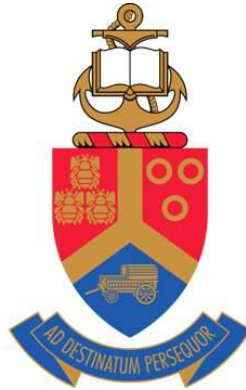


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PhD

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**Negation and Naturalisation: Tracing the Logic of Discovery
in the Promotion of National Unity and Reconciliation Act**

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Abstract

This thesis critically examines the Promotion of National Unity and Reconciliation Act of 1995 (PNURA) in South Africa, arguing that it reinforces colonial logic and jurisprudence despite its stated aim of promoting reconciliation. The study contends that the PNURA, which established the Truth and Reconciliation Commission (TRC), operates within a framework that legitimizes the existence of South Africa as a settler colonial state, thereby perpetuating historical injustices against indigenous peoples.

By employing the concept of the "logic of discovery", the thesis demonstrates how the PNURA's approach to transitional justice negates indigenous sovereignty and naturalizes European conquest. The research critiques the Act's underlying assumptions, particularly its failure to address the fundamental issue of territorial sovereignty for indigenous South Africans.

The study further analyses the PNURA as a narrative project, exploring how its liberal historiography and chronosophy shape a national identity that aligns with Western ideals while marginalizing indigenous perspectives and territorial sovereignty. It examines the TRC's restorative justice approach and its reliance on colonial legal frameworks, such as indemnity jurisprudence.

Furthermore, the thesis investigates how the PNURA's focus on individual human rights and liberal democracy obscures broader structural inequalities rooted in colonialism and apartheid. It argues for a fundamental reconceptualization of transitional justice discourse that challenges entrenched colonial underpinnings and considers alternative approaches to reconciliation and nation-building.

Dedication

To Dali, my love.

To Amani, my joy.

To my mother, my inspiration.

To Charles Mills, my intellectual muse.

To Mogobe Ramose, my intellectual illuminator.

- *Tsela e itsiwe ke yo o e tsamayang. Tell the truth, even if your voice shakes.*

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NEGATION AND NATURALISATION: TRACING THE LOGIC OF DISCOVERY IN THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT 34 OF 1995

CHAPTER 1: INTRODUCTION

1.1. Problem Statement

In contemporary South Africa, discussions of the lingering dynamics of colonial conquest are systematically minimized, erased, or distorted to fit an epistemic framework that assumes the inherent justifiability of the state's existence and current power relations. This dynamic is exemplified by the Promotion of National Unity and Reconciliation Act 34 of 1995 (PNURA), which framed reconciliation as an inevitable, teleological endpoint and portrayed it as a necessary resolution of South Africa's confrontation with historical injustice. This ideological narrativization of South Africa's transcendence serves to obscure the ongoing reproduction and regeneration of colonial conquest. This study scrutinizes the PNURA with a view to reread it as an instrument in the fortification and rationalization of colonial logic and jurisprudence in South Africa. By framing apartheid primarily as an issue of racial strife that could be transcended through national unity and reconciliation, the TRC's framework implicitly legitimizes South Africa's existing structural inequalities while minimizing the persistent material conditions of Black subjugation and subpersonhood in their native land. This thesis examines how the TRC's narrative of transcendence—embodied in its investigative processes, victim and perpetrator hearings, and stated goal of achieving "national unity, the well-being of all South African citizens and peace"—operates within a colonial epistemic framework that distorts our understanding of historical injustice.¹ Through historical contextualization, this research reveals how the colonial logic embedded in the TRC's reconciliation narrative continues to reproduce and justify existing power relations, thereby maintaining systems of white supremacy while impeding a more comprehensive engagement with South Africa's colonial past and its contemporary manifestations.

The PNURA was mandated in the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution) to regulate the creation of an amnesty commission which

¹ Promotion of National Unity and Reconciliation Act 34 of 1995.

was a measure agreed upon during the negotiations towards a liberal democratic South Africa. The PNURA's role evolved to legislating and regulating South Africa's Truth and Reconciliation Commission (TRC); a court-like body established in South Africa following the 1994 national elections "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past."² In principle, the mandate of the TRC was to promote national unity and reconciliation through (1) conducting investigations into politically motivated human rights violations during apartheid, (2) granting amnesty for those perpetrators of human rights violations who gave full disclosure of their acts, (3) holding victim hearings, and (4) giving recommendations for reparations for victims.³ The overarching logic underpinning the creation of the TRC is that South Africa as a political formation has an inherent right to exist as a state and its existence as a liberal democratic state is justified in and of itself; thus, all measures aiming for historical redress must be targeted towards this foundational premise.⁴ The grand narrative of the TRC was intended to facilitate the road to transcendence by facilitating the closure of historical strife and animosity. The logical operation of the narrative would generate a meaning buttressed by the predetermined organisation of the details ascertained through the investigations and also through the perpetrator and victim hearings. The meaning of this narrative, which is the necessity of the transcendence of racial strife to national unity, provides a political, ethical and epistemic basis from which to understand said transcend historical injustice. Historical injustice in this dimension was considered to be relational strife and segregation, and the goal of the transcendence was to achieve "national unity, the well-being of all South African citizens and peace... [through] reconciliation between the people of South Africa and the reconstruction of society [that is, a collective civic identity]."⁵

Building a critique of the foundational assumption that South Africa's territory belongs to a polity constituted by both settler colonizers and indigenous people, as assumed in the negotiations towards a liberal democratic South Africa, the main contention of this thesis is that the jurisprudence regulating the TRC unjustifiably posits a causal or substantive link between its functions—facilitating investigations and truth-telling, granting amnesty, and recommending reparations—and the transcendence of historical injustice. In fact, I will extend the critique that despite the TRC's stated purpose of promoting national unity and

² Promotion of National Unity and Reconciliation Act 34 of 1995.

³ Promotion of National Unity and Reconciliation Act 34 of 1995.

⁴ Promotion of National Unity and Reconciliation Act 34 of 1995.

⁵ Constitution of the Republic of South Africa Act 200 of 1993.

reconciliation, the PNURA may actually pre-emptively perpetuate the very colonial and apartheid structures the TRC sought to transcend. The thesis identifies a key conundrum: the South African state aims to transcend historical injustices related to racial segregation and discrimination, yet it is established on indigenous territory as a settler colonial racial polity governed by Western imperial norms. Consequently, the research question to be confronted is: how does the Promotion of National Unity and Reconciliation Act reinforce the continuity of colonial conquest in South Africa?

In this thesis, the specific form of colonial logic explicated and utilised as a conceptual tool is the logic of discovery. The European logic of discovery, central to conquest, hinges on negating indigenous sovereignty and naturalizing European dominion through the force of law. This logic underpins legal and philosophical justifications for colonization. It is essential to interrogate the epistemological foundations of transitional justice, exposing the ways in which it is inextricably linked to the logic of discovery that facilitated and justified European conquest. Unpacking the "logic of discovery" is crucial to unravelling the deeply ingrained colonial mentality that continues to shape contemporary perceptions of justice, sovereignty, and legitimacy. The concept of terra nullius, or "empty land", central to the logic of discovery, allowed European powers to deem occupied territories as "empty" if indigenous occupants were considered uncivilized by European standards.⁶ This process created a legal vacuum that European sovereignty could fill, positioning indigenous peoples as inferior to European ideals.

This study posits that a fundamental reconceptualization of transitional justice discourse is imperative, one that challenges the entrenched colonial underpinnings and dismantles the hegemonic narratives that legitimize the perpetuation of racial domination as embedded in the logic of discovery. This logic, born out of the encounter between European powers and indigenous peoples during the pre-Enlightenment era of global conquest, served as a legal and philosophical framework for negating the territorial sovereignty of the latter while simultaneously naturalizing and justifying European conquest and domination. The logic of discovery, central to European conquest, hinges on two key processes: the negation of indigenous sovereignty and the naturalization of European domination through law. These intertwined concepts form the backbone of the legal and philosophical justifications for

⁶ C Boisen "The Changing Moral Justification of Empire: From the Right to Colonise to the Obligation to Civilise" (2013) 39 *History of European Ideas* 321.

colonization. This negation was not merely a passive dismissal but an active process of rendering indigenous peoples and their rights invisible in the eyes of European law. The concept of terra nullius, or "empty land," exemplifies this negation. Even when indigenous peoples clearly occupied territories, European powers could declare these lands "empty" in a legal sense if they deemed the occupants to be lacking in "civilization" or proper land use according to European standards.⁷ Naturalization (which also involves obscuring the political and material foundations of the settler colonial order) on the other hand, was the process by which European sovereignty was presented as the natural, inevitable order of things. By negating indigenous sovereignty, European powers created a legal and conceptual vacuum that their own sovereignty could then naturally fill. This process was not just about territorial acquisition but about ontological positioning. Indigenous peoples were categorized as "not Christian, not positive, not good, not fully human, not civilized" – a series of negations that positioned them as the inverse of European ideals.⁸

It will be argued that the PNURA functions as a mechanism of liberal constitutional democracy, and, by employing a colonial historiography and constructing a national narrative legitimating the establishment of a settler colonial racial polity on territory belonging to indigenous people, the PNURA effectively dispossesses them of their territorial sovereignty. Transitional justice legislation such as the PNURA, it will be argued, embodies this colonial logic. By presenting reconciliation and unity narratives that obscure ongoing dispossession and marginalization of indigenous communities, the PNURA diverts attention from restoring indigenous sovereignty, thereby negating indigenous sovereignty and naturalizing European conquest. This study critiques transitional justice mechanisms, including truth commissions, which, despite their ostensible aim to address historical injustices, inadvertently maintain colonial forms of domination. The persistence of the colonial logic of the negation of indigenous sovereignty and the naturalisation of European conquest hinders genuine decolonization, perpetuating power imbalances rooted in European conquest. A fundamental reconceptualization of transitional justice discourse is imperative to challenge entrenched colonial underpinnings and dismantle hegemonic narratives that legitimize Western dominance over territories with a history of suffering colonial conquest. Colonialism

⁷ P Gúmplová "Rights of Conquest, Discovery and Occupation, and the Freedom of the Seas: A Genealogy of Natural Resource Injustice" (2021) *Isonomía* 103.

⁸ S Newcomb *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (2008) 137.

continues to cast a long shadow over contemporary political, legal, and social structures in many parts of the world. Examining how the jurisprudence of transitional justice mechanisms such as the TRC may reinforce the continuity of European colonialism, the study will explore the foundational concepts that have shaped colonial relationships, and how they continue to influence current legislative frameworks. By critically examining the PNURA and its underlying assumptions, this research aims to contribute to a deeper understanding of how colonial logic continues to shape contemporary legal and political structures in South Africa and beyond. It seeks to unpack the complex relationship between history, justice, and sovereignty, and to propose alternative frameworks that can more effectively address the legacies of colonialism and promote genuine decolonization.

1.2. Motivation and Background

The central argument advanced in the motivation is that transitional justice discourse, including the narratives constructed by the TRC and the PNURA, is fundamentally rooted in a colonial logic that perpetuates the subjugation of indigenous peoples and the usurpation of their sovereignty. This colonial logic, termed the "logic of discovery," served as a legal and philosophical framework for negating the territorial sovereignty of indigenous communities while simultaneously justifying and naturalizing European conquest and domination.

This work is fundamentally motivated by the recognition that meaningful decolonization requires understanding how legal instruments like PNURA, while promising reconciliation, can reproduce colonial power relations and impede genuine justice. The PNURA demands urgent scholarly attention for its role in perpetuating colonial dynamics. While existing literature has examined the Truth and Reconciliation Commission's role in nation-building, insufficient attention has been paid to how the Act itself functions as a legal instrument that simultaneously naturalizes settler presence and negates indigenous claims to justice. The Act merits particular scrutiny because it embodies both legal and psychological dimensions, shaping collective memory and inter-group relations on a duplicitous logic of national identity. This research reveals how transitional justice discourse, ostensibly aimed at reconciliation, reinforces the "logic of discovery"—a framework that continues to negate

indigenous territorial sovereignty while normalizing white settlement.⁹ The significance of this investigation extends beyond academic discourse to the material conditions of Black subjugation and the broader project of decolonization. By exposing how this dynamic operates in both narrative and legislation, this research contributes to the reclamation of indigenous territorial sovereignty and epistemic frameworks that centre *ubuntu*—where true justice demands not the obfuscation of historical injustice but a genuine reckoning with colonial conquest and its contemporary manifestations.¹⁰ This work is fundamentally motivated by the recognition that meaningful decolonization requires understanding how legal instruments like PNURA, while promising reconciliation, can reproduce colonial power relations and impede genuine justice.

Transitional justice legislation will be dissected through a critical lens, and I will track its underlying colonial logic of discovery. This logic, intricately woven into legal frameworks, perpetuates the historical narrative of European conquest and domination while eroding indigenous sovereignty. By analysing the operational mechanisms of this colonial jurisprudence, the study exposes how it continues to exert influence, shaping state sovereignty in favour of colonizers. One key aspect elucidated is how the PNURA negates indigenous sovereignty and naturalizes European conquest by presenting a narrative that nullifies the need for the return of territorial sovereignty to indigenous peoples of South Africa. Through the lens of colonial logic, the legislation constructs a narrative of reconciliation and unity that obscures the ongoing dispossession and marginalization experienced by indigenous communities. Consider, for instance, the assumption in the preamble of the PNURA that “the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society”, an assertion that omits the restoration of land to the indigenous people exigent for redress of historical injustice.¹¹

What has often come to the fore in conversations on the relationship between transitional justice and historiography is the importance of "reconciliation through truth telling and about the healing force of remembering or remembrance as justice."¹² As this

⁹ RJ Miller "The International Law of Colonialism: A Comparative Analysis" (2011) 15 *Lewis & Clark Law Review*

¹⁰ MB Ramose "An African Perspective on Justice and Race" (2001) 3 *Polylog* <<https://them.polylog.org/3/frm-en.htm>> (Accessed: 11—05-2024).

¹¹ Promotion of National Unity and Reconciliation Act.

¹² B Bevernage "Transitional Justice and Historiography: Challenges, Dilemmas and Possibilities" (2014) 13 *Macquarie Law Journal* 8.

study will show, the assumptions underpinning transitional justice literature, regarding the taken-for-granted relationship between history and justice, unveil the resolute determination of colonial powers to champion individual human rights observance in liberal democracy and its manifestation in global politics as the panacea for all forms of political injustice, whether rooted in the past or persisting in the present.¹³ The research scrutinizes the paradox inherent in transitional justice mechanisms, notably truth commissions, which are often heralded as just responses to historical injustices. However, these mechanisms inadvertently perpetuate colonial forms of domination, maintaining the status quo of power imbalances rooted in European conquest and colonization. This study posits that a fundamental reconceptualization of transitional justice discourse is imperative, one that challenges the entrenched colonial underpinnings and dismantles the hegemonic narratives that legitimize the perpetuation of Western dominance over formerly colonized territories. It is essential to interrogate the epistemological foundations of transitional justice, exposing the ways in which it is inextricably linked to the logic of discovery that facilitated and justified European conquest.

To fully comprehend the TRC's role and function, it is crucial to situate it within the discourse of transitional justice. While lacking a precise definition, transitional justice generally refers to a multifaceted approach that addresses systematic or widespread human rights violations during periods of political transition from oppressive or violent regimes to democracy and peace. As Ruti Teitel defines it, transitional justice is "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."¹⁴ As such, transitional justice encompasses juridical processes and procedures implemented during political change, aiming to redress large-scale human rights violations while simultaneously promoting reconciliation, sustainable peace, and democratic order.¹⁵

Desmond Tutu, the chairperson of the TRC, emphasized the importance of restorative justice in the Commission's approach. This focus on healing breaches, redressing imbalances, and restoring broken relationships stands in contrast to retributive justice.¹⁶ Tutu appealed to

¹³ P Arthur "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice" (2009) 31 *Human Rights Quarterly* 335.

¹⁴ R Teitel "Transitional Justice Genealogy" (2003) 6 *Harvard Human Rights Journal* 69.

¹⁵ G Kasapas "An Introduction to the Concept of Transitional Justice: Western Balkans and EU Conditionality" (2008) *UNISCI Discussion Papers* 60; R Teitel "Transitional Justice Genealogy" (2003). 6 *Harvard Human Rights Journal* 69; A Bothmann *Transitional Justice in Nicaragua 1990–2012: Drawing a Line Under the Past* (2015) 27.

¹⁶ M Walker "Restorative Justice and Reparations" (2006) 37 *Journal of Social Philosophy* 383.

the practice of the African ethic of Ubuntu, which, to him, seeks to rehabilitate both victims and perpetrators and reintegrate them into the community.¹⁷ This restorative justice model formed the cornerstone of the TRC's work, aiming to provide redress and justice for victims of human rights abuses while promoting reconciliation and the establishment of a democratic order. The concept of Ubuntu, which emphasizes the interconnectedness of human beings and the importance of community, played a significant role in shaping the TRC's approach. By incorporating its version of Ubuntu into its framework, the TRC sought to create a process that was not only about uncovering truth but also about fostering a sense of shared humanity and collective responsibility for the future of South Africa.

Within this context, the TRC, as a truth commission, fulfils an essential epistemic role by investigating and recording human rights violations in South Africa's recent history. This process establishes historical truth and brings it into the public domain, combating the denial of historical atrocities. As Michael Ignatieff aptly notes, "[t]he past is an argument and the function of truth commissions, like the function of honest historians, is simply to purify the argument, to narrow the range of permissible lies."¹⁸ The TRC was meant to achieve its goals by holding hearings for statements from both perpetrators and victims, providing a platform for public acknowledgment and healing. This approach is rooted in the belief that uncovering the truth about past abuses is essential for national reconciliation and the prevention of future human rights violations. By creating a public record of these atrocities, the TRC aimed to ensure that history is not forgotten or distorted, thereby contributing to the collective memory of the nation and fostering a shared understanding of the past.

The need to reread the PNURA as a narrative project is rooted in the complex interplay between historical reconstruction, national reconciliation, and the persistence of colonial frameworks. As intimated in the preamble of the PNURA, the purpose of the TRC was to ensure that history is not forgotten or distorted, thereby contributing to the collective memory of the nation and fostering a shared understanding of the past. This approach aligns with R.G. Collingwood's concept of historical imagination, which argues that historians must use "*a priori* imagination" to bridge gaps in evidence and create coherent narratives of the past while still aiming for truth.¹⁹ However, the process of constructing this narrative is not neutral. Hayden White's "Metahistory" contends that historical narratives are inherently

¹⁷ D Tutu *No Future without Forgiveness* (2000).

¹⁸ M Ignatieff "Articles of Faith" (1996) 25 *Index on Censorship* 113.

¹⁹ RG Collingwood *The Idea of History* (1994) 92-94.

literary constructions with ideological underpinnings. White argues that historians shape events into coherent stories through "emplotment", which ascribes meaning to historical accounts.²⁰ This perspective is crucial when examining the PNURA and TRC's work, as it highlights the potential for these narratives to be shaped by existing power structures and ideologies. The PNURA's narrative framing is evident in its portrayal of South Africa as emerging from a "deeply divided society characterized by strife, conflict, untold suffering and injustice" and moving towards "a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans."²¹ This framing, while ostensibly promoting reconciliation, nonetheless reinforces a colonial perspective by presenting a linear narrative of progress that aligns with Western liberal democratic ideals.

The PNURA's framing assumes that knowledge of "the truth about the past" would lead to forgiveness and reconciliation, promoting national unity and transcending racial animosity.²² This epistemological assumption guided the TRC's work in creating an epistemic infrastructure to facilitate South Africa's transition. The TRC's mandate to record and contextualize testimonies to create a meaningful account, bridging gaps between individual experiences to form a national narrative, aligns with Collingwood's notion of historical imagination. However, this process was constrained by the need to create a picture that was "meant to be true" while also serving the goals of national healing and reconciliation.²³ This tension between historical accuracy and national reconciliation objectives merits further scrutiny. Rereading the PNURA and TRC as a narrative project allows for a critical examination of how these mechanisms may have been influenced by and potentially reinforced colonial epistemologies. It invites questions about whose stories are centred, whose perspectives are marginalized, and how the framing of historical events may shape contemporary power dynamics. Furthermore, this re-examination can shed light on the limitations of transitional justice mechanisms that operate within existing legal and political frameworks.

However, while the TRC's work is often lauded for its role in uncovering truths and promoting national healing, it has not been without criticism. The TRC's focus on individual acts of violence and reconciliation has been criticized for potentially obscuring broader

²⁰ H White *Metahistory: The Historical Imagination in Nineteenth-Century Europe* 1973 20.

²¹ Promotion of National Unity and Reconciliation Act.

²² Explanatory Memorandum to the Promotion of National Unity and Reconciliation Bill, 1995 <<https://www.justice.gov.za/trc/legal/bill.htm>> (Accessed: 30-01-2019).

²³ Collingwood *The Idea of History* 94.

structural inequalities that persisted in South African society. Mahmood Mamdani argues that by focusing on individual perpetrators and victims, the TRC may have inadvertently downplayed the systemic nature of apartheid and the ways in which it benefited entire segments of the population.²⁴ This critique suggests that true reconciliation and justice might require addressing not only individual acts of violence but also the broader socio-economic legacies of apartheid. The tension between the TRC's aspirations for reconciliation and its reliance on colonial legal frameworks raises important questions about the nature of transitional justice. While the Commission sought to create a new narrative of national unity and healing, its methods and structures were, to some extent, rooted in the very systems it aimed to overcome.

One significant area of contention is the TRC's use of colonial indemnity jurisprudence within the PNURA's conception of and conditions for amnesty, which highlights how the Commission employed a colonial jurisprudence that threatened its project of transcending colonial governmental structures.²⁵ Indemnity jurisprudence has its roots in colonial governance, where it was used as a mechanism to manage the suspension of the rule of law under the guise of necessity.²⁶ During the colonial and apartheid eras, the principle of parliamentary sovereignty reigned supreme, granting the parliament the power to dispense or withhold indemnity as it saw fit. This legal construct allowed the government to justify and legalize actions that would otherwise be considered unlawful, often in the name of maintaining order or responding to perceived threats.²⁷ The excessive application of indemnity jurisprudence during the apartheid era led to a severe erosion of the rule of law. As Sitze argues, this erosion allowed for significant abuses of power and ultimately rendered the rule of law insubstantial within the context of indemnity jurisprudence. The apartheid government frequently invoked the principle of necessity to justify its repressive actions, creating a legal environment where state violence and human rights violations could be carried out with impunity.

While the TRC was established to create a clear break from the legal traditions that had enabled and sustained apartheid, the PNURA's use of indemnity jurisprudence

²⁴ M Mamdani "When Does Reconciliation Turn into a Denial of Justice?" in CH Heyns & K Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A Reader* (1998) 382.

²⁵ A Sitze *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (2013).

²⁶ 11.

²⁷ 11.

perpetuated elements of the very system it sought to overcome.²⁸ The TRC's amnesty process required applicants to demonstrate a political motive for their actions to be considered for amnesty.²⁹ This requirement, while intended to distinguish between political acts and criminal ones, effectively reiterated the logic of necessity that had previously enabled state impunity under apartheid. By adopting this approach, the TRC unintentionally allowed elements of colonial indemnity jurisprudence to persist in the post-1994 state.³⁰ The PNURA's struggle with indemnity jurisprudence demonstrates how deeply ingrained legal traditions can persist and influence even well-intentioned efforts at reform. The tension between the PNURA's aspirations for a new legal order and its reliance on familiar legal concepts highlights the broader challenges of transitional justice. In essence, the PNURA's use of indemnity jurisprudence threatened its goal of achieving a jurisprudential break from the past by perpetuating elements of colonial and apartheid-era legal thinking. This approach shows the limits of the PNURA to establish a truly novel framework for justice and reconciliation.

This thesis aims to elucidate the nature of South Africa as a settler colonial racial polity, a crucial understanding that serves as a foundation for analysing the liberal historiography embedded in the PNURA. By establishing this context, we can better comprehend how the PNURA's narrative framework functions to legitimize the establishment of South Africa as a liberal democracy, while simultaneously perpetuating colonial power structures. The thesis will argue that racialization and racism are constitutive elements of colonial relations in South Africa. The process of racializing colonizers as white and natives as black was intrinsically linked to the pursuit of profit and the maintenance of white security in the face of a growing black population perceived as a potentially dangerous "other". This racialization formed the basis of a social and economic hierarchy that persisted well beyond the formal end of apartheid. By establishing South Africa as an imperialized settler colonial racial polity, the thesis will provide a critical lens through which to examine the PNURA and its underlying liberal historiography. This perspective is essential for understanding how the Act, despite its stated commitment to equality and democracy, operates within a framework deeply rooted in Western colonial thought.

²⁸ Sitze *The Impossible Machine*.

²⁹ 11.

³⁰ 11.

The study will also turn to Charles Mills's critique of social contractarianism to demonstrate how the PNURA, like the Interim Constitution it stems from, redefines sovereignty in a way that legitimizes European settlement and domination over indigenous people.³¹ This redefinition process, while couched in the language of individual human rights and equality, effectively perpetuates the exclusion of indigenous ways of thinking and governing in racial polities. Furthermore, the thesis will explore how the PNURA's narrative aligns with what James Tully describes as the "grand discursive formation of control" prevalent in liberal and transitional justice discourse.³² This framework encompasses processes of constitutionalisation, representative democratization, and centralization of sovereignty, which serve to maintain Western dominance under the guise of democratization and reconciliation. By explicating South Africa's nature as an imperialized settler colonial racial polity, the thesis will demonstrate how the liberal historiography of the PNURA functions to legitimize the establishment of South Africa. This understanding is crucial for several reasons: Firstly, it reveals the continuity of colonial logic in post-1994 South Africa, despite the rhetoric of reconciliation and equality. Secondly, it exposes the limitations of transitional justice mechanisms that operate within Western liberal frameworks in addressing deep-rooted historical injustices. Thirdly, it provides a basis for critiquing the assumption that adopting Western models of democracy and constitutionalism is the only or best path forward for societies with a history of colonial conquest. Lastly, it opens up space for considering alternative approaches to reconciliation and nation-building that might better address the legacy of colonialism and apartheid.

In the case of the Doctrine of Discovery, this relationship between law, narrative, and time worked to the benefit of European colonial powers at the expense of indigenous peoples and lands. The doctrine provided a legal framework that legitimized colonial narratives of discovery and conquest, while simultaneously shaping the temporal understanding of indigenous histories and rights. This interplay created a powerful tool for maintaining colonial power structures and justifying the dispossession of indigenous peoples. The relationship between law, narrative, and time is a complex and influential one, particularly in the context of colonial legal frameworks. This interplay is evident in the PNURA's approach to addressing historical injustices. To understand this relationship, we must examine how these elements interact and reinforce each other. Time serves as a fundamental structuring

³¹ CW Mills *The Racial Contract* (1997).

³² J Tully "Modern Constitutional Democracy and Imperialism" (2008) 46 *Osgoode Hall Law Journal*.

principle for narratives, providing the framework within which stories unfold and gain coherence. In turn, these narratives give meaning to the law by providing context and justification for legal principles and actions. The law then legitimizes these narratives by codifying them into doctrines, rights and statutes that enforce and perpetuate the underlying stories. This creates a powerful mechanism for shaping social consciousness and maintaining power structures.³³ The PNURA's approach to transitional justice exemplifies this interplay in that it employs a modernist politics of time that allows perpetrators to distance themselves from past actions, potentially escaping accountability. This approach, coupled with human rights discourse, prioritizes a liberal future over addressing historical injustices. The underlying chronosophy, or understanding of time, influences how historical events are interpreted and represented, impacting how personal and social identities are constructed in relation to historical injustices.³⁴

The concept of *chronosophy* plays a crucial role in shaping narratives and identities. The PNURA's approach to time and historical narrative reflects a specific chronosophy rooted in Western liberal conceptions, which influences how South Africa's past is understood and addressed. As Berber Bevernage argues, this temporal framing creates a narrative that prioritizes a liberal future over a comprehensive reckoning with historical injustices, potentially perpetuating colonial power dynamics.³⁵ The PNURA's chronosophical approach marginalize alternative temporal understandings and historical narratives, particularly those of indigenous communities, highlighting the persistent influence of colonial structures in shaping narratives of national identity and reconciliation. This underscores the need for a critical examination of temporal and narrative frameworks in transitional justice projects, especially in contexts where multiple understandings of time and experiences of history coexist. An investigation into the ways with which transitional justice discourse reinforces colonial power dynamics is necessary, particularly as it pertains to the NURA's epistemic function as a transitional justice mechanism. The critical linkage of the logic of discovery, which naturalizes the historical results of European conquest, to the PNURA, is necessitated.

³³ LA Khan "Temporality of Law" (2009) 40 *McGeorge Law Review* 59.

³⁴ JT Fraser *The Voices of Time: A Cooperative Survey of Man's Views of Time as Expressed by the Sciences and Humanities* (1981) xvii.

³⁵ B Bevernage "Transitional Justice and Historiography: Challenges, Dilemmas and Possibilities" (2014) 13 *Macquarie Law Journal*.

An African philosophical critique of the colonial chronosophy is essential for the study in exploring measures for historical redress for colonialism and conquest because it challenges the temporal and geopolitical narratives imposed by colonial powers, emphasizing the continuity of historical injustices. This critique is grounded in the indigenous principle of *molato ga o bole*, which asserts that an offence or injustice does not expire with time. This principle contrasts sharply with the colonial chronopolitics that seek to create a discontinuity between past and present, thereby evading liability for historical redress.³⁶ This indigenous historiography, informed by *molato ga o bole* and the African ethic of *Ubuntu*, calls for the recollection and restitution of the sovereignty of indigenous people over their land. It underscores the importance of addressing historical justice from its roots. It advocates for substantive justice in the form of the recovery and restoration of lost sovereignty, highlighting that "the restoration of title to territory and the reversion of sovereignty over it is the basic problem" and "an exigency of historical justice" necessary to achieve true equilibrium.³⁷

1.3 Research Questions

Given this critique, these research questions follow:

1. How does the human rights framework of the PNURA legitimate the necessity of the establishment of the state of South Africa as a liberal constitutional democracy?
2. How does the PNURA's historiography serve broader political and ideological objectives in positioning the transition to liberal constitutional democracy?
3. How does the jurisprudence of the PNURA facilitate the continuity of colonial historical injustice?
4. What is the logic underpinning the doctrine of discovery as the international law of colonialism?

How does the PNURA use historiography to reiterate the logic of discovery and reinforce unjust colonial power dynamics in South Africa?

³⁶ MB Ramose "An African Perspective on Justice and Race" (2001) 3 *Polylog: Forum for Intercultural Philosophy* 6.

³⁷ 7.

1.4. Methodology

This research project falls under the umbrella of settler colonial studies, critical philosophy of race and African philosophy, with strong influences from scholarly work on decolonisation.³⁸ It adopts a sceptical stance towards mainstream transitional justice narratives, particularly in settler colonial contexts. The theoretical framework draws on scholars who critique the limitations of liberal peacebuilding and reconciliation models in addressing deep-rooted historical injustices. While the critique of the TRC's obfuscation of enduring colonial injustice has been addressed elsewhere, the core enquiry explores the colonial jurisprudence that constructed the TRC at an abstract level. The proposed investigation into the limitations of South Africa's transitional justice process, particularly its failure to adequately address the legacy of colonial conquest, holds significant scholarly, philosophical, and critical value.

From a scholarly perspective, this research challenges existing paradigms in transitional justice literature, potentially expanding avenues for academic discourse. By bridging multiple disciplines - including law, history, political science, and postcolonial studies - it contributes to the growing field of interdisciplinary scholarship. Moreover, by offering a critical re-examination of South Africa's widely studied transition, the thesis has the potential to reveal new insights and interpretations that have been overlooked in previous analyses. The investigation raises profound questions about the nature of justice, reconciliation, and nationhood. It engages with complex concepts such as historical injustice, collective responsibility, and the legitimacy of state power. By challenging the philosophical underpinnings of transitional justice mechanisms, it could contribute to a more nuanced understanding of justice in complex historical contexts, particularly those shaped by colonialism and conquest.

