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**REALIGNING HUMAN RIGHTS WITH THE LAND QUESTION  
IN SOUTH AFRICA**

By

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Khanimambo

## **ABSTRACT**

### **REALIGNING HUMAN RIGHTS WITH THE LAND QUESTION IN SOUTH AFRICA**

This study commences from the premises that the 1994 political settlement in South Africa as reflected by the 1996 Constitution and government policies offer no solution to the land question in South Africa. By the land question, I mean the unresolved question of historical injustice relating to land dispossession through various unjust actions that manifested in both colonial and apartheid times. The study asserts that the ideological and philosophical thrust of the Constitution is completely misaligned to the lived experiences and indigenous philosophies by Africans such as Ubuntu in favour of Western philosophies represented by neo-liberalism. This misalignment adversely affects effective resolution of the land question because it is neither bifocal nor restorative and consequently protects the status quo.

As regards policies of the current government and the ruling party the study argues that the much celebrated political dispensation of 1996 witnessed a change of a government and not necessarily that of a state. As I will show failure of state succession means that the colonial state form, and consequently deprivation of Africans of title to their lands, remain.

The study argues that the deliberate disregard of African philosophies in the negotiation process and consequently in the form and structure of the Constitution has created a false perception that the land question was resolved, and that what was left of it would be covered by the provisions of the Constitution. The Constitution, which has a complete disregard of the violent past as evident in land theft through conquest, pretends that South African land questions started with apartheid.

The study traces the rise of South Africa's neo-liberalism and her Constitution to the fall of feudalism in Europe, the wars of conquests and subjugation, the rise and fall of apartheid and the disregard of African philosophies and practices by the ANC before and after its rise to power. The study concludes that neither the current Constitution, nor current half-hearted government policies on land will provide a solution to the land question.

The study consider the Constitution an instrument for legalizing land theft and calls for a completely new Constitutional dispensation as opposed to an incremental approach. The study concludes by proposing six steps that should be taken to developing a new Constitution. Central to those six steps is the principle of participation by the victims of conquest and subjugation.

Participation will mean the latitude granted to victims to make inputs into the contents of the Constitution before adoption by parliament and to confirm their support for a new document through a referendum shortly before it is officially signed off by the head of state.

This study will therefore consider, the hitherto unappreciated views on human rights, by victims of colonialism, which views are in many respects contrary to those reflected in the South African Constitution. Consequently, one of the central arguments of this study is, therefore, that the realignment of human rights with the land question necessarily implies the reframing of the concept of human rights itself.

**KEYWORDS:**

Decoloniality

Human rights

Land question

Lived experiences

Ubuntu

**LIST OF ABBREVIATIONS**

AMCU	Association of Mineworkers and Construction Union
ANC	African National Congress
ANCYL	ANC Youth League
BCM	Black Consciousness Movement
COSATU	South Africa Congress of South African Trade Unions
CPSA	Communist Party of South Africa
EFF	Economic Freedom Fighters
GEAR	Growth Employment and Redistribution
NP	National Party
NUMSA	National Union of Metal workers of South Africa
OUTA	Organisation Against Tax Abuse
PAC	Pan Africanist Congress
SACP	South African Communist Party
SAFTU	South African Federation of Trade Unions
SASO	South African Student Organisation

## TABLE OF CONTENTS

<b>DECLARATION OF ORIGINALITY</b> .....	1
<b>ACKNOWLEDGEMENTS</b> .....	3
<b>ABSTRACT</b> .....	4
<b>KEYWORDS</b> .....	6
<b>LIST OF ABBREVIATIONS</b> .....	6
<b>CHAPTER ONE: INTRODUCTION AND BACKGROUND CONTEXT</b> .....	9
1.1 Introduction and background.....	10
1.2 Research problem.....	11
1.3 Significance of the study.....	15
1.4 Objectives of the study.....	16
1.5 Theoretical framework.....	17
1.6 Literature review.....	19
1.7 Research methodology.....	20
1.8 Chapter overview.....	21
<b>CHAPTER TWO: HOW FEUDALISM, THE FRENCH AND BRITISH REVOLUTIONS SHAPED A COLONIAL VERSION OF RIGHTS</b> .....	22
2.1 Introduction.....	22
2.2 Feudalism and rise of Eurocentric property rights.....	23
2.3 The French revolution model.....	25
2.4 The Napoleonic civil code and land ownership.....	25
2.5 The end of British Feudalism and the thrust of British Property Law.....	28
2.6 The conspiracy of human rights and international law.....	29
2.7 Conclusion.....	32
<b>CHAPTER THREE: THE IDEOLOGICAL AND PHILOSOPHICAL CHALLENGES ON THE LAND QUESTION IN SOUTH AFRICA</b>	
3.1 Introduction.....	34
3.2 The concept of human rights.....	35
3.3 The Western concept of human rights.....	36
3.4 A neo-liberal construct of human rights.....	36
3.5 The relevance of decoloniality in human rights.....	38



3.5.1	The “human” in human rights.....	39
3.5.2	Who speaks for the human in human rights?.....	40
3.5.3	What provision is there for the lived experience of the human in human rights?.....	42
3.5.4	Whether human rights adopt a bifocal nature?.....	42
3.6	The South African Constitution and human rights.....	43
3.7	Conclusion.....	44

**CHAPTER FOUR: THE IDEOLOGICAL ORIENTATIONS OF POLITICAL ACTORS THAT INFLUENCED THE CURRENT CONSTITUTIONAL DISPENSATION..... 45**

4.1	Introduction.....	46
4.2	The ANC and human rights.....	46
4.2.1	The context of its formation.....	46
4.2.2	The ideology of the ANC.....	46
4.2.3	Critical historical moments for reflection.....	47
4.2.4	The human right stance of the ANC.....	49
4.2.5	Factors that influenced ANC human rights policy.....	50
4.3	The Pan-Africanist Congress.....	51
4.3.1	Conditions that led to the establishment of the PAC.....	51
4.3.2	The PAC’s ideology and human rights stance.....	52
4.3.3	The demise of the PAC and the resurgence of its ideology.....	53
4.4	The Black Consciousness Movement.....	53
4.4.1	The context of the BCM’s formation.....	54
4.4.2	The ideological and philosophical outlook of the BCM.....	54
4.4.3	The impact of the BCM on the political landscape.....	55
4.5	The National Party.....	56
4.6	Conclusion.....	57

**CHAPTER FIVE: A FRAMEWORK TO ADDRESS THE LAND QUESTION IN SOUTH AFRICA..... 59**

5.1	Introduction.....	59
5.2	Historical account of land dispossession in South Africa.....	59
5.3	Some salient features regarding the land question in South Africa.....	65
5.3.1	South Africa as the world’s most unequal country.....	65
5.3.2	Vast amounts of land owned through conquests.....	66

5.3.3	Conquests legalised by colonial and apartheid laws.....	67
5.3.4	The status of the South African Constitution.....	67
5.3.5	An inappropriate philosophy in human rights.....	68
5.4	A framework to align human rights with the land question.....	69
5.4.1	A definition of a bill of rights.....	69
5.4.2	Participation by all citizens.....	70
5.4.3	Effecting an appropriate philosophy on human rights.....	71
5.4.4	Development of a new Constitution.....	71
5.5	Conclusions and recommendations.....	72
<b>REFERENCES.....</b>		<b>75</b>

# CHAPTER ONE – INTRODUCTION AND BACKGROUND CONTEXT

## 1.1 Background

This study is about aligning the concept and core principles of human rights with the land question in South Africa. By the land question, I mean the unresolved question of historical injustice relating to land dispossession through various unjust actions that manifested in both colonial and apartheid times. The evidence of the misalignment of human rights and the land question is demonstrated by multiple protests and public pronouncements against the inadequacies of the 1994 political settlement as represented by the Constitution and government policies.

The protests against the defects of the settlement and its ability to meet the expectations of Black people took various forms and is executed by a wide spectrum of the Black community. Among these protests were some by University students who, even though their principal demands were education related, they openly objected to the presence of colonial symbols in society and called for a decolonised thrust of education as precursor to the complete decolonisation of society.<sup>1</sup> These students protests have inaugurated what we call a ‘decolonial turn’ in society.

Workers across the board objected to what they considered a collaboration between the ruling class and their exploitative bosses. Even the most powerful trade union in South Africa Congress of South African Trade Unions (COSATU), witnessed a breakaway on alleged ideological and relations with the South African state. The biggest union, which later became the backbone of a new federation, South African Federation of Trade Unions (SAFTU). National Union of Metal workers of South Africa (NUMSA), was expelled from COSATU after denouncing the ideological position of African National Congress (ANC), the major sponsor of the 1994 political settlement and the Constitution.<sup>2</sup> The rise of the Association of Mineworkers and Construction Union (AMCU), was also partly fuelled by discontent on the ability of the settlement to meet workers expectations.

AMCU openly denounced government policy and assumed an ideological posture similar to political organisations such as the PAC (Pan Africanist Congress) which rejected the 1994 settlement. Around the time of the Marikana massacre the union and its lawyers implicated a high ranking officials of the ruling party, who has since become president as a source of their problems in the platinum mining sector. <sup>3</sup>

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<sup>1</sup> Gukurume, S, and Maringara, G, (2001) Being Back in #FeesMustfall and #freedecolonisolidEducation: Students protests at the University of the Western Cape, pp. 39-40

<sup>2</sup> McKinley, D.T, (2014) The political significance of NUMSA’s expulsion from COSATU, The South Africa Civil Society Information service, Johannesburg.

<sup>3</sup> Farlam, G, (2015) *Marikana Commission of Enquiry*, pp. 411 -438 [www.sahrc.org.za](http://www.sahrc.org.za)

In general, and in recent times the number of protests against the state far surpassed those that existed at the height of apartheid. By the end of the first decade after the 1994 elections, a pattern of an alarming state of protests against various spheres of the government which amounted to a rebellion by the poor was evident. <sup>4</sup>The growing dissatisfaction from the youth, workers, landless urban Black people, and the rural poor is a clear indication that the celebrated miracle of 1994 is completely misaligned with the expectations of the majority of Black South Africans, in whose name it was conceived.

The rise of organisations such as Abahlali baseMjondolo/Shack Dwellers Movement, with an ideological orientation which stands in complete opposition to the ruling party in their demand for urban land reform, is also evidence of a growing rejection to the human rights provisions as per our current Constitution. It also confirms that there is a different thrust among the dispossessed on what constitutes human rights and how a regime of human rights should apply to them.

In this study therefore, human rights as they apply in the Ubuntu philosophy will be presented as an alternative to the neo-liberal thrust in the Constitution. An emphasis will be made of the bifocal nature of Ubuntu as evident in idioms such as “molato ga o bole” (a pedi idiom meaning an offence does not prescribe). Ubuntu also emphasises the centrality of the community as opposed to the individual. Consequently land theft would be an offence against communities.

## 1.2 Research Problem

There is no country in the African continent which has experienced and witnessed a well-planned and systematic dispossession of an indigenous people through conquest and employment of the law in a scale similar to South Africa. What renders this dispossession even more relevant for the discourse of human rights is the extent to which the laws justifying dispossession were implemented by state agencies.<sup>5</sup>

The current laws seem to ignore the violent history of land dispossession which started long before the arrival of the Dutch in 1652. The Portuguese under the guise of exploration made the first attempt to colonize South Africa in 1488 with the arrival of Bartholomew Diaz. <sup>6</sup> This was 164 years before the arrival of Jan Van Riebeck in 1488.

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<sup>4</sup> Eide, C, I and Jili, N,M, (2020) *Service delivery with Wanton protests in Megalopolises*, South Africa, Journal of Politics and development, Vol 10, no 2, Department of public administration. University of Zululand.

<sup>5</sup> Beinart, W, et al *Putting a Plough to the Ground: Accumulation and Dispossession in Rural South Africa 1850 to 1930* (Ravan: Johannesburg) pp1.

<sup>6</sup> Swanson, J , (2008) Bartolomeu Diaz, Rosen Publishing group New York pp. 05

The battle of Oude Melon in between the Khoi and the Portuguese in 1651, which involved a dispute over stolen cattle and resulted in the death of a high ranking Portuguese commander, Francisco de Almeida, was evidence of a culmination of the violent nature of dispossession, long before the arrival of the Dutch<sup>7</sup> Portuguese, who constituted an earlier contingent of settlers were driven away, by violent means by those they sought to dispossess.

The withdrawal of the Portuguese was followed by the arrival of the Dutch a century later. Shortly after their arrival, the Dutch effected a program to seize land from the Khoi and the San. Years later, the subsequent annexing of the Cape by the British and the systematic control of the then Natal granted the settlers a geographical launch pad to further dispossess the indigenous people.<sup>8</sup> Of even more significance is how the long-term impact of dispossession resulted in economic disparities against Black people and how this impoverished their cultural, religious, social and political identities.

The above notwithstanding, the problem remains that human rights as provided for in the South African Constitution have not translated into a solution to the land question, which is a subject of intense contestations at various levels of society including, various political actors participating in parliamentary activities. A call by an opposition party, the Economic Freedom Fighters (EFF) for an amendment of Section 25 of the Constitution, and the subsequent concurrence by the ruling party, the African National Congress (ANC) demonstrated that legislative provisions are far from being adequate to resolve the land question.<sup>9</sup>

To date, Section 25 of the Constitution, the Land commission, the Land court, various policies evident in the government White Paper do not address the injustice of dispossession in a manner that concede to land theft. This is irrespective of the fact that it is more than twenty years after the 1994 election and sixty-three years after the land question has led to the formation of a splinter political grouping from the current ruling party. As recent as 2017, Africans owned as little as 4% of agricultural land, whilst white people owned 72% of same.<sup>1</sup>

As it stands, the issue has become a source of political and social tension in the country. These tensions are evident in the rate of land occupations, which are illustrated by a whopping sum of two hundred, in Cape Town alone by the 4<sup>th</sup> of August 2018.<sup>10</sup>

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<sup>7</sup> Mkhize, N, M (2019, The Precolonial rise of Khoisan economies, [www.thejournalist.org.za](http://www.thejournalist.org.za)

<sup>8</sup> Parliamentary Monitoring Group (2018) [www.pmg.org.za](http://www.pmg.org.za)

<sup>9</sup> Land Audit Report, November (2017) version 2 Department of Rural Development and Land Reform Republic of South Africa

<sup>10</sup> ENCA news <https://www.enca.com>news.cape-town> (Date of use: 22 April 2020)

Writing four months earlier, Madlingozi illustrates the alarming state of land redistribution by asserting that South African whites who constitute 8% of the population own 72% of farms, whilst Black Africans who constitute 80% of the population own 4% of the land.<sup>11</sup>

It is not surprising that the youth, led by political formations such as the Economic Freedom Fighters and student youth in the Fees Must Fall Movement have raised land as a central factor in transforming society. The ruling party has since adopted a resolution at its national conference which recognizes the land issue as a problem that deserves a Constitutional amendment.

As evident on different opinions around the ability of Section 25 of the Constitution to resolve the land question, the Constitution's capacity to have a clear directive on dispossession is doubtful. The recent decision by parliament to amend the Constitution to expropriate land without compensation confirms the limitations the Constitution has always had on addressing dispossession. This decision appears to confirm that the subject of conquest and the need for restoration has not found an appropriate expression in the Constitution and that the human rights provisions of the Constitution do not adequately address the land issue. There is also a clear recognition that the land issue would be a source of instability if not addressed.<sup>12</sup>

What constitute even a bigger problem is the lack of a theoretical and legal consensus on the interface between human rights and the land question. This is understandable, as the relationship between the two is often a function of both a philosophical and an ideological approach. It is the lack of a middle ground among South African scholars, the victims of dispossession and policy makers which impoverish a strategy to confront dispossession.

At the centre of this problem lies the inability of the Constitution to assume a nature of a decolonizing Constitution in which case it would define the past for what it is, and to project the future as it should be. If the above prescription would be met, the Constitution would be a product of a new state, as opposed to having merely witnessed a change of government.<sup>13</sup>

This study is premised on the assertion that there is an intrinsic relationship between human rights and the land question in South Africa, and that at the centre of growing poverty and instability in South Africa lies the unresolved question of land dispossession, and absent Constitutional provisions to define human rights in a manner that encompasses the lived experiences and expectations of the victims of conquest.

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<sup>11</sup> Madlingozi, T (2018) *The Proposed Amendment to the South African Constitution: Finishing the Business of Decolonisation?* (University of Pretoria 2018)

<sup>12</sup> <https://lol.co.za/news/opinion> : Ramaphosa speech at Afrikanerbond (Date of use: 23 April 2020)

<sup>13</sup> Madlingozi, T, (2018) *The Proposed Amendment to the South African Constitution: Finishing the Business of Decolonisation?* (University of Pretoria )

Land is at the centre of economic development: It's about food security, shelter, the control and exploitation of minerals, and about raw materials it is for this reason that it affects the worker, the student, the aspiring owner of a house and entrepreneurs.

It is this land that the Black majority was disposed of through various means. These means were military conquests, skewed "treaties", land purchases and a legislative regime meant to dispossess Black people. Of the four means of subjugation the first was more prevalent in the first four centuries of occupation and it was violent and disruptive.<sup>14</sup> Legislation gained dominance from the late 19<sup>th</sup> century to just before 1990, a period before the democratic dispensation.<sup>15</sup>

The study is concerned to show that an intrinsic relationship exists between human rights and the land question in that our understanding and conceptualization of human rights has a lot of bearing on how we approach the resolution of land question.

This study will not view the origins of the land question as having been stimulated only by the various Land Acts that further dispossessed Black people. Instead, one of the original contributions of this study is to draw a nexus between developments in the Western World as regards the concepts of human rights and how this had a bearing on the state of rights in South Africa.

More specifically, this study will argue that the relationship between human rights and the land question finds expression not only in property ownership but in the philosophy governing various facets of the property regime including ownership, restitution and harvesting the proceeds of the property.

More importantly, the concept of human rights in this study will go beyond its characterisation as an individual's legitimate claims from society to include redress and reparation for historical injustice. Key to this reframing will include the examination of what is considered "human: in the concept of human rights."<sup>16</sup> It will also transcend the centrality of the individual in the neo-liberal definition of human rights.

Therefore, the definition of human rights in this study will include the rights of communities, their belief systems and philosophies. Human rights will therefore be analysed in full tandem with alternative indigenous philosophies and beyond Eurocentric paradigms. The proposal will start off by raising the main problem and it will be argued that the context of the problem should be examined as both an ideological and philosophical issue. It will be demonstrated that there has been a disregard of the oppressed people's wisdom(s) and lived experiences in the crafting of the Constitution and by extension the provisions on land rights.

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<sup>14</sup> Ngcukaitobi, T, (2018), *The Land Is Ours*. 1<sup>st</sup> ed Cape Town pp 272.

<sup>15</sup> Maldonado-Torres, N, (2017) "On the Coloniality of human rights" *Open Edition Journals* 117-136.

Once again, emphasis must be made that this study will appreciate that this exercise takes place in the midst of restlessness among the disposed on the land issue. This has not only brought pressure to bear on political leaders, but it has propelled a rethink among scholars on an appropriate human rights and land regime in South Africa. For this reason at the time of research on this study the South African parliament had voted for the amendment of the Constitution to allow for more latitude to expropriate land without compensation.

This study will argue that the above measures of amending the Constitution on a piecemeal basis, falls far behind what would meet the expectations of the majority of South Africans as their lived experiences require a complete change of ideological and philosophical orientation to both a definition and periodization of human rights and the land question.

