ISSN 1128/322X SPRING-SUMMER 2023 Vol. 29

The Cardozo Electronic Law Bulletin

CELB | THE CARDOZO ELECTRONIC LAW BULLETIN

The Cardozo Electronic Law Bulletin

Sito web: https://www.ojs.unito.it/index.php/cardozo/index
e-mail: celbulletin@gmail.com
 ISSN 1128-322X

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Vol. XXIX Issue 1 2023

CELB | THE CARDOZO ELECTRONIC LAW BULLETIN

The Cardozo Electronic Law Bulletin 29 (Spring-Summer) 2023

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UNCOVERING COLONIAL-APARTHEID LEGAL GEOGRAPHY.
WOMEN'S RIGHT TO LAND, HOUSING AND PROPERTY BEFORE THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Abstract The article discusses the innovative approach adopted by the Constitutional court of South Africa towards women's land, housing, and property rights in two landmark decisions: *Daniels v. Scribante* (2017) and *Rahube v. Rahube* (2018). The first section introduces the notion of "apartheid geography" and the land reforms promoted by the South African national government since 1994. The second section discusses the *Daniels* and *Rahube* cases. In these rulings, the judges partially departed from the traditional legal methods and reasoning by reading the impugned provisions through the lens of legal geography. The last section deals with the gendered approach adopted by the court in *Daniels* and *Rahube* and the implications with regard to the protection of women's land and property rights. The aim is to highlight the Constitutional court capacity to uncover the resilience of colonial and apartheid spatial logic in contemporary South African legal system by combining legal geography methodology and the intersectional approach to land, race, and gender.

Keywords Land, race, gender, women's rights, property rights, apartheid, legal geography, intersectional approach, South Africa.

Introduction

This contribution addresses the Constitutional court's role in advancing women's rights to land, housing, and property in South Africa within the framework of post-apartheid land reforms.

As is known, the colonial and apartheid regimes shaped South African human and legal geography.[1] Law was instrumental in establishing and maintaining racially and classed-based spaces. Moreover, it contributed to the uneven distribution of goods and resources between white and black people.[2]

In turn, the construction of racially identified spaces influenced the drafting and implementation of South African law. This occurred as places inscribed with legal significance «are not simply the inert sites of law but are inextricably implicated in how law happens».[3] Thus, during the colonial and apartheid regime, law and space co-constituted each other on terms beneficial to white people.[4]

As regards rights to land, housing, and property, Western categories and legal constructs were transplanted into the South African legal system during the colonial administration.[5] This also entailed introducing the Western understanding of rural and urban development, i.e., capitalism, individualised cash economy, cheap migrant labour working.[6]

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[1] The term "legal geography" has been firstly used by F.W. Maitland, *Township and Borough: The Ford Lectures 1897*, Cambridge University Press, Cambridge, 1898, p. 11 with reference to the legally relevant relationships between the law, space, and the community. In the past two decades, legal geography methodology is contributing to investigate the interdisciplinary connections between law and space by focusing the attention on how spaces affect legal implementation and drafting (the spatiality of law), how law contributes to the construction of spaces and places, and how do lawyers understand and engage with matters of jurisdiction and scale. See L. Bennet, A. Layard, *Legal Geography: Becoming Spatial Detectives*, in *Geography Compass*, vol. 9, n. 7, 2015, pp. 406 – 422 doi: 10.1111/gec3.12209. See also N.K Blomley, *Law, space, and the geographies of power*, Guilford Press, New York, 1994; I. Braverman, N. Blomley, D. Delaney, A. Kedar (eds), *The expanding spaces of law: a timely legal geography*, Stanford University Press, Stanford, 2014, M. Nicolini, *Territorial and Ethnic divide: A new legal geography for Cyprus*, in M. Nicolini, F. Palermo, E. Milano (eds.), Brill, Nijhoff, 2016, pp. 285 – 315.

[2] T.W Bennet, *African Land – A History of Dispossession*, in R. Zimmermann, D. Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa,* Clarendon Press, 1996, pp. 65 – 94.

[3] I. Braverman, *Who's afraid of methodology? Advocating a methodological turn in legal geography*, in I. Braverman et al. (eds), *The expanding spaces of law: a timely legal geography*, Stanford University Press, Stanford, 1994, p. 1.

[4] On the definition of apartheid geography see R. Madlalate*, Dismantling apartheid geography: transformation and the limits of law*, in *Constitutional Court Review*, vol. 9, n. 1, 2019, p 197. doi:10.2989/ccr.2019.0008. See also, A. Akinwumi, *Powers of reach legal mobilization in a post-apartheid redress campaign*, in *Social & Legal Studies*, vol. 22, n. 1, 1993, pp. 25–41; J Robinson, *The Power of Apartheid: State Power and Space in South African Cities,* Butterworth-Heinemann, Oxford, 1996.

