AN AFRICAN JURISPRUDENTIAL PERSPECTIVE ON LAND AND PROPERTY

by

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SUMMARY OF THE MINI-DISSERTATION

The mini dissertation explores an African jurisprudential perspective on land and property. The investigation is situated in the historical context of colonisation and apartheid as well as the present post-1994 debates on land and section 25 of the Constitution. It shows how African jurisprudence could respond to the way in which colonial modernity has affected the way we relate to, understand and use land (that is, how African jurisprudence could challenge the commodification of land).

Chapter 2 looks at the historical context of land dispossession and land reform in South Africa. It starts with the pre-colonial period then moves to conquest and dispossession by the Dutch and British and their perceptions on land. It also deals with the internal colonisation by Afrikaners under the apartheid, its impact, the transition and ends with the Constitution and Land Reform Programme.

Chapter three deals with the core tenets of the African jurisprudence. It addresses the question of African Jurisprudence and Ubuntu. It then moves to cover African Cosmology, Justice, Traditional Leadership, and Communalism.

Chapter four deals with ways in which African jurisprudence can disclose an alternative vision of land and property through the Decolonisation of the Constitution, history and integration of Traditional Leadership and Governance.

The chapter 5 deals with the conclusion and recommendations.

The last chapter is the bibliography.

DECLARATION BY STUDENT

I, the undersigned, **MANGORO JANINE MOGALE** do hereby declare that this Mini-Dissertation submitted to the University of Pretoria, for the degree of Masters of Laws (LLM) in Law and Political Justice, has not been previously submitted by me for a degree at this or any other university or similar institution, that it is my own work in design and in execution and that all material contained herein has been duly acknowledge.

Mangoro Janine Mogale 04 February 2020

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1. African National Congress (ANC).
2. Azanian People's Organisation (AZAPO).
3. Communal Land Rights Act (CLRA).
4. Inkatha Freedom Party (IFP)
5. National Party (NP).
6. Pan Africanist Congress of Azania (PAC).
7. Permission to Occupy Certificates (PTOs).
8. Pretoria University Law Press (PULP).
9. Reconstruction and Development Programme (RDP).
10. South African Communist Party (SACP).
11. South African National Native Congress (SANCC).
12. Traditional Courts Bill (TCB).
13. Traditional Leadership and Governance Framework Act (TLFGA).
14. United Democratic Front (UDF).

CHAPTER 1: INTRODUCTION

1. Research Problem

The aim of this study is to explore an African jurisprudential perspective on land and property. The investigation is situated in the historical context of colonisation and apartheid as well as the present post-1994 debates on land and section 25 of the Constitution. I am interested in how African jurisprudence could respond to the way in which colonial modernity has affected the way we relate to, understand and use land (how African jurisprudence could challenge the commodification of land). The argument to be developed is that to address land restoration in South Africa, the solution is to decolonise the Constitution by looking back at the start of the conquest, the 1961 and 1996 Constitution which protect, and safeguard unjustly acquired land and property using the features of African jurisprudence. The adoption of African jurisprudence will lead to the end of land commodification and as a result ordinary South Africans will have use and access to land and property and African jurisprudence would have enabled the law to secure, defend and promote the dignity of Africans in all spheres of social existence.

2. Research Questions

The above research problem will be addressed by answering the following research questions:

- What is the historical context of land dispossession and land restoration in South Africa?
- What are the core tenets of African jurisprudence?
- In what way could African jurisprudence disclose an alternative vision of land and property?

3. Motivation

3.1. Background

Historically, African and Western communities differ when it comes to land and property. The white settlers or colonialists view land and property as a thing capable of being sold for profit, whereas Africans view land and property in holistic terms where everything works together including the earth, atmosphere, rivers and oceans.[1] I aim to show that colonialism reshaped indigenous African communities to be inflexible destroying the social and political structures that existed before the colonial rule. During the pre-colonial period, land was not regarded as a commodity, but was shared amongst members of the community where traditional leaders acted as custodians who held the land on behalf of the whole community.[2] Land was owned communally, and if it was under chiefdom, it belonged to the whole nation and no single person could hold on to massive amounts of land when there were community members who remained landless.[3]

Things started to change from the mid-17th century with the landing of Jan van Riebeck in the Cape of Good Hope where he established a Dutch settlement on behalf of the Dutch East Company.[4] The establishment of the settlement resulted in the Dutch seizing land from the Khoi and San people in order to increase their land for grazing. The Khoi and the San were rendered destitute. They had lost the land from which they derived their livelihood and were forced to make a living by working for the white settlers.[5] The British took over governance of the Cape Colony in 1795 and again in 1806 and started with a colonial development process which was

[1] K Tafira and S Ndlovu-Gatsheni "Beyond Coloniality of Markets: Exploring the Neglected Dimensions of the Land Question from Endogenous African Decolonial Epistemological Perspective" (2017) 46 *Africa Insights Journal* at 11.
[2] J Sithole and P Ngonyama "Unpack the double agenda of the KZN land deal that sought to entrench Bantustan cliques and subvert the revolutionary gains of 1994" http://www.polity.org.za/article/the-land-question-the-ingonyama-trust-controversy-2018-05-11 (accessed 19 July 2018).
[3] Sithole and Ngonyama (n 2 above) 1.
[4] J Murungi *Introduction to African Philosophy* (2013) 16.
[5] L Ntsebeza *Democracy Compromised; Chiefs and the politics of land in South Africa* (2008) 3.

made effective by violent wars of dispossession and resulted in the majority of Africans being landless and property-less.[6]

The violent dispossession did not end in the Cape but continued throughout the country affecting all the indigenous peoples including amaXhosa, amaZulu, Bapedi etc.[7] It started with the Frontier Wars involving the Xhosa people, Boers, Khoisan and the British which lasted for almost a hundred years.[8] The Dutch trekked through the interior and settled on the other side of the Vaal river where they conquered the Ndebele people in 1836 which led to the Ndebele nation fleeing to the other side of the Limpopo river into Zimbabwe. The Zulu people were also involved in a war of resistance against colonial dispossession on the banks of Ncome river in 1838.[9] King Cetshwayo and his people were also involved in the battle of *Isandlwana* in 1879 against land dispossession where the British troops suffered their worst defeat in what is called Anglo-Zulu war.[10] The Boers and the British fought each other in the First Boer War in 1880-1881 because the Boers wanted self-determination and the Boers won.[11] The British attacked and defeated King Lobelunga and the Ndebele people in Matabele land in 1893-1894 for land.[12] The Afrikaners in 1894 conquered Chief Mmaleboho of the Bahananwa people in Blouberg in the Malaboch War for land.[13] The Boers and the British fought each other again in 1899-1902 and the British won. The dispossession of land and demarcation of borders gave birth to a territory called South Africa.

The white settlers sealed the dispossession of land through the imposition and application of different laws, which were enacted with the intention to complete and maintain dispossession. The first law that was enacted was the Glen Grey Act 25 of 1894 by the British government which was then upgraded and became the foundation of the dispossession. It was turned into the

[6] Ntsebeza (n 5 above) 3.
[7] L Changuion and B Steenkamp *Disputed land: The historical development of the South African Land Issues, 1652 – 2011* (2012) 31.
[8] Changuion and Steenkamp (n 7) 31.
[9] L Thomson *The History of South Africa* (2000) 90.
[10] Changuion and Steenkamp (n 7) 51.
[11] Changuion and Steenkamp (n 7) 112.
[12] Changuion and Steenkamp (n 7) 89.
[13] Changuion and Steenkamp (n 7) 110.

Native Land Act 27 of 1913. The Glen Grey Act was promulgated in 1894 during the premiership of Cecil John Rhodes in the Cape Colony with the purpose of establishing a rural form of government based on a district council model or "dummy" African representation and limiting African land ownership by introducing individual land tenure and not land ownership.[14] The other purpose was that the implementation of the Act would force African people to go work in the mines and supply cheap labour for the mineral revolution in South Africa.[15]

The Glen Grey Act was followed by the Natives Land Act 27 of 1913 which cramped the African majority to only 7% of the land in South Africa and disqualified Africans from purchasing and retaining land anywhere other than in the earmarked areas which became overpopulated.[16] It also prohibited Africans from renting land from white owned farmers. The Native Trust Land Act 18 of 1936 later renamed the Bantu Trust and Land Act of 1936 and the Development Trust and Land Act of 1936 and added another 6% to the land in the scheduled areas, which led to only 13% of land being allocated to Africans.[17] The impact was that a significant number of rural people went from being an employer or self-employed to being employed as a wage labourer, while others became migrant workers with insecure tenure to land. Those who worked earned minimum wage and most of it was spent on transport because they lived outside white areas where they were employed.[18]

The National Party (NP) was voted into power in 1948 and began to enforce a policy of apartheid by introducing the Group Areas Act 41 of 1950. Its purpose was to create segregated districts for different racial groups and made it illegal for them to mix.[19] The results were gruesome because socially families were torn apart, houses were destroyed.[20] Economically, Africans were not allowed to own land outside the designated areas; land allocated in new areas was small and

[14] Changuion and Steenkamp (n 7) 127.
[15] Ntsebeza (n 5) 64.
[16] EM Letsoalo *Land restoration in South Africa: A Black Perspective* (1987) 35.
[17] Natives Trust and Land Act 18 of 1936, thereafter "the Act" section 2(1) and 6(1).
[18] Ntsebeza (n 5) 108.
[19] Group Areas Act 41 of 1950, thereafter "the Act".
[20] MA Yanou *Dispossession and Access to Land in South Africa: An African Perspective* (2009) 17.

sharecropping was banned.[21] Land dispossession resulted in inadequate distribution of property rights in land and water because white settlers seized the best pieces of land either for cattle grazing or for crop cultivation and turned the indigenous African farmers into renters or salary workers, or ejected them.[22]

Apartheid policy led to internal struggle against the regime through riots, boycotts and demonstrations; amongst others were the slaughter of 69 Africans by the police in Sharpeville 1960 when they protested the internal passport system "Pass Laws" created to separate the citizens, control urbanisation and migrant labour.[23] Another one is the assassination of about 700 schoolchildren in 1976 who were protesting against the use of Afrikaans language as a medium of instruction by the police.[24]

The apartheid government began to realise that the policy of separateness was expensive to maintain.[25] Globally the tension was also mounting against the apartheid regime; India denounced apartheid in 1948; the United Nations pronounced apartheid a violation against mankind in the 1960's; and the Soviet Union rebuked apartheid in 1973.[26] African nations also assisted by imposing an armaments restriction against South Africa and also helped by providing lodging for exiled comrades due to the enactment of the Suppression of Communism Act 44 of 1950 or Internal Security Act 74 of 1976.[27] The Suppression of Communism Act legally prohibited the operation of Communist Party of South Africa and was also utilised as a justification to putting people under banning instructions while the Internal Security Act aim was to prohibit or limit public assemblies and to take people into custody with no chance of attending a court case.

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[21] L Modise and N Mtshiselwa "The Natives Land Act of 1913 engineered the poverty of Black South Africans: a historico-ecclesiastical perspective" (2013) 39 *Journal of the Church History Society of Southern Africa* at 53.
[22] Ntsebeza (n 5) 3.
[23] M Mothlabi "Black Resistance to Apartheid Future Prospects" (1987) 4 *Journal of Black Theology in South Africa* at 6.
[24] S.M Ndlovu "The Soweto Uprising" http://sadet.co.za/docs/RTD/vol2/Volume%202%20-%20chapter%207.pdf at 341 (accessed on 07 October 2019).
[25] L Ntsebeza and R Hall *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 109.
[26] Changuion and Steenkamp (n 7) 245.
[27] Changuion and Steenkamp (n 7) 193.

Demonstrations and embargoes escalated over the years and forced the apartheid regime to pronounce a state of emergency in 1986 which was unsustainable and led to lifting the ban of all struggle parties such as the Pan Africanist Congress of Azania (PAC), ANC and South African Communist Party (SACP) and the release of political prisoners in 1990.[28]

The unbanning of political parties led to negotiations on land where the apartheid regime wanted to protect unjustly acquired property rights through the property clause in the Constitution and the ANC desired for land transformation within the Interim Constitution.[29] The PAC on the other wanted absolute independence of African people including that land must be restored to its rightful owners.[30] The liberation movements were not in agreement with the insertion of the property clause because it was going to be an obstacle in achieving land restoration because it meant protecting unjustly acquired property which was taken through violent conquest.[31] This was opposed by the apartheid government who wanted to protect the interest of white landowners against changing from private ownership to state ownership and confiscation.[32] At the end the property clause was inserted in the Interim Constitution and later enacted as 25 of 1996 Constitution without more information on land restoration plan except for return of land for those who lost it after 1913.[33] The government also informally adopted the World Bank "Willing buyer, Willing seller" policy.[34] The combination of these two factors made the land restoration programme extremely inefficient.[35]

The white settlers employed a Western legal framework to gain and control the unjustly acquired land and property by adopting the Roman Dutch Law and capitalism which are characterised by

[28] Changuion and Steenkamp (n 7) 264.
[29] Yanou (n 20) 33.
[30] MP More *Fanon and the Land Question in (Post) Apartheid South Africa* (2011) 10.
[31] Yanou (n 20) 34.
[32] S Buthelezi *The Land Belongs to us: The Land and Agrarian Question in Africa Today* (2009) 183.
[33] Changuion and Steenkamp (n 7) 266.
[34] The Department of Land Affairs *1997 White Paper on Land restoration Policy*.

[35] E Lahiff "Willing Buyer, Willing Seller: South Africa's failed in market-led agrarian reform" (2007) 28 Third World Quarterly Journal at 5.

private ownership where one has full control and use over property to the exclusion of others.[36] It views land as private property, a commodity, which its primary goal is to be controlled and exploited in order to fulfil one's self-indulgent.[37] This is different in the African context because in African jurisprudence we have *Ubuntu* values which contradicts the Western system. African land laws debunk the idea of ownership. Land in Africa is seen as a bequest that can neither be bought nor sold.[38] Land belongs to those who are still alive, those who have passed and those who are yet to be born, making it inalienable. Ownership of land is antithetical to African jurisprudence because land goes from one generation to the next.[39] African land tenure is not based on ownership but on use and access. The connection between people and land in *Ubuntu* is based on group tenancy communities, custom and guardianship.[40]

African jurisprudence perspective on land and property is that of restoration. *Molato ga o bole* is a Sepedi maxim meaning there is no prescription regardless of how many centuries, decades and years have passed.[41] African jurisprudence proverb does not regard the passage of time, illegal performances are not destroyed, if an illegal act has been executed one is accountable for their own behaviour and it is through *molato ga o bole* that unjustly acquired land should be given back. *Molato ga o bole* is an *Ubuntu* lawful ethical value attempting to reinstate the unbalance irrespective of the time it happened.[42]

Ubuntu is taken from *Motho ke motho ka batho* (a Sepedi saying) or *Umuntu umnutu nga bantu* (a isiZulu)saying which means I am because we are.[43] The assertion of *Ubuntu (botho)* is a figure

[36] AJ Van der Walt "The notion of absolute and exclusive ownership: a doctrinal analysis" (2017) 134 *South African Law Journal* at 36.
[37] K Tarifa "Why land evoke such deep emotions in Africa" 27 May 2015 http://www.theconversation.com/Why-land-evokes-such-deep-emotions-in-Africa (accesses 27 May 2018).
[38] Tafira and Ndlovu-Gatsheni (n 1)15.
[39] Tafira and Ndlovu-Gatsheni (n 1) 15.
[40] S Moyo "The Land Question in Africa: Research Perspective and Questions" (2003) Draft paper presented at Codesria Conferences on Land restoration, the Agrarian Question and Nationalism in Gaborone 21. file:///C:/Users/u22328689/Downloads/The_Land_Question_in_Africa_Research_Perspectives_.pdf
[41] M Ramose *African Philosophy through Ubuntu* (1999) 117.
[42] M Ramose "An African Perspective on Justice and Race" (2001) 3 *Polylog: Forum for intercultural Philosophy* at 3.
[43]BN Mtshiselwa "An African Philosophical Analysis of Isaiah 58: A Hermeneutic Enthused by *Ubuntu*" (2017) 116 *Scriptura Journal* at 4.

of speech for moral, common and lawful verdict of compassion and kind behaviour.[44] Human decency in *Ubuntu* is intertwined with ethics and morality and originate from the act of restoring the evils and criminal done by colonialism and apartheid.[45] *Ubuntu* encourages collectivism by promoting the just distribution of economic resources in order to alleviate poverty captured by the African proverb that says *Bana ba motho ba ngwathelana hlogana ya tsie* which means "the siblings share the head of the locust".[46]*Ubuntu* is a wide-ranging age old tradition African perspective founded in African cultural standards, expectations, norms and values of kinship, caring, distribution, respect, sympathy and associated ethics such as use and access of land.[47]

Ubuntu is past realities and existing way of life responding to the disagreement of the indigenous people conquered in unjust wars of colonisation. Conquest is a type of brutality directed at establishing a regime and upholding it with the use of military forces which make sure that the situation is favourable for total domination.[48] Colonisation began with the theory to divide Africa by the Catholic church and the world politics of how regimes should behave in outer space.[49] The world was divided into two with the centre dominated by the Europeans and the peripheries dominated by non-Europeans informed by the concept of 'I conquer; therefore I am the sovereign'. Europeans decided who was worthy to be deemed a human being which caused non-Europeans to be described as non-Beings, people who cannot think unlike those in the core who claim they can think.[50]

The plan was the growth of Europe to non-European regions because according to the conquerors non-European regions and their occupants were either not socially, culturally or morally advanced. This development was performed by acquiring and planning these non-

[44] Ramose (n 41) 46.
[45] Mtshiselwa (n 43) 7.
[46] Mtshiselwa (n 43) 8.
[47] JLB Eliastam "Exploring Ubuntu discourse in South Africa: Loss, liminality and hope" (2015) 36 *Verbum et Ecclesia Journal* at 2.
[48] Y. Winter "Conquest" https://www.politicalconcepts.org/conquest-winter/ (accessed 07 January 2020) at 1.
[49] T. Lephakga "The History of the Conquering of the Being of Africans Through Land Dispossession, Epistemice and Proselytisation" (2015) 41 *Studia Historiae Ecclesiasticae* at 145.
[50] Lephakga (n 49) 146.

European areas into mini Europe where conquered people were required to obey the degree of 'being human' as instructed by the conquerors.[51] Colonisation is a process that uses brutality to destruct and rearrange non-European countries and lives as stated by the conquerors.[52] Anything that continues to live after the massacres and systematic destruction of any indigenous knowledge base which doesn't concur with the conqueror's knowledge system was put through morally and legally questionable "right of conquest".[53] It is the taking control of the Being of the citizens of the area or the area itself; the authority of the citizens of the region or the region itself; and the epistemology of the population of the country or the country itself through military force.[54] It is based on a theory of overcoming and taking control of a human being by destroying any sign, mark, evidence, memory or history of life of the conquered people.