### **1.3 Significance of study**

As mentioned above, this study will advocate for the realignment of human rights with the land question. This realignment implies the reframing of the concept of human rights which is currently not in tandem with the lived experiences of the indigenous people of South Africa. To achieve this the study will present a hitherto unappreciated concept of human rights, which concept adopts a bifocal approach to human rights and consequently to the land question. By a bifocal approach I mean the need to avoid relegating injustices of the past to obscurity, in favour of elevating present land ownership and future ownership as the main stream of the resolution of the Land question. A focus on both the past and the future will partially constitute the main thrust of resolving the land question.

This study will argue that failure to appreciate the violent nature of land dispossession as a complete disregard to human rights is an immense misalignment of human rights and the land question and that a realignment is necessary to provide a lasting solution. The significance of the study is in part informed by the simmering anxiety both at a political and at the level of the beneficiaries of conquest and their victims on how their human rights are linked with the land issue in general and individual property rights in particular.

The study acknowledges the lack of a theoretical and legal consensus on the relationship between human rights and the land question. It will further acknowledge, as stated above, that there seems to be no practical solution offered by the state on the land question and on the immediate nature for land for both productive activities and residential purposes by the dispossessed. This study will constitute an addition to the body of knowledge on the ideological and legal pitfalls of the current Constitutional regime, how best legal provisions can address the land question and an appropriate philosophical approach on the questions of conquest, dispossession and restoration.



Herein lies the significance of the study: it elevates the land question as a central aspect of human rights, and presents dispossession as a critical variable requiring victim-initiated remedy. It rejects the relegation of indigenous philosophies into obscurity in the resolution of the land question.

#### **1.4 Objectives of the study**

The main objective of the study is to demonstrate that in South Africa, the dominant concept of human rights is one of the main contributors to the failure to resolve the land question. This concept of human rights is imperative to resolve the land question.

The sub-objectives of the study are as follows:

- To demonstrate that land dispossession in South Africa by European settlers had a historical nexus with the practice of feudalism in Europe and how Europeans have always seen other people as non-humans.
- To demonstrate the neo-liberal nature of the South African Constitution and the ideological similarity of the major political contributors to the Constitution. To question the assertion that the consultations done by parliamentary structures on the Constitution constituted an appropriate accommodation of the views and lived experiences of the African people.
- To present ignored indigenous philosophies on Land and human rights such as Ubuntu, and to advance the relevance of decoloniality as an appropriate philosophical framework to address the land question.
- To provide an appropriate philosophical framework and practical considerations to resolve the Land question in South Africa.

#### **1.5 Theoretical framework**

In determining an appropriate theoretical framework for the land question in South Africa and a recognition of the main actors in the South African struggle, two main philosophical strands will be invoked; namely, Marxism and decoloniality. The contrasts between these theoretical thrusts and other approaches to human rights such as transformative Constitutionalism will be further discussed in the sections that will follow.

The main theoretical thrust in this study will be in favor of decoloniality. This is because decoloniality appreciates organic and local ideas and represents an alternative to western thinking. It demystifies the notion that western ideas, whether in the form of liberalism or Marxism bear universal applicability. Herein a brief literature review.

## 1.6 Literature review

Marxism would be best captured by Marx's characterization of private property as the enjoyment of one's possessions without regard to others and as equivalent to selfishness.<sup>17</sup> This is in stark contrast to the position of the South African Communist Party which argued land should be merely confiscated by the state and be given to those who live and work upon the land.<sup>18</sup> There is nothing in their statements about conquest, the community or regard for others.

The difference between South African Marxists and neo-liberals is that with the former, one must demonstrate some form of productive use for the land whilst with the latter individual property rights is at the nerve center of human rights. Some such as Locke link property rights to what they term the natural law of self-preservation.<sup>19</sup> The individual and his interests reign supreme and any effort that suggests rights are beyond an individual constitutes a violation of human rights. Decoloniality refers to inter alia the culture, logic, power matrix created by colonial experiences which still enjoy observance long after colonialism has been officially terminated.

It commences from the premises that colonialism and now recently neo-liberalism have immensely undermined and altered indigenous people's ways of living, thinking, and sense of being. As Mignolo would argue, even the European renaissance did not recognize all humans as worthy of equal status, to the point of employing the language of the powerful as a yard stick to determine who is human and who is not.<sup>20</sup> In the case of human rights decoloniality would pose the question who is the human in human rights? This question attacks the concept of the human as defined by geography, skin colour and race. Fanon refers to the divide as onto manichen colonial line which renders some human forever colonised.<sup>21</sup>

Santos refers to the colonial line as the abyssal line. The line refers to the view that only the Western society was civilized and consequently considered to be constituted by humans, whilst the rest of the world did not.<sup>22</sup>

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<sup>17</sup> Tafira, CK, and Ndlovu-Gatsheni, SJ (2017) "Beyond coloniality of markets exploring the neglected dimensions of the land question from endogenous African decolonial epistemological perspectives" *African Insight*, Volume 46 No 4 March 2017 pp 9-24.

<sup>18</sup> SACP 1963 "The Road to Freedom" 36.

<sup>19</sup> Marx, K, "On the Jewish Question" (1843) in Turker R (ed) *The Marx-Engels Reader* (1978) 26-46.

<sup>20</sup> Mignolo, W, *The Darker Side of the Western Modernity: Global Futures, Decolonial Options* (Durham: Duke University Press 2011) 39&40

<sup>21</sup> Fanon, F, *The Wretched of the Earth* (Translated by Philcox R) New York Grove Press 178 & 239.

<sup>22</sup> Santos, B, "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledge's" 2007 *Review* 30(1) 48 - 49.

Decoloniality would therefore take interest in raising questions such as: who speaks for the human in human rights and whether the lived experience of indigenous people matter in a human rights dispensation.

In some respects, decoloniality stands in stark contrast with Marxism in that the latter point of departure is that the analysis of development starts with the human in the feudal Western world. Marxism also sees equality in the human through the occurring of various future stages and events.<sup>23</sup>

Decoloniality would agree with Marx on the need to have regard to others and to be selfless. It would concede to property as a nerve center of human rights but not necessarily for the individual only, but for the community and in most cases for the common good. Land in this case would assume a value beyond economic value and would encompass identity and spiritual dimensions.<sup>24</sup>

As regards the current ideological posture of the Constitution, it would be best characterised as a neo-liberal document.<sup>25</sup> This does not mean it does not have aspects that are pro-poor, but in general, it makes assumptions that amount to the universalisation of human rights and further pretends that variables such as individual rights and freedom of speech can be effected in a political and social vacuum.<sup>26</sup>

The key elements of neo-liberalism are: Individual freedoms, protection of individual rights, elevation of markets as drivers of economic development and promotion of individual success. It encourages and reinforces individual ownership of property and discourages a radical interference with the status quo.

Even though the Constitution turned out to be neo-liberal as evident in its emphasis of individual rights as opposed to Ubuntu principles which emphasize collective ownership and mutual obligations, the African National Congress (ANC) which was one of the two dominant actors in the negotiation process professed to be closer to Marxism, by virtue of its alliance with the Communist Party and also from the dominance of self-professed Marxists in the drafting of ANC policies over the years. This includes the drafting of documents as important as the Freedom Charter by communists such as Norman Levy.

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<sup>23</sup> Grosfoguel, R, Decolonising Western Universalisations: dialnet.uniroja.es 2012

<sup>24</sup> Savanovic, A, "Economic neoliberalism: Property Right and Redistribution Policy *International Journal of Humanities and Social Sciences* Volume 19 No 5, 2015.

<sup>25</sup> Narsiah, S, Neoliberalism and privatization ins South Africa Geo Journal vol 57 No ½ South Africa 2002 [Accessed: 3 September 2020]

<sup>26</sup> Moyn, S, A Powerless Companion: Human Rights in the Age of neo-liberalism (Law and contempt books 2017)77

<sup>27</sup>Their faith in stagism and their reliance on policy positions drafted by Communists such as Harold Wolpe.<sup>28</sup>

Alternatives that were offered by the Pan Africanist Congress (PAC) and the Black Consciousness Movement (BCM) will be discussed. These alternatives will centre around the identities of the conqueror and the victim. It will also define a route to addressing dispossession and to end the division between the conqueror and the conquered. The theoretical framework will be concluded by a juxtaposition of transformative Constitutionalism (implying upholding social and political justice)<sup>29</sup> and decoloniality, which asserts that repeating colonial ideas on Africa and an overemphasis on whiteness do not constitute a meaningful project.<sup>30</sup>

One clear distinction between transformative Constitutionalism and decoloniality is that the former is keen to undo discrimination based on race, sex and colour but on the same breadth offers equal rights to all South Africans.<sup>31</sup> In reality, this implies offering the same treatment to the perpetrators of dispossession. The ultimate implication is that the conqueror and the conquered gain the same rights without any undoing of the dispossession. Decoloniality insists on establishing a clear distinction between the conquered and their victims. The question whether goods acquired through conquest constitute a right becomes relevant and so are the identities of the conquered and their victims.<sup>32</sup> It is this approach that this study will adopt. This will be informed by the rationale that an examination of land alienation and related legislation is better done when the parties affected are clearly identified.<sup>33</sup>

## 1.7 The Research methodology

The primary approach to be employed in this study will be the legal-historical method. The approach bears relevance as the topic calls for a good account of historical developments on the issue of human rights and how various political and economic developments over the years have shaped both its ideological frame and practical application.

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<sup>27</sup> Levy, N, (2016) *The Final prize: My life and the Anti-apartheid struggle* (SAHO, Cape Town )

<sup>28</sup> Wolpe, H, *Capitalism and Cheap labour power in South Africa: from segregation to apartheid 1972 society: Vol 1 No 4* Taylor and Francis online.

<sup>29</sup> Mashele R (2014) *Transformative Constitutionalism in South Africa: 20 years of Democracy 2014* Mediterranean Journal of Social Sciences Vol 5 no 27, MCSER Publishing, Rome

<sup>30</sup> Madlingozi, T, *Decolonising "decolonization" with Eskia Mphahlele*  
<https://www.power987.co.za>life>deco> (Date of use: 21 April 2020)

<sup>31</sup> Teshome, M, *Transformative Constitutionalism in South Africa* [www.researchgate.net](http://www.researchgate.net) (Date of use: 21 April 2020)

<sup>32</sup> Madlingozi, T, "Social justice in a time of neo-apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition Incorporation and Distribution" (University of Pretoria)

<sup>33</sup> Rao, P.L,(2017) *Tribal Land question* (Rawat Publications New Delhi )

A Legal-Historical Method implies a recognition and appreciation of the history of legal developments and what shaped both the character of legal institutions and the law in question.<sup>34</sup>

This approach will commence from the premise that the law does not owe its existence to a lack of activity and purpose in the political sphere. It is, in the case of human rights, a product of ideology and political interest whose origins can be traced to History. The law does not happen on its own, it is often created to serve a quantifiable purpose and sometimes the patterns of history can be correlated with the development of the law.<sup>35</sup> Legal historical research provides a window to evidence from the past and examines hypotheses which link the future to events and trends that have long happened.<sup>36</sup>

In pursuit of the above, both primary and secondary sources will be employed to test the identified hypothesis and to verify the correlation between ideology, philosophy, the law, and the challenge of the land question. The sources will include *inter alia* the following: Secondary sources: this will include textbooks from both the disciplines of History and Law. Some textbooks from the broader family of Social Sciences will bear relevance. Various articles which are within the confines of the topic and commentators will also be employed.

Even more relevant will be books penned by third-party observers of the unfolding political and legal historical worlds.

Primary sources: this will include the various statutes, diaries of the main actors, Court cases and applicable regulations. It will be accepted that neither secondary sources nor primary sources may constitute an adequate test for the chosen hypothesis.

## **1.8 Chapter overview**

The study will be constituted by five chapters which will be subdivided as follows:

The first chapter presents a background context, a literature review and an outline of the thesis. The second chapter seeks to examine the historical nexus between human rights and the land question. This chapter will present the argument that what became a grand scale land dispossession in South Africa since the arrival of white colonialists was in fact a regurgitation of European feudalism.

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<sup>34</sup> Du Plessis, W, A (2007) "Self Help Guide to Research Methodology" (University of the North West) Potchefstroom.

<sup>35</sup> Fisk, C.L, and Gordon, R.W, "Law as theory and Method in Legal History" [www.law.uci.edu](http://www.law.uci.edu) (Date of use: 21 April 2020)

<sup>36</sup> Freddie, S, and Pinuela, E.D,D Historical Research Laguna State Polytechnic (University Laguna)

The third chapter will address the philosophical and ideological challenges of the land question in South Africa. It will provide a theoretical context of the Land question in South Africa. It will juxtapose two opposing theoretical trends on the Land question which are neo-liberalism and decoloniality. Even though reference will be made to theories such as Marxism, an argument will be made that South African Marxism has always been a version of Liberalism.

Chapter four will examine the ideological and philosophical orientation of the various political actors who contributed to the 1994 political settlement in South Africa. These ideological and philosophical orientations will be analysed against neo-liberalism which is the current dominant theoretical thread in our Constitution.

The fifth chapter will develop a framework to address the Land question in a manner that confronts both the past and the present. It will further define the status of both the conquerors and the conquered in the resolution of the Land question. It will also propose an alternative Constitutional dispensation to define human rights as they relate to the Land question. A summary and conclusion section of this chapter will demonstrate the irrelevance of neo-liberalism in resolving the land question in South Africa. It will argue against transformative Constitutionalism in favour of a non-incremental approach as remedy to the current Constitutional conundrum that remedy will be a complete development of a new Constitution in manners complete different from the 1994 exercise.

## **CHAPTER TWO**

# **HOW FEUDALISM, THE FRENCH AND BRITISH REVOLUTIONS SHAPED A COLONIAL VERSION OF HUMAN RIGHTS**

### **2.1 Introduction**

This chapter seeks to lay a basis that what became a grand scale land dispossession in South Africa since the arrival of white colonialists was in fact a regurgitation of European feudalism. To this end a clear linkage between the structure and nature of feudalism, the intentions and subsequent land dispossession by the colonialists will be demonstrated. This linkage will be done in the context of examining the historical relationship between land and human rights. The concepts of land rights and property rights will be used interchangeably in this study.

The chapter will make a brief analysis of the victory over feudalism with particular reference to the French Revolution and the end of same in Britain. Focus will be made on the French Revolution and the British experience in as much as settler colonialists in South Africa who participated in land theft, had direct influence from the post feudal French and British legal systems and of systems that preceded them such as feudalism and Roman law.

An examination of the global influence of the principles adopted in French legal instruments such as the Napoleonic Code and the post feudal British property rights regime will be made. An explanation will be made of how these supposed legal milestones and new Human Rights provisions were a reaction to the tyranny of feudalism.

The emphasis will be made that the general trend in Western Revolutions was a complete marginalization of the dispossessed at the end of these revolutions. The ones who were triumphant were those that wrote the new human rights declarations, other forms of legal provisions and Constitutions. This became what we can refer to as the colonial concept of human rights. The next sections will examine the end of feudalism in France and how this enhanced a Western version of human rights. It will be followed by a British version of the relationship between the end of feudalism and their concept of human rights.

## 2.2 Feudalism and the rise of Eurocentric notion of property rights

Feudalism was the main social and economic system in medieval Europe, and it started in the 15th and was practiced up to the 19th century. It is a system where the lords would own the land and the peasants would serve and live on a piece of land in full homage to the lord in exchange for one kind of protection or the other.<sup>37</sup>

It is the defeat of this system that has made the French Revolution one of the most significant developments of the past three centuries is the French Revolution. For purposes of this study, its significance lies in inter alia how it led to a new definition of human rights and how one of its most celebrated consequences was to abolish a system of land ownership which respected no equality amongst citizens.<sup>38</sup>

Even more important is how the French Revolution became a referral point for human rights beyond France and also, how in no small measure influenced Britain, the most powerful colonial power of the time.<sup>39</sup> Even the United States of America, the world's most powerful economic powerhouse which in some quarters may be considered a paragon of freedom, bears some influences of the French Revolution.<sup>40</sup>

One of the reasons why the French Revolution is celebrated the world over is that one of its direct consequences is the formal abolishment of feudalism. This is evident in the meeting of the National Constituent Assembly of the 4th of August 1789.<sup>41</sup> In the National Constituent Assembly the ideas of Rousseau and Locke played a significant role in directing deliberations and subsequent resolutions.<sup>42</sup> Rousseau is in some circles hailed as the father of structural individualism.<sup>43</sup> Locke is also considered a proponent of individualism and of classical liberalism. He considered the state as a necessary evil and believed an individual could operate within the laws of reason and coexist with others without the state's involvement.<sup>44</sup>

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<sup>37</sup> <https://www.oxforddictionaries.com> (Date of use: 29 April 2020)

<sup>38</sup> Gershoy, L, (1957) *The Era of the French Revolution* (Van Nostrand Company, New Jersey) p.p12.

<sup>39</sup> Wallerstein, I, (1990) *The French Revolution as a world historical event, in The French Revolution and the birth of Modernity Edited by Feher F University of California Press California*

<sup>40</sup> Monk, I.H, (2005) *The Impact of the French Revolution*, Cambridge University press Cambridge).

<sup>41</sup> Sydenham, M.J, (1965) *The French Revolution*, William Clowes and Sons, London, p 55.

<sup>42</sup> <https://www.libertarianism.org> (Date of use: 24 April 2020)

<sup>43</sup> Dechaux, J, Rousseau and the Symbolic Bond between People: Contribution to structural Individualism.2010 Sociologie, Vol.1 (2) pp. 273 PUF

<sup>44</sup> Bishop, P.C, (2007) *Three Theories of Individualism A thesis Master of the Arts*. Department of Philosophy University of South Florida) 21-22



One of the most outstanding achievements of the National Constituent Assembly was an adoption of a document entitled the Declaration of the Right of Man and the Citizen. This document which subsequently assumed the status of a declaration was authored by Marquis de Lafayette.<sup>45</sup> Lafayette was a known supporter of Thomas Jefferson an individual rights proponent and a wealthy land and slave owner.<sup>46</sup> Just like Jefferson, Lafayette himself was from a rich land owning family in South Central France.

Other than the promotion of individual freedoms, the inviolability of the person, detesting of oppression, equality before the law and discouragement of illegal arrests, at the centre of the declaration was private property rights. The private property provision in the declaration stood in direct contrast to the land rights as espoused in feudalism in that it granted individual citizens land rights which were an exclusive domain of the nobility, royalty and the church.

The French Revolution seems to have appreciated the power of land ownership in the sustenance and affirmation of a political and economic system. Mention needs to be made that the feudal system survived six centuries before succumbing to the French Revolution. The French Revolution would have been no resolution had it not addressed the land question.

What bears relevance to our study is that even though the central thread of feudalism was land ownership, the land itself proved to be a subject of more than its economic value. It encompassed legal prescripts, culture and military obligations.<sup>47</sup> Even though there are some scholars who would argue that the system of feudalism had variations, there seems to be an agreement that the common threads among those variations were hierarchies and an attachment of public power such as the right to justice on land ownership.<sup>48</sup> It can be assumed that even before the French Revolution, property ownership was a function of some form of legal prescripts, even though they were not codified. The fact that property ownership conferred some public powers to those who owned land, which public powers were often used against the landless, grants a window into the inextricable link between land and human rights.

