Recalibrating Everyday Space: Using Section 24 of the South African Constitution to Resolve Contestation in the Urban and Spatial Environment

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Abstract

Positioned as existing predominantly within a green agenda, the right to an environment (section 24 of the *Constitution of the Republic of South Africa*, 1996) presents numerous opportunities for rights-based interpretation in the "brown" urban and spatial environment. In this article I conduct such an exercise, focussing on both the right to freedom of movement (section 21 of the Constitution) and the right to the safety and security of the person (section 12 of the Constitution). I begin by drawing out the historical and contemporary spatial implications of both rights, drawing on empirical research that demonstrates how the enclosure of everyday space through gating practices and private securitisation in the South African city serves to extend spatial apartheid into the current day. A siloed interpretation of both rights, however, leads to an impasse between the two. Both rights are *prima facie* of an equal value in a constitutional setting.

To resolve this standoff, I argue for the use of the environmental right as a constitutional value. This is an underutilised right in the South African Constitution, and yet it holds much promise given how it seeks to protect the health and wellbeing of both present and future generations.

There are two benefits to employing the environmental right as a constitutional value. First, the environmental right situates both section 12 and section 21 in a symbiosis of individual claims to shared resources, in the process recalibrating the human ecology of the urban and spatial environment away from the centrality of dominant actors and towards a polycentricity of interests. In so doing, section 24 provides a fuller and more connected picture of both rights.

Second, the duty implicit in the environmental right reveals how to begin realising these rights on a wider scale that goes beyond individual injustices and towards community justice. I argue strongly that this duty exists on the state: left unattended to, everyday space becomes the preserve of those with the means – financial or otherwise – to shape space according to their own anti-public interests. In this regard, I present two instances of policy and legal choices available to the state that serve to undo contemporary experiences of spatial apartheid.

Keywords

Law and urban space; right to an environment; right to freedom of movement; right to safety and security of the person; law and urban planning.

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1 Introduction

The South African city is a site of daily struggle. A legacy and contemporary reality of spatial segregation produces an urban and spatial environment harmful to our health and wellbeing. The most pernicious manifestation of this environment is the way in which we perceive the threat of violence in everyday space. The South African urban landscape reveals a network of high walls, electric and barbed wire, security vehicles, surveillance technology, security guards, machine guns, and boomed-off streets. Even South Africa's more public spaces are treated in the public imagination less as a common open to all and more as a space subject to control. The net effect is not only a perpetual struggle between those with the resources to enact this control, and those who exist in the shadows of this control, but also an environment of mistrust. This scarred landscape stands in stark contrast to the vision articulated in South Africa's Bill of Rights, which idealises a rainbow nation of diversity, shared prosperity, and a future beyond our current physical and metaphysical barriers.

In this article, I set out how we may read this struggle in terms of the Bill of the Rights. I focus first on a spatialised reading of the right to freedom of movement, followed by a similar reading of the right to safety and security of the person and, specifically, how this incorporates a fear of violence. The article pivots, however, on the power of the environmental right and its attendant duties. I read section 24 as a constitutional value able to transcend siloed interpretations of individual rights in the urban and spatial environment, and in a way that centralises race and space as enacted through everyday practices.

The enclosure of space through gating and privatised policing practices works to deny people a right to freedom of

movement. I develop this right through a spatial lens, cognisant of how people move around, through and within a local scale. The right to freedom of movement is understood at the level of the broader nation-state and so is concerned with how people move across national borders.[1] However, South Africa has a history and contemporary reality of black South Africans being denied freedom of movement within the urban and spatial environment, and so the right necessarily must adopt a more localised scale. Through drawing on research around enclosure practices in South Africa, I demonstrate that apartheid's spatial legacy remains intact.

At the same time, however, people hold a fear of everyday space and the people in it. The fear of violence is inculcated through popular media, and it is magnified by the enclosure and patterns of spatial apartheid. Drawing on case law, the Constitution protects the fear and threat of violence as much as it protects against the actual violence. However, the fear which pervades questions of security in the South African urban and spatial environment is often racialised, and private security surveillance in the South African urban environment entails an enactment of spatial apartheid.[2]

Nevertheless, the Constitution recognises a right to hold the threat of violence, and so it would appear that there is an impasse. Enter the role of section 24 of the Bill of Rights: the right to an environment. I draw on both the right and its corresponding duty as a way of resolving this impasse, and to demonstrate the importance of the state in recalibrating the urban and spatial environment towards a polycentricity of interests. This involves deliberate policy and legal choices that

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1 Currie and De Waal *Bill of Rights Handbook* 451 notes how "freedom of movement has what can be termed 'internal' aspects – the right to move freely and to choose one's place of residence within the borders of a country – and 'external' aspects – the right to leave one's country and to return to it." However, the focus of this chapter in the *Bill of Rights Handbook* is almost exclusively on the external aspects. Currie and De Waal *Bill of Rights Handbook* 451-457.

2 Clarno and Murray 2013 *Social Dynamics* 219.

facilitate a recalibration of everyday space that serves to disrupt a racist status quo, and which lies at the core of this impasse in the first place.

The environmental right informs the content of other rights insofar as they apply to the urban and spatial environment, and section 24's corresponding duty reveals how to begin realising these rights on a wider scale that goes beyond individual injustices and towards community justice. In making this argument I argue that the state's failure to inculcate a vibrant, heterogeneous and safe urban and spatial environment results in a defensive and mistrustful approach to everyday space.[3] This is enacted by dominant actors with the means – financial or otherwise – to shape space according to their own interests.

In articulating both the content and the duty behind each right, I position two examples of practices deliberately aimed at undoing spatial apartheid, both of which embody the environmental duty in practice. The first is a planning policy of the City of Johannesburg aimed at "restitching" the city's urban fabric through housing and public transport initiatives, and the second highlights the state's lack of innovative and proactive thinking in using the law to enact urban land reform.

2 Movement's spatial implications

Movement is an integral component of being in the city. It allows for the necessary flow of energy that gives the city its vibrancy and its vitality. It is the platform upon which we appropriate, participate in, and inhabit the city. Without freedom of movement, we are beings unto ourselves, and our cities remain devoid of encounters that expose us to the different identities and experiences that constitute urban society. This exposure to difference goes to the core of a diverse and democratic society.

South African cities remain a space in which movement is controlled. This emerges both from a history of legislated

[3] Also see Hook and Vrdoljak 2002 *GeoForum* 204-206; Cooper-Knock 2016 *Africa* 100; Dirsuweit 2002 *Urban Forum* 14-16; Dirsuweit "Public Space and the Politics of Propinquity" 58.

control of movement as well as a contemporary desire to maintain these spaces of exclusion.[4] Much of this movement takes place along the lines of class and race-based modes of segregation. These boundaries manifest in a physical realm through gating practices and private policing, but also through a digital realm in the form of online community forums, social media sites and WhatsApp groups. The cumulative effect is an enclosure of physical space, exercised through both overt and more subtle practices of exclusion.

These practices contradict the spirit and object of section 21(1) of the Constitution.[5] This subsection provides that everyone has the right to freedom of movement. The spatial and localised dimensions of the right have received little attention in the literature, the focus of which is mostly on the freedom to cross national borders.[6] Instead, the right is regarded as somewhat self-evident, which means that it has escaped a more substantive elucidation.[7]

Section 21(1) of the Constitution must be understood in two contexts. First, movement in and around the South African urban and spatial environment is influenced heavily by a colonial and apartheid legacy of control. Section 10 of the

4 Ramoroka and Tsheola 2014 *JGRP* 59; Lemanski 2006 *Journal of International Development* 792-796; Lemanski, Landman and Durington 2008 *Urban Forum* 151 (although these authors caution against a homogenous discourse regarding the processes and consequences of gating practices worldwide and aver that local conditions must inform analyses).