Conquest was felt in South Africa through land dispossession, and Africans were forced to go through a violent process which alienated them from their ancestral land and therefore any interruption to the relation between the land and the Africans will result in them losing their self and becoming outsiders in their ancestral land. The "right of conquest" in South Africa has been expanded by the property clause because it keeps land and property obtained through unjust wars during colonialism on the conquered indigenous people by the conqueror including the successors in title to the conquest.[55] The 1996 Constitution did not bring radical changes relating to land dispossession of conquered African people but instead preserved the stolen land and property.[56]

My argument here is that philosophies embedded in African jurisprudence can serve to disclose an alternative idea to restore land and property that was unjustly acquired through colonial conquest by adopting the core tenets of African jurisprudence and decolonising the Constitution.

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[51] Lephakga (n 49) 152.
[52] N. Dladla "Towards an African Critical Philosophy of Race: *Ubuntu* as a Philo-Praxis of Liberation" (2017) 6 *Journal of African Philosophy, Culture and Religions* at 45.
[53] Dladla (n 52) 45.
[54] Lephakga (n 50) 155.
[55] Dladla (n 52) 41.
[56] Dladla (n 52) 39.

Decolonisation means that the colonial conquerors reverse the gains of colonialism by recognising the injury and injustice done to the indigenous people; reinstating the title to the territory to its rightful owners; surrender power, authority and rule; and pay damages for injury and loss.[57] It entails that the indigenous reclaim land and property; the colonialist repudiate the territory and there is a discontinuation of the current model of government based on the western system. The colonialist deny the name to South African state and jurisdiction over it so that it returns to its appropriate beneficiaries which will lead to the discontinuation of the current government based on the Western model and make a way for state succession by Africans for Africans.[58] The land will return together with the use, customs, norms and connections with emphasis on African indigenous land use and access which will eradicate colonial private property and power relations and most importantly close the inequality and poverty gap.[59]

As a result of the above background, we need an African jurisprudence that will secure, defend and promote the dignity of Africans in all spheres of social existence by redistributing land to the disadvantaged Africans.[60] In Africa, the right to hold a property is not based on freehold, but on use and access.[61] The question of whether one owns or rents the piece of land is not important. What is important is how we live and use the land together based on communalism, participation, inclusiveness, accountability and transparency which enhances security of tenure.[62]

3.2. Research Methodology

This mini dissertation involves desktop research, which is to say a literature study of books, journals, articles, legislations and cases. The research is primarily an analysis of the interpretation

[57] M Ramose "Justice and restitution in African political thought" in P.H Coetzee and A.P.J Roux (eds) *The African Philosophy Reader* (2005) at 541.
[58] Ramose (n 42) 5.
[59] E Tuck and K Yang "Decolonization is Not a Metaphor" (2012) 1*, Decolonizing: Indigeneity, Education and Society Journa*l at 21.
[60] Murungi (n 4) 68.
[61] Tafira and Ndlovu-Gatsheni (n 1) 15.
[62] H Mostert and L Verstappen and others *Land Law and Governance: African perspective on land tenure and title* (2017) 4.

and application of the African Jurisprudence in relation to land and property using authors, case law and various legislations such as Glen Grey and Group Areas Act.

3.3. Chapter overview

This mini dissertation consists of five chapters.

Chapter one is the introduction and background that lays down the foundation of the study.

In chapter two, I will focus more deeply on the historical context of land dispossession and land restoration in South Africa starting with the arrival of Jan van Riebeck in the Cape Colony and showing that conquest by the white settlers through colonialism and apartheid resulted in the white minority owning the majority of land and property taken by conquest from African people. That the colonialist used private ownership which was foreign to the African people to exclude them from sharing in the land and this led to poverty. I will also show that with post-apartheid government and the adoption of the 1996 Constitution little changed regarding land restoration because section 25 protected the existing property rights of the white settlers, their descendants and State-owned land.

Chapter three provides a discussion of how property is understood in African Jurisprudence. I am going to show that the characteristics of African jurisprudence on land and property deals and benefits the majority because they are based on communalism, unlike the Western notion of private property which is individualistic. I will be relying on Murungi, Ramose and others to show that land and property in African jurisprudence refers to more than physical land and includes amongst other things harmony between people, land and sea. This chapter shows that if we embrace African jurisprudence, we can radically change land restoration and increase tenure security for the African majority.

Chapter four deals with a question of in what way could African jurisprudence disclose an alternative vision of land and property? I will show why we need to engage decolonial perspectives on the Constitution by referring to Modiri, Madlingozi, Tuck and others. I will end with how African jurisprudence can achieve land use and access through the integration model and traditional leadership and governance.

Chapter five will be a summary of conclusions drawn from the whole study and recommendations.

Chapter six will be the bibliography.

CHAPTER 2: THE HISTORICAL CONTEXT OF LAND DISPOSSESSION AND LAND RESTORATION IN SOUTH AFRICA

2.1. Introduction

Since 1652, African people in South Africa have suffered a devastating process of land dispossession in history which was achieved through unjust war by white settlers.[63] In this chapter, I aim to show that over time the white settlers seized land using brutal and violent conquest and through enacting several laws to enforce the process of dispossession. I shall further illustrate how they imposed a legal and political framework which protected their interests through deploying a Western notion of private property and ownership. This led to the removal of African people against their own will from areas which were reserved for white people to the outskirts with devastating social, economic and psychological results. The impact was that African farmers were turned into wage labourers and food became expensive because of high demand and low supply.

I will end the chapter by showing that the historical developments discussed above led to civil unrest and influenced the apartheid government to abandon the racial segregation policy and embrace democracy. This was achieved through the multi-party negotiations, the 1993 interim Constitution, the Promotion of National Unity and Reconciliation, the 1996 Constitution including section 25 and the use of the "willing buyer, willing seller" policy for land restoration programme.

2.2. Land dispossession and colonial conquest in South Africa

South Africa is an outcome of land dispossession achieved through several wars launched against African people. In 1652 Jan Van Riebeeck, Dutch navigator and colonial administrator for the Dutch East Company, landed on the fort of Good Hope (today known as Cape Town) which

[63] L Ntsebeza *Democracy Compromised; Chiefs and the politics of land in South Africa* (2008) 3.

signalled the start of white people occupying the region.[64] The initial settlement was created as a halfway refreshment station for ships in trade between Europe and Asia until they saw an arable land. Over time, the white settlers forcibly took land from the Khoisan.[65] Khoisan is an umbrella word given by Leonard Schultze, a German anthropologist referring to a group of indigenous people including the Khoikhoi and the San.[66] The Khoisan were the first group of people to occupy the South of Africa region and had a different set-up of dealing with property because they had a distinct association to land. They dwelled by hunting and gathering but most importantly land belonged communally to the indigenous people.[67] Jan Van Riebeeck did not acknowledge their lifestyle but deprived the Khoisan people claim to the land because according to him there was no recording of title deed to the land.[68]

The Khoisan were stripped of the land from which they derived their livelihood and as a result were forced to work for their dispossessors for low wages. This is where land dispossession and economic exploitation started and with it came the forced labour model. In 1659 the Khoisan people initiated several unsuccessful armed uprisings against the white settlers' seizure of their land. Their refusal to accept capture persisted for at least 150 years.[69] The conquest continued and by the 1770s escalated to the Bantu speaking chiefdoms. The term "Bantu" means people in Swahili, Zulu and Xhosa and is used in Central and Southern Africa. It was coined by Wilhelm Bleek, a German linguist.[70] Britain through the British East India Company used military force to occupy the Cape and take possession from the Dutch in 1795.[71] This was done in order to stop it

[64] MA Yanou *Dispossession and Access to Land in South Africa: An African Perspective* (2009) 9.
[65] A Le Fleur and L Jansen "The Khoisan in Contemporary South Africa: Challenges of Recognition as an indigenous People" www.kas.de/suedafrika/en This term is very contested in the literature. According to some accounts the term was coined by Leonard Schultz, a zoologist to gather the San, Khoi, Nama, Korana and Griqua people within a racial typology that marked them as an inferior race.
[66] S Gabie "Khoisan Ancestry and Coloured Identity: A study of the Korana Royal House under Chief Josiah Kats" Masters dissertation, University of the Witwatersrand, 2014, at 9.
[67] L Changuion and B Steenkamp *Disputed land: The historical development of the South African Land Issues, 1652 – 2011* (2012) 16.
[68] Changuion and Steenkamp (n 58 above) 16.
[69] L Ntsebeza *Democracy Compromised; Chiefs and the politics of land in South Africa* (2008 3.
[70] H Wittenberg "Wilhelm Bleek and Khoi imaginations: a study of censorship, genocide and colonial science" (2012) 38 *Journal of Southern African Studies* at 3.
[71] Oliver, E. & Oliver, W.H. "The Colonisation of South Africa: A unique case" (2017) 73, *HTS Teologiese Studies/ Theological Studies* at 5.

from being captured by the French who were instigating uproar in Europe through the French Revolution.[72] The British ruled until 1802.

The conquest by white settlers stretched in all directions of South Africa and with that came several violent confrontations called the Frontier Wars involving the Xhosa people, Boers, Khoisan and the British which lasted for almost a hundred years.[73] After they were defeated in the frontier wars, the Dutch settlers with their leader Louis Tregardt (original spelling), moved from one region to another until they settled on the other side of the Vaal river from the Cape Colony in 1836. They fought the Ndebele people near the Vaal river and took control of the area which resulted in the Ndebele people skipping the Limpopo river into Zimbabwe. The dispossession continued and in 1838, the Zulu people were also involved in a war of resistance against colonial dispossession on the banks of Ncome river where they suffered from gun fire while armed with spears.[74] The tension between the colonialists and Bantu people continued for the next 40 years when the British wanted to develop a white-led state on land owned by the Zulu people under King Cetshwayo. The King and his people refused leading to the battle of *Isandlwana* in 1879 where the British troops suffered their worst defeat in what is called Anglo-Zulu war.[75]

The Boers and the British went to war with each other because the Boers wanted independence from the British in what is called the First Boer War in 1880-1881 which the Boers won.[76] A British South African Company wanted to exploit mining opportunities and expand British colonial holdings, in order to achieve their goal, they attacked and defeated King Lobelunga and the Ndebele people in Matabele land in 1893-1894.[77] The Afrikaners continued with illegal dispossession of land reaching Blouberg in 1894. Chief Mmaleboho of the Bahananwa people was overthrown by the Afrikaners for refusing to pay taxes to the Transvaal government after it

[72] L Thompson *The History of South Africa* (2000) 52.
[73] Changuion and Steenkamp (n 58) 31.
[74] Thomson (n 63) 90.
[75] Changuion and Steenkamp (n 58) 51.
[76] Changuion and Steenkamp (n 7) 112.
[77] Changuion and Steenkamp (n 58) 89.

was given back to the Boers in 1881 by the British in the Malaboch War.[78] The taking control of land through war was not only over the African population but between the white settlers as well. In 1899-1902 the Boers and the British went to war with each other again in the Second Boer War because the British wanted to establish economic and political stability. The British won the Transvaal and Orange Free State which were Boer colonies. The results of the land dispossession were devastating; African people were forced to pay tax which led to the 1906-1907 Bambatha Rebellion by the Zulu people revolting against poll tax on all native male members over 18 years in Natal.[79] Through the process of land dispossession and borderline control a territory called South Africa was shaped.

The next section I will explain in detail the state of land dispossession in the territory of South Africa by discussing the major events of land dispossession which left Africans in poverty. I will show that African people suffered the most as they were rendered homeless. Their farms were taken and they were forced to become tenants on white settlers farms which meant that they either worked for meagre wages or became labour tenants who worked three months without pay in exchange for living on the farm and having a right to graze their animals or till the fields.[80] This arrangement allowed Africans to continue farming through sharecropping where they could agree with the white settlers to till their fields, using their own resources and share in the harvest. The white settlers only provided land which was in excess.[81] Africans were now tenants in their own country with an insecure tenure.

2.3. How land dispossession is linked to the imposition of a Western legal regime of land and property.

The white settlers utilized a statutory structure of ownership that resembled the description of the Roman-Dutch Law where ownership is referred to as a set of rights, privileges and powers a

[78] Changuion and Steenkamp (n 58) 110.
[79] Changuion and Steenkamp (n 58) 122.
[80] Ntsebeza (n 54) 3.
[81] E.M Letsoalo *Land restoration in South Africa: A Black Perspective* (1987) 31.

legal person could have regarding a thing. Ownership is referred to as *dominium* which means absolute ownership.[82] Western legal regime consider land as a commodity, belonging to one particular person or group of people only and its primary goal is to be controlled and exploited by the owner whichever way he deems fit.[83] Van Der Walt defines ownership over private property as the most complete legal entitlement a person has concerning an object which includes possession, use and occupation.[84] Ownership is therefore a collection of legal entitlements over a thing that gives permission to its holder a strong form of power or control over it by deciding on its use, claim the value generated by it, exclude others from using it and transfer the ownership of it to another holder.[85] The result is that the concept of ownership is distinguished by complete and undivided collection of enjoyment in land and property by a particular individual to the exclusion of others and in the South African historical context, to the exclusion of African people.

The impact of the Dutch rule at the Cape is that Dutch laws, customs and white supremacy were brought to South Africa and Dutch people became the ruling class.[86] Aristotle meaning of "man is a rational animal" initiated the starting point of racism in Europe because when they spoke of it they left out Africans.[87] These characteristics of societal culture relations were brought with when the white settlers landed in the Cape. Imperialism and discrimination are prejudices because essentially both reject that other people are likewise human.[88] There is a chronicled and theoretical connection between conquest, racism, and oppression as it will be shown below.[89] The colonialists dispossessed African people of land, surveyed, subdivided and sold it to the highest bidder. They used the private property ownership regime to enrich themselves at the

[82] A van der Walt "Exclusivity of Ownership, Security of Tenure and Eviction Order: A Critical Evaluation of Recent Case Law" (2002) 18 *South African Journal on Human Rights* at 373.
[83] K Tafira "Why land evoke such deep emotions in Africa" 27 May 2015 http://www.theconversation.com/Why-land-evokes-such-deep-emotions-in-Africa (accesses 27 May 2018).
[84] Van der Walt (n 73) 374.
[85] A van der Walt *Property and Constitution* (2012) 114.
[86] Changuion and Steenkamp (n 58) 14.
[87] M.B Ramose "Discourses on Africa Introduction: The Struggle for Reason in Africa" P.H. Coetzee and A.P.J. Roux *The African Philosophy Reader* (2003) at 1.
[88] M.B Ramose "An African Perspective on Justice and Race" (2001) 3 *Polylog: Forum for intercultural Philosophy* at 1.
[89] Ramose (n 78) 3.

cost of African ancestors lives because they waged war on them and forced them to give up their land. When there was a disagreement, Roman-Dutch law was used to settle the disagreement.[90] It is the above view that the white settlers used to dispossess the African people of their land and property under the guise that Africans did not have title deeds records to show that they owned the land disregarding the fact that in Africa they did not use the writing system but an African oral philosophy which pre-dates the text system.[91]

The Western legal regime on land and property was used to dispossess Africans of land and natural resources such as gold and diamonds and exploit the displaced African people as cheap labour for the white capitalists class in the mines.[92] The dispossession by legislation started with the 1905 Lagden Report which was the foundation for the development of land policy targeting Africans. The report recommended that there should be reserved areas for Africans; locations for Africans must be built next to labour centres; squatting on white farms must be limited; purchase of white farms by Africans must also be limited and whites are not allowed to purchase land in African reserves.[93] The infamous 1913 Land Act was based on this report.

In 1910, the British colonies of Cape and Natal and the Boer Republic colonies of Orange Free State and Transvaal unified under one constitutional system and the Union of South Africa was formed.[94] This 1910 Constitution established the Union of South Africa as a regime for white people accordingly integrating the non-acceptance of African people by implementing the plans to impede the thriving of African farmers with the 1913 Land Act.[95] The purpose of the Act was to hinder the growth of profitable African farmers, guaranteeing a reserve of migrant labour for mines and farmers.[96] The unification of colonies were now called provinces and in the Free State and Transvaal sharecropping was on the rise which became a concern to the government because

[90] Changuion and Steenkamp (n 58) 16.
[91] J Murungi *Introduction to African Philosophy* (2013) 16.
[92] Letsoalo (n 72) 4.
[93] Yanou (n 55) 14.
[94] Changuion and Steenkamp (n 58) 127.
[95] T Madlingozi "The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Colonisation?" 6 April 2014 http://www.criticallegalthinking.com (accessed 18 June 2019).
[96] Letsoalo (n 72) 35.

most Africans preferred it than working in the mines. This led to a 1911 bill forbidding Africans to live on any white owned land leading to a loss of 1 410 000 morgen by African farmers. This led to an outcry by Africans and the formation of South African National Native Congress (SANCC) which would later be renamed African National Congress (ANC).[97] Land dispossession encompassed more than land deprivation; it was an entire cultural and political process (more on this coming later in 2.4) of remaking the territory of what would later be called "South Africa" supported by the following laws and legislations:

2.3.1. The Glen Grey Act

In 1795 the British attacked the Cape Colony and the Dutch capitulated, handing over the colony to the British. The British ruled until 1803 when they gave back the colony to the Dutch. The British gained control of the Cape Colony again in 1806 and began a quick and ruthless process of settler expansion through wars.[98] This led to the adoption of various laws which legitimised the process of dispossession.

Cecil John Rhodes, then prime minister of the Cape, proclaimed the Glen Grey Act 25 of 1894 in parliament.[99] Some of the provisions were that Africans should apply to the magistrate to have their indigenous land plotted and measured of which the African would acquire title on payment of his share of the cost of survey.[100] They will also pay an annual quitrent. The title received could not be pledged. Another provision was a labour tax on each male adult who had not been out of the district at work during the year.[101] The Act announced a levy charge against African men who were jobless with a purpose of forcing them to work on white farms and in the mines.

[97] Changuion and Steenkamp (n 58) 131.
[98] Murungi (n 82) 16.
[99] Ntsebeza (n 54) 64.
[100] RJ Thompson "Cecil Rhodes, the Glen Grey Act, and the Labour Question in the politics of the Cape Colony" Masters thesis, Rhodes University, 1991 at 2.
[101] Thompson (n 91 above) 3.

The purpose of the Act was to construct a rural form of administration based on local committee representation which restricts African holding on land. This was an individual rather than a communal land tenure system which created a labour tax to force African men into employment on farms or mines.[102] The Act was aimed at driving African people from the land into wage labourers because it restricted African men from owning land.

The impact was that Africans could not afford to support themselves because they had no land to produce food or graze domestic animals and were now forced to look for employment in the mines. The emphasis was on land tenure and not land ownership because the latter would create permanent rural African peasantry. The discovery of gold in the 1880 led to a demand for cheap labour and the colonialist saw that African people could fulfil that demand.[103] The colonial approach shifted from endorsing African peasantry to forcing Africans to becoming wage labourers.