[5] See M. Nicolini, *L'altra Law of the Land. La famiglia giuridica mista dell'Africa Austral*e, BUP, 2016, pp. 117-131; pp. 156 – 166.

[6] See H. Wolpe, *Capitalism and Cheap Labour-Power in South Africa: From Segregation to Apartheid*, in *Economy and Society*, vol.1, n. 4, 1972, pp. 425–56; N. Worden *The Making of Modern South Africa: Conquest Segregation and Apartheid,* 3rd ed, Blackwell, 2000, p. 75.

Furthermore, the apartheid regime contributed to the drawing of South African (physical, human, and legal) geography through land dispossession and relocation of black people to racially based "homelands" and reserves.[7]
In 1994, the National Government advanced land reforms to redress past injustices and promoting fundamental civil rights through land restitution, land redistribution, and the reform of the tenure system.[8]
Within the framework of land reform programme, women's rights to land, housing, and property, as well as women's organizations engagement in the process of land redistribution, restitution and tenure reform were granted particular attention.

The alteration of South African traditional forms of economic and social organization during the colonial and apartheid regimes was particularly harmful for women. Due to dispossession and overpopulation, landlessness increased within the reserves and the homelands. This crisis was deepened by colonial policies, according to which customary land and inheritance laws had to be strictly enforced by white officials and traditional (male) leaders. The patriarchal version of customs was preferred as it better served colonial and apartheid policies.[9]
Against this background, the article discusses the innovative approach adopted by the Constitutional court of South Africa towards women's land, housing, and property rights, highlighting the judge's contribution to the development of a new «spatial jurisprudence» beyond colonial and apartheid spatial construction.[10]
In the first section, the article deals with the spatial and gender inequalities in land access and ownership produced by settler colonialism and apartheid rule. In this regard, it introduces the notion of "apartheid geography".[11] Then, it discusses the land reform programmes promoted by the South African national government to redress historical injustices.
The second section focuses on the Constitutional court's approach towards women's land, housing, and property rights by drawing the attention on two landmark decisions: *Daniels v. Scribante* (2017) and *Rahube v. Rahube* (2018).[12]
In the judgments at hand, the Court partially departed from traditional legal methods and reasoning by providing an extensive social and historical contextualisation of land and housing claims.

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[7] See T.W Bennet, *African Land – A History of Dispossession*, cit., pp. 65 – 94.
[8] White Paper on South African Land Policy (April 1997), Department of Land Affairs, available at the website www.gov.za, 1997.
[9] A. Claassens, *Recent changes in women's land rights*, in *Journal of Agrarian Change,* vol. 13, n. 1, 2013, p. 73. doi:10.1111/joac.12007.
[10] R. Madlalate, *Dismantling apartheid geography,* cit., p. 195.
[11] *Ibidem.*
[12] *Daniels v Scribante & Another* [2017] ZACC 13, 2017 (4) SA 341 (CC); Rahube v. Rahube [2018] ZACC 42, CCT319/17 (CC).

As occurred in previous rulings, the court showed awareness of the resilience of spatial inequalities created by the colonial and apartheid regimes. However, in *Daniels* and *Rahube*, the judges' arguments went beyond the "black-letter law" to read the impugned provisions through the lens of legal geography. By doing so, the Court actively contributed to the reconfiguration of spatial relationship in post-apartheid South Africa.

The ruling also considered land and housing issues from a gendered perspective. By adopting an intersectional approach to land, race, and gender,[13] the judges concluded that colonial and apartheid construction of rural and urban spaces marginalized women by enforcing the «patriarchal model of men as the heads of extended families presiding over their wives and children».[14]

The last section of the article discusses the implications of the gendered approach adopted by the Constitutional court with regard to women's land, housing and property rights.

The aim of the article is to highlight the Constitutional court's capacity to decoding "apartheid geography" in contemporary South Africa legal system, capturing the points at which law, space, and gender intersect. Legal geography methodology and the intersectional approach to race, gender and space successfully combined and helped the judges to uncover the reiteration of apartheid spatial constructions, as well as gendered patterns in apparently neutral legal provisions.