5 *Constitution of the Republic of South Africa*, 1996 (the Constitution). S 21 is entitled "Freedom of movement and residence", and provides as follows: "(1) Everyone has the right to freedom of movement. (2) Everyone has the right to leave the Republic. (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic. (4) Every citizen has the right to a passport."

6 See SAHRC 2004 https://bit.ly/3dza2VM 14-16 for a limited discussion on the impact of gating practices on the right to freedom of movement. See Moore *Political Theory of Territory* 188-218 for a discussion on freedom of movement *viz* national territories and the control of borders and immigration.

7 See, for example, Kepe, McGregor and Irvine 2015 *Applied Geography* 98: "Excluding women from the use of public or community land for several months of the year amounts to gender discrimination in the right to freedom of movement, and spatial injustice in terms of the boundaries created to their movement and the distributional inequalities in limited access to a common resource." Also see Lemanski and Oldfield 2009 *Environment and Planning* 635.

Natives (Urban Areas) Consolidation Act[8] provided that no African could remain for more than 72 hours in a particular area unless the person was born or resided in the area, had worked continuously for one employer for more than ten years, or was the wife, unmarried daughter or underage son of an African person.

Section 2(1) of the *Natives (Abolition of Passes and Co-Ordination of Documents) Act*[9] required Africans to carry passbooks. These had always to be carried, and in terms of section 10(2) could be demanded by a police officer at any time. Section 8(1) of the Act had the effect of ensuring that the only occasion on which an African could enter a white area was if the person was employed there.

The impact of these pieces of legislation was an enforced system of segregation in which Africans were confined to certain areas of the city, and where whites enjoyed a privileged existence. This contributed to a system in which Africans were never seen as equal partakers in the city and the opportunities it provided.

The continuation of this state of affairs continues to impede on people's sense of dignity. Our level of autonomy is hampered in the way we appropriate the city and its spaces, and we fear the way we may be treated, as if we are merely objects that can be stripped of their value.[10] We navigate the city and its spaces as the anti-*flâneur*, the archetypical figure drawn from Charles Baudelaire's description of the artist-poet in the modern metropolis of Hausmannian Paris, a man whose confidence as an individual derived from his effortlessly confident movement through the city:

> The crowd is his element, as the air is that of birds and water of fishes … For the perfect *flâneur*, for the passionate

8 *Natives (Urban Areas) Consolidation Act* 25 of 1942.

9 *Natives (Abolition of Passes and Co-Ordination of Documents) Act* 67 of 1952.

10 Haysom identifies three distinct concerns which emerge as key elements of the right to dignity: firstly, that dignity implies a level of autonomy for the individual; secondly, that dignity rejects conduct which treats a person as non-human, less than human, or as an object; and thirdly, that dignity sees everyone as having equal worth and value. See Haysom "Dignity" 131.

> spectator, it is an immense joy to set up house in the heart of the multitude, amid the ebb and flow of movement, in the midst of the fugitive and the infinite. To be away from home and yet to feel oneself everywhere at home; to see the world, to be at the centre of the world, and yet to remain hidden from the world ... The lover of universal life [who] enters into the crowd as though it were an immense reservoir of electrical energy.[11]

This segregation remains to this day, and thus section 21(1) must also be interpreted in the contemporary spatial context of South African cities. In this regard Clarno and Murray conducted empirical research looking at the practices of private policing in Johannesburg.[12] They note how managers and employees of "several security companies" openly admit that "the definition of 'suspicious' is racialised: whenever they come across two black males, security officers are instructed to conduct an investigation."[13] They note further how private security officers exercise a discretion in determining whether a person has legitimate business in the area. If not, they are escorted out of the neighbourhood.[14] If a person refuses to leave, a variety of intimidation tactics is used, including following their movements, alerting the police, or taking their photograph.[15]

In addition to this more active form of private policing, there is a more passive mode that exists within digital spaces created by residents in a particular area. Anecdotal observations of these digital spaces reflect how this mode of private policing exists through terminology which, in identifying people as possible crime suspects, is racialised in ways that reveal a privatised version of the state-sanctioned modes of spatial control of the past. For example, on a Facebook group set up in response to the kidnapping of a child, it became clear that the original description of the kidnapping suspects – four bravo males – was incorrect and that, in fact, whiskey persons were allegedly involved in the crime as well:

> We know that initially when we first started to ask people to please pray and be on the lookout it was reported that 4 bravo

11 Baudelaire *Painter of Modern Life* 9.
12 Clarno and Murray 2013 *Social Dynamics* 219.
13 Clarno and Murray 2013 *Social Dynamics* 219.
14 Clarno and Murray 2013 *Social Dynamics* 220.
15 Clarno and Murray 2013 *Social Dynamics* 220.

> males snatched Amy'Leigh. The 4 people arrested for her kidnapping as we all know is 1 whiskey male, 2 whiskey females and now one bravo male.[16]

This securitised, reductive terminology reveals the way in which South Africans essentialise and explain black presence in everyday space. The terminology suggests that we all have a predefined role in everyday space, one set and enforced according to a white standard: the black maid walking to work; or the bravo (not black) male in the process of committing a crime. Anything else is anomalous in this imagined construction of everyday space, which is why some responses explained why one whiskey male and two whiskey females were implicated in Amy'Leigh's kidnapping.[17] The death of the state-controlled policy of spatial apartheid has clearly not reversed the everyday realities of spatial apartheid.

But this is not surprising. As Dirsuweit and Wafer argue, the immediate post-apartheid deconstruction of the city meant that white residents sought to reimagine the scale in which they identified with the city. This occurred in a manner that reiterated the narratives of "community self-determination",[18] viewing road closures as a way "to 'scale-down' local politics in an attempt to maintain control of spaces of privilege".[19] This view is echoed by Hook and Vrdoljak who argue that the articulation of internal bylaws and the control over the aesthetics of a South African residential estate represent avenues to escape the disorder of the urban centre.[20] This is perceived as encompassing unregulated and uncontrolled space and is therefore dangerous.[21]

16 See Amy-Leigh's Missing Kids Facebook Page (Anon 2019 https://bit.ly/2lZHJbc).

17 The misidentification of the suspects was explained by the author of the post as follows: "The initial report of 4 bravo males originated from the one she saw, and from what other people on the scene reported. Again, it was total chaos and everybody panicked so it is not strange that the amount of people reported and the actual amount differs. It was reported in the midst of absolute chaos, confusion and panic." See Anon 2019 https://bit.ly/2lZHJbc.

18 Dirsuweit and Wafer 2006 *Urban Forum* 330.

19 Dirsuweit and Wafer 2006 *Urban Forum* 330.

20 Hook and Vrdoljak 2002 *Geoforum* 202-204.

21 Hook and Vrdoljak 2002 *Geoforum* 196.

In her study of everyday policing in Durban, Cooper-Knock also identifies privatised policing practices as a product of the post-apartheid deconstruction of the city. However, she argues that these practices represent a way of "waiting", ostensibly for something bad to happen.[22] This heightened anxiety emerges from a guilt regarding one's place in society, one marked by centuries of acts of dispossession, conquest, and repression, and an inescapable knowledge that this legacy has not been reversed and that the patterns of colonialism and apartheid remain firmly in place. This incongruence means that white residents remain "hyper-vigilant, scanning the streets for would-be attackers".[23]

Both passive and active forms of control impinge on the more physical aspects of the right to freedom of movement. Cumulatively speaking they create islands of privilege and exclusion in the urban and spatial environment, which means that movement in general is curtailed. In Johannesburg, examples here include pathologising walking or taking public transport as extraordinary and dangerous. As a result, infrastructure for these critical aspects of a city remains maligned and undeveloped.