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<sup>45</sup> William, D, (1990) *Oxford history of the French Revolution* 3rd edition (Oxford University Press London)

<sup>46</sup> Finkelman, Paul, (2001) *Slavery and the founders: Race and liberty in the age of Jefferson* Chapter 6

<sup>47</sup> Vovelle, M, (1975) *The Fall of the French Monarchy* Cambridge Press Cambridge.pp 3-7

<sup>48</sup> Blaufarts, R, (2016) *The Great Demarcation: The French revolution and the Invention of modern property* (Oxford Press London)

It is inter alia, the abuse of and unfairness of the use of public powers by land owners that the French Revolution sought to undo. The next section will examine the main pillars of the French Revolution, with a particular focus on the Napoleonic Code and how this has influenced a global concept of land rights.

### **2.3 The French Revolution model**

A summary of the two elements of the consequences of the French Revolution as regards property rights was the dismantling of the power over land which was wielded by the church and feudal Lords. This constituted the abolishment of the unfettered formal public power.

This freed property from the realm of the sovereign. In the process of relegating the church and the Lords to powerlessness, the state suffered the same fate. The French Revolution had completely disarmed the state in favour of society.<sup>49</sup>

Given the injustice of feudalism or any form of tenure that existed before the revolution and the disconnect between the monarchy and the populace, this was a remarkable departure from the past into a new dispensation. This dispensation as some would continue to argue, borrowed extensively from feudal practices and legal systems.<sup>50</sup> The French Revolution, historic and far-reaching as it was remained, remained an incomplete revolution. To sum up, the French Revolution model is an example of how land owners can set measures in place to protect their properties to the disadvantage of the landless.

### **2.4 The Napoleonic civil code and Land Ownership**

Just like the Declaration of Man and the Citizen the Napoleonic civil code was an important milestone in defining the global parameters of property rights. In fact some historians argue that of all the achievements of Napoleon, the civil code stands out as an important legal milestone in the history of France and the legal fraternity across the world. The Napoleonic Code influence even made a great impact in the Netherlands where Napoleon's brother was appointed king of the kingdom of Holland. He introduced an adapted version of the Civil Code which is to date evident in Dutch Law.<sup>51</sup>

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<sup>49</sup> Furet, F, (1981) *Interpreting the French Revolution* translated by Forster E" (The Press Syndicate of Cambridge University Press Melbourne) pp 24.

<sup>50</sup> Robert, F, *The Survival of the nobility during the French Revolution past and present* (JSTOR 1967) pp 71- 86.

<sup>51</sup> Meijer, G, and Meijer, S.Y, (2002) *Influence of the Code Civil in the Netherlands*. *European Journal of Law and Economics* 2002) 227.

What the French Revolution in general and the Napoleonic civil code reacted to can best be summarized by studying Thomas Spencer's observation on land rights, in a speech to a philosophical society in 1775. It reads thus:

"If we look back to the origins of the present nations, we shall see that land, with all its appurtenance, was claimed by a few and divided amongst themselves, in an assured manner as if they had manufactured it and it had been the work of their own hands, and by being unquestioned, or not being called upon to account for such usurpations and unjust claims, they fell into the habit of thinking, or, which is the same thing to the rest of mankind, of acting as if the earth was made for or by them, and did not scruple to call it their own property, which they might dispose of without regard to any other living creature in the universe".<sup>52</sup>

The French Revolution constituted a reaction against desecularising land ownership, granting land owners more privilege than the rest of the populace, absolute monarchy, skewed legal privileges and it also constituted a break from feudal primogeniture and skewed succession systems.

The Civil Code, which was adopted in 1804, represented the various debates post the revolution and attempted to capture the ideals of the revolution. In general, the Code achieved the following: doing away with the privileges of the nobility and clergy, rendering the law equal for all citizens, introducing the ideal of equal opportunity and the recognition of talent without consideration of one's background. One of its outstanding achievements remains the conception of property ownership in its most modern form.<sup>53</sup>

On property, the Code emphasizes and affirms that the individual has absolute rights of ownership. This implies that the individual has the right to dispose of property, save for limitations from inheritance law.<sup>54</sup> This principle is covered by section 544 of the Code, which affirms an individual's right to enjoy and dispose of property save for limitations by the law. This principle constitutes one of the cornerstones of liberalism and it is still very much an area of theoretical interest. The Code's definition of property was landed property.

It was also in the context of the need to enhance an agricultural economy of the time. It must be emphasized that individualism was unequivocally affirmed by the Code and by the prescripts of neo-liberalism (This will be further discussed in the next Chapter).

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<sup>52</sup> Spencer, T, A, (2005) *Lecture read at The Philosophical Society in new Castle England* in Monk Ian Hampsher *The Impact of the French Revolution* (Cambridge University Press Cambridge)

<sup>53</sup> Lyons, M, (1994) *Napoleon Bornaparte and the Legacy of the French revolution* (The Macmillan Press London) pp 96

<sup>54</sup> Ibid

It is worth mentioning that the French Revolution invoked reaction in Europe and beyond her borders. Whilst some of France's contemporaries reacted with horror at the dramatic and violent nature of the revolution, French armies across Europe were generally considered carriers of a revolutionary message. It was only much later with Napoleon's appetite for war that they were considered bearers of French imperialism.<sup>55</sup>

So immense was the French Revolution that it inspired Black slaves in Haiti to successfully revolt against French control.<sup>56</sup> It created Egypt's modernised Muhammad Ali<sup>57</sup> and inspired the Irish to bury their Catholic and protestant differences to unite against colonialism.<sup>58</sup> The 1798 Irish rebellion, waged by an organization called the Society of United Irishmen even went to an extent of collaborating with the French military against British colonialism.

Its impact in Europe and beyond notwithstanding, there are areas of the French Revolutions which fell short of representing complete victory of the vulnerable in society, i.e. peasants and women. The property regime that promoted individualism and the right of individual enjoyment and disposal rendered it a middle class affair.

Some would argue that the French Revolution's real impact was global more than internal. The Civil Code itself constituted an attempt to reconcile the ideals of the revolution and state of affairs in feudalism. Its interpretation the world over however, suggests it was a major historical development of the past three centuries. The conclusion below by Immanuel Wallerstein on his article, "The French Revolution as a world historical event is instructive".

"The French Revolution did not change France very much. It did change the world system very much. The world scale institutional legacy of the French Revolution was ambiguous in its effects. The post 1968 questioning of this legacy requires a new reading of the meaning of the popular thrusts that crystallised as the French Revolutionary turmoil".<sup>59</sup>

An important observation about the French Revolution is that although workers and peasants participated in its execution the authors of the legal provisions on inter alia land rights were those who would not completely destroy the status quo. I will come back to the significance of this observation in the context of this study.

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<sup>55</sup> Feher, F, (1990) *The French Revolution and the birth of Modernity* (Penguin London)

<sup>56</sup> James, C.L. (1938) *The Black Jacobins* (Penguin books London 1938) 08

<sup>57</sup> Khalid, F, (1998) *All the Phasha Men: Mehmedi Ali His army and the making of Modern Egypt* pp10.

<sup>58</sup> Beiner, G, (2007) *Remembering the year of French: Irish folk history and social memory* (Madison: University of Wisconsin) pp 06

<sup>59</sup> Wallerstein, I, (1990) *The French Revolution as a World Historical Event in The French Revolution and the Birth of Modernity* (ed by Feher, F) (University of California Press California)

Lafayette, the author of the Declaration on Rights of man and the citizen had an ideological orientation which would not accommodate a complete control of land by the peasantry.

The Napoleonic Code which would be seen by others as a codification of the principles of the French Revolution, did not constitute a radical departure from some of the features of feudalism. If anything the Napoleonic Code was a disguised codification of liberalism. Liberal thought, adapted to new conditions in the passage of history still reign supreme in world affairs today.

## **2.5 The End of British Feudalism and the thrust of British Property law**

Whilst the French Revolution and its Civil Code had immense influence the world over, by virtue of its perceived ideals and by influencing the legal orientation of its contemporary colonizers such as Spain and Portugal, British law impacted on even a much wider audience. This is because Britain has been a major colonizer, with colonized territories covering a greater part of North America, vast parts of Asia such as India and nearly the whole of Southern, Eastern and West Africa.

The British legal theory on property rights has a bearing on land dispossession in South Africa. In the next chapter, it is argued that the dominant philosophical position of the British, i.e. liberalism plays itself out in the final product of the South African Constitution and by extension on how the land question should be resolved.

The feudal system in England started around 1066<sup>60</sup> when the Norman King William conquered England. He established a monarchy with himself as the first king. Others argue that whilst Feudalism in France ended with the French Revolution, Britain had had its revolutions much earlier than the French. These revolutions were the civil wars between parliament and the king in between 1642-1649. The main issues during the civil war were the role of the monarchy, the church, individual rights and institutional power.<sup>61</sup> A second revolution is what was called a glorious revolution which witnessed the dethroning of the absolutist Catholic Church by Aristocratic Protestants.<sup>62</sup>

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<sup>60</sup> Hams, P, (1994) The end of Feudalism in Fiefs and Vassals: The Medieval Evidence Reinterpreted Journal of Interdisciplinary History xxvii: 4 pp, 655-622.

<sup>61</sup> Ibid.

<sup>62</sup> Monk, H, (2004) The Impact of the French Revolution (Cambridge university press Cambridge )

The British revolutions were not as violent as the French ones. Some scholars would characterize them as an evolutionary abolishment of feudalism.<sup>63</sup> What is noteworthy is that around the time of the French Revolution, William Goldstone in his book entitled *Commentaries on the law of England*, refers to vestiges of feudalism.<sup>64</sup>

Unlike the French law which is codified, the British one is not, but its philosophical nature can be recognized from the law of Property Act of 1925 and the Trustee Act of the same year<sup>65</sup>. By and large, it shares similarities with the provisions of the Civil Code in that it provides for the peaceful enjoyment and disposal of property.

English law does not allow for possession of land by conquest, but it does accept permanent possession of land in cases where twelve years lapses without any formal objection to possessed land. In theory, this represents a marked difference in behaviour of settler colonialists such as Jan Van Riebeck, who as it will be explained in the next section believed land could be owned through conquest.

The next chapter will also explain how British colonialist side stepped their own established legal traditions to effect dispossession in South Africa. Mention must be made that the end of feudalism and the new order as evident in various acts of parliament such as Property Act of 1925, have not really transferred land into the hands of the populace. In fact as Guy Schrubsole argues, fifty percent of England is owned by one percent of the population.<sup>66</sup>

Even though a central aspect of both the French and British opposition to feudalism was land, both revolutions have not been able to transfer land to the common people. The legal traditions that grew out of these changes discouraged tampering with existing property rights, and imposed stringent conditions for land ownership or dispossession. The next section will address how international law continued to perpetuate a version of human rights that sought to exclude the powerless in favour of those who had the means and resources, (sometimes superior military means) in acquiring and owning land.

## **2.6 The conspiracy of human rights and International law**

As argued in the sections above the end of feudalism, the French and British Revolutions reinforced a colonial version of human rights. To the defence of the colonial version of human rights was international law.

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<sup>63</sup> Congost, R, (2003), *Property Rights and Historical Analysis: What Rights? What History? From Past and present*, no 181 Nov 2003, PP 73-106, Oxford University Press.

<sup>64</sup> Goldstone,W, (1765) *Commentaries on the Laws of England* (Clanderon Press Oxford 1765)

<sup>65</sup> Ball,J (2006) *The Boundaries of Property Rights in English law report to the xviith of International Congress of Comparative Law* (Nederland Comparative Law Association 2006)

<sup>66</sup> Schrubsole, G, (2019) "Who owns England, (Blackwell's London) pp 20

Before exploring the colonial version of human rights as presented by neo-liberalism and by extension the West, and as we are about to present a non-European alternative thinking on human rights as they pertain to land, an important question as raised above deserves further attention. Of what consequence was International Law during the wars of conquest and subjugation in South Africa?

Around the time the Portuguese and the Dutch arrived in the Cape, one of the most celebrated developments was the success of the 1648 Westphalia treaty in Europe which recognized the existence of the nation-state and formed the basis of contemporary International Law. The Westphalia treaty also recognized the sovereignty of states and extended rights within states that discouraged external interference.<sup>67</sup>

If the wars of conquest continued against Africans from the early days of the arrival of the European settlers and if land theft was allowed, what then was the relevance of the sovereignty and the need for non-interference by states towards each other?

A definition of what was considered a state from a European perspective can partly respond to the above question. In this regard, a definition of what does not constitute a state is instructive (by Wheaton): "A state is also distinguished from an unsettled horde of wandering savages not yet formed into civil society. The legal idea of a state necessarily implies that of the habitual obedience of its members to those persons in whom superiority is vested and of a fixed abode and definite territory belonging to the people by whom it is occupied."<sup>68</sup>

Referring to the writings of Montesquieu, Grotius and Bynkershoek, Wheaton further concludes that there is no universal law generally applicable to the human race or mankind. He further classifies mankind as among others, Christians, the uncivilized, savages, barbarians and pagans. The above were the views of a scholar who was on the verge of becoming professor of law at Harvard just before he died and who was an emissary of the United States in Europe.<sup>69</sup>

In defining what does not constitute a state, Wheaton continues to argue that the definition of a state cannot be properly applied to voluntary association of robbers, pirates or outlaws of other societies even though they may have the common purpose of creating their own in mutual safety and advantage.<sup>70</sup> It may well be that the indigenous people of South Africa could have found this definition fitting in relation to Jan van Riebeck who was recalled from a mission in Asia for criminal activities and who in his arrival at the Cape representing a company and not necessarily a state.

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<sup>67</sup> Strydom, H, (2016) *International Law* (Oxford University press) pp8-11.

<sup>68</sup> Wheaton, H, (1866) *Elements of International Law 8th ed* (John Wilson and Sons Cambridge) pp 30.

<sup>69</sup> Ibid, pp 08.

<sup>70</sup> Ibid

It is interesting to note that the word “kaffir” which was used as an equivalent to pagans, barbarians and savages was dispensed to describe the African tribes found by the European settlers in the Cape.<sup>71</sup> Savages would according to the views from Wheaton, which views he argued represented the best of opinions from European International law experts, not qualify to constitute a state and would therefore have no rights.

To demonstrate how Europeans respected the rights of their kind, in 1795 when the British captured the Cape from the Dutch, they were treated humanely. The Dutch Reformed Church was not tempered with, there were no new levies and their properties were not seized.<sup>72</sup>

This is in stark contrast with the how the captured Dutch and their successors had treated the indigenous people they have found in the Cape, who Van Riebeck had referred to as the dull, stinking and as thieves not worthy of trust.<sup>73</sup> The above contrast can be traced back to the doctrine of discovery, promoted by the Roman Catholic Church which stood for the affirmation of one happy Christian family of peoples. To this effect, as early as the 14th and 15th century, the pope had given the Portuguese and the Spanish the right to conquer territories overseas, and by overseas meant outside Europe.

The indigenous people found in those territories had their rights denied and their properties could be seized. The discovering state had the right to act with ruthless and Spain was in the forefront.<sup>74</sup> It comes as no surprise that the Spanish produced the first scholar of International law in the person of Francisco de Vitoria who whilst he disagreed with the Pope that on the sovereignty of the indigenous people, asserted that Christian empires had the right to employ force against non-believers if their rulers stood on the way of spreading Christianity.

Even though the posture of scholars such as Vitoria were to maintain the status quo of Europe’s Christianity as a colonizing tool, this assertion that the newly discovered territories were sovereign was vehemently opposed by other European scholars such as Vattel who developed a theory called to the benefit of mankind.<sup>75</sup>

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<sup>71</sup> Campbell, C.T. (1897) A History of the Cape Colony from its Conquest in 1795 (Juta and company Cape Town 1897) pp 10-11.

<sup>72</sup> Ibid

<sup>73</sup> Marks, S, (1972) *Khoisan resistance to the Dutch in the Cape in the Seventeenth and Eighteenth Centuries* (Cambridge University Press 1972) 55. Vol 13 No 1 [www.cambridge.org](http://www.cambridge.org)

<sup>74</sup> Dorr D The Background of the Theory of Discovery 38AM (Indian Law Journals 2014 REV.477) 480-481.

<sup>75</sup> Vattel, E, (1797) *The Law of Nations* (Liberty fund Indianapolis Indiana)



This theory argued that where people appropriated land for the greater benefit of mankind, in a situation where the existing inhabitants was squandering such land, justification existed to seize such land. He saw indigenous Indians in the Americas as savages whose loss of land was desirable.<sup>76</sup>

Anghie Antony<sup>77</sup> summarizes the position of the West as regards to how they perceived African Kingdoms, African land and her people as follows: “European states were sovereign and equal. The colonial confrontation however, particularly when colonialisation reached its apogee, was not a confrontation between two sovereign states, but rather between sovereign European states, and non-European society that was deemed by jurists to be lacking in sovereignty or else at best partially sovereign”

The treaty of Westphalia, and the development of International law in the West that identified civilized Nations under amongst others able scholars such as Grotius, the celebrated American and French Revolutions and the development of British law did not change the status of African states and kingdoms as hordes of savages, kaffirs and cattle thieves. If anything it reinforced the status of African land as Terra Nullius (nobody’s land).

The treatment of Africa as having been populated by non-humans was despite known diplomatic relations between European Nations such as the Portuguese and African Kingdoms such as the Kingdom of Benin and the Congo long before the Westphalian treaty. The European states deliberately destroyed the kingdoms and consequently rendered Africa an object of International Law.<sup>78</sup>

## **2.8 Conclusion**

As this chapter attempted to show, human rights and International law have therefore always converged on matters of colonialism and the right to land and resources. The phase of conquest of South African land by the settlers would therefore find justification in International laws as the Europeans perceived it. The land theft would be explained by various European legal and philosophical instruments, which found its way into International Law.

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<sup>76</sup> Ibid pp 485

<sup>77</sup> Anthony, A, (2004) *Imperialisation Sovereignty and the Making of International law* (Cambridge University Press New York 2004) 05.

<sup>78</sup>Elias, T, (1988) *Africa and the development of International Law* (Martinus Nijhoff publishers London ) pp 08

This would be covered in theories and concepts already explained above such as, the Terra Nullius, the laws of discovery, the status of civilized nations and a theory on the benefit of mankind. What then became of this theory in our current law and human rights regime?

The next chapter will address two competing theories on the Land question in South Africa. The first will be the one upon which the 1996 Constitution in South Africa is founded and that is neo- liberalism. The second will be one upon which recent protests from the youth and various sectors civil society seem to be basing their arguments on and that will be the decoloniality.

## CHAPTER THREE

# THE IDEOLOGICAL AND PHILOSOPHICAL CHALLENGES ON THE LAND QUESTION IN SOUTH AFRICA

### 3.1 Introduction

This chapter will commence from the premises that the South African Constitution is ideologically a neo-liberal modernist and Eurocentric instrument whose thrust and orientation is devoid of a meaningful contribution by its indigenous population.<sup>79</sup> This is not to say that the Constitution is a result of a struggle for liberation waged by, inter alia, actors in the form of political and social movements. These actors represented different ideological and philosophical positions on human rights as it related to the land question.

For the above reasons, an examination of the features of neo-liberalism as it relates to human rights will be made. Its inadequacy in addressing the specific historical injustices will also be discussed. Moreover, alternative thoughts with particular reference to the philosophies of indigenous people will be shared. In addition, an emphasis will be made that these philosophies were not accommodated in the South African Constitution.