1. Apartheid legal geography and land reforms in South Africa

A. *Spatial and gender inequality under colonialism and apartheid*

Apartheid spatial inequality is a recurring theme in South African case law with reference to housing, land, and property rights.[15] In this respect, the term "apartheid geography" has been used in literature to denote «the creation and maintenance of racially identified spaces, coupled with racial and class-based segregation and an uneven distribution of social goods and public amenities»,[16] also shaped through discriminatory law and practices.[17]

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[13] K. Crenshaw, *Mapping the margins: Intersectionality, identity politics, and violence against women of color*, in *Stanford Law Review,* n. 43, 1991, pp. 1241–1299. See also, L. McCall, *The complexity of intersectionality*, in *Signs: Journal of Women in Culture and Society,* vol. 30, n. 3, The University of Chicago Press, pp. 1771–1800.

[14] A. Claassens*, Recent changes in women's land rights*, cit., p. 74.

[15] See, *Government of the Republic of South Africa and others v. Grootboom and others [2000] ZACC 19, 2001 (1) SA 46 CC*; *Port Elizabeth Municipality v. Various Occupiers [2004] ZACC 7, 2005 (1) SA 217 CC* at paras 11 - 12; *Federation of Governing Bodies of South African Schools (FEDSAS) v. Member of the Executive Council for Education, Gauteng and Another [2016] ZACC 14, 2016 (4) SA 546 (CC)* at para 38*; Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others [2019] ZACC 38.*

[16] R. Madlalate*, Dismantling apartheid geography*, cit., pp. 195-217. See also J. Robinson, *The Power of Apartheid: State, Power and Space in South African cities*, Butterworth-Heinemann, Oxford, 1996.

To mention just a few examples, racialization of South African urban and rural spaces occurred under the Black Land Act 27 (1913), the Natives (Urban Areas) Act 21 (1923); the Black Communities Development Act 18 (1936).

The production of apartheid geography was further characterised by statutory measures which allowed the native people eviction from their land. In particular, the Group Areas Acts n. 41 (1950) and the Group Areas Acts n. 36 (1966) regulated the acquisition, alienation and occupation of land and established six self-governing territories (KwaNdebele, QwaQwa, Gazankulu, Lebowa, KwaZulu-Natal and KaNgwane) and four independent nation states, the so-called "homelands" of Transkei, Bophuthatswana, Ciskei, and Venda.[18] These acts created racially identified urban spaces. Moreover, black people who were not required as workers in the urban areas were forced to move to designated township and reserves.

The legacies of racialisation of spaces, segregation and land deprivation are still visible in contemporary South Africa, where black people are still «experiencing precarious tenure in land and housing rights».[19]

The colonial and apartheid regimes used the legal system «to advance a racist agenda and ensure that the formation of South Africa's urban and rural areas occurred on terms beneficial to white people».[20] Law was instrumental «to determine who could be present, as well as when and on what terms this was to occur».[21]

When it comes to women, they were simply "absent" in the apartheid legal construction of rural and urban spaces, as they were excluded from holding land, housing, and property rights.

More in details, pre-colonial era exhibited a variety of forms of acquisition and inheritance of land which also allowed women to acquire land and housing.[22] Under the colonial and apartheid regimes instead the Western legal concept of exclusive ownership was introduced. Land was only vested in men and women's land, housing, and property rights were connected to marital status; thus, impairing women's social and economic position within the rural family and the society.[23]

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[18] In 2021, the Parliament of South Africa voted against the amendment of Section 25 of the Constitution which provided for the expropriation for land reform without compensation. See Elmien du Plessis, *No expropriation without compensation in South-Africa Constitution – for the Time Being*, in *VerfBlog,* 2021/12/09, available at *www.verfassungsblog.de,* 2021.

[19] A Lemon (ed.) *Homes Apart: South Africa's Segregated Cities*, Indiana University Press, 1991, p. 1 - 9.

[20] R. Madlalate, *Dismantling apartheid geography*, cit., p. 198.

[21] *Ivi*. p. 199.

[22] B. Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era*, Boydell & Brewer Ltd, Oxford, 2005; D. Posel, *State, Power and Gender: Conflict over the Registration of African Customary Marriage in South Africa c. 1910–1970,* in *Journal of Historical Sociology*, vol. 8, n. 3, pp. 223–256.

[23] H.J Simons, *African Women: Their Legal Status in South Africa*, C. Hurst& Co, London, pp. 264-266

During the negotiation of the post-apartheid Constitution, rural women's organizations were successful in ensuring that customary law should be subject to the Bill of Rights.[24] Furthermore, they repeatedly challenged discriminatory laws before courts.[25] Gender inequalities in terms of land and housing have been also subject to discussion and addressed by the government within the framework of the post-apartheid land reforms. In this context, women and civil society organisations actively campaigned to advancing women's rights to land and property.

Despite their engagement in such a transformative project, South African women still suffer from consolidated gendered patterns governing land, housing, and property.