This has a detrimental effect on the city, and it means that the city is never truly "public". Instead, the city tends to be public only in highly controlled and largely privatised spaces, such as shopping malls, Gautrain stations, or "public" neighbourhoods in which a single developer takes responsibility for creating an illusion of safe, vibrant, and well-maintained everyday space. But these "public" domains tend to be exclusionary. One can act independently only to the extent permitted by whomever controls the space, and one's interactions with others are relatively predictable and sanitised.

Young's normative ideal of city life demonstrates why the proliferation of isolated spaces is detrimental to the broader health of the South African city. Young argues that urban life is to be valued because:

22 Cooper-Knock 2016 *Africa* 101-102.
23 Cooper-Knock 2016 *Africa* 102.

> … persons and groups interact within spaces and institutions they all experience themselves as belonging to, but without those interactions dissolving into unity or commonness … City dwelling situates one's own identity and activity in relation to a horizon of a vast array of other activity, and the awareness that this unknown, unfamiliar activity affects the conditions of one's own.[24]

Young argues for an ideal of city life in which the permeability of group identity means that individuals "intermingle without becoming homogenous", and where our attraction to the "other" entices us to be "drawn out of one's secure routine to encounter the novel, strange, and surprising".[25] In short, the public nature of the urban and spatial environment enables South Africans to confront and *be* with difference; closing off this environment shuts down the kind of unpredictable encounters that make urban life what it is.

3 A right to fear?

The control of freedom of movement is a key enabler of spatial apartheid. At the same time, the reason this control comes about in the first place is not, at least on the face of it, an explicit desire to replicate spatial apartheid, even if this is what results. Instead, the research on gated communities and private policing practices demonstrates that this control emerges because of fear and a perception that the state does not do enough in guarding against this fear.[26] And, in the same way that the Bill of Rights recognises a society in which freedom of movement is protected, it also recognises a society in which there can be no threat of violence.

In making this argument I draw on the section 12(1) right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.[27] This right protects the threat of violence as a form of violence. The right does not protect the fear of violence, but it is difficult for law and policy to distinguish between imagined fear and credible threat.

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24 Young *Justice and the Politics of Difference* 238.

25 Young *Justice and the Politics of Difference* 239.

26 Bénit-Gbaffou 2006 *Urban Forum* 302; Cooper-Knock 2016 *Africa* 115.

27 Section 12(1)(c) of the Constitution.

In her study of gated communities in Gauteng, Landman points out how the very high levels of fear of crime in the Johannesburg and Tshwane municipalities "contributed to a large demand for different types of gated communities".[28]

Bénit-Gbaffou positions security privatisation less as a consequence of fear, and more as a result of the perception of inaction to tackle safety and security on the part of the state:

> … security privatization is not merely a symptom of the resurgence of a "culture" of self-government… Neither is it a development of a "new apartheid" by residents or "communities" nostalgic for the old order. And it is not an expression of indifference or contempt for the State (considered by many neo-liberal discourses as less capable to provide security and other services than the private sector). These shifts towards the privatisation of security are often the direct consequence of the lack or inappropriateness of public response to local needs, which the communities were often asked to identify.[29]

Bénit-Gbaffou demonstrates her argument through a range of interviews of residents of Yeoville (an inner-city, low-income, predominantly black neighbourhood) and Observatory (a neighbouring, suburban, middle to upper-income, predominantly white neighbourhood). Bénit-Gbaffou refers to the views of Siswe, a leader of a street patrol in Yeoville, who argued that his rationale for switching from a mere street community to vigilantism was very easy "because he 'was tired of watching people getting mugged in front of his place'".[30] She also refers to the views of Sipho, a member of the road closure community in Observatory, who noted how "You have the constitutional rights of people to access public space, and I'm sure it is just displacing crime somewhere else, and it's bad for society as a whole. But … there is crime and we need to protect our families. You can understand that too …".[31]

Durrington reveals similar views in his ethnographic analysis of gated community environments in Durban. When asked if she was upset that she had to leave her previous area to

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28 Landman *Gated Communities* 9.
29 Bénit-Gbaffou 2006 *Urban Forum* 302.
30 Bénit-Gbaffou 2006 *Urban Forum* 309.
31 Bénit-Gbaffou 2006 *Urban Forum* 317.

move to a gated community, one informant in Durrington's study respondent argued that she felt '"more angry than anything else … I mean I know this may sound rather harsh but I felt like I was forced to leave … I suppose that sounds terrible, that I was forced to live in a gated estate but that is the way I feel."[32]

Cumulatively, it appears that fear forms a critical part of people's decisions to enclose space through gating and private securitisation practices. Stories like the one depicted in *Loureiro v iMvula Quality Protection* abound in the South African suburban consciousness.[33] In this case, armed robbers deceived a security guard employed by iMvula into gaining access to a home in Melrose, Johannesburg. The robbers accosted the household staff and children, holding them captive during the robbery, and thereafter held Mr and Mrs Loureiro captive upon their return home later that evening. As Justice Van der Westhuizen remarked:

> South Africa is plagued by crime – often viciously violent, sometimes sophisticated and organized, often ridiculously random, but always audacious and contemptuous of the values we are supposed to believe in and the human rights enshrined in our Constitution … .[34]

The fear discussed above reflects an owner-centric perception. The extent to which these perceptions are protected by a "right to fear" is central to the pernicious impact this fear has on the South African urban and spatial environment. But it is similarly important to consider the right to fear of the *non*-owner in everyday space, and to consider the fear the law tends to privilege above other fears. In their study of women living in cities, Tandogan and Ilhan demonstrate how the fear of crime is not independent of crime and may be a social and political problem "bigger than crime itself".[35] This not only has an impact on everyday life itself, but it also reveals how the experience of fear is gendered or aged

32 Durrington 2006 *GeoJournal* 157.
33 *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC).
34 *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC) para 1.
35 Tandogan and Ilhan 2016 *Procedia Engineering* 2012.

– "women are less victimized than men and older people have less chance of being victimized than young people".[36]

In the South African context, it would appear that queer people are similarly victimised in public space. Emerging amidst a series of similar reports from around the country, the story of how Andile Ntuthela's body was found butchered and charred beyond recognition in a hole in the ground in Uitenhage, Eastern Cape is especially tragic.[37] Each murder suggested a link to the victim's sexual orientation or gender identity, and a vulnerability to the public expression thereof in public space. Further empirical research is necessary on the fear of being in everyday space *as a result of* private securitisation. As a Facebook post by Nomboniso Gasa demonstrates, it would appear the fear of owners, their securitised apparatus, and what violence they may inflict if you do not move on is real.[38] The experience of fear in everyday space in South Africa is likely to be layered – gendered on one level, racialised on another, and xenophobic on another. The fear of violence in everyday space resembles a cycle of anxiety: some grounded in a reasonable apprehension, some grounded in misconception, but both nevertheless a fear.

The jurisprudence on section 12(1), however, makes a distinction between fear and the reason for this fear. This is apparent in the Constitutional Court's reasoning in *F v Minister of Safety and Security*:

> The threat of sexual violence to women is indeed as pernicious as sexual violence itself. It is said to go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women. It is deeply sad and unacceptable that few of our women or girls dare to venture into public spaces alone, especially when it is dark and deserted. If official crime statistics are anything to go by, incidents of sexual violence against women occur with alarming regularity.[39]

The Court's reasoning in *F* demonstrates that section 12(1) is not immune to feelings of the fear of violence, but by positioning this fear within crime statistics and by looking at

36 Tandogan and Ilhan 2016 *Procedia Engineering* 2012.
37 Igual 2021 https://bit.ly/3tBvG16.
38 Gasa 2016 https://bit.ly/3slJJrw.
39 *F v Minister of Safety and Security* 2012 1 SA 536 (CC).

the broader impacts of this fear on group livelihoods, the court suggests that a fear cannot be entirely subjective and must have some grounding in a perceived threat of violence to enjoy section 12(1) protection.