2.3.2. The Native Land Act

In 1910 the British colonies of Cape and Natal and the Boer colonies of Transvaal and Orange River amalgamated following the defeat of the Boers in Anglo-Boer War to form the Union of South Africa.[104] Some of the provisions of the Glen Grey Act were subsumed in the Native Land Act 27 of 1913. Section 1(1) of the Act states that "except with the approval of the Governor General no African person can buy, rent or obtain land in outside scheduled reserves and whites could not buy, rent or obtain land in African reserved areas".[105] Section 1(2) disallowed other races to procure, let, attain, venture into a contract or deal in land and property in areas which were preserved for African unless authorised by the Governor-General.[106]

[102] Ntsebeza (n 54) 64.
[103] Ntsebeza (n 54) 65.
[104] Changuion and Steenkamp (n 58) 127.
[105] Natives Land Act 27 of 1913, thereafter "the Act".
[106] Section 1(2) of the Act.

The objective of the legislation was to bring area separateness based on the colour of one's skin where Africans were not allowed to acquire or occupy land and property in white reserved areas.[107] This Act prohibited Africans from renting, procuring and retaining land except for the 7 per cent of the land that was set aside for their inhabitancy.[108] It terminated a form of agriculture called sharecropping where a white land owner would allow an African occupant to operate the land in exchange for a part of the harvests produced on the portion of land and also prohibited possession of land or property as a tenant.[109] The legislation only allowed 9 million hectares of land for Africans to own and created homelands within which white people were not allowed to buy land. The reason why the colonial regime wanted to end sharecropping was because it was automatically going to diminish competition with white farmers regarding property, workforce, and markets. It was an attempt to stop Africans from being wealthy because they were a threat to colonial growth. It was also going to force Africans to migrate to the mines and serve as low waged workers.[110]

The impact of this legislation was that contracts concluded were in transgression of the Act and as a result rescinded; and the parties to the contract were guilty of wrongdoing punishable with a fine or imprisonment of up to six months.[111] This Act became the foundation for apartheid and territorial separation because it was founded on the colour of one's skin, where Africans were banned from inhabiting or procuring land in scheduled areas. This led to overcrowding in reserves. It also proscribed sharecropping undertakings between white property-owners and African farmers, depriving African farmers of revenue leading to poverty.[112]

[107] H Kloppers and GJ Pienaar "The Historical context of Land Reform in South Africa and early policies" (2014) 17 *Potchefstroom Electronic Law Journal* at 682.
[108] Letsoalo (n 72) 35.
[109] Yanou (n 55) 15.
[110] C Walker "The Land Question in South Africa: 1913 and Beyond" (2017) *Oxford Research Encyclopedia of African History Online Journal* at 6.
[111] Section 5 of the Act.
[112] Section 1(2) of the Act.

2.3.3. The Native Trust and Land Act

The Development Trust and Land Act 18 of 1936 was endorsed with the goal of increasing the 7 per cent reserved land for Africans to 13 per cent and cramping 80% of the population to this area. Section 2(1) of the Act provided for the handover of 6.2 million hectares of land to the preserved areas for Africans which was relocated to the Native Trust to be procured by the Trust.[113] Section 13 permitted the trustees of the Trust to seize property possessed by Africans situated beyond the listed zone for public well-being justification. When the state seizes the property from its owner for public use or benefit reimbursement compensated is set based on the reasonable value of the land without any improvements.[114]

The aim of the Act was to regularise the separation of white and African rural areas and created a South African Native Trust which was assigned to secure and manage land on behalf of Africans in the reserves.[115] Another reason was to closely monitor regulations over tenant households on white farms.[116]

The impact was that any African who lived on land or farm owned by a white person could be removed because their residency was uncertain as they were not legally entitled to hold the deed for that land.

2.3.4. The Group Areas Act.

In 1948, the National Party (NP) ascended to power and started to implement their policy of apartheid which means separateness. The Group Areas Act 41 of 1950 was passed with the main goal of creating separate neighbourhoods where only people of a certain race were able to live. This legislation was used to restrict property rights of African people and to restrain their life and

[113] Natives Trust and Land Act 18 of 1936, thereafter "the Act" section 2(1) and 6(1).
[114] Section 13(1) of the Act.
[115] Section 4(1) of the Act.
[116] Walker (n 101) 7.

movements.[117] It was a method of separateness to administer transfer and seizure of land and immovable property. The purpose of the Act was to enable the formation of group areas and for the regulation of procurement of immovable property and inhabitation of land and buildings through the establishment of a white, African and coloured groups.[118]

The removals were implemented through crushing of Africans and mixed districts using earthmoving machines in metropolises and municipalities all over the republic, driving their inhabitants into homelands on the outskirts of urban areas.[119] The apartheid policy spread to all areas of society including residential, social, educational, commercial, recreational and industrial. The end results were the proportion of white people possessing more than 80% of preserved land and property.[120] It was assessed that between 1960 and 1983 around 3.5 million people were compelled to move against their own will.[121] Millions of Africans were forced to move to the reserved areas or Bantustan.[122]

During 1960, most white settlers had a sense that they were in command of a significant size of South Africa and decided in October to hold a referendum and left the Union to form the Republic of South Africa under the 1961 constitution which was based on a Western concept of law like the Westminster system.[123] Legally, the Union of South came to an end and was re-established as the Republic of South Africa with the president as the head of state in the executive, parliament, judiciary and provinces. The 1961 constitution was used as a master plan to rubber stamp white supremacy over Africans using an advancement programme of constitutional adjustment which set a structure of homelands for previously dispossessed people through continuous incorporation.[124] The programme included the partition of land into housing,

[117] Group Areas Act 41 of 1950, thereafter "the Act".
[118] Section 2(1) of the Act.
[119] Walker (n 101) 10.
[120] Walker (n 101) 11.
[121] Kloppers and Pienaar (n 98) 687.
[122] J van Wyk "The Legacy of the 1913 Black Land Act for Spatial Planning" (2013) 28 *South African Public Law Journal* at 98.
[123] Changuion and Steenkamp (n 58) 210.
[124] Madlingozi (n 86) 3.

cultivable and pasturing land, the transfer of the population from their dispersed farmsteads to new condensed betterment hamlets, ravine restoration, curtailment of cattle and the creation of a barrier between housing and grazing areas for rotational grazing.[125]

2.4. Impact of Colonial Conquest

We can see from the above that the colonial legal order created reserves for African people and prohibited the sale of land in territories reserved for whites to Africans and only allowed Africans to live in white territories if they could prove that they were on an employment basis. Once the law was passed the government began the mass relocation of African people to homelands and townships which were on the outskirts of white areas and did not have proper infrastructures. Under the 1913 Natives Land Act, the colonialists captured more than 90 per cent of the land, restricting Africans to the outskirts forcing many rural residents to migrate to urban areas and farms in search of work.[126]

The political control of land and property by the colonialists and apartheid government was done through the implementation of various laws and legislations. The land laws and legislations were made to divide the country into African areas and white areas with the intention of uplifting the needs of colonialists as more important than the indigenous needs of Africans.[127] By implementing the Western legal regime on land and property the use and access was denied to African people based on the colour of their skin.[128] This resulted in loss of political and territorial sovereignty for Africans and converted them into subjects of Western laws, marked in terms of dehumanising racial categories. Legislations like the Glen Grey Act made land available for Africans on condition that they lose it if they revolt which meant that their tenure was insecure.[129] The Group Areas Act in pursuit of political gain put aside or divided land for occupation and use according to race classification e.g. white, African and coloured with

[125] Letsoalo (n 72) 36.
[126] Ntsebeza (n 54) 108.
[127] Letsoalo (n 72) 35.
[128] Yanou (n 55) 16.
[129] Yanou (n 55) 20.

devastating results. For example, the coloured community were divided further into Indian, Malay, Chinese breaking up families and leading to landlessness.[130] The government passed laws in order to control the movement of Africans through pass regulations meaning if you were found guilty of not having a permit you lost access and use to your land.[131] The introduction of the Bantustans by the apartheid government denationalized Africans from South Africa by making them citizens of homelands which were reserves with political independence thus making Africans foreigners in South Africa.[132]

The social effects were traumatic because extended families were destroyed. In African communities extended families are the roots of the community because they provide social network and security.[133] The Population Registration Act of 1950 broke families because it determined your race, spouse and area in which one had to live, it was now illegal to marry the wrong race or ethnicity. It became illegal to marry white people.[134] The Bantustans policy of dispossession and displacement destroyed families and communities and eroded the cultural identity of Africans. The consolidation of homelands meant removing Africans from one area of homeland to another area of homeland based on an ethnic group.[135] People lost their ancestral graves, they did not have access to them because they now fell under "white" land or belonged to the wrong indigenous people; they could not access spiritual sites; their culture was eroded because they lost contact with archaeological sites which had been previously accorded a sacred identity due to either their grandeur or mystery.[136]

The economic impact of land dispossession on Africans was harrowing because their wellbeing and stability were extremely undermined. They were no longer owners of land and could no longer buy and let land outside the listed zones; they could no longer generate income, share

[130] Yanou (n 55) 17.
[131] Yanou (n 55) 21.
[132] Letsoalo (n 72) 44.
[133] Yanou (n 55) 17.
[134] Changuion and Steenkamp (n 58) 127.
[135] Letsoalo (n 72) 48.
[136] G Pwiti and Webber Ndoro "The Legacy of Colonialism: Perceptions of the Cultural Heritage in South Africa, with special reference to Zimbabwe" (1999) 16 *The African Archaeological Review* at 147.

cropping was terminated and thus could no longer share in the profits from the agricultural activities with their white counterparts.[137] The majority of rural people went from being an employer or self-employed to being employed as a wage labour for an employer, while others looked for jobs in other areas with a weak link to land. The white settlers introduced a type of farming where they produced goods according to demand and supply which challenged the indigenous agricultural systems as they did not have the size of the land and funding from the government.[138] Land dispossession has led to extreme inadequate division of property legal entitlements in land and water because the colonialists seized the finest parts of land for pastural and arable and transformed the indigenous African farmers into renters or salaried employees, or ejected them. The elimination of African farmers from their own land and property was methodical and made possible by enacting various legislation and using violence to depopulate the land by removing and driving them to marginal areas, designated homelands or communal areas.[139]

The colonial geographical planning made African people in Bantustans to live on land that was of poor quality, next to natural parks which were called "rural geography of apartheid" used as a buffer from white areas.[140] Labour exploitation was rife, this is shown by the survey done by the labour department where one in three farm worker children were stunted from malnutrition even though their parents worked on farms which produced food.[141] The colonialist remunerated low wages labour in mines and on farms and reasoned that Africans had land in the Bantustans and could supplement their income with subsistence farming.

Explicit racial discrimination policies under apartheid altered wages and salary directly. Africans and whites with the matching credentials were remunerated different earnings for executing the

[137] L Modise and N Mtshiselwa "The Natives Land Act of 1913 engineered the poverty of Black South Africans: a historico-ecclesiastical perspective" (2013) 39 *Journal of the Church History Society of Southern Africa* at 53.
[138] Ntsebeza (n 54) 108.
[139] Letsoalo (n 72) 5.
[140] Ntsebeza (n 54) 108.
[141] R Hall "The Legacies of the Natives Land Act of 1913" (2014) 1 *Scriptura Journals* at 5.

same work, specifically in the public sector.[142] Africans suffered immensely under the job reservation policy were they were not allowed to manage whites and they could not fill certain jobs even though there was a vacancy because those jobs were reserved for whites.[143] The results of the geographical discrimination between the white areas and Bantustans entrenched economic dependency and deprivation in that sections of utmost greater degree of scarcity of income, employment, education, living conditions and health was in the former homelands.[144] The apartheid spatial planning continues to exploit the poor because they earn meagre wages most of which goes to transport; the majority of Africans have to travel long distance to work and in most cases use more than one transport. The underutilisation of white farms has led to food being very expensive because of high demand by the population and lack of supply by farmers. The legacy of colonisation and apartheid policies is still fresh in people's minds, which is why even today land and property issue arises intense feelings and there is still demand for land use and access.[145]

2.5. Transitional Period and Discussion on Land leading to section 25 of the Constitution

South African legal textbooks description of ownership resembles the description of the Roman-Dutch authors which relies on the Western cultural and philosophical definitions and understandings of ownership.[146] The definition of ownership affords for confiscation against payment in certain situations and explicitly mentions that the owner's legal entitlement of free discarding is restricted by law and the civil liberties of others.[147] It is characterised by having absolute and exclusive rights of control over property.[148] This meant that there is no sharing between community members something which was unknown to the African people because African societies are traditionally communal meaning that land is distributed equally to members

[142] J Seekings and N Nattrass *Class, Race and Inequality in South Africa* (2005) 4.
[143] Changuion and Steenkamp (n 58) 205.
[144] Hall (n 132 above) 6.
[145] Ntsebeza (n 54) 108.
[146] F du Toit "Roman Dutch law in modern South African succession law" (2014) *Ars Aequi.nl/maandblad* 279.
[147] A van der Walt *Property and Constitution* (2012) 114.
[148] AJ Van der Walt "The notion of absolute and exclusive ownership: a doctrinal analysis" (2017) 134 *South African Law Journal* at 6.

of the community and it is handed form one generation to the next generation with emphasis on use and access.[149]

In 1944 the ANC through its youth league drafted the programme of action which championed for actions such as strikes, boycotts and protests as a form of resistance against the racist regime.[150] People started to revolt, and the apartheid government began to realise that the policy of separateness was expensive to maintain.[151] There was growing international pressure against the regime; India condemned apartheid in 1948, The United Nations declared apartheid a crime against humanity in the early 1960's and the Soviet Union condemned apartheid in 1973.[152] The neighbouring countries also helped by placing an arms embargo against South Africa and also accommodated exiled comrades because a ban was made on political parties which were advancing the struggle against colonialism and apartheid through legislation such as the Suppression of Communism Act 44 of 1950 and Internal Security Act 74 of 1976.[153]

Internally protests and boycotts intensified starting with the 1960 Pan Africanist Congress of Azania (PAC) Sharpeville campaign against the pass law.[154] The party called for a peaceful stay away from work campaign where they burned the pass documents and handed themselves over for arrest which turned violent when 69 people were massacred by the police. In 1976 there was an uprising by students against the use of Afrikaans language as a medium of instruction where about 700 schoolchildren were also killed by the police.[155] On 3 September 1984 the community of Vaal called for a stay away and protests in support of rent boycott against the racist regime municipality, the riots spread countrywide where 600 people were killed by September 1985.[156]

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[149] Letsoalo (n 72) 78.
[150] M Mothlabi "Black Resistance to Apartheid Future Prospects" (1987) 4 *Journal of Black Theology in South Africa* at 6.
[151] L Ntsebeza and R Hall *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 109.
[152] Changuion and Steenkamp (n 58) 245.
[153] Changuion and Steenkamp (n 58) 193.
[154] Mothlabi (n 141) 8.
[155] S.M Ndlovu "The Soweto Uprising" http://sadet.co.za/docs/RTD/vol2/Volume%202%20-%20chapter%207.pdf at 341 (accessed on 07 October 2019).
[156] http://www.historicalpapers.wits.ac.za – The Vaal Triangle on 3 September 1984 at 730.

The rent boycott coincided with the adoption of a new Constitution on 3 September 1985 which gave Indians and Coloureds limited role in the apartheid regime parliament to the exclusion of African majority which led to demonstrations by the United Democratic Front (UDF).[157] This led to the apartheid regime declaring the state of emergency in the country. On 31 July 1986 the American government announced sanctions on the apartheid regime.[158] Pressure was mounting on the regime to release all political prisoners and resulted in the unbanning of all liberation movements such as the PAC, ANC and SACP and the release of political prisoners in 1990.[159]

2.5.1. Multi-Party Negotiations

Van der Walt argues that the above events prompted land and property authorities and strategy creators to identify that significant political and social changes had to happen.[160] Land restoration was inevitable. The PAC, ANC, SACP and other parties held discussion with the apartheid government in the 1990's regarding land restoration. There were several opposing groups. The first group was comprised of the property lobbies and libertarians, supported by government and the Inkatha Freedom Party (IFP) who wanted formal assurance that there will be an ongoing safeguard and committed preservation of vested property interests and insisted that the required land restorations should be managed in a way that would not adversely affect established rights. They wanted the discussions to be based on possession as a whole legal entitlement one can partake in land and property, or one of a restricted amount of classification of partial legal power in someone else's property.[161] In their quest to protect their interests, the property lobbies and libertarians ignored the main negative point the policy will have on the majority of the people whom were Africans.

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[157] T Machaba "American press reportage on PW Botha's attempts at reforming apartheid, 1978-1989, with specific reference to the New York Times, newspaper and African Report" (2011) 36 at (82) 75-92. https://repository.up.ac.za/bitstream/handle/2263/17126/Machaba_American%282011%29.pdf?sequence=1&isAllowed=y

[158] Machaba (n 148 above) 93.

[159] Changuion and Steenkamp ((n 58) 264.

[160] Van der Walt (n 104) 26.

[161] Yanou (n 55) 33.

The second group was made up of the reform activists, ANC delegates who wanted property and land law to be the focus in achieving successful reforms and reversing dispossession enabled by colonialism and apartheid.[162] They wanted the interim Constitution to encompass nominal rights which will allow for legislation and rules to be changed so to address the massive inequality in ownership and use of land and natural resources.[163] By so doing it was inevitable that there will be an impact on established private land and property rights.

The third one is the undertaking by the PAC of complete freedom of the African people from all forms of enslavement including deprivation of the land and resources by demanding that land must be restored to its rightful owners.[164] Their goal was to reclaim complete authority of land by returning the country and political rule to African people. The party dismissed as inadequate the protection of property rights and said the clause was to protect the action of taking property unlawfully from the African majority instead of creating and implementing a constitution based on anti-racist, democratic, and anti-capitalist country.[165] It was advocating for the recovery of unjustly acquired land to the previously dispossessed and the liberation of the African mind which could only be achieved by executing the desires of the majority of the population through a pro-African Constitution.[166] The party viewed the land question as the cornerstone of the struggle which cannot be separated from reconciliation with white settlers without giving back that which was unjustly acquired.[167] When referring to land, the party includes the air, oceans, space, mineral resources, people and not only the agricultural and residential purpose and also acknowledges that land belongs to the dead, living and unborn meaning it belongs to the ancestors. It cannot be sold as it is not a commodity.[168]

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[162] Yanou (n 55) 34.
[163] Ntsebeza (n 54) 113.
[164] MP More *Fanon and the Land Question in (Post) Apartheid South Africa* (2011) 10.
[165] Madlingozi (n 68) 8.
[166] Madlingozi (n 68) 7.
[167] NS Khayelitsha " PAC foundation is at the core of the land question in Azania" 03 May 2018 http://www.news24.com/pac-foundation-is-at-the-core-of-the-land-queestion-in-azania (accessed 30 December 2018).
[168] PAC "PAC is consistent on the Land policy. Land must not be used as a political football" 08 June 2018 http://www.polity.org.za/article/pac-pac-is-consistent-on-the-land-policy-land-must-not-be-used-as-a-political-football-2018-06-08 (accessed on 18 June 2019).

