what extent can law,

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as well as the private sector, we can mobilise our resources so that together we can achieve the visions of a better South Africa and Tshwane’.

<sup>971</sup> Huchzermeyer M *Cities with ‘Slums’: From Informal Settlement Eradication to a Right to the City in Africa* (2011).

<sup>972</sup> *Tshwane 2055* on 110.

<sup>973</sup> *Tshwane 2055* on 114: ‘The City of Tshwane has undeniably been shaped by a legacy of apartheid urban form, space economy, and settlements that has resulted in spatial inequity and equality. In 2055, it will be South Africa’s capital city, with an identity that represents the aspirations of South Africans. Spatial justice and urban form will be re-engineered. It will be Africa’s most liveable, healthy, safe and sustainable capital city to live, work, visit and invest in. Mobility and public transport in the City of Tshwane is improved and significantly contributes to the City’s high connectivity and low carbon status... As part of ensuring spatial justice and space economy, the City of Tshwane will continue to revisit its spatial vision to reverse the ‘spatial divide’ (see n188) in Tshwane 2055] that dominates the country as a whole. In this chapter, the focus is on how the City of Tshwane provides quality infrastructure that will support its liveability concept.’

<sup>974</sup> *Tshwane 2055* on 114.

and policies such as *Tshwane 2055*, truly approach justice from and through these characteristics to move towards spatial justice?

Massey's views of space/ place and spatial justice as discussed throughout this thesis, relate the visions of urban space directly to the type of community that will be constituted by the space. What this means for *Tshwane 2055* is that the policy is not merely indicative of the kind of space envisioned by the document, or in the case of Schubart Park, the kind of social housing that will be built, but *Tshwane 2055* also reflects the sense of community and belonging that the city of Tshwane subscribes to.

Massey, Ginwala and Mackintosh co-authored a report on gender and economic policy in a democratic South Africa. The report addresses the structural issues and unequal social relations that shaped the institutions of South Africa and contributed to the *genius loci* of many public and private spaces. It was written to contribute to the 1990 Harare conference where more or less fifty ANC associated economists gathered as a precursor to policy guidelines on economic matters in South Africa written as a collective effort between COSATU and the ANC. They referred to the vanishing trick to capture the way in which women disappear or are not accounted for in debates. I apply some of their critique, situated towards the end of apartheid, and levelled against policies drafted as the foundations of our new society, to the *Tshwane 2055* policy.

The critique of Massey, Ginwala and Mackintosh levelled against the policy, included the fact that very few women were involved in the debate, that very little reference was made to gender in the policy and that 'the recommendations did not reflect an understanding that gender oppression is structured into all aspects of South African society, including the economy'.<sup>975</sup> They argued that institutional sexism should be recognised in the same way that institutionalised racism has and that its recognition should lead to the examination of all private and public institutions. Their critique revolves mainly around two core issues, namely that all other policies should be informed by policy on gender and that the newly formulated economic policies have to be to the benefit of women.<sup>976</sup> They are not merely concerned with what can be termed

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<sup>975</sup> Ginwala F, Mackintosh M and Massey D 'Gender and Economic Policy in a Democratic South Africa' in *Development Policy and Practice* 1991 on 146.

<sup>976</sup> Ginwala F, Mackintosh M and Massey D 'Gender and Economic Policy in a Democratic South Africa' in *Development Policy and Practice* 1991 on 147.

discrimination against women, but with oppression of women more broadly speaking. This formulation addresses the structural issues and unequal social relations that shaped the institutions of South Africa. They argue that these unequal societal structures, which specifically includes the economy, have formed the foundations of the country. The specific topic of their investigation, and foundation for their argument in this 1991 paper, is the Statement of the National Executive Committee on the Emancipation of Women of the ANC, which was drafted in May 1990. They took issue with the extent to which the then recent economic policy, drafted for a democratic South Africa, did not reflect the principles contained in the Statement of the Emancipation of Women. They highlight, throughout the article, the materiality of gender oppression namely that it is always connected to an economic base.<sup>977</sup> They focus on the structural oppression and exclusion of women and call for the considering of gender issues in all policies. They also refer to experiences in other countries and point out how 'periods of rapid structural change have frequently worked to the detriment of women' and issues a warning to the ANC on the basis of these experiences in other countries to heed the dangers of periods of large-scale change and the interest of women.<sup>978</sup>

In respect of the problem of the household and family, they lament the fact that the household is often seen as a social issue rather than an economic issue and challenge the model of a nuclear household with reference to the vast numbers of female-headed households from a 1988 UNESCO report. Notably, these statistics refer to the spatial divisions of South Africa at the time as well: 59% of households are female headed in Bantustan rural areas; 47% in Bantustan urban areas; 25% on white-owned farms; 20% in small towns outside Bantustans and 30% in metropolitan areas.<sup>979</sup> *Tshwane 2055* gives the following statistics on households headed by women: 326 113 of the 911 536 households are headed by women, representing 35.8% of households in the city of Tshwane. This figure is slightly higher than the Gauteng Province average of 34.3%<sup>62</sup>. Region 1 has the highest number of women headed households with

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<sup>977</sup> Ginwala F, Mackintosh M and Massey D 'Gender and Economic Policy in a Democratic South Africa' in *Development Policy and Practice* 1991 on 147.

<sup>978</sup> Ginwala F, Mackintosh M and Massey D 'Gender and Economic Policy in a Democratic South Africa' in *Development Policy and Practice* 1991 on 147.

<sup>979</sup> Ginwala F, Mackintosh M and Massey D 'Gender and Economic Policy in a Democratic South Africa' in *Development Policy and Practice* 1991 on 163.

87 361. Region 1 consists of a northern and a southern zone, the latter includes Akasia, Rosslyn and Pretoria North (south) and Klipkruisfontein, Ga-Rankuwa, Mabopane, Winterveld and Soshanguve (north). Region 1 is what would have classically been classified as the peri-urban area areas of Pretoria during apartheid. In this section I touch on forced removals in terms of the Group Areas and Natives in Urban Areas Acts. Region 1 is an area to which many of the inner-city inhabitants were forcibly removed during apartheid. In terms of female-headed households, region 1 is followed by Regions 3 and 4 respectively. Region 3 includes the inner city, Marabastad, Brooklyn and Hatfield while region 4, in the most south western corner of the Tshwane metropolitan area, consists of an urban area to the east and a rural area to the west both of which are currently under pressure for development.<sup>980</sup> Region 5 has the lowest number of women headed households with 8 328.<sup>981</sup> This is interesting, because the low number is probably only attributed to the fact that the region is scarcely populated. Region 5 is a rural area, characterised by nature conservation, tourism and mixed agricultural land uses. The region includes Cullinan Mine, Dinokeng Nature Reserve, Rayton, Kameeldrift, Derdepoort and Roodeplaat.<sup>982</sup>

By focussing specifically on what they call the ‘vanishing trick’, i.e. the gaps through which women fall in economic debates, three key principles that should translate to policy can be identified.<sup>983</sup> The first of these principles insist on using the term ‘gender oppression’ and not merely discrimination.<sup>984</sup> This is important because it acknowledges that the roles of women and men in the economy are socially constructed. A practical example that Ginwala, Mackintosh and Massey use is the training of women, how women are earmarked for acquiring certain skills, are trained in those skills and then fulfil the roles which have been carefully carved out for them by societal structures. They also raise the issue of economic culture by pointing out

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<sup>980</sup> Tshwane 2055 on 49.

<sup>981</sup> Tshwane 2055 on 65.

<sup>982</sup> Tshwane 2055 on 50.

<sup>983</sup> Ginwala F, Mackintosh M and Massey D ‘Gender and Economic Policy in a Democratic South Africa’ in *Development Policy and Practice* 1991 on 148-150. With the vanishing trick they imply the way in which women disappear or are not accounted for in debates of an economic nature. They take issue with a quote from the reports of the 1990 Harare meeting mentioned at the beginning of their article that called for the ‘rapid, successful integration of women into economic activity’ this they argue, is indicative of a persisting perception that women is not already part of the economy.

<sup>984</sup> Ginwala F, Mackintosh M and Massey D ‘Gender and Economic Policy in a Democratic South Africa’ in *Development Policy and Practice* 1991 on 148.

that it is 'not just the economy itself, but also some of the ways in which most economists habitually think about it'<sup>985</sup> that determines the roles of women and men. Their second principle entails the 'eternal dilemma'. According to the authors this dilemma involves the two difficult sides. On the one hand the plight of women and the positions they currently find themselves in must be acknowledged and policy must be drafted to address the conditions of these positions. On the other hand, and this is what makes it a dilemma, the current positions of women should also be actively questioned. This is also applicable to *Tshwane 2055*.<sup>986</sup>

The 'eternal dilemma' means that while one only questions the state of women's current role the foundations of the role are not questioned and challenged and therefore merely reinforces the existing societal structures, but at the same time, there also needs to be a call for the improvement of the current position women fulfil in the economy. Policies need to be aimed at improving the positions that women occupy now, but policies should also challenge these positions and the very structures that preserve the sexual divisions of labour. Their third principle concerns control and democracy and the inclusion of women in decision-making processes. They critically address certain aspects of decision-making and the position of women within it.

In concluding the article, the authors call for new meanings and new definitions of terms in order to change our way of thinking of women in terms of the economy. This is interesting and important in the sense that they consider language as integral to our conceptual frameworks. It is worthwhile to mention the terms they call for redefining:

'[W]ork:' and 'the working day' to include unpaid work, hence recognizing and valuing women's total working day; 'production' to include the production of the human resources and reproduction of the social relations in society; the 'household' as a complex of economic relations which can be influenced by economic policy; 'women' as full working adults, not

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<sup>985</sup> Ginwala F, Mackintosh M and Massey D 'Gender and Economic Policy in a Democratic South Africa' in *Development Policy and Practice* 1991 on 149.