The critical value of this research lies in its ability to provide a necessary critique of dominant narratives surrounding South Africa's "transition", which have often been celebrated uncritically in international discourse. By exposing potential limitations and contradictions in transitional justice frameworks, particularly when applied to settler colonial contexts, the thesis contributes to decolonial scholarship by centring the ongoing impacts and manifestations of colonialism in contemporary political processes.

³⁸ P Wolfe. "Settler Colonialism and the Elimination of the Native" (2006) 8 *Journal of Genocide Research* 4.

1.5 Chapter Overview

This thesis is composed of five substantive chapters.

Chapter 1 is the introduction.

The aim of chapter 2 is to analyse the PNURA and its implementation through the TRC, with a critical focus on the PNURA's background and its use of human rights discourse. The chapter illustrates how this approach to history and justice reflects the broader political and ideological objectives shaping contemporary South Africa. I will show how the PNURA's rights discourse reaffirms liberal democracy as the natural resolution to historical injustice.

By critically examining the narrative strategies employed by the PNURA, chapter 3 demonstrates how the PNURA's approach to history reflects broader political and ideological objectives in South Africa. The central argument is that the PNURA's primary goal was to construct a common historical narrative that positioned the transition to a liberal democracy as the only path to move beyond past conflicts employed a liberal historiography to achieve its objectives, particularly the creation of a collective truth to promote national unity and reconciliation. I will analyse how the PNURA's official narratives construct a teleology of progress that obscures ongoing colonial power structures. In doing so, I will argue, it negates historical narratives that decentre the settler narrative.

Chapter 4 situates the PNURA's liberal historiography within the broader context of colonial jurisprudence and Western international jurisprudence, rooted in colonialism, imperialism, and racism. It explores how these elements manifest in South African society. The analysis seeks to unveil the intricate connections between liberal historiography and colonial jurisprudence, demonstrating how the PNURA's approach actively contributes to the perpetuation of historical injustices. I will examine how PNURA jurisprudence repackages colonial dispossession within legal frameworks that preclude structural redress, such as the indemnity convention used by the apartheid government to naturalise its dominance over black lives.

Chapter 5 delineates the logic behind the doctrine of discovery, a crucial step in understanding the colonial underpinnings of the PNURA and its role in transitional justice in colonial contexts. The chapter seeks to expose the epistemic assumptions and beliefs that justify and legitimize global European dominance across time and space, with the ultimate goal of deconstructing the colonial logic inherent in transitional justice narratives and exploring alternative approaches. To build this investigation, I will unpack the foundational assumptions of the doctrine to trace their survival in South Africa's post-apartheid legal order as the negation of indigenous sovereignty and the naturalisation of European conquest through law.

Chapter 6 establishes the critical link between the logic of discovery, which naturalizes European conquest, and the PNURA. This connection is fundamental to understanding how contemporary legal and political systems, particularly in transitional justice discourse, continue to benefit colonial interests in subtle ways. To explore this issue, I will critique how PNURA's framing of the concept of the nature of the passage of time reproduces the logic of discovery through an imposition of colonial time. The concept of "chronopolitics" is used to demonstrate how this logic of discovery persists in the PNURA narrative. By analysing the PNURA through the lens of Eurocentric chronosophy and historiography, the chapter extends the historical analysis to introduce valuable theoretical tools - such as the concepts of reversible and irreversible time - to critically examine how narrative and time structures in law continue to benefit colonial interests.

2. CHAPTER 2 – THE PNURA: LEGITIMIZING THE TRANSITION THROUGH LAW

2.1. Introduction

The chapter details key political developments aimed at addressing systemic violence and fostering negotiations. It explains how it came to be that, in February 1990, then-president F.W. de Klerk lifted the bans on political organizations like the ANC and released Nelson Mandela. The chapter discusses subsequent negotiations, including the Groote Schuur Minute and the Convention for a Democratic South Africa (CODESA), which resulted from prior engagements between the ANC and the National Party, particularly granting amnesty to political offenders. Further, it gives insight into the outcomes of the Multi-Party Negotiating Process (MPNP), a process which culminated in the creation of the Interim Constitution, formalizing the requirement of an “amnesty mechanism” in its postamble.

Subsequently, the chapter outlines the PNURA’s primary objectives, which revolved around investigating the gross human rights violations that occurred during apartheid rule. The PNURA mandated the TRC to construct a comprehensive representation of the nature, causes, and extent of these violations, encompassing the experiences of victims as well as perpetrators. A significant aspect of the PNURA was its provision for granting amnesty to individuals who fully disclosed their involvement in politically motivated acts. This approach was portrayed as arising from the imperative to balance the need for justice with the imperative of creating a stable democracy. Furthermore, victim and perpetrator hearings were assumed to assist victims to reclaim their dignity while also allowing perpetrators to confront their guilt, in the hopes of producing reconciliation between direct victims and perpetrators, and between different racial groups at the national level. This multifaceted approach aimed not only to document the truth but also to lay the groundwork for a more inclusive democracy.

The section thereafter highlights the role of the PNURA as a crucial mechanism for embedding restorative justice within the national narrative, which fosters a sense of legitimacy and acceptance of the governance framework in South Africa. By prioritizing human rights discourse, the PNURA helped to create a measure of faith in state institutions that were previously compromised during apartheid. The emphasis on nation-building as part

of bureaucratic governance is situated within the broader framework of transitional justice. The goals outlined by scholars reflect the dual, albeit troublingly conflicting, objectives of providing redress to victims while ensuring social stability and peace.

Thereafter, the chapter fleshes out the tangible effects of the epistemic framework of the PNURA through a discussion of the AZAPO judgment typical of transitional justice literature. The AZAPO case is significant as it highlights the ethical and legal dilemmas surrounding the amnesty provisions of the PNURA, framing it as a necessary tool for reconciliation in a democratic South Africa. The plaintiffs argued that the amnesty clauses undermined victims' rights, stripping them of access to justice via the courts and accountability for the atrocities committed under apartheid. This contention reflects a broader struggle for a legal framework that reconciles the need for truth with the imperative of justice. The Constitutional Court's ruling, particularly Justice Ismail Mahomed's interpretation, positioned the amnesty mechanism as a crucial element in transitioning towards a democratic society. Mahomed's judgment emphasizes the idea that truth-telling was essential not only for healing individual victims but also for the construction of a South Africa unconstrained by the animosity of "the past". By framing the past as a book closed through the TRC process, the ruling advocates for a forward-looking approach, encouraging society to transcend its history of violence. The judgment thus links the struggle for justice with the broader project of nation-building.

2.2. The PNURA: From Amnesty Commission to Truth and Reconciliation Commission

The Interim Constitution played the role of creating the legal principles necessary to promote the political stability necessary to reach the 1994 elections; in its own words, to be "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."¹ In order to achieve the realisation of this wellbeing and peace, and to transcend the "transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge," there has to be "reconciliation between the people of South Africa and the reconstruction of society."² On this basis, there was a need for

¹ Interim Constitution of the Republic of South Africa Act 200 of 1993.

² Constitution of the Republic of South Africa Act.

“understanding but not for vengeance”, “for reparation but not for retaliation”, and for ubuntu but not for victimization” on the part of citizens.³ The instruction of the Interim Constitution was that there be a mechanism providing for the granting of amnesty for those perpetrators of human rights violations who gave full disclosure of their “acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.”⁴ In this regard, the mandate of the PNURA was to legislate and regulate the objectives, functions, and duties of this mechanism based on the grounds and justifications given by the Interim Constitution for the “reconstruction of society”, mainly that transcending apartheid required reconciliation between the people of South Africa. This mechanism, which would eventually come to be known as the TRC, was to be the conduit for said reconciliation. The kind of reconciliation envisaged by the decision-makers behind the whole TRC process was “both a goal and a process” that would not be reached definitively but on an incremental basis and that had to take place at multiple levels.⁵ These included reconciliation of victims with “their own pain... perpetrators with their guilt and shame... between victims and perpetrators...between the oppressed black population and the former state... between the young and the old, men and women, neighbours, as well as between different ethnic and racial groups.”⁶

There was another justification for the creation of the TRC that did not appear in the Interim Constitution. This “extra” rationale appeared in the preamble of the PNURA, and it stated that the reconstruction of society required that the TRC “establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred and to make the findings known in order to prevent a repetition of such acts in future”.⁷ However, in order for this knowledge of the truth to take effect in this way, truth-telling was to be facilitated in a way that served the goal of national unity and reconciliation. Furthermore, at was *for* and *in* this truth recovery and truth-telling process that understanding, reparation and ubuntu were to prove central for reconciliation, and for vengeance, retaliation and victimisation to be repudiated in order to avoid the derailment of the reconciliation process.

³ Constitution of the Republic of South Africa Act.

⁴ Constitution of the Republic of South Africa Act.

⁵ Truth and Reconciliation Commission of South Africa *Report* 1999 Volume 1 106

⁶ 107.

⁷ Promotion of National Unity and Reconciliation Act 34 of 1995.

To fully grasp the logic behind these cautions against violence, it is essential to examine the events leading up to the negotiations towards a democratic South Africa and the factors that influenced the preamble of the Interim Constitution. It is to this historical background to which I now turn. My focus, therefore, is anchored around the reasoning behind the decision to create a law regulating a mechanism to “providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with.”⁸

2.2.1. The Creation of the PNURA

On 2 February 1990, in his opening speech at the opening of parliament, then-apartheid president Frederik Willem de Klerk announced that he would unban the ANC, the Pan Africanist Congress (PAC) and other banned political parties; that he would release Nelson Mandela from prison along with a number of other political prisoners; and that he would place a moratorium on the death penalty.⁹ Although these measures may be interpreted as “the beginning of the ... negotiations” for a democratic South Africa, they were actually what Zwelethu Jolobe refers to as a step towards surmounting “the preconditions... to the opening of multiparty negotiations.”¹⁰ However, prior to these negotiations, for at least five years, the National Party had been having meetings with Mandela and a handful of other ANC leaders towards the construction of some form of democratic South Africa.¹¹ For the NP government, the precondition for embarking on negotiations was that the ANC renounce an plans for violence.¹² The ANC committed to a formal ceasefire only once a new constitution had been agreed on, and its preconditions for negotiations were, according to the Harare Declaration articulated in August 1989, the “ending the state of emergency, releasing political prisoners, lifting a ban on political organisations and withdrawing troops from black townships”.¹³

The first official round of talks between the ANC and the NP government to pave the way for negotiations occurred at Groote Schuur on 2 May 1990. The result of the meeting was a joint statement called the Groote Schuur Minute released on 4 May, which established

⁸ Constitution of the Republic of South Africa Act 200 of 1993.

⁹ H Corder “Towards a South African Constitution” (1994) 57 *The Modern Law Review* 495.

¹⁰ Z Jolobe *Getting to CODESA: An Analysis on Why Multi-Party Negotiations in South Africa Began, 1984-1991* DPhil thesis University of Cape Town (2014) 386.

¹¹ L Mallinder “Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa” (2009) *Working Paper No. 2, Institute of Criminology and Criminal Justice* 10.

¹² T Simpson “Toyi-Toyi-ing to Freedom: The Endgame in the ANC's Armed Struggle, 1989-1990” (2009) 35 *Journal of Southern African Studies* 512.

¹³ 511.

a working group to “make recommendations on a definition of political offences in the South African situation... [and] advise on norms and mechanisms for dealing with the release of political prisoners and the granting of immunity in respect of political offences to those inside and outside South Africa.”¹⁴ Further, the ANC leadership would be granted “temporary immunity from prosecution of political offences committed before” 4 May 1990.¹⁵ From the outset of the discussions, the issue of amnesty was deeply contested, with both the ANC and the NP government adopting strategically opposed positions. For the ANC, the most urgent demands included “the release of all political prisoners,... the safe return of all exiles,... and the repealing of apartheid security legislation” that had enabled arbitrary detention of anti-apartheid political activists.¹⁶ While the ANC advocated for a “broad” demarcation of political acts that included related to political objectives in the anti-apartheid resistance, the NP government pursued a “narrower” definition that excluded acts such as murder or assault.¹⁷ The NP government’s strategy, as explained by Zwelethu Jolobe, consisted of excluding as many anti-apartheid prisoners as possible from amnesty, with the goal of indemnifying as many of their operatives as possible.¹⁸ Lynn Berat asserts that the NP government consistently linked any potential amnesty for ANC-aligned prisoners to a blanket indemnity for members of the security forces.¹⁹ The government passed the Indemnity Act of 1990 on 18 May 1990, which declared that “for the sake of reconciliation and for the finding of peaceful solutions it has now become necessary from time to time to grant temporary immunity or permanent indemnity against arrest, prosecution, detention and legal process’ to persons whose arrest was ‘possible or pending’.”²⁰

In 1991, amidst heightened politically motivated violence in the country, in the effort to negotiate a new constitution, the Convention for a Democratic South Africa (CODESA) was initiated. The first sitting was on 20 and 21 December 1991 and it was boycotted by black radical parties such as the Azanian People’s Organization (AZAPO) and the PAC due to “concerns that all decisions made at the negotiations would be subject to bilateral agreements

¹⁴ INCORE International Conflict Research Institute “Groote Schuur Minute” <https://www.incore.ulster.ac.uk/services/cds/agreements/pdf/sa3.pdf> (accessed 10-11-2022).

¹⁵ Groote Schuur Minute.

¹⁶ Jolobe *Getting to CODESA* 255

¹⁷ 269

¹⁸ 269

¹⁹ L Berat "South Africa: Negotiating Change?" Impunity and Human Rights in International Law and Practice” in N Roht-Arriaza *Impunity and Human Rights in International Law and Practice* (1995) 272

²⁰ Mallinder (2009) *Institute of Criminology* 18.

between the NP and the ANC.²¹ CODESA 1 collapsed when, on the night of 17 June 1992, armed IFP supporters killed thirty-eight people in their homes and the ANC withdrew from negotiations.²² In response, the government instituted the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation in October 1991, chaired by Judge Richard Goldstone, to investigate political violence that occurred after 17 July 1991, the date on which the Commission's mandating Act, the Prevention of Public Violence and Intimidation Act 139 of 1991, came into effect.²³ One of the recommendations of the Goldstone Commission was that the government give amnesty to those members of the political groups instigating the violence who would be amenable to coming forward and giving information about these violent instances as this would make the work of the commission easier.²⁴

CODESA 2 began on 15 May 1992, but was dissolved the next day due to deep disagreement about the number of delegates necessary to constitute a majority for adopting a new constitution.²⁵ In November 1992, the government passed the Further Indemnity Act, which would grant the executive the power to indemnify any politically motivated crime, with said crime being

any act or omission which has been advised, directed, commanded, ordered or performed with a view to the achievement of a political object; or for the promotion or combating of an object or interest of any organization, institution or body of a political nature; or with the bona fide belief that such object or interest will be served; or with the approval or on instruction or in accordance with the policy of such organization, institution or body, or in reaction thereto.²⁶

The ANC met the 1992 Further Indemnity Act with scorn because it saw it as "self-pardon" by the apartheid government, aimed at shielding its forces from accountability and depicting anti-apartheid activism as morally equivalent to apartheid state abuses.²⁷ Nonetheless, De Klerk was able to have the bill passed. Despite this self-evaluation as the moral superior

²¹ Corder "Towards a South African Constitution" 496; Background to CODESA <https://www.concourttrust.org.za/uploads/files/Background_to_CODESA_1.pdf> (accessed 20 May 2018).

²² A Sparks *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* (1994) 140.

²³ Mallinder (2009) *Institute of Criminology* 31.

²⁴ 32.

²⁵ Corder "Towards a South African Constitution" (1994) 498.

²⁶ K Savage "Negotiating the release of political prisoners in South Africa" *Centre for the Study of Violence and Reconciliation Report* <www.csvr.org.za/docs/correctional/negotiatingtherelease> (accessed 10 November 2022) 2-3.

²⁷ Mallinder (2009) *Institute of Criminology* 41

between itself and the NP government, the ANC could no longer ignore allegations of human rights abuses and internal misconduct in its exile camps. In January 1993, it appointed a commission of inquiry, led by Dr Sam Motsuenyane and assisted by a Zimbabwean judge and an American lawyer, to investigate crimes committed in its camps in Angola, Zambia, Tanzania, and Uganda.²⁸ This followed sustained pressure from former detainees who alleged widespread torture and mistreatment.

In April 1993, the negotiations for a democratic South Africa resumed, this time with a wider representation of political parties and under the moniker The Multi-Party Negotiating Process (MPNP). In August 1993, while the discussions were ongoing, the Motsuenyane Commission's report was publicised and confirmed a troubling culture of abuse.²⁹ This revelation of the complicity of the ANC in human rights violations was used by the NP government to discredit the moral integrity of the ANC and further advocate for blanket amnesty. However, the ANC had strategically timed the release of the report to oppose the NP government's push for a general amnesty, highlighting its willingness to confront internal wrongdoing and recognise international humanitarian law (such as the Geneva Conventions). It proposed, rather, that there be a reconciliation clause in the interim constitution.³⁰ This move had significant implications: while it demonstrated a commitment to accountability, it also challenged the ANC's moral authority as a liberation movement. The ANC's move toward establishing a truth commission stemmed from an internal crisis sparked by the findings of the Motsuenyane Commission.³¹ The report's findings prompted intense debate within the ANC's National Executive Committee (NEC) about how to respond. The dilemma was clear: how could a liberation movement that claimed moral authority address violations committed by its own members without undermining its legitimacy?³² ANC NEC member Kader Asmal proposed the idea of a national truth commission—not one focused solely on the ANC, but one that would investigate *all* apartheid-era gross human rights violations, regardless of the perpetrator or victim.³³ His intervention offered a way to confront past abuses honestly while preserving the broader integrity of the liberation struggle and was

²⁸ Berat "South Africa: Negotiating Change?" (1995) 275

²⁹ Report of the Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuse Against ANC Prisoners and Detainees by ANC Members (1993)
<https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1000&context=faculty_projects> (accessed 23 July 2023)

³⁰ Mallinder (2009) *Institute of Criminology* 45

³¹ A Sachs "Truth and Reconciliation" (1999) 52 *SMU Law Review* 4 1564

³² 1565

³³ 1565

incorporated into official ANC policy aimed at addressing the questions of apartheid-era human rights violations and amnesty.

While the MPNP produced the main body of the Interim Constitution in November 1993, the post-amble was only added in the early hours of 27 April 1994, after all other bargaining had ended.³⁴ Its governing ethics were “national unity, the wellbeing of all South Africans and peace” through reconciliation and reconstruction. The post-amble was introduced to address demands primarily from the NP and its security forces, who insisted on blanket amnesty for politically motivated human rights violations committed before 6 December 1993. De Klerk had promised amnesty to security forces, who in turn threatened to withdraw support for the elections unless this was constitutionally secured.³⁵ ANC intelligence suggested that indeed extreme right-wing groups were planning to sabotage the democratic process, and the security forces warned they would not intervene unless granted protection from future prosecutions.³⁶

Faced with credible threats of disruption, boycott, and what it considered to be the threat of civil war, the ANC capitulated to the realisation that peaceful elections were impossible without security force cooperation. As a result, the ANC agreed that the new Parliament would pass an amnesty law, provided that beneficiaries fully disclosed their violations.³⁷ This understanding was symbolically and legally encoded in the Postamble, drafted at the last moment by Mac Maharaj (of the ANC) and Fanie van der Merwe (of the NP).³⁸ In this way, the amnesty provision was not merely a technical addition but a politically charged, strategic concession shaped by the exigencies of the so-called South African “transition”.

The post-amble pronounced that the path to its stated goal of achieving reconciliation, peace and reconstruction, included a large measure of amnesty in the “transition” process. The vices of vengeance, retaliation and victimisation had to give way to the stated civic virtues of ubuntu, understanding and reconstruction. The exercise of these virtues would necessitate amnesty based on full disclosure and hearings that would allow victims to share their experiences to a sympathetic public. These ethical and juridical elements would go on to be formative aspects of the logic operating when what had once been an amnesty commission

³⁴Wilson, R. A. (2001) "Justice and Legitimacy in the South African Transition", in *The Politics of Memory: Transitional Justice in Democratizing Societies*, eds., A B De Brito, C González Enríquez, and P Aguilar 199

³⁵ Sachs (1999) *SMU Law Review* 1566

³⁶ Mallinder (2009) *Institute of Criminology* 46

³⁷ 46-48

³⁸ Wilson "Justice and Legitimacy in the South African Transition" 199

became a truth and reconciliation commission. Ultimately, I hope to have shown, this amnesty was imposed on South Africa following negotiations between elites in response to political expediency.

2.2.2. The Objectives of the PNURA

With the above context in mind, we can better understand the specific objectives and mandate of the TRC. The TRC was established for

the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights.³⁹

To do this, there would be three arms of the TRC: the Committee on Human Rights Violations, the Committee on Amnesty, and the Committee on Reparation and Rehabilitation. The task of the Committee on Human Rights Violations was to investigate gross human rights violations committed during apartheid and provide the context in which these violations occurred, as well as establish the identity of the victims. The Committee on Reparation and Rehabilitation was tasked with identifying the immediate material needs of the people determined to be victims and recommending reparations to alleviate their material difficulties.⁴⁰ The task of the Committee on Amnesty was “to consider applications for

³⁹Promotion of National Unity and Reconciliation Act 34 of 1995; As explained in an abovementioned section earlier, the time period set by the Act was between 1 March 1960 (the month in which the Sharpeville massacre took place) and ended on 10 May 1994 (the date the final agreement was reached in the political negotiations).

⁴⁰Truth and Reconciliation Commission of South Africa Report Volume 1 125.

amnesty for acts associated with a political objective and to grant amnesty.”⁴¹ A fundamental objective of the TRC was to publish a report into the results of the investigations and testimonies given at the TRC proceedings, specifically as it enquired into the nature and context of a human rights violation framework in the form of killings, abductions, torture and acts of severe ill-treatment (*KATS*). The report was presented to then-President Nelson Mandela on 29 October 1998. The report was intended to be a record for a collective memory and shared historical understanding of the brutality that was visited upon people during apartheid; an understanding which was to promote the achievement of reconciliation and national unity. It had seven volumes composed of findings and recommendations from the three committees. Of particular concern for this project is Volume One of the report, which explains “the reasons for conducting such a commission, and outlines the approach and methods used to fulfil its mandate.”⁴²

2.3. Transitional Justice and Human Rights Discourse

The PNURA’s pursuit of political and legal transcendence is exemplified in its status as a legitimating mechanism of the existence of the South African state and its current dispensation. Truth commissions legitimize the state through human rights discourse and the rule of law by embedding restorative justice within the national narrative. Richard Wilson asserts that “human rights became the language of restorative justice and forgiveness of human rights offenders in South Africa”, illustrating how the TRC’s human rights framework facilitated a broader acceptance of the new justice system.⁴³ This process is central to "manufacturing legitimacy", as the state sought to consolidate a new form of bureaucratic governance.⁴⁴ Wilson emphasizes that nation-building is not an end but a means to fortify bureaucratic governance, which involves integrating the rule of law with cultural, community, and national values to foster national unity.⁴⁵ By legitimizing state institutions such as the courts and police, which had been compromised during apartheid, this holistic approach not only reinstates the rule of law but also strengthens the state's legitimacy in the

⁴¹Explanatory Memorandum to the Parliamentary Bill (1995) <https://www.justice.gov.za/trc/legal/bill.htm> (accessed 30 January 2019).

⁴² SABC TRC Commissions *Special Report* <<https://sabctrc.saha.org.za/reports.htm>> (accessed 20-05-2019).

⁴³ RA Wilson *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2008) 16.

⁴⁴ Wilson *The Politics of Truth and Reconciliation* 39.

⁴⁵ 18.

eyes of its citizens.⁴⁶ Exploring the rule of law as it pertains to truth commissions is important because the PNURA legitimates the state through the construction of a national historical narrative the credibility of which is buttressed by its status as a legal instrument. In turn, the PNURA legitimates and makes credible the legal institutions of the state and the state as a legal institution itself. It offers a historical explanation for the necessity and legitimacy of the instantiation of South Africa as a liberal constitutional democracy. In this manner, the PNURA serves its role as part of the legitimization project of the South African state through its role as the legal facilitator of the South African historical narrative and civic identity.

Understanding these specific roles and functions of the TRC is crucial for situating it within the broader framework of transitional justice mechanisms, the framework that in contemporary times has come to be the primary paradigm by which the TRC is understood and interpreted. In this section, I elucidate the self-identity of the TRC as articulated within the framework of transitional justice mechanisms. The field of transitional justice has gained prominence both as a field of scholarly interpretation concerning truth commissions and as praxis. Central to this field is the fundamental question: how can the injustices of a former regime be addressed to establish a just new order? There is no consensus on a precise definition of transitional justice, what makes transitions just, or what constitutes a genuinely just transition. Literature within this tradition generally refers to it as a multifaceted approach to addressing systematic or widespread human rights violations during periods of political transition from oppressive or violent regimes to democracy and peace.⁴⁷ Even the term "transition" itself is contested within transitional justice discourse, with no clear consensus on when a transition begins or ends.⁴⁸ Some thinkers refer to “‘revolutions,’ others ‘transfers of power,’ others ‘regime change,’ or ‘restorations,’ or ‘independence,’ or ‘modernization,’ or ‘political development’.”⁴⁹ Scholars like Kaminsky et al. refer to transitional justice as "formal and informal procedures implemented by a group or institution of accepted legitimacy around the time of a transition out of an oppressive or violent social order."⁵⁰ Ruti

⁴⁶ 18.

⁴⁷ G Kasapas “An Introduction to the Concept of Transitional Justice: Western Balkans and EU Conditionality” (2008) *UNISCI Discussion Papers* 60; R Teitel “Transitional Justice Genealogy” (2003) 6 *Harvard Human Rights Journal* 69; A Bothmann *Transitional Justice in Nicaragua 1990–2012: Drawing a Line Under the Past* (2015) 27.

⁴⁸ N Turgis “What is Transitional Justice?” (2010) 1 *International Journal of Rule of Law and Transitional Justice* 15.

⁴⁹ P Arthur “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice” (2009) 31 *Human Rights Quarterly* 337.

⁵⁰ MM Kaminsky et al ‘Normative and Strategic Aspects of Transitional Justice’ (2006) 50 *The Journal of Conflict Resolution* 296.

Teitel, a prominent thinker in the field, defines it as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."⁵¹ However, a common theme emerges - transitional justice comprises juridical processes and procedures implemented during political change from oppressive or conflictual social orders. These processes aim to address large-scale human rights violations perpetrated by previous regimes. At its core, transitional justice recognizes the dual objectives of providing redress and justice for victims of human rights abuses while simultaneously reinforcing opportunities for reconciliation, sustainable peace, and the establishment of a democratic order. This approach acknowledges that dealing with a legacy of systematic violations requires more than merely holding perpetrators accountable; it also necessitates addressing the underlying conditions and structural injustices that enabled such atrocities to occur.

While the origins of transitional justice can be traced back to the post-World War II era, its evolution has been shaped by the global recognition of human rights norms and democratization.⁵² The first phase of transitional justice, according to Teitel, emerged post-World War II and emphasized retribution and punishment for human rights abuses.⁵³ During this period, there was a shift from national to international justice, with trials aimed at deterring future crimes and countering impunity.⁵⁴ However, the subsequent phase, coinciding with globalised endeavour towards democratization, saw an increase in blanket amnesties and prioritization of peace over legal accountability due to the ascendance of the human rights legal paradigm.⁵⁵ Historian Samuel Moyn contends that, contrary to common belief linking human rights to "Greek philosophy and monotheistic religion, European natural law and early modern revolutions, horror against American slavery and Adolf Hitler's Jew-killing," the human rights juridical and moral paradigm gained prominence in the 1970s as a response to the collapse of other universal ideologies, such as revolutionary and anti-colonial movements, that had previously offered frameworks for international change.⁵⁶ Disillusionment with these failed "utopias", he argues, created a space for human rights to emerge as a new, supposedly apolitical moral ideal, distinct from the political struggles that

⁵¹ Teitel "Transitional Justice Genealogy" 69.

⁵² Bothmann *Transitional Justice in Nicaragua*.

⁵³ Bothmann *Transitional Justice in Nicaragua* 29; Teitel "Transitional Justice Genealogy" 70.

⁵⁴ Bothmann *Transitional Justice in Nicaragua* 29.

⁵⁵ 30.

⁵⁶ Moyn, S. *The Last Utopia: Human Rights in History* (2010) 4.

had preceded it.⁵⁷ These “other utopias”, he argues, “were belief systems that promised a free way of life, but led into bloody morass, or offered emancipation from empire and capital, but suddenly came to seem like dark tragedies rather than bright hopes.”⁵⁸ Moyn lists factors such as “the search for a European identity outside Cold War terms; the reception of Soviet and later East European dissidents by politicians, journalists, and intellectuals; and the American liberal shift in foreign policy in new, moralized terms, after the Vietnamese disaster” as imperative to the shift towards the proliferation of human rights discourse in the late 1970s. The amalgamation of these historical elements, he argues, positioned human rights as a vehicle for individual dignity, transcending state sovereignty and promoting international law as the ultimate standard for “global framework for the achievement of freedom, identity, and prosperity.”⁵⁹

Moyn's analysis of the emergence of human rights in the 1970s provides crucial context for understanding the wave of democratization in the 1980s and subsequent transitions to democracy in the global South. As human rights became the dominant moral-political framework following the collapse of competing utopian visions, it created an ideological foundation that helped legitimize and accelerate democratic transitions. The human rights paradigm's emphasis on individual rights, its positioning as a “pure alternative in an age of ideological betrayal and political collapse”, and its transcendence of state sovereignty aligned perfectly with the liberal democratic model that would spread globally in the 1980s.⁶⁰ This alignment had profound implications for “transitional justice”. The discourse of “transition to democracy” became dominant in interpreting political change during this time.⁶¹ The transitional justice field, emerging from this historical context, inherited the human rights framework's political and legal legitimacy, making it a ready-made tool for negotiating political transitions. Thus, the adoption of human rights frameworks and international law served a specific political agenda of liberalization, helping to legitimate new democratic states in the eyes of Western governments.

Nir Eisikovits lists six goals of contemporary transitional justice mechanisms.⁶² Firstly, establishing the rule of law is paramount. Societies accustomed to authoritarianism often harbour a cynical perception of the legal system, viewing it as a tool for political

⁵⁷ 6.

⁵⁸ 8.

⁵⁹ 9.

⁶⁰ Moyn *The Last Utopia* 8, Arthur “How ‘Transitions’ Reshaped Human Rights” 334.

⁶¹ Arthur “How ‘Transitions’ Reshaped Human Rights” 336.

⁶² Eisikovits “Peace versus Justice in Transitional Settings” (2014) 32 *Quinnipiac Law Review*.

oppression. New governments often inherit a legacy of legal abuse and institutional mistrust, which undermines the very foundations of the rule of law. In South Africa, for example, state institutions such as courts and police were deeply compromised by their association with the apartheid regime. New regimes must overcome the practice of legal abuse and institutional mistrust to establish credible legal frameworks. This practice creates a significant obstacle for incoming governments attempting to establish a credible legal system and gain public trust in state institutions. Thus, a fundamental aim of any transition is to recalibrate this perception by instituting the foundational principles of the rule of law.⁶³ Secondly, efforts to identify, prosecute, and sanction perpetrators of past human rights abuses are crucial.⁶⁴ Thirdly, “creating a reliable record of past human rights abuses” serves as a cornerstone in holding those complicit in oppressive regimes accountable for their actions and minimizing the possibility of denialism.⁶⁵ Moreover, establishing a functional and professional bureaucracy and civil service is essential for fostering citizens' trust in the government and delivering basic services reliably and impartially.⁶⁶ Additionally, aiding victims by “attending to their physical and psychological afflictions, giving restitution for their lost property, compensating them for their losses, and fixing historical injustices that systematically disadvantaged them.”⁶⁷ Finally, mechanisms must prioritise efforts to stop violence and establish stability are paramount.⁶⁸ While these objectives may align in many respects, Eisikovits warns that they consist of an inherent conundrum:

Officials and citizens in transitional countries concurrently hold two powerful yet often contradictory moral intuitions: (1) that in order to establish a legitimate, functioning civil society, one must do justice for the crimes of the past; and (2) that to secure quiet, stability, and a functioning government, it is sometimes necessary and morally acceptable to leave past crimes and past criminals alone.⁶⁹

Consequently, goals such as prosecuting perpetrators may be perceived as politically motivated and lead to resentment among certain groups.⁷⁰ Furthermore, providing victims with opportunities to share their stories in respectful public forums, essential for their healing

⁶³ 708.