B. The land reform programme in South Africa

In the 1990s, the post-apartheid governments started land and property reforms. The aim was to ensure security of tenure for labour tenants in white-owned farms, as well as redistribution and restitution of land. Due to the relevance of land rights in the transition from apartheid to constitutional democracy, land reforms were embedded in the 1996 Constitution.

Section 25 grants a considerable degree of protection to property owners; at the same time, it provides that «the state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on equitable basis», advancing land rights on equal terms.

Yet, the reform process is hampered by extensive institutional dysfunctions, lack of transparency, and systemic rights violations, thus, impeding the fulfilment of post-apartheid constitutional promises.[26]

This failure is particularly harmful for young people and women,[27] who, as already mentioned, were excluded from land ownership by the codification of the «the overlapping patriarchies of white officials and black elders» in colonial and apartheid laws.[28]

[24] C. Albertyn, *Women and the Transition to Democracy in South Africa,* in *Acta Juridica*, 1994, pp. 39–63.
[25] *Ivi*, pp. 39-63.
[26] Department of Agriculture, Land Reform & Rural development of South Africa, *Annual Report, 2020/2021 on Agriculture, Land Reform and Rural Development,* available at *www.dalrrd.gov.zaf*, 2022.
[27] D. Hitchcock-Lopez, *If a Person Must Die, Then So Be It: A Constitutional Perspective on South Africa's Land Crisis*, in Wash. U. J. L. & Pol'y, 2019, p. 318.
[28] A. Claassens, *Recent changes in women's land rights*, cit., p. 82. See further, S. Marks, *Patriotism, Patriarchy and Purity: Natal and the Politics of Zulu Ethnic Consciousness*, in L. Vail (ed.), *The Creation of Tribalism in Southern Africa*, University of California Press, Berkeley, 1989, pp. 215–40.

In the aftermath of the apartheid, land, housing, and property rights remained the cornerstone of activism in the quest for the advancement of women's socio-economic rights and the catalysts of the democratization process.
In this respect, the Constitutional court is playing a decisive role in advancing the cause of women' equality and justice over land and housing.[29]

2. The Constitutional court's approach to land, housing, and gender

In *Daniels* and *Rahube*, the Constitutional court of South Africa discussed the impugned legal provisions within the broader historical and social context in which they were conceived and operated.
The contextualisation of land claims allowed the Court to acknowledge the resilience of colonial and apartheid spatial logic in the contemporary legal construction of rural and urban spaces.
In this respect, legal geography methodology was instrumental in uncovering the duplication of apartheid legislation in contemporary land and property laws.[30]
Furthermore, the Constitutional court adopted an intersectional approach by discussing the legal frameworks governing land, housing, and property in the light of the intersections between race, gender, and space. The result has been the development of a "post-apartheid spatial jurisprudence",[31] which is also gender responsive.

A. *Daniels v. Scribante (2017)*

In *Daniels*, the applicant, Ms Yolanda Daniels, resided in a dwelling on the farm Chardonne as an occupier under the Extension of Security of Tenure Act 62, 1997 (ESTA). The dwelling required improvements to bring the house to a level «consonant with human dignity».[32] The farm owner refused the permission to make the improvements. Ms Daniels unsuccessfully argued before the Stellenbosch Magistrates' Court, the Land Claim Court, and the Supreme Court of Appeal that she was entitled to make the necessary improvements without the consent of the property owner.

[29] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30.
[30] J. Dugard, *Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform*?, in *Constitutional Court Review*, vol. 9, 2019, pp. 135-160.
[31] R. Madlalate, *Dismantling apartheid geography*, cit., p. 207.
[32] *Daniels v. Scribante* at para 59

The Constitutional court instead rejected the argument that the owner has no constitutional obligation to ensure dignified living conditions to the tenant and ruled in favour of Ms Daniels.

The decision is ground-breaking, and it has been extensively discussed in literature because it acknowledged that constitutional positive obligations may have direct horizontal effects on private persons. In brief, the Court held that the imposition of a positive duty on a private individual was justified by the importance of Ms Daniels' right to adequate housing *ex* art. 26 Const., and the tenuous nature of the owner's duty to compensate an occupier for the improvements. The imposition of such a duty indeed remains within the court's discretion.

The present article aims to discuss an additional aspect of the *Daniels* ruling that received little attention in scholarly contribution, namely the Constitutional court's approach to the legal construction of (rural) spaces.

In discussing whether an occupier under the ESTA had the right to improve his/her dwelling without the owner's consent,[33] the Constitutional court reframed the issue in terms of restoration of human dignity for a person holding precarious land rights due to the enduring effects of (mostly repealed) apartheid discriminatory legislation.