<sup>986</sup> This caveat also concerns the trap of merely looking at space in the same terms as the perpetuation of capitalism i.e. the constant and consistent production and reproduction of unequal relations through space – comparable to Harvey's 'spatial fix' as one of the ways in which capitalism has adapted to over-accumulation. Harvey D 'The spatial fix – Hegel, Von Thunen and Marx' 2006 *Antipode* 13(3) 1-12 on 12: 'If the Marxian theory of the spatial fix is right, then the perpetuation of capitalism in the twentieth century has been purchased at the cost of the death, havoc and destruction wreaked in two world wars.'

dependants; 'income distribution' as measured among adults, not households; and 'skill' as not an objective fact but a category structured by gender-related assumptions.<sup>987</sup>

In light of the concepts I cover in chapter 2 and 3,<sup>988</sup> I would suggest that spatial justice in South Africa should be open to the uncertainty introduced by the inclusion of a variety of different voices and knowledges. It should take seriously the warning of Froneman J in the *Schubart Park* case, that inhabitants of the city should not be seen as nuisances and the voices of the poor and marginalised should not only be heard during scheduled consultations to appease the constitutional court, but should be 'heard' in the very policies that will affect their futures. The *Tshwane 2055* document acknowledges only the right of the citizen of the city to the city. For Lefebvre the right to the city cannot be limited in this manner and spatial justice should open up to other inhabitants of the city and specifically engage and include the working classes in re-visioning the capital city. Such an understanding of spatial justice would be in tension with the modernist aims of rejuvenation and development tabled by *Tshwane 2055*. This tension is shown by Huchzermeyer with reference to the United Nation's UN-HABITAT policy and by Johan van der Walt with reference to the *Joburg 2030* policy.<sup>989</sup>

#### 4.4.2. State of the city (capital)

Reflecting on the past four years' state of the capital address (the duration of this project) a few things are striking. Firstly I look at the name and venue of the address and how that has changed over time (and the significance of this change), secondly, references to the *Natives Land Act* of 1913, and thirdly how Schubart Park features in the state of the city addresses after the finding of the constitutional court in 2012.

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<sup>987</sup> Ginwala F, Mackintosh M and Massey D 'Gender and Economic Policy in a Democratic South Africa' in *Development Policy and Practice* 1991 on 170.

<sup>988</sup> 'Simultaneity', 'throwntogetherness', 'the right to the city as the right to difference', 'space as heterogeneous', 'inhabitation vs habitat', 'cognitive mapping', 'belonging', '*genius loci*'.

<sup>989</sup> Huchzermeyer M *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* 2011 and Van der Walt 'Johannesburg: a Tale of Two Cases' in Philippopoulos-Mihalopoulos A (ed.) *Law and the City* 2007 221- 235.

#### 4.4.2.1. Name of the address

In 2013 the address takes place as ‘the state of the city address’ in the city hall. In 2014 the word ‘capital’ is added and the ‘state of the capital city address’ takes place, again, in the city hall. Renovations of the city hall start during 2014 and even the name changes for the 2015 ‘state of the capital address’ at Freedom Park. 2016 follows the previous year with the ‘state of the capital address’ at Freedom Park. It is significant that the city plays a smaller role and actually disappears from the title and capital starts playing a more important role as the gentrification agenda is stepped up. This focus on capital is coupled with a perceived competition with other cities, towards being more ‘world-class’ than the next. In 2014 Ramakgopa makes a point of saying that Tshwane rolled out wi-fi before New York. Massey addresses the issue of world-class cities, or, in her words, ‘world cities’.<sup>990</sup> As cities across the globe are striving to be world cities, it raises important questions around political responsibility, place and identity. Massey’s book *World City* focuses specifically on London, but in doing so she shapes a broader critique against the formation of a new class and increased inequality in global cities. She shows how a particular ‘geographical imagination’<sup>991</sup> simply serve as a justification for the growing domination of the powerful metropolises. The city of Tshwane/ Pretoria’s aspiration to join these world cities, signals a geographical imagination that does not have regard for the impoverished inhabitants.

In 2015 the addresses also start to be themed, with 2015’s theme *Remaking the People’s Capital Through Radical Economic Transformation and Spatial Justice*, and the theme for 2016 *One Nation, One Capital: Advancing Tshwane 2055*. The theme of 2016 links to President Jacob Zuma’s announcement during his state of the nation address prior to Ramakgopa’s address, in which he raised (again) the possibility of moving parliament from Cape Town to the city of Tshwane/ Pretoria. In his state of the capital address Ramakgopa announced that they are ready to receive parliament and that Fort Klapperkop can immediately be made available for those purposes, being state-owned and close to feeder routes from the airport, as well as the Gautrain. In 2014 Ramakgopa is ‘the mayor of Tshwane’ and in 2013, 2015 and 2016 he is ‘the mayor of the City of Tshwane’. These designations are important, because they

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<sup>990</sup> Massey D *World City* 2007.

<sup>991</sup> Massey D *World City* 2007 on 32-34. She distinguishes between implicit and explicit geographical imaginations.



coincide with the ongoing legal battles around the name change of the city of Tshwane/Pretoria.

#### **4.4.2.2. Natives Land Act of 1913**

The address of 2013 marks the 100 year commemoration of the act and the mayor announces that in step with the centenary they 'will accelerate the process of restoring land to the dispossessed covering various aspects of the tenure reform, with provision of title deed for business reform'. In 2014 he then reports back on what was done during the year of the centenary. He claims that the promise that was made in the 2013 address was for symbolic reversal of the injustices of the act and that they donated large portions of land to churches and businesses from previously disadvantaged communities. During 2015 the city puts several pieces of municipal land up on auction and they are sold to big businesses, contradicting the ostensible humble aspirations expressed in the state of the capital city addresses of 2013 and 2014. The 2015 address yet again remoulded the city's handling of the land policy around redressing the Natives Land Act. According to the mayor the land donations policy that commenced in 2013 was based on a resolution in 2012 to forge closer relationships with faith-based organisations. He couples this resolution with the task of churches for moral regeneration and uses this as an entry point to address the Nyaope problem in the city. In 2016 he describes the donation of 170 parcels of land to religious communities as a way towards fostering social cohesion that undermines the effects of, amongst others, the *Natives Land Act* and the *Group Areas Act*. Again the fight against moral degeneration, drug and substance abuse, crime and corruption takes centre stage in motivating why these land parcels were donated to religious communities. He then also refers to the donation of over 10,000m<sup>2</sup>, valued at R2.9 million, to the Thaba Tshwane Islamic Centre Trust in Valhalla. He says that racially motivated individuals attempted to disrupt the signing of the donation deed, but that no racially exclusive enclaves will be tolerated in the city of Tshwane. This reference is to Afriforum's resistance to the building of a mosque in Valhalla. I discuss this matter briefly above.<sup>992</sup>

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<sup>992</sup> See sections 3.3.2. A sense of belonging and/ as genius loci (spirit of place) and 3.3.3. Belonging as home and place as fluid.

#### **4.4.2.3. Schubart Park**

The constitutional court delivered judgment in October 2012 and in April of the following year the mayor proclaims that they had engaged with residents of Schubart Park and had ‘used all means provided by our democratic system, including the decision by the highest court in the land, the constitutional court, to pursue meaningful discussion to resolve matters’. In this formulation the whole court case seems to have been the initiative of the City in an attempt to resolve the issue with the residents. This cannot be further removed from the actual situation, which is captured aptly by Froneman’s words quoted above. The mayor mentions ‘Schubart Park’<sup>993</sup> under ‘promotion of safe and secure communities’. This is an ironic framing of the issue, in light of the fact that the insecurity was caused by the council in a robust and callous move to make the community unsafe. In 2014 the mayor announces that Schubart Park will not be demolished, but will be refurbished. This indicates that the city planned on demolishing the blocks even after the judgment of the constitutional court saying they should reinstate the residents in their homes. The promise of the R900 000 upgrade project that will be done in 24 months’ time (i.e April 2016) has not even commenced yet. In 2015 there is no reference to Schubart Park in the address, but in 2016 Ramagopa mentions the blocks in the same breath as ‘the importance and innate symbolism of the inner-city’ and the potential memorandum of understanding with the Department of Defence for the development of ‘office and residential accommodation within the heart of the Capital’. This memorandum of understanding, he continues, will bring together ‘joint implementation of various catalytic projects, aligned to our important commitment of remaking of the Capital, including the improvement of Schubart Park’. The mind boggles about how he brings all of these aspects together. If Schubart park is developed for housing for the defence force, the block moves back again to its initial apartheid beginnings; providing affordable accommodation for civil servants.

The city council created a land invasion unit. Under the name of this unit they have over the years evicted many inhabitants violently and often also illegally. On 22 May 2016 settlements in Kanana and Suurman in Hammanskraal were broken down by the red ants. The community retaliated and killed and set alight two of the red ants. These

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<sup>993</sup> Note the typographical error in his address.

deaths can be placed at the door of the city council that continues with the violence of spatial injustice in the ordinary and relational areas of the city despite laying claims to spatial justice in their policy documents and speeches. Hammanskraal was one of the areas to which former Lady Selborne residents moved after their forced removals. One such an example is poet Lebogang Lance Nawa who was born in Lady Selborne,<sup>994</sup> but grew up in Hammanskraal. His poetry comments on South Africa's political situation since the 1970s. His poetry has of course been shaped by growing up in Pretoria and especially in Hammanskraal where he was exposed to poetry during communal gatherings such as harvesting, ploughing, funerals, weddings and inauguration of royalty. But, in addition to these more subtle expositions of Pretoria, he also has two poems specifically on Pretoria:

Pretoria 1994<sup>995</sup>

Tshwane, the city of melodies,  
I bow my head to you  
for carrying over my seed from iKapa  
on wings of love  
and placing it on your purple bed  
of Jacaranda: with my midwifery hands of liberation  
to give birth to our first child  
in front of the eyes of  
our new country's first President

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<sup>994</sup> His poem 'Rains in a village' Nawa LL *through the eye of a needle* 2005 on 14 relates the forced removals:

'I was still steadying my footsteps / In 1980 3<sup>rd</sup> avenue a street in Walmansthal / where my family lived at the time of my birth / when they, together with many others, were summoned to a local church one day / for a sermon never to be forgotten / from collective memory.

A government official, an Afrikaner it was said, / took the place of the missionary priest at the pulpit. / He removed his hat and placed it neatly / in the middle of a lily-white table cloth / which had served countless communions.

"What is it that you see in front of me?" / The official asked a rhetoric question / while wiping off sweat from his bald head.

"A black hat on a white cloth" / they chorused in response.

"Correct!" the man said authoritatively. / "This black hat symbolizes a black spot / on a white land, / a black pimple on a white skin. / You people are a black spot / which must be removed immediately / and permanently from the white cloth!". Only an excerpt. '/' indicates a new line.

<sup>995</sup> Nawa LL *through the eye of a needle* 2005 on 67.

### A normal day in Pretoria<sup>996</sup>

In this city

Where new laws are enforced

A man and a woman stroll into a deserted alley

And lean against a wall.

The man turns his back against the street

to shield the woman

who promptly lifts up her skirt

to retrieve stolen items tucked inside her panties

and put them inside a bag.

They then casually step back

among the unsuspecting eyes

of the city.