It is difficult, however, to make this distinction. At what point does the fear of the occurrence of an isolated incident become a threat worthy of constitutional protection? This blurred distinction is problematic in South Africa, where the fear that results in the enclosure of space is a racialised fear. Kynoch draws on the 2012 Victims of Crime Survey by Statistics South Africa to conclude that "white South Africans were more afraid than their black counterparts despite a lower rate of victimisation".[40] Kynoch suggests that much of this fear of "crime" stems from the past, with the only difference being that previously the South African state drew on various apparatus – including pass laws, curfew regulations, by-laws, and the *Urban Areas Act* – to insulate the white settler population from the broader African population.[41]

However, whilst the fear may be explained through racialised tropes and internalised through a racist prism, it nevertheless emerges from a threat, however overstated that threat may be. This claim neither suggests that the reason for the crime is racial, nor that the response is racialised or intended to target a particular group of individuals (on the contrary, the research suggests that this is the response); rather, it is simply that the threat of the crime exists. In the 2019/20 Victims of Crime Survey by Statistics South Africa, it was estimated that at 72.2% of all crimes experienced by households in the 12 months preceding the survey, housebreaking represented the most prevalent form of crime.[42] This was followed, at 11.3% of all household crimes, by home robberies.[43] There was a decline in those affected by home robberies from 2015/16 to 2019/20, but an increase of 200,000 people affected by housebreaking/burglary.[44] Households in urban areas were more likely to experience housebreaking, and households in

40 Kynoch 2014 *Canadian Journal of African Studies* 428.
41 Kynoch 2014 *Canadian Journal of African Studies* 428.
42 Stats SA 2020 https://bit.ly/2XZF0hn 13.
43 Stats SA 2020 https://bit.ly/2XZF0hn 13.
44 Stats SA 2020 https://bit.ly/2XZF0hn 3.

the lowest four income tiers surveyed (earning up to R16 000 per month per household) were collectively three times as likely to be affected by housebreaking as those in the top income tier.

Thus, it is not merely the fear that exists, but the threat too. The right cannot protect the perception of violence, or the fear. However, it can protect the objective anticipation of a threat. And, because one can indeed establish a threat, section 12 can be interpreted as protecting the kind of interests that bring about the enclosure of everyday space.

4 Section 24 and the recalibration of everyday space

And so it would appear we are at an impasse. The right to freedom of movement and the right to safety and security of the person are *prima facie* of an equal value in the constitutional framework. Given the impasse it is important to situate both rights within a broader constitutional principle; an indication of what the Constitution envisages for South Africa's urban and spatial environment, and how the Constitution would resolve a dispute over physical space. To do this, I draw on a public account written by Nomboniso Gasa as an allegory of the kind of contestations in play. Gasa was accosted in a Johannesburg suburb one night in September 2016 whilst simply sitting in her parked car:

> The standoff continued for what seemed like hours. In truth, it was only a few minutes. By now, there were radioed messages. The men in the house must have been calling for backup. The Security man replied, "It's a woman. Bravo. She is not doing nothing. Sitting in the car. No, control, she doesn't want to move. She says it's a human right issue. I don't know control. No, control. Properly dressed. No, control. Doesn't look like that. Sober. I think she was phoning, control. English control. Only English. No, not only English, Zulu also. Me, I speak only English to her …."
>
> The radioed exchange stopped. The Security man asked me to please move. He was only doing his job. Now, they were telling him to remove me by force. I replied "We have a problem. I am not going to be told by you or anybody to move. Please, understand this. I have nothing against you or the owner of that house. I am simply parked in the street. I do not

> owe you an explanation. Now, may I ask that you leave me alone."[45]

Gasa's missive reveals that there were two competing claims to space here: on her part, she claimed her right to freedom of movement meant she could park her car and simply "be" wherever she so desired. There also existed on her part the threat of violence – armed men telling her to move on. On the part of her captors, they feared what a parked car outside their home could mean: a criminal reconnaissance or a criminal in waiting.

Both claims offer windows into the kinds of contestations at play in the South African suburban landscape. I make two arguments in working to resolve these contestations: First, competing rights in the urban and spatial environment must be linked to a broader constitutional vision and, specifically, that of section 24 of the Constitution.[46] Second, inasmuch as section 24 reveals the content of competing rights, it is equally important to give meaning to this content by examining section 24's corresponding duty.

4.1 Using the environmental right

Section 24 – entitled "Environment" – is an underutilised right in the South African Constitution and should be understood more as a constitutional value than a stand-alone right. Section 24 indicates the value we must ascribe to divergent claims to space within a broader urban environment. It reveals the content of these individual claims to space not only because it situates their interpretation in both a historical and a contemporary context, as well as in an understanding of

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45 Gasa 2016 https://bit.ly/3slJJrw.

46 Section 24 of the Constitution reads as follows: "Everyone has the right –
(a) to an environment that is not harmful to their health or wellbeing; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

intergenerational and intragenerational equity, but also because, in the process, it invites consideration of the corresponding duty implicated in section 24.

Section 24 is often positioned in a green environmental agenda, as applying only to the natural environment and, specifically, ecologically sustainable development. However, as both Marius Pieterse and Anél du Plessis make clear, section 24 can and must apply to the urban environment.[47]

Du Plessis focusses on the brown agenda in environmental parlance, one which "hinges on the understanding that social issues ('brown capital') cannot be separated from the environment – human beings are an integral and indivisible part of the earth system".[48] This goes beyond the "anthropocentric cast", a notion which is "limited to the non-human natural environment".[49] Du Plessis argues that the "conceptual malleability" of section 24(a) of the Constitution lends itself to protecting "brown capital", protecting interests that range from the relief of poverty to the "aesthetic and spiritual dimensions of the natural environment, including the idea of a 'sense of place' … ."[50]

This conceptual malleability comes about because section 24 explicitly protects a right to an environment not harmful to a person's health or wellbeing. If the right seeks to protect a person's health or a wellbeing, then we are required to consider which kinds of environments are harmful. If we do this we begin to realise that the "natural" and the "manmade" are so distinctively intertwined that they are inseparable. For example, air quality – a "natural" occurrence – is poor only because of man-made pollution. Positioning a human and a non-human natural environment as being separate presents a false binary between the two systems.

This kind of non-dualistic thinking has its roots in the idea that the environment we inhabit embodies a symbiosis of individual claims to shared resources. It drives an articulation of rights as

47 Du Plessis 2015 *PELJ* 1846; Pieterse 2014 *SAPL* 175.
48 Du Plessis 2015 *PELJ* 1849.
49 Du Plessis 2011 *SAJHR* 292.
50 Du Plessis 2015 *PELJ* 1855.

existing within a shared polity, and that competing claims must be resolved in a way that moves beyond siloed rights-thinking and towards an approach that animates the interdependent vision of section 24. In this way, it introduces the notions of "communing" and the "commoned space" into the law, pushing back against the primacy of dominant interests or actions which demonstrate little regard for a public realm or the quality of urban life beyond an immediate existence.[51] In another words, it serves to redress a lack of symbiosis in the urban and spatial environment.

Commoning, as opposed to the *a priori* existence of the urban commons, permits insight into how everyday space is appropriated or used in creating (or destroying) a "commoned" space. It reveals the practices, processes, imaginations, and governance which animate everyday space in the urban and spatial environment, positioning these as determinant of a "commoned" space.[52] This positions space as more reflective of everyday use, and does not assume that because a space may appear shared that there is, in fact, an equality of appropriation. In fact, the primacy of dominant interests in the space may suggest the opposite, locating the "commons" as somewhat artificial.