A comparison of the two strands of thought, i.e. neo-liberalism and Decoloniality, and an examination of the ideological orientations of the main political actors will also feature in the context of this Chapter. The purpose of the aforementioned examination will be to evaluate whether the political actors' ideological disposition bear relevance to the philosophies of the indigenous people and their lived experience.

The Chapter will then conclude by examining why the dominant philosophies have not provided a solution to the land question, and why a need exists to re-examine the nature and features of the land question in South Africa. The latter will be carried out by further demonstrating how the lived experiences and the philosophies of the indigenous people were not taken into account in the drafting and the adoption of the Constitution.

The chapter begins with a demonstration of the exclusionary nature of a colonial definition of human rights and how that finds expression in elements of a Eurocentric concept of property rights. A link between a colonial interpretations of what is considered human in the colonial concept of human rights and land dispossession in South Africa will also be made. The particularities of the South African history of land dispossession and its impact beyond Economics was also put into context.

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<sup>79</sup> Comarof, J, and Comarof, J.L (2004) 'Policing culture, cultural policing: law and social order in postcolonial South Africa' (Law & Social Inquiry 2004) 521

Furthermore, this chapter demonstrates the nexus between post-feudalism Eurocentric property rights principles and the systematic dispossession of indigenous people. It challenges the notion that the land problem in South Africa owes its genesis to apartheid and colonial legislation, and that consequently the replacement of the said legislation resolves the land question. It also argues that legislation was a late arrival in the catalogue of dispossession and was preceded by a violent phase of conquest.

The next section will examine the concept of human rights with particular focus on Western philosophies as represented by neo-liberalism. It will also address alternative philosophies as represented by indigenous thought and conventions on human rights. Focus will be made on these two strands of thought as the former represents the current profile of the South African Constitutional framework and the latter represents current protest against the framework and by extension the future.

### **3.2 The concept of human rights**

There is no consensus on the exact meaning and implications of human rights as the concept is often informed by lived experiences, class orientation and philosophical ideas about how society should develop and sustain itself. For this reason, the concept of human rights is fraught with ideological perspectives which in some cases may bear no relevance to the lived experiences of all people. The various positions include: Conservatives, neo-liberalism, and Marxism and for our purposes, African humanism.

So far apart are some of the philosophies that Conservatives in Britain would even challenge the relevance of the doctrine of natural rights. This was out of fear that granting human rights as per the prescripts of natural rights would create social instability.<sup>80</sup> Marxism, for example, link rights to economic determinism.<sup>81</sup>

Even the United Nations seem to be taking a middle road on its definition of human rights which can be paraphrased thus: It is a recognition of rights inherent among all people regardless of race, sex, gender, ethnicity, language and religion. They guarantee the right to life and freedom from torture and slavery, freedom of opinion, right to work and education.<sup>82</sup>

This definition is subject to several interpretations and may also at face value seem to be straying away from other important variables in human rights such as restoration and rights over poverty acquired through conquest.

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<sup>80</sup> First Principles Natural Law [www.firstprinciplesjournals.com>articles](http://www.firstprinciplesjournals.com>articles) (Date of use: 25 January 2020)

<sup>81</sup> Macfarlane, L.J Marxist Theory and Human rights 2014 <https://www.cambridge.org>core>

<sup>82</sup> <https://www.un.org> (Date of use: 20 May 2020).

This will be examined again at the end of this Chapter. This section will commence with the concept of human rights as it developed in the West.

### **3.3 The Western concept of human rights**

The Western concept of human rights derives its genesis from various challenges Western societies have confronted over the centuries. These challenges included the limitations of rights by institutions such as the Church, feudal Lords and by colonial powers. The evolution of the concept of human rights can also be traced to milestones in the form of international treaties, such as the treaty of Westphalia, legal codes such as the Napoleonic code which borrowed heavily from the French Declaration of the Rights of man and the 1791 United States Bill of Rights which affirmed individual freedoms of white men, to the exclusion of Black slaves.

As explained in Chapter 2, there appears to be some pattern on how the confines of human rights over the centuries in the Western World. Human rights would at a given point in time be an exclusive terrain of a select group of people. The Rights would be expanded to the next level only after pressure threatening the status core.

This is true of the treaty of Westphalia, where the nation state experienced its “independence” from the church, after Kings and Lords staged a sustained opposition to papal control. They attained their rights and won the right to do as they pleased to their citizens. The question was then how would these version of human rights be defined and for whom was it? An important milestone in the development of human rights and property ownership was the French Revolution, the rights of the individual was thrust at the centre of property ownership. The questions there were which individuals stood to gain and who drafted the relevant declarations?

The American Revolution is another example of how the relationship between human rights, its definition and its relationship to property can be examined. The American Revolution also affirmed individual rights but was not all inclusive. In fact the American Revolution had an inhuman position on its definition of property as it related to human rights. It considered other human beings as property of others as it did not abolish slavery. The best that it could achieve was to ban slave trade and thereby freeing humanity as being classified as cargo.

The above developments have played a critical role in the development of what is today characterised as a neo-liberal definition of human rights. Below will be a characterisation of what is considered broadly as Western influence of human rights:

### **3.4 A neo-liberal construct of human rights:**

The dominant theory on human rights which bears relevance to this essay is neo-liberalism and can best be summarized by Moyn who characterise them as the

universalisation of human rights. Put differently, they are supposed to mean the same thing to anyone, anywhere in the world.

A summary of the features of neo-liberalism which can be equated to the dissolution of social ties is as follows: it emphasizes individual rights, freedom of speech and association.<sup>83</sup> Neo-liberalism represents a progression of Liberalism which as argued earlier on owes its origins to various developments in Western Europe and North America. It will therefore be prudent to define neo-liberalism against the background of its liberal foundations.

A dictionary definition of Liberalism is that it is a doctrine that enhances the freedom of the individual, supports government in its provision of security, limit government power and protection of individual property rights.<sup>84</sup> Alfred Hayek, a proponent of Classical Liberalism, goes on to raise the following features of Liberalism: limitation of the power of the state, promotion of the power individuals and advancement of individual natural rights, individual liberty and justice.<sup>85</sup>

The challenge with the liberal concept though is that one cannot refer to one kind of Liberalism. As Ryan would argue: Proponents of Liberalism were themselves in complete disagreement on the confines of Liberalism. Adam Smith, Thomas Jefferson and Montesquieu would not agree on important variables such as a welfare state, slavery, or what were the building blocks of democracy and human rights.

Neo-liberalism stands distinct from classical liberalism in that as opposed to classical liberalism that advocated for a weaker state, it does accommodate the role of a stronger state and in some cases a developmental state. Its strength is in its ability to adapt to new situations yet perpetuate the fundamentals of liberalism.

The fundamentals of liberalism are as follows: The centrality of individual freedom in society, limiting the role of institutions above an individual in determining personal choice, relegating the role of the state into that of a “night watchman”,<sup>86</sup> a complete disrespect and de-emphasis of social groupings and traditions in the achievement and sustenance of rights. It is these fundamentals that have come to characterise neo-liberalism, its supposed successor. Neo-liberalism even though like liberalism, poses difficulties to define, broadly shares the following features: stimulating a strong private property rights regime, safeguarding of individual freedoms, limiting the role of the state and creation of market opportunities by the state. As regards the last-mentioned, the state should not go beyond a creation of absent markets.<sup>87</sup>

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<sup>83</sup> Moyn, S, (2014) “A Powerless Companion: Human rights in the Age of neo-liberalism” 2014 Law and Contemp. Probs 147.

<sup>84</sup> Ryan, A, (1993) “Liberalism” in Goodin RE and Pettit P (ed) A Companion to Contemporary Political Philosophy 1993 291-311.

<sup>85</sup> Hayek, F, (1944) The Road to Serfdom (Routledge Press United Kingdom 1944)

<sup>86</sup> Poulantzas, N, (2014) State Power and Socialism (London 2014) 44

<sup>87</sup> Boas, T.C and Gans-Morse, J (2009) Neoliberalism, from New liberal philosophy to Anti liberal slogans studies in comparative International Development (2009) 38

The emphasis of human rights in neo-liberalism would be individual rights, protection of rights of property as owned by individuals and entities to the exclusion of the historical context of ownership, emphasis of the markets as an arbiter on matters of property rights and land ownership, and no emphasis at all on varying philosophies on rights and their implications to development. <sup>88</sup>

### **3.5 The relevance of decoloniality in constructing a human rights framework.**

In the section above, the features of neo-liberalism as it applies to human rights were discussed. Even though, its elements are broad and are subject to various interpretations, what assumes prominence is sometimes how it is portrayed as the latest innovation and all-encompassing development strategy. Bearing universal applicability. It is defended by Foundations' research institutes, Public Relations experts and Scholars across the globe. <sup>89</sup>

Quiet often even international organisations such as the World Bank become proponents of neo-liberalism. Structural adjustment programmes with their promotion of free market economics constitute one example. True to the theoretical thrust of neo-liberalism, which preaches universal applicability at the expense of the respect for alternative thinking, this international institutions are prescriptive in their dealings. Neo-liberalism is part of coloniality in that it seeks to modernise a way of doing things in a manner that is in tandem with colonial practices, this is in stark contrast with decoloniality. Decoloniality strives for a detachment from a colonial structure of knowledge and seeks to reconstitute culture, ways of thinking, and to challenge the rhetoric of modernity.

It is the universal applicability and the promotion of an all-encompassing new liberal framework of human rights that counter-hegemonic philosophies such as decoloniality seek to challenge.<sup>90</sup> Other than challenging its universal applicability, some of its key elements such as the promotion of individual rights as a cornerstone of development and the relegation of the state, as a central authority to mere spectator in the affairs of society are also challenged.

As opposed to a broad range of assumptions made by neo-liberalism, decoloniality assumes a more critical posture to development theory in general and to what constitute and stimulate decoloniality and by extension raises the question: What would constitute a conception of human rights that responds to human beings? Consistent with the question above, decoloniality responds to, inter alia, the following further questions: Who is the "human" in human rights?

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<sup>88</sup> Ibid

<sup>89</sup> George S (1999) "A short history of neo-liberalism, presented at the conference of economic sovereignty in Globalising World Bangkok" (1999) 24-26 March 1999

<sup>90</sup> Elliot, M, (2019) "Critical theory and decolonial possibility in the neo-liberal moment" 2019 International Journal of Social Economics 1279-80.

Who speaks for the human in human rights? What provision exists for the humans lived experience in human rights? What provision exists in human rights to address a situation in a manner that is bifocal in order to address historical injustices such as the land question?

### 3.5.1 The “human” in human rights

The question bears relevance as throughout the development of a neo-liberal version of human rights, humans are also segregated by race, geography and complexion. This question is important as it explains why land thieves assumed thievery only apply among humans. Consequently interaction between humans and non-humans cannot bear the same legal consequences.

Who is the “human” in human rights, is better explained by Franz Fanon’s call for a new man (“person”) and his suggestion for the creation of new humanity. <sup>91</sup>By making the above calls, Fanon is raising deeper questions which call for boldness in pointing out the identity of the conceptualisers and the beneficiaries of human rights.

He raises questions far broader than the mere identification of who human rights in neo-liberal terms are meant for. He is stimulating a debate on the historiography of colonialism and how it continues to exist long after its formal abolishment. He rejects western humanism and by extension a Western concept of human rights. He asserts amongst others that the perpetuation of injustice is evidence of the lack of genuineness in western humanism. This existence is through embedded ideas, culture, various conventions, traditions and psychological frame of mind. The embedded ideas relate to, inter alia, race, gender and philosophy. <sup>92</sup> To further examine who is the “human” in human rights, Fanon refers to an Onto-Manichean colonial line.

He refers to this as the production of ontological differences representing hierarchies in a colonial manner which typifies the modern civilisation order. This renders some humans forever colonised. <sup>93</sup> It is Fanon’s Manichean line that Santos refers to as the abyssal line.<sup>94</sup>

The line refers to a long held view that what is considered human and civilised would only be found in what is today referred to as the Western world. In terms of this invisible abyssal line, there is one part of the world that constitutes the realm of the illegal whilst another constitutes the realm of the legal. It then follows that there is one part that is a territory of the lawless or even the illegal. <sup>95</sup>

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<sup>91</sup> Fanon, F, *The Wretched of the Earth* (Translated by Philcox R) New York Grove Press pp 178 & 239.

<sup>92</sup> Finkeldei, L, (2018) *The Decolonial Power of Community Tourism – Challenging Colonial Paradigms in Ecuador’s Tourism Industry* (M.Sc. Thesis Human Geography: Germany Institute of Geography) 10, 11 & 12.

<sup>93</sup> Maldonado-Torres, N, (2017) “On the Coloniality of Human rights” *Open Edition Journals* 123.

<sup>94</sup> *Ibid*

<sup>95</sup> Santos, B, (2007) “Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledge’s” *2007 Review* 30(1) 48 - 49.



As the Western world made progress in economic and social development, the progress was targeted to its own benefit, and not for those it did not recognise. In this regard, Mignolo demonstrates how even the European Renaissance saw civilisation and rights within the confines of the Abyssinian line up to a point where even the language of the powerful would be granted a status above the rest and consequently employed as a tool to determine who is a better human and who is not.<sup>96</sup>

The “human” in human rights is therefore not for humanity at large. Even the well-known Declaration of the Rights of man and of the citizen in France distinguishes citizens from the rest of humanity. The American Revolution differentiated between what was human and what was not. Slaves were not human but property. They were only freed from being part of sea cargo.

In the same vein, when the colonialists arrived in South Africa, they had a European consciousness of human rights. These human rights did not apply to the Southern side of the Abyssal line. The rights belonged to humans as they knew them. These humans were themselves. It is themselves who qualified to belong and to create a sovereign nation state. The Khoisan, the Xhosas and the Zulus were excluded from their perception of who qualified for human rights. The human in the human rights excluded them.

It is this biased conception of human rights that led Fanon to remark that the colonialists’ position on rights was built on strange foundations.<sup>97</sup> For them the invisible line as explained by Santos was visible. It is the same Abyssal line that Madlingozi refers to as representing the sub-human status of Black people in South Africa. He further characterises Black people as, inter alia, the disinherited and denationalized.<sup>98</sup> Consequently, the “human” in human rights is of a status of someone with no voice and who can’t speak for oneself. This begs the question: who speaks for the “human” in human rights?

### **3.5.2 Who speaks for the “human” in human rights?**

Spivak makes a noteworthy observation regarding who speaks for the “human” in human rights.<sup>99</sup> He particularly focuses on those that have become spokespeople of the oppressed, who by virtue of their position of lack of power cannot speak for themselves.

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<sup>96</sup> Mignolo, W. (2011) *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Durham: Duke University Press ) pp 39 & 40.

<sup>97</sup> Fanon, *The Wretched of the Earth* 236.

<sup>98</sup> Madlingozi, T, *On Settler Colonialism and Post Conquest Constitutions*, University of Pretoria.

<sup>99</sup> Spivak, G.C(2011) “Righting Wrongs” in Singh A R & Cistelean A (eds) *Wronging Rights?: Philosophical Challenges for Human rights* pp 78-103.

He refers to human rights advocates from both sides of the colonial line who do not only speak for the poor, but who have become experts on human rights matters affecting the poor.<sup>100</sup>

Mignolo is scathing in his attack of these humans who have found it necessary to bear the burden of speaking for others, but whose focus is that the humans they represent should not be denied human rights.<sup>101</sup> That they do not see beyond complying with the dominant concept of human rights and they do not trust the oppressed's capacity to speak for themselves is a reflection of the spokespeople's colonial thinking, he further asserts.

Madlingozi contextualises the challenge on who speaks for the oppressed. He asserts that in South Africa it is white Social Justice Civil Society that is organising advocacy, litigation and research priorities in favour of the oppressed.<sup>102</sup> The assertion by Madlingozi is in tandem with the profile of some civil Society organisations in South Africa which claim to represent the oppressed. The advent of democracy has been the rise of powerful and well-funded organisations such as Afri-Forum and the Organisation Against Tax Abuse (OUTA) which are white initiated and funded and often claim to speak for the voiceless and powerless. Afri-Forum has taken some cases against powerful families such as the Zuma and Mugabe families.

This organisations only focus on what is considered current injustice .They take no effort to address the grave consequences of historical injustices. In fact they constitute a diversion from tackling historical injustices such as land theft. Failure to address historical injustice results in no meaningful change as those that been rendered sub human by conquest will remain in such a status.

The questions that remain are: Would these enthusiastic representatives of the oppressed be willing to stimulate conditions for the voiceless to speak for themselves? In whose interest is their passion to speak for the voiceless? Do the lived experiences of the voiceless matter in their pilgrimage to defend the oppressed? Are the human rights provisions at whose behest they act in tandem with the lived experiences of their clients?

Addressing the Helen Suzman sponsored quarterly forum on consultation and the Constitution, former deputy Minister of Justice, John Jeffrey disputes the legitimacy of those who speak on behalf of the power.<sup>103</sup> He cites the case of the Organisation Against tax Abuse (OUTA) as an example of voices that claim to speak on behalf of the poor when the poor have other pressing challenges.

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<sup>100</sup> Mignolo, W, (2009) "Who speaks for the "Human in Human rights" Human rights in Latin American and Iberian Cultures pp 7-24.

<sup>101</sup> Mignolo (2009) Human rights in Latin American and Iberian Cultures 23.

<sup>102</sup> Madlingozi, T, (2017) "Social Justice in a Time of neo-apartheid to Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" Stellenbosch Law Review (28) pp 144.

<sup>103</sup> <https://hsf.org.za> (Date of use: 24 April 2020).

He further argues that organisations who operate from a privileged platform advocate for change in so far as it entrenches their interests and their inputs do not necessarily reflect the lived experiences of the majority.<sup>104</sup> This is noteworthy coming from a cabinet member from the ruling party addressing a forum whose stated objectives, are amongst others, promoting Liberal Constitutional democracy.

### **3.5.3 What provision is there for the lived experience of human in human rights?**

As argued earlier on, the Western notion of human rights is exclusive, individualistic and avoids accommodating voices that would derail its haste in arriving at a conclusion that it bears universal applicability and that the scope of human rights has already been determined. This position gives an impression that the experience of those that determined the current scope of human rights is sufficient for the rest of humanity.

In emphasising the significance of encompassing lived experience of everyone in a regime of human rights,<sup>105</sup> Wolf emphasised the significance of both vertical and horizontal accountability. By horizontal and vertical accountability, Wolf refers to the experience of the Bolivian Revolution where accountability is practised both within and without conventional state structures.<sup>106</sup> He also explains how the indigenous people's opinions and contributions were a cornerstone of the new Constitutional dispensation.

The elephant in the room in South Africa is whether the Constitution, and indeed the Bill of Rights, can lay any claim to containing the lived experiences of the majority of the people? Modiri responds to this by characterising the Constitution as a Liberal post-colonial narrative of white innocence, national consensus and historic closure.<sup>107</sup>

It is this haste for closure and an overemphasis on national consensus that renders a legal instrument as important as our Constitution a subject of continued suspicion and symbol of an unfinished project. It has not taken into account the lived experience of the oppressed and in the process it failed to be bifocal in its content.

### **3.5.4 Whether human rights adopt a bifocal nature?**

Ramose's response to some of the issues raised above is to rhetorically further enquire whether it is justifiable for the conqueror to assume that because he has conquered, the conquered lose their right to contribute, both in the immediate and long-term.