If the spatial justice referred to in *Tshwane 2055* and the references in the mayor's sate of the city addresses will not (and do not) really culminate into changes in the lived experiences and everyday lives of the inhabitants of the city of Tshwane/ Pretoria, what should spatial justice look like? In the following section I draw primarily from Philippopoulos-Mihalopoulos's expansion on spatial justice as a way to challenge the grand spatial justice narrative in the *Tshwane 2055* policy and the mayoral addresses.

### **4.5. Spatial Justice<sup>997</sup>**

The co-option of geographical terminology in law and policy does not necessarily mean that law is spatialized.<sup>998</sup> On the contrary, Philippopoulos-Mihalopoulos suggests that law's spatial turn is a turn away from space and specifically away from the unique and unpredictable characteristics of geography. He specifically argues that this turning away from space can most clearly be discerned in the use of the notion of

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<sup>996</sup> Nawa LL *through the eye of a needle* 2005 on 117.

<sup>997</sup> Portions of this section have been published in De Villiers I 'Tshwane 2055 and the (im)possibility of spatial justice' *De Jure* 2014 47 202-217, De Villiers I 'Leibniz, Lefebvre and the spatial turn in law' *HTS Theological Studies journal* 2016 72 1 1-6 and Van Marle K and De Villiers I 'Book Review: Andreas Philippopoulos-Mihalopoulos: Spatial Justice: Body, Lawscape, Atmosphere' *Journal of Law and Society* 2016 43 320-323.

<sup>998</sup> See Massey D *for space* 2005 on 16-18.

spatial justice.<sup>999</sup> This, he proposes, is partly due to a ‘fear’ of space. Spatial justice should connote something more than social justice or regional justice with some regard to the spatial, and in fact, it is almost unthinkable that justice cannot be spatial when it is concerned with the distribution of resources in a given area.<sup>1000</sup> Philippopoulos-Mihalopoulos, after rendering critique against the way in which spatial justice is perceived, suggests two characteristics in terms of which spatial justice should be radically rethought, the one ontological and the other epistemological. Ontologically speaking spatial justice should be conceptualised as radically different from its ‘habitual temporal’ and ‘social conceptualisation’.<sup>1001</sup> This means that spatial justice is something different from justice viewed within the usual historical framework and also different from what has been established as social justice. Spatially situated justice is distinct from historically situated or socially situated justice. On an epistemological level the location of justice should be between law and space.<sup>1002</sup> This raises the question of point of departure and of where spatial justice itself is situated. If what Philippopoulos-Mihalopoulos says about the point of departure being placed somewhere on the meeting point of space and law, then a geographical understanding of space is integral in the understanding of a concept of spatial justice.

Philippopoulos-Mihalopoulos situates spatial justice inside of the Nietzschean claim that there is no outside and thereby he places his book inside of the lawscape. That is where he stands, his placement and, as he says, faithful to etymology, his thesis. From this central point of departure he laments the fact that spatial justice, instead of being the ‘most radical offspring of law’s spatial turn’ has instead been limited to a geographical conception of social justice.<sup>1003</sup> To this diluted and diluting ‘add space and stir’ approach Philippopoulos-Mihalopoulos offers a rich and challenging array of understandings of spatial justice - challenging to readers and challenging to existing

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<sup>999</sup> Philippopoulos-Mihalopoulos A ‘Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space’ *Law, Culture and Humanities* 2010 7(2) 187-202.

<sup>1000</sup> Philippopoulos-Mihalopoulos A ‘Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space’ *Law, Culture and Humanities* 2010 7(2) on 189.

<sup>1001</sup> Philippopoulos-Mihalopoulos A ‘Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space’ *Law, Culture and Humanities* 2010 7(2) on 197.

<sup>1002</sup> Philippopoulos-Mihalopoulos A ‘Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space’ *Law, Culture and Humanities* 2010 7(2) on 200.

<sup>1003</sup> Parts of the overview of this book that I present here have also been taken up in the following book review: Van Marle K and De Villiers I ‘Book Review: Andreas Philippopoulos-Mihalopoulos: Spatial Justice: Body, Lawscape, Atmosphere’ *Journal of Law and Society* 2016 43 320–323. Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 174.

ideas and theories on spatial justice. Spatial justice, for Philippopoulos-Mihalopoulos is a hope,<sup>1004</sup> a withdrawal,<sup>1005</sup> a conflict a concept and a practice.<sup>1006</sup> It is the notions of atmosphere and rupture that distinctly distinguishes his expression of spatial justice from those of other authors. Starting from his standing point, namely the thesis that there is no outside, the argument flows like this: 1. there is no outside of the lawscape, 2. because there is no outside, it necessarily means that bodies want to occupy the same space at the same time; there is nowhere else to go, 3. the conflict caused by this desire to occupy the same space at the same time is spatial justice. It also follows that because bodies cannot escape from the lawscape there are only ruptures and these ruptures occur in order for the inside to be re-orientated such that bodies can fit better with each other. The inside to which there exists no outside, is the lawscape. Philippopoulos-Mihalopoulos asserts that the lawscape is not a requirement for, but rather an inevitable feature of spatial justice. Everything is determined by spatial positioning and therefore every spatial position has the potential to be or is in fact regulated by law. Because there is no outside the lawscape, spatial justice emerges within the lawscape. Spatial justice occurs when there is withdrawal in the form of a rupture. Because there is no outside the lawscape and because the lawscape is inevitable, bodies in the lawscape want to be in the same space at the same time. He explains extensively what he means by bodies in the chapter entitled: 'Welcome to the lawscape'. With a 'body', he makes it clear, he does not mean 'individual human bodies' as we commonly understand them, instead a body is always an assemblage.<sup>1007</sup> Therefore bodies can be 'a collectivity, a flock of sheep, a fleeting community clustered in a lift going from the third to the fifth floor, or a boat of illegal immigrants'.<sup>1008</sup>

While being clear about his central thesis, Philippopoulos-Mihalopoulos also makes it clear that the text does not subscribe to a single school of thought. The thesis or standing point is rather derived from his engagements with different theories. While there are several references to Deleuze, Philippopoulos-Mihalopoulos asserts that the text is not Deleuzian, and nor is it Luhmanian, sociolegal or critical or materialist. Some

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<sup>1004</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 1.

<sup>1005</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 2.

<sup>1006</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 3.

<sup>1007</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 78.

<sup>1008</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 176.

of the theoretical underpinnings of his thesis include Spinoza, Nietzsche, Grosz, Braidotti, Gatens, Nagerastani, Morton, Serres, Gauttari, Lyotard and Derrida. The text also relies on object oriented ontologies, post-humanist feminist theory, ecological and environmental concerns, architecture, materiality and questions around emplacement and identity. Philippopoulos-Mihalopoulos furthermore offers the disclaimer that the book also does not offer critique; if critique is understood to mean an evaluation aimed at highlighting gaps and flaws in existing literature.<sup>1009</sup> But he does offer critique, understood as highlighting gaps, on two occasions. He critically evaluates the existing literature on spatial justice<sup>1010</sup> and on atmosphere.<sup>1011</sup> As highlighted earlier, Philippopoulos-Mihalopoulos takes issue with despatialised accounts of spatial justice. In his critique of available theory on it, he specifically problematizes the analyses of spatial justice by G.H. Pirie and Mustafa Dikeç for respectively being an example of the transdisciplinary mode of ‘add space and stir’ and running the risk to misaddress spatial justice’s challenge because it lacks theorisation.<sup>1012</sup> Following this, he identifies four specific problems with current discourses on spatial justice:<sup>1013</sup> Firstly, it reinstates the human subject as primacy in society. In this regard it is important to point out that Philippopoulos-Mihalopoulos understands the geological era of the anthropocene not as a way to slip anthropocentrism into the discussion, but as an era of ‘human responsibility’.<sup>1014</sup> Secondly, because of the insistence on anthropocentrism it marginalises ‘current radical thinking on the fluidity of the boundary between human and natural/ artificial/ technological’.<sup>1015</sup> Thirdly, it does not deal with the radical uncertainties of space and therefore neglects the ‘spatiality of space’.<sup>1016</sup> Finally, epistemically speaking, it appears to be ‘a battle for geography to assert the centrality of space’ and a missed an opportunity of a ‘transdisciplinary encounter between law and geography’.<sup>1017</sup>

His critique of the material on atmosphere, is that it leaves out atmospheric movement ‘What is routinely omitted from the literature’, he writes, ‘is the fact that atmospheric

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<sup>1009</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 3.

<sup>1010</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 182.

<sup>1011</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 173.

<sup>1012</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 182.

<sup>1013</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 182-183.

<sup>1014</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 5.

<sup>1015</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 182.

<sup>1016</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 183.

<sup>1017</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 183.

engineering regularly dissimulates itself, its excess and provenance, in order to push the engulfed bodies into further blindness with regards to the scripts that orchestrate them in the first place'<sup>1018</sup>. What makes his take on spatial justice interesting and valuable for this project is his reliance on several artworks, films and works of literature to emplace his concept of spatial justice. A special touch in the book is photographs by the author included to visually represent certain key concepts in the book. In each instance the photograph bears an idea or concept as title: 'the manifold',<sup>1019</sup> 'the lawscape',<sup>1020</sup> 'atmosphere',<sup>1021</sup> and finally 'spatial justice',<sup>1022</sup> with a subtitle to describe the content of the photograph and where it was taken. These photographs are capturing because they appear almost stumbled upon and presented intentionally within their context of the author's travels and thereby giving these ideas a sense of place. With these four images, the title and subtitle of the book come together in St Teresa's sculpture, (body, manifold), a footbridge (lawscape), biosphere (atmosphere) and an installation called *Head On* (spatial justice). These photographs present the reader with a spatialised and material understanding of the key concepts of the book. I want to pause for a moment at these photographs, because it captures something of the essence and standing point of the book. Under the title 'The manifold'<sup>1023</sup> is a photograph of Gian Lorenzo Bernini's baroque statue *The Ecstasy of St Teresa*. In the text Philippopoulos-Mihalopoulos discusses briefly Luce Irigaray's critique of and engagement with the statue, but then explains that what struck him there in the Cornaro Chapel, Santa Maria della Vittoria, Rome about the statue was precisely its 'unstatuesqueness'. The statue is made out of marble, but it moves. The image of the statue represents 'the manifold' because apart from the orgasmic expression of the saint, the largest part of the artwork consists of Teresa's robe, or more precisely 'the rising and falling folding and refracting riot of the saint's robe... It is captured, but the captive is breathing'. What happens in the manifold is that bodies and space become one. The concept of the manifold for Philippopoulos-Mihalopoulos, explains Lefebvre's production of space; that each living body has its space while it also is space, i.e bodies, by producing themselves in spaces also produce those spaces. The

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<sup>1018</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 137.