In the majority judgment, the Court extensively illustrated the colonial and apartheid policies that created spatial discrimination and socio-economic inequalities in South African society.

Then, the Court explicitly addressed the connection between racial discrimination and gender-based discrimination in land and property laws. Firstly, the ruling focused on the negative implications of colonial and apartheid laws in terms of women's land, housing, and property rights. Then, it recognised the resilience of gender-based discrimination in contemporary apparently gender-neutral legislation; and, thus, the gendered dimension of land disputes in South African legal system.

By adopting an eclectic approach to women's land and housing rights, which combined intersectionality and legal geography methodology, the Constitutional court concluded that, although past discriminatory laws were repealed, some legacies of the colonial - apartheid legal construction of spaces remain; thus, contributing to fostering race and gender-based discrimination in contemporary rural and urban spaces.[34]

[33] Indeed, such a right is not contained in the Extension of Security of Tenure Act 62, 1997 (ESTA).

[34] In a separate concurring judgment, J. Cameron is more cautious towards the bold use of historical arguments in the majority ruling by affirming that «it is not within the competence of judges to write history» (para 149).

In his concurring opinion, Justice Froneman affirmed that three things must be done to fulfil constitutional promises in post-apartheid South Africa: «(a) an honest and deep recognition of past injustice; (b) a re-appraisal of our conception of the nature of ownership and property; and (c) an acceptance, rather than avoidance or obfuscation, of the consequences of constitutional change».[35]

B. Rahube v. Rahube (2018)

The resilience of colonial-apartheid legislation and policies clearly emerges in *Rahube*, decided on 30 October 2018 by the Constitutional Court.

The Applicant, Ms Rahube, and the First Respondent, Mr Rahube, are siblings who moved into a house in Mabopane in the 1970s. In 1987, the Department of Interior of the Bophuthatswana Government Service issued a Certificate of Occupation in Mr. Rahube's name under the Native Proclamation Act R293 (1962). In 1988, the Department of Local Government and Housing of the Republic of Bophuthatswana issued a Deed of Grant in Mr Rahube's name as head of the household.

Under the apartheid regime only men were considered as "family head" and could obtain Deeds of Grants. Women, instead, were denied land and housing rights.

In 1991, the Upgrading of Land Tenure Rights Act automatically upgraded land rights acquired under the apartheid rule to ownership rights. Since the Native Proclamation Act excluded women from land and housing ownership, the upgrading measures indirectly perpetuated gender-based discrimination in contemporary land and property law.

In force of the Upgrading of Land Tenure Rights Act, Ms. Rahube was automatically excluded from property ownership in favour of her sibling, Mr Rahube. The latter instituted eviction proceedings against Ms Rahube in Garankuwa Magistrates' Court in 2009.

Ms. Rahube successfully opposed the eviction proceedings. The High Court held that the land tenure rights which the Upgrading of Land Tenure Act recognized and converted to land ownership were indeed acquired under a gender-based discriminatory legal regime.

The Constitutional court unanimously upheld the High Court's findings that section 2(1) of the Upgrading of Land Tenure Rights Act was unconstitutional and therefore invalid, since it violated women's right to equality.

As previously occurred in *Daniels*, the Court considered the broad historical and social context in which South African land regime operates.

[35] *Daniels v. Scribante* per J. Froneman at para 115.

As already noted, the Upgrading Land Tenure Act automatically converted to ownership the land tenure rights acquired under the Native Proclamation Act.
The Native Proclamation did nothing but formalized customary land laws. Among the different traditional systems of land ownership and transmission, the patriarchal paradigm of land tenure was preferred. According to the official customary law, only the "family head" - i.e., men - could hold tenure rights. The Act applied also to those traditional communities where the living customary laws provided otherwise.
The Constitutional court found the impugned provisions irrational and unconstitutional because they were aimed to ensure security of tenure of those damaged by past discriminatory legislation; instead, they indirectly contributed to perpetuate land rights discrimination based on sex and gender.[36]
In deciding the case, the Court made extensive use of the social and historical narrative to contextualise the dispute. The judges noticed that the Upgrading Land Tenure Act does not provide a definition of the "family head". However, considered in the broad context of past discriminatory measures, policies, and social practices, it cannot be read in a gender-neutral way.[37] The contextualization of relevant legislation revealed that women were placed "outside the law"[38] and excluded from holding land tenure rights during the apartheid.
In light of these considerations, the Constitutional court found that section 2(1) of the Upgrading Land Tenure Act was irrational, since it was based on a position acquired under apartheid legislation and, thus, it contradicted the aim of the Act itself. Furthermore, the section under scrutiny was unreasonable, insofar it was designed to ensure equitable access to property and tenure security in a way that indirectly discriminated against women.