The colonialists endorsed constitutional supremacy so that any law that was to be created had to abide or be consistent with the Constitution. They preferred democratisation over decolonisation because with decolonisation there is the reinstatement of the title and jurisdiction including restitution, meaning that the apartheid government was supposed to repudiate, theoretically, the title to territory of South African state and jurisdiction over it so that it returns to its appropriate beneficiaries.[169] The result was going to be the discontinuation of the apartheid government, making a way for state succession. The Democratisation on the other hand adheres to the apartheid government maintenance of active prescription where democracy can be attained through the incorporation of indigenous African defeated people in the new constitution making way for nonracialism society in the new constitutional system.[170] The apartheid government opted for the termination of legislative supremacy which had absolute sovereignty and was in use under their rule. They elected for constitutional supremacy meaning that any law that is inconsistent with the constitution is invalid making parliament a hostage of the constitution and constitutionalising the brutality, inhumane and exploitation of the conquest.[171]

The incorporation of the property clause and the preservation of existing property rights were significantly achieved by the libertarians by moving from parliamentary sovereignty to a system of constitutional supremacy and making sure that the property interests of the white settlers were safeguarded and not endangered in a future democratic dispensation.[172] This was a loss to the African people because it meant that white economic and social power was protected at the expense of African majority for land that was unjustly acquired through crimes against humanity. It also meant that the racialised gap between the poor and rich was going to grow because there was not going to be any sharing of property but protection of existing property rights.[173] The land

[169] M Ramose "An African Perspective on Justice and Race" (2001) 3 *Polylog: Forum for intercultural Philosophy* at 5.
[170] Ramose (n 160 above) 5.
[171] Ramose (n 160) 6.
[172] A Chaskalson "Stumbling towards Section 28: Negotiations over the protection of property rights in the interim Constitution" (1995) 11 *South African Journal for Human Rights* at 222.
[173] Chaskalson (n 163 above) 114.

reform provisions in the Constitution are constrained in that for one to have the restitution right to land one must have been dispossessed after June 1913, property expropriation only applies in the public interest and the land reform policy is based on the willing seller, willing buyer.[174]

The National Party initiated its White Paper on land restoration in 1991 which was restricted to and directed at preserving the current state of affairs in property ownership because they advanced the view that the restoration of land that was accumulated through colonial dispossession was not achievable.[175] They also insisted on the formation of a title deed system and the changing of traditional and communal tenure systems to private ownership or control because they are unproductive. A commitment was made to white land owners that their land ownership will not be queried and their land will not be seized without payment.[176] The White Paper described land restoration as the elimination of all race-related limitations on land entitlements and preservation with regard for the nobility of land ownership and also made an undertaking to allocate only 1, 250 000 hectares in the previously populated homelands.[177] The libertarians unlike the reform and Africanist activists got what they wanted which was that the required land restorations should be controlled so as not to have a major adverse effect on established rights of white minority which is why the query of how the land would be settled was brought up in the backdrop of discussing the Bill of Rights for a future South Africa.[178]

Two apartheid judges, Judges Ramon Leon and John Didcott were against the property clause because it protected white economic power at the expense of the African majority.[179] They were of a view that land restoration is an important measure that attempt to give entry to and possession of land and property from colonialists to Africans with an intention to correct the abuse done by colonial and apartheid dispossession. It was also to redesign socio-economic

[174] Section 25 of The Constitution of the Republic of South Africa Act 108 of 1996.
[175] M Weidman "Who Shaped South Africa's Land restoration Policy" (2004) 31 *Politikon: South African Journal of Political Studies* at 220.
[176] Changuion and Steenkamp (n 58) 266.
[177] S Buthelezi *The Land Belongs to us: The Land and Agrarian Question in Africa Today* (2009) 183.
[178] Changuion and Steenkamp ((n 58) 266.
[179] Ntsebeza and Hall (n 142) 110.

associations in the African communities and that is why it needs to be a priority.[180] The ANC failed to address the land restoration matter, and this was confirmed by Weidman when he said the following:

> "There is a perception that land restoration was a high-profile issue at CODESA, but the ANC negotiators were not really interested in land restoration. It became a big issue when it came up on the agenda, but we had great difficulty in getting the key negotiators to pay attention to the land issue. Even when it came to the property clause it was difficult to get the ANC negotiators to realise the importance of not locking up land rights at that point".[181]

The ANC possessed a strategy that the land required to be divided among those who labour it and that a legally limiting restriction of land ownership on a race-related basis would be terminated and all the land dissected between those who work it to dispel deprivation and land hunger.[182] The ANC position was in terms of the Article 12 of the Freedom Charter which unequivocally stated:

> "The land, the waters, the sky, and all the natural assets, which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation. The system of property rights in relation to land shall consider that it is the country's primary asset, the basis of life's necessities, and a finite resource".[183]

According to Judge Chaskalson the land programme faced minimal attention before the end of the negotiations. On paper, the policy appeared reassuring because it conveyed the following: that property rights compelled responsibility meaning there won't be expropriation without compensation or unnecessary squatting; and their implementation require that there be no disagreement with the public interest like in a case of a willing buyer, willing seller which became an obstacle to land reform achievement; expropriation of property shall exist in the context of

[180] Ntsebeza and Hall (n 142) 87.
[181] Weidman (n 166) 227.
[182] S Rugege "Land restoration in South Africa: An Overview" (2004) 283 *Internal Journal of International Legal Information* at 3.
[183] Ntsebeza and Hall (n 142) 111.

the law and in the public interest whereas there was no clear definition of what constitutes public interest; determined by equitable compensation and ratification on economic affairs shall be directed by the concept of motivating participation amongst related stakeholders.[184]

Chaskalson's perspective is that the land and the property clause in the Bill of Rights were formulated, not as a tool to preserve the title of existing property owners, but preferably to advance a juridical strategy of land restoration and rural reconstruction. That there were people in the ANC who were seeking to influence the land issue and "was particularly concerned about the implications of a constitutional property right for a programme of land restitution to assist the victims of forced removals".[185]

My view is that the CODESA negotiations failed the South African majority by not embracing a strategy aimed towards the fundamental social and economic change of society and instead chose a settlement which was in line with the structural-adjustment programme forced by the International Monetary Fund and the World Bank.[186] The ANC rationalised the strategy option by saying a fundamental appropriation strategy will adversely affect the land market and scare off investors.[187]

2.5.2. The Interim Constitution Act 200 of 1993.

There was not enough time and resources dedicated on land restoration before the Interim Constitution which steered South Africa into the new dispensation and resulted in apartheid government parties and the liberation movements trying to find the middle ground in the bargaining process regarding the land ownership matter.[188] The liberation movements were in disagreement with the property clause being inserted in the Constitution because it was going to be an obstacle in achieving land restoration, protecting unjustly acquired property taken through

[184] Ntsebeza and Hall (n 142) 112.
[185] Ntsebeza and Hall (n 142) 113.
[186] Weidman (n 166) 226.
[187] The Department of Land Affairs *1997 White Paper on Land restoration Policy*.
[188] Rugege (n 173) 3.

violent conquest.[189] This was opposed by the apartheid government who wanted to protect the interest of white landowners against changing from private ownership to state ownership and confiscation.[190] At the end the property clause was inserted without more information on what happens to those who were dispossessed since 1652 on land restoration plan except for return of land for those who lost it after 1913.[191]

The apartheid government concession on the issue that expropriation of property would not be linked to commercial prices was a smoke screen.[192] The belief that this issue will not be an obstacle to the achievement of land reform because prices to be paid will be less than commercial value was not true.[193] We have seen that the compensation matter and market role remain the stumbling block to land restoration. This was confirmed by the Chairperson of the Portfolio Committee on Rural Development and Land Restoration when reporting to Parliament saying that one of the reasons for the delay in land restoration was high land prices charged by landowners.[194]

At the end of the negotiations, section 28 of the interim Constitution read as follows:[195]

1. "Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights".
2. "No deprivation of any rights in property shall be permitted otherwise than in accordance with a law".
3. "Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and

[189] Yanou (n 55) 34.
[190] Buthelezi (n 168) 183.
[191] Changuion and Steenkamp (n 58) 266.
[192] Ntsebeza and Hall (n 142) 114.
[193] Chaskalson (n 163) 232.
[194] M Lukani "There's no willing buyer, willing seller principle in our Constitution – Gugile Nkwinti" 19 May 2017 http://www.parliament.gov.za/there's-no-willing-buyer-willing-seller principle-in-our-constitution.
[195] Ntsebeza and Hall (n 142) 111.

equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investment in it by those affected and the interests of those affected".

The apartheid government and ANC reached a compromise on section 28. The section guards against prevailing property legal entitlements concurrently making an assurance to seize land and property for public use and in the public interest. It shields white people who have gained property under dispossession while at the same time trying to pay them for the unjustly acquired land property.[196] The incorporation of subsection 2 was understood to have meant that where there is no expropriation, it is not necessary for the government to reimburse the deprived party of property rights.[197]

2.5.3. The Promotion of National Unity and Reconciliation Act 34 of 1995.

The Promotion of National Unity and Reconciliation came as a result of the multi-party negotiations and the interim Constitution; was enacted in 1995 with the aim to give an official pardon to people who have previously committed political offences.[198] The purpose was to encourage national harmony and reconciliation in a spirit of *Ubuntu* by creating as whole an image as conceivable of the reasons, identity and degree of human rights abuse perpetrated from 1 March 1960 to the cut-off date, inclusive of antecedents, surroundings, circumstances and perspective of such abuses, as well as the viewpoints of the wounded persons and the intentions and views of the perpetrators by overseeing inquiries and conducting investigations.[199] Another aim was affording forgiveness to perpetrators who made full revelation of relevant facts.[200]

[196] Yanou (n 55) 34.
[197] Chaskalson (n 163) 236.
[198] Promotion of National Unity and Reconciliation Act 34 of 1995, thereafter "the Act".
[199] Section 3(1)(a) of the Act.
[200] Section 3(1)(b) of the Act.

The Act also made provision for the creation of a Truth and Reconciliation Commission which will consist of a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation. The purpose of the Human Rights Violation Committee to handle serious infringement of human rights issues.[201] The Amnesty Committee was responsible for handling reprieve issues.[202] The Reparation and Rehabilitation Committee aim was to address compensations of the human rights violation victims.[203] This legislation together with the interim Constitution created the foundation for applying *Ubuntu* philosophy in dealing with the past oppressions because it advocated for understanding, reconstruction, reparations instead of vengeance, retaliation and victimisation. The two started the foundation of post 1994 constitutional philosophy in addition to the original examples of the application of *Ubuntu* by the court of law in handling past inequalities and its extensive establishment into South African legal debate.

2.5.4. The Constitution of the Republic of South Africa Act 108 of 1996.

The interim Constitution ushered in the 1996 Constitution. Section 25 dealt with land and property and read as follows:[204]

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Property may be expropriated only in terms of law of general application; for a public purpose or in the public interest; and subject to compensation. The amount of the compensation and the time and manner of payment must be just and equitable".

My view is that section 25 was confirmation to protect white properties against restoring what was taken from Africans hence the exorbitant amounts charged when property is sold. From the

[201] Section 3(3)(a) of the Act.
[202] Section 3(3)(b) of the Act.
[203] Section 3(3)(c) of the Act.
[204] Ntsebeza and Hall (n 142) 117.

previous sections we have seen that colonial conquest and dispossession was done for only one thing and that is land and property. It makes sense that restitution should be land because the dispossession engineered poverty for Africans and is the cornerstone of racial inequality which was executed through unfair policies, actions or exclusions, explicitly or incidental by the state.[205] This is because section 25 opens with a general provision that offers a significant guarantee to property owners: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."[206] Section 25(2) then shifts the focus to land restoration by permitting state expropriation of property "for a public purpose or in the public interest," with land restoration specifically identified in s25(4) as in the public interest.[207] This clause is qualified by the requirement that expropriation must be "in terms of a law of general application" and "subject to compensation."

The 1996 Constitution continued where the interim Constitution ended on only allowing expropriation for public purpose by including for public interest. The main concern is how to categorise land expropriated for restoration purposes. The reason is that land expropriated for land restoration purposes is not for public purposes because it is transferred to the people who were previously divested.[208] By stretching expropriation to public interest, it gave hope that the expropriating land for land redistribution resolutions might happen. The property clause in section 25 of the Constitution strives for just and equitable balance; it provides protection for existing property rights and subsection (9) simultaneously requires and authorises legislation that would bring about wide-ranging land restorations.[209]

It seems to me as if the South African Constitution legitimates and consolidate colonial land theft because it shields the prevailing land and property rights, while promising reallocation of land to the dispossessed majority. I agree with Ntsebeza that the two purposes are competing and

[205] Dugard J and Seme N "Property rights in court: an examination of judicial attempts to settle section 25's balancing act re restitution and expropriation" (2018) 34 *South African Journal on Human Rights* at 37.
[206] The Constitution of the Republic of South Africa Act 108 of 1996 Section 25 (1)
[207] The Constitution (n 191 above) Section 2 and 4.
[208] Ntsebeza and Hall (n 142) 118.
[209] Yanou (n 55) 36.

cannot be realised concurrently because eighty per cent of land is privately owned and defended by the Constitution.[210]

2.5.5. Land restoration Programme

The South African land restoration programme which is based on land redistribution, restitution and tenure reform has so far remained too laggard and uncertain.[211] In 1994 the South African government enforced the Reconstruction and Development Programme (RDP) for land restoration purposes which was based on the World Bank's recommendation of redistributing 30 per cent of agrarian land in less than five years.[212] The idea was to be accomplished by way of a retail like scheme where the government aid those who desire, the "willing buyer" to attain land and property at commercial value from "willing sellers". The *White Paper on South African Land Policy* acknowledged the "willing buyer, willing seller" (WBWS) scheme.[213] The scheme was created with the intention that the government will acquire land on behalf of those who were formerly evicted through a land restitution programme. The scheme also addressed the issue of Permit to Occupy certificates which were given to people who lived in the Bantustans or former homelands that they need to be terminated and replaced with title deeds documents thereby ensuring security of tenure. The relief was also provided to employees on farms and residents on profit-making farms owned by others through various legislations which shielded them from abuse.[214]

The concept of "willing buyer, willing seller" did not form part of the ANC's *Ready to Govern* policy but only appeared on the White Paper on South African Land Policy of 1997 as the main scheme. It was not authorised by the South African Constitution but was adopted as a strategy

[210] Ntsebeza and Hall (n 142) 121.
[211] Kloppers and Pienaar (n 81) 690.
[212] E Lahiff "Willing Buyer, Willing Seller: South Africa's failed experiment in market-led agrarian reform" (2007) 28 *Third World Quarterly Journal* at 1581.
[213] The Department of Land Affairs *1997 White Paper on Land restoration Policy*.
[214] Lahiff (n 197) 1579-1580.

to appease the investors who happened to be white settlers.[215] Willing buyer, willing seller is not constitutionally mandated; it does not derive any authorisation from the Constitution. It is a strategy aimed at protecting the interest of the white minority as it neither compels them to sell against their will nor at a price with which they are not fully satisfied. The white settlers could choose to sell land to whomever they preferred regardless of whether the person was previously dispossessed or not. They could refuse to accept the purchase price offered by the state or cancel the agreement or choose to sell to anyone who offered a lower amount, the government did not have a preference.[216] The government did not have control of the policy which ended up being utmost failure because less than 1 per cent of agrarian land had been reallocated by 1999. The government decided in 2000 to amend the objectives of transferring 30% over 15 years but in February 2005 only 4 per cent of agrarian land had been reallocated.[217]

At the end of the Land Summit in July 2005 coordinated by the Department of Land Affairs, acting Chairperson of the Land Tribunal, Advocate Dumisa Ntsebeza said the following in his concluding statement:

> "It does appear that there may well be a case here in the Constitution, which cries for an argument as to whether we don't have within the same Constitution competing rights. And if we have those competing rights the question arises, which of those rights must take precedence. That will probably be one of the remedies that the claimants in this case will want to look at".[218]

The current Constitution has not been successful in managing land and property issues which has led to a laggard land restoration because it is based on a Western idea of ownership and does not speak to the African people's way of life. Therefore, the Azanian People's Organisation (AZAPO) requested for the discarding of section 25 and the application of nationalisation of land to re-create pro African domination.[219] Section 25 has constitutionalised land theft and racial

[215] Rugege (n 173) 5.
[216] Buthelezi (n 168) 197.
[217] Rugege (n 173) 10.
[218] Ntsebeza and Hall (n 142) 121.
[219] J Dugard "Unpacking section 25: Is South Africa's property clause an obstacle or engine for socio-economic transformation?" 01 May 2018 http://www.wits.ac.za-law (accessed on 23 June 2019).

inequality has been rearranged but not destroyed and which is why we need a post-conquest Constitution that will dismantle the inequality based on principles of African humanness.[220] Ramose also contended that section 25 reduced the right to title of territory and territorial sovereignty into private right to ownership, therefore sidestepping the fulfilment of historical justice.[221] Radical land restoration needs to be based on an African jurisprudence decolonised Constitution which will explicitly acknowledge African culture, remind the people about colonialism and apartheid crimes against humanity and make them hopeful about the future through justice and *Ubuntu* in its text.[222] More on African jurisprudence decolonised Constitution will be discussed in chapter 4.

2.6. Conclusion

In this chapter we looked at the historical context of land dispossession and land restoration in South Africa. We saw that South African underwent colonisation in 1652 until 1961 under the Netherlands and Britain. The country underwent another form of internal colonisation by Afrikaners under the apartheid theme which ended in 1994 when the country became a democracy. The impact on Africans was land dispossession, forced removal, racism, inequality and poverty. We saw that the colonialists stole and protected the land using Western laws to the exclusion of the African majority. It is therefore fundamental that, that which was unjustly acquired must be returned to its rightful owners without any form of payment.

In the next chapter we will learn more about the core tenets of African Jurisprudence that can be used to address the land question.

[220] T Madlingozi "On Settler Colonialism and Post-Conquest Constitutionness: The Decolonising Constitutional Vision of African Nationalists of Azania/South Africa" November 2016 www.academia.edu (accessed on 05 August 2019) at 22.
[221] Madlingozi (n 205) 12.
[222] Madlingozi (n 68) 5.

CHAPTER 3: THE CORE TENENTS OF AFRICAN JURISPRUDENCE

3.1. Introduction

This chapter provides an examination of the core tenets of African jurisprudence. Firstly, I will explain what African jurisprudence is and how it relates to land and property. I will then move to the concept of *Ubuntu* and how it relates to African jurisprudence. Finally, I will go through the core tenets of African jurisprudence and show how the principles and ideologies of African jurisprudence can be used to benefit the African majority and improve access to and use of property and land.