⁶⁴ 708.

⁶⁵ 709.

⁶⁶ 710.

⁶⁷ 710.

⁶⁸ 710.

⁶⁹ 715.

⁷⁰ 710.

and recovery, may conflict with legal procedures focused on defendants' interests, potentially turning trials into adversarial experiences for victims.⁷¹ Lastly, the imperative to establish a functioning bureaucracy may conflict with the pursuit of accountability. Purging officials implicated in past crimes, argues Eisikovits, may leave a dearth of competent administrators, undermining stability, economic development, and public trust.⁷²

2.4. Transitional Justice Mechanisms

Of the six aforementioned goals of contemporary transitional justice mechanisms, the rule of law plays a pivotal albeit precarious role in transitional justice contexts. Periods of political transition as described by transitional justice discourse are defined by the simultaneous precarity and priority of the rule of law since the overarching purpose of transitional justice mechanisms is to administer justice under exceptional circumstances whereby legal mechanisms themselves may not be operational due to the political atmosphere. A key ideological strategy by which incoming governments articulate the importance of the rule of law is through human rights discourse. Human rights ideals have become foundational in new states because they granted the language necessary to deal with past violations and future constitutional structures. Richard Wilson emphasizes that an analysis of the rule of law in these regimes should encompass not only its implementation and preservation but also the tangible "ideological and administrative challenges" these regimes face.⁷³ This perspective posits that emerging regimes leverage human rights discourse to redefine national identity and legitimize critical state institutions, thus facilitating the restoration of the rule of law.⁷⁴ Trials and tribunals, reparations and truth commissions, discussed below, are the mechanisms by which states pursue this restoration of the rule of law.

2.4.1. Trials and Tribunals

While reasons for punishment may involve the commitment to deter would-be offenders or rehabilitate offenders, often the argument that amnesty is impunity is premised on a conception of justice as retribution. The key idea of retribution in this context is punishment for the violation of human rights with the view to communicate the message that

⁷¹ 711.

⁷² 711.

⁷³ Wilson *The Politics of Truth and Reconciliation* xvi.

⁷⁴ xvi.

people have equal dignity and that those who violate the dignity of others deserve to be punished.⁷⁵ Victimization gives the impression that the offender is so superior in moral worth in relation to the victim that they can use the victim “merely as a means or object in service to his desires and projects.”⁷⁶ Moral desert in retribution is elaborated by the Principle of Desert: “People deserve to be treated in the same way that they have (voluntarily) treated others. Those who have treated others well deserve to be treated well in return, while those who have treated others badly deserve to be treated badly in return.”⁷⁷ It is a principle that relies on the value of reciprocity and the value of inherent human value and the rights that emerge from this value, i.e., human rights. When applied to retributivism, the Principle of Desert justifies the view that wrongdoers “deserve to be punished and that this alone is sufficient to justify punishing them.”⁷⁸ When based on the Principle of Desert, the message the retributive punishment expresses is that both the offender and the victim are of equal moral worth and consideration and bear equal human rights such as “the right to health, housing, security of the person and participation in the conduct of public affairs.”⁷⁹

Trials and tribunals are underpinned by this idea of justice as retribution. They consist of prosecutions for past atrocities and may occur at the local and international levels.⁸⁰ The standard view of justice as retribution is that justice is the punishment of a criminal offender for having committed a wrong. Trials and tribunals present the opportunity to hold perpetrators accountable by incarcerating them, or, if that is not possible or feasible, by at least identifying them as morally blameworthy and expressing communal disapproval of their actions or character.⁸¹ In essence, trials and tribunals in transitional justice discourse express the equal moral worth of victims and offenders, and that punishment signifies and preserves the values of equality of persons, people’s right to fair treatment, and accountability, which are typically embodied by punishment of wrongdoers.⁸² The prioritization of the rule of law

⁷⁵ See J Hampton “Forgiveness, Resentment and Hatred” in JG Murphy & J Hampton (eds) *Forgiveness and Mercy*; M Minow ‘Forgiveness, Law, and Justice’ (2015) 103 *California Law Review* 1630.

⁷⁶ JG Murphy *Getting Even: Forgiveness and Its Limits* (2003) 35.

⁷⁷ J Rachels “Justice: Punishment and Desert” in H LaFollette (ed) *Ethics in Practice* (1997) 475.

⁷⁸ 478.

⁷⁹ United Nations “Human Rights and Constitution Making” (2018) 10.

⁸⁰ HO Yusuf “Prosecutions for Abuses and Gross human Rights Violations” in HO Yusuf & H Van der Merwe (eds) *Transitional Justice: Theories, Mechanisms and Debates* (2021) 7.

⁸¹ Minow “Forgiveness, Law, and Justice” 1629; JG Murphy *Getting Even: Forgiveness and Its Limits* (2003) 35.

⁸² J Rachels “Justice: Punishment and Desert” in H LaFollette (ed) *Ethics in Practice* (1997) 475.

in such cases where trials and tribunals are primary tools of transitional justice may curb “arbitrary power” that could manifest as blanket amnesty, as an example.⁸³

2.4.2. Reparations

Reparations are another notable transitional justice mechanism. As Priscilla Hayner notes, at their core reparations aim to "repair" and provide recompense for the harms inflicted upon victims and communities.⁸⁴ In the main, reparations can take the form of “restitution, compensation, rehabilitation, satisfaction, and guarantees of non-recurrence.”⁸⁵ These reparations may take on a symbolic and/or material form. Both symbolic reparations offering official recognition and material reparations providing tangible redress like money or services serve important complementary purposes. Symbolic reparations “include various forms of recognition and acknowledgement for the suffering of victims,” while material reparations may involve “all tangible assets which are provided to repair the harm done; this includes money, goods or services.”⁸⁶

Fundamentally, reparations are rooted in the concept of redressing wrongs and injustices. Margaret Walker lists characteristics of restorative justice which can be summarized as encompassing the following virtues or values: reparation of a harm, the effort to prioritise the experiences and needs of victims, the opportunity for the perpetrator to re-join the moral community through their accountability for the wrong and responsibility for the repair, and the communal effort to strengthen relationships in the community after a wrong has been done.⁸⁷ The aims of restorative justice are to “involve, to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible.”⁸⁸ This opportunity is available to the offender as well to the extent to which they are willing to be part of the facilitation of this “healing” of the relational rupture they have caused by offending. Symbolic reparations from the offender, for instance, would be an apology, while material

⁸³ M Krygier “Why the Rule of Law Matters” (2018) 9 *Jurisprudence* 147.

⁸⁴ PB Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2011) 166.

⁸⁵ J Garcia-Godos “Reparations” in O Simić (ed) *An Introduction to Transitional Justice* (2021) 195.

⁸⁶ 196.

⁸⁷ M Walker “Restorative Justice and Reparations” (2006) 37 *Journal of Social Philosophy* 383.

⁸⁸ A Gohar & H Zehr *The Little Book of Restorative Justice* (2002) 40.

reparations would be availing oneself to help the victim overcome whatever material difficulty they suffer as a result of the offence. In light of this, “justice is not based on punishment inflicted but the extent to which harms have been repaired and future harms prevented”.⁸⁹

The core of Walker’s conception of restorative justice is the presupposition that a moral wrong is the “disregard or violation of acceptable human relationships”, and therefore, reparation is the restoration of acceptable human relationships.⁹⁰ Reparations under these grounds are less about the compensation of a loss than they are about the restoration of a relational rupture. Reparations undergirded by restorative justice express the value of the communal effort to restore to completion the victim’s capacity to flourish in their unique place as part of a social collective. Material measures directly target specific violations’ impacts, whether financial costs for medical treatment, property restitution, or services alleviating burdens on victims.⁹¹ Symbolic components like official apologies hold significance by acknowledging the wrongfulness of the acts themselves.⁹² Reparations programs pursue multiple vital aims. They provide avenues to “repair damage” while also officially “vindicating the innocent” by recognizing injustices suffered.⁹³

Symbolic and material reparations may also be grounded on corrective justice.⁹⁴ Walker characterizes corrective justice as presupposing a “*moral baseline* of acceptable conduct or due care and regard for the security, dignity, or well-being of others.”⁹⁵ When that baseline is not met, she contends, the task is to correct for that failure through reparations of some sort in order to get back to status quo that respects the moral baseline, which often translates into compensation.⁹⁶ This means that corrective or compensatory justice does not evaluate the ‘rightness’ of the moral baseline in a society, but rather it accepts the moral baseline of a society and then prescribes how deviation from that baseline can be repaired.

⁸⁹ MJ Gilbert & TL Settles “The Next Step: Indigenous Development of Neighbourhood-Restorative Community Justice” (2007) 32 *Criminal Justice Review* 7.

⁹⁰ Walker “Restorative Justice and Reparations” 382.

⁹¹ S Sharpe “The Idea of Reparation.” In G Johnstone & DFW van Ness (eds.) *Handbook of Restorative Justice* (2013) 27.

⁹² 28.

⁹³ 28.

⁹⁴ Walker “Restorative Justice and Reparations” (2006).

⁹⁵ 378.

⁹⁶ 378.

This sort of rationale for reparations is morally suspect, argues Walker, because the moral baseline to which reparations are supposed to return the status quo may itself be immoral or unjust. The success of reparations in this ethical perspective would consist in the return to the moral baseline, even if the norms that constitute it are unjust.⁹⁷ Accordingly, Walker contends for reparations based on restorative justice, which, in her view, satisfactorily accounts for the justice of moral baselines established on just norms to which society should strive.

Official reparations, versus purely privatized efforts, are meant to signal a state's recommitment to protecting citizens' rights and ensuring non-recurrence. However, implementing reparations raises complex questions. In post-conflict settings, the scale of need is often immense with vast numbers of victims facing diverse violation impacts. This raises the "fundamental question" of whether reparations are best pursued through individualized processes targeting specific victims or collective community-based approaches where entire regions were devastated.⁹⁸ A crucial consideration is whether reparations should focus solely on specific violations or also underpinning "structural violence" and systemic inequalities enabling conflicts.⁹⁹ Some transitional justice experts advocate integrating reparations with broader socioeconomic development policies tackling root injustices.

2.4.3. Truth Commissions

Truth commissions are a third form of transitional justice mechanism, and their core epistemic function is to investigate and record human rights violations in the recent history of a country.¹⁰⁰ The epistemic role of truth commissions is to fulfil the function of 'uncovering' hidden or unknown information, to establish and construct historical truth and bring it into the public domain for public acknowledgement because very often, as Ignatieff asserts, "the past is an argument", so truth commissions aim to combat the denial of historical atrocities.¹⁰¹ According to Berber Bevernage, there are three roles that historians tend to play in transitional justice processes: delineating truth from myth or lie; preserving the historical narrative, and "demonstrating the fundamental differences that exist between past and

⁹⁷ 381.

⁹⁸ Hayner *Unspeakable Truths* 165.

⁹⁹ 165.

¹⁰⁰ HO Yusuf "Truth Commissions" in HO Yusuf & H Van der Merwe (eds) *Transitional Justice: Theories, Mechanisms and Debates* (2021) 101.

¹⁰¹ M Ignatieff 'Articles of Faith' (1996) 25 *Index on Censorship* 113.

present.”¹⁰² In fulfilling this role, truth commissions may hold hearings for statements from either the perpetrators and/or the victims, depending on the truth commission in question.

“One did not need to be a political activist to become a victim of apartheid,” says the TRC Report.¹⁰³ “[I]t was sufficient to be black, alive and seeking the basic necessities of life that whites took for granted and enjoyed by right.”¹⁰⁴ This shows some concern of the TRC with the systemic effects of the policy of apartheid. This is an acknowledgement by the Report that the effects that apartheid legislation were felt not only by non-white people but also a small population of poor whites. The purpose of this elucidation of apartheid segregation legislation in the Act is to acknowledge that there were human rights violations which were “an assault on the rights and dignity of millions of South Africans.”¹⁰⁵ Hence it identified the “gross socio-economic inequalities [as] the visible legacy of the systematic, institutionalised denial of access to resources and development opportunities on grounds of colour, race and sex, [and as] the less tangible consequences of centuries of dehumanising devaluation of ‘non-Europeans’, ‘non-whites’ and ‘non-males’.”¹⁰⁶ However, the human rights violations that were to be addressed in the TRC in terms of the hearings and applications for amnesty were those categorised under the harms of killings, abductions, torture and acts of severe ill-treatment (*KATS*), which centred around the notion of rights related to bodily integrity of the individual.¹⁰⁷

One of the major issues that the PNURA surfaces is moral equivalence between the acts of political violence by agents of the state and those by political activists in fighting the state. The resort to violence by anti-apartheid political activists was considered just by the drafters of the PNURA. However, this did not translate to the justification for their committing gross human rights violations of international human rights laws as they “were under an obligation to employ just means in the conduct of this fight,” hence the decision to also hold anti-apartheid political activists accountable for specific acts of *KATS*.¹⁰⁸ The

¹⁰² B Bevernage "Transitional Justice and Historiography: Challenges, Dilemmas and Possibilities" (2014) 13 *Macquarie Law Journal* 8, 13, 16.

¹⁰³ Truth and Reconciliation Commission of South Africa Report Volume 1 35

¹⁰⁴ 35.

¹⁰⁵ 34.

¹⁰⁶ 109.

¹⁰⁷ Promotion of National Unity and Reconciliation Act.

¹⁰⁸ Truth and Reconciliation Commission of South Africa *Report* Volume 1 69.

decision to define human rights violations as *KATS* was fundamentally influenced by these international human rights norms. The PNURA followed the logic of the international norms of such as The Norgaard Principles as referred to earlier in the chapter and the Geneva Conventions, which are a set of treaties in international humanitarian law created to “provide minimum protections, standards of humane treatment, and fundamental guarantees of respect to individuals who become victims of armed conflicts,” specifically non-combatants.¹⁰⁹ Non-combatants are protected persons so they may not be harmed. Article 3 of the four 1949 Geneva Conventions reads:

Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat [outside combat] by sickness, wounds, detention, or any other cause, shall in all “circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.”¹¹⁰

According to Desmond Tutu, the chairperson of the Commission, reconciliation was a more morally appealing response to historical injustice as a retributive response to perpetrators would not be a viable option bearing in mind the need for national unity. This is the conclusion reached when retributive justice is assumed to have little regard for the well-being of both victims and perpetrators. Instead, says Tutu, the idea of justice embodied by the Commission was restorative justice, which he explains to be a tenet of ubuntu. With restorative justice,

the central concern is not retribution or punishment but in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence. This is a far more personal approach, which sees the offence as something that has happened to people and whose consequence is a rupture in relationships.¹¹¹

¹⁰⁹ Geneva Conventions and their additional protocols, <https://www.law.cornell.edu/wex/geneva_conventions_and_their_additional_protocols> (accessed 15 May 2020).

¹¹⁰ Truth and Reconciliation Commission of South Africa *Report* 74-75.

¹¹¹ D Tutu *No Future without Forgiveness* (2000) 51-52.

Alex Boraine, one of the architects of the PNURA, acknowledges that there are limits to what the law can achieve in terms of scale (not everyone that should be prosecuted can be prosecuted) and acknowledges that deterrence is not guaranteed.¹¹² However, according to him, there is a place for the law in addressing the issues of accountability and respect for the law that arise. He argues that transitional justice is the effort to balance retributive with restorative justice. He lists the pillars of a holistic approach to transitional justice as: accountability for those who violate the law; truth recovery, a fundamental part of which is referred to as truth-telling; reconciliation between victims and perpetrators; reform for institutions such as the military, the police, the security forces, politicians, faith communities, legal representatives, the media and labour organisations; and finally, reparations, which seek to remedy the harms suffered by the victims.¹¹³ Thus, in Boraine's analysis, restorative justice can secure political stability while holding perpetrators accountable and responsible for their offences.

Truth-telling was implemented as a way to combat the wrongs of apartheid and the psychological trauma inflicted. The denial of one's capacity for "claiming, making sense of, and healing through their lived experiences" is described by Gina EM Samuels as *epistemic trauma*.¹¹⁴ In the South African case, this epistemic trauma manifests as victims "being rendered invisible, vilified or demonized, or systematically distorted."¹¹⁵ It is an assault on the victim's claim to moral recognition. According to the report, truth-telling in the form of hearings was a way to restore the "human and civil" dignity of victims whose "pain is real and worthy of attention."¹¹⁶ Jonathan Allen defends the notion of justice as recognition as because it affirms the equal moral worth of victims by acting as "a public marker of these citizens' rightful passage into equal consideration and respect."¹¹⁷ Justice as recognition would be purportedly achieved partly through giving the victims a chance to relate their experiences of apartheid-era injustice related to gross human rights abuses. This aspect of the process was intended to create a space and time for victims to be heard and for their pain to be acknowledged; a space and time that, it was envisioned, would lead to "respect for [the

¹¹² A Boraine "Transitional Justice: A Holistic Interpretation" (2006) 60 *Journal of International Affairs* 25

¹¹³ Boraine (2006) *Journal of International Affairs* 19-25

¹¹⁴ GEM Samuels "Epistemic Trauma and Transracial Adoption: Author(iz)ing Folkways of Knowledge and Healing" *Child Abuse & Neglect* 130 (2022) <<https://doi.org/10.1016/j.chiabu.2022.105588>>

¹¹⁵ J Lackey "Epistemic Reparations and the Right to be Known" (2022).

¹¹⁶ Truth and Reconciliation Commission of South Africa *Report* 114.

¹¹⁷ J Allen "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission" *The University of Toronto Law Journal* 49 (1999) 332.

victims] as equal sources of truth and bearers of rights,” as well as “legitimate sources of truth with claims to rights and justice.”¹¹⁸ As per the report, “Acknowledgement is an affirmation that a person’s pain is real and worthy of attention. It is thus central to the restoration of the dignity of victims.

Another manifestation of the epistemic wrong of apartheid is psychological trauma. The logic here is that the victims’ testimonies were not necessarily for historical accuracy because they could not always be verified, but had the psychological function of a catharsis, the purpose of which was to foster healing. Some of the people who qualify to be identified as victims are those who suffered the psychological trauma following from the experience of gross human rights violations. The opportunity for restoration here consists in the chance and platform for victims to tell their stories and heal from the trauma through catharsis. As per the report, the victim hearings functioned as the “public unburdening of [victims’] grief”.¹¹⁹

2.5. The Case of AZAPO

The AZAPO case is an exemplar of the ethical concerns that supposedly enamoured the drafters of the Interim Constitution and the PNURA. One of the key investigations required to understand the mechanisms of the PNURA pertains to *why* and *how* the law governing an amnesty commissions became a law governing a truth and reconciliation commission. The AZAPO case of 1996 offers a window into the reasoning credited with the creation of the truth and reconciliation commission.¹²⁰ In 1996, a legal challenge emerged against a key aspect of South Africa's reconciliation process. AZAPO, joined by families of anti-apartheid martyrs (notably Stephen Bantu Biko, killed by apartheid police in detention in 1977), contested the amnesty provisions of the TRC. This coalition took their case to the Constitutional Court, arguing that the PNURA is unconstitutional insofar as it limits victims’ right of access to court.¹²¹ They presented arguments to support their claim that this power violated constitutional principles. Once the perpetrator had been granted amnesty, they were immune from any other legal recourse or consequence arising from their perpetration of *KATS*. Victims could not have any juridical means to hold perpetrators or the state (where

¹¹⁸ A du Toit “The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition” in R Rotberg & D Thompson (eds) *Truth versus Justice: The Morality of Truth Commissions* (2000) 136.

¹¹⁹ Truth and Reconciliation Commission of South Africa *Report* 128.

¹²⁰ Azanian People’s Organization (AZAPO) v President of the Republic of South Africa 1996 SA 671 (CC).

¹²¹ P Lenta *Transitional Justice and Retributive Justice* *Ethical Theory and Moral Practice* (2019) 339 .

state actors were the perpetrators) accountable to the prosecution process or litigation once they had been granted amnesty by the Amnesty Committees powers and outlined in the PNURA.

The section to which the plaintiffs appealed in the Interim Constitution was section 22, which gives citizens the right to 'have justiciable disputes settled by a court of law, or . . . other independent or impartial forum'.¹²² At the heart of the dispute was section 20(7) of the PNURA, which empowered the TRC to grant amnesty. The plaintiffs sought to have this provision struck down, viewing it as an unjust shield for those who had committed atrocities under the apartheid regime.¹²³ This is because the PNURA's power to grant amnesty was overarching and final. In section 20 subsection 7 of the PNURA, the provision for amnesty is stated as follows:

(a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.

(b) Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first-mentioned person.

(c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, omission or offence.¹²⁴

2.5.1 The Pursuit of accountability

The pursuit of equality and accountability as necessary components of justice is the inspiration behind the plaintiffs' contention that the amnesty clause in the PNURA is a miscarriage of justice. The factor of amnesty and perpetrators no longer being held liable for their actions once they had given full disclosure of their acts opposes the aspects of equality

¹²² Promotion of National Unity and Reconciliation Act, section 20(7).

¹²³ Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa 1996 (4) SA 671

¹²⁴ Promotion of National Unity and Reconciliation Act.

and accountability in notions of retributive justice. The presiding chief justice of the Constitutional Court at the time of the closure of the case, Ismail Mahomed, delivered a judgement in which he expressed that the amnesty provision was constitutional because it was in the interests of providing an incentive for disclosure of the truth and, as per the Interim Constitution, full disclosure of the truth was required for the promotion of reconciliation and reconstruction.

The judgement delivered by Justice Mahomed can be interpreted according to three axes: the need for truth, the incentive of amnesty and the goal of political transcendence. These three concerns were considered imperative for the supposed goal of the TRC, which was to promote reconciliation and reconstruction as outcomes of the decisions taken re the TRC constitution. The judgement indicates that the “limitation on the right of access to court were sanctioned in the epilogue” for a specific pragmatic purpose: the exchange of truth for amnesty, or, rather, amnesty as the incentivisation for truth.¹²⁵ This objective indicates the centrality of truth acquisition, which Justice Mahomed argued was the outworking of the “vision which informs the epilogue,” with the vision being “a rapid and enthusiastic transition to the new society at the end of the bridge.”¹²⁶

2.5.2 The need for truth

The truth, in the judgement, is envisioned as in the PNURA, which is the knowledge of what “happen[ed] to their loved ones, where and under what circumstances it did happen, and who was responsible.”¹²⁷ The idea is that the determination and exposure of the “truth” had a three-fold purpose: firstly, it was to ‘restor[e] the human and civil dignity of... victims’ by affording them an opportunity to relate their own accounts of the violations and by recommending ‘reparation measures’ in respect of such violations,” and to assist them to “receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones.”¹²⁸ Secondly, the determination and exposure of the “truth” in terms of perpetrators was not only to use the prospect of amnesty to incentivise perpetrators to give full disclosure but also to assist them to “obtain relief from the burden of a guilt or an anxiety they might be living with for many

¹²⁵ *Azapo v President of South Africa*: summary < <https://www.justice.gov.za/trc/legal/azaposum.htm> > (accessed 7-10-2019).

¹²⁶ *AZAPO vs President* para 18.

¹²⁷ Para 18.

¹²⁸ Para 17.

long years.”¹²⁹ Lastly, the purpose of the determination and exposure of the “truth” was to assist the country to embark on “the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for... ‘reconciliation and reconstruction’.”¹³⁰

2.5.3 *The incentive of amnesty*

In the judgement, Mahomed argues that amnesty was indispensable to the transition to a “democratic society based on freedom and equality”.¹³¹ This was for two reasons. Firstly, to uncover the truth for the abovementioned reasons, perpetrators had to be convinced that they would not be held liable for their participation in the acts that they disclosed.¹³² Secondly, “[f]or a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a ‘democratic society based on freedom and equality’.”¹³³ Thus, “in order to advance reconciliation and reconstruction,” the obligation of Parliament was, as per the Interim Constitution, was to “adopt a law ... providing for the mechanisms, criteria and procedures... through which such amnesty shall be dealt with.”¹³⁴

Without the incentive of amnesty, Mahomed clarified, not only would the instantiation of “a democratic society based on freedom and equality” be threatened, but so too would the negotiations to bring it about in the first place.¹³⁵ Consider this quote from the judgement:

Even more crucially, but for a mechanism providing for amnesty, the “historic bridge” itself might never have been erected. [...] If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others.¹³⁶

¹²⁹ Para 17.

¹³⁰ Para 30.

¹³¹ Para 54.

¹³² Para 17.

¹³³ Para 19.

¹³⁴ Para 14

¹³⁵ Para 19.

¹³⁶ Para 19.

2.4.4.4 The pursuit of political transcendence

The exposure of the truth through the incentivisation of amnesty was assumed to be a catalyst to “a rapid and enthusiastic transition to the new future” at the end of the TRC process.¹³⁷ The decision-makers behind the steps to be taken to advance reconciliation and reconstruction, according to the judgement, were governed by an “ethos” characterised by the preference of “understanding over vengeance, reparation over retaliation, ubuntu over victimisation”, ideals stated in the postamble of the Interim Constitution, and prescribed to SA citizens as the ethically appropriate responses to the brutality of apartheid.¹³⁸ These decisions entailed a very tricky process of finding a balance between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new. With this reasoning of the value of truth being based on the need for the alleviation of psychological suffering of victims, perpetrators, and the country at large; the incentivisation of amnesty for truth recovery; and the pursuit of reconciliation and reconstruction, the judgement laid down the purpose of the TRC.

The metaphors used in Mahomed’s judgement reveal the TRC’s perception of the situation at the time: the past as a book, the present as a bridge, and the future as a destination. Also, the metaphors of what the Interim Constitution was (a bridge), what the TRC process was meant to be (a vehicle for the crossing of the bridge, a reconciliation of the books). These metaphors have to do with leaving something behind. For instance, the past is characterised as a place anterior to the bridge, and the closing of the books implies that the contents of the book no longer serve for the purpose of enquiry since the matter is settled. In these metaphors, the TRC was meant to be the juridical vehicle which would transport the victims, perpetrators and the country at large to a new society through primarily through psychological closure of the trauma of apartheid. The chapter of the past was coming to a close, as per TRC chairperson Desmond Tutu:

"Having looked the beast of the past in the eye, having asked and received forgiveness and having made amends, let us shut the door on the past – not in order to forget it but

¹³⁷ Para 21.

¹³⁸ Para 3.

in order not to allow it to imprison us. Let us move into the glorious future of a new kind of society where people count, not because of biological irrelevancies or other extraneous attributes, but because they are persons of infinite worth created in the image of God ..."¹³⁹

The AZAPO judgment exemplified the ethical and legal dilemmas around amnesty, which the Constitutional Court positioned as crucial for transitioning to democracy by framing truth-telling as essential for healing and nation-building. By constructing a shared national identity focused on overcoming the injustices of apartheid, the PNURA asserts both the moral and epistemic validity of the new political order. Critically, this aspiration towards healing and nation-building would require the negation of a substantive rectification of historical injustice.¹⁴⁰

2.6. Conclusion

The aim of this chapter was to elucidate the logic the PNURA used in its justification of the transition to a liberal democratic South Africa. The central argument is that the PNURA's liberal use of a human rights paradigm functioned as a tool to foster a shared national identity, thereby asserting the moral and epistemic legitimacy of establishing a democratic state. The chapter began by examining the PNURA's mandate and aims, and provided historical context to show the PNURA was a political solution to a political problem - granting legal indemnity to address state instability. The chapter detailed key political developments, like the lifting of bans on organizations and Mandela's release, leading to negotiations that resulted in the Interim Constitution's amnesty requirement. A key goal was to safeguard the rule of law through transitional justice procedures focused on accountability and expressing the equal moral value of victims and perpetrators. The PNURA's primary objectives revolved around investigating gross human rights violations and providing amnesty to foster stability. Victim and perpetrator hearings were meant to reclaim dignity and produce reconciliation. This multifaceted approach aimed to document truth and lay the groundwork for an inclusive democracy. The PNURA sought to generate a collective memory centred on apartheid as an injustice violating individual rights. Forgiveness was presented as fundamental to restoring victims' dignity and reconciling with offenders. The

¹³⁹ Truth and Reconciliation Commission *Final Report* 91.

¹⁴⁰ I will return to the case study of Azapo in chapter 4 to build on this assertion that the PNURA essentially justified the negation of rectification for historical injustice.

chapter then highlighted how the PNURA embedded restorative justice in the national narrative, fostering legitimacy and acceptance of the new governance framework by prioritizing human rights discourse. This was systematically analysed in the AZAPO case study to show how the emphasis on restorative justice, truth-telling, and national reconciliation serves to reinforce the narrative of a legitimate transcendence from an unjust past to a liberal democracy.

In Chapter 3, I will examine how the PNURA shaped South Africa's political transition through its strategic use of narrative. I will investigate how the PNURA employed specific narrative techniques to present liberal constitutional democracy as South Africa's only viable political future, effectively dismissing alternative possibilities as paths to disaster. Through careful narrative analysis, I will trace how this positioning was constructed rather than inevitable. I will contextualize the PNURA's approach within South African intellectual history by identifying its alignment with specific ideological and historiographical schools. This analysis will reveal how the PNURA's fundamentally liberal orientation informed both its ideology and political objectives, as opposed to employing a historiography that would “establish” a truth about apartheid violence that is not already teleologically determined.

3. CHAPTER 3: THE NARRATIVIZATION, NATIONAL IDENTITY, AND POLITICAL LEGITIMACY OF LIBERAL SOUTH AFRICA

3.1. Introduction

The TRC and the PNURA represent more than mere instruments of transitional justice in post-apartheid South Africa. They embody a sophisticated exercise in historical narrativization—one that served specific political purposes in legitimizing South Africa's transition to a liberal constitutional democracy. This chapter examines how the PNURA's narrative framework, while ostensibly focused on truth-telling and reconciliation, effectively reproduced problematic patterns of South African historiography that have traditionally privileged white experiences and European paradigms of historical understanding.

The PNURA's approach to historical truth-telling was not politically neutral. Rather, it constructed a particular version of South African history that suggested the pre-existence of a unified national identity waiting to be recovered through reconciliation. This narrative framework strategically positioned apartheid as an aberration in South Africa's trajectory toward democratic governance, rather than acknowledging it as a manifestation of deeper colonial structures and systematic indigenous dispossession. By framing the transition to democracy as the natural resolution to historical conflict, the PNURA's narrative served to legitimize the emerging liberal constitutional order while sidestepping more fundamental questions about enduring colonial societal dynamics.

The TRC aimed to establish historical facts through investigations and witness testimonies, acting as a “temporal anchor” for transitioning from apartheid to a new national identity. Its report is seen as a “reusable text” that encapsulates the narrative of historical injustices and the path toward healing, guided by the PNURA, which defines relevant “truth.” To develop this argument, the chapter proceeds through interconnected sections, each building upon the previous to construct a comprehensive critique of the PNURA's narrative framework and its political implications.

The first section examines how the PNURA and TRC employed collective memory as a political tool in South Africa's nation-building project. I analyse how transitional justice seemingly holds a contradictory mandate to "remember" while "closing the chapter" on the past actually served a specific political purpose in creating discontinuity with the apartheid

order. Drawing on memory studies, particularly the distinction between communicative and cultural memory, I examine how the TRC Report was designed as a "reusable text" of cultural memory, with the PNURA setting crucial parameters for what constitutes relevant "truth."

Subsequently, the chapter builds upon this foundation by exploring the theoretical underpinnings of collective memory and identity formation. Through an examination of how the PNURA and TRC shaped collective memory in post-apartheid South Africa, this section introduces crucial theoretical frameworks about memory's role in society. The analysis of the TRC's four-part approach to truth—forensic, narrative, social/dialogue, and healing/restorative—reveals how the Commission attempted to create a comprehensive national narrative while navigating competing memories and interpretations. This theoretical groundwork is essential for understanding the subsequent critique of the PNURA's narrative construction.

Thereafter I outline the TRC's historical narrative as guided by the PNURA. This section demonstrates how the Commission's storytelling method was deliberately constructed to reframe South Africa's national identity, linking it to a narrative of struggle against apartheid while charting a path toward reconciliation. By analysing the TRC's narrative structure, we reveal how it functioned not merely as historical documentation but as a political tool for securing legitimacy for the new democratic regime.