3. Decoding and dismantling colonial-apartheid legal geography

In both *Daniels* and *Rahube*, the Constitutional court shed light on a paradox hidden in the South African legal system: although post-apartheid land, housing, and property laws are explicitly designed to rectify historical injustices, they indirectly contribute to reproducing colonial-apartheid geography and, consequently, women's spatial inequality and insecurity.
The resilience of colonial and apartheid geography in contemporary South Africa is mainly due to the long-lasting consequences of the past legal construction of

[36] *Harksen v Lane N.O. [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC)* at para 43.
[37] *Rahube v. Rahube,* at paras 23 and 33.
[38] *Rahube v Rahube,* per J. Goliath citing T. Nhlapo, at para 33.

spaces, as well as the duplication of the colonial-apartheid logic in contemporary legislation on urban and rural development.
In other words, in *Daniels* and *Rahube*, the Constitutional court showed awareness of the mechanisms that underpin the construction of urban and rural areas through law and their persistence over time. In doing so, it paved the way to a «post-apartheid spatial jurisprudence»,[39] which uncovers the duplication of colonial and apartheid patterns over land and property in present laws and administrative practices.

A. Racial and gender inequalities in law: a "past sin"?

It is not a novelty for the South African courts to drawn by history in their reasonings as *argumentum quoad auctoritatem*. However, the resilience of colonial-apartheid construction of spaces in South African contemporary legal system has been rarely acknowledged by the judges.
As regards women's socio-economic rights, the Constitutional court of South Africa has usually adjudicated disputes by describing apartheid geography as a "past sin" repaired by the 1996 Constitution. According to this view, the apartheid discriminatory legal system is still part of the history of the country, but it no longer affects South African people.[40]
Take, for example, *Mazibuko v. City of Johannesburg* (2009) on water rights. The precedent-setting decision has been extensively criticised by legal scholars as it fails to advance the constitutional right to access to adequate water in poor urban areas.[41]
Mrs Lindiwe Mazibuko and other applicants challenged the City of Johannesburg Free Basic Water policy, which provided for six kilolitres of water per month free to every account holder in the city and the installation of a system of pre-pay water meters in the black township Phiri. Once the free water kilolitres per household had been consumed, the inhabitants had to buy extra water credit to avoid water supply to be shut off for the rest of the month. Mrs Mazibuko - who shared her dwelling with thirteen children, her two sisters and their mother – and the other applicants complained that the local water policy did not guarantee the right to access to sufficient water protected in the Constitution (art. 27).[42] This was not least in

[39] R. Madlalate, *Dismantling apartheid geography*, cit., p. 217.
[40] *Ivi* pp. 208 – 212. See also L. Stewart, *The Politics of Poverty: Do Socio-Economic Rights Become Real Only When Enforced by Courts?*, in *Diritto Pubblico Comparato ed Europeo*, 2011, pp. 1510 – 1526.
[41] L. Stewart, *Do Socio-Economic Rights Become Real Only When Enforced by Courts?*, cit., 2011, p. 152 – 1521.
[42] *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28, 2010 (4) SA 1 (CC) at para 108.

consideration of the fact that the black township of Phiri, in Soweto, is one of the poorest and overcrowded areas of Johannesburg.

In an extremely conservative ruling, the Court considered apartheid spatial construction in historical terms by arguing that «[…] the group affected are people living in Soweto who have been the target of severe unfair discrimination in the past». The judges recognised that the apartheid legal framework was discriminatory based on race. However, in the Court's narrative, the effects of discrimination are depicted as something belonging to the past which does not affect contemporary South African society.

By considering the applicants as victims of a past discrimination, the judges failed to acknowledge the reproduction of spatial inequality in contemporary urban spaces through apparently race-neutral legislation and the negative consequences in terms of distribution of resources, public goods, and amenities.

As reported in *Mazibuko*, apartheid urban policies destined the township of Phiri to black people only. The urban plan conceived each dwelling as a single-family unit. However, racially based demographic policy and forced displacement of black people caused overpopulation. The dwelling of Phiri became overcrowded. Moreover, they lacked space and basic facilities. In brief, the houses were inconsonant with human dignity.

Furthermore, water supply was insufficient to meet the basic needs of the inhabitants and the distribution system of pre-paid water meters was unaffordable for low-income residents. Women were the «most adversely affected by prepayment water meter-related problems» since they have «to make difficult choices between going for days without water and conserving water in ways that compromise health or dignity».[43]

The context in which the *Mazibuko* dispute originated was indeed the result of the apartheid spatial construction of urban spaces. Whilst apartheid legal system has been dismantled, the consequences of racial and class-based policies are still visible in South African rural and urban geography, and they contribute to foster spatial discrimination.