<sup>1019</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 45.

<sup>1020</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 88.

<sup>1021</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 127.

<sup>1022</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 177.

<sup>1023</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 45.



notion of manifold is central to his understanding of space not as ‘a line defined by two points, but a manifold plane of disorientation’.<sup>1024</sup> The second photograph entitled ‘The Lawscape’ is of a footbridge in Brisbane, Australia. The photo features arrows and signs pointing the users of the bridge in the direction that they should walk/ ride in when on that side of the bridge. The third photo, with the title ‘atmosphere’ depicts the large structures of cities suspended in mid-air by artist Tomás Saraceno. The artwork of the photo is entitled *Biospheres* and was photographed at the States Museum for Kunst in Copenhagen in 2009. The photo that captures Spatial Justice has as object Cai Guo-Qiang’s installation called *Head On*. The photograph shows a gnarling wolf glaringly facing an oncoming stream of other (also gnarling and glaring) wolves. Instead of colliding with the pack the head-on-head is avoided in that the foxes running towards the single standing fox are lifted into the air, and suspended in the installation, moving in a trajectory over the single facing fox. Finally a photograph of the author is also used as the cover image, which can be a picture of the inside of a lift with a light reflected in the back-mirror of the lift. Other aesthetic pieces that feature are films: Vassiliki Katrivanou and Bushra Azzazouz’s documentary *Women of Cyprus*,<sup>1025</sup> *The Truman show*,<sup>1026</sup> Craig Zobel’s film *Compliance*, literature: Tournier’s *Vendredi ou les Linbes du Pacifique (Friday)*,<sup>1027</sup> and artworks: Ingeborg Lüscher’s work called ‘The other side: Israel/ Palestine’.<sup>1028</sup>

Philippopoulos-Mihalopoulos conceptualises spatial justice in ‘a spatial, corporeal, and generally material way’ and secondly, perceives of spatial justice in the context of law. The term ‘spatial justice’ has formally made its appearance in South African legislation in the *Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA)*. It is an attempt to address the ‘cluster’ of acts that produces unjust spaces during colonial and apartheid South Africa. In the *PE Municipality* case Justice Albie Sachs refers to this as a ‘cluster of statutes... that gave a legal/administrative imprimatur to usurpation and forced removal’ and goes on to state that ‘[f]or all black people, and for Africans

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<sup>1024</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 183.

<sup>1025</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 183.

<sup>1026</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 204.

<sup>1027</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 in chapter 6.

<sup>1028</sup> Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Lawscape, Atmosphere* 2015 on 218.

in particular, dispossession was nine-tenths of the law'.<sup>1029</sup> In the section that follows, I attempt to map the terrain of this interwoven cluster of injustice.

As shown in chapter 3,<sup>1030</sup> literary cartography is linked to genre as the collective means of orientating oneself in reality. Literature and cartography both make worlds and represent reality. This is related to Lefebvre's conceived and perceived space respectively.<sup>1031</sup> White asserts that the law (also) makes a world.<sup>1032</sup> The lawyer uses words and therefore, like others who also use words, she has to capture unexpressed and inexpressible experiences.<sup>1033</sup> Law is a language, not merely a collection of locutions and terminology, but a culture in the manner that Klare defines legal culture: the habits of mind and intellectual reflexes of lawyers.<sup>1034</sup> Worlding acknowledges that law is not simply about language, but also about power. Mapping, even if it is not merely tracing, draws lines and borders. I look at literary cartography to insist on particular views of mapping. The idea of literary cartography relates to the notions of 'cognitive mapping' and 'mapping loss'. In chapter 3 I give an overview of these two notions, established by Jameson and Graham respectively.<sup>1035</sup> I also touch on notions of unmapping and counter-topographies.<sup>1036</sup>

Mapping encompasses a call to context understood as time connected to place. It questions established views of the public/ private divide, it problematises the place and standing of common law and customary law. Mapping insists on a relational approach and challenges the inevitability presented by formalist error in showing how unequal relationships, and imbalanced distribution of power and voice, underlie and are perpetuated by decisions, decision-making, reasoning and judgment in law. In the domain of the humanities, mapping does not consist of distinctive steps culminating to a simple formula, but is instead a process where constant interaction between utopia

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<sup>1029</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at par 9.

<sup>1030</sup> See section 3.4.6. Literary cartography (writing as mapping and writer as mapmaker).

<sup>1031</sup> Lefebvre H *The Production of Space* 1991 on 356.

<sup>1032</sup> See footnotes 1032-1034.

<sup>1033</sup> White JB *The Legal Imagination* 1973 on 3.

<sup>1034</sup> See section 4.4. Post-apartheid grand narratives: Tshwane 2055 and the state of (the) Capital addresses, above. White JB *The Legal Imagination* 1973 on xiii and Klare K 'Legal Culture and Transformative Constitutionalism' *South African Journal on Human Rights* 1998 on 156.

<sup>1035</sup> See section 3.4. Mapping.

<sup>1036</sup> For the notions of unmapping and counter-topographies, see section 3.4.3. Cognitive mapping and 3.4.4. Rogue urbanism, unmapping, countertopographies and the 'sphinx' in the city.

and reality reveals not only that different answers are possible, but also sets an agenda for spatial justice in which it becomes clear that certain answers makes spatial injustice (im)possible. Spatial justice presents an impetus for reaching answers, via cognitive mapping, transduction, rhizomatic reasoning and experimental utopia.

The *Spatial Planning and Land Use Management Act* 16 of 2013 (SPLUMA) has now formalised the imperative of spatial justice in South African law. It is an attempt to address spatial memory and acknowledge our spatial legacy. Similar acknowledgement of our unjust spatial past can be found in policy documents such as the Urban development Framework of 2014.<sup>1037</sup> The preamble of SPLUMA sets out its aims. Importantly, it envisions spatial planning that is ‘inclusive, developmental, equitable and efficient’. The act also aims to ensure that different levels of government address regulatory and special imbalances. This, the preamble states, is in addition to encouraging greater ‘consistency and uniformity’ in decision-making and other procedures undertaken by various forms of authority that are responsible for decisions on the utilisation of land.

Spatial justice becomes a formal requirement in all documentation drafted by different spheres of government. Section four of the act determines that development principles, norms and standards must guide spatial planning, land use management and land development. The notion of ‘development principles’ is expanded in section seven, with spatial justice as the first principle. Spatial justice is unpacked to cover redress of ‘spatial and other imbalances’ through better access to and use of land (section (7)(a)(i) of SPLUMA). No further content is given to what these imbalances entail, how the past has impacted on this, nor the way in which space reproduces unequal social relationships. The second paragraph of section (7)(a) already moves on to policy requirements:

(7)(a)(ii) spatial development frameworks and policies at all spheres of government must address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation.

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<sup>1037</sup> This document is still in draft format. See in particular pages 10-11.

The section also addresses spatial planning mechanisms, which include land use plans, and requires that it must include mechanisms through which processes to provide disadvantaged communities with access to land can be put in place, as a process of redress. The term reconciliation is not used in the SPLUMA, but redress is a specific aim. Section seven, under the principle of spatial justice also requires all management systems for land use to be flexible and relevant to disadvantaged areas, with specific mention of informal settlements and former homeland areas. The subsection also requires that all areas of a municipality should be covered by management systems for that area (SPLUMA (7)(a)(iv)).

- (v) land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas; and
- (vi) a Municipal Planning Tribunal considering an application before it, may not be impeded or restricted in the exercise of its discretion solely on the ground that the value of land or property is affected by the outcome of the application;

The other developmental principles include spatial sustainability, spatial efficiency, spatial resilience and good administration (section 7(b) – 7(c) of SPLUMA). At face value it seems as if the act has a deep form of reconciliation in mind (even though it is not pertinently articulated in SPLUMA).

Both the *Tshwane 2055* and the *Joburg 2030* policies reference the United Nation's UN-HABITAT 2010 plan. This plan envisioned lifting city dwellers out of slum-conditions without giving regard to those who rather want to defend the slums as their homes against relocation, forced removals and eviction, as was the case with Schubart Park, and not 'escape' life in the slums.<sup>1038</sup> For Marie Huchzermeyer, the impossibility of spatial justice in the UN-HABITAT policy was due to 'the unfortunate language, particularly as packaged in high-level press releases and introduction or forewords'.<sup>1039</sup> She seems to be saying that despite the use of certain keywords or concepts in policy documents, the broader intention reflects in discussions, summaries and the execution of these policies. It is for these reasons that the possibility of

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<sup>1038</sup> Huchzermeyer M *Cities with 'slums': From Informal Settlement Eradication to a Right to the City in Africa* 2011 on 5.

<sup>1039</sup> Huchzermeyer M *Cities with 'slums': From Informal Settlement Eradication to a Right to the City in Africa* 2011 on 5.

improving the living conditions of slum-dwellers encompassed simultaneously the impossibility thereof and was further made impossible by forced removals. The less carefully worded call for 'Cities without Slums',<sup>1040</sup> was adopted by the UN and construed to mean the eradication of slums in opposition to 'slum upgrading' as suggested best practice by previous UN policies.

In the City of Tshwane context and applicable to the *Tshwane 2055* vision, Huchzermeyer, remarks that it is one of the unspoken premises of cities 'not to attract a population that is superfluous to growth in the formal economy, or embarrassing to those aspiring to world-class city status'.<sup>1041</sup> A strategy, employed by cities in South Africa to keep this 'unwanted population' out of cities, is to fail to provide adequate affordable living environments within cities and to then refuse to deliver services to the informal settlements that develop on the fringes of cities due to this lack of supply of accommodation for lower-income groups.<sup>1042</sup> In this regard Huchzermeyer refers specifically to the way in which the poor are prevented from building new shacks and other metropolitan councils are also adopting the City of Tshwane's approach to outsource and privatise the control of informal settlements to security companies.<sup>1043</sup> The issue of privatisation of services in the city is closely connected to that of exclusion of the poor.

In his commentary on the *Joburg 2030* policy Johan van der Walt also raises concerns connected to privatisation.<sup>1044</sup> Through the spatial history of Johannesburg he explains that the white population and black population of Johannesburg had been living apart for most of the city's history. Well-off citizens spend most of their lives within the highly secured enclaves of gated neighbourhoods and office parks with limited exposure to

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<sup>1040</sup> Slogan of the Cities Alliance as explained by Huchzermeyer M *Cities with 'slums': From Informal Settlement Eradication to a Right to the City in Africa* 2011 on 1.