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51 Pieterse makes a similar argument. Specifically, he argues that a progressive interpretation of s 24 lends itself to considerations of the quality of urban life, such as the quality, quantity and accessibility of public space, urban safety and security, urban aesthetics, as well as access to a wide range of urban facilities, from essential services to entertainments. Pieterse 2014 *SAPL* 192.

52 A finite distinction between an urban commons and a commoned space is unlikely; however, a "commoned" space is more the result of the transformation and production of the space through its everyday use by a broad swathe of users and interests, whereas an urban commons presumes a commoned space even where its use may be circumscribed by dominant interests. In this way, we can draw on Stavrides' articulation of Copenhagen Railway Station as a commoned space, which he describes as "a *terraine vague*, neither inside nor outside. They are wide open, inviting and centrally located. Although designed for the swift flow of travelers, they are used for other purposes as well. Very different kinds of people cohabit this transit space, long distance travelers, tourists, daily commuters, but also many kinds of non-travelers who for different reasons are attracted to the station: the homeless seeking shelter, bored teenagers looking for action, people out of work trying to pass the day. This mix makes it a special kind of urban commons." Stavrides *Common Space* 12.

Section 24 envisions a commoned space as the ideal, one that not only presents an ecology between human and non-human but which also presents an ecology between humans themselves, both in the present but also in relation to future generations. Section 24 recognises that the urban environment is a space of contestation between divergent interests[53] and, rather than maligning these divergences as immaterial encourages consideration of what a constitutional vision for the South African urban and spatial environment may entail.[54]

The state plays an important role in driving the recalibration of everyday space so that no one interest dominates. It does this through its ability to make law, set policy, and implement both in pursuit of any particular constitutional vision. This argument does not assume that the state acts benignly in favour of marginalised communities in the urban and spatial environment (it often does not), but the argument does portend that the state's mismanagement and inattention to the access, governance, and quality of everyday space results in the degradation and usurpation of common resources by dominant actors.[55] Left unattended to, everyday space becomes the preserve of those with the means – financial or otherwise – to shape this space according to their own interests.[56]

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53 Also see Pieterse 2014 *SAPL* 182.

54 Du Plessis makes a similar argument when she laments how "[t]wo decades since the adoption of the environmental right, the judiciary and litigants *per se* have nonetheless made limited use of section 24(a) in court proceedings that have directly or in a consequential way concerned brown agenda conflicts". Du Plessis 2015 *PELJ* 1855.

55 See Van der Berg *Municipal Planning Law and Policy* 82-83, who argues that a core component of sustainable development in the urban environment necessitates a focus on human security.

56 See Harvey *Rebel Cities* 74, who argues that the contemporary state of space in the urban environment has been mismanaged in a way that has allowed the market to degrade common resources through abuse. He points to the example of a street gridlocked with traffic to illustrate this: this results in a common for neither drivers not pedestrians or protestors. "Before the car came along however, streets were often a common – a place of popular sociality, a play space for kids … . But that kind of common was destroyed and turned into a public space dominated by the advent of the automobile." Harvey *Rebel Cities* 74.

Part of this drive towards the recalibration of everyday space necessitates understanding how race is enacted through various official and unofficial, hidden and visible determinants. The centrality of race and space in the South African urban and spatial environment should be clear from the empirical research presented earlier in this article. This research presents both formal and informal practices in which spatial apartheid is enacted. But, as Madlalate argues, the law is also to blame. He argues that "the law, through a series of directives, interdictions and bans, has been central to this process."[57] From this, he notes how this "makes the geography of apartheid at once a geography of law: a network of legal provisions which shape use and access to space, thus guiding socio-political outcomes."[58] He notes that the legal architecture behind race and space in the apartheid city not only created "areas which differentiated their users' experiences on the basis of race", but also ensured that "inequality would be reproduced by their very design".[59]

One of Madlalate's central concerns is how post-apartheid jurisprudence is largely blind to the intersection of race and space. He critiques the Constitutional Court decision of *Mazibuko v City of Johannesburg*, in which the Court grappled with the lack of access to water in black spaces.[60] Madlalate points out how the lack of access to water is a salient example of the contemporary manifestation of apartheid geography and critiques the Court's decision for its lack of race consciousness in its reasoning. This occurs through three techniques: first, the Court situates race and space as a legacy inherited from the past, rather than experienced in the present; second, the Court emphasises a break from the past; and its third technique is to situate the socio-economic marginalisation of the applicants as a function of poverty rather than that of "the manifold effects of racialisation."[61]

Legislation on private security is similarly rooted in a false utopia of post-apartheid non-racialism. The Private Security

57 Madlalate 2019 *CCR* 200.
58 Madlalate 2019 *CCR* 200.
59 Madlalate 2019 *CCR* 200.
60 *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).
61 *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) 208-212.

Industry Regulatory Authority's Code of Conduct forbids discrimination on the basis of race in a security provider's general obligations towards the public and, when rendering a security service, mandates that a provider may not use abusive language or language based on hatred or contempt based on race.[62] The word "race" is not even mentioned in the empowering Act itself.[63] Neither of these two points are to suggest that legislation should not try address the intersection of race and space at all, nor that the inclusion of the word "race" necessarily makes a meaningful difference. Rather, it is to make the point that existing legislation and associated regulations mean little in affecting everyday gating and securitisation practices, and so something more is required of the law.

If the environmental right is understood as a constitutional value, then law and policy must be positioned in a way that confronts the intersection of race and space in South Africa differently than it does. For a start, this would recognise that our urban and spatial environment is one of colonial and apartheid epithets and actions, and it would recognise that even articulating the contemporary urban environment as a legacy of the past continues to create this divide.

Primarily, however, situating the intersection of race and space within section 24 necessitates the pursuit of anti-racist measures. However, this must go beyond words in a statute, and must direct the state towards the recalibration of existing power relations in everyday space. This means that we do not give individual rights a siloed meaning, but we position them at the intersection of race and space and with due regard to disrupting dominant interests in the urban and spatial environment. This leads me to discuss the duty implicated by the environmental right.

4.2 The duty created by the environmental right

The second way I develop the content of the environmental right is to draw out the corresponding duty it creates. If we

62 Regulations 8(2)(a) and 8(12)(c) in GN 305 in GG 24971 of 28 February 2003.

63 *Private Security Industry Regulation Act* 56 of 2001.

employ the metaphor of a coin for a constitutional right, we realise that considering only one side of the coin – the affirmative claim behind the right itself – tells us a limited story of what that right means. A right must be defined as much by its entitlement as it is defined by who shoulders the responsibility of that entitlement, and what that responsibility entails. [64] In so doing, the "coin" reveals more fully the contours of the right than simply observing the entitlement it creates.[65] Consider, for example, the missive at the start of this section. Gasa owed no duty to the two men to assuage their feelings of insecurity. This would create unreasonable expectations on everyone to assuage everyone else's feelings of insecurity. Thus, because the duty in relation to Gasa does not exist, the right on behalf of the two men and in relation to Gasa does not exist either. (This is different to arguing that the right exists in relation to other actors.)

In this section of the paper I argue that the duty in respect of both rights (to create an environment of safety and security, and to create an environment of free movement) exists on the state, and it is in this context that I consider the more remedial role the state should exercise in the governance of space. However, here again, focussing only on the duty implicit in section 12 and section 21 of the Constitution reveals only siloed interpretations. Rather, it is necessary to draw out the duty in the environmental right as a value to inform contestations in everyday space. The failure to do so indicates a lack of recognition of the urban environment as an interdependent web of interests, and a lack of recognition of how other rights are implicated.

The state plays an important role here in making this connection between rights, and in carrying out its duty in

64 The argument presented here is a Hohfeldian argument about the importance of clarifying the meaning and scope of jural relationships. Hohfeld "Some Fundamental Legal Conceptions" 23.