3.2. What is African Jurisprudence?

African Jurisprudence refers to the study of the fundamental nature of knowledge, reality and existence of law which focuses on the interpretation, identity, characteristics, functions including a juridical belief structure that emanates from ideas, customs and social behaviour of African people.[223] Its foundation is built on 'the culture and experience of African peoples' and has communal unity as its purpose.[224]

The colonialists did not acknowledge African Jurisprudence which Murungi describes as an investigation of the existence of being a human, the knowledge of being human.[225] According to Murungi African jurisprudence is a human centred field because it deals with internal aspects of humanity.[226] It is therefore, a tool for the restoration of social cohesion and equilibrium which is achieved by stressing the nature of law in terms of reconciliation and restorative justice with a

[223] D Ndima "The anatomy of African Jurisprudence: a basis for understanding the African socio-legal and political cosmology" (2017) 50 *Comparative and International Law Journal of Southern Africa* at 85.
[224] N Dladla 'The liberation of history and the end of South Africa: some notes towards an Azanian historiography in Africa, South' (2018) 34 *South African Journal on Human Rights* at 420.
[225] J Murungi *Introduction to African Philosophy* (2013) 32.
[226] I William "Against the *Skeptical* Argument and the *Absence* Thesis: African Jurisprudence and the Challenge of Positivist Historiography" (2006) 6 www.miami.edu/ethics/jpsl at 43.

vision of maintaining peace in the community.[227] African communities pursue unity, preservation of peace and restoration of existing relationships which makes law not punitive in nature. Law in Africa and morality exist to promote community interest.[228] African jurisprudence emphasis the way of living of Africans, their cultural experiences and values which includes the religious beliefs, rituals, language expressions, proverbs, myths, folktales and customs.[229] Mbiti says it is "the understanding, attitude of mind, logic and perception behind the manner in which African peoples think, act or speak in different situations of life".[230]

The colonialist enquired how manageable it was that land could belong to a group of people without ownership being written down and how the community was able to utilise the land in harmony with each other.[231] According to Ojwang African jurisprudence contemplates not only the community-based rule order and the ethnic inclination of the group, but also African ideology and ethics framework.[232] African jurisprudence is based on *Ubuntu* which is a collective moral that permeates beyond cultural lines.[233] There can be no African jurisprudence without *Ubuntu* because the two are intertwined, they both pursue human dignity, compassion, spirituality, redress, harmony and alleviation of poverty; all of which are found in cosmology, justice, communalism and traditional leadership which are *Ubuntu* attributes.[234]

Law is the cornerstone of jurisprudence therefore law must be interpreted as the entry to and a situation where the well-being of being human is recognised.[235] At the heart of African jurisprudence must be the portrayal of quality of being an African, an explanation that is unavoidably connected to the mission for the welfare of the African which is carried through

[227] Williams (n 212 above) 45.
[228] I William and O Moses "Theories of Law and Morality: Perspectives from Contemporary African Jurisprudence" (2008) 3 *In-Spire Journal of Law, Politics and Societies* at 153.
[229] TM Magutu "African Philosophy and Ubuntu: Concepts Lost in Translation" Masters thesis, University of Pretoria, 2018 at 16.
[230] J Mbiti *African Religions and Philosophy* (1969) 2.
[231] Ramose (n 209) 41.
[232] Keevy (n 210) 118.
[233] Keevy (n 210) 311.
[234] Murungi (n 211) 32.
[235] Murungi (n 211) 69.

Ubuntu features of communalism, cosmology, justice and tradition.[236] The welfare of African people can be enhanced in the community by endorsing use and access to land through leadership and justice. African jurisprudence recognises that land belongs to the community and tenure is shared which means that choices about use and access to the land are made for the advantage of the group.[237] It is a jurisprudence that utilizes ethics, safeguards, shields and encourages the self-esteem of Africans in all domains of communal being and also advocate for secure land tenure.[238] This is because *Ubuntu* is based on African communal life which must be lived in harmony, where there is a balance between communalism, cosmology, justice and traditional leadership, the core tenets of African jurisprudence which will be explained in more detail below.

3.3. *Ubuntu*

Ubuntu is the foundation of African philosophy.[239] According to Ramose *ubu* is the beginning and *ntu* is the branch that originates from *ubu* and "it is the fundamental ontological and epistemological of African thought of the Bantu speaking people".[240] *Ubu*-induces the thought of be-ing and reveals itself in the actual shape of a thing. It is continuously leaning towards revelation through specific shape and types of being. It brings about the purpose of existence and is continuously aligned in the direction of constant real action through certain types and methods of existence which is -*ntu*. -*Ntu* becomes a place where existence in the process of continuous development becomes physical form which is distinctly epistemological.[241] *Ubu-ntu* are equal formation of existence because they form a state of complete and harmonious whole.

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[236] Murungi (n 211) 69.
[237] WJ du Plessis "African indigenous land rights in a private ownership paradigm" a paper presented at the 13th Biennial Conference of the International Association for the Study of the Commons (IASC) (2011) India. http://www.scielo.org.za/pdf/pelj/v14n7/v14n7a03.pdf
[238] Murungi (n 211) 68.
[239] M.B Ramose "An African Perspective on Justice and Race" http://them.polylog.org/themes/focus/Mogobe B. Ramose: An African Perspective on Justice and Race6/19/2015 (accessed on 28 September 2019) at 2.
[240] Ramose (n 225 above) 2.
[241] M Ramose 'The Philosophy of *Ubuntu* and *Ubunt*u as a Philosophy' in P Coetzee and A Roux (eds) *The African Philosophy Reader*; (2003) at 270.

The term *umu*- enjoys the same ontological characteristics with the word *ubu*- and combined with -*ntu*, *umu*- becomes *Umuntu* which means human being. *Umunt*u becomes the precise physical growth of *umu*- by moving away from the general to the specific.[242] *Ubuntu* (*botho*)is taken from (isiZulu saying) *Umuntu umnutu nga bantu* or (a Sepedi saying) Motho *ke motho ka batho* which means "to be a human be-ing is to affirm one's humanity by recognizing the humanity of others and, on that basis, establish humane relations with them" (the proverb is without limit in English and there are other identical Bantu languages as well).[243] This makes *ubuntu*, to be perceived as the quality of being human because it is this duty regarding others that creates an ethical burden to encourage life and prevent murder.

Ubuntu contains of the ideologies of sharing and caring for one another. The motion becomes the principle of be-ing by expressing a condition of human and acknowledging be-ing becoming. It simultaneously represents a form of existence and manifestation by showing an achieved, becoming or upcoming activity. It temporarily prevents the existence from being in effect.[244] It is not ubuntu-ism which represents the inaccurate idea that we are working with obsessions to thoughts and customs which are supreme and fixed.[245] This is different because action is the theory of existence, therefore, there must be interchange between living and non-living organisms for African humanness rather than African humanism. The be-ing of an African in the cosmos is indivisible with *ubuntu*.[246] *Ubuntu* is an abundant source moving steadily and continuously with African knowledge systems and existence which must be perceived two features of the same thing.

The philosophy of *Ubuntu* expresses ethical principles such as kindness, mutuality, peace, humankind and self-respect of the communal with the objective of establishing and sustaining

[242] Ramose (n241) at 272.
[243] BN Mtshiselwa "An African Philosophical Analysis of Isaiah 58: A Hermeneutic Enthused by *Ubuntu*" (2017) 116 *Scriptura Journal* at 4.
[244] M Ramose 'Globalization and *ubuntu*' in P Coetzee and A Roux (eds) *The African Philosophy Reader*; (2003) at 752.
[245] Ramose (n 244 above) 752.
[246] M Ramose 'The Philosophy of *Ubuntu* and *Ubunt*u as a Philosophy' in Coetzee and Roux (n240) at 271.

the welfare of the community.[247] It is an experienced and active way of life of the Bantu speaking people of Africa and relates to association between human beings.[248] Human decency in *Ubuntu* is intertwined with ethics and morality and originate from the act of restoring the evils and criminal in our case done by colonialism and apartheid.[249] *Ubuntu* encourages collectivism by promoting the just distribution of economic resources in order to alleviate poverty captured by the African proverb that says *Bana ba motho ba ngwathelana hlogana ya tsie* which means "the siblings share the head of the locust".[250] African jurisprudence is also musical; entrenched in the harmonious formation of the cosmos which can end with a depiction of coherent and spiritual music rhythm.[251] The ability to comprehend belief as an arrangement means acknowledging it as a whole-ness as well as inseparability and joint reliance of the coherent and spiritual. There is a maxim in Sepedi that says *kosa ga e theeletswe o e duletse* meaning you don't listen to music seated emphasizing the African school of thought and response regarding the dance of existence as an ontological and epistemological vital importance because to dance along with existence is to be in harmony to existence.[252]

3.3.1. *Ubuntu* and Land Access

African land rights are untransferable and are interweaving with the cultural and cosmological feature that are significant in appreciating the value of land embedded in *Ubuntu*.[253] The connection between people and land in *Ubuntu* is based on group tenancy communities, custom and guardianship.[254] In *Ubuntu*, land tenure is based on use and access. Okoth-Ogendo argues

[247] M Mahlatsi "Botho/*Ubuntu* philosophy: Education from childhood to Adulthood in Africa" (2017) 6 *International Journal of Scientific and Technology Research* at 95.
[248] Mtshiselwa (n 243) 2.
[249] Mtshiselwa (n 243) 7.
[250] Mtshiselwa (n 243) 8.
[251] Ramose (n 246) at 275.
[252] Ramose (n 246) at 276.
[253] Collin, J and Woodhouse, P "Introduction: Interpreting Land Markets in Africa" (2010) 80 *Journal of the* International *African Institute* 6.
[254] S Moyo "The Land Question in Africa: Research Perspective and Questions" (2003) Draft paper presented at Codesria Conferences on Land restoration, the Agrarian Question and Nationalism in Gaborone 21. file:///C:/Users/u22328689/Downloads/The_Land_Question_in_Africa_Research_Perspectives_.pdf

that to fully question the issue of property; one must inspect the issue of rights and how communities administer them, that is, their creation, apportionment and discharge:

> "If, as I believe is the case, the idea of a right merely signifies the manner in which claims are asserted in particular fact or jural contexts, or in respect of specific things or objects, then the existence of a right is best understood in terms of a power which society allocates to its various members to execute a particular range or quantum of functions in respect of any given subject matter. Where that power coincides with or amounts to exclusive control of that subject matter it is normal or ordinary to talk of the existence of ownership and that subject matter as property".[255]

Land in Africa is built on distribution of control and the *Ubuntu* communal philosophy that regulates how that authority should be entrusted in specific members of the community.[256] Due to the fact that land cannot be owned it remains the privilege of the chief to keep it in trust on behalf of members of the community. The chief or traditional authority assigns rights of usefulness in terms of space and period through generations and ancestry.[257] However, there is no complete control by community members over land, only the power to use and utilise and the distribution of that authority runs through generations. African jurisprudential perspective on land law does not have absolute inheritance but generation to generation usage. Consequently, land cannot be transferred to non-community members through *Ubuntu*.[258]

In African jurisprudence and *Ubuntu* cosmological thought it is a taboo to market land for profit because land is viewed as invaluable, a natural legacy and can neither be sold, nor transferred. Africans have shared legal entitlements to land, collective privileges supersede individual privileges, that are incorporated in the total well-being of the community. Land is viewed in most African cultures as holy; hence, it is incapable of existing with individual tenure.[259] African land

[255] H.W.O Okoth-Ogendo (1989) 59 "Some Issues of Theory in the Study of Tenure Relations in African Agriculture" *Africa Journal of the International African Institute* 7-8.
[256] Okoth-Ogendo (n 237 above) 8.
[257] K Tafira and S Ndlovu-Gatsheni "Beyond Coloniality of Markets: Exploring the Neglected Dimensions of the Land Question from Endogenous African Decolonial Epistemological Perspective" (2017) 46 *Africa Insights Journal* at 15.
[258] Tafira and Ndlovu-Gatsheni (n 238) 15.
[259] Tafira and Ndlovu-Gatsheni (n 238) 16.

belongs to those who are still alive, those who have passed and those who are yet to be born, thus making it absolute.

3.3.2. *Ubuntu* and African Cosmology

Ubuntu is the cornerstone of African jurisprudence that is based on Bantu idioms, expressions, customs, morals, values and heritage on one side and the lived experiences and events that shaped their character.[260] It is a completeness and continuous flow of being where the values of natural life from the *ntu* flows through the entire universe and covers the whole cosmos including living and lifeless kinds of being.[261] African traditional life reveals the relationship the Higher Power, the dead, the living and nature where the whole lifespan since natal to expiry represents that all things alive including the Higher Power, spirits and ancestors are part of the spirit and each thing links beings to the invisible superior kingdom.[262] A clearly identified component of the practice and notion of completeness in *Ubuntu* way of life is comprehending existence with regards to the three levels of existence (onto-triadic structure of existence); the living, the living-dead and the yet to be born.[263] The living is *umuntu* who cause the language and experience of existence conceivable. The living-dead left the world of the living and it is consequently unspoken that death has ceased their presence only regarding the physical, fleshly, and daily life. They cross over into an unknown world and continue to live despite their exodus from the world of the living; becoming everlasting. The yet to be born are humans of the future.

Cosmology is a structure of belief entrenched in action. It is the incorporation of environment, society, and the spiritual which together preserve the culture, community and spiritual landscape where indigenous knowledge enlightens actions relating to the performance of latest expertise,

[260] N Dladla "Towards an African Critical Philosophy of Race: *Ubuntu* as a Philo-Praxis of Liberation" (2017) 6 *Journal of African Philosophy, Culture and Religions* at 39.
[261] KMB Nalwamba "Mupasi as cosmic s(S)pirit: The universe as a community of life" (2017) 73 *HTS Teologiese Studies/Theological Studies Journal* at 4.
[262] Nalwamba (n 242) 5.
[263] Ramose (n 246) at 278.

farming, livestock ranching, entertainment, household and so on within *Ubuntu*.[264] The living-dead and the yet to be born relate to humans which are either unidentified or unseen, making it the ontology of invisible beings which is the address about the mysterious from the perspective of the living.[265] There is a belief of the living in the protection and guidance by the living-dead and this belief in the unestablished incomprehensible beings is the foundation of *ubuntu* metaphysics. *Umuntu* present an answer to the problem of variability of be-ing. *Umuntu* cannot accomplish *ubuntu* without the interference of the living-dead who are crucial to the maintenance and safety of the family of the living.[266]

In African cosmology a being is trapped in a framework of mystical interconnections between the Higher Power and other beings within the spiritual kingdom where on a daily basis he or she must balance these relationships in order to avoid evil curses which could threaten the life and wellbeing of his community .[267] The living-dead are vital to the maintenance and protection of the family of the living and applies to the community where the leader and his subordinates must have virtuous relationship with their living-dead.[268] This expresses the *ubuntu* understanding of cosmic harmony that it needs to be conserved and sustained by interpreting it into harmony in all scopes of life.

When we refer to community in African jurisprudence, we refer to customs, ethics, divine beings and supernatural forces that are philosophically linked to existing people, the dead and generations to come; meaning the "we" in African cultures refers to a divine community that is founded on an ethical and real custom, communal and metaphysical truth.[269] Mkenda says Africans see themselves as part and parcel of the Mother Nature and man is imaginable only in this intertwined extra-terrestrial which makes them see the earth as their mother and themselves as her children. Everything is intertwined, the Higher Power, humankind and mother nature. The

[264] Nalwamba (n 242) 5.
[265] Ramose (n 246) at 278.
[266] Ramose (n 246) at 278.
[267] S Nyang "Essay Reflections on Traditional African Cosmology" (1980) 8 *New Directions Journal* at 3.
[268] Ramose (n 246) at 279.
[269] P Ikuenobe *Philosophical Perspectives on Communalism and Morality in African Traditions* (2006) 56.

affiliation between individuals and mother nature are ingrained in the Higher Power as a maker of everything including plants, animals, minerals and other inanimate beings all create unity and rely on each other making an African one with nature and the entire universe.[270] In African culture, the human being is not secluded from nature and is seen as a centre of the cosmos, all things in the universe occurs in relative too sapiens. When the meteorological conditions are great, the public experience tranquillity and calmness with nature, their ancestors and Higher Power and when there is a dry spells, starvation and torrents they believe not to have a right and good relationship with the mother nature, ancestors and Higher Power.[271] Death in cosmology is perceived of as an exodus and not a total extinction of a being because he travels on to connect with the dead, and the only alteration is the decomposition of the physique, but the soul travels on to an alternative form of being."[272]

There is Ndebele proverb which says the footpath ahead is recognized by persons who are deceased which means that the significance of the departed, who become ancestors, is reinforced and is only through kinship with the departed that expressive devotions to Higher Power are made and it is the dead who direct and provide for the living.[273] In African cosmology, there is no classification of time, which is contrary to the coloniality of time brought about by Western modernity but, there is a connection between the past, the present and the future: cyclical conception of time where tomorrow is today and the past does not remain the past, the proverb says.[274] According to Klaus there is no separation amongst the most immediate of the departed and the living as regards to order and period.[275]

The West perceives property as limited and separate which is the essence of modernism and free enterprise. African philosophy acknowledges that the African people were slayed by the

[270] B Mkenda "Environmental conservation anchored in Africa" 01 April 2010 http://www.africafiles.org/environmental-conservation-anchored-in-African-heritage (accessed 16 July 2018).
[271] Mkenda (n 247) 2.
[272] Nyang (n 198) 4.
[273] Tafira and Ndlovu-Gatsheni (n 238) 16.
[274] Tafira and Ndlovu-Gatsheni (n 186) 15.
[275] JK Phiri "African Pentecostal Spirituality: A study of the emerging African Pentecostal Churches in Zambia" PhD Thesis, University of Pretoria, 2009 at 3.

colonialist who demolished everything along the way during land dispossession and the African soil soaked up a lot of blood through the massacre which left many graves and sites that need to be respected. African culture view property as common, meaning that African personal identity and existence focus on earth and all that walks on it, the heavens, the waters and all that live in it, the natural landscape, the atmosphere and livestock.[276] Thus, treating land as a commodity with cash and market value leads to conflicts over access and allocation. The issue of ancestral graves is still quarrelsome and unresolved. Colonial conquest did not result in land dispossession of communities only but also disconnection from their symbolic roots which was and is an unjustifiable defilement of identity and being.[277] The departed are venerated because they become ancestors and in African perspective, sharing of intimate thoughts and feelings on spiritual level with the deceased enables important prayers to the Higher Power and it is through the deceased who direct and provide for the living.[278]

We have seen in the previous chapter that white settlers brought with them property laws which served to protect their privileges and rights against their accumulation of wealth. The African jurisprudential perspective on land is that land is seen in its totality and not as a commodity and doesn't belong to individuals, but it is an inheritance from Higher Power.[279] Land is perceived as incorporating the organic, ethnic, universal, common and the mystical. The method of land administration which is rooted in communal structures result in morals, customs and adherences that guard raw materials, the ecology and flora and fauna.[280] This is the cause for prohibitions and stringent commands that ban ecological spoliation, destructive and non-selective cutting down of trees, degrading of holy places, contamination of spiritual pools where water spirits give life in lieu of water, and contraventions that are said to upset the earth. Land, soil, earth and cosmology accordingly are intimate, they are entangled.[281]

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[276] K Tafira "Why Land evokes such deep emotions in Africa" http://theconversation.com/Why-land-evokes-such-deep-emotions-in-Africa 27 May 2015 (accessed 27 February 2019).
[277] Tafira and Ndlovu-Gatsheni (n 238) 17.
[278] Tafira and Ndlovu-Gatsheni (n 238) 16.
[279] Tafira and Ndlovu-Gatsheni (n 238) 16.
[280] Tafira and Ndlovu-Gatsheni (n 238) 16.
[281] Tafira and Ndlovu-Gatsheni (n 238) 10.