<sup>1041</sup> Huchzermeyer M *Cities with 'slums': From Informal Settlement Eradication to a Right to the City in Africa* 2011 on 53.

<sup>1042</sup> Huchzermeyer M *Cities with 'slums': From Informal Settlement Eradication to a Right to the City in Africa* 2011 on 53. She calls this withdrawal or denial of basic services in South Africa's informal settlements a 'new form of influx control'.

<sup>1043</sup> Huchzermeyer M *Cities with 'slums': From Informal Settlement Eradication to a Right to the City in Africa* 2011 on 53. She mentions specifically the Ekurhuleni Metropolitan municipality as an example of a municipality that follows this approach to 'the 'management' of informal settlements' and 'finds no fault with this approach'. She relies on a personal communication by Williamson dated 28 July 2010.

<sup>1044</sup> Van der Walt J 'Johannesburg: a Tale of Two Cases' in Philippopoulos-Mihalopoulos A (ed.) *Law and the City* 2007 on 221-235.

the city-life in general. Van der Walt is doubtful whether the regeneration of the central business district of Johannesburg will lead to the return of city life.<sup>1045</sup> He suggests that the return of city life in Johannesburg 'will ultimately turn on the cultivation of a public-minded concern with an exposure to otherness' and therefore proposes city life as public life based on the works of Jean-Luc Nancy, Young and Gerald Frug.<sup>1046</sup> He laments the lack of political vision in *Joburg 2030* and the fact that it is, apart from mentioning fighting crime and poverty, devoid of any values other than economic growth.<sup>1047</sup> The policy over-emphasises Johannesburg's economic importance at a national level and, Van der Walt argues, that the political confidence expressed by the document comes from the realisation that 'Johannesburg is a formidable economic force' in South Africa. In terms of the executive summary of *Joburg 2030* the 'historically black townships will be redeveloped and upgraded' so as to 'become new suburbs designed like historically white suburbs'.<sup>1048</sup> Against the backdrop of *Joburg 2030* he then proceeds to consider two cases on public expression decided by the Johannesburg high court: *Deneys Reitz v SA Commercial Catering and Allied Workers*<sup>1049</sup> and *Four Ways Shopping Mall v SA Commercial Catering and Allied Workers*.<sup>1050</sup> In the first case the court granted an interdict preventing members from the union to picket outside the building of the law firm in protest against the firm's anti-union practices. Van der Walt argues that the court's reasoning, based on the subjective comfort of clients and employees entering the building, illustrates an attempt to extend such private-sphere considerations of peace and quiet, as one expect in one's own home, to the public sphere.<sup>1051</sup> In respect of the second case, he points out that the granting of the interdict against picketing in a public space was made subject to concrete evidence to be provided. The applicants had to prove that

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<sup>1045</sup> Van der Walt J 'Johannesburg: a Tale of Two Cases' in Philippopoulos-Mihalopoulos A (ed.) *Law and the City* 2007 on 222-223.

<sup>1046</sup> Frug G *City Making. Building Communities Without Building Walls* 1999, and Frug G 'The geography of community' 48 1996 *Stanford LR* 1047-1066, Nancy *la Communauté Désœuvrée* 1999 and Young IM *Justice and the Politics of Difference* 1990. Through these theorists Van der Walt supports an understanding of community in terms of 'the communality or 'in common' that does not precede, but results from the experience of difference and lack of community'.

<sup>1047</sup> Van der Walt J 'Johannesburg: a Tale of Two Cases' in Philippopoulos-Mihalopoulos A (ed.) *Law and the City* 2007 on 229.

<sup>1048</sup> *Joburg 2030* (executive summary) 7-8 as quoted by Van der Walt J 'Johannesburg: a Tale of Two Cases' in Philippopoulos-Mihalopoulos A (ed.) *Law and the City* 2007 on 228.

<sup>1049</sup> *Deneys Reitz v SA Commercial Catering and Allied Workers* 1991 (2) SA 685 (WLD).

<sup>1050</sup> *Four Ways Shopping Mall v SA Commercial Catering and Allied Workers* 1999 (3) SA 752 (WLD).

<sup>1051</sup> Van der Walt J 'Johannesburg: a Tale of Two Cases' in Philippopoulos-Mihalopoulos A (ed.) *Law and the City* 2007 on 232.

the picketing will lead to the wrongful infringements of others' rights.<sup>1052</sup> On account of this last judgment he remarks that it is still open for the Johannesburg high court to decide on the issue of public expression in the city. Van der Walt highlights the interaction between the policy of the city of Johannesburg and the decisions by its high court. He speculates that the constitutional court will (hopefully) have the final say on public expression in the city and will then (hopefully) be influenced and lead by its architecture that encourages embracing city life, not as a concern with the comfort of the home, but as a concern with 'the curiosity and courage that celebrate difference and alterity'.<sup>1053</sup> Schubart Park equally captures the interaction between a city policy and city litigation.<sup>1054</sup>

These policy documents attempt to respond to the lingering lawscape and the spatial palimpsest of injustice that commenced already with colonialism in South Africa. Spatial production and reproduction in colonial and apartheid South Africa is one way to think about the lingering of the law long after the formal legislation has been removed, another way of framing this production and reproduction is through the concept of legal culture.

#### **4.6. Legal Culture as *genius loci***

*Genius loci* captures the total relationship to place.<sup>1055</sup> The spirit of place gathers the senses and illustrates a specific culture, character and identity. What then is the sense of place of South Africa? I set out the meaning of South African legal culture and consider it as that which establishes a certain spirit of place. A group creates, cultivates and grows a way of being and behaving through practices and gestures. Culture is produced.<sup>1056</sup>

Legal culture entails looking at law as culture; law consisting of rituals, where language plays a central part; law as situated within a context and with underlying systemic

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<sup>1052</sup> Van der Walt J 'Johannesburg: a Tale of Two Cases' in Philippopoulos-Mihalopoulos A (ed.) *Law and the City* 2007 on 232.

<sup>1053</sup> Van der Walt J 'Johannesburg: a Tale of Two Cases' in Philippopoulos-Mihalopoulos A (ed.) *Law and the City* 2007 on 235.

<sup>1054</sup> See section 2.2. Schubart Park.

<sup>1055</sup> See section 3.3.2. A sense of belonging and/ as *genius loci* (spirit of place) above.

<sup>1056</sup> Culture generally refers to a style of life that includes certain habits and mores, ways and customs. It involves patterns of human activity and the symbolic structures that signify the activity.

attributes. Karl Klare's article 'Legal Culture and Transformative Constitutionalism' has now almost acquired cult status.<sup>1057</sup> In addition to sustained academic engagement with this text since 1998,<sup>1058</sup> the notion of 'transformative legal education' has also recently been taken up into the Commission for Higher Education standards on the LLB degree document. What Klare means (meant) by legal culture is 'professional sensibilities'. This would not only imply a current observable ideology, but also a susceptibility or predisposition towards a certain way or method of thinking, reasoning and arguing. Klare describes it as 'habits of mind and intellectual reflexes', and also 'rhetorical' and 'argumentative' strategies.<sup>1059</sup> Legal culture would determine that valid arguments are those that feature again and again in legal discourse, forming and reinforcing that culture. The presupposed commitments of the profession results in intuitive understandings of and assumptions about politics, ethics, and social life in general as well as a specific vision of justice. It refers therefore to law's sensibilities, which lies beyond, but not entirely removed from, the senses. Expressing law as culture disrupts the formalist claim that law is objective and neutral, and stresses that legal systems are in fact 'culturally preferred ways of looking at the world'. Klare incurs the words of Justice Kriegler, in the *Du Plessis* case and explains legal culture as 'the ingrained inarticulate premises' that informs 'professional discourse and outlook'.<sup>1060</sup> These inarticulate premises form the sixth sense of law. Looking at legal culture as the sixth sense of law acknowledges the presence of legal culture in sites of law-making.

Klare illustrate that we often (wrongly) perceive legal cultural constraint as natural, non-political or non-ideological through sketching two scenarios. The first is of an adjudicator, so emerged in traditional values and influences that she does not identify or notice the ambiguities in the material she is dealing with, which is not apparent at first sight. The other adjudicator, led by her moral and political convictions, describes

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<sup>1057</sup> Klare K, 'Legal Culture and Transformative Constitutionalism' *South African Journal on Human Rights* 1998 14 146.

<sup>1058</sup> I thoroughly explored Klare's notions of legal culture and transformative legal culture in my LLM dissertation: De Villiers I 'South African Legal Culture in a Transformative Context' 2009 University of Pretoria.

<sup>1059</sup> Klare K, 'Legal Culture and Transformative Constitutionalism' *South African Journal on Human Rights* 1998 14 146 on 150.

<sup>1060</sup> 'The legal issues involved are inherently complex. The conundrum is compounded by perceptions of its social, political and economic implications, as also by inarticulate premises, culturally and historically ingrained. It is therefore necessary to strip the problem down to bedrock.' *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) at par 119.



these gaps in the (same) materials. She consequently finds a different meaning in them than can be concluded at first sight.<sup>1061</sup> From this description one can be tempted to incur that the first adjudicator does not commit a political act. But surely she does enact a politics external to the materials, by inscribing a ‘status quo ideological spin’ to the materials, regardless of the fact that they might not require or even allow it. Legal constraint is culturally constructed and constraint is part of culture. Legal culture restricts and inhibits, but also provides the possibility of transformation. It is more complex to determine legal culture or context than it is to look at content. Similarly it is much easier to address content. Just like cultures in general, legal culture takes longer to change.

In addressing the central research problem of this thesis, my argument is that legal culture, just like the spirit of place, can be established through the senses. A phenomenological approach to legal culture focuses on the everyday life-world of law and of sites of law-making. According to Norberg-Schultz the *genius loci* of a place does not necessarily change or get lost, regardless of whether the place changes.<sup>1062</sup> Legal culture remains in spite of changes in the content of law. The content of law can be changed easily, but the context remains. This systemic momentum is also true for the South African legal culture, a tendency that can be investigated through the notion of continuation. I address this lingering sense of the law with reference to the architecture and sense of place of two courts: the South African constitutional court in Braamfontein and the Palace of Justice in Pretoria.<sup>1063</sup>

South Africa’s history is marked by spatial regulation, segregation, allocation and in particular the organisation of spaces politically through a carefully crafted system of laws. Various laws all wrote indelibly on the spaces and places in South Africa, and as such the law can be approached as mapping. In concluding one of the follow-up articles to Klare’s 1998 influential piece, Davis and Klare address innovative methods

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<sup>1061</sup> Klare ‘Legal Culture and Transformative Constitutionalism’ *South African Journal on Human Rights* 1998 14 146.