65 Hohfeld argued that the "broad and indiscriminate use" of rights resulted frequently in an incorrect or limited articulation of the right. As a result, the right needed to be defined by its limitation as much as it is defined by what it entitles. Per Hohfeld: "[W]hat clue do we find, in ordinary legal discourse, towards limiting the word in question to a definite and appropriate meaning? That clue lies in the correlative 'duty'…". Hohfeld "Some Fundamental Legal Conceptions" 38.

recalibrating the human ecology of the urban environment. In a society where the private market has adopted the role of a quasi-state in relation to various determinants of urban life, it is imperative that the state adopts deliberate anti-racist planning and legal strategies which engineer a multi-racial urban fabric.

In making this argument I point to two different interventions, one in Johannesburg and spearheaded by the City's planning apparatus, and the other in Cape Town and spearheaded by an activist organisation fighting against the City's existing planning and development process, and which draws part of its inspiration from the land reform clause underpinning section 25 of the Constitution. Both measures are designed to recalibrate dominant power relations in everyday space and so, rather than directly influencing freedom of movement and safety and security, serve instead to upend the disempowering urban and spatial fabric.

4.2.1 Planning interventions: Corridors of Freedom

In Johannesburg the Corridors of Freedom was a transit-oriented development project aimed at "re-stitching" divided and resource-disparate parts of the city divided through increased densities along identified transit routes. The increased density would not only provide opportunities for new forms of social mixing and affordable housing, but would also "bring people from the spatial margins of the city into the core and would physically link parts of the city historically divided by race-based planning."[66] Corridors of Freedom were motivated by the need to provide affordable mass public transport to a city which had grown outwards without a formally-planned transit system. It was borne out of a recognition that not only did apartheid's planning strategies result in a racist and divided city, but the lack of planning foresight resulted in various inefficiencies, including the availability of affordable housing and the provision of mass public transport.

Six years after the announcement of the project Harrison *et al* expressed cynicism over the impact of the project in its efforts to spatially reconfigure the city through its attempts to focus on

66 Harrison *et al* 2019 *JPER* 458.

economic, social, and spatial inclusion. They present three possible reasons for why the Corridors have not had the impact originally envisioned. First, in "the urgency to offer a compelling response to the persisting inequities of a post-apartheid city, the possibilities and limitations of spatial inclusion were glossed over."[67] Second, the change in the political make-up of the City meant that support for the project was not always consistent.[68] And third, this was especially problematic when the nature of the project required "constant vigilance and programmatic attention" in the face of "the arcane workings of a bureaucracy and the self-interested actions of real estate developers and other actors in the urban space."[69] Part of their reasoning in arriving at this cynical outlook is that:

> Spatial transformation in Johannesburg is immensely complex and constrained. Almost all property in the city is in private hands, the economy is subdued, established communities resist change, there are strong political imperatives to spend the bulk of public money in the townships rather than in the corridors, and private developers are geared to investing in the wealthy northern nodes and edges of the city.[70]

Despite these downfalls, Corridors of Freedom represents the level of state-driven intervention required to work towards section 24 of the Constitution as a constitutional vision; an effort to create a new kind of urban and spatial environment, one which draws together various determinants of urban life through an interconnected lens. Rather than working towards the realisation of one right – such as the right to access to adequate housing – the Corridors position the policy content implicit in this right both in relation to other rights and within a broader urban and spatial environment. Thus, the provision of affordable housing is situated along a transit corridor because of the linkages to other resources, including economic opportunities, education, and health services, and so have a longer-term and more sustainable impact than the provision of affordable housing on the periphery.

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67 Harrison *et al* 2019 *JPER* 465.
68 Harrison *et al* 2019 *JPER* 465.
69 Harrison *et al* 2019 *JPER* 465.
70 Harrison *et al* 2019 *JPER* 462

Further, by densifying existing routes through traditionally whites-only suburbs in the city, urban policy begins to address a constitutional vision of non-racialism through accommodating in an existing urban fabric population groups traditionally marginalised through spatial apartheid. It is the resistance to these efforts that demonstrate why such efforts are critical. For example, the Patterson Park Precinct Plan – an affordable housing project located in close proximity to the Louis Botha Corridor in Johannesburg's north-east suburbs and linking Alexandra with the inner city – faced resistance by predominantly white middle-class resident associations because of the "creep" that would result and which would ostensibly cause a decrease in property values, the harming of the urban environment, and an increase in crime.[71] This resistance nets results. The original plan was to build between 1445 and 2277 housing units on the city-owned property. However, following objections to the rezoning and discussions with resident associations and community members, the City committed to reducing the number of units to 1457.[72]

The point of highlighting this reduction is to demonstrate why a proactive state-driven intervention is necessary in fulfilling the environmental right. This is obviously a difficult task given ingrained interests resistant to change, but the failure to do so entails no disruption to a racist status quo. Gasa's story is a parable of this status quo. Such measures – such as the Corridors of Freedom – attempt to go beyond mere tokenism because they represent radical reconfiguration of space, as opposed to mere insertion. Such is the duty implicit behind the environmental right.

4.2.2 Legal interventions: Urban land reform

The duty behind the right, however, requires more than simply the adoption of progressive planning policies that focus on an interconnected realisation of rights. This is because urban planning mechanisms cannot fully address the core reason for why spatial apartheid exists in the first place: the loss of land ownership. I focus on the loss of land ownership not only

71 Applebaum *Contestation, Transformation and Competing Visions* 22.
72 Applebaum *Contestation, Transformation and Competing Visions* 13.

because it was centuries of land theft and forced removals that led to spatial apartheid, but because the Constitution mandates a duty on the state to redress this arbitrary deprivation of property.

Indeed, part of conceptualising the environmental right as a constitutional value is to recognise the transformative nature of the property clause. Although at times denoting an entrenchment of existing property rights, section 25 in fact encompasses predominantly a right to land. There are nine different sub-sections of section 25, and only three of them pertain to the protection of property rights. The remaining six mandate the state to enact land reform measures which not only include restitution of land lost through successive colonial or apartheid governments but also include a positive duty to enact "reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."[73]

If we situate the connection between race and space as a central component to the duty implicit in the environmental right, the interpretation of section 25 is understood as spatial recalibration rather than primarily the protection of entrenched property interests. This is important to do, given how property rights are brandished as a shield against spatial reconfiguration. In the process, section 25 becomes a tool employed against the duty implicit in the environmental right. This is constitutionally limited not only as it means section 25 acts unquestionably as a trump against the duty implicit in section 24, but the position misconstrues the primary purpose of section 25 as protecting property rights. As with the Corridors of Freedom, this position continues to entrench a racist status quo. This is especially relevant in the urban environment, where anecdotally it would appear that land interests in well-located areas of the South African city remain predominantly white.

Empirical research would be useful here, but a Land Audit conducted by the Department of Rural Development and Land

73 Section 25 of the Constitution.

Reform suggests this observation has its basis in fact.[74] The report highlighted that at 49% (or 357 507 ha) of all land counted, white landowners accounted on average for the biggest proportion of erven land ownership in the country, followed by 30% (or 219 033 ha) of all land counted owned by Africans.[75] The racial inequality of land ownership is evident if we compare these figures to the racial distribution of South Africa's population according to the 2011 National Census, which revealed that whites accounted for only 7.8% of South Africa's population (4.6 million people), whereas Africans accounted for 80.8% of the population (48 million people).[76] Africans make up a majority of individual landowners by race (at 56% versus 26% for Whites), but this number looks far less attractive when considering the figures in absolute numbers – in a country of almost 60 million people, 3.3 million Africans are individual landowners, whilst 1.5 million whites are individual landowners.[77] In other words, approximately one in three white South Africans are individual landowners, whereas approximately one in ten Africans are individual landowners.