However, in *Mazibuko*, the Constitutional court did not recognise the resilience of apartheid geography.[44] The spatial narrative in this judgment depicted racial discrimination as a matter of the past and the contemporary urban spaces as gender and race neutral. By ignoring the long-lasting adverse effects of apartheid legal construction of spaces, the Court effectively allowed the reproduction of past

[43] J. Dugard, A. Alcaro, *Let's Work Together: Environmental and Socio-Economic Rights in the Courts*, in *SAJHR*, 2013, pp. 564-565.

[44] R. Madlalate, *Dismantling apartheid geography*, cit., pp. 208-212.

inequalities and it failed to ensure women's equal access to water, sanitation, and hygiene.

B. A new spatial and gender-responsive jurisprudence for South Africa

Almost a decade later, the attitude of the Constitutional court towards apartheid geography and its consequences in present times has changed.

In both *Daniels* and *Rahube*, the Court went beyond legal formalism to advance socio-economic rights within the framework of the transformative mandate of 1996 Constitution.[45]

The extensive historical and socio-economic contextualisation of the disputes provided by the judges was more than a mere picture from past times. It was functional to the recognition of the resilience of apartheid legal construction of space and the impact of apartheid geography on women's rights in contemporary South Africa.

Furthermore, while previous judgments mainly concentrated on racial and class-based discrimination, in *Daniels* and *Rahube*, the Constitutional court explored the conflation of sex, gender, race and space in land, housing and property regimes. The intersectional approach towards race, gender, and space further contributed to uncovering the resilience of colonial-apartheid patterns in South African legal system.

Regarding sex and gender, in particular, the Constitutional court argues that in Section 9 of the Constitution both sex and gender are mentioned, and the terms are treated on distinct grounds. In *Rahube*, the impugned legislation discriminated based on both the biological and the sociological view of women, as well as their role in South African society.[46]

Indeed, the approach to race, gender, space, and law contained in the *Daniels* and *Rahube* rulings can foster the already vibrant debate on women's spatial insecurity and discrimination with regards to land, housing, property, and related rights in South Africa.

[45] A. Sen, *Human Rights and the limits of law*, in *Cardozo Law Review*, 2005-2006, p. 2927; D. Brand, *Courts, socio-economic rights and transformative politics*, LLD Thesis, Stellenbosch University, Stellenbosch, 2009, p. 70.

[46] As noted by Justice Goliath in *Rahube* «The exclusion of women from being the head of the family is based on the social perception of what women can do and how they should behave. This is a sociological phenomenon, not a biological one. For these reasons, this judgment examines the provision using both the grounds of sex and gender in the Constitution, but reference will be made predominantly to gender because the overwhelming effect of the impugned provision is to reinforce social rather than biological characteristics attributed to women». *Rahube v. Rabube* at p. 9, note 22.

C. Women's land and property rights under customary law(s): a complex and nuanced relationship

These pioneering judgments are even more interesting if discussed within the larger debate on the status and content of customary law, the implications of the codification of indigenous laws on land, marriage and inheritance during the colonial and apartheid regimes, as well as their (direct or indirect) enforcement in the legal system.

Customary land and property systems, as well as chthonic and religious laws on marriage and inheritance, are mostly blamed for failing to secure women's land and housing rights.[47]

However, a deep look into South African legal pluralism reveals a more nuanced and complex scenario as official customary law, i.e., codified in statutes, frequently diverges from living customary law applied in each traditional community.[48]

When codifying customs, the colonial rulers extensively relied on the practices described by (male) traditional leaders, which exaggerated their status and prerogatives at the expenses of women and youngers members of the community.[49]

Moreover, codified customary law was deeply influenced by English common law and Roman-Dutch law, which contributed to strengthening the patriarchal system in society.

In both *Daniels* and *Rahube*, the Constitutional court discovered the (not so) hidden link between current discriminatory practices regarding land and housing rights and the colonial-apartheid legal framework, which enforced official customary legal provisions.