The following section moves to examine this historical context by tracing in dominant South African schools of historiography. By outlining and critiquing five dominant schools of thought—British imperialist, settler or colonialist, Afrikaner nationalist, liberal, and radical/revisionist—this section demonstrates how South African historical writing has consistently centred the settler experiences or attempted to assimilate Black experiences into European frameworks. This historical context is crucial for understanding how the PNURA's narrative approach, despite its claims to inclusivity, reproduced problematic historiographical patterns.

Building on this historiographical foundation, I then present a crucial argument: that the PNURA narrative functions to legitimize South Africa's transformation into a liberal constitutional democracy while sidestepping deeper critiques of settler colonialism and racialized land ownership. By examining how the narrative strategically highlighted human

rights violations while overshadowing historical antagonisms between settlers and indigenous populations, this section reveals the political nature of the PNURA's historical construction.

The narrative analysis that follows provides theoretical tools for understanding historical narrative construction through three key lenses: periodization, scientific history, and narrative emplotment. This theoretical framework helps explain how the PNURA's narrative choices—in terms of how it divided time, approached historical truth, and structured its story—served specific political purposes. By examining how historical narratives create continuity and discontinuity, how they claim scientific validity, and how they generate meaning through plot structures, this section provides analytical tools for understanding the PNURA's narrative strategy.

Throughout these sections, the chapter maintains a focus on how the PNURA's narrative framework operated as a political technology rather than a neutral historical methodology. Its approach to truth-telling and reconciliation was shaped by the political imperatives of South Africa's negotiated legal “transition”. The resulting narrative emphasized racial reconciliation within a liberal democratic framework while minimizing deeper historical antagonisms between settlers and indigenous populations. This progressive building of argument through chapter reveals how the PNURA's narrative construction served to legitimize particular political arrangements while constraining the possibilities for more radical transformation.

3.2. Collective Memory and Collective Identity

Populations emerging from the types of histories addressed in transitional justice discourse are often urged that they have a “duty to remember” this history and not “forget” it.¹ As a truth commission, the main epistemological aim of the TRC was to establish historical events via investigations and ‘truth-telling’, that is, witness statements. The PNURA’s idea of “closing the chapter on the past” was accompanied with the discourse of “a new beginning” and a transformed national identity. The TRC was to serve as the temporal anchor designed to create discontinuity with the former political order characterized by racial segregation conflict. The results of the investigations and the testimonies coming from the hearings were

¹ M Lavabre “Historiography and Memory” in A Tucker *A Companion to the Philosophy of History and Historiography* (2009) 376.

considered types of truth and were to cumulatively serve as the narrative designed to create discontinuity with the former political order characterized by racial segregation, animosity and conflict. The TRC report is meant to play the role of such a reusable text. It was to be a text that encapsulates the national narrative about historical injustice in South Africa and how it has supposedly been or is being transcended. However, the terms by which the report would become such a text were set in the PNURA as it is in the PNURA where relevant “truth” is indicated, as well as what makes it relevant. Thus, the PNURA is a historiographical guide of South African cultural memory. For this reason, it is prudent to investigate the particularities of the historiography of the PNURA.

Memory has a collective social dimension and can be used to foster social cohesion. There are various views on the nature and kinds of collective memory. Jan Assman and John Czaplicka call attention to two kinds of collective memory: communicative and cultural memory.² Like oral history, communicative memory is the kind of collective memory that is constituted by everyday communications.³ Assman and Czaplicka call it “an everyday form of collective memory” in that it does not transcend generations but it is transmitted through every day communications between members of a social collective.⁴ An example of communicative memory in the PNURA context would be the victims’ hearings where each individual memory was meant to add to the grand narrative of the injustice of apartheid but would not be an intergenerational text to which each person in the social collective would have to remember as a pivotal part of their identity, just as a constitutive element. In terms of cultural memory, which creates a more rigid collective experience in groups, it does not fade or change as time passes but rather takes on a certain fixity according to historicization of the events that constitute it. These may be chronicled in cultural formations such as “texts, rites, monuments” and institutional formations such as “recitation, practice, observance”, which Assman and Czaplicka term “figures of memory”.⁵ Cultural memory, in essence, “comprises that body of reusable texts, images, and rituals specific to each society in each epoch, whose ‘cultivation’ serves to stabilize and convey that society's self-image.”⁶ The TRC Report is meant to play the role of such a reusable text. It was to be a text that encapsulates the national narrative about historical injustice in South Africa and how it has supposedly been or is being

² J Assmann and J Czaplicka "Collective Memory and Cultural Identity" *New German Critique* 65 (1995) 125-133.

³ 127.

⁴ 127.

⁵ 129.

⁶ 132.

transcended. However, the terms by which the report would become such a text were set in the PNURA as it is in the PNURA where relevant “truth” is indicated, as well as what makes it relevant. Thus, the PNURA is a historiographical guide of South African cultural memory. For this reason, it is prudent to investigate the particularities of the historical narrative of the PNURA.

Collective memory is “not simply a memory shared across a community. It must serve a function for the community”.⁷ It must be an identity marker. It is socially framed through shared experience of “representations of the past in the minds of members of a community that contribute to the community’s sense of identity”.⁸ Cultural memory, as a form of collective memory, “comprises that body of reusable texts, images, and rituals specific to each society in each epoch, whose ‘cultivation’ serves to stabilize and convey that society’s self-image.”⁹ “The binding character of the knowledge preserved in cultural memory has two aspects: the formative one in its educative, civilizing, and humanizing functions and the normative one in its function of providing rules of conduct.”¹⁰ It provides an explanation for the norms and forms of the community. Manier explains collective memory as based on shared experience also explainable as an interpretative lens that creates and adopts meaning.¹¹ The “collective-ness” of collective remembering, pertains to a social collective’s shared cultural hermeneutic of the past, with the past often being expressed and depicted in the form of a narrative. For James Wertsch and Henry Roediger, this shared hermeneutic consists of a “cultural toolkit”, such as “narrative forms, to make sense of the past.”¹² Wertsch and Roediger argue that there is a certain collective historical hermeneutic that shapes the meaning of the social collective’s fundamental narratives, and, in turn, the meaning of the social collective’s fundamental narratives reinforces the legitimacy of this historical hermeneutic.¹³ Put differently by John Gillis, “we are constantly revising our memories to suit our current identities.”¹⁴ This reveals why Wertsch and Roediger propose that the term “collective remembering” better encapsulates the process by which there is a reciprocal and

⁷ David Manier & William Hirst 2008 “A Cognitive Taxonomy of Collective Memories” In A. Erll & A. Nunning (eds) *Cultural Memory Studies: An International and Interdisciplinary Handbook* 253.

⁸ 253.

⁹ Assmann & Czaplicka (1995) *NGC* 132.

¹⁰ 132.

¹¹ Manier & Hirst “A Cognitive Taxonomy” in *Cultural Memory Studies* 253.

¹² James Wertsch & Henry Roediger “Collective Memory: Conceptual Foundations and Theoretical Approaches” *Memory* 16 (2008) 324.

¹³ 324.

¹⁴ John Gillis 1994 “Memory and Identity: The History of a Relationship” in John Gillis (ed) *Commemorations: The Politics of National Identity* 3.

constant negotiation between the social collective's fundamental narratives and its historical hermeneutic of the relationship between the past and the present, as well as the significance of the past in the present.¹⁵ Felix Berenskotter explains this mutual engagement and “political” process as merging “past and future worlds together in a narrative that constitutes spatio-temporal being in the world as a coherent whole.”¹⁶

Every country has a biography which is the official or grand narrative. There is an infrastructure that creates, safeguards and reinforces this narrative. While there are multiple narratives competing for space in the public sphere, there is a basic discourse which “guides and legitimizes” the multiple narratives in order to “provide[s] ontological security” by assimilating and fusing them into a coherent grand or governing narrative.¹⁷ This assimilation and fusion safeguards the national biography from those narratives that may threaten the “coherence of the basic discourse”.¹⁸ The aforementioned infrastructure requires legitimized and officially sanctioned chroniclers who assimilate and fuse the numerous narratives in the country into a coherent official narrative, and those with institutional power to further and promote this official narrative through “tangible practices”.¹⁹ These actors participating in “the formulation and dissemination of a national narrative” possess the credibility and legitimacy of state institutions to privilege some narratives while sabotaging or silencing others.²⁰ This differentiation between central, peripheral and dismissed narratives is a political exercise that serves to preserve certain political power relations, in essence, the integrity of the state, and prevent the emergence of oppositional relations that would threaten this integrity.

Memory can be disadvantageous to the task of creating a collective memory in that, if memory is malleable and may not have veracity or be based on fact, then it can be manipulated to suit certain agendas that foster distrust of other groups. Marie-Claire Lavabre points out that this malleability of memory may result in a certain suspicion of memory where some have argued that memory may not always be rationally controlled and can thus pose a threat to social cohesion as people can be manipulated to distrust each other, which would subvert the PNURA's goal of fostering a shared understanding of the past.²¹ This

¹⁵ Wertsch and Roediger (2008) *Memory* 320.

¹⁶ Felix Berenskotter “Parameters of a National Biography” *European Journal of International Relations* 20 (2014) 278-279.

¹⁷ 279.

¹⁸ 279.

¹⁹ 279.

²⁰ 279.

²¹ 366.

scepticism of the epistemic and social value of collective memory is often promoted by the position that historiography is the appropriate epistemic approach to give an authoritative account of historical injustice because “history is willing to change a narrative in order to be loyal to facts, whereas collective remembering is willing to change information (even facts) in order to be loyal to a narrative.”²² The politics of memory shape what the national biography will be. They concern “the shaping of collective memory by political actors and institutions”.²³ This shaping is an area of great disputation, competition and negotiation in the sense that it concerns “how the past should be recorded, remembered, and disseminated, or else silenced and forgotten”.²⁴ This fact raises the question of credibility and authority in narrative; that is, the legitimacy of historical accounts. This legitimacy of a national narrative is reliant on the perception of a beginning, a middle and a future, which is meant to convey a sense of identity continuity.

A nation’s collective memory shapes its identity, with an official narrative constructed through selective memory that consolidates power by legitimizing some accounts while marginalizing others. However, memory’s malleability can lead to distrust, challenging the national biography’s coherence. The next section builds on this, examining the TRC’s efforts to reconcile these competing memories within a pluralistic framework. The TRC’s categorization of “truth” into four types—social, forensic, narrative, and dialogical—reflects an attempt to create a more inclusive historical record, underscoring the complexities and limitations of establishing a singular narrative of past injustices.

3.3. Towards a Collective Memory from a Plural Truth

The Report explains the four kinds of truth as: social truth, forensic truth, narrative truth, and social/dialogue truth.²⁵ A criticism of the TRC is that its historiographical assumptions and historical method were not cohesive enough to realize its objective of a coherent picture of historical injustice. In aiming for a collective or plural memory, it did not sufficiently acknowledge the implications of the irreconcilability of competing collective memories. The

²² 366.

²³ Geneviève Zubrzycki & Anna Wozny “The Comparative Politics of Collective Memory” *Annual Review of Sociology* 46 (2020) 176.

²⁴ 176.

²⁵ 110-114.

PNURA was tasked with “establish[ing]... as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960” until the eve of the 1994 elections.²⁶ It was attested in the report that all four kinds of truth, when understood and accepted, “contribute to the reparation of the damage inflicted in the past and to the prevention of the recurrence of serious abuses in the future.”²⁷ Even if one may posit that the categorization of “the truth” into four types is perhaps a concession by the TRC that there could be no one grand or cohesive narrative, nonetheless this assertion is refuted by this implied objective in the PNURA’s historiography. Certainly, this suggests that there exists a central idea of the nature of truth; that the four kinds of truth have a common purpose in their plurality and facilitate a common understanding and acceptance of the past.

These kinds of truth are intended to form the chronological anchor of historical injustice and are based on history, some on memory, and some are hybrid, and they each contribute to the construction and legitimation of this grand narrative. The PNURA placed significant emphasis on the task of the TRC to uncover “factual or forensic truth” during the investigation process.²⁸ Forensic truth is described in the Report as “the familiar or scientific notion of bringing to light factual, corroborated evidence, of obtaining accurate information through reliable (impartial, objective) procedures”.²⁹ The findings on specific incidents, as well as broader patterns and causes of violations, were understood to involve rigorous verification and a social scientist's analytical approach, akin to legal or scientific methodologies. In its pursuit of factual truth, the TRC was mandated to delve into two crucial aspects. Firstly, it needed to examine individual incidents in detail, elucidating the specifics of what occurred, “to whom, where, when and how, and who was involved?”³⁰ Achieving this requirement of the Act would require comprehensive verification and corroboration protocols to ensure that the TRC’s findings were rooted in precise and accurate information. Secondly, the TRC was tasked with elucidating the broader contexts, causes, and recurring patterns behind human rights violations.³¹ This endeavour would require the Commission to employ its database and diverse secondary sources for analysis, interpretation, and inferential work. The limitations of this methodology to uncover all the human rights violations that

²⁶ Promotion of National Unity and Reconciliation Act.

²⁷ Truth and Reconciliation *Report* Volume 1 114.

²⁸ 111.

²⁹ 111.

³⁰ 111.

³¹ 111.

were hidden by the state are acknowledged in the report. The sentiment shared therein is that the primary impact of truth commissions is embodied in the diminishment of the spread of denialism; the unchallenged falsehoods in public discourse that take hold in the absence of transparency and publicity of human rights violations.³² While the TRC Act required the pursuit of what came to be called forensic truth, it also embraced other complementary notions of truth as integral components of its broader mission of the creation of an official record of apartheid, as discussed subsequently.

The Commission aimed to give victims the chance to tell their experiences of pain during the Apartheid regime, a “personal or narrative truth” that would create a “national memory”.³³ This national memory would consist of multifaceted and diverse personal experiences of apartheid of both perpetrators and victims of apartheid.³⁴ Storytelling, it is averred, holds “healing potential” “unique insights into the pain and complexities of South Africa’s past.”³⁵ As opposed to functioning as statements or arguments made in a court of law, the aspiration was to amplify, illuminate and validate the individual subjective experiences that had been silenced or marginalized.³⁶ In collecting these testimonies, the TRC sought to capture the widest possible range of perceptions, stories, and experiences, as though recognising each to be indispensable to a broader collective narrative of South Africa’s history.

Social or dialogue truth is described as “the truth of experience that is established through interaction, discussion and debate”.³⁷ This type of “truth”, as articulated in the report, derives from interaction and debate.³⁸ According to the report, the establishment of this truth, requires a careful consideration of the diverse motives and perspectives of all stakeholders. In fulfilment of this requirement, the TRC sought to create an environment where voices “from all walks of life were invited to participate in the process, including faith communities, the South African National Defence Force (SANDF), non-governmental organisations (NGOs) and political parties,” where they could be heard and evaluated

³² 111.

³³ 112-113.

³⁴ 112.

³⁵ 112.

³⁶ 112.

³⁷ 113.

³⁸ 113.

equally.³⁹ The TRC posited that the intrinsic link between the truth-seeking and the process of “truth-telling” in the hearings was the affirmation of human dignity.⁴⁰

Lastly, healing and restorative truth is, according to the Report, “the kind of truth that places facts and what they mean within the context of human relationships”.⁴¹ The Report holds this “healing and restorative truth” as central to the mission of the TRC, challenging what it considers the prevailing dichotomy between “objective information and subjective opinions”.⁴² It emphasizes the importance of acknowledging the pain experienced by victims as a means to contribute to the repair of past harm and the prevention of future abuses. This acknowledgement involves publicly recording known information about past human rights violations, affirming the reality of victims' pain and the necessity of addressing it. Acknowledgment, in the TRC's perspective, is the “affirmation that a person’s pain is real and worthy of attention [and] is thus central to the restoration of the dignity of victims.”⁴³ The TRC's concept of truth encompasses various kinds, including social truth, narrative truth, and social/dialogue truth, each contributing to the construction and legitimation of a historical narrative. The section below outlines what can be called the TRC’s grand narrative into which it aimed to portray as the formal narrative to which this plural truth would adhere and take as the basis from which narrative truth, dialogue truth, and healing truth would emerge.

3.4. Towards a Social Reconciliation: South Africa’s History from the Perspective of the TRC

The TRC's narrative approach to reconciliation was not just a method of addressing past wrongs, but a powerful political tool for shaping national memory and charting a course for the future. It demonstrates how storytelling can be used to reframe national identity, address historical injustices, and create a shared vision for a nation's future. One key impact was the TRC's role in facilitating South Africa's transition from its turbulent past to a “reconciled” future. By framing this process as a story, the TRC highlighted the therapeutic and unifying power of shared narratives, both for individuals and the nation as a whole. The TRC Report is

³⁹ 112-113.

⁴⁰ 114.

⁴¹ 114.

⁴² 114.

⁴³ 114.

meant to play the role of such a reusable text. It was to be a text that incapsulates the national narrative about historical injustice in South Africa and how it has supposedly been or is being transcended. However, the terms by which the report would become such a text were set in the PNURA as it is in the PNURA where relevant “truth” is indicated, as well as what makes it relevant. Thus, the PNURA is a historiographical guide of South African cultural memory. For this reason, it is prudent to investigate the particularities of the historiography of the PNURA.

The TRC’s project is defined by “techniques of truth-finding, with distinct genealogies and epistemological underpinnings,” thus weakening its potential to construct “an uncontested and factual history” inclusive enough and “one to which all South Africans would consent, as an authoritative, impartial account.”⁴⁴ As per the report, “inclusive remembering of painful truths about the past is crucial to the creation of national unity and transcending the divisions of the past.”⁴⁵ The aim was for a holistic, cohesive “remembering” that would contribute to the solidification of a unified South African identity; in other words, a collective memory in service of a collective identity. The TRC recognized that truth is multi-layered, encompassing not just factual accounts but also personal narratives, social dialogue, and a restorative process aimed at healing and preventing future injustices. Establishing this comprehensive truth involved rigorous investigation, inclusive participation, and understanding truth as intricately linked to human relationships, dignity and reconciliation.

The report refers to apartheid as “the climactic phase of a conflict that dated back to the mid-seventeenth century, to the time when European settlers first sought to establish a permanent presence on the subcontinent.”⁴⁶ As per the Report, the uniqueness of the apartheid state was that the post-1948 state “set out to segregate every aspect of political, economic, cultural, sporting and social life, using established legal antecedents where they existed and creating them where they did not.”⁴⁷ In essence, apartheid was the policy underpinning the system of racial segregation and inequality, a policy which was itself a

⁴⁴ The Truth and Reconciliation *Report* 6; Van der Walt et al *The South African TRC* 260; D Posel & G Simpson, *Commissioning the Past: Understanding South Africa’s Truth and Reconciliation Commission* (2002) 148; D Posel *The TRC Report: What Kind of History? What Kind of Truth?* (1999) 4; G Stevens, N Duncan & C Sonn et al ‘The Apartheid Archive: Memory, Voice and Narrative as Liberatory Praxis’ (2010) 40 *PINS* 13.

⁴⁵ Truth and Reconciliation Commission *Report* Volume 1 116.

⁴⁶ Truth and Reconciliation Commission of South Africa *Report* Volume 1 24-25.

⁴⁷ 30.

violation of human rights that determined civil and political rights by race. Apartheid was also an ideology of “reactionary change”, which was at one time continuing the status quo of white supremacy, but also changing it by more aggressively using law to extend and systematize this status quo.⁴⁸ The particular pieces of legislation the Report refers to as examples of the systematization of segregation are the Population Registration Act of 1950, the Group Areas Act of 1950, the Prohibition of Mixed Marriages Act of 1949, the Immorality Amendment Act of 1950, the Suppression of Communism Act of 1950, the Separate Amenities Act of 1953, and the Bantu Education Act of 1953. The Report also acknowledges the way in which apartheid legislation excluded Coloured male voters from the voter's roll, as well as restricting Africans' freedom of movement and economic participation through pass laws.⁴⁹

The TRC Report is replete with references to conquest and colonization but relegates them to a distant past. For instance, the slavery of the 1600s at the Cape, “wars of dispossession and colonial conquest”, the San and Khoi-Khoi genocide, the Mfecane, the “South African War” and the Herero genocide in the early 1900s are all depicted in the report as relevant but distant, and relevant only insofar as they provide context for the *actually relevant* and *recent* period, post-1960 to 1994.⁵⁰ In fact, while the Report acknowledges that the “recent” history was preceded and subtended by the white supremacist logic propagated and realized in colonial conquest, it is asserted therein that the “contemporary history...with which we have had to come to terms” began in 1 March 1960 and ended on 10 May 1994.⁵¹ This period from 1960, the legislation of which is explained in the Report as “of a qualitatively different type”, was ushered in by the Sharpeville “disaster” and culminated in the inauguration of Nelson Mandela as president of South Africa.⁵² Although it seems to be an arbitrary date given that the report does acknowledge prior human rights abuses, the historian Colin Bundy posits that this period was chosen because of the maximization of state repression through brutal and authoritative policies that heightened the occurrence and international notoriety of the state’s human rights violations.⁵³ In the report, it is explained therein that one of the reasons underpinning this periodization was that it was “possibly the

⁴⁸ 30.

⁴⁹ 33.

⁵⁰ 25-27.

⁵¹ 156.

⁵² 1, 29.

⁵³ Colin Bundy “The Beast of the Past” in W. James, & D. P. van der Vijver (eds) *After the TRC: Reflections on truth and reconciliation in South Africa* (2000) 17.

worst and... the bloodiest in the long and violent history of the human rights abuse in this subcontinent [and] the climactic phase of a conflict that dated back to the mid-seventeenth century, to the time when European settlers first sought to establish a permanent presence on the subcontinent.”⁵⁴

3.5. The Grand South African Narrative Tradition

In the South African history academy, five dominant historiographical schools are often identified or recognized: (1) the British imperialist, (2) the settler or colonialist school, (3) the Afrikaner nationalist, (4) the liberal school, and (5) the revisionist or radical school. I will narrate the intellectual foundations and historical/historiographical premises of each school and show how it justifies a political project and a set of social, political and economic arrangements particularly with regards to indigenous people. Each dominant historiography of South Africa privileges a certain perspective with regards to whom the country belongs and the distribution of rights within it and pursue a political project that justifies a set of social, political and economic arrangements. Some of the schools are coterminous and have similar boundaries in meaning and content. Thus, the discussion below does not aim to delineate strict boundaries, especially for the first three schools discussed, but seeks to rather clarify the ideas that are emblematic of each tradition and present key texts or authors that shaped them.

3.5.1. The British Imperialist School

For the British imperialist school, South Africa is part of the British Empire, and so this school chronicles the events relating to and actions of the British empire in the country, such as the empire’s expansion from its first occupation of the Cape in 1795.⁵⁵ British rule in South Africa is considered to be justified by the superiority of British values, and military conflict with indigenous people is presented as “a narrative of the progress of European

⁵⁴ 24-25.

⁵⁵ W Visser “Trends in South African Historiography and the Present State of Historiographical Research” 2004 <http://fliphtml5.com/blbz/zrzp/basic> (accessed 10 November 2019).

civilization in a benighted continent.”⁵⁶ The core focus is on “the expansion of the British Empire and the achievements and benefits of empire.”⁵⁷ As such, the writings do not pay much attention to the unfolding conflict between Dutch East India Company and the Trekboers. Boers who took part in the Great Trek are seen as uncivilized; the abandonment of the coastal empire was itself uncivilising because Britishness is conflated with civilization and superior values.⁵⁸ Ultimately, it is a tradition defined by its depiction of the British in South Africa as bastions and gatekeepers of civilization whose travails are centred around the importation of civilization to the lesser civilized Boers and uncivilized natives.⁵⁹

Per James Bryce’s 1899 account in his book *Impressions of South Africa*, in the seventeenth and eighteenth centuries, Dutch settlers at the Cape came to understand that the indigenous “kafirs” [sic] were “no large dominion, but a great number of petty tribes, mostly engaged in war with one another.”⁶⁰ Bryce depicts the populations as being disparate, having no centralized authority and, by virtue of being semi-nomadic, having no strong ties to the land.⁶¹ Their lack of centralized authority, reasons Bryce, indicated an existence without recorded history.⁶² He described the Khoikhoi men as lazy, preferring “talking and sleeping better than continuous physical exertion”, which would later present a challenge to European mine owners intent on exploiting the labour of indigenous men for their economic purposes.⁶³ Bryce's portrayal of the "Bushmen" (San people) and Hottentots (Khoikhoi people) as primitives stuck in a "savage state" demonstrates the prejudiced attitudes that were used to justify colonial expansion and exploitation. Bryce argues that these indigenous peoples were "intellectually feeble" and unable to adapt to their environment, claiming they were "condemned to submit to the kind of life which [the environment] prescribe[s]”.⁶⁴ This view ignores the complex adaptations and knowledge systems developed by these groups over millennia. He further asserts that their lifestyle "permitted no accumulation of wealth, gave no leisure, suggested no higher want than that of food, and was in all respects unfavourable to

⁵⁶ A Bank *The Great Debate and the Origins of South African Historiography* (1997) 282.

⁵⁷ Visser “Trends in South African Historiography”.

⁵⁸ K Smith *The Changing Past: Trends in South African Historical Writing* (1989) 19; Visser (2004).

⁵⁹ N Dladla “The Liberation of History and the End of South Africa: Some Notes Towards an Azanian Historiography in Africa” (2018) *South African Journal on Human Rights* 428.

⁶⁰ Bryce, James. *Impressions of South Africa* (1899) 83-84.

⁶¹ 85.

⁶² 84.

⁶³ 89.

⁶⁴ 44.

material progress". This statement reveals a narrow, Western-centric definition of progress and civilization, dismissing the cultural richness and sustainable practices of these indigenous societies. Bryce goes on to compare the indigenous people of South Africa to "Red Indians and primitive Celts," describing them as "fond of hunting, even in its lowest forms, and of fighting," which he claims to be the "natural state" of the "tribes toward one another".⁶⁵

In recording the relationship between the European settlers in the territory, Bryce refers to the history of the numerous conflicts between the British and the Dutch at the Cape between 1795 and 1814, and points to two important reasons for the fissure between the two groups at the Cape that led to the creation of two Dutch republics after the Dutch left the Cape *en masse* in what is known as the *Great Trek* in 1836.⁶⁶ He identifies the infrequent interaction between the British and Dutch farmers, who he describes as "ignorant, prejudiced, strongly attached to their old habits, [and] impatient of any control", as the first cause.⁶⁷ The fermentation of conflict was exacerbated by what the Dutch farmers deemed to be the British's overreach of their dominance.⁶⁸ The second cause of the fissure of British-Dutch relations, according to Bryce, included the imposition of English as the official language, the leniency of the British in certain matters where the British deemed to be the ill-treatment of the "natives" by the Dutch, and the abolition of slavery by the British.⁶⁹ Calling on the myth of a vast, untamed interior made sparse and deserted due to purported intra-native conflicts, Bryce explains the rebellion of the Dutch farmers against the British to be emboldened by the promise of "a great wild country [laying] open before them, where they could lead that solitary and half-nomadic life which they loved, preserve their old customs, and deal with the natives as they pleased, unvexed by the meddlesome English."⁷⁰ Ultimately, argues Bryce, for Britain to maintain control of the territory of what came to be called South Africa in the succeeding years after British-Afrikaner conflicts and wars, it will have to "ensure the external peace of that country".⁷¹ After all, he assumes, the lineage of the British and the Dutch "is strong and sound; and they have carried with them to their new home the best traditions of Teutonic freedom and self-government".⁷²

⁶⁵ 89-80.

⁶⁶ 112.

⁶⁷ 112.

⁶⁸ 112.

⁶⁹ 113.

⁷⁰ 115.

⁷¹ 476.

⁷² 477.

3.5.2. The Settler School

The settler or colonial School portrays South Africa as being a wild and untamed country to which *all* colonists are called to civilize and Christianise the natives and subdue the natural surroundings.⁷³ The settler tradition is “pro-colonist” and “anti-black”.⁷⁴ Like with the British school, Europe is the centre, and the colonies are the extension of Europe, and so the history of the colonies is essentially secondary to that of Europe.⁷⁵ This narrative is of “how whites [resolve] their differences to establish a white-dominated Union of South Africa.”⁷⁶

In the South African history academy, George Theal is considered the foremost pioneer and “first great historian of South Africa” who depicted blacks as peripheral to South African historical developments and as unequal with whites. Theal, a Canadian immigrant and “father” of the settler tradition, wrote *History of South Africa* in the beginning of the 1900s.⁷⁷ The narrative bent of *History* was the history of South Africa as a “story of white settlement”.⁷⁸ He portrayed whites as civilized and progressive, which, according to him, justified white conquest and rule over what he considered “barbarism”, and he did not consider Africans to have any history of which to talk about, and “could on occasion write as if they did not exist.”⁷⁹ In contrast, he was the first English writer to sympathize with the Afrikaner in his *History of the Boers*.⁸⁰ Accordingly, he held the emancipation of slavery to be a conversion of slavery as a useful contributor to society to being a burden to society.⁸¹

Other prominent writers in this school are George Edward Cory and Frank Cana. Cory’s *The Rise of South Africa* (published between 1910 and 1939) chronicled the developments of the settler administration of the Cape and, for his time, gave the most detailed sympathetic chronicle of the Great Trek.⁸² Cana’s *South Africa from the Great Trek*

⁷³ A Cobley “Does Social History have a Future? The Ending of apartheid and Recent Trends in South African Historiography” (2001) 27 *Journal of Southern African Studies* 613.

⁷⁴ C Saunders *The Making of the South African Past: Major Historians on Race and Class* (1988) 20.

⁷⁵ JWN Tempelhoff ‘Writing Histories and Creating Myths: Perspectives on Trends in the Discipline of History and its Representations in Some South African Historical Journals 1985-1995’ (1997) 27 *Scientia Militaria - South African Journal of Military Studies* 126.

⁷⁶ Visser “Trends in South African Historiography”.

⁷⁷ Saunders *The Making of the South African Past* 9; Smith *The Changing Past* 31.

⁷⁸ Saunders *The Making of the South African Past* 21.

⁷⁹ Smith *The Changing Past* 28-29.

⁸⁰ Smith *The Changing Past* 37.

⁸¹ Saunders *The Making of the South African Past* 37.

⁸² Visser “Trends in South African Historiography”.

to the Union (published 1909) embraced the same themes as Theal and Cory, which are characterised by a commitment to the unification of white settlers for the sake of white dominance in the country; in other words, to “reap the benefits of civilized union”.⁸³ As with Theal and Cory, Cana’s work does not pay much attention to the history or agency of indigenous people. Furthermore, *Cambridge History* delves into the emergence of Afrikaner nationalist historiography as a reaction to the dominant liberal imperialism. It highlights how Afrikaner nationalist historians, particularly at universities in Stellenbosch and Pretoria, focused on preindustrial matters, the Cape colonial origins of the Afrikaner volk, the Great Trek, and the history of the Afrikaner republics.⁸⁴ This nationalist historiography chronicled the organizational changes and adaptations of Afrikaner politics, drawing connections to Germany and the Netherlands. *Cambridge History* also discusses the diverse interpretations of South African history by different historians. It introduces John Noble's History, which narrates European colonization from the times of Portuguese and Dutch settlement, emphasizing liberal constitutionalism and colonial nationalism in the Western Cape.⁸⁵ In contrast, Wilmot and Chase's *History of the Cape Colony* offers a pro-settler chronicle from the viewpoint of Eastern Cape separatists.⁸⁶

3.5.3. The Afrikaner Nationalist school

The Afrikaner Nationalist school developed rapidly as a response to the critique by the English liberals in the late 1700s and early 1800s that it was wrong to enslave the natives and that the natives had rights. Pieter Duvenage identifies three epochs that affected Afrikaner self-identification: 1652-1795 when the VOC ruled the Cape under the authority of the Netherlands; 1795-1910 when the British first occupied the Cape and the initiation of the Great Trek in opposition; and 1910-1948 when the Afrikaner state became consolidated.⁸⁷ This tradition places special emphasis on idea of Afrikaner history as a struggle against nature, natives and the British in a fight for self-preservation.⁸⁸

⁸³ Smith *The Changing Past* 49.

⁸⁴ Saunders *The Making of the South African Past*.