These figures speak only to land title, however. As the report notes, these figures do not say anything "about the land, settlement quality and value of erven land".[78] As Budlender and Royston argue, the focus on conferring land title in place of other factors (such as location) in the delivery of housing has "led to the entrenching of Apartheid spatial forms, as construction and delivery of freehold housing is cheaper and easier to do at scale on peripheral green-field sites than it is in already built-up areas."[79]

The image sketched above reveals the existing environment that characterises the South African urban landscape. This is not a controversial or new claim to make – the Spatial Planning and Land Use Management Act (SPLUMA) itself recognises in its preamble that "many people in South Africa continue to live and work in places defined and influenced by

74 DRDLR 2017 https://bit.ly/3sCmERF.
75 See DRDLR 2017 https://bit.ly/3sCmERF Table 10.
76 Stats SA 2020 https://bit.ly/3bRJFKk.
77 DRDLR 2017 https://bit.ly/3sCmERF Table 11.
78 DRDLR 2017 https://bit.ly/3sCmERF 13.
79 Budlender and Royston *Edged Out* 6.

past spatial planning and land use laws and practices … ."[80] And yet there is an unexpressed resistance on the part of the state to disrupt these patterns, and the result is that individual rights – such as movement and safety and security – remain unaddressed and subject to the behest of dominant actors in the urban and spatial environment. The duty implicit in the environmental right requires the state to use the land reform components of section 25 and to understand its transformative potential.

I now position an example of a practice employed by activist organisations in Cape Town as representative of the kind of disruption necessary in realising the duties implicated in both rights. In 2020 Ndifuna Ukwazi placed pressure on the City of Cape Town to revaluate its decision to renew its lease agreement with the Rondebosch Golf Club. Golf clubs represent a penumbra of urban inequality in the South African city: large swathes of often well-located land that remain closed off to most people and used exclusively and inefficiently for an expensive form of recreation. They solidify the control of freedom of movement, enclosing a green common for the benefit of a dominant class and requiring everyone else to move around the space. The enclosure itself creates divides between people, shoring up feelings of safety and security for those in and outside the space.

Ndifuna Ukwazi argued that the location of the Rondebosch golf course meant it was ripe for social housing – a way of redressing formal and informal housing development on the urban edge. The City of Cape Town, however, argued that the land was unsuitable for social housing for various reasons, including that less than half of the area available was below the 1 in 50 year flood line.[81]

The campaign demonstrated the injustice of land use in the contemporary South African city. It highlighted the absurdity in the City of Cape Town leasing the land to the golf club for a mere R1 000 per year, and it expressed the frustration that the state appeared unwilling to rethink how it is using the land,

80 Preamble of the *Spatial Planning and Land Use Management Act* 16 of 2013.

81 Human 2020 https://bit.ly/3sEhd4E.

with the argument about "suitability" appearing as a post-rationalised excuse rather than an obstacle to be overcome. If an activist organisation can think laterally about how we use land, so too can the state.

The duty implicit in the environmental right requires proactive and innovative thought about how section 25 empowers the state to recalibrate the urban and spatial environment towards an ideal of non-racialism. And there are many tools within section 25 to make this work – ranging from a broader non-market related concept of just and equitable compensation to the internal limitation in section 25(8), which removes the compensation requirement for an expropriation aimed at land- or water-related reform. But this requires consistent and deliberate interventions against entrenched interests: identifying a piece of land in well-located (and, most likely, predominantly white) areas to address housing shortages, for example, or refusing to classify an informal settlement as a land invasion and instead meeting its section 25(5) obligations "to foster conditions which enable citizens to gain access to land on an equitable basis."

5 Conclusion

The enclosure of space through gating practices and securitisation harms the urban and spatial environment in systemic and irredeemable ways. It has the effect of transposing spatial apartheid to the current day and embodies measures that entrench rather than address racism in everyday space. If the environmental right recognises the interdependence of present and future generations in the urban and spatial environment; if it works against the dominance of any one actor; and if recalibration of this environment denotes measures that are anti-racist in their pursuit – then the private enclosure of public space cannot be considered constitutional. On its own, section 12 does not lead to this conclusion, but using the environmental right as a constitutional value highlights how unsustainable these enclosure practices are to the prosperity of the South African urban and spatial environment.

However, the environmental right is useful not only in transcending siloed interpretations of rights, but it also reveals the duty implicit in the right. Part of the reason why the enclosure of space takes place is because of the failure of the state to proactively recalibrate this environment – not as a way of appeasing fears grounded in racism or other prejudice, but because leaving the urban and spatial environment unattended allows dominant actors to shape everyday space to their own agenda.

This article began with analyses of the spatial implications behind section 12 of the Constitution. Developed primarily through a cross-border lens, the article demonstrated how the right to freedom of movement has spatial connotations critical to South Africa's contemporary urban and spatial environment.

The article then considered the right to freedom and security of the person in section 21 of the Constitution. This right could be employed as a bulwark against free movement, but only if the fear of violence concerned presents a credible threat and not an imagined one. However, it is difficult for ordinary people in everyday space to make a distinction between an imagined threat and a credible one grounded in reality. It is also much

easier to make this distinction once the right has been violated.

As such, neither section 12 nor section 21 on their own reveals how everyday contestations in space could be resolved constitutionally. Given this impasse, I have argued that section 24 of the Constitution – the right to an environment – must play a more determinative role in disputes concerning the urban and spatial environment. This serves not only to clarify the content of existing rights, but it also informs the environmental duty incumbent on the state to recalibrate the urban and spatial environment.

I have highlighted two examples of this duty that attaches to the state in policy and the law. Both examples attempt to address the root cause of the impasse in the first place, not by focussing explicitly on freedom of movement or safety and security, but rather on the intersection of race and space in the South African urban environment. In disrupting existing patterns of racial inequality, I have demonstrated how section 24 can be used as a tool of spatial recalibration – this occurs not only through conceptual malleability of the right itself, but because the right acts as a constitutional value in animating other rights in the Constitution and their role in driving forward spatial change.

I end this article by returning to Gasa's account of what transpired that night on Currie Street in Oaklands, Johannesburg. She told the two men accosting her that "[y]ou may live in this street but you do not own it. You may own that house but you do not own me. I do not have to answer to you. I do not owe you an explanation. Policing the street and the people in it is not your role."[82] The South African street is full of everyday contestation. Often this yields a dynamic and vibrant urban and spatial environment. But it also sometimes reveals an unequal assumption of power that, if left unchallenged, fails to recalibrate everyday space towards an environment of equality.

82 Gasa 2016 https://bit.ly/3slJJrw.

Bibliography

Literature

Applebaum *Contestation, Transformation and Competing Visions*
Applebaum A *Contestation, Transformation and Competing Visions: A Study of Orange Grove and Norwood* (University of the Witwatersrand Johannesburg 2017)

Baudelaire *Painter of Modern Life*
Baudelaire C *The Painter of Modern Life* (Mayne J ed & trans) (Phaidon New York City 1863)

Bénit-Gbaffou 2006 *Urban Forum*
Bénit-Gbaffou G "Police-Community Partnerships and Responses to Crime: Lessons from Yeoville and Observatory, Johannesburg" 2006 *Urban Forum* 301-325

Budlender and Royston *Edged Out*
Budlender J and Royston L *Edged Out: Spatial Mismatch and Spatial Justice in South Africa's Main Urban Areas* (SERI Johannesburg 2016)

Clarno and Murray 2013 *Social Dynamics*
Clarno A and Murray M "Policing in Johannesburg After Apartheid" 2013 *Social Dynamics: A Journal of African Studies* 210-227

Cooper-Knock 2016 *Africa*
Cooper-Knock S-J "Behind Closed Gates: Everyday Policing in Durban, South Africa" 2016 *Africa* 98-121