According to Nkosi, from the outlook of African jurisprudence land is an inheritance from the Higher Power and the ancestors, and we persist to see ourselves as overseers of the Higher Power's resources, specifically of collectively possessed land. In African relations, when the baby is born the umbilical cord is hidden in the ground and when a child is circumcised, the foreskin and blood are also buried with the intention to attach to the land and this connection continues until death when one is buried in the ground.[282] When one visits the burial site, one kneel down shoeless before speaking to the ancestors, displaying honour for the land. When someone passes on, family members are forbidden from working the land during mourning time and after the funeral until a purification ceremony has been performed. In cases where a royal member has passed on the mourning period can last up to a year.[283]

Land in African jurisprudence is perceived as a means of support because it manufactures food and water which provides natural life to all organic things. It is precisely why they burn incense and communicate with ancestors asking for permission and guidance before they go hunting, digging for herbs, climbing the mountain for a rain prayer or a praying for forgiveness and cleansing when a specific tragedy has occurred in the community and there is a suspicion that Higher Power has abandoned them. The mountain on which they pray is treasured, cherished and preserved as a holy area.[284]

In African jurisprudence mother nature is viewed as a consecrated component. Communities trust that plants and woodlands are the demonstration of dominance by the creator and perceive them as supreme spaces to meet Higher Power. Communities in African cultures use big trees and the surrounding shrubbery as shrines, areas for spiritual prayers which are conserved. Oblations and burnt offerings are executed under these trees and no person is permitted to trim or gather firewood from the dry branches of these trees.[285] These observations and position

[282] Nkosi (n 253) 1.
[283] Nkosi (n 253) 2.
[284] Nkosi (n 253) 1.
[285] Mkenda (n 247) 1.

helped to conserve the plants, foliage and ecosystem which were beneficial in enriching human life by providing treatment and remedy to man and animals. Trees, leaves, roots and grasses provide healing remedies to the communities and animals by using some parts of the trees such as the wood, bark and leaves in cleansing ceremonies to prevent paranormal bad luck and sanctifications ceremonies which includes forgiveness, marriage, birth, initiation, graduation amongst other things.[286]

Tafira and Ndlovu-Gatsheni refer to Goheen's argument that terra firma, sphere, soil and topography are accredited human features linking land as corporeality and human beings which is the reason why umbilical cords, placentas, foreskins and initiation blood are planted in the ground. It implies the bonds and extension a person has with the soil and that one is attached to the soil and will return to it someday. Most importantly association between communal self and land can be used by people to make claims to land.[287]

According to Blyden as referred to by Tafira and Ndlovu, the household is the foundation of African communities which is tied to nuclear family, kinship group, community and the society at large where land and property including water is available to all and no person experience poverty.[288] African jurisprudence outcomes of communal possession of land and water is the equivalent availability of natural resources to all members of the community. As they write:

> "When the full meaning to the life of the African of the two conditions we have mentioned above, as regards land and water, is understood, then it will be realised why the African everywhere fights for his land when he will hesitate to fight about anything else".[289]

[286] Mkenda (n 247) 2.
[287] Tafira and Ndlovu-Gatsheni (n 238) 17.
[288] Tafira and Ndlovu-Gatsheni (n 238) 19.
[289] Tafira and Ndlovu-Gatsheni (n 238) 16.

3.3.3. *Ubuntu* and Traditional Leadership

Traditional leadership are the carriers of *ubuntu* values.[290] *Ubuntu* is a group ideology that represents qualities that honour the joint communal obligation, common support, distribution, generosity, cooperative and moral principles.[291] African jurisprudence, traditional leadership and *Ubuntu* are interlinked. *Ubuntu* is a word that is employed to include the idiom from Nguni people which means *Umuntu Umuntu nga bantu* or *motho ke motho ka batho* in Sepedi. It signifies that you are who you are because of how you relate to others around you. The assertion of *Ubuntu (botho)* is a figure of speech for moral, common and lawful verdict of compassion and kind behaviour.[292]

Tradition is the transmission of customs or beliefs from generation to generation which is a way of living in African culture and forms part of the African philosophy through observation of how Africans interpret their existence and the world in which they function.[293] This incorporates the evolution of consciousness concerning culture, history and connections between Africans. The matter of natural resources is of great importance to the growth of the African economic and has been linked to cultural and traditional practices. Ceremonies associated with rainmaking, thanksgiving and prayer have in the past been linked to land in Africa; the administration of land is tied to the multiplex interaction of economic, social and political authority.[294]

African jurisprudence balance the needs of a community between economy and spirituality as was the case with Madagascar where traditional beliefs rejected a creation of a shrimp

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[290] N Mthembu "The Bearers of Ubuntu/Botho Principles at the Helm of Individualistic Capitalistic Norms: the case of Traditional Leaders in the Post-Apartheid Azania (South Africa)" Paper prepared for presentation on the 3rd Annual Traditional Leadership Conference 2008, 20 - 22 August 2008, Marine Parade Hotel, Durban at 1. https://pdfs.semanticscholar.org/5c4a/9a2f9cbeed06cd84995c03abb7afdece8067.pdf?_ga=2.90809625.2047459031.1570180063-149004189.1570180063

[291] B Bondai and TM Kapunda "Reaffirming Ubuntu/Unhu Mainstreaming in the Education Curricula: Panacea for Sustainable Educational Change in Southern Africa" (2016) 4 *International Journal of Academic Research and Reflection* at 38.

[292] Ramose (n 209) 46.

[293] G Azenabor *Modern Theories in African Philosophy* (2010) 2.

[294] http://www.wcc-coe.org/land-and-spirituality-in-africa (accessed on 22 March 2019).

aquaculture farm and instead opted to protect a religious ceremonial site.[295] Land in African jurisprudence is regarded as a dedicated consecrated area used for various purposes including placing signs, symbols and shrines and must be respected as such meaning it cannot and should not be either spoiled or violated.[296] Dedicated spaces such as burial sites are extremely respected because generations of people have been placed on those sites. Removing the living generation from these spaces or declining to grant them access to this monuments in their frame of mind is a grim misconstruction to their heritage as well as withholding of vital mystical and holy entitlements.[297] Dispossessing African people of their land and refusing them entry to burial sites resulting in them not being able to perform ceremonies and spiritual rituals for their ancestors is atrocious because graveyards represents lived human experience, serve as a central connection with the living and as well as a guidepost for the future.[298] This is the reason why we need an African jurisprudence that will recognise and balance the needs for economic development, history, culture and relations between land and its people but most importantly recognise that African land is transgenerational.

Ubuntu is reiterated as the premise of finding by the maxim: *Kgoshi ke kgoshi ka batho*, meaning, the foundation and the validation of the king is the people or a King without the community is neither the figure nor the genuineness of monarchy .[299] This means that when it comes to issues affecting the community such as land, the king has an ethical responsibility to govern through engaging and obtaining consent from the people and also applying impartiality, answerability and openness. Every time a king makes pronouncements concerning land and property, he must apply African ethics and morality. Kimmerk confirms this when he says, "If when faced with a decisive choice between wealth and the preservation of the life of another human being, then one should opt for the preservation of life".[300]

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[295] A Simcock Aesthetic*, Cultural, Religious and Spiritual Ecosystem Services Derived from the Marine Environment* (2017) 13.
[296] Mkenda (n 247) 1.
[297] Ramose (n 209) 46.
[298] Tafira and Ndlovu-Gatsheni (n 238) 17.
[299] Mahlatsi (n 227) 96.
[300] S Shepherd and D Mhlanga "Philosophy for Children: A Model for Unhu/Ubuntu Philosophy" (2014) 4 *International Journal of Scientific Research Publications* at 3.

Privileges to land in African communities originated from being part of clan, village or residential group tied to a chiefdom. When the community has been established in a new uninhabited area, the chief together with his agents would demarcate areas of land to lower-ranking leaders who would divide areas to headmen who in turn would arrange for allocation to family heads on which to construct, plough and for rites.[301] Once land has been settled it was usually given to the next generation within the same family. Oral traditions propose that a traditional approach was to acknowledge the prevailing privileges of such groups and even to admit their preceding connection to the land in important ceremonies within chiefdoms.

A traditional leader in Africa is perceived as a person who is a servant to the clan, indigenous people, community or group. Traditional leadership has to do with someone who has commanding authority or influence within a group. The erections of an African human settlement are ranked and arranged with a king at the top reigning the community. [302] The king supports the community to create aims and direct the course by showing leadership in displaying capability, kindness, reasonableness and completeness, being just, open, answerable and consulting the community.[303] Therefore, African people and their traditional leaders need to behave in a way that is not harmful to the community but with the goal of elevating and empowering each other in order to advance secure land tenure through fairness, transparency and accountability. African leadership is about African solutions to local problems and the restoration of moral fibre in the community.

We need African leaders who will implement legislations and policies that promote and protect the security of tenure of the people through consultations, consent, participation, accountability and transparency. We need African leaders who will ensure that the people benefit from protected land occupation and economic and social growth plans taking place on their land.

[301] A Claassens and B Cousins *Land, Power and Custom: Controversies generated by South African Communal Land Rights Act* (2008) 219
[302] M Masango "Leadership in the African Context" (2002) 23 *Verbum et Ecclesia Journal* at 708.
[303] Masango (n 279) 710.

African jurisprudence should not allow a situation where the African majority are economically and socially abused and excluded instead of profiting from their ancestral lands.

3.3.4. *Ubuntu* and Justice

African jurisprudence is regulations of conduct which are carried through a lifestyle in common living and use the security by paranormal powers as the source of equality, fairness, balance, justice and harmony.[304] The paranormal powers pursue to reinstate unity and encourage the continuance of peace. Justice preserves the spiritual and interdependent link between the living and the ancestors and supply the abstract provision for the African viewpoint in natural justice by guiding how members of the communal should conduct oneself in relation to each other through sustaining an equilibrium and imposing consequences.[305] This balance between the living and ancestors is sustained by applying ethics, prohibitions, ideologies, standards and views which are shared through the African community and links *Ubuntu* and justice system between individual and the cosmos, Mother Earth, and the society.[306] African religion, politics, and law are founded on and immersed with the knowledge and notion of cosmic harmony and need to be firmly secured having good insight of the cosmos as the constant strife for concord. It is this state of being secured that gives them genuineness and legality.[307] *Umuntu* cannot accomplish *ubuntu* unless with the involvement of the living-dead who are significant for the conservation and guard of the family of the living. Harmony through the real recognition of justice is the ultimate law of ubuntu philosophy. Justice without harmony is the denial of the conflict towards cosmic harmony; harmony without justice is the displacement of *umuntu* from the cosmic arrangement.[308]

In chapter 2 we learned about the Dutch and British conquest over the indigenous people through unjust wars which resulted in the defeater taking over the land through force from the

[304] Keevy (n 210) 23.
[305] M Letseka "*Ubuntu* and Justice as Fairness" (2014) 5 *Mediterranean Journal of Social Sciences* at 547
[306] Letseka (n 283 above) 549.
[307] Ramose (n 246) at 279.
[308] Ramose (n 246, above) at 279.

defeated nation and possessing it as if they are lawful owners. The results brought about this was that the indigenous people lost title to territory, control and authority which is irrevocable and indefinite.[309] In 1994 South Africa became a democratic country and the 1996 Constitution was adopted affording official equivalent legal position to the conqueror and the conquered indigenous people thereby officially institutionalising inequality and prejudice. *Ubuntu* is a way of life, where ideology and morals are conceptualised in a holistic way regarding the community.[310] In African jurisprudence there is no prescription and therefore there is a need for historical fairness where balance is reinstated by returning the title to territory and reversing the sovereignty.[311] The conquered indigenous people want impartiality, and this can only be achieved by giving back their land together with full control and rule which will lead to stability, peace and eradication of poverty.[312]

Ubuntu and African law interpret fairness as compensation and damages.[313] Justice in African jurisprudence does not impose punishment but seeks to restore the imbalance caused by the offence and to satisfy the souls of the ancestors who seeks retaliation on behalf of family or communities.[314] It is concerned mainly with community privileges, responsibilities, obligations, consent, settlement, restorative justice and the safety of the law-abiding citizens, reimbursement of the victim and the feeling of disgrace humiliation imparted in the offender and his family.[315] Restorative justice and consent are very important in *Ubuntu* jurisprudence because traditional African communities are founded on unity and communal unity entails the restoration of harmony, order and middle ground amongst disputing groups.[316] *Ubuntu* is not only an ethical philosophy interested with instilling human characters but also incorporates ideals, ethics and

[309] M.B Ramose "Justice and restitution in African political thought" in P.H Coetzee and A.P.J Roux (eds*) The African Philosophy Reader* (2005) at 551.
[310] M.B Ramose "To whom does the land belong to" (2016) 50 *Psychology in Society Journal* at 86.
[311] Ramose (n 225) 7.
[312] Ramose (n 284) 553.
[313] Ramose (n 225) 1.
[314] Keevy (n 210) 28.
[315] Keevy (n 210) 29.
[316] Keevy (n 210) 40.

concepts of ancestral African communal justice which is undertaking to do what is right and moral in the traditional African communities.[317]

African jurisprudence is connected to the notion of justice through *Ubuntu* where prescription does not apply.[318] Section 25(7) of the Constitution only makes provision for people who were dispossessed after 1913 to be redressed or compensated.[319] However, in African jurisprudence there is no prescription or expiry date for a crime committed, a liability or dispute is never terminated even if many generations pass; an inequality that continues is never expunged just because of the passage of time.[320] Therefore, African jurisprudence should as its core goal seek to right the crimes which were executed by colonialism and apartheid particularly the recovery of the land which was unjustly acquired during the unjust wars of colonial conquest. *"Molato ga o bole"* is the Sepedi expression of prescription and in *Ubuntu* African jurisprudence means that the recovery of staggering government rest in the fact that when there was change from colonial to independence, position to land did not return to the slaughtered nation, the correct possessors of their own lands from long time ago.[321] We therefore need to apply restorative justice as described by Skelton as follows:

"Restorative justice has a special resonance with African customary law processes, where disputes are treated in much the same way whether they civil or criminal and this tendency to avoid a strong distinction between civil and criminal wrongs is also a feature of restorative justice. Acceptance of responsibility, making restitution and promoting harmony are the key outcomes desired in all kinds of disputes".[322]

The nation of Africa will recognise justice as being equitable through the return of the land, which was unjustly acquired during violent wars, this will accomplish African jurisprudence virtues of morality and integrity. The spirit of *Ubuntu* rest in its potential to establish harmony, reinstate

[317] Letseka (n 283) 544.
[318] Ramose (n 225) 3.
[319] The Constitution of the Republic of South Africa Act 108 of 1996 section 25 (7).
[320] Ramose (n 225) 3.
[321] Ramose (n 209) 117.
[322] C Himonga and M Taylor "Reflections on Judicial views of Ubuntu" (2013) 16 *Potchefstroom Electronic Law Journal* at 399.

stability and concord within African environment, and preserve the equilibrium between hostility and solidarity in African communities.[323] No nation can be expected to protect the property rights of its colonisers, property which was unjustly acquired through wars against humanity. *Molato ga o bole* is, therefore, an *Ubuntu* lawful ethical value attempting to reinstate the unbalance irrespective of the time it happened.[324] African jurisprudence proverb does not regard the passage of time, illegal performances are not destroyed, if an illegal act has been executed one is accountable for their own behaviour and it is through *molato ga o bole* that unjustly acquired land should be given back.

3.3.5. *Ubuntu* and Communalism

Communalism is the centre of *Ubuntu*; the traditional African lifestyle revolve around the community where a human being expresses his or her survival in relation to others.[325] The concern of the human being is regarded as of a lesser importance than the concern of the collection.[326] Common acknowledgement and admiration symbolise the relationship between other beings and each being relies on other beings and they also rely on him. *Ubuntu* is made of accumulation of principles such as admiration for human beings, self-respect, kindness, perseverance, trustworthiness, patience, charity, gentleness, humanity, modesty, and love which keep the common as one.[327] Communalism stability originates from communal backing where the self-respect and individuality are accomplished through joint support, compassion, kindness, and the community's agreement.[328]

[323] Letseka (n 283) 549.
[324] Ramose (n 225) 3.
[325] Shepherd and Mhlanga (n 277) 3.
[326] N Olinger, J Britz and M Olivier "Western Privacy and/or Ubuntu? Some critical comments on the influences in the forthcoming data privacy bill in South Africa" (2007) Article based on a paper presented at the CEPE Conference in 2005 at 8.
https://pdfs.semanticscholar.org/b2ec/16e603e3d8f83bc756a10e6079d0d0adf6f2.pdf
[327] Shepherd and Mhlanga (n 277) 3.
[328] F Strozenberg, W Filho and Others "Ubuntu: Alterity as a Perspective for Peace" (2015) 5 *Sociology Study Journal* at 55.