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<sup>104</sup> <https://hsf.org.za> (Date of use: 25 February 2020).

<sup>105</sup> Wolf, J, (2013) "Towards Post Liberal Democracy in Latin America: A Conceptual Framework Applied to Bolivia" *Journal of Latin America Studies* (45) 31-59.

<sup>106</sup> Wolf (2013) *Journal of Latin America Studies* 31.

<sup>107</sup> Modiri J M (2018) "Conquest and Constitutionalism: First Thoughts on Alternative Jurisprudence" 2018 *South African Journal of Human rights* 21.

Ramose characterises the deliberate silencing of the past as an example of how the triumphant treat the powerless as sub-human.<sup>108</sup> He further argues that rights are better determined and defined in the context of the past, present and the future.

In support of Ramose, Madlingozi dismisses the 1996 South African Constitution as displaying the lack of appreciation that South Africa has a past upon which the future should be built. He observes that the current Constitution does not contain the words apartheid or Colonialism, which variables account for the challenge of human rights in South Africa today. Madlingozi further argues that the point of departure should be to appreciate that the new Constitution and its thrust on rights has never represented a new beginning. It represented a change of government and not a change of state.<sup>109</sup>

At the centre of his assertion lies the argument that a Constitution should be bifocal and consequently assume the boldness to name the past it denounces and the future it seeks to uphold. He further points out that our Constitution even lacked the audacity to mention apartheid or Colonialism. It is in affirmation of Madlingozi's assertions that Gustafson cites the preamble of the Bolivian Constitution as an example of the embedment of a bifocal imperative of a Constitution.<sup>110</sup>

As we examine the concept of human rights and the bearing it has on the land question, the principal question will be to determine the extent to which it addresses the interests of both the conquerors and the conquered.

The interest of the conquered cannot be examined outside the context of the past. It also cannot be examined outside the wisdom of their lived experience. It is the lived experience and their understanding of the past that form the basis of their expectations on a human rights regime.

### **3.6 The South African Constitution and Human rights?**

The appropriateness of the South African Constitutional provision to the land question is being severely criticized for its deliberate naivety and dismissal of the lived experiences of the dispossessed.<sup>111</sup> This is evident in its inability to respond to the questions above. Some proudly pronounce it is similar to its Canadian counterpart, as if human rights are of universal application and require no contextualization.

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<sup>108</sup> Ramose, B.D (2018) "Towards a Post-Conquest South Africa: Beyond the Constitution of 1996" South African Journal on Human rights (34) 326-341.

<sup>109</sup> Madlingozi, T, "The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonisation?" <https://www.criticallegalthinking.com> (Date of Use: 20 March 2020).

<sup>110</sup> Gustafson, B, (2009) "Manipulating Cartographies: Plurinationalism, Autonomy and Indigenous Resurgence in Bolivia" 2009 Anthropological Quarterly 82(4) 985-1016.

<sup>111</sup> Madlingozi, T, and Social Justice in a time of neo-apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution, University of Pretoria.

The Constitutional provisions on human rights do not seem to appreciate the particular circumstances in South Africa which call for a recognition that some were deemed sub-human and that edifice of apartheid should be dislodged by deliberate Constitutional means.<sup>112</sup> (The next section will examine the Constitutional defects in greater detail).

### **3.7 Conclusion**

The next chapter will examine the main political players and their role in dispensing the current human rights regime in South Africa. The political actors are as follows: The African National Congress (ANC), the Pan Africanist Congress (PAC), The Black Conscience Movement (BCM). The aforementioned political actors claimed to be representing the dispossessed and excluded the masses of South Africa. A brief narration of what the then apartheid government, represented by the National Party, stood for will also be made.

This chapter has demonstrated a distinction between neo-liberal and decoloniality theories on human rights. It has also demonstrated the deficiency of both neo-liberalism and Marxism in responding to the nexus between human rights and the land question as understood by Africans. It has also located the South African Constitution as a construct of Western thought.

Both the PAC and BCM, albeit in different strands and emphasis, address the issues of the sub-human and the need to completely create a new dispensation that constitutes an antithesis of previous relations. The BCM even has the gallantry to disclose an end game for the existence of the human and the sub human, and pronounces that it, too, will cease to exist on that day.

The PAC has championed the struggle against land theft and dispossession and openly pronounced on its illegality. This is incomplete contrast to the ANC which is only pronouncing on matters of conquest only recently, with the resurgence of Africanist and Black Consciousness thought.

The next chapter will address key challenges on how the land question in South Africa has been handled. It will relate this to the role played by the political actors examined above.

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<sup>112</sup> Sarkin, J (1998) - The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human rights Provisions.  
<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1474&context=jcl>. pp. 02,05,28

## **CHAPTER FOUR**

### **THE IDEOLOGICAL ORIENTATIONS OF THE POLITICAL ACTORS THAT INFLUENCED THE CURRENT CONSTITUTIONAL DISPENSATION**

#### **4.1 Introduction**

In the last chapter various ideological orientations on human rights in general and as it relates to the South African land question in particular were examined. The South African Constitution was characterized as a predominantly a neo-liberal construct. This chapter seeks to examine the roles of the various political actors that shaped the Constitution, whether by their participation in negotiations or various forms of activism, political actions and advocacy.

The political actors referred to above will be as follows: The African National Congress (ANC), originally known as South African Native National Congress (SANNC) which political movement became a ruling party and was a key player in the development of the 1996 Constitution (Act 108 of 1996), the Pan Africanist Congress (PAC), the Black Consciousness Movement (BCM) and the National Party (NP). It is worth mentioning at this stage that the second and third mentioned political actors had adopted a more indigenous approach to the land question. Equally important is an assessment of the National Party's position on the land question which will also form part of this Chapter.

The foregoing will be done with a view to explain how our current Constitution's human rights orientation came to assume the form it has. The Chapter will then conclude by examining why the dominant philosophies have not provided a solution to the land question, and why a need exists to re-examine the nature and features of the land question in South Africa. The latter will be carried out by further demonstrating how the lived experiences and the philosophies of the indigenous people were not taken into account in the drafting and the adoption of the Constitution.

The next section will examine the concept of human rights with particular focus on Western philosophies as represented by neo-liberalism. It will also address alternative philosophies as represented by indigenous thought and conventions on human rights. Focus will be made on these two strands of thought as the former represents the current profile of the South African Constitutional framework and the latter represents current protest against the framework and by extension the future.

## **4.2. The ANC and human rights**

This section addresses the following features of the ANC and the development of its human rights policies: the context of its formation, ideological outlook, critical moments in which ideological reflection was pertinent, the general outlook of its human rights policies, factors that influenced the policies and the long-term impact of its human rights policies. The original name of the ANC that is the South African Native National Congress (SANNC) will be used interchangeably with its current name.

### **4.2.1 The context of its formation**

Among the prominent issues that led to the formation of the SANNC are: The land question, a deliberate and legal exclusion of the indigenous people in government and a complete disregard of their views and opinions on the past and future of the country. This was in the context of a dehumanised African, prompting one of the founders of the ANC, Pixley Ka Seme, to lament the global disrespect dispensed to Africans in general. This was six years before the SANNC's formation.<sup>113</sup> The centrality of the land issue was demonstrated by campaigns initiated by predecessors of the SANNC such as the Natal Native Congress.<sup>114</sup> The land issue also motivated the SANNC to send its first deputation to the British Government in 1914 to protest against the 1913 Natives Land Act.<sup>115</sup>

The SANNC was formed at a stage when the white regime had resorted to employing legislation to finish off its dispossession project. Whilst its predecessor's organisations had to deal with the Glen Grey Act, a year after its formation the SANNC had to deal with the 1913 Land Act. The legal philosophy of the white regime was that the conquered had no rights to restoration or any meaningful say on the land issue and its various manifestations on resource allocation and exploitation. The passing of one land deprivation Act after another was a deliberate confirmation of this stance.<sup>116</sup> The various laws to restrict movements, disempower traditional leaders and by extension, undermine African customs also propelled the formation of the SANNC and its programmes.

### **4.2.2 The Ideology of the ANC**

The ideology of the ANC has always shifted overtime and demonstrated immense vulnerability to dominant circumstances of the time. Before 1955, it vacillated between being a mere Liberal movement to being closer to socialist tendencies.

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<sup>113</sup> Seme, P, (1906) The Regeneration of Africa, <https://www.sahistory.org.za/archive> (19 May 2019)

<sup>114</sup> The origins of the ANC and the freedom struggles in South Africa, [www.anc.org.za](http://www.anc.org.za) (17 May 2019)

<sup>115</sup> Dube, J.L <https://www.sahistory.org.za> (17 May 2019)

<sup>116</sup> Bundy, C, The Rise and Fall of African Peasantry (James Curry London)

At one stage leaders of the ANC declared their opposition to the Bolshevik revolution and cited the killing of a good man in the person of the Tzar unacceptable. About a decade later, it seemed to have embraced Communism following Josiah Gumede's visit to the Soviet Union in 1927. On his return, he claimed Russia was the New Jerusalem.<sup>117</sup>

In the 1940s, the ANC through the influence of the ANC Youth League (ANCYL) was more Africanist. The first President of the ANCYL, Anton Lembede, called his philosophy, "Africanism".<sup>118</sup> Between the Kliptown conference and exile, the ANC always took the ideological position of its sponsors, at one point being the Communist block and at another being the West who sponsored the political settlement process. The ANC is still a member of the Socialist International,<sup>119</sup> but its true colours are evident in Growth Employment and Redistribution (GEAR), one of the first major policy thrusts they effected once in government. GEAR is a neo-liberal ideological stance which was no more than a way of complying with the Bretton Woods Institutions policy prescripts.<sup>120</sup> In fact, GEAR implied an un-coerced acceptance of neo-liberalism on the part of the ANC government.

#### **4.2.3 Critical historical moments for reflection**

History has presented the ANC with various moments for reflection and for realigning its ideological position with the lived experience of Black people and to realign its position with a sustainable strategy to address the challenge of conquest and dispossession.

The following represents such opportunities: the first would have been the 1955 Congress of the People at Kliptown where the Freedom Charter was adopted. The significance of 1955 was twofold. For one thing, it was a conference where the ANC had a strong Youth base with the recent rejuvenation of the ANCYL where leaders such as Zakes Mda, Oliver Tambo and Nelson Mandela were active.<sup>121</sup>

For another, the mobilization of the African masses was beginning to take shape in amongst other programmes such as the defiance campaign. Bus boycotts in several areas at the Transvaal such as Evaton, Katlehong and Kliptown demonstrated the politicisation of Africans in those times.<sup>122</sup>

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<sup>117</sup> Dube, J.T <https://www.anc.org.za> (Date of use: 13 May 2019)

<sup>118</sup> Meli, M.A History of The ANC (Zimbabwe Publishing House Harare).

<sup>119</sup> Socialist International-Progressive Politics for a fairer world [www.socialistinternational.org](http://www.socialistinternational.org) (21 April 2020).

<sup>120</sup> Malikane, C.A Growth Path and Economic Transformation, <https://www.scribid.com> (Date of use: 13 May 2020)

<sup>121</sup> Apartheid and reactions to it:[www.sahistory.org.za](http://www.sahistory.org.za)>article>a (Date of use: 13 May 2019)

<sup>122</sup> Popular Struggles in the early days of apartheid: <https://www.sahistory.org.za>>topic>po (Date of use: 13 May 2019)



Instead of adopting an ideological stance that resonated with the Black majority, the ANC adopted a document which was generous in its definition of the beneficiaries of the struggle and which was silent on conquest, land and dispossession.

The second opportunity the ANC missed was the need for ideological refinement as a response for increased repression executed by the apartheid state since 1960 when the liberation movements were banned. There is no evidence of a theoretical thrust from the ANC to realign its ideology. Instead, the vacuum from the ANC's silence is filled by the banned Communist Party of South Africa (CPSA), which uses this opportunity to be a theoretical and ideological guardian of the ANC. They employ this opportunity to refine a concept called colonialism of a special type and a further one called two-staged theory.

The latter theory was borrowed from a theory called "stagism", meaning that underdeveloped countries could only witness their transition to communism only after a capitalist phase. In essence, the theory argues that the route to a revolution is only after exhaustion of reforms. <sup>123</sup>The African identity of Seme, the Africanism of Lembede, the land issue of Dube and Gumede never featured in the developing ideological thrust of the ANC at the moment when it desperately needed ideological clarity.

A third opportunity lost was the Morogoro conference, in Tanzania, which was preceded by two mutinies: one led by Tennyson Makiwane and the other, by Chris Hani. Makiwane had protested to the ANC leadership on the dominance of the Communist Party, for which he was labelled a racist. He was also subjected to disinformation and dubbed a spy.<sup>124</sup> His rebellion was only a direct call to the ANC to remember its Africanist origins.

The Kabwe conference, which was the last consultative meeting of the ANC in exile was held in the spirit of Morogoro and there was no significant realignment of the ANC's policy. The challenges of conquest and dispossession were never given priority. It can be argued that since 1955, the ANC abandoned the concept of Africanness, the challenge of conquest and the need for restoration in favour of imported political theories whose relevance made sense to funders and to liberals and communists in their ranks.

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<sup>123</sup> Marxist Internet archive, [www.marxist.org](http://www.marxist.org) (8 April 2020)

<sup>124</sup> Tambo, O, *Beyond the Engeli Mountains* (David Phillip Claremount).

#### 4.2.4 The human rights stance of the ANC

One of the factors that were clearly pronounced upon by the ANC since its formation was the subject of rights. Whilst there is sufficient evidence of the ANC leadership protesting over various categories of rights, such as the right to land, universal franchise and equal treatment, there is not much inclusion of matters of conquest and dispossession into ANC ideology and conception of rights.

On two instances, one in 1968 on the occasion of the United Nations' year of human rights and in the 1988 Constitutional provisions by the ANC through the office of Zola Skweyiya, head of its Constitutional affairs, the ANC attempts to address the issue of human rights. The first one was through a statement from the President of the ANC, Oliver Tambo. <sup>125</sup>His statement is silent on the land issue and about dispossession.

Tambo's statement addresses the rights to Universal Franchise, freedom of movement, freedom to go to places of entertainment and attend scientific institutions. It upholds individual rights and is silent on the character of rights as Blacks would perceive it.

In Skweyiya's Constitutional guidelines, it is made clear that the basic thrust of the Constitutional provisions and by extension the human rights prescripts will be the Freedom Charter. <sup>126</sup>The ANC's position on human rights is a neo-liberal one and the evidence resides in the 1996 Constitution. Some would argue that the Constitution has gone left of neo-liberalism whereas others would argue that the adoption of GEAR as a macroeconomic policy was meant to counter any Constitutional provision that would defeat the purpose of neo-liberal policies. The speed at which GEAR was adopted would fuel this assertion.

The features of ANC human rights policy can be summarised as follows: seeking to be inclusive of all racial groups regardless of historical experiences, protection of individual rights, lack of emphasis on restorative justice, rights of communities in contexts other than land restoration, a reluctance to address illegal rights, assumption of a universal character and no major rethinking since 1955.

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<sup>125</sup> Tambo, O, "Statement on human rights day" [www.historicalpapers.wits.ac.za](http://www.historicalpapers.wits.ac.za). (Date of use: 13 March 2020)

<sup>126</sup> ANC Constitutional Guidelines <https://www.sahistory.org.za.archive> (Date of use: 9 May 2019)

#### 4.2.5 Factors that influenced ANC'S human rights policy

The factors that influenced the ANC's human rights policy are inter alia as follows: ideological change of course: in 1955, the ANC changed its ideological course which was Africanist in character and espoused by young people such as Mda and Sobukwe 1955 represented a shift towards imported ideological positions espoused by the Liberals and the Communists. The Freedom Charter, to date a very important ANC policy document, states that the land shall be shared among those who work it. It does not recognise the need for the return of land. The closest it gets to address historical injustice is to condemn cattle theft.

Communist influence: as explained earlier on, the Communists were responsible for developing key tenets of the ANC's new ideological stance. The concept of Colonialism of a Special Type (CST) and the two stage theory were the most prominent. Communists like Harold Wolpe also developed a concept called "the cheap labour thesis" which promoted the Marxist thinking in analysing the problem of oppression in South Africa but completely ignored conquest and economic subjugation by means of land theft. In essence these theories have resigned themselves that the conquerors had the same right as the conquered, and what was left was to find ways to have equal rights and live peacefully. The communists therefore had no decolonial proposal in their theories.

Liberals in the form of formations such as the Congress of Democrats took over a good portion of theorising and thinking on behalf of the ANC. They were also helpful in raising funds and drumming up international support. To the ANC's credit, perhaps any ideology or strategy that could have overtly elevated conquest and dispossession would have been to its detriment as the PAC's case has demonstrated. It could have made tactical sense to work with Liberals who had access to influential lobbies and funding in the Western world.

In summary the ANC did not consider the apartheid state as a function of colonialism instead it saw the creation of a new state as an incremental effort to install a new government which would have policies granting all citizens equal rights. The ANC did not call for the return of land and it advocated individual rights and guaranteed property ownership to those who owned it, regardless of the methods employed. The post 1994 Constitution, with its neo-liberal thrust largely reflected the ANC position on human rights.

### **4.3 The Pan Africanist Congress of Azania**

This section will address conditions that led to the formation of the PAC, the ideological position of the PAC and human rights stance, why it met its demise and factors contributing to its resurgence. The PAC's philosophy and activities are significant in a number of respects amongst which were the following: It was formed in opposition to the ANC's change of ideology on land and on the centrality of African interests in the struggle, it continued to emphasise, the need to return land throughout the period of illegality and it denounced the 1994 settlement as inadequate for victims of colonialism. The PAC philosophy, as indicated in Chapter one is a current source of reference by those who consider the 1994 settlement a betrayal to Africans.

#### **4.3.1 Conditions that led to the establishment of the PAC**

The Congress of the People and the adoption of the Freedom Charter sowed discontent in the ranks of the ANC. This was worsened when the ANC adopted the Freedom Charter as an integral part of its Constitution in 1958.<sup>127</sup> This discontent was preceded by great enthusiasm from the emerging leadership of young intellectuals who had espoused identity as an important element of ANC ideology.

The young people had reservations against the relegation of conquest and dispossession away from ANC ideology and were wary of the influence of communists and liberals on ANC affairs. The young leaders were not alone in their reservations. Even Dr Xuma, one-time leader of the ANC accused the new leadership of staying away from a distinctly African leadership. It was also a time when other people had established a political party called "the National Minded Block" which did not allow Indians or Whites in its ranks.<sup>128</sup>

There was indeed an observation that the ANC was being dominated from without its ranks. It was not a baseless allegation as the Freedom Charter had moved so far away from a document such as the African claims, which had land and dispossession as an important element. Some Africanists in the ANC stayed on for a while before they moved on. It was only in 1959 when the PAC was established with Robert Sobukwe as its first President and claimed to be the rightful successor of the original ANC that was formed in 1912.

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<sup>127</sup> Meli, F. A (1988) History of the ANC (Zimbabwe Press Harare)

<sup>128</sup> Ibid.

### 4.3.2 The PAC'S Ideology and human rights stance

Until very recently, the PAC was one of the most misunderstood political parties in South Africa. This was on account of its claim to (in) fame via slogans such as “one settler one bullet” and misunderstood slogans such as “Izwelethu, Afrika”. What has not worked in the PAC’s favour is its short spell as an organization, the perpetual detention of its leader and its unsuccessful and controversial international mission.