In *Rahube*, for instance, the Court expanded the boundaries of relevant considerations beyond the "black-letter law" to include the effect of racially based apartheid law and gender on the legal construction of urban and rural spaces. It affirmed: «Under apartheid, the effects of patriarchy were compounded by legislation that codified the position of African women as subservient to their husbands and male relatives».[50]

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[47] T.E. Higgins, J. Fenrich, *Customary Law, Gender Equality, and the Family. The Promise and Limits of a Choice Paradigm,* in *J.* Fenrich, P. Galizzi, & T. Higgins (eds.), *The Future of African Customary Law,* Cambridge University Press, Cambridge, pp. 440 – 444,

[48] Alongside official and living customary law, South African jurisprudence listed another form of customary law: the academic law, i.e., the recording of customs in legal doctrine referred to by judges when deciding a case. These customary legal systems are described in the minority judgment by Justice Ngbobo in *Bhe and others v. Magistrate, Khayelitsha and Others, 2005 (1) SA 580 (CC)*.

[49] M. Mamdani (ed.), *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Right and Culture,* David Philip, Cape Town, 2000, p. 5. See also, L. Pospisil, *Formal Analysis of Substantive Law: Kapauku Papuan Laws of Land Tenure*, in *American Anthropologist*, vol. 67, n. 5, 1965, p. 186 – 214.

[50] *Rahube v. Rahube* at para 26

The colonial-apartheid legislation duplicated in some contemporary legal provisions over land; thus, perpetuating the racialized and gendered construction of space which characterized past regimes.

The nature and scope of customary law was influenced by the power relations and socio-economic context of colonial and apartheid regimes.

In pre-colonial rural context, women raised children and were primary crop producers. They played an essential role for the continuation of the rural family.[51] Women's place in the rural and family economy gave them a bargaining power within the community.

Albeit generally within a patrilineal form of social organization, the relationship between women and land is more nuanced in living customs than in codified/official customary law.[52] As documented in a range of anthropological and ethnographic accounts, pre-colonial women often enjoyed primary right to arable land and housing. This means that the patriarchal conception of society that characterized most traditional communities (but not all of them) was accentuated in the colonial and apartheid legal systems.[53] The preference for a patriarchal system of social organisation, the concept of "male primacy", and the Western legal construction of "exclusive ownership" vested into the Native Administration Act (1927) and, before that, the Natal Code of Native Law (1878) cemented the «overlapping patriarchies of white officials and black elders».[54]

Compared to previous times, women's status under the apartheid regime sharply deteriorated. Land shortages created by apartheid law and practices changed the agricultural economy. Consequently, women became vulnerable to eviction and land-grabbing by male family members which did not rely on their agricultural work anymore. Codified customary law entrenched by apartheid laws adapted to the circumstances by vesting land rights exclusively in men.

As explained above, the Upgrading of Land Tenure Act censored in *Rahube* automatically converted to ownership the rights in property acquired under the discriminatory framework of sec. 23 of the Native Administration Act 38 (1927), it indirectly duplicated apartheid geography and gender discrimination in post-apartheid South Africa.

[51] H.J Simons, *African Women: Their Legal Status in South Africa*, cit., p. 74

[52] M. Mamdani, *Beyond Rights Talk and Culture Talk*, cit., pp. 1-13.

[53] T. Ranger, *The Invention of Tradition in Colonial Africa*, in E. Hobsbawm, T. Ranger (eds.), *The Invention of Tradition*, Cambridge University Press, Cambridge UK,1983.

[54] A. Claassens*, Recent changes in women's land rights,* cit., p. 82.

4. Concluding observations

The article deals with the recent developments in South African constitutional jurisprudence on women's land, housing, and property rights within the framework of the land reforms programme.

In *Daniels* and *Rahube*, the Constitutional court departed from traditional approaches to law. The judges abandoned legal formalism to discuss women's claims on land and housing within the broader South African historical and social context.

The innovative spatial and intersectional approach to land and housing disputes adopted by the Court uncovered the resilience of colonial and apartheid spatial logic in contemporary legal construction of rural and urban spaces in South Africa. Under the colonial and apartheid regimes, South African women were excluded from the legal construction of rural and urban spaces. Despite women's activism and women's public participation in the transition from apartheid to democracy, as well as government's pronouncements of prioritising women in access to land, official data shows that they still constitute less than a quarter of the beneficiaries of land redistribution and reallocation nationally.[55]

Furthermore, land tenure reforms promoted by post-apartheid governments often failed to address consolidated discriminatory patterns on land.

In *Daniels* and *Rahube*, the Constitutional court shed light on the link between the structural women's spatial and economic inequalities and the resilience of colonial-apartheid geography.

Whilst past discriminatory land, housing and property laws are now repealed and replaced, they still operate silently in the interstices of the South African legal system, jeopardising women's socio-economic rights in both rural and urban areas.

[55] Department of Agriculture, Land Reform & Rural development of South Africa, *Annual Report, 2020/2021 on Agriculture, Land Reform and Rural Development,* available at www.dalrrd.gov.zaf, 2022.