A person is the core of traditional commitments and responsibilities corresponding with privileges and freedoms circulating in a degree of relationships illuminating from the fact of being descended from the same ancestors of family relations, genealogy and to the broader perimeter of familyhood founded on the shared ownership of the Higher Power.[329] The thought of a person or self is communal and persons experience a series of steps taken for communal change or modification up until they achieve full position as persons under the guidance of the community. Reaching the position of personhood depends on communal accomplishments that advance common good.[330] The person's mental and moral nature is guided by the community, it enlightens efforts to be taken when reflecting on one's character and this forms individuality.[331] Mbiti describes the existence of a person in African culture as 'I am because we are; and since we are, therefore, I am'; making the relationships with other persons in a communal determine the becoming of a person.[332]

The *Ubuntu* philosophy highlights the significance of a being in a communal life. A being is considered significant if he works for the benefit of the whole communal other than for his selfish gain.[333] *Ubuntu* was established through community involvement which guaranteed partisan reliability and financial safekeeping for the common good. African communalism concentrates on the involvement of each community participant in the direction of those events and deeds that will guarantee the well-being of the community because once the welfare of the community is safeguarded, the profits will outpour to each community member.[334] The idea of the mutual welfare needs to be grasped as the welfare from which each community member profit because when the mutual well-being has been reached, the individual well-being is also achieved. If the community flourish, all members of the community have a portion in its success. In communalism the accomplishment of the being is divided among all he relates with, equally, the bad luck of the

[329] P Coetzee 'Morality in African Thought' in P Coetzee and A Roux (eds) *The African Philosophy Reader*; (2003) at 343.
[330] Coetzee (n 329) 206.
[331] L Teffo and A Roux 'Metaphysical Thinking in Africa' in P Coetzee and A Roux (eds) *The African Philosophy Reader*; (2003) at 206.
[332] Teffo and Roux (n 331) 252.
[333] Mahlatsi (n 227) 96.
[334] JY Mokgoro "Ubuntu and the Law in South Africa" (1998) 1 *Potchefstroom Electronic Law Journal* at 8.

being is the mishap of several through solitary bonds.[335] Each community member understands that he is part of the common and that the collection relies on his talent, ideas, work and devotion in order to live, thereby making him to have a very strong sense of belonging.[336]

African relationships are based on an ongoing interlinkage of beings in the communal.[337] The interrelationship work in unity with the departed, who continue to live amid their offspring through their knowledge, insight and hardships. African jurisprudence perspective does not isolate a being from additional objects that are part and parcel of life such as Divinity, the departed, beings, wildlife, vegetations and non-living beings but consider as a wholly being who is a member of the communal. Humankind are regarded as part of the cosmos interaction of spirits through the societies where they reside and are in immediate and everlasting linking with the divine world of the departed and the unborn. [338]

Ubuntu and communalism are the cornerstone of African jurisprudence, they provide a feeling of community and there is communal interrelationship between individuals who share in the land and property which encourage secure land tenure. The person's survival and self is in relation to the community and is determined by the community which is different from the Western idea of individuality.[339] Communal interrelationship for instance in Sotho will be whereby four or more households would meet and decide on a schedule that would let them to till each other's land to make ready for sowing and this displays consideration for others, compassion, kindness, generosity etc., unlike the Western idea of individuality where everyone is for him/herself.[340]

The above features can be implemented and used to build African communities which founded on humankind and fellowship. Jomo Kenyatta likened collectivism in African jurisprudence to the

[335] Shepherd and Mhlanga (n 277) 3
[336] Mokgoro (n 305) 8.
[337] Mahlatsi (n 227) 94.
[338] Strozenberg, Filho and Others (n 303) 55.
[339] Olinger and Brits (n 301) at 7.
[340] Letseka M "Understanding of African Philosophy Through Philosophy for Children" (2013) 4 *Mediterranean Journal of Social Sciences* 748.

way of living and thinking of the Gikuyu people of Kenya: "nobody is an isolated individual. Or rather, his uniqueness is a secondary fact about him; first and foremost, he is several people's relatives and several people's contemporary".[341] Communalism is when there is a consciousness of fundamental interrelationship where one's obligation to the community is more vital than individual civil liberties and freedoms. Kwame Gyekye outlines communalism in African cultures as the policy where the community becomes the emphasis of the person's actions and puts more importance on the achievement of the whole community but not at the cost of the individual.[342]

Broodryk discloses that *Ubuntu* safeguards and assurances unity, amity, fellowship, closeness, admiration, camaraderie, cooperation, unison, resolution and labour among other vital ethics particularly when referring to responsibilities regarding use and access of land and property. The values emerge from a lifestyle which is defined by a cordial and amicable association which also applies to the universe, wildlife, cosmos and the supernatural.[343] African jurisprudence is focused on people's duties in relation to one another concerning land and property than with the civil liberties of individuals in property. The relations between individuals takes priority than a person's capability to declare his or her benefit in property against the world. Land and property in African jurisprudence champions community association rather than individual's private right over private property.[344]

We need to draw on the philosophical and practical insights of African jurisprudence. We need to turn towards African jurisprudence and emphasise that being an African is part and parcel of the community unlike the West which perceives a person as some sort of a thing that is competent of existing and thriving on its own, separate to any public; not restricted by family ties or social class, community and cultural relationships. The combination of *Ubuntu* and

[341] Letseka (n 311) 748.
[342] Letseka (n 311) 749.
[343] J Broodryk "*Ubuntu*: Life Coping Skills, Theory and Practice-A Paper Presented at CCEAM Conference" 12-17, October (2006) Lefkosia, Nicosia, Cyprus.
https://vdocuments.site/ubuntu-school.html
[344] WJ du Plessis "African indigenous land rights in a private ownership paradigm" (2011) 14 *Potchefstroom Electronic Law Journal* at 5.

communalism should furnish theoretical structure for understanding and examining the humanness that *botho* or *Ubuntu* express in strengthening the African nation through use and access to land and property with the purpose to advance security of tenure.[345]

African jurisprudence affords analytical mechanisms to *Ubuntu* and communalism, for crucial consideration on welfare and human prosperity based on shared ethics and its influence on individual behaviour through use and access to land property. Letseka indicates that people who support *Ubuntu* have interest in dealing impartially with others which results in harmony and consensus and that through teaching, *Ubuntu* and communalism can produce favourable outcomes by producing people who are interested in the wellbeing of others are inclined to be selfless and respectful.[346] Several individuals and their descendant can have a right or similar entitlements in the same land and property under *Ubuntu* and communalism which advances security of tenure. In communalism land is transferred from one descendant to the other, it cannot be traded because African jurisprudential perspective is that descendants are linked to the land and land belongs to the dead, the living and the future generations.[347]

3.6. Conclusion

This chapter shows that the African jurisprudential perspective on land and property exposes the contrast between capitalism and *Ubuntu* in that by enforcing the Western notion of ownership and commodifying land we are depriving Africans of land and robbing them of their personhood, being and identity. African land laws expose the intention of private ownership because land is seen as legacy that can neither be bought nor sold.[348] The right to hold property is manufactured through shared responsibilities and duties. Land belongs those who are still alive, those who have passed and those who are yet to be born, making it unassailable. In Africa the right to hold a property is not based on freehold but on use and access. Since Africans have joint legal

[345] Broodryk (n 314) 14.
[346] P Higgs "African philosophy and the transformation of educational discourse in South Africa" (2003) 30 International *Journal of Educational Development in Africa* at 13.
[347] Du Plessis (n 315) 11.
[348] Tafira and Ndlovu-Gatsheni (n 238)15.

entitlements to land, collective rights supersede individual rights, which are incorporated in the general communal wellbeing and there is no prescription in African jurisprudence.[349]

[349] Tafira and Ndlovu-Gatsheni (n 238)16.

CHAPTER 4: IN WHAT WAY COULD AFRICAN JURISPRUDENCE DISCLOSE AN ALTERNATIVE VISION OF LAND AND PROPERTY?

4.1. Introduction

In the previous chapters we learnt about the history of South Africa, the dispossession of land and property through colonialism and apartheid, the transition into the new democracy, the adoption of the Constitution including the property clause and characteristics of African jurisprudence. In this chapter I am going to show why decolonising the Constitution is necessary in order to reverse colonial conquest and why African Jurisprudence connects with traditional leadership and governance and how the two can be used together to disclose a different vision of land and property. This will be achieved by exposing that the 1996 Constitution is anti-African through *Ubuntu* values and the integration of traditional leadership and governance in a future model.

4.2. Towards a Decolonised Constitution

We have seen in chapter 2 that the ANC commenced the negotiations from a shaky standpoint which resulted in a deal where the NP kept and merged white minority benefits, protecting their huge profits that were unfairly attained and stopping extensive reallocation of resources including land and property to previously disadvantaged Africans.[350] This arrangement which was done through the adoption of section 25 of the Constitution transformed the unjustly acquired property into legitimate property defended by constitutional rights from reallocation and restoration.[351] In the previous chapter I spoke about the African jurisprudence principle of *molato ga o bole* which forbids instant dissolution of past obligation because no continued progress of existence or period can alter history.[352] It is from this position that I think we need to revise the

[350] J Modiri "Conquest and constitutionalism: first thoughts on an alternative jurisprudence" (2018) 34 *South African Journal on Human Rights* at 319.
[351] Modiri (n 321) 318.
[352] Modiri (n 321) 314.

current Constitution in order to reflect the African values of *Ubuntu* where fairness, redress, compensation and restoration are primary in our community supplemented by liberty, impartiality, harmony and unity because a full agenda of decolonisation cannot materialise using the existing structure of the Constitution.[353]

Decolonising the constitutional idea and practise needs to talk to the colonial state organisation and the perpetual suppression of indigenous sovereignties; the infiltration of separateness and the breaking down of resolution to the National Question; and the ongoing subjection of African way of life and their theory of knowledge and jurisprudence .[354] If conquest and colonialism are performances of historical disruption and not solely an effort to stagnate indigenous way of life decolonisation should empower the colonised nation to readopt its past and proclaim its sovereignty. Such a restart empowers the conquered indigenous people to undertake power accountability and re-endure their chaotic historical walk with each other. The declaration is that African methods of disagreement settlement; customs and communal organisation and unwritten constitutional law were dislocated, and that decolonisation is an event to recover and develop them.[355]

The following are crucial framework of eluding the dangers of post-colonial constitution-creation by providing a decolonising constitution as analysed by PAC's non-racial African nationalism vision and Ramose's modern philosophy of rescinding the colonial state form; resolving the National Question; and remembering and re-membering Africa.

De-constituting the colonial state attempts to deal with colonial organisational legacy. The colonial state is a framework designed out of the enforcement and merging of borders established and manufactured during conquest; the disintegration of current political

[353] Modiri (n 321) 318.
[354] T Madlingozi "On Settler Colonialism and Post-Conquest Constitutionness: The Decolonising Constitutional Vision of African Nationalists of Azania/South Africa" November 2016 www.academia.edu (accessed on 05 August 2019) at 3.
[355] Madlingozi (n 354) 4.

communities; and unwanted incorporation into a new formed state.[356] A decolonising constitution should reverse the effects of this legacy. White settlers created the Union of South Africa in 1910 and through the South African Act of 1909 enabled 'racial cooperation' between the British and Afrikaners, rejecting Africans and committing to putting aside 13% of land for the conquered indigenous people. This action constitutionalised and naturalised the 'right of conquest' by granting citizenship of the country to white settlers which is everlasting. Ramose says the right of conquest is a territory disorganisation and rejection of state creation formed in the 16th century portrayal of the amity lines where beyond certain lines are humans who do not have reasonableness and are considered sub-humans. These humans occupied land, but their land and property were viewed by white settlers as empty land because they were unable to behave rationally therefore could not develop customs of societal organisation and could not establish sovereignties.[357]

The 1996 Constitution preclude the reality of conquest and this act constitutionalises the right of conquest, preventing Africans from proclaiming their fundamental and natural right to regain possession and sovereignties over their territories. This result in Africans disremembering and dis-membering and believing that Africans are beneath the human line and not worthy of damages, retrieval of sovereignties and restoration of possession over land.[358] According to Ramose where possession and authority over lands has not been reinstated, the conferring of identical constitutional position to both the conqueror and the conquered has culminated in the bestowal 'limping sovereignty'.[359] This is because the transformation of the communal right to title of territory into individual right to ownership of land during the codesa talks diminished the question to that of land reform instead of territorial sovereignty.

Dislodging the line and enabling an Africanist being-belonging is concerned with the legacy colonialism. How are the white settlers fitting in and what position do they occupy after the 1996

[356] Madlingozi (n 357) 9.
[357] Madlingozi (n 357) 9.
[358] Madlingozi (n 357) 12.
[359] Madlingozi (n 357) 14.

Constitution arrangement in terms of the successors of the right of conquest and in what way would an Africanist constitution transform colonists into Africans?[360] Ramose says decolonising constitutional customs commences with a recognition that neo-colonialism is a product of the abortion of autonomy and failure to put out of centre the successors of the 'right of conquest'. This process is important to the de-constitution because colonisation is determined by an ideology of isolating human from the cosmos, the resolution to shape the cosmos according to human's desires, and the exclusion or conquest of the other living organisms so that human's place at the core of the realm is certain.[361]

The 1996 Constitution is changing from basic to complex, not only does it protect white domination it also makes the knowledge system of African humanness unseen. The resolution to situate what is generally considered to be the essential law of the new South Africa on the moral epistemology of one segment of people negatively disturbs the process of constructing a national identity and willingness to work together. The precluding of *Ubuntu* philosophy of the indigenous people suggests that they are disqualified in post-1994 constitutional re-planning.[362]

The side-lining of *Ubuntu* and African jurisprudence by the adoption of Western jurisprudence has harmed the likelihood of constructing a unified and caring community because the last-mentioned jurisprudence is mainly tailored towards disintegration, division and distraction. The purpose of African jurisprudence is unity, it pursues and directs completeness as be-ing becoming. The word "Be-ing" is used to show a *be* (human) that has started but not yet (-ing) finished (action) because in this philosophy, "…motion is the principle of be-ing; to be is to be in, with and by motion". African humanness or character "suggests both a condition of being and the state of becoming, of openness or ceaseless unfolding". The constitutional conceptualization of Ramose will in this context be distinguished as that of constitution-ness since this quest for incorporation, unity and amalgamation is a quest for continual evolving and completeness about state being-becoming. *Ubuntu*, the principal of African jurisprudence prescribes that, "to be a

[360] Madlingozi (n 357) 13.
[361] Madlingozi (n 357) 16.
[362] Madlingozi (n 357) 16.

human be-ing is to affirm one's humanity by recognising the humanity of others and, on that basis, establish humane relations with them".[363] It is suitable for the purpose of constitution-ness because it forbids separateness and the marginalisation of 'the Other'.

Enabling a return to the source challenge the abyssal constitutional custom that the indigenous people conquered unjustly during colonialism are not completely human because they do not have reasonableness. Post-conquest constitution-ness ought to re-member the African question by developing and unifying African knowledge systems, cosmologies and essentials of traditional ethos and allow "a radical break with modern Western ways of thinking and acting".[364] A return to the source allows a recalling of conquered indigenous people's morals and knowledge systems; a re-membering of the fragmented three part society of the living; the living dead and the yet-to be born governed by African humanness.

A post-colonial constitutionalism is straightforward and inflexible unlike the post-conquest constitution-ness which directs a continuous pursuit of universal balance, completeness and national being-becoming arrangement.[365] It encompasses a twofold action of dissociating from Western modernity and "re-Africanisation" attainable by associating with persons who are not totally captured by the western ways of thinking and acting.[366] The 'living customary law' and 'interlegality' dwell in clustered and countryside communities where African customs, standards and establishments are constantly formed and reconstructed in reply to the evolution of being, the invasion of Western modernism, public law and African law-deteriorating effects of the system of indirect rule .[367]

The African nationalists wanted to reinstate 'Africa to Africans,' and 'Return Africa' itself through the commemoration and acknowledgement of African history, culture, standards and customs. This decolonisation aim could only be realised when a, "total war is waged against the demi–god

[363] Madlingozi (n 357) 17.
[364] Madlingozi (n 357) 18.
[365] Madlingozi (n 357) 5.
[366] Madlingozi (n 357) 18.
[367] Madlingozi (n 357) 22.

of white supremacy" and a "mental revolution" is also tackled to get rid of the colonised mind through "complete overhaul of the present structure of society". The PAC's planned uprising was an complete disobedience of the reason of amity lines and abyssal rational because for Africans it meant that, "they are not immature or irrational but that they are human"[368] Accordingly, African nationalists adopted a detachment position with Western modernism, swapped integration and imitation for spiritual reversal and self-rule, adopted Africanity and construct an Africanist realm authentic to African current lifestyle and joining of enlightening basics from other cultures.

An authentic constitution will bring to an end the right of conquest that talks to the fundamental immorality of establishing a community where Africans are given identity as outcast and humans with sub-standard ontology.[369] A decolonised constitution will sincerely reflect the community in which everybody perceive themselves as considered and appreciated. For any law to be valid, it is necessary that it originate its power from the action of *umuntu*. The 1996 constitution rejects conquered indigenous people and experienced by them as an outgrowth, an isolating and repressive cultural framework.[370] A post–conquest constitution is the peak of the fight for epistemic fairness and the recalling that the African is a being.

Decolonisation comprise of the return of all land together with the acknowledgement of use and connections to land and not just figuratively, with emphasis on African land and being.[371] It eradicates coloniser private property and power by supporting the authority of local land and community.[372] The purpose of the process is that land and property is returned and restored to indigenous African people and all colonisers become landless.[373] The aim is to disrupt the framework of the colonial triangle by returning land and property under the authority of

[368] Madlingozi (n 357) 19.
[369] Madlingozi (n 357) 20.
[370] Madlingozi (n 357) 21.
[371] E Tuck and K Yang "Decolonization is Not a Metaphor" (2012) 1*, Decolonizing: Indigeneity, Education and Society Journa*l at 21.
[372] Tuck and Yang (n 325) 26.
[373] Tuck and Yang (n 325) 27.

indigenous people thereby undoing imperialism.[374] It provides an alternative outlook to natural and constitutional rights based approach to justice.[375] The process entail a fundamental redirection of African worldview through decolonising the African mind and systems of philosophy and existence; African knowledge systems and power which is *Ubuntu* and its values.[376] Decolonization is a procedure of self-recuperation from colonial structures, system of knowledge, outlook and institutions by knowing thyself; knowing African values and outlook.[377] This means that knowing yourself through African values, lifestyle, artwork, belief, geography, education, literature, and languages.[378]

The white settlers through war against humanity diminished and discredited different kinds of knowledge and existence, ancient times, being, customs, languages, beliefs, etc.[379] The aim of decolonisation is to reposition the reasoning, goals, observations, intelligence and the existence of the colonised by exposing the viciousness and control rooted in favouring section 25 of the Constitution over African jurisprudence of *Ubuntu*.[380] This can be seen in the fact that although customary law is equal to statutory law it continues to be secondary to Roman Dutch law because the Constitution display the philosophical model of white settlers ignoring the African manner of living, philosophies and community structure.[381] A genuine Constitution should resonate with the majority of people by including *Ubuntu* principles of knowledge systems, cosmologies and elements of traditional culture because excluding them means that there will always missing an honest, enlightened, liberated and authentic South Africa which will affect land restoration.[382]

[374] Tuck and Yang (n 325) 31.
[375] Tuck and Yang (n 325) 36.
[376] H Chitonge "Trails of Incomplete Decolonisation in Africa: The Land Question and Economic Structural Transformation" (2018) 57, *African Study Monographs, Supplementary Issue Journal* at 24.
[377] Chitonge (n 330) 25.
[378] Chitonge (n 330) 25.
[379] Chitonge (n 330) 26.
[380] Chitonge (n 330) 27.
[381] T Madlingozi "On Settler Colonialism and Post-Conquest Constitutionness: The Decolonising Constitutional Vision of African Nationalists of Azania/South Africa" November 2016 www.academia.edu (accessed on 05 August 2019) at 7.
[382] Madlingozi (n 335 above) 21.