The PAC stood for African Nationalism, for the advancement of the human race, for loyalty to African values, for socialism and for democracy. The PAC advocated that for white people to become Africans they must give up their privileges and white supremacy. Land would be an important element of their privileges.<sup>129</sup>

The PAC did not want to achieve the above objectives by violence. Sobukwe’s final instruction before the Sharpeville massacre is instructive. In a statement distributed before the march he calls for non-violence and argues that the PAC should be on the lookout for “provocateurs” who by their violent actions will grant the enemy the grounds to derail progress in the fight for freedom. Furthermore, he is quoted thus: “We are fighting for the noblest cause on earth, the liberation of mankind. They are fighting to retrench and outworn, anachronistic, vile system of oppression. We represent progress”.<sup>130</sup>

Central to the noblest cause about which Sobukwe is writing, is the land question and the distorted history that colonialists moved into unoccupied lands or that they began to settle around the same period as the arrival of Black people from the Northern parts of Africa.<sup>131</sup> On the land issue, Benny Alexander, one time Secretary-General of the PAC, emphasises its primacy by arguing that it is one of two issues they would be persuaded to go to negotiations for.<sup>132</sup>

The PAC, therefore, recognised reparation as an integral part of its cause. It is the land issue that the PAC characterises land dispossession as theft. It is also on the land issue where the PAC’s stance renders the question raised by Ramose on whether conquest as a right bears relevance. In general, there are four other areas which further explain the ideology of the PAC in relation to human rights: Its stance on Africanness, socialist’s ideological position emphasis on land restoration and upholding African values.

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<sup>129</sup> Pogrand, B, (2018) Mangaliso Sobukwe New Reflections (Johnathan Ball Cape Town) pp3.

<sup>130</sup> Pogrand, B, (2011) How Can a Man Die Better (Johnathan Ball Cape Town) pp127

<sup>131</sup> Worden, N, (1996) The Making of Modern South Africa (Massachusetts USA).

<sup>132</sup> Rantee, J, (1992) “Liberation and Negotiations The Pan Africanist Congress in the South African Transition” Series Policy, Issues and Actors.

White people were not allowed to join the PAC but were encouraged to give up the object of theft, in this case being land for them to become new human or Africans. Ideologically the PAC considered itself socialist but qualified this by also upholding the concept of democracy, albeit within the context of a united continent. Azania would therefore be part of a federation of African States.

The above description raises the following about the PAC's ideology: Its constituency would be Africans and it sought to deliver back to them the object of theft, which is land. The PAC attached no colour to Africanness and emphasized restoration. Thus, a central feature of the PAC is therefore that no one has a right to a stolen object.

#### **4.3.3 The demise of the PAC and the resurgence of its ideology**

The PAC's death can be attributed to, inter alia, the following factors: its short spell as a political organization, lack of Western support on account of its policies, lack of business support in the country owing to its ideology and leadership squabbles and incapacity which led to inter alia misguided military campaigns. The failure of the ANC to address the land issue, the demise of its leadership capacity, both technically and morally, the lack of programmes to address the concerns of the youth and Black peasants and the failure of the ANC to provide intellectual leadership led to the resurgence of the suppressed ideology of the PAC.<sup>133</sup>

In summary the PAC has always considered the apartheid state an extension of colonialism. At the centre of the ideology of the PAC has always been the need to undo conquest and the return of land. The PAC's human rights disposition has been within the context of restoration, consequently, the 1994 Constitution is considered gravely inappropriate for restoration of stolen land.

#### **4.4 The Black Consciousness Movement (BCM)**

The Black Consciousness Movement of Azania added a lasting and substantive political footprint in South African history and also provided a political and social philosophy which bears relevance to current challenges in South Africa. In examining its ideology and approach to human rights, the following will be addressed: The context of its formation; its philosophical and ideological outlook; its post-1977 posture and its stance on human rights.

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<sup>133</sup> Arendse, S, (2016) What can Sobukwe teach us for today's struggle, workers socialist party? (Wordpress Johannesburg ).

#### **4.4.1 The context of the BCM's formation**

The Black Consciousness Movement's formation was in the late 1960's, at the time when liberation movements were banned and when there was a general lull in the country. One of its outstanding features is that it was initiated and led by student youth. Its formation was also a response to the inability of National Union of Student Organisation (NUSAS); a liberal student organisation dominant in white campuses, to act upon the lived experience of Black youth.

The exile mission of the ANC and the PAC were not providing effective political leadership in the country. In fact, they were engaged in political squabbles that on the part of the ANC, led to the Mogororo conference. The apartheid government was in the midst of rolling out its programme of apartheid. Forced removals of Black people from prime land in the areas was in full swing. The government was moving ahead with the establishment of homelands.<sup>134</sup>

At international level, 1968, the year in which The South African Student Organisation (SASO) was formed, was an eventful one politically. It was a year in which France and Germany witnessed student riots that shook governments. A year that experienced heightened civil rights protests in the United States, and when Martin Luther King was assassinated. The year in which the United Nations had a programme of human rights. It was also the year of protest against the Vietnam War.<sup>135</sup>

The Black Consciousness Movement of Azania was formed at a moment when human rights were an area of intense debate and action, nationally and globally. The global action as asserted above was both on the streets of Western Capitalists and in the jungles of third world countries such as Vietnam.

#### **4.4.2 The ideological and philosophical outlook of the BCM**

The following values and concepts were at the heart of the BCM's ideological stance: The first is the concept of desalination which encouraged the need for the oppressed to be inwardly-looking, and examine challenges from within themselves. As evident in the article that Biko entitled "We Blacks", this inward-looking exercise would lead a realisation that "all in all the Black man has become a shell, a shadow of a man, completely defeated, drowning in his own misery, a slave, an ox bearing the yoke of oppression with sheepish timidity".<sup>136</sup>

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<sup>134</sup> The South African forced removals history essays: <https://www.ukessays.com/essays/the>. (Date of use: 28 May 2019)

<sup>135</sup> The year that changed history: <https://www.theguardian.com/jan/1968>. (Date of use: 29 May 2019)

<sup>136</sup> Biko, S. I Write What I Like (African Writers Series London 1978) 29.

Linked to the above value, the BCM insisted that it is Black people, themselves, who accepted their complacency in their oppression. It is them who accepted inferiority and who, by extension, colonised themselves. Fanon took this further and argued that: “A negro behaves differently with a white man and with another negro”. That this self-division is a direct result of colonialist subjugation is beyond question.<sup>137</sup> (In the next Chapter, this assertion will be discussed in greater detail).

The BCM was further characterised by their emphasis on identity, in which case they used the word “Black” as opposed to the PAC’s “African”. They emphasised consciousness as an integral element of a broader strategy to defeat racism. In this regard, BCM embraced elements of Hegel’s dialectics and saw the “slave-master” relationship in South Africa, represented by “white power” on one hand and Blacks on the other, as a possible thesis and antithesis that would lead to a free society with neither Black nor White Azanians.

The above statement accounted for the position held by the BCM that it was merely transitional and would wind up when whiteness was defeated. Outstanding in the philosophy of the BCM is the opposition towards turning South Africa into a European province, in line with Fanon’s position that Europe should be left alone. It can be deduced from the above assertions that the human rights position was informed by the concept of African humanness, which knew no colour or creed. It emphasised communal ownership of property. Although there was no emphasis on reparations, the return to Ubuntu implied a white man’s portion of the blame, would mean a measure of restoration.

#### **4.4.3 The impact of the BCM on the political landscape**

The BCM hassled to the reinvigoration of the ANC, in that it was at the centre of the 1976 riots. Policies of the Bantustan’s culture identity, and in particular the appreciation of Blackness, can be attributed to the work of the BCM. This was not without its fair share of criticisms. Neville Alexander branded the BCM a retrogressive occurrence.<sup>138</sup> Tousant in the African communist called it, a liberal and pacifist. The facts are that, its members not only changed the history of South Africa, but swelled the ranks of the ANC in exile, in Robben Island and inside the country.

In summary the BCM agreed with the PAC on the colonial nature of the South African state, albeit with more emphasis on the need for Black people to decolonise their minds as well.

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<sup>137</sup> Halisi, C.R Black political thought in the making of South African democracy (Indiana University Press USA 1999).

<sup>138</sup> Ibid.



The BCM embraced Ubuntu, and consequently a communal ownership of land. This implied a return to values and practices disrupted by colonialism. The BCM advocated for equal rights to all on condition that those acquired privilege by conquest and related means should first denounce that privilege. The proponents of the BCM also denounced the 1994 settlement.

#### **4.5. The National Party**

The National Party (NP) had been governing for more than forty years when a new Constitution was finally adopted. In the more than four decades in which the NP was in power, land dispossession was violently and drastically effected.

Various legislation to justify land dispossession such as the Group Areas Act of 1950 and the Promotion of Self-Government Act of 1959 were passed. The NP's economic and social policies were evident in the drastic efforts put into strengthening state owned entities in economic development. This included proceeding with the initiative of their predecessors to reinforce the dominance of the state through its entities in the following areas: Electricity supply, financial support to new enterprises, infrastructure provision and transport. The NP clearly stood for a developmental state, but one that prioritises white people, who constituted a minority.

The position of the NP on negotiations and how it wished to craft a new Constitution and consequently a new regime of human rights is evident in the speech delivered by its leader, F.W De Klerk on the occasion of the opening of Parliament in February 1990. The statement below is instructive: "The Government accepts the principles of the recognition and protection of the fundamental individual rights which form the Constitutional basis of most Western democracies. We acknowledge, too, that the most practical ways of protecting those rights justiciable by an independent Judiciary. However, it is clear that a system for the protection of rights of individuals, minorities and national entities have to form a well-rounded and balanced whole".

On the economy, De Klerk goes on to reveal that the government would promote privatisation, deregulation, curtailment of the role of the state, reduction of the role of the public sector in the economy and only allow for the developmental role of the state in particular circumstances. The negotiation position of the National Party was vastly encompassed in this speech. The position was for the affirmation of individual rights, as defined and practiced in Western Countries; reduction of the role of the state; reformation (not revolution) and protection of minorities. The National Party did not entertain any discussion about past injustices.

The National Party's position in the negotiations was very much in tandem with neo-liberal principles. This was a remarkable twist of events given the National party's history of employing statism to effect development. The question is what inspired the National party to adopt the fundamental principles of Liberalism such as individual rights while, for forty years, it ridiculed the Liberal and Progressive Federal parties which stood for this principle. It appears that the adoption of these ideological stunts by the National Party brought it much closer to the ANC's own Liberal principles which are evident in their various policy positions. This will be further discussed in the Chapter to follow.

In summary the National Party embraced neo-liberalism on the eve of the settlement and had as its primary objectives, the protection of individual land rights regardless of the manner in which they were acquired. Individual interests became the cornerstone of the National Party's land policy. The 1994 settlement was very much in tandem with their objectives.

#### **4.6. Conclusion**

The ANC has not demonstrated the will or the capacity to appreciate that human rights are not "one size fits all". At every turn since the mid-fifties, the ANC has strived to import human rights philosophy instead of appreciating context. The context would be addressing the legal status of conquest and to rectify the impact of the metaphorical "Meridian" line. It was not for lack of a theoretical or an immediate value base that the ANC neglected this reality. The concept of Ubuntu, which considers human rights, a mutual obligation, was sufficient to form the basis of addressing the issue of conquest and theft of land. In this case, the thief should show genuine remorse and hand back the stolen item.

Both the PAC and BCM, albeit in different strands and emphasis, address the issues of the sub-human and the need to completely create a new dispensation that constitutes an antithesis of previous relations. The BCM even has the gallantry to disclose an end game for the existence of the human and the sub human, and pronounces that it, too, will cease to exist on that day.

The PAC has championed the struggle against land theft and dispossession and openly pronounced on its illegality. This is in complete contrast to the ANC which is only pronouncing on matters of conquest only recently, with the resurgence of Africanist and Black Consciousness thought. <sup>139</sup>

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<sup>139</sup> Vatcher, W.H (1965) *White Laager: The Rise of the Afrikaner Nationalism* Frederick (Prageger) pp. 58-60.

The National Party has since ceased to exist. Their policies and ideological thrust find expression in the conduct and policies of the ruling party and several opposition parties including the main opposition party, the Democratic Alliance (DA). These parties do not confront the reality of conquest. In fact their declared positions is to protect the status quo. It took new parties such as the EFF to shake the ANC into a reflection on the land policy.

The next chapter will develop a framework against which a long-lasting solution to the land question in South Africa can be found. It will also suggest ways in which a new Constitution can encompass the lived experiences and philosophical dispositions of the Black majority.

## **CHAPTER FIVE**

### **A FRAMEWORK TO ADDRESS THE LAND QUESTION IN SOUTH AFRICA**

#### **5.1 Introduction**

Chapter four has explained political circumstances that led to the developing and adoption of the 1996 South African Constitution. It also examined the key challenges on how the land question in South Africa has been handled by policy makers who were informed by the prescripts of the Constitution. This chapter will commence from the premises that the South African Constitution as it stands is in no position to address the challenge of the land question, and that it is structured to preserve the status quo and to ignore the theft of land through conquest.

For purposes of context this Chapter will commence by providing a historical account of land dispossession in South Africa and how there is a nexus between Western philosophy on conquest and land theft. The crafting of the law to perpetuate dispossession will also be examined. This background will form the basis against which corrective measures will be proposed to address the land question.

The Chapter will develop a framework around which a Constitution can be aligned to human rights as defined and as they apply to the conquered and subjugated people of South Africa. At the centre of this framework is due consideration of the lived experiences of Africans and the philosophies they have developed over the centuries.

Before explaining the framework that will guide a new Constitutional dispensation. Some salient features of the South African situation justifying an alternative to transformative Constitutionalism will be examined. An argument will be made that as it stands, neither the courts nor the government can employ the current Constitution or government policies to resolve the land question.

This chapter will maintain that constitutional provisions and government policies are not aligned to the need for restoration. Neither do they offer an adequate response to the impact of conquest. The chapter will conclude by presenting the main arguments in this study and provide some considerations to resolve the land question.

#### **5.2 A Historical account of land dispossession in South Africa**

At the centre of struggles over land in South Africa lay the question of the means to acquire land and evidence of the ownership of such land. European settlers seemed to believe that conquest justified land ownership.

Indigenous South Africans, with a completely different system of land ownership to that conceived by European settlers, did not only disagree with their newly acquired European enemies, but fought bitter battles to preserve their land.

It is now known that battles over land did not begin with the arrival of Jan Van Riebeck in 1652. There are various accounts suggesting that the Portuguese explorers did not abandon their plans to settle in the Cape out of goodwill but out of fierce opposition from the indigenous people. This is evident in amongst others, the Oude Molen battle of 1651 in the city of Cape Town, where the Khoi not only defeated the Portuguese in a battle over stolen cattle, but also a well-known Portuguese Commander, Francisco De Almeida was killed.<sup>140</sup>

This is in stark contrast to the characterization of the land struggles as having their origins from the 1652 arrival of Jan van Riebeck and his Dutch East Indian Company (DEIC) crew to set up a refreshment station in the Cape. The arrival of Jan van Riebeck though, did constitute a further sustained and systematic effort of dispossessing the indigenous people of their land and resources. It was also the beginning of a systematic expansion of white control of the country.<sup>141</sup>

From the very beginning, the philosophical differences between Eurocentricism and an African concept of human rights played out. Jan Van Riebeck, under pressure from a Khoi Chief to explain his claim to the occupied land told them that the territory was won in battle and was no longer belonging to the indigenous people. Here begun the elevation of conquest as an accepted legal claim to land and by extension to human rights.<sup>142</sup>

The implications of Van Riebeck's response was that those that are conquered have lost out permanently. Their only recourse would be to reverse the conquest. Rights to property were linked to who conquered and who was conquered. The conqueror would earn the right to distribute land in a capacity as victor. (In chapter four, I will address the question whether, in the case of South Africa the conquest was reversed, and whether, the rights to land was ever accorded back to those that were initially conquered).

At this point, it may well be necessary to examine Jan Van Riebeck's attitude to land theft. A question arises whether Jan Van Riebeck needed to be reminded that his military attacks and theft of land from the indigenous of South Africa was against the principles of human rights and the principle of sovereignty.

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<sup>140</sup> Mkhize, N, "The Precolonial Rise of Khoisan Economies" [www.thejournalist.org.za](http://www.thejournalist.org.za) (Date of use: 24 April 2019)

<sup>141</sup> South African History online <http://www.sahistory.org.za> (Date of use: 20 April 2020)

<sup>142</sup> Jaffer, Z, "The Journalist" <http://www.iol.co.za> (Date of use: 20 April 2019)

This question could be extended to several other colonial agents such as Governor Harry Smith appointed and reporting to an authority as powerful as the British colonial government who decided that in the fight against Amakhosa, his allies the Afrikaners, had the latitude to shoot as they please.<sup>143</sup> Mention should be made that both gentlemen named above were in all probability aware of the great strides humanity had made to define and observe human rights and the sovereignty of nations.

Jan Van Riebeck for example arrived in the Cape in 1652, four years after the treaty of Westphalia which confirmed the sovereignty of states, which development was hailed as a foundation for peaceful co-existence of communities. It was also four years after the end of the eighty year war against Spanish imperialism. The eighty year war was between The Netherlands and Spain. At the end of the war the Dutch won their sovereignty and their claim to human rights from this Spanish. It is from the Netherlands, where Van Riebeck hailed from. This was the land of great legal minds such as Grotius, Johannes Voet and Van Bijnkeshoek, the latter an expert in Public International Law. All these would have at least instilled a sense of respect to other nations.

At issue is the colonialist's perception of what was human and what was not. As demonstrated in the previous chapter, international law, whether in the form of international Western treaties, by conventions or national customs would only apply to humans. Non-humans would have no claim to land, and consequently would not qualify for sovereignty. The assumption of the status of the land of the indigenous people as "Terra Nullius" (No man's land) characterized the colonialist's approach to land and human rights. (The concept of the "human" in human rights will be discussed in greater detail in the next section and chapter.

What followed thereafter in the dispossession of the indigenous people was in complete tandem with Van Riebeck's assertion that what was won in battle legally belongs to the victor. Several wars were fought between the Khoi and the Dutch, the first major one being the 1659 one, exactly seven years after the Dutch arrival in the Cape. The wars and the general level of tensions led to several treaties, which were in favour of European settlers.<sup>144</sup>

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<sup>143</sup> Ngcukaitobi, T, (2018) *The Land is Ours* (Penguin Cape Town) pp. 13.

<sup>144</sup> Timeline of Land Dispossession in South Africa 1652-1799: South African History Online [www.sahistory.org.za](http://www.sahistory.org.za) (Date of use: 24 April 2020)

Treaties became a second frontier of land dispossession in the encounters between indigenous people of South Africa and the white settlers. Even though it may seem farfetched to argue that indigenous leaders did not understand the implications of these treaties, it would be fair to assume that the legal implications of these treaties were generally not understood by the African leaders. This is evident in the complicated wording of the documents which were characterized by vagueness particularly on matters describing geographical entities. <sup>145</sup>

The avenue of treaties became a way of legalising conquests and conferring the rights of land acquisition by the victors. Violence and treaties were not the only avenue of acquiring rights and land ownership.

There were other “legal” means of land acquisitions: These include the procuring of tracts of land and the promulgation of legislation to gain control of land.