⁸⁵ 22.

⁸⁶ 22.

⁸⁷ P Duvenage “Afrikaner Intellectual History: An Interpretation” in Vale et al (eds) *Intellectual Traditions in South Africa: Ideas, Individuals and Institutions* (2014).

⁸⁸ Smith *The Changing Past* 57.

The pivotal role assigned to the Great Trek is highlighted in the historiography, with the period post-1806 seen as leading inevitably to this significant event.⁸⁹ Of particular concern in these works is the achievements of the Trekboers and their descendants and is instrumental in the ideology of Afrikaner nationalism.⁹⁰ The dominant idea was that Jan van Riebeeck, and his fellow travellers had purely economic reasons for conquering the indigenous people of the Cape and settling there. Van Riebeeck plays a crucial role in this school as “the bringer of civilization and Christianity to benighted Africa.”⁹¹ He is considered a key representative of the Fatherland (the Netherlands), and a pioneer of a devout Christian people who landed and settled in a territory up for grabs and spread out in different directions, bringing with them the light of Christianity and civilization to the heathen.⁹² Afrikaners are depicted as a fiercely independent people whose self-reliance was forged in the struggle against VOC tyranny, British Imperialism, and the savage barbarism of the natives in the quest to claim their God-ordained promised land. An empty land (or “empty land thesis”) is prominent in Afrikaner historiography and the resulting practices of their dispossession of the indigenous people.⁹³ The British are considered oppressors of the Afrikaners, and the dominant narrative is of Afrikaner liberation from British imperialism and black barbarism, and so the major nodal points of South African history in this school are the Great Trek, the Second Anglo-Boer War, and the formation of an Afrikaner state in 1948. The Anglo-Boer War is considered the ultimate sequel to the Great Trek, with a perceived chain of causality linking the two. This interpretation underscores the centrality of the Great Trek as the axis of Afrikaner history, asserting that events from 1836 to 1902 shaped the present landscape of South Africa. According to this perspective, the division caused by the Trek and the subsequent unification during the war is attributed to the imperial factor.

Post-World War I, the influence of European training on Afrikaans scholars shaped their methodologies.⁹⁴ The significance of the Great Trek in the formation of the state is a point of contention, with Afrikaner scholars viewing it positively. In contrast, liberal scholars consider it a disaster, and Africanists see it as a conquest. Notably, the union of South Africa

⁸⁹ 65.

⁹⁰ N Worden *The Making of Modern South Africa* (2012) 24.

⁹¹ Bank *The Great Debate* 267.

⁹² 267.

⁹³ C Boisen “From Land Dispossession to Land Restitution: European Land Rights in South Africa” (2017) 7 *Settler Colonial Studies* 327.

⁹⁴ Smith *The Changing Past* 69.

did not emerge as a popular subject within the Afrikaner tradition. Instead, the focus remained on the political dynamics between whites, emphasizing the continued subjugation of the Afrikaner within the broader historical narrative.⁹⁵ This historiography was particularly expedient for the apartheid government in legitimizing Afrikaner settlement as it posited the supposition that the Dutch settlers arrived in the territory later called South Africa at the same time as the indigenous Bantu peoples.⁹⁶

3.5.4. The Liberal School

TRC historiography emerges from the liberal understanding that “Western liberal democracy [is] the final form of human government” and that “the end point of mankind’s ideological evolution and the universalization,” to which all nation states should strive.⁹⁷ Liberalism in South Africa has a paternalistic proclivity to conceive of indigenous people solely as victims of the tragedies of what Alan Cobley terms the “confrontation between modernity and irrationality.”⁹⁸ Liberalism espouses a logic that presumes Europe to be the pinnacle of progress and civilization, a presumption that undergirds the tendency of liberals to assume the place of tutors and supervisors of so-called less-civilized peoples in this direction of “civilized maturity, from which would follow full equality.”⁹⁹ The liberal promise of equal rights and citizenship is heavily qualified according to how well natives assimilate into “civilized society”.

Liberal historiography recognizes the indigenous experience as a pivotal part of South African history inasmuch as “the history of South Africa was the tale of race relations [and] contact between race groups of different civilizations and their gradual coming together into a single, although heterogenous, community”.¹⁰⁰ Historians place William Macmillan and Cornelius de Kiewiet as forerunners of this tradition in South Africa. According to Stolten, these two historians started writing their histories in the 1920s and 1930s partly as a response to and critique of Theal, particularly as it pertained to his historiographical approach to the

⁹⁵ 88.

⁹⁶ Boisen “From Land Dispossession to Land Restitution” *Settler Colonial Studies* 323.

⁹⁷ M Andrews *Shaping History: Narratives of Political Change* (2007) 188.

⁹⁸ Cobley (2001) *Journal of Southern African Studies* 613.

⁹⁹ C Allsobrook “A Genealogy of South African Positivism” in *Intellectual Traditions in South Africa* (2014) 99

¹⁰⁰ Visser “Trends in South African Historiography”.

significance of blacks.¹⁰¹ They articulated the role of blacks in the narrative of South Africa's history in relation to poor whites, Afrikaner nationalism, and their political "awakening".¹⁰² Saunders explains that Macmillan's work foregrounded social history and the economic and relational dynamics of the common people instead of the ruling elites and the state. He was the first to write about poor whites, the legacy of slavery and the competition whites faced from blacks for labour.¹⁰³ He portrayed blacks as victims of dispossession, and it is evident in his work that his study into how blacks entered the white establishment ignited in him a sense that these historical developments were an anticipation of a future multi-racial society.¹⁰⁴ In line with Theal's rhetoric, however, he saw blacks as child races and agreed that colonization was thus justified as it helped to civilize blacks.¹⁰⁵ At the same time, he supported multi-racialism on the basis that the solution to the fear of mixing races was the economic upliftment of blacks.¹⁰⁶ Similar sentiments about the plurality of South African history were shared by De Kiewiet, who emphasized the value of the economic interdependence of blacks and whites in South Africa.¹⁰⁷ He interpreted colonization from an economic lens and bemoaned the tendency of white society to use black labour but alienate blacks politically and socially.¹⁰⁸ This concern for the role of blacks in South African history and society burgeoned in liberal historiography in the 1960s. By then, the school was spearheaded by the likes of John Omar Cooper, Leonard Thompson, and Monica Wilson, who then wrote the seminal liberal historiographical text, the *Oxford History of South Africa*.¹⁰⁹ The political objective of the was to articulate pre-colonial South Africa with an ethnocentric focus and to "show both the history of blacks had to be integrated into the totality of South Africa's history, and that besides conflict, there had been much interracial cooperation before the social engineers of the apartheid era took steps to end it."¹¹⁰

3.5.4.1. Mac Maharaj and Pallo Jordan: Breakthrough to a Miracle

¹⁰¹ HE Stolten *History Making and Present-Day Politics* (2007) 12.

¹⁰² 12.

¹⁰³ Saunders *The Making of the South African Past* 62.

¹⁰⁴ 65.

¹⁰⁵ 72.

¹⁰⁶ 73.

¹⁰⁷ 87.

¹⁰⁸ 89.

¹⁰⁹ Stolten *History Making and Present-Day Politics* 13.

¹¹⁰ Stolten *History Making and Present-Day Politics* 13; Saunders *The Making of the South African Past* 154.

The liberal historiographical tradition is epitomized by the book *Breakthrough: The Struggles and Secret Talks that Brought Apartheid South Africa to the Negotiating Table* by Mac Maharaj and Pallo Jordan.¹¹¹ Maharaj and Jordan are a prime example of the miracle narrative that is told about South Africa. Their point of departure is the question, “How did South Africa arrive at this moment when negotiations were about to begin?”¹¹² They present a history of the negotiations for a democratic South Africa as a third way between political violence or civil war and impunity for human rights abuses.

Maharaj and Jordan begin with the advent of the African National Congress (ANC) being forced into exile in 1967, setting the stage for the struggle against a system backed by formidable economic interests. Maharaj and Jordan consider the Durban strikes of 1973 and the Soweto unrest of 1976 to be seminal events that shifted the dynamics.¹¹³ In 1979, the South African government deployed repressive tactics against anti-apartheid protesters, including torture and detention leading to death. National Security Management System formed to coordinate military, economic, political, and other responses to security issues. In the 1980s and 1990s, South Africa faced significant political and economic challenges, including mass action and organizing, the creation of the National Security Management System (NSMS), and the detention and suppression of activists by government security agencies.¹¹⁴ Maharaj and Jordan explain the importance of these struggles in shaping the country's transition to democracy and the impact of external factors on the political and economic landscape. Jordan and Maharaja's miracle narrative contributes to political legitimacy in South Africa's transition period (1990-1994). The discussion focuses on the role of social movements and the ANC in the negotiated settlement leading to Mandela's release from prison. They highlight the role of mass action and organizing in bringing about change and the need for continued resistance against government oppression.

Maharaj and Jordan identify the United Democratic Front (UDF) in 1983 and the Congress of South African Trade Unions (COSATU) in 1985 as key components of grassroots mobilization. Sanctions and boycotts gained momentum, signifying growing global condemnation of the apartheid regime. The narrative exposes the government's total onslaught strategy, marked by extra-legal measures, militarization, and the elevation of the

¹¹¹ Mac Maharaj & Pallo Jordan *Breakthrough: The Struggles and Secret Talks that Brought Apartheid South Africa to the Negotiating Table* (2021).

¹¹² 2.

¹¹³ 11.

¹¹⁴ 21.

State Security Council, which had oversight over security departments, including police and intelligence, and operated outside the law with impunity.¹¹⁵ The State Government's response to political resistance in Coloured, Indian, and Black communities reached extreme levels, with the military deployed to townships during the state of emergency in 1984. The brutality described aligns with the climax of violence documented in the TRC report. The extensive measures included the use of military personnel as teachers and the establishment of hit squads for extrajudicial actions and assassinations. Black constables were deployed to create dissent within black communities, contributing to a strategy of divide and conquer. This system of repression, as described by Maharaj and Jordan, aimed to meet the perceived total onslaught with total war, creating fluid front lines reminiscent of martial law.¹¹⁶

The ANC's underground army, MK, gained prominence with strategic bombings. Mass mobilization, international condemnation, and internal fractures within the National Party added to the pressure on the apartheid regime. Neighbouring African countries played a role in the struggle against apartheid, hosting and contributing to policies like the Harare Declaration in 1989, which outlined conditions for negotiations leading to a democratic South Africa. Maharaj and Jordan note that the ANC orchestrated a multifaceted campaign to influence Western governments on cultural sphere issues, including sports, celebrity culture, and religion, drawing attention from Western governments and constituents who condemned apartheid. Maharaj and Jordan explore how reform efforts, represented by the Progressive Liberal Party and the Progressive Reform Party, sought to co-opt sections of the black community for the preservation and control of white capital. The Progressive Reform Party engaged in conversations with black leaders but avoided collaboration with the ANC, instead pursuing an alliance with the Inkatha Freedom Party (IFP) and various Bantustan leaders. In the exploration of South Africa's transition period between 1990 and 1994, the focus is on the narrative surrounding individuals like Nelson Mandela and movements such as the UDF and significant events like the Durban strikes and Soweto unrest. They illustrate how civil society initiated a gathering storm that began to cripple the oppressive apartheid regime. In this period of turmoil and activism, the narrative focuses on the power of solidarity, empathy, and common interests. Individuals like Mandela become symbolic figures, and movements like the UDF and COSATU illustrate the strength of grassroots mobilization. The narrative

¹¹⁵ 28.

¹¹⁶ 31.

contrasts with the economic forces that had driven South Africa's history, emphasizing the role of people in driving change.

Thiven Reddy observes that liberal narratives like that of Maharaj and Jordan take the form of “discourses of democratic transition and consolidation” which “orient how we interpret, talk about, consider thinkable, and debate the “miracle” of change in South Africa.”¹¹⁷ In this kind of discourse, the narrative is built around the linear progression from an authoritative regime to negotiations between political moderates (framing the negotiations as a compromise), and ending with the consolidation of democracy in the form of neoliberal constitutionalism.¹¹⁸ In South Africa’s case, for instance, key events would “start with the unbanning of black nationalist organizations and the release of Mandela in 1990 and end somewhere between the first democratic elections in 1994 and the adoption in 1996 of the new constitution.”¹¹⁹ These kind of narrative frameworks rely on a metaphor of stages to organize our understanding of the process of democratization – regime breakdown, transition and consolidation.¹²⁰ The commitment to the seamless and linear coherence that these narrative discourses of democratic change pursue often induces a dismissal of what Reddy terms “the messiness of the process of change”.¹²¹ These narratives tend to lead with the “miracle” access where the negotiations are made central and the political elites are made the protagonists, which relatively conceals the agency of ordinary people as well as the way in which the negotiations and the simultaneous violence were intertwined as opposed to the negotiations being a “third way” between violence and peace.

3.5.5. The Radical School

Radical historiography is primarily concerned with the relationship between apartheid and capitalism, which is essentially the relationship between race and class in South Africa. Although there had been some work in the tradition in the 1950s, it came to prominence distinctively in the 1970s and 1980s in the context of South Africa’s economy falling into

¹¹⁷ T Pillay “From Apartheid to Democracy in South Africa: a Reading of Dominant Discourses of Democratic Transition” in HE Stolten (ed) *History Making and Present Day Politics: The Meaning of Collective Memory in South Africa* 2007 148.

¹¹⁸ 149.

¹¹⁹ 151.

¹²⁰ 154.

¹²¹ 163.

crisis due partly to mass labour protests.¹²² The Radical school or revisionist school interprets South Africa as a racial order that is “an expression of class interests...designed largely to further the growth of capitalism”.¹²³ For revisionists, apartheid is the result of industrialisation and the apex of class domination by capitalists as opposed to a pure racial polity, and history is written with the aim of understanding the mechanics of this class domination. Radical historiography gained its theoretical and scholarly weight at the University of the Witwatersrand’s Wits History Workshop. Beginning in 1978, the Workshop was held every three years, and here scholars could engage work on “history from below”, that is, historical work “focusing on the history of ‘ordinary people’, whether formally employed or not, whether policemen or criminals, whether living in their own homes or renting, whether experiencing relative comfort or poverty.”¹²⁴ The primary focus of work in this school was on bringing marginalized economic communities and their stories to the forefront of historical narratives about South Africa which were touted as “people's history” or “history from below”.¹²⁵

3.5.5.1. Sampie Terreblanche: Captured by Empire

Sampie Terreblanche’s *Lost in Transformation: South Africa's Search for a New Future Since 1986*, is a key text that illuminates the radical school’s historiography of South Africa.¹²⁶ Terreblanche gives an analysis of the circumstances enabling the negotiations that shows that the negotiations were not a miracle but an inevitable result of the shared understanding of the need for negotiations and of the preconditions that would need to be met in order to get to those negotiations.¹²⁷ Terreblanche's inquiry revolves around understanding the historical and geopolitical emergence of the American-led neoliberal global empire and its impact on countries like South Africa. He argues that comprehending the logic behind this empire's influence is crucial to unravelling events leading up to 1986 and their ongoing consequences. His focus on the mineral industrial complex is instrumental in revealing how American

¹²² Dladla (2018) *South African Journal on Human Rights* 434; Stolten *History Making and Present-Day Politics* 15.

¹²³ P Maylam *South Africa's Racial Past: The History and Historiography of Racism, Segregation, and Apartheid* (2003) 4.

¹²⁴ Visser (2004).

¹²⁵ Stolten *History Making and Present-Day Politics* 18.

¹²⁶ Sampie Terreblanche *Lost in Transformation: South Africa's Search for a New Future Since 1986* (2012).

¹²⁷ Zwelethu Jolobe *Getting to CODESA* 386.

imperialism shaped decisions regarding the need to negotiate, including the construction of South Africa's constitution.¹²⁸ He marks the following periodizations before the adoption of the Interim Constitution.

In outlining South Africa's political-economic history, Terreblanche underscores the intricate relationship between the political and economic powers in South Africa.

Terreblanche contends that the VOC, operating from 1652 to 1795, laid the groundwork for the entwining of political and economic power, shaping the trajectory of South Africa's development.¹²⁹ The second system, British colonialism (1795-1910), unfolded as Britain took control of the Cape of Good Hope, establishing a colonial administration.¹³⁰ The discovery of diamonds and gold in the late 19th century intensified Britain's economic interests, leading to the formation of a "mineral-energy complex" (MEC).¹³¹ This complex, characterized by powerful mining industries, exerted substantial control over South Africa's economic decisions. The MEC's dominance between 1910 and 1980 saw a handful of influential companies hold sway over the South African economy. The MEC's power extended from mining to energy industries, shaping government policies and forming a fortress around its major companies.¹³² Terreblanche contends that the NP government of 1948 to 1980, initially perceived as anti-capitalist, eventually became aligned with the MEC. The implementation of segregation policies, such as the Land Act of 1913, aimed at maximizing profits for the MEC. However, political and economic instability in the 1970s, triggered by strikes and unrest, prompted a shift. The MEC took a leading role in propagating optimism about the transformation process, aligning itself with the path to negotiations.¹³³

Terreblanche traces America's imperial growth in the 1980s to the transformation of local industry and markets into global capitalist dominance. After the Great Depression of the 1930s, the American government sought solutions through mass production, industrial reform, and, inadvertently, faced the challenge of overproduction.¹³⁴ To counter this, a campaign was launched to promote consumerism, fostering the growth of the advertising industry. After World War II, Western nations embraced social democracy, aiming for stability and prosperity.¹³⁵ However, a shift towards neoliberalism occurred in the 1980s,

¹²⁸ Terreblanche *Lost in Transformation*.

¹²⁹ 42.

¹³⁰ 44.

¹³¹ 44.

¹³² 45.

¹³³ 46-50.

¹³⁴ 18.

¹³⁵ 18.

during which the United States governments financially backed transnational corporations for neoliberal policies, including privatization and financial deregulation. Transnational corporations exploited the Global South with impunity and created a disjuncture between industrializing and non-industrializing nations in the Global South.¹³⁶ These corporations bolstered the rise perpetuation of an American-led neoliberal global empire that effectively controls the Global South due to their industrialized and highly indebted nature. The global order in the 1980s promoted the American ideologies of market fundamentalism, neoliberal globalism, and consumerism allow transnational corporations, where they continue to operate without accountability, serving the interests of a global elite through the exploitation of the Global South.¹³⁷

In 1986, South Africa witnessed significant global events that played a pivotal role in the unravelling of the apartheid regime. Four key occurrences shaped the country's trajectory: the explosion of Chernobyl nuclear plant in April, the apartheid government's state of emergency in June, the enactment of the Comprehensive Anti-Apartheid Act by the American Congress in October, and a summit conference between Reagan and Gorbachev in October.¹³⁸ The Chernobyl Nuclear Disaster of April 1986 marked the worst nuclear disaster in history and exposed the internal unravelling of the Soviet Union. Terreblanche associates this incident with the failure of Mikhail Gorbachev's Communist Party, which presided over a period of "structural inefficiency [...and] widespread retrogression and misery in the Soviet Union."¹³⁹ In June, the apartheid regime was unravelling internally. It instated a Comprehensive State of Emergency led by securocrats (army and police generals) but by 1989 they had lost control.¹⁴⁰ In October 1986, the American Congress enacted the Comprehensive Anti-Apartheid Act, which imposed sanctions against South Africa, leading to a decline in the international exchange rate of the South African currency. The Act contributed to the international isolation of the apartheid regime, causing economic losses and pressuring the corporate sector to advocate for the end of apartheid.¹⁴¹ The Ronald Reagan- Mikhail Gorbachev Summit in Reykjavik in October highlighted the technological superiority of the United States over the Soviet Union and this realization led "the abdication of the Soviet Union from its aspirations to be an equal superpower", as well as the decrease

¹³⁶ 22.

¹³⁷ 26-31.

¹³⁸ 9-12.

¹³⁹ 9.

¹⁴⁰ 10-11.

¹⁴¹ 12.

or abandonment of military and financial support to institutions or military allies like the ANC.¹⁴² The shift in global dynamics put pressure on the ANC to negotiate with the apartheid government, while UK Prime Minister Margaret Thatcher capitulated to her own internal party structures to convince De Klerk that a negotiated solution was best otherwise Britain would impose sanctions. Talks about possible negotiated solutions took place between 1987 and 1990, culminating in discussions involving ANC leadership, academics, civil society, and the corporate sector. In 1990, amidst increasing pressure and internal unrest, the apartheid government conceded to the prospect of negotiations towards the end of apartheid.¹⁴³

In essence, the MEC entered the political arena openly from 1986 onwards through its orchestration of secret negotiations involving local and foreign powers and influenced the ANC's shift from socialism to neoliberalism. The ANC underwent a significant ideological shift from socialism to neoliberalism under pressure from foreign powers like Britain and the USA, as well as local entities such as the Minerals Energy Complex (MEC). The MEC orchestrated meetings between white business leaders and ANC co-leadership to promote the adoption of neoliberal capitalism, emphasizing principles like anti-statism, deregulation, privatization, fiscal austerity, and free trade. Secret negotiations between 1990 and 1993, involving the Transitional Executive Council (TEC) and IMF loans, solidified South Africa's commitment to neoliberal ideologies in exchange for debt settlement.¹⁴⁴ This alignment with global neoliberalism signalled a shift towards economic subservience to Western powers, with local elites collaborating to maintain their economic interests. The compromise allowed Western transnational corporations (TNCs) to play a significant role in South Africa's economy, excluding the African poor and unemployed from meaningful participation. Despite the promise of constitutional democracy to ensure accountability and influence over government decisions, economic powers continue to wield significant influence, undermining the legitimacy of the state. This highlights the entrenched control of the economy over political decision-making in South Africa.

Terreblanche's historical analysis demonstrates the enduring marriage between political and economic systems in South Africa. The trajectory from the VOC to the NP government highlights how economic interests consistently shaped political decisions. The

¹⁴² 13.

¹⁴³ 14.

¹⁴⁴ 65-73.

MEC's pervasive influence underscores the intricate dance between economic elites and political power, with significant implications for the nation's historical development. This intricate interplay forms the backdrop for South Africa's journey towards negotiations and transformation in the latter part of the 20th century.

In the section below, I introduce a narrative analysis of the PNURA by drawing on Claire Moon's assessment of how the PNURA constructs a reconciliation narrative. I examine the specific narrative techniques it employs to create a teleological narrative that justifies the establishment of a liberal constitutional democracy.

3.6. Political Dimensions of the TRC's Reconciliation Narrative

The PNURA in South Africa employed a narrative approach to reconciliation that had several important political ramifications, as analysed by Claire Moon.¹⁴⁵ The TRC's narrative approach to reconciliation was not just a method of addressing past wrongs, but a powerful political tool for shaping national memory and charting a course for the future. It demonstrates how storytelling can be used to reframe national identity, address historical injustices, and create a shared vision for a nation's future. One key impact was the TRC's role in facilitating South Africa's transition from its turbulent past to a "reconciled" future. By framing this process as a story, the TRC highlighted the therapeutic and unifying power of shared narratives, both for individuals and the nation as a whole. Moon emphasizes that "the TRC explicitly undertook the task of telling a story about South Africa's transition from past violence to future reconciliation," arguing that this storytelling was "fundamental to catharsis, healing, and reconciliation on an individual and a national level."¹⁴⁶ This storytelling method has since influenced similar reconciliation efforts in societies with similar histories. Another significant aspect was the TRC's attempt to balance ethical considerations with political necessities. As she puts it, reconciliation is "pitched between attempts to answer to the 'moral demands of justice' and the 'political demands of peace'".¹⁴⁷ This delicate equilibrium is inherently political, shaped by existing power dynamics that influence peace negotiations,

¹⁴⁵ Claire Moon "Narrating Political Reconciliation: Truth and Reconciliation in South Africa" *Social and Legal Studies* 15 (2006).

¹⁴⁶ 258.

¹⁴⁷ 258.

government legitimacy, and national unity efforts. The structure of the TRC's narrative itself had political implications. By organizing events, victims, and perpetrators into a coherent timeline, the TRC created a framework for understanding the nation's history. Moon argues that narrative "imposes form upon its subjects ('victims' and 'perpetrators') and objects ('gross violations of human rights') because it arranges actions and events in a sequential and connected relationship."¹⁴⁸

Secondly, by linking South Africa's national identity to the history of apartheid, the TRC's narrative created a national origin story that was inseparable from the struggle against racial oppression.¹⁴⁹ This framing has profound implications for South Africa's collective identity and historical consciousness. Thirdly, the narrative structure employed by the TRC has specific political effects. Moon argues that narrative "imposes form upon its subjects" ("victims" and "perpetrators") and objects ("gross violations of human rights") by arranging "actions and events in a sequential and connected relationship".¹⁵⁰ Furthermore, the TRC's narrative approach established "a causal and linear relationship" between the violent past and the imagined reconciled future. Moon describes this narrative structure as moving from "a past conditioned by violent conflict, a present marked by the confessional, and testimonial, and a future reconciliation."¹⁵¹ This linear progression serves to create a coherent national story and provides a framework for understanding the transition process. Lastly, "by situating the mandated period within a broader historical context of violence spanning about 300 years", the TRC's narrative has the political effect of linking the genesis of the South African nation with the "origins of apartheid".¹⁵² As Moon argues, this narrative approach renders "an account of the genesis of the South African nation that is commensurate with the origins of apartheid."¹⁵³ This framing has significant implications for how South Africans understand their national identity and history.

The discussion by Moon highlights the political dimensions of the TRC's reconciliation narrative in South Africa, focusing on how the TRC used storytelling as a tool to bridge a violent past with a hopeful future. This narrative strategy created a shared national identity

¹⁴⁸ 268.

¹⁴⁹ 270.

¹⁵⁰ 268.

¹⁵¹ 269.

¹⁵² 270.

¹⁵³ 270.

rooted in the struggle against apartheid, shaping how South Africans remember and interpret their history. Transitioning to the next section, the analysis shifts from describing the TRC's impact to examining theoretical tools that reveal *how* the TRC structured its narrative. This analytical framework – through scientific history, periodization, and narrative emplotment – unpacks the strategic narrative choices within the PNURA. I will be evaluating the political nature of the PNURA's narrative choices by employing the reflections of famed philosopher of history George Collingwood, sociology scholar Eviatar Zerubavel, and historian and literary critic Hayden White. Collingwood, Zerubavel, and White all agree that historical accounts are constructed through interpretive processes, but they focus on different aspects. Collingwood is concerned with the philosophical process of understanding the intentions behind historical events, Thus, he will be informative for identifying the historical imagination of the PNURA especially as it pertains to the intentions leading the actions of historical actors and those leading the choices of the historians as they attempted to “create an accurate picture of the past”. Zerubavel focuses on the social functions of time division and periodization. He is useful for showing the method of the historians in devising the historical narrative endorsed by the PNURA. White analyses the literary and narrative techniques historians use to create meaning through emplotment, and he is key for demonstrating the ideological norms driving the narrative choices in the PNURA narrative.

3.6.1. History as Scientific

Collingwood argues that, by systematically studying and interpreting evidence from the past, history as a science allows us to gain insight into human identity, capabilities, and the complexities of human behaviour across different contexts and eras.¹⁵⁴ Through this process of inquiry, history contributes to our understanding of ourselves as individuals and as a species. Per Collingwood, history contributes to human self-knowledge and identity by revealing what humans have done and are capable of doing.¹⁵⁵ Essentially, "Knowing yourself means knowing what you can do; and since nobody knows what he can do until he tries, the only clue to what man can do is what man has done".¹⁵⁶ Therefore, the value of

¹⁵⁴ RG Collingwood *The Idea of History* (1994).

¹⁵⁵ 7.

¹⁵⁶ 7.

history lies in teaching us about past human actions and experiences, which in turn illuminates human nature and potential.

3.6.1.1. History and Science

Collingwood distinguishes history from memory, noting that "memory is not history, because history is a certain kind of organized or inferential knowledge, and memory is not organized, not inferential, at all".¹⁵⁷ In Collingwood's view, history qualifies as a science through its systematic inquiry into the past via interpreting evidence about human actions and events. Moreover, he argues this scientific study of the past allows humans to gain crucial self-knowledge and understanding of human nature, capabilities and identity. History, points out, is considered a science because it involves a systematic process of inquiry and research aimed at understanding the past.¹⁵⁸ He outlines several key points that establish history as a science. Firstly, history is a form of research or inquiry that belongs to the broader category of "sciences" – the disciplines that ask questions and attempt to answer them through systematic study.¹⁵⁹ The object or aim of history as a science is to answer questions about human actions that occurred in the past.¹⁶⁰ The method or procedure of history consists primarily of interpreting evidence about the past, although there are complexities in determining what constitutes evidence and how to interpret it appropriately.¹⁶¹ Collingwood argues that while historical knowledge is inferential, it can still be reliable and credible.¹⁶² Historical narratives are more credible than memory because they are based on evidence and involve a process of reasoning and inference. Collingwood acknowledges that historical inference "never proves its conclusion with that compulsive force which is characteristic of exact science" and "never leads to certainty, only to probability".¹⁶³ However, he argues that this does not undermine the reliability of historical conclusions. The historian's task is to carefully examine the evidence and make inferences that "follow inevitably from the evidence".¹⁶⁴ While different historians may draw different conclusions from the same evidence, each conclusion can be

¹⁵⁷ 97.

¹⁵⁸ 6.

¹⁵⁹ 6.

¹⁶⁰ 7.

¹⁶¹ 7.

¹⁶² 97.

¹⁶³ 100.

¹⁶⁴ 103.

justified if it is properly supported by the available evidence. One key factor that makes historical inferences reliable is the historian's active and critical engagement with the evidence.

Simultaneously, argues Collingwood, historical enquiry departs fundamentally from the methodology of the natural sciences.¹⁶⁵ While the natural sciences study external phenomena through observation and aim to establish governing laws, historical enquiry is concerned with understanding the inner workings of the human mind and its thought processes behind actions and events. He contends that "whereas the right way of investigating nature is by the methods called scientific, the right way of investigating mind is by the methods of history".¹⁶⁶ The key distinction lies in the object of study. Collingwood asserts, "The thesis which I shall maintain is that the science of human nature was a false attempt -- falsified by the analogy of natural science -- to understand the mind itself".¹⁶⁷ Historical enquiry, on the other hand, aims to understand the mind and its thought processes through a different methodology. Collingwood explains this departure from the natural sciences further: "The value of generalization in natural science depends on the fact that the data of physical science are given by perception, and perceiving is not understanding. A science which generalizes from historical facts is in a very different position. Here the facts, in order to serve as data, must first be historically known; and historical knowledge is not perception, it is the discerning" of human thought.¹⁶⁸ Collingwood asserts that historical enquiry departs from the natural sciences in its focus on understanding the inner workings of the human mind, its thought processes, and the motivations behind actions, rather than simply observing and generalizing external phenomena. This requires a different methodology, centred on re-enacting and discerning the thoughts behind historical events, distinct from the observational and empirical methods of the natural sciences.

3.6.1.2. History and Imagination

¹⁶⁵ 80.

¹⁶⁶ 80.

¹⁶⁷ 80.

¹⁶⁸ 85.

The historian's primary task, Collingwood claims, is to discern and re-think the motivations, thoughts, and reasoning processes behind the actions of historical agents.¹⁶⁹ To access these internal motivations, Collingwood suggests that the only way for a historian is to "re-think" or "re-enact" the thoughts of historical agents in their own mind through a process of "active and critical thinking."¹⁷⁰ He states, "The history of thought, and therefore all history, is the re-enactment of past thought in the historian's own mind"¹⁷¹. In other words, the historian must actively reconstruct and re-think the thought processes of historical actors within their own mind, rather than merely observing external events. To illustrate this concept of re-enactment, consider how the TRC sought to understand and document the motivations, decisions, and experiences of various actors during the apartheid. Historians and researchers involved in the TRC process were tasked with engaging in re-enacting the thought processes of these individuals, both victims and perpetrators, to gain insight into the complex web of reasoning, beliefs, and circumstances that shaped their actions. Collingwood argues that this active re-enactment of thought is "the only way in which [a historian] can know the mind of another, or the corporate mind (whatever exactly that phrase means) of a community or an age".¹⁷² Through this process, historical knowledge becomes not merely a collection of facts but a means of comprehending the lived experiences, worldviews, and reasoning that shaped human actions across different eras and societies. For instance, in examining the actions of a former apartheid government official responsible for human rights violations, a historian might attempt to re-enact the individual's thought process, considering the prevailing political climate, ideological beliefs, institutional pressures, and personal motivations that influenced their decision-making. By mentally reconstructing and empathetically "re-living" these thought processes, the historian could develop a deeper understanding of the historical context and the multifaceted factors that contributed to the official's actions. This pursuit of "understanding" is illustrated by the emphasis on truth-telling hearings, where both the victims and perpetrators of human rights violations would give a "personal" and "narrative truth", as well as the notion of "dialogue truth".