<sup>1062</sup> Norberg-Schultz *Genius Loci: Towards a Phenomenology of Architecture* 1980 on 40-42.

<sup>1063</sup> See sections 2.7.1. Chronotope as timespace and courts as chronotopes above. In chapter 2 I discuss the spirit of place of these sites against the backdrop of their diverging decisions in the eviction case of *Schubart Park*.

of reasoning that have already been introduced into South African law.<sup>1064</sup> They show however how these new methods present the possibility of being both post-formalist and neo-formalist. They refer to contextual legal reasoning, balancing and proportionality and the separation of powers. Just as the case with mapping, these can either re-establish current approaches to law and therefore encourage formalist error, or destabilise the law through thinking differently. In respect of contextual thinking, lawyers usually identify an unjust apartheid practice and then illustrate how this is irreconcilable with new constitutional values and therefore a new (constitutional) norm should be used to reach a decision in the case. As Davis and Klare correctly point out, this can also result in a mere recipe, a belief that a conclusion necessarily flows from a given norm:

if 'social context' merely invokes past injustice without providing legal-analytic content – legal reasoning based on social context can easily slide into a new kind of formalistic discourse, purporting to derive concrete solutions from highly abstract legal concepts.<sup>1065</sup>

Similarly, balancing is often viewed as superior to deduction from abstract norms and authorities, however balancing is not necessarily superior, in fact it is neither inferior nor superior: '[e]verything depends on how the tool of balancing is deployed' this means that it is dependent on '[the] level of attention to context, [the] level of self-awareness and candour, [the] scope of vision, [the] sense of values, and [the] policy orientation'.<sup>1066</sup> It is most notable in the manner in which courts treat the separation of powers that Davis and Klare identify a 'denial about the destabilising power of 'advanced' legal methods''.<sup>1067</sup>

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<sup>1064</sup> Davis D and Klare K 'Transformative Constitutionalism and the Common and Customary Law' 2010 26 *South African Journal on Human Rights* on 494-501.

<sup>1065</sup> Davis D and Klare K 'Transformative Constitutionalism and the Common and Customary Law' 2010 26 *South African Journal on Human Rights* on 494.

<sup>1066</sup> Davis D and Klare K 'Transformative Constitutionalism and the Common and Customary Law' 2010 26 *South African Journal on Human Rights* on 499.

<sup>1067</sup> Davis D and Klare K 'Transformative Constitutionalism and the Common and Customary Law' 2010 26 *South African Journal on Human Rights* on 500.

Christiane Wilke aptly captures the haunting in the lawscape and legal culture as the spirit of place: '[g]hosts are signs of a haunting in which "that which appears to be not there" is in fact a 'seething presence'.<sup>1068</sup>

In Wilke's 'Enter Ghost: Haunted Courts and Haunting Judgments in Transitional Justice' she exposes the ghosts in the Federal high court in Germany. By focusing on two sets of trials, the trials of Nazi judges around the 1960s and the trials in the 1990s of East Germany judges accused of 'bending the rules', she ultimately argues that these cases illustrate a need for a particular kind of engagement and a form of justice that can simply 'not be found in courts'.<sup>1069</sup> With reference to the title of a work of Borneman, she invokes a different meaning of the word 'settle' and 'unsettle'. I link this to dwelling and undwelling, *stabilitas loci* and *non-stabilitas loci*. Wilke points out that the 'institutions that are asked to "settle accounts" with a haunting past are themselves unsettled by the spectral presence of injustices they had either committed or failed to address'.<sup>1070</sup> This relates to Massey's conceptualisation of the throwntogetherness of space as a negotiation as discussed above.<sup>1071</sup>

When we see legal culture as production, and as the production of space, it highlights valuable explanations for the endurance of colonial and apartheid law in the present lawscape. This is why the spatial turn in our jurisprudence and approaches to law is so crucial. The danger however with the growing popularity of the spatial justice discourse is that it will in turn also become a grand narrative and reinforce rather than challenge our legal culture, which is predominantly based on a view of space as abstract. In the next section I draw some tentative caveats around the possible use of spatial justice to merely enforce the endurance of law.

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<sup>1068</sup> Wilke C 'Enter Ghost: Haunted Courts and Haunting Judgments in Transitional Justice' *Law and Critique* 2010 21 73 on 74, quoting Gordon A *Ghostly matters: Haunting and the sociological imagination* 1997 on 8.

<sup>1069</sup> Wilke C 'Enter Ghost: Haunted Courts and Haunting Judgments in Transitional Justice' *Law and Critique* 2010 21 73 on 74.

<sup>1070</sup> Wilke C 'Enter Ghost: Haunted Courts and Haunting Judgments in Transitional Justice' *Law and Critique* 2010 21 73 on 74, relying on Borneman J *Settling accounts: Violence, justice, and accountability in post-socialist Europe* 1997. In expanding on the concept of 'settling of accounts' she explains that 'Transitional justice, the overarching term for recognising and addressing state-sponsored human rights violations, is easily seen as marking a return to reason, truth, and measurable justice after times of fear, lies, and capricious injustices.'

<sup>1071</sup> See section 2.5.1. Throwntogetherness as gendered space.

#### **4.7. The lurking positivism and formalist error in spatial justice<sup>1072</sup>**

Above I highlight some of the key clauses of SPLUMA. The question of the degree to which this act will achieve reconciliation through redress, will, to a large degree, depend on the underlying understanding of spatial justice, and therefore how space is conceptualised. If spatial justice becomes yet another formal requirement for municipal policies relating to land and land use, then space returns to its conception of abstract and loses the relational qualities first introduced by Leibniz and taken up by the spatial turn in law through the work of Lefebvre.

Some theorists attribute the start of positivism in Germany to Leibniz who spent his life's work on defending a fully codified legal system based on science. It is however not only systems of law that are codified, but also in common law systems (of which South Africa is a good example) that positivism was strived for. The aims of positivism, regardless of the area or jurisdiction, entail the creation of a coherent set of rules where law is acknowledged for what it is and where a complete rationalization of law can be allowed.

Berkowitz investigates precisely these often unrecognised effects of the scientific foundations of modern law.<sup>1073</sup> His argument is that social scientific thinking presents a threat to justice. In his conceptualisation what social science does is to subject justice to notions of fairness, efficiency and legitimacy. Justice is replaced by these 'weaker' and more empirical and scientifically measureable notions. What takes place in this process is that the difference between justice and legitimacy becomes blurred where the force of the relation between positive law and democracy is asserted. Berkowitz convincingly shows how modern law has been transformed into a science, by providing an alternative genealogy of positive law. Where the ideal of justice is lost, Berkowitz says, law should reclaim its roots in the art of judgment rather than asserting its foundation in the science of law.<sup>1074</sup> In the context of SPLUMA, this would mean a careful consideration of the various development principles: spatial justice, spatial efficiency, spatial resilience, spatial sustainability, good administration. If the emphasis

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<sup>1072</sup> Portions of this section have been published in De Villiers I 'Leibniz, Lefebvre and the spatial turn in law' HTS Theological Studies journal 2016 72 1 1-6.

<sup>1073</sup> Berkowitz R *The gift of Science: Leibniz and the modern legal tradition* 2005.

<sup>1074</sup> Berkowitz R 'Democratic Legitimacy and the Scientific Foundation of Modern Law' in *Theoretical Inquiries in Law* 2007 on 91.

is places on the empirical measurable notions of efficiency and sustainability, the danger is that justice will be lost in the process.

In Jurisprudence, Leibniz is generally considered to be a natural law thinker and not a positivist. However, Berkowitz is interested in a reference to Leibniz in the introduction to an 1832 article of one of the leading positivists John Austin. Because of this reference, Berkowitz reconsiders the relation between Leibniz's work and the rise of legal positivism. He asks: 'What is an epigraph from the greatest natural lawyer of the seventeenth century doing on the title page of the work that has established itself as the *locus classicus* of nineteenth-century legal positivism?'.<sup>1075</sup> What connects Austin, the positivist, and Leibniz, the natural law thinker, is their shared commitment to use science to address the loss of law's 'natural, rational and traditional authority' and to employ science to respond to the rise of positive law.<sup>1076</sup> Berkowitz shows that the crisis of authority, which Nietzsche later called 'the death of God', lead to new form of law, namely law as a form of scientific reasoning. Law as science emerged as both the symptom and the cure for crisis in authority. For Nietzsche, the death of God already commenced with the attempt of Socrates to rescue a decomposing Greek civilization by a new reliance on reason. But, argues Berkowitz, Socratic reasoning was simply another disease which further gnawed at the belief in truth which it was supposed to prove. This same pattern was followed in the social-sciences that followed Leibniz's legal science, when they undermined all the grounds for legal authority. He states categorically that there has not been any science of law that could successfully establish itself as a true science of justice. Justice retreats in the face of legal science.<sup>1077</sup>

For some, the failure of science to refound law's authority has led to the recognition that science itself is interested, subjective, and suffused with political and metaphysical presuppositions. For others, the failure of legal science is an embarrassment. Most legal scholars, however, simply carry on as if the recourse to economic and democratic grounds for law were as natural as it is

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<sup>1075</sup> Berkowitz R 'From Justice to Justification: An Alternative Genealogy of Positive Law' *UC Irvine Law Review* 2011 on 611.

<sup>1076</sup> Berkowitz R 'From Justice to Justification: An Alternative Genealogy of Positive Law' *UC Irvine Law Review* 2011 on 613.