In some cases this also included taking away the authority of communities as vested in their traditional leadership. An example of how white settlers would procure huge tracts of land with no due regard to African communal rights would be in the Rustenburg area where missionaries bought land from Africans up to the 1860s. <sup>146</sup>

The legislative provisions of dispossession included the following Acts: the Glen grey Act of 1894, The Natives Land Act of 1913, Urban Areas Act of 1923, Natives Trust and Land Act of 1936 and the Group Areas Act of 1950. What all these legislations had in common was the reduction of the land owned by Africans or the curtailing of their movement and ability to own property. The legislation simultaneously granted more rights to Europeans in South Africa.

In this regard, the Glen Grey Act of 1894 was the first salvo and also a test case of a legislative provision of human rights to both European settlers and Africans. Its significance is in the fact that it was the first piece of legislation to provide for the concept of reserves for Africans. Its objectives were amongst others the following: the isolation and identification of land meant for Africans, created a labour tax to force Black young men into employment and identify those Africans who needed to attend to local wants. <sup>147</sup>

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<sup>145</sup> Donaldson, J.W (2011), Perceptions of Legal and Geographic Clarity: Defining International Land Boundaries in Africa in Home R Essays in African Land Law. University Law Press. Pretoria, pp. 03.

<sup>146</sup> Mbenga, B, and Morton, F, (1997) the Missionary as a Land Broker: Henri Gonin Saulsport 269 and the Bakgatla of Rustenburg District 1862-1922. South African Historical Journal 36(1), pp145-167

<sup>147</sup> Simons, H.J. and Simons, R.E. Class and Colour in South Africa 1850-1950 (Penguin African Library Middlesex 1969) 43

The 1913 land Act's most outstanding achievement of violation was to employ land ownership as a racial tool to allocate agricultural and housing resources. The Land Acts achieved a clear categorization on how people would access land and created privileges for one racial group and none for another.<sup>148</sup> The 1913 and the 1936 land acts merely complimented one another in dispossessing. Black people, although at face value the 1936 Act seemed to expand the land volumes owned by Black people. The 1913 land act perfected the 1936 Act by further limiting the amount of land owned by Black people to 7%. Whilst the former isolation purposes, the latter concluded the allocation and specified the framework of rights over land.

The Native and Trust Act of 1936, ironically later renamed the Development Trust and Land Act, constituted a completion of loopholes that previous legislation would not have foreseen. These included the reality that Africans would have remained living in areas that would have been legislated as white without their consent.

By law they would have suddenly become squatters and would have forfeited rights to their land. The act expressly disallowed such and characterized it as illegal occupation. The 1936 land Act laid the basis for various legislative tools that were enacted by the apartheid state to define ownership of land and human rights associated with land. The Group Areas Act of 1950 was one such case.

At the heart of the Group Areas Act was the right to property ownership and access to land. The legislated forfeiture of rights imposed on communities such as the residents of Sophiatown in Johannesburg and district six in Cape Town and Cato Manor in Durban was confirmation of the conquest approach on human rights, in that the conquered had neither a say nor a legal recourse. What had befallen them was merely a legal fate. The prevention of illegal squatting Act (no 52) which granted private land owners and local authorities the right to demolish properties that were erected without the permission of the land owner is another example. This Act empowered land owners to evict whoever was in their property without their approval. It did not matter whether such people had a legitimate claim to the land.

One interesting aspect of apartheid illegalization of human rights of Black people was their use of language in naming the legislative tools that effected such limitations. The promotion of self-government Act (no 45 of 1959, for example was aimed at establishing homelands, where Black people would eventually become citizens of "independent countries" but with limited land and resources.

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<sup>148</sup> Ibid



The Black community's development Act (no 4 of 1984) would at face value be read as promoting development of Black communities. In substance it was a calculated legislative tool to empower the state to dispose Africans. It even went further to grant the state the latitude to reverse the status of land granted to Black people. This legislation demonstrated the level at which the apartheid state recognized the significance of land ownership in its conception of human rights.

In determining the parameters of human rights as it pertained to the rights to land, successive colonial and apartheid governments used a variety of legal instruments to dispose Black people. These instruments ranged from blatant conquest, which as alluded to earlier, Jan Van Riebeck considered a legal method of acquiring the right to land. It also included treaties, which were skewed against Black people, in some cases procuring land from Black tribes, was employed as an initial tool of occupation. When the white settlers completely subjugated the Black people they resorted to employing legislation as a means of settling the land question. The idea of the right of conquest seemed to inform the theft of land by colonialists. At the centre of this idea was the belief that as soon as you have repelled an aggressor you have the right to his or her land<sup>149</sup>

The Acts constituted a deliberate effort to under develop Africans and to subjugate them into a new class of land owners, who in this case were white people.<sup>150</sup> So desperate was the situation of Africans after the Land Acts that some people were rendered so desperate in that they woke up to be told the land they always believed was theirs, was all of a sudden belonging to white farmers. Some had to end up working for the new farmers and were compensated by "boroko" (accommodation to lay their heads at night).<sup>151</sup> Working for the landlord in exchange for accommodation bears a stuck similarity with the definition of feudalism.

One of the central thrusts of feudalism was allowing serfs and peasants to use the land in exchange of protection and related needs such as accommodation. It appears that the land acts were one of the final instruments to achieve the objectives to create a feudal and slave society which resembled the situation in the Cape during the 18th and 19th century. Simons J. and Simons R. describe the post British system of the Cape thus, "...the colony resembled a feudal society in many ways. It was divided into estates rather than classes and strongly resisted radical reforms."<sup>152</sup>

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<sup>149</sup> Ramose MB, (2017) "The right of conquest and the expropriation of land, Thejournalist.org.za/spoor

<sup>150</sup> Bundy, C, African Peasants and Economic Changes in South Africa, 1870-1913 with particular reference to the Cape (PhD Thesis University of Oxford)

<sup>151</sup> Letsoalo, E, "Land Reform in post-apartheid South Africa" www.fao.org (Date of use: 22 April 2020)

<sup>152</sup> Simons, H.J and Simons, R.E (1969) Class and Colour in South Africa 1850-1950 (Penguin African Library Middlesex ) pp 12

Furthermore there were slaves from the East Indies, Madagascar and Mozambique. These slaves had their rights curtailed. For example, they were not allowed to enter into legal marriages up until 1823. Meanwhile the white farmers and their urban counterparts had a good time fornicating with slaves but still keeping them under intense subjugation. The implementation of the land acts throughout the country was a completion of the project of dispossession and feudalization that had started in the Cape a few centuries before. <sup>153</sup>

As argued in the preceding chapters not only has the current Constitution failed to settle the land question, it has instead affirmed the ownership of land to those who have won it through conquest. Furthermore, it has failed just like the legislative traditions post the French Revolution and the purported end of the British feudalism. The dispossessed and landless are not beneficiaries of the Constitutional provisions. In fact the dispossessed were not adequately engaged. Their lived experiences and their philosophical disposition to the land question was not accommodated at all in the drafting and the adoption of the Constitution

### **5.3 Some salient features regarding the land question in South Africa**

Even though South Africa suffered colonisation through conquest and a complete disregard of the economic and cultural interest of Africans, the Constitution of 1996 seems to commence from the premises that 1994 represented a beginning from a clean social, economic and political slate. It ignores the major variable that would inform a Constitutional framework that would take into account not only the interests of the subjugated, but also their opinions and wisdoms in finding a permanent solution to the land question.

Herein some salient features constituting worthy peculiarities on the South African land question.

#### **5.2.1 South Africa the world's most unequal country**

Around 1993, at the time of the negotiations for a political settlement, South Africa was one of the most unequal nations in the world. It trailed behind Brazil and countries such as Sierra Leone. <sup>154</sup> Twenty six years later, the World Bank has declared South Africa the most unequal country in the world. The report also points out those that are risk of chronic poverty are Black and colored South Africans. This antinomy summarizes the deficient of the 1994 political settlement and its impact on redress and the economy. It also flags the argument that the political settlement should not have been treated as merely calming down warring parties, but as an effort to dig deeper into the country old causes of strife's between Black and white people in South Africa.

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<sup>153</sup> Ibid

<sup>154</sup> Fransisca, H, G Ferreira, Phillipe, Leite and Julia, A, (2007) The Rise

The World Bank study put the blame on the enduring legacy of apartheid. This study argues that the genesis of the problem cuts deeper than apartheid. It stretches back to South Africa's colonial past, for the World Bank to at least acknowledge the role of history in the South Africa poverty trap is not commendable, but an important admission that examining and addressing the past would be an important variable in resolving the conundrum.

At the centre of South Africa's history is the land question. Even poverty levels can be understood and resolved better against examination and resolution of the land question. Any Constitutional dispensation that negates a relationship between poverty and the land question would be misdiagnosing the problem.

### **5.2.2 Vast amounts of land owned through conquest**

Land ownership patterns owe their profile to violence against communities in South Africa, commencing years before the arrival of Jan Van Riebeck in 1652. The violence from colonialists took the forms of slavery, forced migration, brutal seizure of land and driving away of indigenous communities from their land.<sup>155</sup> To date more than 72% of farms and agricultural holdings are owned by white people as opposed to 4% which is in the hands of Black people. This is as a result of colonial conquest the first recorded attempt of which was in 1510, when Portuguese colonialists were defeated at the outskirts of Cape Town.<sup>156</sup>

Ownership of land by conquest under whatever guise, even if it is the pretext of civilization as advocated by various colonialists,<sup>157</sup> deserves a dedicated Constitutional and policy response and remedy.

An ownership of 72% of farmland by a minority, which ownership was secured at gunpoint and repressive legislation is not an issue about which they can be silenced when a new Constitution is being developed.

Conquest by its very nature causes death and consequently social and psychological harm. Even worse is the economic impact of land theft that accompanies conquests. The theft of and the deliberate rendering of African males as candidates for labour provides in amongst others the mining industry resulted in the land impoverishment of rural communities, and destruction of the traditional rural economy.<sup>158</sup>

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<sup>155</sup> Mellet, P, T, (2020), A decolonized history of land, Tafelberg, Cape Town

<sup>156</sup> Madlingodzi, T (2018), A proposed amendment to the South African Constitution: finish the unfinished business of decolonization, critical legal thinking.com

<sup>157</sup> Bowden, B, ( 2019), In the name of civilization: war, conquest and colonialism, University of Western Sydney, Sydney

<sup>158</sup> CJPME Foundation, (2014), Roots of apartheid: South Africa's mining Industry, Analysis, 2014-001-v1

Both policies and Constitutional provisions of a nation are supposed to appreciate the context provided by conquest and its impact on society, and at least respond by providing a framework for sound remedy. The South African Constitution does not even mention the work colonialism and instead mentions conflicts of the past.<sup>159</sup>

The violent nature of conquest and its consequences should not be underplayed as it has a way of arising at a latter strategy as evident in amongst others, the Zimbabwe situation and the general attitude of the youth in South Africa displayed in the Rhodes and fees must fall campaigns.

### **5.2.3 Conquests legalised by colonial and apartheid laws**

Conquest legalized land theft. As explained in Chapter three of this study, various legislative instruments were employed to justify and legalize conquest. This included the Grey Acts the land Acts and the Group Areas Act. By passing these repressive legislations an impression was given that there was no law preceding European sponsored prescripts.

At the heart of the legalization that justified ownership of land by conquest lies the philosophy that land acquired by conquest can be legally owned. A new Constitutional dispensation and new policies must have challenged the notion that land acquired through violent means can be legally owned by the victor.

Even though it may be argued that the various land legislations were repealed in all practicality, the fact that in 2020, a hundred and seven years after the 1913 land Act, Black peoples land ownership patterns have not changed significantly implies that those legislation exist indirectly today through the provisions of the Constitution.

The Constitution has therefore given refuge to some of the harrowing consequences of the repealed legislations. This is evident in the fact that the adoption of the Constitution and the development of policy has not undone the impact of conquest. The next section will explain this further.

### **5.2.4 The status of the South African Constitution**

As regards the land issues, the South African Constitution has justified some of the major elements of repeated legislation in that it reinforces the following: a guarantee that who owned stolen land would keep it and they would be protected against those who wanted it backed, rendering land expropriation a matter of special circumstances which would involve a tedious process involving negotiations with the affected land owners encouraging of the supremacy of individual property rights as opposed to other forms of rights.

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<sup>159</sup> Madlingodzi T, (2018), A proposed amendment to the South African Constitution: finishing the unfinished business of decolonialisation, critical legal thinking.com

These features, amongst others, renders that legal instrument of conquest. It is document that starts in the future, at the expense of both the present and the past. It assumes that the subjugated and the conquered deserve no input on how to deal with the past and that there is no need to consider reparations. Even the charter of the African union is far more firmer on pronouncing the need to confront colonialism and its consequences in order to correct past injustices. It isolates colonialism as a problem in its preamble and encourages its eradication by whatever means necessary.<sup>160</sup>

The Zimbabwean Constitution is very explicit on identifying colonialism as a source of land theft and on the need for restoration.<sup>161</sup> That the Zimbabwean Constitution had to be so explicit about colonialism 23 years after independence is a lesson on what happens when colonialism is not confronted at the outset.

### **5.2.5 An inappropriate philosophy on human rights**

As explained in Chapter three, the philosophical thrust of the Constitution is neo-liberal. The origins of neo-liberalism and its key elements were also examined in Chapter two. This notwithstanding, and for the purposes of locating a relevant and appropriate philosophical thrust to address the land question, the following features of neo-liberalism deserve some emphasis.

In neo-liberalism, the individual constitutes the epicentre of human rights. Individual rights are therefore above every other right and deserve full expression and protection. These individual are as buttress against an enquiry on how they came to exist and whether their existence as a result of trampling upon other rights. This is one of most outstanding of the paradoxes of neo-liberalism.

Neo-liberalism as explained earlier on in this study is reluctant to bring the past into the equation of defining and determining the boundaries of human rights. It also relegates the role of communities to obscurity. The above lie in complete contrast to African philosophies which place the community as the enforcer and primary beneficiary of human rights. The rights of an individual in African philosophy do not exist in a vacuum. They are seen in the context of a broader community and in the spectrum of time, past, present, and future. An acknowledgement of a transgression in the past invokes the participation of the community and it is often meant for restorative purposes.

It is not true that the law was alien to Africans. Neither is it true that Africans never had their own philosophies. Over the centuries Africans developed their own laws and philosophies that informed and regulated their affairs including criminal conduct, foreign policy, determination of boundaries, ownership of land, and resolution of conflicts.

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<sup>160</sup> African Union charter, preamble and section 20 (2)

<sup>161</sup> Section 72 (7) of the 2013 Zimbabwean Constitution

In fact, African law is to a large extent based on morality and community interests, and has in some instances some sharp differences with European law. For example in African law there is no prescription.<sup>162</sup> The dictum “molato ga o bole” (meaning a transgression does not rot or expire) is in complete contrast with European law which upholds a prescription of transgressions.

A framework for Constitutional provisions to address the land question in South Africa needed to take into account amongst other things the salient areas raised above. The failure of the Constitution to take into account the reality of conquest, of the legalization of theft by colonial and apartheid regimes and the indigenous philosophies on conflict resolution misaligned the Constitution and land policies with the realities of the land question in South Africa.

#### **5.4 A framework to align human rights with the land question**

This framework rejects the current theoretical thrust of the Constitution which recognises no need to address conquest and its economic and social consequences, and which upholds individual rights as more important than the community and national interests. It further rejects the notion that an incremental approach in designing a Constitution would be appropriate to address the land question in South Africa. For these reasons herein the areas that need attention in addressing the vexing pain of dispossession.

##### **5.4.1 Definition of bill of rights**

Chapter two of the South African Constitution is about the bill of rights as they apply to South Africans. It covers the various aspects of rights citizens have. It covers rights such as dignity, privacy, life, freedom, security, freedom of religion, beliefs, opinion, association and political rights as possessed by citizens at present.

Even though the preamble of the Constitution recognizes the injustices of the past, in its second sentence, it does not give past injustices any prominence in its bill of rights. The thrusts of the Constitution are that the rights the citizens possess should not be tampered with. These rights are clearly existing rights which may be also be translated into the future.

Even though section 36 (1) and (2) provide a framework on the limitation of rights. Acquiring land by conquest does not feature at all. The bill of rights discourages any institutional effort to challenge conquest. Even the government is warned in the second sentence of the bill of rights not to temper with this rights, but to promote, respect and fulfil them.

As regards rights related to property, the Constitution categorically discourages seizure of possession as and as evident in section 14 (4) and also discourages redress to those who were victims of the 1913 land Act as stipulated in 15 (7).

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<sup>162</sup> Ramose, B.D (2018) “Towards a Post-Conquest South Africa: Beyond the Constitution of 1996” South African Journal on Human rights (34) 326-341.

The definition of human rights as projected by the Constitution is unable to look behind 1913 and it's largely sees individuals and not communities. This is just an indication of theoretical and philosophical bias of the Constitutions in favour of neo-liberalism which grudgingly refers to 1913 to acknowledge the history of land theft.

Any definition and concept of human rights, which fails to chronologise the conflict of human rights to at least 1510, and which fails to acknowledge that rights were trampled upon by various means for centuries, falls short of providing a framework of resolving the land issue in South Africa.

A Constitution for a nation as divided as South Africa, whose profile consequent to this is the most unequal country in the world needs to appreciate what human rights mean to all its people. A Constitution should appreciate the impact of conquest and this must be a fundamental consideration and not patch work, as evident in the various effort to amend the Constitution.

#### **5.4.2 Participation by all citizens**

A Constitution of a country which so violent a history should and so vast experiences should be developed in a manner that involves the participations of citizens in forums and manners they appreciate and understand. Planeloads of parliamentarians flying around and inviting people to community halls may tick the boxes, but may not sufficiently secure the inputs of those affected by injustice.

Even though a programme of consultation on the 1996 Constitution was designed and implemented, it was far from being adequate and appropriate to engage the victims of dispossession. The public meetings held, public hearings, the media awareness programmes and the inputs received were only sufficient to justify that consultations were held. The victims of dispossession would be easily excluded by amongst others the mediums employed for consultations.

Some victims of injustice use structures such as local imbizos run by traditional leaders and they may operate in manners different from town hall meetings. They would have no access Mere consultations can be very different from participation. Participation from Black communities is usually bottom up and not top down.

This framework proposes engaging the victims of colonialism in manners more immense than mere consultations. This is even more important because in the consultation model prior to the 1996 Constitution the real power to sift and accommodate information did not lie with the common people. This is evident in the product that emerged from those purported consultations. Had the collective wisdom of the oppressed people been duly considered the current human rights thrust by the state wouldn't be rejected.

Participation in this framework would encompass various phases i.e. from the conception of the Constitution to the approval stage. For this reason, this participation will adopt a different approach which will also ensure that the affected people have a role to play even after deliberations by the elected representatives. In this regard, an instrument such as referendum as employed in the adoption of the 2009 Bolivian Constitution would be appropriate provided that it was preceded by substantive participation. Participation limits the power of the elites and a referendum confirms if the scribes have accommodated the inputs of the majority. For the power of the elites to be limited the communities should be given the latitude to make inputs without censor.

A South African Constitution deserves immense participation and approval by the majority of the people and not only by elected officials. Granting more power to elites has resulted in cases where historical developments such as the fall of feudalism in France ended up with land owners developing the Constitution. A referendum of the final document encompassing human rights should be subjected to a National referendum.