Collingwood emphasizes that the historian's work is fundamentally inferential and constructive. This constructive process is essentially imaginative, as the historian must fill in the gaps and create a continuous narrative from incomplete data.¹⁷³ Collingwood emphasizes

¹⁶⁹ 82.

¹⁷⁰ 83.

¹⁷¹ 83.

¹⁷² 84.

¹⁷³ 92.

that "the scientific historian reads with a question in his mind, having taken the initiative by deciding for himself what he wants to find out from them".¹⁷⁴ By asking specific, targeted questions and carefully analysing the evidence, the historian can arrive at well-supported conclusions. Moreover, Collingwood argues that the historian's inferences are not limited to the explicit statements found in sources. "If the scientific historian gets his conclusions not from the statement that he finds ready-made, but from his own autonomous statement of the fact that such statements are made, he can get conclusions even when no statements are made to him".¹⁷⁵ In other words, the historian can draw inferences from the very existence of certain sources, as well as from silences and gaps in the historical record. Collingwood maintains that the credibility of historical narratives lies in the rigorous process of reasoning and the careful justification of conclusions based on the available evidence. Collingwood distinguishes between "potential evidence," which includes "all the extant statements about [a subject]," and "actual evidence," which is "that part of these statements which we decide to accept".¹⁷⁶ However, he stresses that in scientific history, "for 'source' we must read 'evidence'".¹⁷⁷ In other words, the historian is not merely looking for sources that contain statements about the subject but is actively seeking evidence that can help answer the specific question at hand. Collingwood further elaborates that "scientific historians study problems: they ask questions, and if they are good historians they ask questions which they see their way to answering".¹⁷⁸ This approach emphasizes the importance of focused, specific questions rather than broad, open-ended inquiries. Crucially, Collingwood argues that "you can't collect your evidence before you begin thinking... because thinking means asking questions... and nothing is evidence except in relation to some definite question."¹⁷⁹

However, Collingwood is clear that the historian's imaginative picture of the past is not a work of fiction but is "meant to be true".¹⁸⁰ The historian, unlike the novelist, has a "double task" of constructing a coherent picture that also accurately represents "things as they really were and...events as they really happened".¹⁸¹ To achieve this, the historian must follow certain methodological rules, such as localizing the narrative in space and time, maintaining consistency, and justifying claims through evidence. Collingwood argues that

¹⁷⁴ 104.

¹⁷⁵ 106.

¹⁷⁶ 107.

¹⁷⁷ 107.

¹⁷⁸ 107-108.

¹⁷⁹ 108.

¹⁸⁰ 94.

¹⁸¹ 94.

"everything is evidence which the historian can use as evidence", but he can only use it if he approaches it with the right kind of historical knowledge.¹⁸² Evidence is not self-explanatory but requires interpretation by the historian. Ultimately, for Collingwood, it is "the idea of history itself" that provides the criterion of historical truth, not the raw data or the historian's interpretive tools.¹⁸³ The historian's task is to construct an "imaginary picture of the past" that, while necessarily shaped by imagination, nonetheless aims at truth.¹⁸⁴ Crucially, Collingwood sees the historian himself as "a part of the process he is studying", inevitably viewing the past from his own situated perspective.¹⁸⁵ Historical imagination, then, is a disciplined, evidence-based attempt to reconstruct and understand the reality of the past.

Collingwood's ideas about historical imagination and the construction of historical narratives can be fruitfully applied to the objectives of the TRC. In light of Collingwood's philosophy, we can see the TRC as engaged in a process of historical imagination, attempting to construct a coherent picture of South Africa's past. The Commission relied on the testimonies of individuals who came forward to share their stories, which served as the "evidence" from which the TRC's historical narrative was crafted. As Collingwood notes, "[e]vidence is evidence only when someone contemplates it historically".¹⁸⁶ The TRC's work involved interpreting and contextualizing these testimonies to create a meaningful account of the apartheid era. However, the TRC's task was not merely to compile a factual record, but to use "a priori imagination" to bridge the gaps between individual experiences and create a coherent national story.¹⁸⁷ This involved making judgments about the significance of certain events, the motives of actors, and the broader patterns of oppression and resistance. The TRC's final report can be seen as the product of this historical imagination. At the same time, the TRC was constrained by the need to create a picture that was "meant to be true".¹⁸⁸ While the Commission's work involved imaginative interpretation, it also required adherence to methodological rules, such as the verification of testimonies and the corroboration of evidence. The TRC's legitimacy depended on its ability to justify its conclusions through an appeal to the "evidence" it had gathered. Moreover, the TRC's work exemplified Collingwood's idea that the historian is always situated within the historical process they are

¹⁸² 94.

¹⁸³ 95.

¹⁸⁴ 95.

¹⁸⁵ 95.

¹⁸⁶ 95.

¹⁸⁷ 92.

¹⁸⁸ 94.

studying. The commissioners themselves, as South Africans who had lived during apartheid, brought their own experiences and perspectives to bear on their interpretation of the evidence. The TRC's work was not an objective, detached analysis, but a deeply engaged attempt to come to terms with a traumatic past. Ultimately, the Commission's attempt to construct a truthful narrative of the apartheid era required a blend of historical imagination, empirical methodology, and an acknowledgment of the situatedness of the historian.

3.6.2 Historical Narrative Structure: Periodization

Zerubavel makes the point that the ways in which historical narratives depict continuity or discontinuity are socially constructed and shaped by the cultural traditions, perspectives, and ideological interests of different groups.¹⁸⁹ In his analysis, Zerubavel asserts that perceiving historical discontinuity or distinct separations between historical eras is an artificial social construction, not an inherent given.¹⁹⁰ We create these perceived breaks through the very language we use, and as such applying different labels to specified time periods reinforces the notion that they were discrete, disconnected eras. Conversely, using a broad umbrella term like "medieval" to encompass many centuries can foster a perception of that extended timeframe as a relatively uniform epoch. The ways we choose to periodize and segment history are social constructs shaped by tradition and perspective, rather than neutrally self-evident truths. As Zerubavel argues, there exist "many alternative ways to divide up the past," none more intrinsically valid than others.¹⁹¹ Our conceptions of what events constitute transformative turning points or historical watersheds are products of the cultural narratives and mnemonic traditions we have been socialized into accepting.

3.6.2.1. Historical Continuity and Discontinuity

When we look back at historical events, there are two fundamental ways we can envision the progression of time within historical narratives; two modes that he terms "general visions of

¹⁸⁹ Eviatar Zerubavel *Time Maps: Collective Memory and the Social Shape of the Past* (2003) 95.

¹⁹⁰ 95.

¹⁹¹ 96.

change" that represent different ways of framing and interpreting the same events.¹⁹² One perspective, depicting gradualist historical change, views history as a continuous flow, with gradual transitions from one era to the next. The other perspective, depicting abrupt transitions, highlights distinct breaks or discontinuities, separating historical episodes into discrete, abrupt shifts.¹⁹³ To illustrate these contrasting modes, consider the political history of a nation. A narrative emphasizing smooth transitions might depict the nation's transition from a monarchy to a republic as a gradual process, with reforms and power shifts occurring over decades or centuries. This perspective would highlight the continuity of institutions, laws, and cultural traditions, even as the system of government evolved. On the other hand, an abrupt transition narrative might portray the same event as a sudden, revolutionary overthrow of the monarchy, a clear break from the past, and the establishment of an entirely new political order. This perspective would emphasize the discontinuity, with the revolution marking a distinct rupture from the previous era. Both of these narrative modes serve important purposes in helping us understand and contextualize historical progression. As Zerubavel notes, "gradualist narratives are naturally quite indispensable to any effort to establish historical continuity," while "abrupt transition narratives are inevitably at the heart of any attempt to introduce some historical *discontinuity*."¹⁹⁴

Narratives with periods of "density" highlight socially significant periods for collective remembrance, while those with unimportant periods show historical irrelevance.¹⁹⁵ Collective memory, beyond individual recollections, shapes the perceived significance of historical events. This highlights the selective nature of collective memory, where some (perceived as dense) periods are memorialized while others (perceived to be thin or empty) are left virtually forgotten or purposefully marginalised. In essence, the core point is that depictions of historical continuity or discontinuity in narratives are ideologically laden constructions shaped by the particular mnemonic traditions of different social groups, rather than neutrally self-evident truths. Controlling these narratives becomes a means of legitimizing a group's ideological vision of its authentic origins and identity formation.

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3.6.2.2. Historical Continuity

Many historical narratives depict the flow of time not as a series of distinct breaks or ruptures but rather embrace the notion that the present is a direct continuation and outgrowth of the past, part of an “integrated whole” rather than a definitive departure.¹⁹⁶ They reject the illusion that we can neatly demarcate “then” from “now” with a clear dividing line. This perspective highlights how aspects of our lives - from social customs and interpersonal etiquette to legal precedents - are historically embedded “habitual patterns continually perpetuated as part of a social *tradition*.”¹⁹⁷ The present does not exist in isolation but is “a cumulative, multilayered collage of past residues continually deposited through the cultural equivalent of the geological process of sedimentation.”¹⁹⁸ In other words, this perspective presupposes that the present moment and current societal norms and practices are an accumulation of layers of historical influence which continue to influence and shape our daily lives.

Political institutions and social relations exemplify this idea of being historically embedded and stretching across temporal boundaries. A nation's current government, for instance, may present itself as the modern manifestation of founding ideals established centuries ago. A political party often traces its organizational identity back through generations of leadership transitions. According to Zerubavel, our ability to mentally construct these “continuous identities” spanning disconnected points in time is a product of human memory.¹⁹⁹ It is our mnemonic capabilities that allow the “mental integration of otherwise disconnected points in time into a seemingly single historical whole.”²⁰⁰ This integration creates an “illusion of continuity” by bridging “temporal gaps” between non-contiguous events or periods.²⁰¹ Zerubavel likens this process to “mental bridging” akin to how physical bridges connect disconnected spaces.²⁰² Just as a bridge spans a river or chasm, our minds metaphorically “bridge the historical gap” between past, present and future manifestations of an entity we perceive as continuous.²⁰³ This mental bridging often involves

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subconscious "editing" of our memory and historical narrative. As a result, what may have been separate moments in time become perceived as a continuous and uninterrupted historical sequence in our minds.²⁰⁴

3.6.2.3. Historical Discontinuity

In his analysis of how we construct historical narratives, Zerubavel explains that when trying to highlight discontinuity and breaks in the historical record, we engage in a process akin to punctuating the past.²⁰⁵ Just as written language uses devices like commas, spaces, and pauses to separate words and phrases, we employ conceptual demarcations to segment history into defined periods or chapters. This act of *periodization* explicitly delineates what are perceived as distinct eras for a particular societal group or community. These perceived temporal boundaries are often anchored by events that are perceived to be transformative or generation-defining "because... they are collectively perceived as having involved significant identity transformations".²⁰⁶ Such watersheds are "chronological anchors" catalysing fundamental shifts in a group's identity, marking the transition to a new chapter distinct from the previous era. By classifying history into these discontinuous periods separated by watersheds, we construct a narrative of evolving, fragmented identities over time rather than a continuous through-line.²⁰⁷

When declaring the advent of a new historical period or societal genesis, there is frequently an impulse to sever connections to the preceding era in order to legitimize a definitive new origin point. Zerubavel argues that establishing these "new beginnings" often involves symbolically "destroying every possible link" to what came before, explicitly resetting *a mnemonic community's "historical chronometer" at zero*.²⁰⁸ Pivotal events serve as temporal guideposts marking the point of departure into unprecedented territory. This resetting of the historical timeline is often accompanied by rhetoric emphasizing the primacy and pioneering nature of the new period, portraying it as the authentic founding moment for a people, nation, or civilization. Zerubavel cites examples like historical accounts of

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²⁰⁵ 83.

²⁰⁶ 84.

²⁰⁷ 85.

²⁰⁸ 89.

Mozambique that begin with the arrival of Portuguese colonizers, essentially rendering the pre-colonial indigenous past invisible and irrelevant.²⁰⁹ In “discovery narratives” the memory and presence of native populations is routinely suppressed or eradicated, as in depictions of Columbus having “discovered” a depopulated America.²¹⁰ According to Zerubavel, this rhetorical “decapitation” of inconvenient antecedents serves to reinforce a stark division between what is regarded as true “history” worthy of being remembered versus the deprecated “prehistory” that is deemed forgettable and extraneous.²¹¹ Legal instruments like statutes of limitations enshrine this notion of quarantining certain pasts as socially irrelevant and unworthy of being carried forward into the collective memory. “When trying to put things ‘behind us’,” argues Zerubavel, “we do not necessarily deny that whatever predates a certain historical point of departure actually happened.”²¹² Yet in constructing these discovery narratives of historical discontinuity centred on proclaimed moments of societal renewal, the manipulation of periodization, resetting of chronological anchors, and articulation of new founding origins all serve to align the past with a desired vision of a group's authentic heritage and formation story. Indigenous narratives and memories and historiography that contradict this vision are systematically minimized, distorted or erased from the record.²¹³

3.6.3. History as Narrative

Historians craft narratives to interpret the past, making deliberate choices in selecting and organizing facts. These choices reflect ethical and moral considerations, as well as deeply held beliefs. Hayden White's "Metahistory" explores the relationship between chronicle and narrative in historical writing.²¹⁴ White argues that historians transform open-ended chronicles into meaningful narratives by organizing events hierarchically and assigning them significance as story elements. This process of emplotment discloses an overarching coherence to the historical processes depicted. White distinguishes between questions about what factually occurred, relating to a narrative's coherence, and deeper questions probing the

²⁰⁹ 92.

²¹⁰ 92.

²¹¹ 93-94.

²¹² 94.

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²¹⁴ H White *Metahistory: The Historical Imagination in Nineteenth-Century Europe* 1973.

meaning and importance of those events. The structure of a historical narrative extends beyond mere chronology, encompassing elements like plot and thematic coherence. Hayden White's *Metahistory* contends that historical narratives are inherently literary constructions, imbued with ideological underpinnings.

3.6.3.1. The Plot is the Structure

White begins his exploration by distinguishing among several levels of conceptualization in historical work: chronicle, story, mode of emplotment, mode of argument, and mode of ideological implication. He considers both chronicle and story as "primitive elements" in the historical account, representing processes of "selection and arrangement of data from the unprocessed historical record" aimed at rendering the historical record more comprehensible to a particular audience.²¹⁵ Chronicle, as White describes it, involves the arrangement of "elements in the historical field" in a temporal sequence, providing a chronological framework for understanding historical developments.²¹⁶ In contrast, story further organizes these events into a cohesive story with a clear beginning, middle, and end. This transformation from chronicle to story is achieved through the characterization of events using *inaugural motifs*, *transitional motifs*, and *terminating motifs*, which imbue the story with formal coherence.²¹⁷ By characterizing events using inaugural motifs (such as the Sharpeville Massacre for the historical scope of the TRC), transitional motifs (such as the escalation of protests in response to police violence in the 1980s) and terminating motifs (such as the 1994 elections), historians can construct a narrative that reveals the underlying meaning and significance of these events).²¹⁸

Historical stories, according to White, trace the progression of events leading from *inaugurations* to the *terminations* of in social and cultural processes, a task not required of chronicles, which are open-ended by nature.²¹⁹ Even when depicting chaos, historical stories have an identifiable narrative form that distinguishes them from mere comprehensive records of events. Their purpose is to depict origins leading through processes to terminations, rather

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than an open-ended chronicle.²²⁰ By characterizing events using inaugural, transitional, and terminating motifs, historians can construct a story that reveals the underlying meaning and significance of these events.²²¹

According to White, historians shape chronicles into coherent narratives by organizing events hierarchically based on their assigned significance as story elements. This process of emplotment discloses an overarching formal coherence to the historical process.²²² Historians ask questions like "What happened next?" "How did that happen?" "Why did things happen this way rather than that?" "How did it all come out in the end?" to determine the necessary story techniques for constructing a compelling and meaningful historical account.²²³ In essence, questions of what happened in history and how it came to happen are distinct from questions concerning the importance and meaning of what happened in history. However, White differentiates between queries about what factually occurred, which relate to the narrative's coherence, and questions probing the deeper importance and meaning of those events. The former have to do with "the connections between events which make of them elements in a followable story," while the latter concerns the interpretation of the narrative's significance and relevance, interpretations that compete with others for prominence.²²⁴ These deeper interpretive questions can be explored through different modes like emplotment, ideological implications, and argumentation, each offering a distinct perspective on making sense of history.²²⁵

Explanation by emplotment involves fashioning the sequence of events into a narrative that gradually reveals its meaning, thereby providing insight into the complexities of the past.²²⁶ By organizing events into a narrative structure, historians can elucidate the significance of historical events and convey their broader implications to readers. To illustrate these concepts further, consider how historians analysing the TRC must navigate between the chronological arrangement of events and the construction of a meaningful narrative that captures the complexities of the reconciliation process. By assigning different functions to events within the chronicle, historians can craft a narrative that not only recounts

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the sequence of events but also explores their broader significance in the context of South Africa's transition from apartheid to democracy.

3.6.3.2. The Plot is the Meaning

Central to White's analysis is the idea that historians do not simply chronicle a sequence of events but rather shape those events into coherent stories or plots that ascribe meanings. White contends that providing the "meaning" of a historical account occurs through the process of emplotment - "the way by which a sequence of events fashioned into a story is gradually revealed to be a story of a particular kind."²²⁷ By fashioning chronicles into stories with distinct plots, historians can "explain" history through the kind of story being told. Emplotment is thus the mode by which a chronological record gradually reveals itself as a particular type of story conveying its deeper significance. White identifies four primary modes or archetypal plot structures that historians can employ through emplotment: Romance, Tragedy, Comedy, and Satire. Each of these modes provides a different lens for framing and interpreting historical processes. The act of discerning formal coherence in historical records inherently carries ideological implications, as it reflects underlying theories about the nature of history and knowledge itself. This assertion lays the groundwork for a deeper examination of how ideology influences narrative emplotment and the creation of meaning in historical discourse. Ideology, in this context, refers to a set of prescriptions for engaging with the social world and advocating specific actions or stances. White identifies four fundamental ideological positions—Anarchism, Conservatism, Radicalism, and Liberalism—that inform historians' approaches to interpreting and narrating historical events.

The Romance mode of emplotment casts history as a drama of the realization of human potential and self-actualization. Within this emplotment, "the hero's transcendence of the world of experience, his victory over it, and his final liberation from it" is depicted.²²⁸ The narrative trajectory traces the hero's ultimate triumph, mastery, and the fulfilment of human possibilities. Conservatism, characterized by its adherence to tradition and stability, aligns closely with the narrative structure of Romance.²²⁹ Historians with conservative leanings may

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²²⁹ 9.

emphasize continuity and the preservation of established social orders in their narratives. For example, in the context of TRC, conservative historians might highlight the importance of maintaining legal frameworks and traditional justice mechanisms, arguing against radical interventions that could disrupt social harmony.

Diametrically opposed is the mode of Satire, which depicts humanity as ultimately subjugated by and helpless against oppressive, unrelenting forces - chiefly death itself. Satirical emplotment suggests "human consciousness and will are always inadequate to the task of overcoming definitively the dark force of death".²³⁰ Here history reveals the inescapable captivity of our condition rather than any sense of potential realization. Anarchism, drawing parallels with the narrative structure of Satire, seeks to dismantle hierarchical structures and promote individual freedom and autonomy.²³¹ Historians aligned with anarchism may critique traditional narratives that reinforce power imbalances, highlighting marginalized voices and alternative perspectives. In the TRC narrative, historians using a satirical interpretation might focus on grassroots movements and community-led initiatives that challenge dominant narratives of state-sponsored reconciliation, questioning the legitimacy of centralized authority and advocating for decentralized forms of governance.

The Comic mode, on the other hand, implies opportunities for "reconciliations of men with men, of men with their world and their society" where "opposed elements in the world" become "harmonizable with one another".²³² By highlighting symbolic events, Comedy allows for the imaginative resolution of conflicts within society. This emplotment thus conveys meaning of redemptive celebration amidst life's discordances.²³³ Liberalism, reminiscent of the narrative structure of Comedy, prioritizes individual rights, democracy, and gradual reform within existing institutions.²³⁴ Historians with liberal inclinations may underscore the significance of legal frameworks, human rights norms, and democratic processes in their narratives, promoting stories of incremental progress and reconciliation. In the TRC narrative, liberal historians might advocate for truth commissions, legal prosecutions, and reparations programs as means to address past human rights violations and foster societal healing.

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²³⁴ 9.

Tragedy also allows for partial liberation but has a more sombre, resigned tone. In the Tragic mode, humanity confronts "inalterable and eternal") limits that can never be fully transcended.²³⁵ While greater consciousness of constraints is gained, there are boundaries that cannot be overcome. The meaning afforded is one of having to accept and work within an inexorable existential framework.²³⁶ Radicalism, akin to the narrative structure of Tragedy, advocates for fundamental societal transformation to address systemic injustices.²³⁷ Historians aligned with radicalism may foreground narratives of resistance, rebellion, and social change, challenging dominant narratives that uphold oppressive structures. In the TRC narrative, radical historians might critique mainstream approaches for failing to address root causes of violence and exploitation, advocating for more radical forms of reparative justice and redistribution of resources.

So, while Romance emplotment conveys triumphant self-mastery, and Comedy celebratory resolution, Satire underscores perpetual subjugation and Tragedy a wisdom about innate constraints we cannot escape. White suggests these archetypal narrative forms provide different ways for historians to "explain" and ascribe meaning.²³⁸ Importantly, White argues that "every history, even the most 'synchronic' or 'structural' of them, will be emplotted in some way" - there is no pure chronology.²³⁹ The fashioning of events into plots with attendant meanings is fundamental to the historian's interpretive craft.²⁴⁰ Moreover, the different modes work in counterpoint. Satire achieves impact by frustrating resolutions expected from other modes.²⁴¹ An event's significance shifts based on its rendering as Tragic versus Comic. So, beyond arguments and ideology, White analyses deeper narrative meaning-making strategies.²⁴²

White's delineation of emplotment modes allows for more nuanced "readings" of how historians interpret the past through narrative construction choices. It provides a lens for understanding the literary operations and storytelling strategies underlying how authors craft meaning - not just through argumentation but through emplotment tactics for ordering events. Recognizing these different narrative techniques enriches our ability to engage with the meaning-making process of representing history itself. Each ideological position embodies

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²⁴¹ 8.

²⁴² 8.

distinct attitudes towards historical change, the role of social institutions, and avenues for collective action.²⁴³ Conservatives uphold existing structures, liberals advocate for incremental reforms, radicals call for systemic transformation, and anarchists challenge hierarchical power dynamics. Through critical examination of ideological implications in historical narratives, we can deepen our understanding of how the past is interpreted and contested in the present, particularly in contexts like South Africa's TRC, where historical injustices continue to reverberate in contemporary society. Conservatives may view history as a gradual progression towards an idealized past, liberals as a process of incremental improvement, radicals as a struggle for liberation, and anarchists as a quest for individual autonomy. These ideological orientations inform not only historical narratives but also contemporary debates about the nature of society and the possibilities for collective action.²⁴⁴

There is enough evidence from the preamble of the PNURA to argue that the narrative it promotes about historical injustice in South Africa follows a primarily Comic mode of emplotment, with Romantic and Tragic influences. The Romance is typically “a drama of self-identification symbolized by the hero's transcendence of the world of experience, his victory over it, and his final liberation from it.”²⁴⁵ While that is the goal of the PNURA, there is no assumption that the liberation has been achieved but rather that the plan to achieve liberation from historical injustice has been *set in motion*. A Comic emplotment in the PNURA's historiography is identified in the sentiment emanating in the Interim Constitution and echoed in the PNURA that South Africa was *emerging* from “the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice,” and *entering* “a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans.”²⁴⁶ Moreover, the Tragic emplotment's motif of lamentation and resignation at the inevitability of injustice and humankind's subjection to it incorporates the idea that the past is gone and unalterable, and so a lesson may be learnt or not, but there is no utility to trying to reverse its damage in the past or for the future. Here the PNURA and TRC's theme of “closing the books on the past” is reiterated. The role of the PNURA was to create the epistemic infrastructure to facilitate this movement over the bridge; to show South Africans where they are historically and where they are headed, as it were, and guide them over it.

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²⁴⁴ 10.

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²⁴⁶ Promotion of National Unity and Reconciliation Act 34

Ultimately, the presupposition of this emplotment of the PNURA was that once South Africans knew “the truth about the past”, forgiveness and reconciliation would follow, indicating that at the least, racial animosity would be transcended, and national unity promoted.²⁴⁷

The historiography of the PNURA, shaped by scientific history, periodization, and narrative emplotment, significantly impacts the narrative surrounding South Africa’s transition and reconciliation. By framing history through a "comic" emplotment, the PNURA suggests a triumphant progression from division and oppression toward unity and democracy, creating an idealized narrative where the path to liberal democracy appears seamless and inevitable. This construction facilitates the ANC's alignment with developmental liberalism and justifies the political status quo, bypassing deeper critiques of colonial and racial injustices. Consequently, the historiography of the PNURA suppresses indigenous perspectives and nuances within the historical discourse, echoing a white-centred narrative that overlooks the complexities of conquest and dispossession. As a result, the narrative gives the impression of a harmonious transition toward democracy while marginalizing unresolved tensions. This selective periodization and framing obscure the ANC and NP’s political compromises, legitimizing a liberal democratic vision as the only viable future. This historiographical approach reinforces South Africa's official history by minimizing indigenous narratives and diminishing the visibility of ongoing social and racial disparities rooted in the colonial past, creating an "uninterrupted" linear story that aids the ANC’s political legitimacy while aligning with the liberal democratic ideal.

In the previous section, I discussed the PNURA narrative’s historical imagination through the philosophies of Collingwood, Zerubavel and White. These three thinkers are not necessarily in alignment with their takes on historical imagination. Zerubavel’s contribution concerns historical methodology in particular.²⁴⁸ The greatest “misalignment” arises within Collingwood and White’s interpretations of the nature of a historical narrative. Collingwood would argue that there is a “most plausible” and even “truer” account of historical events at which the historian may arrive, given the facts and evidence before her. White, in contrast, denies the capacity of the historian to access an inherently meaningful or true account of

²⁴⁷ Explanatory Memorandum.

²⁴⁸ For more on the nature of historical method as it pertains to periodization in particular, see E Glissant *Poetics of Relation* 1990.

historical events, and thus the critical reader of historical narratives always investigates the ideological influences that direct the flow of the narrative. Despite these divergences, the most critical contribution arising from their thought is that all agree that history is not an objective recounting of events but is influenced by the historian's interpretations, ideologies, and the social context in which the history is written.²⁴⁹

In the next section I will adopt this presupposition of the ideological subjectivity of the historical imagination to conduct an enquiry into the alignment of liberal ideology with South Africa's dominant historiography while also engaging the British imperialist, settler, and Afrikaner nationalist schools, with a view to illustrate how the liberal paradigm in particular underlies the PNURA's depiction of reconciliation, raising significant implications for understanding South Africa's complex relationship with its past and present.

3.7. The PNURA as Liberal Historiography

The British imperialist, settler and Afrikaner nationalist schools have in common the portrayal of "white-black relationships as a struggle between the forces of 'civilisation' and 'savagery'", and the relegation of black resistance to the background.²⁵⁰ For these schools, the segregation of people for the sake of white domination is not only unquestioned but encouraged. These three schools do not consider the dispossession and subjugation of indigenous people in this country a historical injustice worth seriously ameliorating. This epistemological approach is tantamount to the erasure of the facts of colonization and conquest, transforming them into amoral events that took place in and on a territory up for grabs – a territory virtually empty by virtue of the qualified rights of those who inhabited it before colonization, so that the annexation of that territory is not dispossession of the indigenous but just justified possession by the conquerors. The significance of the liberal and revisionist schools is that they problematize segregation and inequality between the white and black populations in the country. Nevertheless, the liberal and radical schools have in common the tendency to "allow 'moral equivalence' between the position of the oppressor

²⁴⁹ For more on how the dynamics of political power impacts the production and documentation of history, see M Trouillot *Silencing the Past: Power and the Production of History* 2015.

²⁵⁰ Worden *The Making of Modern South Africa* 24; Cobley (2001) *Journal of Southern African Studies* 613

and the oppressed” as victims of the South African social structure.²⁵¹ They render the presence of white settlers on indigenous land irrelevant to the exigencies of present and future national “necessities” like racial or economic equality. They advocate for assimilation of non-white people into white society and the transformation of existing structures, thereby echoing the civilizing mission of colonialism which naturalizes the fact of white settlement. The naturalization of white settlers equates the settler to the native in terms of the ownership of territory they have named South Africa and who belongs in it. In liberal historiography, this question of who belongs in the territory of South Africa is addressed using the discourse of race relations and social pluralism and in revisionist historiography it takes the discourse of the “articulation of the modes of production.”²⁵² However, the emergence and predominance of a liberal historiography in South Africa appears inevitable due to the prevailing liberal ideology within the ANC.