<sup>1077</sup> Berkowitz R 'From Justice to Justification: An Alternative Genealogy of Positive Law' *UC Irvine Law Review* 2011 on 627-628.

necessary. We all, to some degree, ignore the basic fact that the scientific cure for law has failed to restore law's once vibrant bond with justice. (Berkowitz 2011: 629)

Linked to this possible danger of spatial justice to become just another cog in the machine of positivism, Philippopoulos-Mihalopoulos problematises despatialised accounts of spatial justice. This brings us back to viewing legal culture as spirit of place and if we disregard the reproduction of space, then we can reproduce the same legal culture, despite the demolition of apartheid and colonial legislation. Klare and Davis show that there is a continuation of a formalistic legal culture and in particular, one premised on a fallacy of argument. Abuse of deduction is a fallacious form of reasoning and one which is a common logical mistake amongst South African lawyers. 'Formalist error', as Davis and Klare call this error in logic, is a distinguishing feature of South African legal culture and arguing.<sup>1078</sup>

In the introduction to Christopher Roederer and Darrel Moellendorf's student textbook *Jurisprudence*, Roederer offers a model theoretic view from the philosophy of science for mapping the jurisprudential terrain in the 'search for truth in the law'.<sup>1079</sup> The mode of mapping that I propose departs from his reliance on natural and social sciences for a theoretic model of mapping and instead, in contrast to Roederer, I suggest a mode mapping from the humanities. My proposed mode of mapping flows from the rhizomes of lawyer as writer and writer as mapmaker. Writing as mapping is set out above.<sup>1080</sup> In what follows I look at the lawyer as a mapper of time and space. The argument here further relies also on Philippopoulos-Mihalopoulos's call that spatial justice requires spatialised thinking,<sup>1081</sup> and White's 'legal imagination' that creates a world.<sup>1082</sup> It relies also on Bakhtin's concept of the 'chronotope',<sup>1083</sup> Fredric Jameson's 'literary cartography'<sup>1084</sup> and Shane Graham's 'mapping loss'<sup>1085</sup> that are explained above. The transformative project of the South African constitution requires, amongst

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<sup>1078</sup> Davis D and Klare K 'Transformative Constitutionalism and the Common and Customary Law' 2010 26 *South African Journal on Human Rights* on 406.

<sup>1079</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 1-23.

<sup>1080</sup> For the writer as mapmaker, see section 3.4.5. Literature and 3.4.6. Literary cartography (writing as mapping and writer as mapmaker).

<sup>1081</sup> See section 4.2.1. The lawscape above.

<sup>1082</sup> See sections 4.2 and 4.5. Spatial Justice as well as notes 1032 and 1033 above.

<sup>1083</sup> See section 2.7.1. Chronotope as timespace and courts as chronotopes above.

<sup>1084</sup> See section 3.4. Mapping above.

<sup>1085</sup> See section 3.4. Mapping above.

other things, spatial justice. A turn to space in law does not simply mean to consider social justice within a spatial context, but indeed requires new modes of thinking and reasoning in law that do not re-inscribe existing patterns of thought, but rather open up to the full uncertainty that space presents.<sup>1086</sup>

However convinced we may be that facts of a case are ‘on all fours’ with a well-known rule, our conclusion is, in principle, epistemologically provisional. It reflects a *judgment* that is necessarily, if subtly, filtered through the sensibilities and outlook of the lawyers who make it.<sup>1087</sup>

In formal logic, arguments can be valid but false or invalid, but true. Fallacies refer to arguments that are invalid, but not necessarily false.<sup>1088</sup> In the context of deduction it refers to arguments that do not follow, instances where reflexivity is assumed in the premises or abuse of deduction (formalist error). Davis and Klare describe formalist error as a specific kind of logical mistake that takes place when ‘a lawyer believes, or says she believes, that a particular authoritative legal norm... entails a specific legal result or conclusion’.<sup>1089</sup> This belief persists while another lawyer can reach an alternative conclusion based on the same norm while still using accepted methods and following established modes of legal reasoning. They use formalist error in a manner explicitly distinguished from the jurisprudential theory of formalism<sup>1090</sup> and understand it to include a belief that reasoning in law is completely separated from

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<sup>1086</sup> Philippopoulos-Mihalopoulos A ‘Spatial Justice: Law and the Geography of Withdrawal’ *Law Culture and the Humanities* 2010 on 187-188.

<sup>1087</sup> Davis D and Klare K ‘Transformative Constitutionalism and the Common and Customary Law’ 2010 26 *South African Journal on Human Rights* on 428.

<sup>1088</sup> An example would be: The first premise is that South African lawyers are conservative and the second premise is that Karl Klare is not a South African lawyer. If we conclude from these two premises that Karl Klare is therefore not a conservative lawyer it is a logical fallacy, i.e. an invalid argument, regardless of the fact that the statement is true in the sense that it corresponds with reality. On the other hand, suppose our first premise remains that South African lawyers are conservative and our second premise reads that Karl Klare is a South African lawyer. Should we now conclude that Karl Klare is a conservative lawyer our argument, according to the rules of formal logic, is valid, but it does not correspond with reality since the second premise is false.

<sup>1089</sup> Davis D and Klare K ‘Transformative Constitutionalism and the Common and Customary Law’ 2010 26 *South African Journal on Human Rights* on 406.

<sup>1090</sup> Klare’s 1998 article ‘Legal culture and South African legal culture’, on which the 2010 article builds, used the term formalism and formalistic to describe South African legal culture: ‘The new South Africa has a Constitution with massively egalitarian commitments superimposed on a formalistic legal culture without a strong tradition of substantive political discussion and contestation through the medium of legal discourses. An opening to transformation requires South African lawyers to harmonize judicial method and legal interpretation with the Constitution’s substantively progressive aspirations’ Klare ‘Legal culture and South African legal culture’ *South African Journal on Human Rights* 1998 on 188.

politics.<sup>1091</sup> The jurisprudential theory of formalism typically views the law as an abstract and neutral science devoid of politics and normative content. Formalist error relates more specifically to reasoning in law that entails an underlying conviction that ‘a finely shaded conclusion of law can be logically and neutrally derived from an abstract legal rule or concept’, while in fact conclusions are reached through a number of ‘decisional stages’, whether conscious or unconscious.<sup>1092</sup> This, however, does not mean that any answer is as good as the next one, it means that one cannot simply ‘derive’ the legal answer from the principle, but rather that the most suitable alternative from the different possible answers compatible with the norm should be selected by consciously considering aspects outside of the norm.<sup>1093</sup> Formalist error denies the fact that judgment is a process and in order to reach a decision it must go through several stages and at each of the stages ‘value-laden’ and ‘context-driven choices’ enter the decision-making process. In the rest of the article Davis and Klare illustrate how this logical error perpetuates a certain approach to the common law and customary law.

There are of course, as I also argue in chapter 3,<sup>1094</sup> several problems with mapping and therefore also challenges to conventional (Western) notions of mapping in the form of methodologies such as unmapping, mapping loss, rhizomatic mapping, and counter-topographies. Roederer’s proposition of the model theoretic view from the philosophy of science, is introduced by a discussion of different views of the truth. With reference to Benjamin Zipurski he lays a basis for four approaches to the truth: nihilist, sceptic, pragmatic and robust.<sup>1095</sup> Nihilist notions correspond to positivism in that they are merely concerned with validity and are agnostic about whether propositions are also true. Sceptic views prefer to talk about validity and believes that adding the

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<sup>1091</sup> Davis D and Klare K ‘Transformative Constitutionalism and the Common and Customary Law’ 2010 26 *South African Journal on Human Rights* on 406.

<sup>1092</sup> Davis D and Klare K ‘Transformative Constitutionalism and the Common and Customary Law’ 2010 26 *South African Journal on Human Rights* on 407. They do not limit their critique to the mere application of rules and legal norms, but also include abstract legal concepts such as ‘dignity’, ‘contractual autonomy’, ‘property’, ‘reasonableness’, ‘free choice’.

<sup>1093</sup> Davis D and Klare K ‘Transformative Constitutionalism and the Common and Customary Law’ 2010 26 *South African Journal on Human Rights* on 407. These aspects, according to Klare and Davis could include the following: ‘objectives intended to be served by a rule, insights regarding the social context, considerations of economic efficiency or human rights, beliefs about the goals of the legal system, or, indeed, beliefs about the good life’.

<sup>1094</sup> See section 3.4.1. The rise and power of cartography.

<sup>1095</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 5-8.



adjective 'true' to propositions does not contribute anything more than what an 'exclamation mark adds to a statement'.<sup>1096</sup> The pragmatist approach to the truth, as identified by Roederer, entails a view that those in the legal profession find useful. It is convenient to the extent that since the truth is relative, lawyers can defend any client (who is willing to pay) and still feel satisfied because whatever argument they present will be warranted by virtue of serving some purpose, namely that of winning the case.<sup>1097</sup> Roederer's chapter adopts a robust view of the truth that claims to satisfy both the criticisms against strong correspondence theories while still having sufficient substance to evaluate the other theories put forward in the rest of the textbook.<sup>1098</sup> Roederer bases his conception of truth mainly on Hillary Putnam's reading of John Dewey,<sup>1099</sup> in an attempt to 'squeeze a bit more substance out of the notion of truth'.<sup>1100</sup> Despite this attempt, the model theoretic view from the philosophy of science does not bring about a much more robust notion of truth. It does not take account of truth and justice as law's utopias that will never be reached, and resembles strongly the pragmatic approach Roederer is critical of.

The model theoretic view, deriving from formal semantics and mathematics, assists scientific theory to (only) predict, describe and explain. Roederer highlights that scientific theory never deals with actual phenomena, but rather with physical systems: 'highly abstract and idealised replicas of phenomena'.<sup>1101</sup> The model theoretic approach moves from normal phenomena to hard data in the model and is distinct from the alternative view in scientific theory, namely the 'received view' which insists on a strict separation between theory and empirical data so as not to 'pollute empirical

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<sup>1096</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 6.

<sup>1097</sup> On this account, as Roederer illustrates, lawyers are not liars, since the truth is merely what is justifiable and useful. Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 6.

<sup>1098</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 4. The textbook includes chapters on Natural Law Theories, Positivism, Third Path Theories, Historical Jurisprudence, Marxism and the Law, Legal Realism, Law and Economics, Interpretative Approaches, Critical Legal Studies, Critical Race Theory, Feminism and the Law, Gay and Lesbian Legal Theory, Postmodernism(s) and the Law, Justice and the Law, Communitarian and Civic Republican Theories, 'Traditional' African Jurisprudence, Islamic Jurisprudence, Traditional Chinese Jurisprudence, The Duty to Obey the Law, Legal Punishment, Law in the Context of Globalisation, and Transitional/ Transformative Jurisprudence.

<sup>1099</sup> Putnam H 'Are moral and legal values made or discovered?' *Legal Theory* 1995 6-9 and Putnam H 'Replies' *Legal Theory* 1995 69 73-74. With reference to and reliance on Dewey J *Logic: The Theory of Inquiry* 1938, and Dewey J *Experience and Nature* 1926.

<sup>1100</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 7.