#### **5.4.3 Effecting an appropriate philosophy on human rights**

Participation by all the affected people should not be limited to preserving what rights individuals have at present or what their expectations about the future are. Participation should include securing inputs on why the status quo exists and what mechanisms the different communities have to address both the past and the future.

It is here where the philosophies of the victims would bear reference. African philosophy for example has always encouraged restoration, but also confession from a transgressor. The philosophy on how to address a situation of conquests can only enrich the thrust of a Constitution whose overall role is to create legal certainty and social stability.

It is actually very strange that in a country that is constituted by the African majority the main philosophical thrust of the Constitution and government policies is Western. The least Western ideas could have gained is to be enriched by their African counterpart.

This does not appear to be the case in the South African Constitution where Ubuntu the guiding philosophical thrust. Instead Ubuntu is treated as a distant step child of neo-liberalism in our Constitution.

#### **5.4.4 Development of a completely new Constitution**

As argued in the first chapter of this study, the constituted has been a subject of attack by various role players and has been implicated by the youth as an impediment against social and economic justice. As mentioned and explained earlier on, the following would constitute the reasons why the Constitution bears a remote relevance to providing an acceptable overall supreme law of the land.



The neo-liberal theoretical basis of the Constitution and its consequent definition of human rights is not only foreign; it pretends that the indigenous people have no capacity to contribute to a document as important as a national Constitution. Student unrests, multiple service delivery protests and land grabs are a reflection of the inability of the legal framework provided by this Constitution unite the citizens of the country.

A new Constitutional process which will include thorough participation at all levels of both inputs and endorsement should be effected. The views and philosophies of the majority should be respected and included in the theoretical thrust of the Constitution. Any half-hearted incremental exercise will just be followed by many other exercises which will largely be response to dissatisfaction.

## **5.5 Conclusion**

This study concludes that the concept of human rights and how it related to the land question as enshrined in the South African Constitution is not aligned to the lived experiences and the philosophies of the majority of South Africans.

Evidence of this misalignment lies in the rejection of the Constitution by significant sections of the population such as youth and poor people who express this through various forms of protests. The ruling party's reluctant concurrence that the Constitution needs to be amended presents a confirmation of the human rights and land question conundrum.

This study argues that an opportunity exists to align human rights with the land question. This alignment cannot be a mere grafting of foreign philosophies such as neo-liberalism into a document which should primarily respond to the centuries old challenges faced by the majority of South Africans. A Constitution meant to provide a framework for South African legal system and the confines of human rights should therefore take its leaf from lived experiences and philosophies of the majority of the people.

In this case, this will be Black South Africans. Ubuntu, would be as philosophy that would respond and guide the new constituted framework. In disputing that notion that 1994 provided a framework for the resolution of the alignment of human rights with the land question in South Africa, the study stretches back to what is in some circles considered the French, the British and the American resolutions. The study demonstrates an intrinsic link between those revolutions and the development of a neo-liberal concept of human right. Even more important is the rise of land owners as sponsors, scribes and beneficiaries of "revolutions". This study characterizes the 1994 settlement as a theatre of ideological convergence amongst parties and that it is neo-liberalism that won.

The study argues that in the process of addressing the land question and its alignment to human rights, historical examination of who is considered human in the concept of human rights provides answers to the philosophy of neo-liberalism, the elevating of conquest to legality and why the status quo is perceived as the starting point of human rights.

As regards new Constitutional provisions this study proposes thus:

A new Constitution all together which will not be an incremental version of the current document. This Constitution should also be developed in a manner different to how the current one was developed. To this end, this new Constitution should be based on four fundamental steps which will ensure both its acceptability and legality.

The six steps being proposed are as follows:

### **1. Participation**

The first is to ensure that there is adequate participation of the majority of the people in the Constitutional development process. In this regard, mere reference to the people by experts and consultations by politicians cannot quality as participation consultation by politicians as evident in the process towards 1996 was a top down process, with communists at the behest of the authorities.

In the participation, the subject of land dispossession, and the human rights as they relate to land must be overtly raised to avoid ambiguities in interpretations of inputs. Important also would be the subject of local philosophies on conquest resolutions and how this is aligned to human rights as they relate to land. The implications of landlessness, past and present and the impact of conquest should also be discussed freely.

Participation in this case should grant the communities the latitude to tell their histories, express their feelings, and share their ongoing experiences and how this can be resolved. Participation should be beyond merely complying with the requirement of having involved the communities. The facilitation process should also involve people who understand the cultures of the community. The environment of the participation should be conducive for the communities to participate in a manner they are comfortable with and languages of their choice.

### **2. Drafting of the new Constitution**

The second step would be a drafting of the Constitution by experts who have an appreciation of the livid experiences, philosophies and inputs of the majority of the people. History has again demonstrated the power that lies in drafting declarations and Constitutions. The post feudalism drafting of the French Constitution by a land owner is one example.

The two people at the helm of the drafting of the Constitution Roelf Meyer, then a beneficiary of the old regime as a government minister, and the Chairman, Mr Ramaphosa, who became a wealthy man a few years after the adoption of the Constitution.

### **3. Subjecting the Constitution to parliamentary process**

The third step would be subjecting the draft to a parliamentary process which would include a live debate and processing by the appropriate sub-committees. The parliamentary process, whether in the form of debates or other parliamentary mechanism should be publicised sufficiently for the communities to follow. Language access should be stimulated both in parliament and in the media.

### **4. A national referendum**

The fourth step would be endorsement of a new referendum. A referendum would just like in the case of the Bolivian Constitution of 2008, grant the communities an opportunity to confirm their support or rejection of the human rights thrust in the new Constitution. It is also an extension of their participation and confirmation of their ownership of the new thrust on human rights.

### **5 Adoption by parliament**

The fifth step would be forwarding the document back to parliament for a final debate. If the document is rejected, the process would have to follow the motions. If the document has been confirmed by the referendum it will be formally adopted by parliament.

### **6. Signature by the president**

After the adoption by parliament, the Constitution would be forwarded to the office of the head of state. The president would sign the new Constitution and declare it a binding document on the nation at large. This will conclude the adoption of a new Constitution.

The above steps would ensure that the Constitution provisions in general, and its provisions on land and human rights earns not only legitimacy, but the ownership of the majority of South Africans. As it stands, the current Constitution and its provisions on human rights and its response to the land question, cannot claim to be owned by the majority of South Africans. The next remedy should avoid the current pitfalls. It will only do so if it engraves the lived experiences and philosophies of the majority of South Africans.

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## REFERENCES:

### BOOKS

Anthony, A, (2004) *Imperialisation Sovereignty and the Making of International law* edition (Cambridge University Press New York) pp 05.

Arendse S *What can Sobukwe teach us for today's struggle workers socialist party?* (Word press Johannesburg 2016).

Beinart, W, et al *Putting a Plough to the Ground: Accumulation and Dispossession in Rural South Africa 1850 to 1930* (Ravan: Johannesburg).

Biko, S. I (1978) *Write What I Like* (African Writers Series London) PP29.

Blaufarts, R, (2016) *The Great Demarcation: The French revolution and the Invention of modern property* (Oxford Press London)

Bundy, C ,*The Rise and Fall of African Peasantry* (James Curry London)

Campbell, C.T (1897) *A History of the Cape Colony from its Conquest in 1795* (Juta and company Cape Town) pp10-11.

Congost, R, (2003) *Property Rights and Historical Analysis: What Rights? What History? From Past and present* (Oxford University Press) 73-106.

Elias, T, (1988) *Africa and the development of International Law* (Martinus Nijhoff publishers London) pp 08

Fanon, F, *The Wretched of the Earth* Translated by Philcox R (New York Grove Press) 178 and 239.

Feher, F, (1990) *The French Revolution and the birth of Modernity* (Penguin London)

Finkelman, P, (2001) *Slavery and the founders: Race and liberty in the age of Jefferson* Chapter 6

Furet, F, (1981) *Interpreting the French Revolution* translated by Forster E" (The Press Syndicate of Cambridge University Press Melbourne) pp 24.

Gershoy, L, (1957) *The Era of the French Revolution* (Van Nostrand Company New Jersey) pp 12.

Goldstone, W, (1765) *Commentaries on the Laws of England* (Clanderon Press Oxford)

- 
- Halisi, C.R.D (1999) Black political thought in the making of South African Democracy (Indiana University Press USA)
- Hayek, F, (1944) The Road to Serfdom (Routledge Press United Kingdom)
- James, C, (1938) The Black Jacobins (Penguin London) pp. 8.
- Khalid, F, (1998) All the Phasha Men: Mohamed i Ali His army and the making of Modern Egypt pp10.
- Levy, N, (2016) the Final prize: My life and the Anti-apartheid struggle (SAHO Cape Town)
- Lyons, M, (1994) Napoleon Bornaparte and the Legacy of the French revolution (The Macmillan Press London) pp. 96.
- Meli F.A (1988) History of the ANC (Zimbabwe Press Harare)
- Mignolo .W. (2011) The Darker Side of the Western Modernity: Global Futures, Decolonial Options (Durham: Duke University Press) pp 39&40
- Monk H (2004) The Impact of the French Revolution (Cambridge university press Cambridge)
- Ngcukaitobi, T, (2018) The Land is Ours (Penguin Cape Town) pp13.
- Pogrud, B (2011) How Can a Man Die Better (Jonathan Ball Publishers Cape Town) pp 127.
- Pogrud, B, (2018) Mangaliso Sobukwe New Reflections (Johnathan Ball Cape Town 2018) pp 3.
- Poulantzas, N, (2014) State Power and Socialism (London) pp 44.
- Rao, P.L, (2017) *Tribal Land question* (Rawat Publications New Delhi)
- Schrubsole, G (2009) Who owns England (Blackwell London) pp 20
- Simons, H.J and Simons R.E (1969) Class and Colour in South Africa 1850-1950 (Penguin African Library Middlesex) pp 43
- Spencer, T.A (2005) Lecture read at The Philosophical Society in new Castle England in Monk Ian Hampsher The Impact of the French Revolution (Cambridge University Press Cambridge)
- Strydom, H (2016) International Law (Oxford University press ) pp 8-11
- Sydenham, M.J (1965) The French Revolution (William Clowes and Son London) pp 55.
- Tambo, O, Beyond the Engeli Mountains (David Phillip Claremont).
- Vatcher W.H (1965) White Laager: The Rise of the Afrikaner Nationalism Frederick (Prageger )

---

Vattel, E. (1797) *The Law of Nations Liberty fund Indianapolis Indiana*

Vovelle. M, (1972) *The Fall of the French Monarchy (Cambridge Press Cambridge ) pp. 3-7*

Wallerstein, I, (1990) *The French Revolution as a world historical event in The French Revolution and the birth of Modernity Edited by Feher F (University of California Press California)*

Wheaton, H, (1866) *Elements of International Law 8th ed (John Wilson and Sons Cambridge) pp 30*

William, D, (1990) *Oxford history of the French Revolution 3rd ed (Oxford University Press London)*

Worden, N, (1996) *The Making of modern South Africa (Blackwell Publishers, Massachusetts, USA).*

## **ARTICLES**

Boas, T.C and Gans-Morse, J (2009) "Neo-liberalism from New liberal philosophy to Anti liberal slogans" *studies in comparative International Development* pp 38

Comarof, J. and Comarof J.L (2004) "Policing culture, cultural policing: law and social order in postcolonial South Africa" (*Law & Social Inquiry*) pp 521.

Du Plessis, W.A (2007) "Self Help Guide to Research Methodology" (University of the North West Potchefstroom 2007)

Elliot, M, (2019) "Critical theory and decolonial possibility in the Neo-liberal moment" *International Journal of Social Economics* 1279-80.

Finkeldei, L, (2018) "The Decolonial Power of Community Tourism – Challenging Colonial Paradigms in Ecuador's Tourism Industry" (M.Sc. Thesis Human Geography: Germany Institute of Geography) 10-12.

Freddie, S and Pinuela, E.D.D" *Historical Research, Laguna State polytechnic" (University Laguna).*

George, S, (1999) "A short history of neo-liberalism presented at the conference of economic sovereignty in Globalising World Bangkok"

Gustafson, B (2009) "Manipulating Cartographies: Plurinationalism, Autonomy and Indigenous Resurgence in Bolivia" *Anthropological Quarterly* 82(4) 985-1016.

Land Audit Report, November 2017 version 2 Department of Rural Development and Land Reform Republic of South Africa

- 
- Madlingozi, T, (2017) "Social Justice in a Time of neo-apartheid to Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" Stellenbosch Law Review (28) 144.
- Madlingozi, T, (2018) "The Proposed Amendment to the South African Constitution: Finishing the Business of Decolonisation?" (University of Pretoria 2018)
- Madlingozi, T, "On Settler Colonialism and Post Conquest Constitutions" (University of Pretoria)
- Madlingozi, T, "The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonisation?" <https://www.criticallegalthinking.com> (Date of Use: 20 March 2020).
- Maldonado-Torres N (2017) "On the Coloniality of Human rights" Open Edition Journals 123.
- Marx, K, (1978) On the Jewish Question (1843) in Turker R (ed) The Marx-Engels Reader
- Mashele, R (2014) "Transformative Constitutionalism in South Africa: 20 years of Democracy, Mediterranean Journal of Social Sciences" 2014 Vol 5 no 27, MCSER Publishing, Rome
- Mellet, P.T, (2020) A decolonized history of land, Tafelberg, Cape Town
- Mignolo, W, (2009) "Who speaks for the "Human in Human rights" Human rights in Latin American and Iberian Cultures pp. 7-24.
- Modiri, J.M (2018) "Conquest and Constitutionalism: First Thoughts on Alternative Jurisprudence" (South African Journal of Human rights 2018)
- Moyn S (2014) "A Powerless Companion: Human rights in the Age if neo-liberalism" 2014 (Law and Contempt Probs 2014) 147.
- Moyn, S.A (2017) "Powerless Companion: Human Rights in the age of neo-liberalism 2014" (Law and contempt) pp. 77
- Ramose, M.B (2018) "Towards a Post-Conquest South Africa: Beyond the Constitution of 1996" 2 South African Journal on Human rights (34) pp. 326-341.
- Ramose M.B, (2017) "The right of conquest and the expropriation of land, The [journalist.org.za/spoor](http://journalist.org.za/spoor)
- Ramose, M.B (2003) "I conquer, therefore I am the Sovereign: Reflection upon Sovereignty, Constitutionalism and Democracy in Zimbabwe and South Africa" in PH Coetzee and APJ Roux (ed) (The African Philosophy Reader)
- Rantee, J, (1992) "Liberation and Negotiations, The Pan Africanist Congress in the South African Transition Series Policy" Issues and Actors Volume 5 No 2
- Robert, F, (1967) The Survival of the nobility during the French Revolution past and present (JSTOR 1967) pp. 71- 86
- Ryan, A, (1993)"Liberalism" in Goodin RE and Pettit P (ed) A Companion to Contemporary Political Philosophy pp. 291-311.

---

SACP "The Road to Freedom". The African Communist. Volume 2 Number 2 January- March 1963 (pages 24 to 70).

Santos, B (2007) "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges" Review 30(1) pp. 48 - 49.

Sarkin, J, "The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human rights Provisions"  
<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1474&context=jcl>. 02, 05, 28

Savanovic, A, "Economic neo-liberalism: Property Right and Redistribution Policy International Journal of Humanities and Social Sciences Volume 19 No 5.

Spivak. G.C (2011) "Righting Wrongs" in Singh A R and Cistelecan A (eds) Wronging Rights? Philosophical Challenges for Human rights pp. 78-103.

Tafira, C.K and Ndlovu-Gatsheni S.J (2017) "Beyond coloniality of markets exploring the neglected dimensions of the land question from endogenous African decolonial epistemological perspectives" African Insight Volume 46 No

Vatcher, W, H, (1965) "White Laager: The Rise of the Afrikaner Nationalism Frederick (Prageger) pp. 58-60.

Wolf, J, (2013) "Towards Post Liberal Democracy in Latin America: A Conceptual Framework Applied to Bolivia" (Journal of Latin America Studies) 31-59.

Wolpe, H, (1972) "Capitalism and Cheap labour power in South Africa: from segregation to apartheid society." Vol 1 No 4 1972 Taylor and Francis online.

## **INTERNET**

ANC Constitutional Guidelines <https://www.sahistory.org.za.archive> (Date of use: 9 May 2019)

ANC Constitutional Guidelines <https://www.sahistory.org.za.archive> (Date of use: 9 May 2019)

Dube JL <https://www.sahistory.org.za> (17 May 2019)

Dube JL <https://www.sahistory.org.za> (17 May 2019)

First Principles Natural Law [www.firstprinciplesjournals.com](http://www.firstprinciplesjournals.com)>articles (Date of use: 25 January 2020)

First Principles Natural Law [www.firstprinciplesjournals.com](http://www.firstprinciplesjournals.com)>articles (Date of use: 25 January 2020)

Fisk, C.L and Gordon, R.W (2017) "Law as theory and Method in Legal History"  
[www.law.uci.edu](http://www.law.uci.edu), (Date of use: 21 April 2020)



---

Fransisca, H (2007), G Ferreira, Phillipe, Leite and Julia, A, 2007 The Rise and fall of Brazilian Inequality. [www.revista.drclass.harvard.edu](http://www.revista.drclass.harvard.edu)

<https://hsf.org.za> (Date of use: 25 February 2020).

<https://hsf.org.za> (Date of use: 25 February 2020).

<https://www.enca.com>news.cape-town> (Date of use: 22 April 2020)

<https://www.libertarianism.org> (Date of use: 24 April 2020)

<https://www.oxforddictionaries.com> (Date of use: 29 April 2020)

<https://www.sahistory.org.za>article>d> (Date of use: 21 April 2020)

<https://www.un.org> (Date of use: 20 May 2019).

<https://www.un.org> (Date of use: 20 May 2019).

Jaffer, Z, "The Journalist" <http://www.iol.co.za> (Date of use: 20 April 2019)

Letsoalo, E "Land Reform in post-apartheid South Africa" [www.fao.org](http://www.fao.org) (Date of use: 22 April 2020)

Macfarlane, L.J Marxist Theory and Human rights 2014 <https://www.cambridge.org>core> (Date of use: 20 May 2019).

Madlingozi T "Decolonising decolonization with Eskia Mphahlele"

<https://www.power987.co.za>life>deco> (Date of use: 21 April 2020)

Marxist Internet archive [www.marxist.org](http://www.marxist.org) (8 April 2020)

Marxist Internet archive [www.marxist.org](http://www.marxist.org) (8 April 2020)

Mkhize, N, M (2019) The Precolonial rise of Khoisan economies, [www.thejournalist.org.za](http://www.thejournalist.org.za) (Date of use: 21 April 2020)

Ramaphosa speech at Afrikanerbond <https://lol.co.za>news>opinion>: (Date of use: 23 April 2020)

Ramose M.B, (2017) "The right of conquest and the expropriation of land, The [journalist.org.za/spoor](http://journalist.org.za/spoor) (Date of use: 13 Dec 2020)

---

Teshome, M, "Transformative Constitutionalism in South Africa" [www.researchgate.net](http://www.researchgate.net) (Date of use: 22 April 2020)

The origins of the ANC and the freedom struggles in South Africa [www.anc.org.za](http://www.anc.org.za) (17 May 2019)

Timeline of Land Dispossession in South Africa 1652-1799: South African History Online [www.sahistory.org.za](http://www.sahistory.org.za) (Date of use: 24 April 2019)