At the time of the negotiations with the NP, the ANC’s political ideology tended towards the assimilation route in the form of advocating for “inclusion in the rights accorded to the white inhabitants of South Africa, [i.e.,] common citizenship” as opposed to African exclusivism.²⁵³ The ANC’s version of African nationalism was shaped by a developmental liberalism premised on the “effort to de-racialize civic rights”.²⁵⁴ In fact, the ANC’s 1991 constitution explicitly stated that The governing ideological and material pursuit of the ANC has always been to dismantle “the apartheid state and replace it with a united, non-racial, non-sexist, and democratic South Africa in which the people as a whole shall govern, and all shall enjoy equal rights.”²⁵⁵ The liberal ideology of the ANC is evident in its early constitutional documents. The 1943 Constitution maintained the same "liberal-reformist and moderate" perspective as the 1919 Constitution, focusing on racial discrimination elimination while working within existing state structures.²⁵⁶ The "African Claims" document of 1943 further reinforced this liberal orientation, emphasizing "full citizenship rights and direct participation in all the councils of state" rather than revolutionary change.²⁵⁷ Thomas Soko

²⁵¹ B Magubane *The Making of a Racist State: British Imperialism and the Union of South Africa 1875-1910* (1996) 376

²⁵² M Legassick & G Minkley “Current Trends in the Production of South African History” *Alternation* 5 (1998)

²⁵³ Suttner “African Nationalism” in *Intellectual Traditions in South Africa* (2014) 125

²⁵⁴ Mamdani (2001) *Comparative Studies in Society and History* 658

²⁵⁵ African National Congress Constitution Preamble < <https://www.anc1912.org.za/anc-constitution-1991/> > (Accessed 31-05-2023)

²⁵⁶ **TK Ranuga “Marxism and Black Nationalism in South Africa (Azania): A Comparative and Critical Analysis of the Ideological Conflict and Consensus between Marxism and Nationalism in the ANC, the PAC and the BCM, 1920-1980” (1982) Unpublished PhD Thesis, Brandeis University 148.**

²⁵⁷ 150

Ranuga notes explicitly that this document "was not concerned with a programme of revolution leading to the wresting of state power by the oppressed majority" but instead focused on "direct participation in the existing organs of state".²⁵⁸ Ranuga demonstrates that the ANCYL introduced more radical elements through their "Africanism" ideology, taking "a position diametrically opposed to that advocated by senior Congressmen in the Africans' Claims".²⁵⁹ The Program of Action, adopted in 1949, actually represented a victory for more radical elements by officially accepting the principle of self-determination for the first time.²⁶⁰ However, the African Claims document does demonstrate the ANC's liberal-progressive orientation. Ranuga emphasizes that it was "the basic policy document upon which later ANC policies would essentially be based", focusing on integration into existing state structures rather than fundamental transformation.²⁶¹

A key document in this tradition is the Freedom Charter, which was co-written by the South African Indian Congress, the Congress of Democrats (composed of white membership), the South African Coloured People's Organisation and the South African Council of Trade Unions in 1955. This document encompassed values such as "certain basic rights and freedoms for all", as well as nationalization of South Africa's socioeconomic enterprises.²⁶² In the main, the signatories of the Freedom Charter aspired to a pluralist, universalist future where citizens would have equal rights and franchise, and the state would hold economic ownership of the country's banks and natural resources. The Freedom Charter has been taken as an example of the left-liberal ideology of the ANC. The Charter's language around economic redistribution, particularly its declaration that "The land shall be shared among those who work it", and its calls for nationalization could be seen as aligned with communist ideology.²⁶³ Furthermore, as Ranuga notes, communists were involved in the Charter's formulation, which could lead to assumptions about its ideological foundations.²⁶⁴

However, Ranuga argues that viewing the Freedom Charter as a purely Marxist document would be a misinterpretation of its true nature and intent. Nelson Mandela himself explicitly clarified that the Charter was "by no means a blueprint for a socialist state" and emphasized that any redistribution would occur within the framework of a private enterprise

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²⁶² J Saul & P Bond *South Africa, the Present as History: from Mrs Ples to Mandela & Marikana* (2014) 66

²⁶³ Ranuga "Marxism and Black Nationalism in South Africa" 175

²⁶⁴ 178

economy.²⁶⁵ More fundamentally, the Charter represented a revival of liberal traditions within the ANC rather than a radical departure. As Ranuga argues, it effectively renewed the organization's commitment to "egalitarian multiracialism" rather than revolutionary socialism.²⁶⁶ The calls for nationalization, while present, aligned with the ANC's traditional goals rather than signifying a shift toward communist ideology.²⁶⁷

The inevitability of a liberal historiography justifying a constitutional democratic South Africa can be traced to the ANC's foundational ideology as reflected in its organisational documents such as the African Claims document, the Freedom Charter and its 1991 Constitution.²⁶⁸ The Freedom Charter drew inspiration from the 1943 African Claims, which advocated for political rights within South Africa rather than radical economic transformation,²⁶⁹ and in turn, the 1991 constitution refers to the pre-eminence of the values constituting the Freedom Charter.²⁷⁰ The Charter's famous declaration that "South Africa belongs to all who live in it, black and white" underscores this inclusive, democratic vision.²⁷¹ This ideological foundation made the eventual emergence of a constitutional democracy a natural progression rather than an imposed solution. This liberal democratic trajectory was further reinforced when the Charter was integrated into the ANC Constitution, cementing its status as the organization's guiding document despite opposition from the more nationalist Africanist faction.²⁷²

The discussion above not only that the PNURA is a liberal instrument, but also that this liberalism shaped what the PNURA narrative considered historical injustice and the remedies to that injustice; a narrative that aligned with its conceptual inheritance of white-centred historiographies. This discourse overshadows the antagonism between the settlers and indigenous people, which is tantamount to what Modiri, following Goldstein et al, explains to be 'colonial unknowing', an epistemological approach that "renders unintelligible the entanglements of racialisation and colonisation, occluding the mutable historicity of colonial

²⁶⁵ 190

²⁶⁶ 176

²⁶⁷ 178

²⁶⁸ Along with the Harare Declaration mentioned in Chapter 2.

²⁶⁹ 177-178

²⁷⁰ African National Congress Constitution Preamble Section B < <https://www.anc1912.org.za/anc-constitution-1991/> > (Accessed 31-05-2023)

²⁷¹ Ranuga "Marxism and Black Nationalism in South Africa" 174

²⁷² 183-184

structures and attributing finality to events of conquest and dispossession.”²⁷³ Ultimately, the tendency of the liberal and revisionist schools to attribute finality to the facts of conquest and dispossession is an explicit “avoidance of the [question of the] right of settlement, which is in turn based on the right of conquest.”²⁷⁴ These schools do not attempt to give an exposition of the African experience of white settlement in order to inform and adjust their intellectual assumptions, but rather interpret the black experience as one way to legitimize these assumptions, whether they pertain to the evils of segregation or of capitalism. In other words, “South African historiography is basically white historiography since, despite its claims to either bring ‘black people into history’ or interpret history from their vantage point... in various ways [it is] ultimately an attempt to uphold the right of conquest rather than to repudiate it.”²⁷⁵

The ANC’s proclivity towards developmental liberalism and the NP’s interest in maintaining a neoliberal economic system that benefitted the wealth maintenance of whites in the country predated the creation of the PNURA, and the narrative it promoted about the nature and future of South Africa perpetuated the idea that a liberal constitutional democracy was inevitable if the country and its different peoples were to survive. The assertion that the ANC embodies a liberal ethos serves as a crucial link to the formulation of a liberal historiography. Ultimately, the ANC’s commitment to this seamless and linear narrative of events and processes was necessary for the idea of a transition to democracy to take hold in the public imagination. If the narrative of the progression of events is not depicted as seamless and the messiness is acknowledged, then there must be an acknowledgement that there was no fundamental consensus to the negotiations or their aftermath. If that is recognized, then the legitimacy of the current social structure that is South Africa is dubious since it cannot be said to be based on the will of the majority. As such, discourses of democratic transition legitimize the narrative of South Africa as having miraculously undergone a transition from autocracy to a democracy due to an untenable political situation that necessitated negotiations for the sake of political survival.

²⁷³ JM Modiri “Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence” (2018) 34 *South African Journal on Human Rights* 307; M Vimalassery, JG Pegues & A Goldstein “Introduction: On Colonial Unknowing” (2016) 19 *Theory & Event*.

²⁷⁴ Dladla (2018) *South African Journal on Human Rights* 435

²⁷⁵ 435

3.8. Conclusion

This chapter has examined the ways in which the PNURA and TRC's historical narrative frameworks shaped South Africa's transition to a liberal constitutional democracy. Through detailed analysis, I highlighted how these frameworks, while ostensibly committed to truth-telling and reconciliation, in fact served broader political purposes. By positioning apartheid as a deviation in South Africa's historical path, rather than an outcome of longstanding colonial structures, the PNURA and TRC promoted a narrative that aligns with and legitimizes the liberal democratic order, all while overlooking deeper, unresolved colonial and racial tensions.

The chapter commenced with an exploration of how collective memory was used as a tool for nation-building. I analysed how the TRC's creation of a "reusable text" of cultural memory facilitated a deliberate break from apartheid-era narratives, fostering a version of the past that prioritized continuity with a liberal democratic vision. Building on this foundation, I discussed the theoretical basis of collective memory and identity formation, unpacking the TRC's multi-faceted approach to truth in its narrative of national healing and justice.

A close examination of South African historiographical traditions followed, where I critiqued the dominant British, Afrikaner nationalist, liberal, and revisionist schools that have historically privileged settler perspectives. This historical context laid the groundwork for understanding the PNURA's reproduction of these problematic historiographical patterns, despite claims to inclusivity.

I then introduced theoretical perspectives on narrative construction, such as periodization and emplotment, to dissect how the PNURA's selective framing of South Africa's history established a coherent, politically charged narrative. This analysis illuminated the ways in which the TRC and PNURA presented a liberal historiographical approach that constrained South Africa's historical discourse to a vision that underpins the ANC's political legitimacy and the ideals of a liberal democratic state.

Subsequently, I developed the argument that the PNURA's historiography functions as a political mechanism that legitimized South Africa's liberal democracy while minimizing more radical calls for transformation. By foregrounding human rights violations and downplaying colonial antagonisms, the PNURA reinforced a narrative that naturalized the transition to constitutional democracy as inevitable.

In conclusion, this chapter has shown how the PNURA and TRC, as instruments of transitional justice, simultaneously serve as historiographical mechanisms that legitimate the post-apartheid political structure. These frameworks reify a liberal historical narrative that portrays constitutional democracy as South Africa's destined outcome, thereby shaping public memory and future discourse within a narrowly defined liberal paradigm. Chapter 4 will further develop these insights by exploring the connections between liberal historiography and colonial jurisprudence, specifically within South Africa's context as a settler-colonial polity shaped by Western constitutional imperialism.

4. CHAPTER 4: THE PNURA AND THE CONTINUITY OF COLONIAL JURISPRUDENCE

4.1. Introduction

Chapter 3 provided a comprehensive analysis of the PNURA's liberal historiography, examining its mandate, aims, and approach to transitional justice. It explored how the PNURA used narrative strategies to create a collective memory centred on apartheid and human rights violations, while also contextualizing it within South African historiographical traditions and revealing its role as a legitimating mechanism of the reconstruction of South Africa as a liberal constitutional democracy.

The aim of chapter 4 is to position the PNURA's liberal historiography within the broader context of colonial jurisprudence and Western international jurisprudence, rooted in colonialism, imperialism, and racism. It explores how these elements manifest in South African society. The analysis seeks to unveil the intricate connections between liberal historiography and colonial jurisprudence, demonstrating how the PNURA's approach actively contributes to the perpetuation of historical injustices. The chapter begins by examining the PNURA as an ethical predicament. While chapter 3 shows how the PNURA uses historical narrative to legitimize liberal democracy, the first part of chapter 4 critiques the moral and ideological assumptions embedded in the PNURA's reconciliation process. It critically analyses the PNURA's emphasis on forgiveness as a prerequisite for reconciliation, questioning the moral burden this emphasis places on victims. The concept of "good" versus "bad" victimhood is explored, highlighting how this dichotomy exacerbates trauma, reinforces power imbalances, and constrains redress for historical injustice. Additionally, the appropriation and superficial application of Ubuntu in the reconciliation process is scrutinized, questioning whether its use truly aligns with traditional African values or serves as a veneer for Western liberal ideals.

Following this, the chapter examines critiques of the grand historical narrative constructed by the PNURA and subsequently enacted by the TRC. This section of the chapter aims to critique the narrative-building efforts of the PNURA through the lens of transitional justice literature. It highlights several weaknesses in both the content and form of the PNURA's historical narrative, suggesting that the narrative is disingenuous due to its incoherence and incompleteness. By drawing on existing analyses, particularly Chana Teeger and Vered Vinitzky-Seroussi's work, the section illustrates how the PNURA's epistemic framework shaped official collective memory, paralleling the narrative strategies used in the Apartheid Museum. This section explores the concept of "plural truth," indicating that it serves more as a mechanism for mythmaking than as a true representation of history. This is for the purpose of demonstrating how even narratives deemed truthful can be misleading when they omit significant historical details. Additionally, the discussion of David Scott's notion of "ideological problem-space" provides a framework for understanding how power dynamics shape the questions and answers legitimized within historical narratives. Overall, the section seeks to expose the limitations and biases of the PNURA's approach, arguing for a more comprehensive understanding of historical truths that considers the broader implications of narrative construction in the context of transitional justice. This section further critiques the historical narrative constructed by the PNURA by analysing its ideological problem-space, particularly through the AZAPO case. The PNURA's narrative is shaped by an imagined future of liberal constitutional democracy, which limits the types of questions asked about historical injustice and the political responsibility required to address it. Justice Mahomed's judgment reliance on neoliberal logic and its framing of citizens' calls for justice as potential retaliation reveal a significant ideological bias.

A subsequent part of the chapter gives an analysis of the PNURA's colonial jurisprudence by Adam Sitze forms a central part of the chapter. This section explores the origins of indemnity jurisprudence in South African legal culture, tracing its roots to colonial indemnity jurisprudence. The role of commissions of inquiry by the South African state as whitewashing mechanisms is examined, drawing parallels between the TRC and earlier colonial-era commissions. This analysis questions the efficacy of critiquing indemnity jurisprudence within the existing framework, suggesting that a more radical approach may be necessary to address deeply embedded colonial legacies. The chapter then broadens its scope to consider transitional justice as a global project, offering critical reflections on its assumptions and implications. It challenges the notion of transcendence often assumed in

transitional justice frameworks, arguing that such assumptions overlook the persistent influence of colonial structures and thinking.

Finally, the chapter contextualizes the PNURA within South Africa's status as a Western imperialist settler colonial racial polity. Drawing on the work of Patrick Wolfe, Charles Mills, and James Tully, this analysis includes discussions on settler colonialism and colonial continuity in South Africa, examining how past structures of oppression persist in new forms. The concept of South Africa as a racial polity is explored through the lens of social and racial contracts, highlighting how constitutional ideals have historically excluded and continue to marginalize Black constituents. The chapter concludes by positioning South Africa within the framework of Western constitutional democracy imperialism, analysing how this system serves to perpetuate Western power and neo-colonial constitutional imperialism.

4.2. The PNURA: an Ethical Predicament

According to the PNURA, perpetrators of GHRVs would be granted amnesty and thus avoid criminal and civil liability if they gave full disclosure of their crimes. Whereas amnesty would be the closure of criminal liability, reconciliation would be the closure of racial animosity. This reconciliation was an imposed closure of the urgent inquiry into the continuity of the ethical disputation of the PNURA. "Imposed closure" refers to the deliberate enforcement or imposition of an end or resolution to the pursuit of holding perpetrators accountable and to the harbouring of feelings of racial animosity on the part of victims. However, Nir Eisikovits makes the point that giving victims the chance to tell their stories and share their experiences does not necessarily correlate with restoring their dignity. Some victims may feel that the punishment of perpetrators fulfils this function.¹ Others may reject the victim hearings in favour of receiving some sort of compensation. These victims, as Tshepo Madlingozi shows, believe their dignity to be respected or restored when financially compensated by those responsible for their victimhood or by the government holding such

¹ N Eisikovits "Rethinking the Legitimacy of Truth Commissions: 'I Am the Enemy You Killed, My Friend' (2006) 37 *Metaphilosophy* 494.

mechanisms as the TRC.² Madlingozi calls attention to the juxtaposition that truth commissions may make between “good victims” and “bad victims”.³ While good victims are “those who argue that the past must be put behind and that the struggle was not about money,” bad victims are those “who continue to claim and struggle for reparations and social justice”.⁴ Good victims, for mechanisms such as the TRC, are those who respond favourably to the national project of inaugurating a unified nation, that is, those who respond with forgiveness.

4.2.1. Truth, Reconciliation, and the Silencing of Victim Voices within the PNURA

An essential assumption behind the PNURA was that the relationship between truth and reconciliation, with reconciliation being understood as depending on healing, was that “reconciliation depends on forgiveness and that forgiveness can only take place if gross violations of human rights are fully disclosed.”⁵ The “expanded truth paradigm” comprising of the “four kinds of truth” developed by the PNURA effectively limits the agency of victims in narrating their own stories, even before the victim hearings take place.⁶ This paradigm, which includes forensic, personal, social, and healing truths, is designed with a specific goal in mind: national reconciliation. As Moon points out, “each truth is directed towards reconciliation”.⁷ This predefined framework constrains victims' narratives by setting rigid expectations for how stories should be told and interpreted. The paradigm does not allow for truths that might conflict with or challenge the reconciliatory outcome, effectively silencing voices of dissent or demands for alternative forms of justice. The TRC's emphasis on healing truth “asserts the palliative effect of the testimonial and of official recognition”.⁸ This framing imposes an expectation of catharsis and healing through the truth-telling process, regardless of whether this aligns with victims' actual experiences or desires. It creates a narrative

² T Madlingozi “Good Victim, Bad Victim: Apartheid’s Beneficiaries, Victims, and the Struggle for Social Justice” in W Le Roux & Karin van Marle (eds) *Law, Memory, and the Legacy of Apartheid: Ten Years After AZAPO v. President of South Africa* 111.

³ 111.

⁴ 111.

⁵ Explanatory Memorandum to the Parliamentary Bill (1995) <<https://www.justice.gov.za/trc/legal/bill.htm>> (accessed 30 January 2019).

⁶ C Moon *Narrating Political Reconciliation: South Africa's Truth and Reconciliation Commission* (2008).

⁷ 112.

⁸ 112.

structure that victims are expected to fit into, rather than allowing them to express their stories freely.

Furthermore, the expanded truth paradigm serves as a substitute for retributive justice. Moon argues that this expansion is "a compensatory gesture towards victims for the fact that retribution was not a possibility".⁹ By positioning truth-telling as an alternative to judicial proceedings, the TRC effectively forecloses victims' ability to seek other forms of redress or justice. The structure imposed by the TRC's approach actively constrains victim narratives. As Moon states, "victims could not simply relate their accounts 'as they saw them'. They could not demand justice for what they had endured".¹⁰ This limitation is built into the very framework of the truth-telling process, restricting victims' narrative freedom from the outset. Moreover, the TRC's truth categories, while ostensibly favouring victim truths, actually "compound victim subjection to the TRC process".¹¹ By subsuming all types of truth under the goal of reconciliation, the paradigm leaves no space for narratives that might oppose or question the current political order. The expanded truth paradigm actively forecloses the agency of victims to tell their own stories freely. It does this by framing all truths within a reconciliatory context, constraining narrative possibilities, and substituting expanded truth for retributive justice. As Moon succinctly puts it, "Victims, in short, had to be reconciled to reconciliation".¹² This statement encapsulates how the expanded truth paradigm serves to reinforce a predetermined outcome rather than empowering victims to tell their stories on their own terms, effectively limiting their agency in the truth-telling process before it even begins. To expand on this limitation, the Explanatory Memorandum placed a significant burden on victims for the initiation or attainment of reconciliation, a process so nonlinear and unpredictable, says the research director of the TRC Charles Villa-Vicencio, that it "requires restraint, generosity of spirit, empathy and perseverance."¹³ Plausibly, the forgiveness hoped for acted not only as a strong suggestion, but as a prescription. In assuming that victims would embrace giving forgiveness as opposed to affording them the opportunity to choose it for themselves, the PNURA was essentially asking victims to treat a wrong as something for which no perpetrator of gross human rights violations who gives full disclosure must be

⁹ 112.

¹⁰ 112.

¹¹ 112.

¹² 113.

¹³ C Villa-Vicencio, E Doxtader & R Goldstone (2004) *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice* 4

ostracized. For example, the Explanatory Memorandum explains that the purpose of the PNURA to “bring about unity and reconciliation by providing for the investigation and full disclosure of gross violations of human rights committed in the past.”¹⁴

4.2.2. Traumatized by Healing: “Good” versus “Bad” Victimhood

While it appears that the onus was on the perpetrators and investigators to reveal “the truth”, the knowledge of “the truth” by the victims was taken to be an assent to engaging in the process of reconciliation by responding to the revelations with forgiveness. Consequently, the expectation and pressure for victims to forgive their aggressors shows that the requirement for national reconciliation mediated by individual forgiveness does not concern catharsis but rather purging. The TRC did not require catharsis of painful emotions as it did a purging of resentful emotions. The difference between catharsis and a purge is that catharsis is an experience one undergoes whereas a purge is an act. The act of purging carries with it a connotation of expelling impurity while catharsis has a connotation of the psychological relief of pain. As an act, purging has a moral element whereas catharsis does not. If purging is a moral issue, then this creates the possibility to label certain victims as doing something ‘bad’ if they do not reject their resentment and ‘impure’ emotions and desires such as vengeance, retaliation and victimization. Trauma manifesting in feelings of anger and frustration and hate is to not only be neutralized but also repudiated for the sake of building the nation. If these victims become an obstacle to national unity and reconciliation in this way, then the logic can be stretched to say that in the ethical framework of restorative justice as espoused by the logic of the PNURA and its Explanatory Memorandum, the resistance to or refusal to purge these ‘impure’ emotions and desires is in itself moral harm. Thus, not only are those victims who refuse to purge their resentful emotions “bad” in terms of their actions (refusal to purge), but in terms of their character as well.

In actual fact, the moral closure supposedly achieved through the recognition and acknowledgement of the violations suffered by victims could represent closure of psychological trauma even where many victims may not have closure at that time, which constitutes the moral harm of enforced silencing. Truth commissions like South Africa’s, van Hamer and Wilson, “may also cause further psychological trauma when individuals

¹⁴ Explanatory Memorandum to the Parliamentary Bill (1995)

are treated as the social embodiment of the nation and are expected to advance at the same pace as the state institutions which are created in their name, but which are primarily pursuing a national political agenda.”¹⁵ Once it is mediated by the state, forgiveness is no longer forgiveness proper because the agency of the victim is taken away and replaced with an obligation for the victim to overcome their impulse to justice. If forgiveness is fundamentally personal and involves the voluntary overcoming of resentful emotions, then it cannot and should not be mediated; that is, offered or given on behalf of the offended party. If it is mediated, forgiveness ceases being forgiveness and becomes relinquishing the right of the offended party to blame the offender. Once it is mediated by the state, it becomes "amnesty, reconciliation, reparation", and then it is no longer forgiveness because the agency of the victim is taken away and replaced with obligation for the victim to overcome their claim to justice as well as their negative feelings. While this obligation may not necessarily be explicitly solicited, it is assumed to be forthcoming, which indicates that the logic of understanding in operation required the victim's *obedience* to the process. Here again the motif of “good” versus “bad” victims rears its ugly head, where those who “obey” are good victims, while those who “rebel” are bad victims who derail and paralyse the national project of transcending “the past” towards unity, well-being and peace. According to philosopher Jacques Derrida, this concern for the emanation of reconciliation from forgiveness actually “has nothing to do with 'forgiveness',” but rather with the concern that “the nation survives its discords, that the traumatisms give way to the work of mourning, and that the Nation-State not be overcome by paralysis.”¹⁶ This concern is for victims to abide by a timetable of nation-building that imposes involuntary acts on the victim, such as the demand to purge their resentful emotions and “close the books on the past”. This imposition of a “time of forgiveness” on victims’ testimonies and psychological processing of their own victimhood dismisses victims’ unfolding trauma and the ongoing demand for redress.

Usurping the right to withhold forgiveness is an affront to the agency and self-respect of the victim as someone who affirms that a wrong has been committed against them and deserves redress and rectification of the wrong. This usurpation of the victim’s agency is an affront because it strips the victim of their autonomy to decide how to process and respond to the harm they have suffered. According to Joseph Butler, resentment is a "*settled and*

¹⁵ B Hamber & RA Wilson “Symbolic Closure Through Memory, Reparation and Revenge in Post-Conflict Societies” (2002) 1 *Journal of Human Rights* 50.

¹⁶ J Derrida *On Cosmopolitanism and Forgiveness* (2001) 42, 56.

deliberate" response to injustice and moral injury, distinguished from anger by its deliberateness and its connection to the recognition of an offense as unjust.¹⁷ This type of resentment is crucial for several reasons: it allows victims to condemn the offense by highlighting it, to defend against future offenses by taking precautionary measures against further harm by virtue of developing an attitude of distrust towards the offender, and to seek justice.¹⁸ This last point of resentment being crucial to seeking justice, argues Butler, demonstrates that a key purpose of resenting an offender is "to prevent or remedy injury; i.e. the misery occasioned by injury ... and the gratification of it consists in producing misery".¹⁹ By withholding forgiveness and harbouring resentment, victims assert that their moral agency and self-respect is worth preserving and honouring. If someone else, such as societal pressure or an authority figure, demands forgiveness without considering the victim's readiness or willingness, it undermines the victim's autonomy and their ability to affirm the wrong committed against them, which means that victims are stripped of the respect they are due, which in turn means that they are further victimised under those circumstances. The harbouring of resentment, in essence, is the right of the victim, and further, it demonstrates that the victim recognizes the seriousness of the injury and motivates them to affirm their right to seek rectification.

4.2.3. "Ubuntu" without Ubuntu

While the conception of Ubuntu portrayed in the Interim Constitution and the PNURA is used to *temper* the resentment of the victims of human rights violations, the importance of restitution and retribution in communities defined by the praxis of Ubuntu proper is most acutely demonstrated within this context of one's offence against another person. While the emphasis on developing Ubuntu is included in the aims of the PNURA's process of reconciliation, it is mentioned only three times in the Report. This lacklustre conception of Ubuntu in the legislation and report of the TRC has given rise to the critique that Ubuntu was used as a buzzword for any kind of conciliatory sentiment by African people. Philosopher Ramose argues that this "inclusion of Ubuntu in the epistemological paradigm of the TRC could have been demonstrated by the visible and sustained implementation of traditional

¹⁷ J Butler *Upon Resentment and the Forgiveness of Injuries* (2002) 67.

¹⁸ 67.

¹⁹ 76.

African cultural principles and methods of reconciliation.”²⁰ A key contestation in the conceptualization of Ubuntu lies in the translation of the word Ubuntu, an ethic the meaning of which is commonly understood to be *umuntu ngumuntu ngabantu*, loosely translatable as “a person is a person through other persons.”²¹ The literal translation of the ethic *umuntu ngumuntu ngabantu* is “a person is a person through other persons.”²² However, a key issue in the conceptualization of Ubuntu lies in the translation of the word Ubuntu itself. For some non-speakers of Bantu languages, it would be sufficient to say that Ubuntu is translatable as *humanism*, but Ramose cautions that this translation is both misguided and dangerous.²³ For Ramose, the major flaw with the conception of Ubuntu in the PNURA and subsequent legislation of the TRC is that it treated Ubuntu as an ethic devoid of a comprehensive expression of justice. In this explanation, Ubuntu is better translated as *humanness*. Whereas *humanism* would denote an ideology or ideological practice grounded on the idea of the human being as an immutable state of existence, *humanness*, distinguished by the suffix -ness, is grounded on a conception of the human being as a being whose humanness is both immutable and contingent.²⁴

It is quite possible to say in a Bantu language that “*motho ole ga se motho*”, translatable as “*that human being is not a human being*”. The metaphysical identification of a human being is not the same as the ethical quality of acting as a human being. In contrast to Christian Gade’s understanding of Ubuntu as “being about interconnectedness between persons [and] understood as *all* members of the species *Homo sapiens*,” Ndumiso Dladla contends that, while “being born of the species *Homo sapiens* may be a necessary condition to be a human being,” becoming a human being is an ongoing process whereby an individual “become[s] – in an ethical sense – a human being.”²⁵ A human being’s humanness and human *be-ing*, this gradual unfolding of humanness, is inextricably bound with that of others;

²⁰ Ramose *The Philosophy of the Truth and Reconciliation Commission of South Africa* 16.

²¹ F Mangena "Towards a hunhu/Ubuntu Dialogical Moral Theory" (2012) 13 *Phronimon* 1-17.

²² Mangena (2012) *Phronimon* 1-17.

²³ P Gade *A Discourse on African Philosophy: A New Perspective on Ubuntu and Transitional Justice in South Africa* (2017) 5; MB Ramose "Motho Ke Motho Ka Batho" in *The Oxford Handbook of Comparative Political Theory* 261.

²⁴ MB Ramose "Towards a Post-Conquest South Africa: Beyond the Constitution of 1996" (2018) 3 *South African Journal on Human Rights* 330

²⁵ N Dladla "Towards an African Critical Philosophy of Race: Ubuntu as A Philo-Praxis of Liberation" (2017) 6 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 53.

their humanness is contingent on whether they treat other people and the rest of nature with “recognition, respect, affirmation, and promotion of their wellbeing.”²⁶ However, human relationships are also contingent on the prioritisation of Ubuntu in that relationship. Relationships are not important for their own sake, but for the sake of *umuntu* and *abantu* (*person* and *people*). An offence, in this sense, is an action that does not promote this well-being of relationship. An offence is not forgotten or ignored or set aside for the sake of a relationship but is rather, its rectification is considered an exigency to the restoration of the relationship of *abantu*.

While an offence may present as aimed solely against the individual victim, it is a threat to *abantu* of the community. There is a strong emphasis in communities of *abantu* on a collaborative observance of the moral codes of the community.²⁷ Should an individual violate these codes, that offence puts the integrity of the community at threat due to the capacity of that offence to influence others to believe that they are not subject to the law. Consider the case of a member of the community violating laws that concern the entire community in particular, such as disobeying ordinances from the community leader. The impression given is that he is “leading the masses astray” and must be penalised as a form of retribution or deterrence.²⁸ This punishment is based on retribution since he is penalised for the wrong committed, regardless of what he may do to make restitution. This legal response does not prioritise redress per se, but rather retribution for threatening the relational bonds and common commitment of all the members of a community to its success. Further, in the case of an offender found to have violated a law who persists in resisting the injunction to submit to the community’s leadership, the leadership “will despatch armed men, to either take his possessions from him, or to kill him” or he is banished because he is no longer *umuntu*, and the individual against whom the offence was initially committed “retires entirely from the case.”²⁹

This explanation of the wrong committed against an individual extending to the violation of the integrity of *abantu* in the community is true to authentic Ubuntu. Ubuntu in this sense is then diametrically opposed to the form of Ubuntu offered by the Interim Constitution and the PNURA, which presupposes that *abantu* and the community as a whole

²⁶ Ramose *The Philosophy of the Truth and Reconciliation Commission of South Africa* 263.

²⁷ A Joubert *Ethnography from the Mission Field: The Hoffmann Collection of Cultural Knowledge* (2015) 631.

²⁸ 639.

²⁹ 633.

will necessarily and prospectively prioritise the retention of offenders and will eschew retributive sentiments and decisions in the name of “restorative justice”. Even in the case where offenders undergo punishment, being punished does not negate the requirement to regain one’s Ubuntu through restitution and a large measure of reformation. It is a fundamental note, therefore, that while the PNURA narrows down Ubuntu to forgiveness, restoration, understanding, reconciliation and amnesty (and perhaps even remorse from the offender), a faithful rendition of Ubuntu demands a measure of restitution by the victim or punishment by the leadership of the community, and at times both. In the Ubuntu worldview, the initiation of maintenance of relational bonds in the “aftermath” of wrongdoing require accountability and restitution, while reconciliation and forgiveness are not demanded even if they often accompany these moral norms. It is evident, then, that accountability and restitution are fundamental for the offender to regain their status as umuntu in the community. Only then can a “person be a person through other persons”.

It is thus demonstrable why the conception of Ubuntu as restorative justice would be attractive to those who would desire the creation of a coherent group of individuals called a nation in the “aftermath” of oppressive political orders, while also explaining why the paradigm of the respect of individual human rights continue to obstruct their achievement of restorative justice since the relationship between individuals is first and foremost based on the protection of individual rights and not on the integrity and flourishing of communal relational bonds. It also shows the unsuitability of the concept of humanism, the centralization of human desires and capabilities and rationality and control over nature, to exemplify Ubuntu.³⁰ Ubuntu is diametrically opposed to this humanistic worldview. As Ramose explains, a faithful explanation of the maxim *umuntu ngumuntu ngabantu* is that “a human being is a human being in the ethical sense only through the recognition, respect, affirmation, and promotion of the wellbeing of other human beings, including the whole of nature.”³¹

4.3. Critiques of the Grand Historical Narrative

³⁰ Ramose African *Philosophy through Ubuntu* 36.

³¹ MB Ramose "Motho Ke Motho Ka Batho, an African Perspective on Popular Sovereignty and Democracy" (2019) *The Oxford Handbook of Comparative Political Theory* 262.

As explicated in chapter 2, it is reasonable to deduce that the historiographical assumptions about the enquiry into the past through investigations and the use of statements by victims and perpetrators was an effort at the construction of a holistic yet plural truth that would nonetheless be coherent enough to demonstrate the injustice of apartheid and provide a common understanding regarding the need for a liberal democracy. This construction of a truth based on history and memory is useful in creating and maintaining a social collective. In the section that follows, I outline a number of critiques of the historiography of the PNURA.

4.3.1. A Limited Truth

This construction of a plural truth based on history and memory is vulnerable to a number of critiques from transitional justice literature. In this section, I will review a number of critiques from the transitional justice literature about the problems of the narrative-building exercise of the PNURA as a way to demonstrate its historiographical weaknesses and failures as a truth commission. These critiques centre around the content and the form of the narrative. The critique of the form of the narrative, that it is incoherent, fed into the critiques of the content of the narrative, that it is incomplete and thus biased. Essentially, the overall critique of the historical narrative of the PNURA is that it is disingenuous. Further in the chapter, I will expand the critique beyond the literature in the transitional justice field to demonstrate how the PNURA upholds colonial power dynamics through the content and the form of its grand narrative.