<sup>1101</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 9.

enquiry with theory'.<sup>1102</sup> 'Law-like generalisations of theory work with the model like a logical axiomatic system (e.g. like standard geometry)'. Relying on Ronald Geire.<sup>1103</sup> Roederer compares the scientific model with a map.<sup>1104</sup> The map can be seen as a particular type of scale model and despite not claiming to be comprehensive in its representation, the map (like scientific models and in Roederer's argument jurisprudential theories) has two basic requirements: correspondence and value. Correspondence or coherence with our warranted set of beliefs, as the first requirement, consists of theoretical hypotheses, experiments, quasi experiments and counterfactuals. Theoretical hypotheses are claims regarding the level and degree of the accuracy of the map or model. Experiments are ways of arriving at the data that the model or map claims to predict while quasi experiments are performed to determine whether other models can also predict the given data.<sup>1105</sup> Quasi-experiments or crucial experiments can, to some extent, challenge the formalist error, in the sense that it highlights the possibility of two theories or models predicting different outcomes for the same experiment. But experimentation is often not plausible (as in the case of law) and then counterfactuals stand in. Counterfactuals are observations that substitute experiments, they are readily explained as 'if-then clauses' and Roederer provides the following example: 'if socio-economic background influences judges' decision-making, then we expect that judges with similar backgrounds will tend to make similar decisions'.<sup>1106</sup> Mapping as a model in terms of a scientific perspective asks firstly if the map fits the reality it purports to describe and secondly whether the map is valuable, i.e. is it beautiful or does it provide important information.<sup>1107</sup> The value of a map or theoretical model, within the field of philosophy of science can be divided into two different aspects. The value can either be established as constitutive value (this is the value of the scientific method and the scientific process itself) or as contextual value (more broadly conceived values). Mapping viewed in this way could lead to formalist error. This view of mapping constitutes a particular view of space and place and their representation. For lawyers whose laboratories are libraries, Roederer's approach could foster formalist error

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<sup>1102</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 at footnote 26.

<sup>1103</sup> Geire RN *Understanding Scientific Reasoning* 1991.

<sup>1104</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 10.

<sup>1105</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 10-15.

<sup>1106</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 12.

<sup>1107</sup> Roederer C and Moellendorf DI (eds.) *Jurisprudence* 2004 on 14.

rather than prevent it. Comparing scientific models to maps reduces the model theoretic approach, but it also reduces maps and mapping and shadows the political nature of and power relationships connected to mapping.

Approaches to geography and spatial representation have changed significantly, and those involved in projects of radical geography are acutely aware of the manner in which space produces and is produced by unequal relationships.<sup>1108</sup> Roederer's mapping advocates for a (re)turn of law to geography's concreteness whereas Philippopoulos-Mihalopoulos insists that this should be 'conditioned by an adequate conceptualisation of space' as pervaded by simultaneity.<sup>1109</sup> The reasons why the model theoretic view fosters rather than counters the formalist error include the following concerns: firstly none of the mentioned steps take cognisance of the power and politics in the process of mapping, secondly the point of departure is coherence with an existing view, which will lead to the perpetuation of dominant discourses and leading approaches, thirdly the conclusion is still reached through formal logic because data is collected and conclusions induced and value is established by means of deduction. Spatial logic understood in terms of radical geography calls for rhizomatic instead of axiomatic reasoning and for transduction instead of deduction and induction.

#### **4.8. Conclusion**

Several grand narratives of and in the city of Tshwane/ Pretoria along with Massey's critique of 'world-cities' shape this chapter. I look at the idea of the lawscape as the way in which law and the city come together and are intertwined. Bio-politics and the concept of heterotopias exposes the power that underlies the production of space. I identify this power in three space-times: colonial South African cities, apartheid Pretoria and present day city of Tshwane/ Pretoria. In the context of apartheid Pretoria I look at the exercise of state power through political trials and capital punishment that all form part of the palimpsestic lawscape of the city of Tshwane/ Pretoria. Going further back, the sanitation syndrome of colonial urban planning is explored and I show how there is a continuation of this syndrome. After addressing the colonial and

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<sup>1108</sup> Massey D *for space* 2005 on 1-9.

<sup>1109</sup> Philippopoulos-Mihalopoulos A 'Law's Spatial Turn: Geography, Justice and a Certain Fear of Space' *Law Culture and the Humanities* 2010 on 196-197.

apartheid layers, I look at continuations and hauntology in present-day grand narratives such as the *Tshwane 2055* plan and the mayors' state of the city addresses. This brings me to ask what spatial justice could look like in the administrative capital. I close the chapter with some cautions about the lingering formalism in our legal culture and think of it as a form of haunting *genius loci*. Lastly, I warn against the possibilities that the spatial justice framework can (again) lead to a view of space as abstract and can perpetuate and continue existing unequal spatial relations if we take a positivistic approach to it.

The continuing story in the Tshwane lawscape is a grand narrative of violence through administrative power linked to a view of space as abstract. The past and contemporary grand narratives of the city of Tshwane/ Pretoria are illustrated through the sanitation syndrome in the colonial urban planning project, the cluster of dispossessing apartheid laws, and present city improvement policy. Spatial justice can disrupt these grand narratives, but can also potentially become a grand narrative in itself. Our formalistic culture contributes to spatial continuation and it is in this regard that spatial justice should be approached with caution. The limits to the spatial turn in law, should be heeded.

## Chapter 5

### Conclusion

Throughout working on this project, the city council of Tshwane/ Pretoria displayed their view of space as detached from relations in several ways. Perhaps it is not as important to cover what happened in the Tshwane/ Pretoria lawscape, but also to draw attention to that which did not happen. I am acutely aware of the fact that when I embarked on this project, the constitutional court had just given judgment in favour of the Schubart Park residents. Now, almost five years later, the Schubart Park matter has almost not changed at all: the residents are still in temporary accommodation around the city and the buildings are (still) in a state of disrepair. Slowly, the city council is muting Schubart Park. On this year's (un)freedom day, which marks the first democratic election held on 27 April 1994, former residents of Schubart Park picketed in front of the new extravagant mayoral offices in Madiba street, demanding that they 'be taken seriously'.

At the core of this project lies spatiality: space as relational. More specifically, I am interested in the relationship between law and space. Spatial continuation or spatial memory might suggest a passive or inevitable endurance. I therefore choose Lefebvre's understanding of the production and reproduction of space. Spaces are reproduced because they are relational. To give content to the relationality of space, I draw on feminist geographer Massey's work. Chapter 2 focuses on space as relational and mainly draws from radical geography and feminist theory, chapter 3 relies on concepts in art and literature and phenomenology, and chapter 4 uses the concept of the lawscape with a focus specifically on power.

The broad research problem that I identify is the lingering or continuing effect of law on spaces. The relationships produced by law persist long after the laws that created these relations have been abolished or repealed or fallen into disuse. This is particularly evident in post-apartheid South Africa. In this sense I identify a spatial memory or haunting of space or spatial lingering. This concept of the production and reproduction of space as unequal relationships as opposed to a notion of space as abstract is central to a critical version of the spatial justice project. In chapter 2 I

investigate the idea of spatial continuation or reproduction through the instantiation of Schubart Park in the city of Tshwane/ Pretoria. This apartment complex was built during apartheid as a civil servant housing scheme, but is now abandoned. Against the backdrop of Schubart Park, I investigate the ways in which law conceives of space as abstract. Chapter 2 starts with an overview of the history of the apartment complex. Five important spatial justice concepts are explored: the right to the city, the differing notions of habitat and inhabitation, space as gendered, everyday practices, space as connected to time and associated concepts such as 'space-time compression' and the 'chronotope'. Massey's notion of 'simultaneity', with the related importance of looking at space as relational, is the main thread that runs through this chapter.

Chapter 3 also assesses the way in which spaces endure and continue after the law's that have produced these spaces cease to exist. I look at the way in which the law draws on the landscape, the role of representation in the exercise of power and the notion of *genius loci* (spirit of place). A discussion of the series of judgments around changed street names in the city of Tshwane/ Pretoria forms the backdrop for exploring these concepts. That the constitutional court has linked the street names to belonging is significant. Chapter 3 takes a hard look at street names, maps and other symbols that cartographically and otherwise depict and choreograph the lawscape. I suggest that the palimpsestic nature of the dual signage created more possibilities and opened up different spaces. A form of rogue urbanism presents a reminder of the past along with the promise held in the present. I caution against using the street names as spectacle and subsequently ask how we memorialise the ordinary inhabitants of the city of Tshwane/ Pretoria. Two main themes of spatial justice form the basis of this chapter: belonging and mapping. Massey's view of place as open sets the tone for this chapter.

Chapter 4 is situated in the lawscape and is as such based on the idea and concept of the mutual interaction between the law and the city. It continues the idea that spatial relations are not easily severed when the law that produced spaces subside, but instead there is an endurance of law through the spaces that it created. In chapter 4, my focus falls specifically on the city of Tshwane/ Pretoria as administrative capital and what this legal function, of meticulous bureaucratic processes, contribute to the lawscape. As administrative capital, the lawscape is marked by grand narratives,

grand gestures, overt displays of power and also more subtle exercises of power, such as policies and administrative processes. The central research question of this chapter concerns the way in which the administrative function of law in the city of Tshwane/ Pretoria has over time shaped the lawscape and how there is a continuing reproduction of space. I focus on different time-spaces in the capital city. I start with current-day grand narratives in the post-apartheid city by looking at the *Tshwane 2055* policy and the state of the city addresses of the former mayor. I then turn to the colonial and apartheid time-space and answer the research question by drawing from the lawscape of Pretoria as a site of political trials, and executions. I also looked at the cluster of acts that orchestrated dispossession and spatial violence and turn to the sanitation syndrome as it played out in colonial and apartheid Pretoria and can still be seen in the present-day city of Tshwane/ Pretoria. After touching on the sheer spatial injustices that have written this capital city into being, I turn to some key concepts in spatial justice. Towards the end of the chapter, the link in the research question between the administrative function of the law, the city and the endurance of the lawscape, is connected to the idea of legal culture and the continuation (reproduction) of a formalistic legal culture. I conclude the chapter by critically looking at the possible dangers of further continuation of formalism and positivism through the (new) lens of spatial justice. Massey's critique of world-cities connects the ideas on state-power, gentrification and grand narratives in chapter 4 to the rest of the chapters.

In concluding this project, I am left with a sense of complicity in the reproduction of unequal social space in South Africa. I am complicit as lawyer and as a white South African. This leaves me thinking about space, in the final instance, in terms of a 'geography of responsibility'. In addition to an apology, I offer this project as a way of taking responsibility.

The notion of responsibility for the past has led to a spate of 'apologies' for it. Apologising does not always amount to the same thing as taking responsibility. But were the 'distance' to be spatial, and in the here and now rather than imagined as only temporal, the element of responsibility – the requirement to do something about it – would assert itself with far greater force.<sup>1110</sup>

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<sup>1110</sup> Massey D 'Geographies of Responsibility' *Geografiska Annaler: Series B, Human Geography* 2004 86 5 on 10.

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