An authentic decolonisation objective is to rebuild and restore colonial land and agrarian structure to previously dispossessed which means revisiting the Constitution.[383] The reversal of conquest effects can be achieved through recognizing the way in which Africans were dispossessed of land and property through war against humanity, merging of areas, enforcement of boundaries, dividing of communities and mandatory amalgamation into a new government by incorporating and acknowledging this history in the Constitution.[384] This action will repeal the ingrained and adapted conquest which is validated by the current Constitution and laid by the 1961 Constitution and the creation of 1910 Union of South Africa by re-establishing, recouping, redressing the white settlers agreement to the African majority political rule.[385] A decolonised Constitution will deal with the protection and safeguarding plan of unjustly acquired land and property laid by the 1961 Constitution and adopted by the 1996 Constitution.[386]

We need a decolonised Constitution that will stop preserving the established governmental, economic and social systems formed during colonisation; a Constitution that will identify horrific historic past; condemns them; promise to never repeat them and show an inclusive plan on moving forward.[387] A decolonised Constitution will look at the past and the future, acknowledge that colonialism and apartheid happened and record that history text in the Constitution. The Constitution will challenge the base on which the metaphysical philosophy, doctrine, ethical, social and political is built on.[388] This kind of a Constitution will reject regime continuation and opt for restoration of African majority political rule or authority by building a new country.[389] It will also champion for compensation, reform, restoration and damages for those who suffered the injustices of land dispossession because of apartheid and colonialism.[390]

[383] Chitonge (n 330) 36.
[384] Madlingozi (n 335) 9.
[385] Madlingozi (n 335) 16.
[386] T Madlingozi "The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonisation? 06 April 2018 www.criticallegalthinking.com (accessed on 05 August 2019) at 1.
[387] Madlingozi (n 340) 2.
[388] Modiri (n 321) 312.
[389] Madlingozi (n 340) 4.
[390] Madlingozi (n 340) 5.

The decolonised Constitution will radically change the state of things by taking into consideration land dispossession starting with the landing of Jan van Riebeck in 1652 which led to conquest of different regions to be named South Africa in 1910. The brutality, abuse, unfairness and discrimination based on the colour of one's skin will also form part of important things to be rectified by the Constitution.[391] The procedure to decolonise the Constitution will be detailed, being both representative and significant by destroying the power hierarchy and the belief that Caucasian race is innately better compared to other ethnic groups, especially Africans.[392] Colonial emancipation encompasses destroying the colonisers community and culture, replacing it with a new world made up African philosophies, ethics, customs, traditional administration, government and commercial rearrangement.[393] Therefore, a decolonised Constitution will be based on an African jurisprudence which reflects the experiences, knowledge and practices of African people.[394]

4.3. Traditional Leadership and Governance

In chapter 2 we learned how the traditional leaders and their people who made up 87% of the population were conquered, dispossessed of land and property and were forcibly moved to occupy only 13% of the land. Now we are going to learn about the mechanisms applied by the colonialists to implement the dispossession. We will also learn about the perspective of *Ubuntu* and African jurisprudence on the issue of traditional leadership and governance; how to integrate it into the decolonised Constitution and improve future land policies.

The white settler regime brought into use the Black Traditional Act 38 of 1927 to substitute the African structure of leadership and management which converted traditional leaders into assistants and salaried representatives answerable to the regime and no more to their

[391] Modiri (n 321) 315.
[392] Modiri (n 321) 316.
[393] Modiri (n 321) 317.
[394] Modiri (n 321) 323.

countrymen.[395] This Act seized charge of the responsibilities of Africans and was the underpinning of the 1913 Land Act.

The Black Authorities Act 68 of 1951 was approved with the purpose to form tribal authorities and outline their responsibilities and jurisdiction under the directive of the Governor General.[396] He functioned as a commander-in-chief over the territories which were controlled by the traditional authorities at the same time diminishing the status of traditional authorities to chief and headman. The Act permitted the Governor General to form and split the indigenous peoples, assign anybody he thought suitable to be chief or headman and oust any chief or headman. It was also directed at the acknowledgement and execution of customary law with an intention to control the establishment of traditional leadership and regulation of tribal land.[397]

In 1959 the apartheid regime approved and enacted the Promotion of Bantu Self-Government Act 46 with a motive to allow for the steady expansion of independent Bantu countrywide components and for uninterrupted discussion between the regime and the components through the policy of indirect rule.[398] Imperialism and apartheid manipulated the establishment of traditional leadership, making them a bridge between the administration and African community and also providing lawfulness and security to execute their plans.[399]

During this period traditional leaders enjoyed great influence in the societies and so for the public to attain a piece of land they had to obey the oppressive chiefs.[400] Oomen says traditional leadership has always been reliant on the state for existence and that chiefs gained their power through land distribution rather than backing from their community.[401] The imperialist regime exercised indirect rule by regulating social variance where non-Africans were categorised as

[395] Black Traditional Act 38 of 1927, thereafter "the Act".
[396] Black Authorities Act 68 of 1951, thereafter "the Act".
[397] SF Khunou "Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism Beyond Apartheid" (2009) 12 *Potchefstroom Electronic Law Journal* at 86.
[398] Promotion of Bantu Self-Government Act 46 of 1959, thereafter "the Act".
[399] Khunou (n 351) at 88.
[400] M Buthelezi, D Skosana and B Vale *Traditional Leaders in a Democracy* (2019) 52.
[401] B Oomen *Chiefs in South Africa Law, power and Culture in the Post-Apartheid Era* (2005) 13.

"races" and Africans were branded as "indigenous peoples".[402] Mamdani as referred to by Oomen says South African government was disunion with an established construction that formed racial populations internal and external residents.[403] This means that the regime governed its city and countryside territories in dissimilar procedures where the ethnic group-indigenous people split ascertained the rule that the public would be forced to adhere to because ethnic groups were administered through Roman-Dutch law, while indigenous peoples were ruled through customary law.[404]

There was one judicial system in urban areas described as cultured regulation of the West where Africans were required to adapt to Western rule but were deprived of many Western civil liberties, while in the Bantustans they were governed by customary law in which clerical, legal and authority were combined.[405] The traditional leaders functions were including distribution of land, interception of unlawful seizure of land and prevention of illegal settlement on a piece of land.[406] They were in the middle and operated as regionalised oppressors because not only did they have the power to enact regulations controlling his community, he also implemented all rules and was the manager in his territory in which he resolved disagreements; therefore making him judge, law maker, senior official, and overseer.[407] Despite the fact that traditional leaders were handed authority, realistically they had to utilise such within the boundaries permitted by the imperialist regime.[408] Their performance made them more acceptable within the regime and hostile with the community.[409]

[402] Buthelezi, Skosana and Vale (n 354) 58.
[403] Oomen (n 355) 20.
[404] Buthelezi, Skosana and Vale (n 354) 59.
[405] O Seemise "What does Mahmood Mamdani mean by "decentralised despotism"? Why was this idea employed in the African/South African context? 25 August 2016 http://www.academia.edu/32300930/What_does_Mahmood_Mamdani_mean_by_decentralized_despotism (accessed 16 August 2019) 13.
[406] Buthelezi, Skosana and Vale (n 354) 60.
[407] Oomen (n 355) 20.
[408] Seemise (n 315) 14.
[409] Oomen (n 355) 4.

Today traditional leadership is acknowledged by the 1996 Constitution; the establishment of traditional authorities, functions and position.[410] Section 211 (2) provides that the organisation may operate provided it does so within the framework of the Constitution while section 212 provide for national and provincial to create houses of traditional leaders and national legislation to form a council of traditional leaders in order to handle affairs involving traditional leaders. This means that traditional authority has a function of support at local level.

This is asserted by the Traditional Leadership and Governance Framework Act (TLFGA) which acknowledges traditional groups, creates traditional bodies and controls and outlines the functions of traditional leaders.[411] Section 5(1) obliges the national and provincial governments to encourage corporation between municipality and traditional councils. Section 20 (1) on the other hand allow traditional authorities authority to endorse social and economic growth; help local government to recognise community wishes; enable the participation of the public in progress; take part in the forming of rules and regulation and advancing the standards of collaboration administrative, cohesive expansion designing, maintainable growth and service delivery.

TLFGA is the principal section of law with branches such as Communal Land Rights Act (CLRA) and the Traditional Courts Bill (TCB). Section 3 of TLGFA has a profound effect on the control, influence and authority of relationships in communal areas and approves the creation and acknowledgement of traditional councils. The Act was never executed because it was lawfully challenged by four rural communities on numerous grounds of constitutional invalidity. This is what African jurisprudence should learn from and improve future land policies. The CLRA was successfully challenged in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*[412] on technical and functional grounds for being unconstitutional. The opposition was based on the decision by CLRA to give traditional leaders and land management councils extensive authority including regulation over acquisition, usage and administration of

[410] The Constitution of the Republic of South Africa Act 108 of 1996.
[411] Traditional Leadership and Governance Framework Act 41 of 2003.
[412] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

communal land which will weaken the community resident's security of tenure. This opposition was based on traditional leaders having complete authority over communal land at the cost of headmen, families and individuals which deteriorates accountability and challenges the purpose of transparent land administration.[413]

I am of the view that African jurisprudence land administration strategy can revisit these legislations, learn from their weaknesses and create a legislation that address control over occupation, use, management of communal land and security of tenure and be applicable to everyone in the country both rural and urban land.

4.3.1. African Jurisprudential Perspective on Traditional Leadership and Governance.

In African jurisprudence shared tenancy include plainly demarcated individual or family rights to different forms of land such as housing, cultivating crops, pasturing and woodlands. The structure encompasses rights of access and use on condition that one is a member of the community and those rights are exercised on behalf of the common and under authority.[414] African jurisprudence strategy on land should take advantage of traditional authorities' structures and build on them because they disclose characteristics of communalism and management. They have what Claassens and Cousins describe as land tenure relationship which is a group of privileges an individual or group legitimately or customarily holds in land regarding usage, period and circumstances. [415] Good governance is essentially about effective leadership which capitalises by making improvements on existing systems and encouraging leaders to rise to the challenge of modern governance by acquiring ethical values of leadership, liability, impartiality and honesty based on moral duties defined through *Ubuntu*.[416]

[413] A Claassens and B Cousins *Land, Power and Customs – Controversies generated by South Africa's Communal Land Rights Act* (2008) 131.
[414] Claassens and Cousins (n 367) 5.
[415] Claassens and Cousins (n 367) 6.
[416] Institute of Directors Southern Africa "King Report on Governance for South Africa (2009) at 10.

Traditional leaders under African jurisprudence should use their leadership position to promote security of tenure which involves permitted, managerial and communal systems dealing with the shielding of individual or group rights to land as well as recognised guidelines, measures and structures. They should advance strategy choices that administer landholding and land use managerial systems that advances the recognition of rights, interests and arbitration of fights.[417] African jurisprudence land administration policy discloses an alternative vision of land and property by taking advantage of traditional leadership structures. We need kings and chiefs that will push the African jurisprudence of *Ubuntu* and communalism and not become selfish individuals who think they own the land but understand that they hold and control land on behalf of the people with a purpose of advancing use and access for the well-being of the community. African jurisprudence must be on the quest to promote the well-being of the African through traditional leaders by training them to understand the purpose of *Kgoshi ke kgoshi ka batho*, meaning, the source and the justification of the royal power is the people or a chief is a chief by the people and this can only be achieved if the community has use and access to land.[418]

At the core of land restoration should be traditional leaders who are open about the recipients of land and property with the intention to benefit every citizen. Land restoration without regulation by traditional leaders will engrain the side-lining of the deprived, the helpless and the dispossessed and this is the reason why the procedure of land restoration is as imperative as the results required. Just and fair procedures, reinforced by reliable clerical and commitment by traditional leadership amongst others, will guarantee the accomplishment of the system of land use and access.[419]

4.3.2. Integration of African Jurisprudence and Traditional Leadership.

[417] H Mostert and others L *Land Law and Governance* African Perspective on Land Tenure *and Title* (Juta 2017) 5.
[418] M Dube "Translating cultures: The creation of sin in the public space of Batswana" (2015) 114 *Scriptura Journal for Biblical Theological and Contextual Hermeneutics* at 8.
[419] T Ngcukaitobi "How land expropriation would work" 08 June 2018 http://www.mg.co.za (accessed 17 August 2018).

The decolonisation of the Constitution in relation to African jurisprudence perspective on land and property must acknowledge the role played by traditional authorities. The crucial question of land possession and management is an essential factor of African law in which traditional authorities perform a primary function and should be incorporated in the future administration of land. Traditional regulations necessitated government administration and that made chieftainship a system of state jurisdiction. We need to have a coherent framework like the one proposed by Ismail referred to by Ntsebeza which attempts to combine characteristics of traditional regulation into the new land administration strategy.[420]

The traditional leaders must undergo training with the intention to enhance *Ubuntu* skills of understanding the purpose of use, access, control and management of land through consultation, consent, accountability and transparency. African jurisprudence discloses some essentials of the organisation of traditional leadership as it operated before colonisation through *Ubuntu* which should be merged into the new land administration strategy because pre-colonial, the chief always consulted the community every time important decisions were taken.[421] *Ubuntu* does not only improve communication between the chief and the community but affords input through direct involvement where serious disagreement can happen, generating views and resourceful ways of living together.[422] This also applies to those who do not live under traditional authority areas as confirmed by section 5(1) of TLFGA which obliges the national and provincial governments to encourage corporation between municipality and traditional councils. Regulation and administration of land and property resources are not the accountability of the government alone but include traditional leaders. Administration of the resource is within the community's control and is utilized by the traditional leadership on behalf of the community. [423]

[420] L Ntsebeza *Democracy Compromised; Chiefs and the politics of land in South Africa* (2008) 29.
[421] Ntsebeza (n 374) 33.
[422] L Karsten and H Illa "*Ubuntu* as a key management concept: contextual background and practical insights for knowledge application" (2005) 20 *Journal for Managerial Psychology* at 610.
[423] WJ du Plessis "African indigenous land rights in a private ownership paradigm" (2011) 14 *Potchefstroom Electronic Law Journal* at 5.

However, African jurisprudence should acknowledge the restriction with this kind of consultation by being inclusive and address historical gender inequalities, particularly observed from present need for equality because the attending people were married men only. Women and youth were not permitted to partake in these consultations where vital decisions that affected all villagers including women and youth were taken.[424] The on-going repression of indigenous authorities plus the recognition of traditional authorities halts the chosen and unity reconstruction indigenous orders in a way that promise that their retrieval is not in support of traditional leaders and male elders.[425]

Additionally, traditional leadership establishments are founded on the attribute of hereditary rule, which means that the likelihood of the community having the freedom to choose which leadership should govern them is instantly and without conscious thought done away with.[426] Notwithstanding the fact that the right to choose one's representatives is an important basic human right, it is not adhered to by the traditional leadership which is one of the reason that will be addressed by African jurisprudence.[427]

African jurisprudence land administration strategy alternative vision of land and property should recognise that the only way traditional leadership can be representative it appears would be for them to cease to support the title based on inheritance and undergo an election by the community, carrying with them the engagement characteristic entrenched in traditional democracy. The participatory and representative characteristics of democracy are essential in land administration policy to advance security of tenure and can be applied to the whole country regardless of whether it is in an urban and rural area for land expropriation without compensation to flourish.[428]

4.4. Conclusion

[424] Ntsebeza (n 374) 33.
[425] Madlingozi (n 375) 7.
[426] Ntsebeza (n 374) 33.
[427] Ntsebeza (n 374) 34.
[428] Ntsebeza (n 374) 34.

This chapter shows that African jurisprudence can disclose an alternative vision of land and property, but we first need to decolonise the Constitutional by looking backward to pre-colonial Africa, imperialism and forward through *Ubuntu* land restoration in order to improve land use and access. African jurisprudence has revealed that numerous people can have diverse legal entitlements over one resource under state custodianship where everyone benefits. This can be achieved by including traditional leaders and taking advantage of participatory elements they bring. We have also learnt that *Ubuntu* which is the foundation of African jurisprudence is found in land restoration, in use and access, in traditional leadership and again in the integration model. The amendment of legislations such as TLFGA and CLRA is crucial in including everyone and complying with transparency, accountability, consent and participation. We have seen that African tenures do not result in one to one relationship that can be split up and quantified because property object is notionally indivisible.[429] African jurisprudence can provide access and use of land to every citizen; by doing so this will lead to improved dignity and security of tenure, the real *Ubuntu* and communalism.

[429] Mostert and Verstappen (n 371) 98.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Summary of Study

This is the concluding chapter of this mini dissertation; it includes conclusion and recommendations only.

This mini dissertation is based on the African jurisprudential perspective on land and property in the historical context of colonisation and apartheid as well as the present post-1994 debates on land and section 25 of the Constitution.

Chapter one is the introduction and background chapter laying down the foundation, introducing research questions and chapter overviews.

In chapter two I focused on land dispossession and colonial conquest; how land dispossession is linked to the imposition of a Western legal regime of land and property; the impact of colonial conquest and the transitional period of discussion on land leading to section 25 of the Constitution.

In chapter three I focused on what is African Jurisprudence, *Ubuntu* and the core characteristics of African cosmology, Traditional leadership, justice and communalism.

In chapter four I focused on an alternative vision of land and property that could be disclosed by an African jurisprudence and secure security of tenure if we decolonised the Constitution and revised the traditional leadership and governance system through implementation of African jurisprudence and the integration model.

Chapter five is the current chapter and focuses solely on conclusions from the whole study as well as making recommendations.

Chapter six is on bibliography.

5.2. Conclusion

Having conducted a study on the above-mentioned topic, I now come to the following conclusion:

The South Africa's transition period from apartheid to democracy failed to address the land question. The adoption of the willing buyer, willing seller policy together with the inclusion of the property clause in the Constitution has fundamentally altered the lives of the African people for the worst by protecting the interest of the white minority unjustly acquired property. This has resulted in extreme inequality, unequal distribution of property rights in land and water which has been the legacy of white settler colonies.

African jurisprudence has shown that Africans have their way of living and knowledge which through decolonisation of the Constitution and implementation of the African tradition and culture can fundamentally change the lives of many people for the better. African people and their leaders can provide solutions for African problems which will restore the moral fibre in the African community.

5.3. Recommendations

It is by applying the principles of African jurisprudence together with the decolonisation of the Constitution that we can fundamentally change the mental, economic, spiritual and social status quo of the country. It is the only way we can radically improve use and access to land and property and guarantee security of tenure by adopting, amending and implementing an integration model of land policies which involves consultation, participation, consent, accountability and transparency for African people.

Land and property management should exist and function together with new or improved existing rights under relevant laws. The current Constitution does not work for the African majority and needs to be unlocked through decolonisation which involves looking back at the history of conquest and recognizing that Africans were dispossessed of land and property through war against humanity and looking forward to the future by adopting African jurisprudence values as a valid choice for land restoration in order to tackle the historic crimes produced by colonisation and apartheid authority in the dispossession of land. The implementation will guarantee unbiassed use and access to land and property and give the majority of South Africans power to be fruitful members who are in possession of their ancestor's land, contributing to food security and benefiting from agricultural reform programs.

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