Currie and De Waal *Bill of Rights Handbook*
Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (Juta Cape Town 2017)

Dirsuweit 2002 *Urban Forum*
Dirsuweit T "Johannesburg: A Fearful City?" 2002 *Urban Forum* 3-19

Dirsuweit "Public Space and the Politics of Propinquity"

Dirsuweit T "Public Space and the Politics of Propinquity in Johannesburg" in Farber L (ed) *Representation and Spatial Practices in Urban South Africa* (The Visual Identities in Art and Design Research Centre Johannesburg 2008) 51-58

Dirsuweit and Wafer 2006 *Urban Forum*
Dirsuweit T and Wafer A "Scale, Governance and the Maintenance of Privileged Control: The Case of Road Closures in Johannesburg's Northern Suburbs" 2006 *Urban Forum* 327-352

Du Plessis 2011 *SAJHR*
Du Plessis AA "South Africa's Constitutional Environmental Right (Generously) Interpreted: What Is in It for Poverty?" 2011 *SAJHR* 279-307

Du Plessis 2015 *PELJ*
Du Plessis AA "The 'Brown' Environmental Agenda and the Constitutional Duties of Local Government in South Africa: A Conceptual Introduction" 2015 *PELJ* 1846-1880

Durrington 2006 *GeoJournal*
Durrington M "Race, Space and Place in Suburban Durban: An Ethnographic Assessment of Gated Community Environments and Residents" 2006 *GeoJournal* 147-160

Harrison *et al* 2019 *JPER*
Harrison P *et al* "Corridors of Freedom: Analyzing Johannesburg's Ambitious Inclusionary Transit-Oriented Development" 2019 *JPER* 456-468

Harvey *Rebel Cities*
Harvey D *Rebel Cities* (Verso London 2012)

Hohfeld "Some Fundamental Legal Conceptions"
Hohfeld WN "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, Part I" in Cook WW (ed) *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays by Wesley Newcomb Hohfeld* (Yale University Press New Haven CT 1964) 23-64

Hook and Vrdoljak 2002 *Geoforum*

Hook D and Vrdoljak M "Gated Communities, Heterotopia and a 'Rights' of Privilege: A Heterotopology of the South African Security-Park" 2002 *Geoforum* 195-219

Haysom "Dignity"
Haysom N "Dignity" in Cheadle H, Davis D and Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (LexisNexis Johannesburg 2002) ch 5

Kepe, McGregor and Irvine 2015 *Applied Geography*
Kepe T, McGregor G and Irvine P "Rights of 'Passage' and Contested Land Use: Gendered Conflict Over Urban Space During Ritual Performance in South Africa" 2015 *Applied Geography* 91-99

Kynoch 2014 *Canadian Journal of African Studies*
Kynoch G "Fear and Alienation: Narratives of Crime and Race in Post-Apartheid South Africa" 2014 *Canadian Journal of African Studies / Revenue Canadienne des Études Africaines* 427-441

Landman *Gated Communities*
Landman K *Gated Communities in South Africa: Comparison of Four Case Studies in Gauteng* (CSIR Pretoria 2004)

Lemanski 2006 *Journal of International Development*
Lemanski C "Residential Responses to Fear (of Crime Plus) in Two Cape Town Suburbs: Implications for the Post-Apartheid City" 2006 *Journal of International Development* 787-802

Lemanski and Oldfield 2009 *Environment and Planning*
Lemanski C and Oldfield S "The Parallel Claims of Gated Communities and Land Invasions in a Southern City: Polarised State Responses" 2009 *Environment and Planning* 634-648

Lemanski, Landman and Durington 2008 *Urban Forum*
Lemanski C, Landman K and Durington M "Divergent and Similar Experiences of 'Gating' in South Africa: Johannesburg, Durban and Cape Town" 2008 *Urban Forum* 133-158

Madlalate 2019 *CCR*
Madlalate R "Dismantling Apartheid Geography: Transformation and the Limits of Law" 2019 *CCR* 195-217

Moore *Political Theory of Territory*
Moore M *A Political Theory of Territory* (Oxford University Press Oxford 2015)

Pieterse 2014 *SAPL*
Pieterse M "The Right to the City and the Urban Environment: Re-Imagining Section 24 of the 1996 Constitution" 2014 *SAPL* 175-193

Ramoroka and Tsheola 2016 *JGRP*
Ramoroka T and Tsheola J "Gated-Communities and the Privatization of Public Spaces in Urban South Africa: Democratic Social Integration or Exclusion?" 2016 *JGRP* 58-68

Stavrides *Common Space*
Stavrides S *Common Space: The City as Commons* (Zed Books London 2016)

Tandogan and Ilhan 2016 *Procedia Engineering*
Tandogan O and Ilhan BS "Fear of Crime in Public Spaces: From the View of Women Living in Cities" 2016 *Procedia Engineering* 2011-2018

Van der Berg *Municipal Planning Law and Policy*
Van der Berg A *Municipal Planning Law and Policy for Sustainable Cities in South Africa* (PhD-dissertation Tilburg University 2019)

Young *Justice and the Politics of Difference*
Young IM *Justice and the Politics of Difference* (Princeton University Press Princeton NJ 1990)

Case law

F v Minister of Safety and Security 2012 1 SA 536 (CC)

Loureiro v iMvula Quality Protection (Pty) Ltd 2014 3 SA 394 (CC)

Mazibuko v City of Johannesburg 2010 4 SA 1 (CC)

Legislation

Constitution of the Republic of South Africa, 1996

Natives (Abolition of Passes and Co-Ordination of Documents) Act 67 of 1952

Natives (Urban Areas) Consolidation Act 25 of 1942

Private Security Industry Regulation Act 56 of 2001

Spatial Planning and Land Use Management Act 16 of 2013

Government publications

GN 305 in GG 24971 of 28 February 2003

Internet sources

Anon 2019 https://bit.ly/2lZHJbc
Anonymous 2019 *Amy-Leigh's Missing Kids Facebook Page* https://bit.ly/2lZHJbc accessed 26 November 2019

DRDLR 2017 https://bit.ly/3sCmERF
Department of Rural Development and Land Reform 2017 *Land Audit Report: Phase II: Private Land Ownership by Race, Gender and Nationality* https://bit.ly/3sCmERF accessed 14 January 2021

Gasa 2016 https://bit.ly/3slJJrw
Gasa N 2016 *Nomboniso Gase Facebook Post* https://bit.ly/3slJJrw accessed 19 November 2019

Human 2020 https://bit.ly/3sEhd4E
Human L 2020 *Rondebosch Golf Club Lease Renewal Under Fire from Housing Activists* https://bit.ly/3sEhd4E accessed 14 January 2021

Igual 2021 https://bit.ly/3tBvG16
Igual R 2021 *Queer Individual Andile Ntuthela Butchered and Burned in Uitenhage* https://bit.ly/3tBvG16 accessed 16 April 2021

SAHRC 2004 https://bit.ly/3dza2VM

South African Human Rights Commission 2004 *Road Closures / Boom Gates Report* https://bit.ly/3dza2VM accessed 21 April 2021

Stats SA 2020 https://bit.ly/2XZF0hn
Statistics South Africa 2020 *Statistical Release: Governance, Public Safety, and Justice Survey 2019/20* https://bit.ly/2XZF0hn accessed 20 January 2021

Stats SA 2020 https://bit.ly/3bRJFKk
Statistics South Africa 2020 *Mid-Year Population Estimates 2020* https://bit.ly/3bRJFKk accessed 14 January 2021

List of Abbreviations

CCR	Constitutional Court Review
DRDLR	Department of Rural Development and Land Reform
JGRP	Journal of Geography and Regional Planning
JPER	Journal of Planning, Education and Research
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SAPL	Southern African Public Law
Stats SA	Statistics South Africa