4.3.2. Manufactured Silences

The focus on individual narratives of apartheid victimhood of HRVs, argue Stevens et al, obscured how individual experiences of apartheid violence permeated society in a way that went beyond just the experience of HRVs.³² This developed as a consequence of the narrative methodology being exclusionary and individualised, thus silencing key voices and experiences.³³ Accordingly, the TRC's project "effectively (albeit unintentionally) foreclosed the possibility of a fuller exploration of the more quotidian, and no less significant, manifestations of apartheid abuse."³⁴ Clint van der Walt et al identify four ways in which the

³² G Stevens, N Duncan & C Sonn et al "The Apartheid Archive: Memory, Voice and Narrative as Liberatory Praxis" (2010) 40 *PINS* 12.

³³ 12.

³⁴ 12.

TRC's focus was too limited and foreclosed the possibility of addressing the "larger cultures and institutions" of apartheid:

The TRC's focus was highly specific. Firstly, it focused only on 'gross violations of human rights'. Secondly, it focused only on the time period between March 1960 and 11 May 1994. It also chose... to utilize the personal narratives of victims and perpetrators of gross human rights violations. Finally, these narratives were contextualized in a quasi-judicial setting. Each of these four manifestations in the TRC process resulted in certain elisions and silences.³⁵

The solution to this problem, argue Stevens et al, was "the recovery of lost accounts that had been occluded from the apartheid archive, [which would contribute to] the construction of a national collective memory aimed at facilitating the nation-building imperatives facing South African society."³⁶ These accounts, they argue, are imperative for the apprehension of the traumas suffered at a communal level.³⁷ Without this apprehension, the collective memory aspired to in the PNURA, the TRC and the report would be insufficient and inaccurate. To extend on this viewpoint, the argument is made that due to the incoherence and deficiency of the PNURA narrative, the most probable account of historical injustice is biased. This critique is that the PNURA obfuscated the systematic and structural nature of the injustice during apartheid and of apartheid itself, and that "where conflict was also characterised by violent dispossession and socioeconomic deprivation, the issue of social justice and thus redistribution should be central to the discussion."³⁸

The limitation of the investigations to the specific circumstances surrounding the perpetration of gross human rights violations committed during Apartheid facilitated "a sophisticated amnesia of the greater historical and structural violence of apartheid."³⁹ These limited parameters of investigations suppressed the *structural* violence of colonial Apartheid. The PNURA's diminishment of the truth was so extensive that it excluded victims of structural apartheid by defining the unjust practices committed during apartheid within a framework based on those acts which were illegal during the apartheid state. The PNURA

³⁵ Van der Walt et al (2003) "Truth and Reconciliation Commission: 'Race', Historical Compromise and Transitional Democracy" *International Journal of Intercultural Relations* 256.

³⁶ 12.

³⁷ 21.

³⁸ T Madlingozi "Good Victim, Bad Victim: Apartheid's Beneficiaries, Victims, and the Struggle for Social Justice" in W Le Roux & K van Marle (eds) *Law, Memory, and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa* (2007) 109.

³⁹ Van der Walt et al (2003) *International Journal of Intercultural Relations* 251.

fed the narrative that reparations were a personal matter, meaning the responsibility for violations was also personal and not a matter of collective or group experiences of injustice. For instance, Colin Bundy argues against the exclusion of the "bureaucratic terrorism... the use of state power [expressed in]... the everyday and unthinking dehumanisation of a social order that took root long before 1960" and "determined our identities and patterned our society," and may have actually engendered a social amnesia that works to legitimise the existence of a hierarchical structure that privileges whites and continues to disadvantage blacks instead of a collective memory that builds a single nation.⁴⁰ Bundy points out that this decision to focus on this period and the brutality of the apartheid policies and their aggressive implementation ignores the necessity to reckon with the history of colonial dispossession and conquest, the exploitation and disenfranchisement of indigenous people through industrialisation and segregation policies pertaining to "housing, jobs, education and welfare."⁴¹ Tshepo Madlingozi lists "apartheid policies of forced removal, the migrant labour system, racial classification, job reservation" as instances of such structural injustice.⁴² Some legislation that was implemented during apartheid were the Group Areas Act of 1950, the Reservation of Amenities Act of 1953, and the Mixed Marriages Act of 1949.⁴³

Moreover, the PNURA is too limited in terms of its definition of victim and perpetrator. Limiting perpetrators to those who committed gross human rights violations, argues Madlingozi, obscures the role of those who may not have been perpetrators of gross human rights violations but kept the administrative machinery that enabled these atrocities to take place running.⁴⁴ This interpretation of injustice served to reduce the problem of apartheid to a case of a "few overzealous and trigger-happy state security officials," and not of beneficiaries of apartheid in general.⁴⁵ Mamdani expands this critique of the culpability of beneficiaries of the system of apartheid. He avers that the TRC "has given us a version of truth which obscures the link between perpetrators and beneficiaries, and thus between racialised power and racialised privilege."⁴⁶ For Mamdani, "[I]f reconciliation is not to turn into an embrace of injustice, of evil ... then the pursuit of social justice needs to be recognised

⁴⁰ Colin Bundy "The Beast of the Past" in *After the TRC* 20.

⁴¹ 20.

⁴² Madlingozi 'Good Victim, Bad Victim' in *Law, Memory, and the Legacy of Apartheid* 110.

⁴³ Werle (1996) *Law and Politics in Africa, Asia and Latin America* 60-61.

⁴⁴ Madlingozi 'Good Victim, Bad Victim' in *Law, Memory, and the Legacy of Apartheid* 114.

⁴⁵ 119.

⁴⁶ M Mamdani "When Does Reconciliation Turn into a Denial of Justice?" in CH Heyns & K Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A Reader* (1998) 382.

as a political imperative.”⁴⁷ The PNURA’s limited focus on collective suffering and collective benefit from apartheid is that the TRC has political reconciliation as its goal whereas “political reconciliation may not prove durable without social reconciliation.”⁴⁸ The difference between the two kinds of reconciliation is that political reconciliation is limited to perpetrators of gross human rights violations during apartheid and their victims, whereas social reconciliation refers to a broader scenario where the antagonism that needs resolution is between beneficiaries and victims of apartheid as a system. The problem he identifies is that the PNURA’s conception of truth does nothing to combat the system that gives white people racialised power and racialised privilege over black people.

In the section below, I will outline how the PNURA epistemic framework enabled it to perform certain narrative moves in its grand narrative, which foreclosed questions of structural racism and systemic historical injustice in general. To do this, I will use Chana Teeger and Vered Vinitzky-Seroussi’s analysis in their text, “Controlling for Consensus: Commemorating Apartheid in South Africa”, to demonstrate parallels between the curation of the Apartheid Museum and the TRC’s own narrative project to show how the PNURA drew parameters for an official collective memory.

4.3.3. The Construction of Consensus

Teeger and Vinitzky-Seroussi explore how, through the construction of consensus, the Apartheid Museum curates South African history to appear as a struggle against and triumph over the injustice of racial segregation.⁴⁹ Here, South Africans are encouraged to think about a collectively burdensome time to all racial collectivities in the country, in an attempt to elicit the kind of empathy and solidarity that motivates the overcoming of affective hostilities that may threaten the consensus necessary to generate “social harmony”. Apartheid is often portrayed not only as a socio-political juridical system but also a historical period or “era”. In memory and commemoration studies, certain historical periods like apartheid are characterized as contested and traumatic “difficult pasts” that invite remembrance by victims,

⁴⁷ 379.

⁴⁸ 379.

⁴⁹ For a similar discussion, see LJ Bremmer “Memory, Nation Building and the Post-apartheid City: The Apartheid Museum in Johannesburg” *Desire Lines: Space, Memory and Identity in the Post-Apartheid City* (2007) 85-103.

dismissal by perpetrators, and lamentation by the society in general.⁵⁰ The fractured social relations between racial groups characteristic of colonial apartheid are often portrayed as vestiges of a bygone historical period or "era" that has been overcome and replaced by a new inclusivist and integrated South African identity. As a way to contain the threat of historical conflicts presented by certain kinds of "wild" memory, museums and memorials are curated according to their alignment with this grand narrative. Teeger and Vinitzky-Seroussi identify four interconnected narrative techniques to construct consensus in the social collective: divorcing the past; legitimizing the present; forgetting through remembering; and experiencing the past.

4.3.3.1. Divorcing the Past

The Apartheid Museum divorces the past by resisting "narrative lines that construct the past as relevant to present debates and concerns."⁵¹ The museum performs narrative moves in the effort to "divorce the (dreadful) past from the (hopeful) present."⁵² This is one way to preserve hope and social cohesion; avoiding any narrative that threatens to link apartheid perpetrators and beneficiaries to current racial stratifications of structural and institutional benefits and burdens. Similarly, the plural narrative to be created by the TRC was intended to engender consensus and divorce the past from the present by depicting every contributor to the narrative, whether as a victim, perpetrator or witness to the atrocities, as equally affected by the horror of apartheid.

4.3.3.2. Legitimizing the Present

Museums often use a second storytelling approach to build consensus: they legitimize the status quo by highlighting a widely admired hero figure. In the case of the Apartheid Museum and the larger South African transition narrative, this hero is Nelson Mandela, who is ostensibly portrayed as the embodiment of "reconciliation, goodwill, forgiveness, and

⁵⁰ 58.

⁵¹ 64.

⁵² 64.

acceptance”.⁵³ By portraying Mandela as the personification of positive values like reconciliation and forgiveness, the Museum creates a clear divide between South Africa's troubled past and its reimagined future. This narrative technique presents Mandela as a symbolic bridge between two distinct eras in the nation's history. It aims to foster a shared understanding of the present by focusing on a figure who embodies the transition from conflict to unity. The ANC's narrative of the transcendence of a difficult past is centralized while other conflicting or dissenting narratives are marginalized. Similarly, it is evident that the construction of the official narrative sanctioned by the TRC would portray as inevitable and necessary the crossing of a bridge to a hopeful and hope-filled future realised in a liberal constitutional democracy.

4.3.3.3. Forgetting Through Remembering

The Apartheid Museum encourages forgetting through remembering in the sense that some narratives are treated as central and all-encompassing, and others are included nominally or totally silenced. Critically, when these marginalised narratives *are* included, their presence is not equally prioritised and actually functions as absence through *erasure* or *revision* or *assimilation* into a more subsuming narrative. They lose their authority to this narrative, meaning that their inclusion is actually of marginality and disposability and being forgettable. For instance, in the case of the plural narrative pursued by the TRC, the narratives that took centre stage were the ones related to apology and forgiveness discourse, while the marginalised ones were more likely to be those associated with seemingly unrepentant and so-called “bad victims”, victims who refused to align with reconciliation discourse and held to their righteous indignation, what was considered a threat *and* a moral wrong if one considers the founding document of the TRC, the IC, where the values are understanding, reparation and “Ubuntu”, while the censured responses to apartheid violations were resentment, victimisation and retaliation.

4.3.3.4. Experiencing the Past

⁵³ 67.

Another narrative technique that the Apartheid Museum uses to construct a narrative consensus about the relationship between the past, the future and the present is by giving visitors an opportunity to “experience the past” and “what it must have been like”. For instance, one can climb inside the notorious Casspir police vehicles where many a black person was shoved into on the way to their brutalisation or death. The visitor’s imagination is used as a tool to create an intimate engagement with past events on one hand, and a temporal detachment on the other. Teeger and Vinitzky-Seroussi explain that “[t]he past is left in the past, firmly isolated in the present simulations that only point to how the past is so different from the present, from the moment of “stepping out.”⁵⁴

4.3.3.5 Legitimizing A Lie

The TRC can be construed as an “agent of memory” and “mnemonic enterprise”, created to cultivate a culture of consensus.⁵⁵ Similarly to the narrative strategy of the Apartheid Museum, the construction of the plural narrative required by the PNURA would be with the goal of cultivating a sense of a collective national identity. The understanding and Ubuntu prescribed by the IC and in the PNURA would require empathy on the part of the audience of the narratives provided by the victims, perpetrators, and investigations. Empathy, in this context, would be considered a heuristic tool to enable the consumer of the narratives to experience “what it must have been like” to be in the context of the victims and perpetrators. The role of empathy here is to create intimacy with the past experiences of victims and understanding with the past actions of perpetrators, while facilitating a detachment from that “time” through the closure purportedly delivered through knowing the truth and extending forgiveness. Thus, there’s a strong argument that, similarly to the political strategies used by the apartheid museum to use narrative to create consensus about the inevitability and necessity of a common South African identity in the context of a liberal constitutional democracy, the PNURA pursued the same goal by designing its narrative parameters to divorce the past, legitimize the present, forget through remembering, and to create a temporal distance with the past. The so-called new South Africa is depicted in the Interim Constitution, the PNURA, the TRC and the final Constitution as the antithesis of the “old” South Africa,

⁵⁴ 71.

⁵⁵ 72.

and the past is portrayed as closed and final, suppressing conflicting viewpoints for a consolidated, authoritative “truth” that is meant to be legitimated through the manufactured consensus arising from the curated presentation of information.

The above discussion aimed to demonstrate that the TRC’s “plural truth” reflects the mythmaking process, selectively integrating truths and silences that meet the criteria of national unity. Myth here would be taken to refer to a proposition that makes a historical or epistemic claim that is either epistemically unverified or unverifiable. Hence historical myths are contrasted with those historical claims are perceived to be fact or truth (verified and verifiable).⁵⁶ The work of the historian, particularly in the transitional justice context, is thus popularly conceived of as consisting of “establishing ‘historical truth’ and... deconstructing ‘historical myths’.”⁵⁷ For philosopher Arash Abizadeh, myths are structured historical narratives that shape collective identity by selectively presenting events in ways that serve specific social or political purposes, often for nation-building.⁵⁸ Myths can take various forms depending on the relationship between truth and omission, truth and embellishment, and truth and falsification. Abizadeh refers to myths that make truth claims as *myths-as-history*, and myths of this type that make false claims as *myths-as-lies*.⁵⁹ Moreover, there is the historical narrative termed *myth-as-story*, wherein the narrative “is understood by the collectivity’s members in literary terms” and its utility is in the meaning it provides. As such, the criterion of historical truth does not apply.⁶⁰ Then there are historical narratives that, in their selection of historical details, include “embellishments and details about whose truth or falsity there is simply no evidence”.⁶¹ Abizadeh refers to this form of narrative as *myth-as-embellishment*. This type of myth adds exaggerated or unsupported details to historical narratives to make them more compelling or ideologically powerful. While these details may not be strictly false, they lack evidential backing, leading to a skewed interpretation. A further category is *myth-as-omission*, which refers to that historical narrative that omits “particular historical facts that would necessarily change our beliefs about events that are remembered”.⁶² Abizadeh points out that even truthful narratives can be misleading by omission, especially

⁵⁶ D Thelen “How the Truth and Reconciliation Commission Challenges the Ways We Use History” (2002) 47 *South African Historical Journal* 167; Bevernage “Transitional Justice and Historiography” 8

⁵⁷ Bevernage “Transitional Justice and Historiography” 8;

⁵⁸ A Abizadeh “Historical Truth, National Myths and Liberal Democracy: On the Coherence of Liberal Nationalism” 3 (2004) 12 *The Journal of Political Philosophy* 291–313.

⁵⁹ 297.

⁶⁰ 298.

⁶¹ 298.

⁶² 298.

when the omitted facts are ethically or historically significant according to criteria either internal to the narrative itself or relevant to the current social context.⁶³

The PNURA's narrative structure operated through multiple mythmaking mechanisms. The ultimate purpose aligned with what Abizadeh describes as social utility: "the telos of the discourse is to come to a socially useful understanding about history".⁶⁴ In the PNURA's case, this social utility was specifically the promotion of national unity through reconciliation, rather than a purely forensic pursuit of truth. The PNURA engaged in *myth-as-omission* by selectively applying criteria based on KATS, which prioritized the social utility of national unity. This selective framing sought to convey a sense of closure regarding the past, omitting or downplaying details that could disrupt this narrative, such as the persistent colonial power dynamics that jeopardize the characterization of apartheid as the primary problem in South Africa. Additionally, the PNURA exemplified *myth-as-embellishment* through the inclusion of victim narratives, which aimed to evoke public sympathy and solidarity, regardless of their factual accuracy. Consequently, the writers of the PNURA did not present the TRC narrative solely as an objective forensic account. Instead, truth was strategically framed to serve social utility, specifically national unity through reconciliation.

A more critical analysis suggests that the PNURA's criteria resulted in a narrative that functions as a fabrication. According to Abizadeh, a *myth-as-omission* can "produce a *myth-as-lie* when the facts or events it omits... are significant in a new context in which the original narrative is now situated and deployed."⁶⁵ This implies that even if the TRC report's individual details maintain historical accuracy, the selective omission of critical elements regarding apartheid's nature renders the overarching narrative effectively misleading. This observation does not primarily concern the narrative's historical precision, as all historical narratives inherently contain mythical elements through their selective inclusion of historical details. No historical narrative can claim to present "the truth, the whole truth, and nothing but the truth". Rather, this observation about the omission of critical historical details addresses the fundamental criteria of selection. The justification for such selection rests not on veracity alone but on significance. The narrative crafted by the PNURA omitted *significant* details about apartheid, particularly those related to enduring colonial power

⁶³ 304.

⁶⁴ 298.

⁶⁵ 307.

dynamics and their implications for present-day South Africa. By excluding these crucial elements, the narrative misrepresented the complexities of the historical context. In the PNURA's case, the lie is not in the individual facts presented (which may all be true), but in how these selective truths create a false narrative about the nature of reconciliation, presenting it as achievable through truth-telling rather than structural change. The lie is also in how the scope of injustice is portrayed as individual acts of terror, while ongoing colonial structures are downplayed; and it is also in how the PNURA depicts the purpose of the TRC process, claiming to serve justice while actually serving political transition to liberal democracy. This is tantamount to an unethical ruse, a political sleight of hand through the weaponisation of a legally legitimated narrative, primarily for the sake of obfuscating the PNURA's true political function of facilitating South Africa's transition to a liberal democracy while maintaining existing power structures, making its truth claims fundamentally deceptive despite their surface-level accuracy.

A further criticism of the historiography of the PNURA relates to its *ideological problem-space*.⁶⁶ David Scott's notion of an ideological problem-space refers to a certain "challenge or provocation" to which a historical narrative or "text can be read as a response."⁶⁷ It is a discursive field of the dynamic rationalisation and contestation of the questions that are legitimately posed in the creation of the historical narrative, the problems that are worth investigating for the historical narrative, and the answers to these questions and problems that are worth keeping.⁶⁸ In this manner, the ideological problem-space is also an arena that indicates the power dynamics of the participants in the "language-game" of the discourse.⁶⁹ Citing the work of Collingwood, Scott avers that one must think of a "proposition" as the answer to a particular question, and that this proposition can only really be understood in light of that initial question.⁷⁰ This builds on the notion of the ideological problem-space as a discursive space where questions and answers are in a reciprocal relationship of legitimation, where a question can truly be understood only in relation to its answer, and vice versa.⁷¹

In the field of historiographical enquiry, the historical narrative is an answer or a proposition that arises from a certain enquiry into "the past". To elaborate on the ideological

⁶⁶ Scott *Conscripts of Modernity: The Tragedy of Colonial Enlightenment* (2004) 64

⁶⁷ 64

⁶⁸ 4

⁶⁹ 4

⁷⁰ 51-52

⁷¹ 51-52

problem-spaces of historical narratives, Scott calls attention to the way that the ideological problem-spaces in “histories of the present” are influenced by the utility that the past has for a future that is hoped for or expected; an *imagined* future.⁷² The relationship between the past, the present and the future – particularly in the context of historical injustice – is reflected in historical narratives that “tend to organize a distinctive connection between the pasts they are seeking to overcome, the presents they inhabit, and the futures they are anticipating.”⁷³ Imagined futures thus shape the understanding of the kind of question the past seems to be answering for the present.⁷⁴ To critique the form and content of the PNURA’s historical narrative, then, requires an investigation into its ideological problem-space, which calls for the identification of the imagined future guiding its construction. To expound on the ideological problem-space of the PNURA, I will use the example of the AZAPO case.

It has already been argued that the narrative emplotment of the PNURA was based on the pursuit of a certain imagined future – a liberal constitutional democracy.⁷⁵ Consequently, that imagined future foreclosed the kinds of questions that could be asked about the nature of historical injustice in South Africa and in turn the kind of political responsibility necessary for addressing historical injustice. The ideological problem-space of the judgement delivered by Justice Mahomed was contingent on the aspiration towards this future liberal constitutional democracy and can be described according to a central query: how can the country “transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights”?⁷⁶ However, it would be a mistake to take this articulation of the constraints of the circumstances surrounding the “transition” at face value. In fact, an explicit reference to the question underpinning the granting of amnesty as directly arising from the objective of “effecting a constructive transition towards a democratic order”.⁷⁷ Mahomed admits that the question of retributive justice is legitimate as any “decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack.”⁷⁸ However, in the same breath, he seeks to justify this same impunity by referring to “circumstances in support of this

⁷² 31.

⁷³ 32.

⁷⁴ 31

⁷⁵ In chapter 2.

⁷⁶ Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa: summary <<https://www.justice.gov.za/trc/legal/azaposum.htm>> (accessed 7-10-2019) para 2.

⁷⁷ Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa Para 32.

⁷⁸ Para 17.

course”.⁷⁹ These circumstances, he argues, consisted of immense constraints on “the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; [and] between a correction in the old and the creation of the new.”⁸⁰ The result of these “agonising...balancing act”, according to Mahomed, was an imperfect solution akin to Kant’s notion of the “crooked timber” of human attempts at justice.⁸¹

A key constraint within this set of “agonising” circumstances that led to the foreclosure of citizens bringing civil claims against perpetrators was, in Mahomed’s view, “the competing claims on [the state’s] resources,” pointing to the insertion of the logic of neoliberal concerns into the considerations of the drafters of the interim constitution.⁸² Even more crucially, he equates citizens’ appeal to the courts against the granting of amnesty to perpetrators as the enabling of continuous cycles of “retaliation and revenge”.⁸³ This equation, while baffling, is quite telling as to the ideological problem-space of the PNURA. The PNURA’s ideological problem-space effectively legitimized state power at the expense of justice by presenting amnesty and liberal democracy as the only viable post-apartheid path.

The AZAPO case illustrates how this ideological framework functioned. Justice Mahomed’s judgment constructed false dichotomies, portraying the transition as an unavoidable progression toward a just and democratic political order. While acknowledging legitimate concerns for retributive justice, Mahomed justified impunity by referencing supposed constraints and circumstances that necessitated it. The text highlights the manipulation of justice concepts within this framework, equating citizens’ calls for justice with notions of retaliation while framing impunity as a necessary compromise. Mahomed’s invocation of “competing claims on state resources” further embedded neoliberal logic within constitutional considerations, illustrating how justice was subordinated to pragmatic concerns. The PNURA’s ideological problem-space presented a balancing act of false choices, depicting justice against transition, truth against reconciliation, and the old against the new. By naturalizing these political choices as necessary compromises, the framework limited opportunities for authentic justice and transformation. Ultimately, AZAPO revealed

⁷⁹ Para 17.

⁸⁰ Para 21.

⁸¹ Para 21.

⁸² Para 45.

⁸³ Para 19.

that the transition could not be morally justified and that the PNURA conceptual framework was based on a fabrication about the true nature of the constraints guiding the “transition”. The process was a self-conscious narrative construction intended to manage and suppress calls for justice. In the final analysis, the judgement revealed how the incoming dispensation was wielding the power of the law to negate dissenting voices and impose a liberal democracy without the consensus of the governed.

4.4. The PNURA’s Colonial Jurisprudence

In examining the TRC and its relationship with colonial and imperial antecedents, it is important to recognize that while there are continuities, the nature of the TRC’s “success or failure” can be best understood when viewed in the context of its repetition and differentiation from colonial jurisprudence.⁸⁴ This perspective reveals the ambition of the aspirations of the TRC, surpassing the limitations envisaged by transitional justice. The TRC reiterated colonial juridical forms to shape a postcolonial state. I use Adam Sitze’s critique of the TRC in his book, *The Impossible Machine*, to posit that if legal discontinuity was enacted, then it is reasonable to surmise that there was a measure of jurisprudential continuity involved.⁸⁵ Sitze offers a distinct perspective on the TRC, challenging existing transitional justice studies and associated theories.⁸⁶ Sitze’s critique of transitional justice literature is that, by marginalising the coloniality of the South African “transitional” period, it excludes the continuing problem of colonial jurisprudence. The TRC’s audacity, argues Sitze, lay in using manifestly colonial frameworks to bury these precedents, in order to counter existing paradigms of state power that enable the abuse of the rule of law by the state. Transitional justice, in his view, fails to grasp that the TRC’s use of colonial sovereignty and governmentality may not render these paradigms obsolete but, instead, allows their survival “under cover of a new, and newly acceptable, lexicon.”⁸⁷ I will draw upon Sitze’s critical examination, which challenges traditional interpretations of the TRC’s success and effectiveness by analysing the relationship between the TRC and colonial governance

⁸⁴ 253.

⁸⁵ A Sitze *The Impossible Machine: A Genealogy of South Africa’s Truth and Reconciliation Commission* 2013

⁸⁶ 3.

⁸⁷ 253.

structures. Thus, what much transitional justice literature gets wrong is to approach the system of apartheid as the primary analytic framework by which to understand the “white managing of the different non-white populations [through] racial exclusion and segregation.”⁸⁸ Sitze's argument revolves around the notion that while the TRC emphasized concepts like reconciliation, forgiveness, and truth, these alone do not necessarily signify its success. Instead, Sitze proposes a different criterion: whether the TRC managed to dismantle or render obsolete the legal precedents it inherited from apartheid.

Central to this critique is the issue of amnesty, which Sitze analyses as a continuation of colonial indemnity jurisprudence. Indemnity, as Sitze outlines, was a principle deeply rooted in providing retroactive protection to individuals who violated apartheid laws. The TRC's approach to conditional amnesty, according to Sitze, did not fundamentally challenge this principle but rather perpetuated it under a different name. Despite the TRC's transformative potential, it ultimately failed to disrupt the underlying structures of power and authority that upheld apartheid-era legal norms.

Sitze argues that scholars in the field of transitional justice should address the issue of amnesty, a fundamental conceptual framework utilized by the TRC, which “originated in one of the most repressive branches of colonial jurisprudence.”⁸⁹ Sitze maintains that the prevalent view in transitional justice literature that the TRC's principle of conditional amnesty was unprecedented is mistaken because conditional amnesty has been practiced in preceding mechanisms, such as the Latin American tribunals and the Nuremberg trials, as well as in the lineage of South African indemnity acts made and enforced before the TRC. In fact, the PNURA itself is an indemnity act. When the PNURA came into effect, it repealed the Indemnity Act 35 of 1990, the Indemnity Amendment Act 124 of 1992, and the Further Indemnity Act 151 of 1992. Thus, stresses Sitze, the TRC should not be understood primarily as a mechanism of transitional justice, but rather as a reiteration of indemnity jurisprudence as practiced under the colonial dispensations in their various forms.⁹⁰ Once it is recognized to have this lineage, then its jurisprudential limitations and potential can be more strongly critiqued. Rejecting conventional “hermeneutic horizons”, Sitze argues that understanding the TRC requires looking beyond transitional justice frameworks.⁹¹ He argues that the TRC's

⁸⁸ G Therborn “From Settler to Postcolonial: The Turn of the South African Nation-State in a Comparative Perspective” in N Jablonski (ed) *Persistence of Race* (2020) 83.

⁸⁹ Sitze *The Impossible Machine*: 49.

⁹⁰ 48.

⁹¹ 3.

operations find clarity when questions the transitional justice framework tend to centre, such as “How does this thing work? And what should we call this thing?”, are approached from a perspective outside of the paradigm of transitional justice, which ignores the TRC’s lineage of “colonial sovereignty and governmentality”.⁹² Sitze argues that the TRC’s conditional amnesty did not mark “a legal discontinuity with apartheid jurisprudence.”⁹³ For instance, one way in which transitional justice discourse does this is by not investigating and interrogating the TRC as a lineage of the colonial and apartheid-era Commission of Inquiry.⁹⁴ Sitze proposes that a historical analysis of the creation of the TRC requires a genealogical investigation of the juridical basis of the TRC, an investigation that goes beyond the jurisprudential concerns of the transitional justice approach that centres binaries such as the peace versus justice and retributive versus restorative justice dilemmas:

If transitional justice were to consistently apply its normative *prescriptions* for the TRC (“amnesty, not amnesia,” “forgive, don’t forget,” etc.) to its own *descriptions* of the TRC, then debate over the TRC would no longer take place on transitional justice’s reified binary terms (truth vs. justice, vengeance vs. forgiveness, etc.). It would raise the juridical question of precisely *how*—through what exact combination of repetition and difference—the TRC’s amnesty reiterated the indemnity jurisprudence that preceded it.⁹⁵

The PNURA was legislation that repealed three indemnity acts implemented by the NP government prior to the finalization of the IC. The PNURA itself, therefore, was a form of indemnity act. Given this legal continuity, argues Sitze, the colonial genealogy of the PNURA may reiterate this indemnity jurisprudence specifically as a form of colonial Commission of Inquiry, the tendency of which was to grant indemnity to state agents who had illegally enacted violence on the public to rely on the state agent’s acting in favour of the common good. Curiously, according to Sitze, there has not been much literature on how the term indemnity was used in the indemnity acts referred to. The idea of an amnesty was contentious because the new dispensation had the goal of distancing itself from the practice of indemnity enacted by the authoritarian apartheid government under its system of parliamentary sovereignty. The term amnesty was used in the PNURA, meaning that although the PNURA acknowledged the indemnity acts from which it drew its lineage, it was

⁹² 3.

⁹³ 40.

⁹⁴ 255.

⁹⁵ 49.

taken for granted that indemnity and amnesty were coterminous yet distinct.⁹⁶ Despite the stated relation of the two terms, there was trouble using indemnity in the PNURA because it embodied the tendency and practice of the parliamentary sovereignty of the apartheid state and harkened to the totalitarianism that accompanied this sovereignty in the indemnity acts it had passed.⁹⁷ However, the pursuit of legal continuity during the negotiations ensured that the law was extended beyond apartheid. The rhetorical shift from indemnity to amnesty seems to have happened when the PNURA drew its linguistic framework directly from the 1993 Interim Constitution. Then Minister of Justice, Dullah Omar, explained at the unveiling of the Explanatory Memorandum of the PNURA at the IDASA conference (Institute for Democratic Alternatives in South Africa) of 1994 that there was a crucial difference between amnesty and indemnity. Whereas indemnity granted before a trial would “be granted to a group or class of persons who were part of a movement or organization whose declared policy was to commit offences to bring about political change, “[a]mnesty is granted to persons who have been convicted of an offence and who are serving or have served a period of imprisonment.”⁹⁸

4.4.1. The Origins of Indemnity Jurisprudence in South African Legal Culture

Indemnity jurisprudence was introduced to regulate the suspension of the rule of law using the notion of *necessity*. Indemnity jurisprudence evolved from the context of the system of parliamentary sovereignty operational during colonial and apartheid governance. Its development can be traced back to the scholarship of British jurist Albert Venn Dicey, whose contribution to indemnity jurisprudence in South Africa is paramount. He is “understood to have generated the concepts of parliamentary sovereignty and the rule of law... under issue under apartheid.”⁹⁹ His development of indemnity jurisprudence emanates from the idea of sovereignty as it is signified in the legal and political modes. The idea of parliamentary sovereignty is central in Dicey’s work. Under colonial governments and apartheid, the supreme legislative power in the country was parliament was the political sovereign, and this power was displayed in the prerogative of parliament to dispense or withhold indemnity. The duty of parliament was to uphold the rule of law. The rule of law is “the precept that no one is

⁹⁶ 30.

⁹⁷ 32.

⁹⁸ Sitze *The Impossible Machine* 34-35.

⁹⁹ 47.

above the law and that any minister or public servant who violates the law will be held individually liable for those violations before ordinary tribunals.”¹⁰⁰

Parliamentary sovereignty as Dicey formulated it, is the right and power of Parliament to create laws that may not be overruled by anyone.¹⁰¹ Parliamentary sovereignty is the authoritative status that parliament holds to suspend the rule of law, while the sovereignty of law entails the idea that no one is above the law, and thus any suspension of the law contravenes this sovereignty. However, there are times at which a government would have to suspend the rule of law to satisfy the principle of public safety or wellbeing, otherwise articulated as the principle *salus populi suprema lex esto* (the common good is the supreme law).¹⁰² Dicey undertook the task of resolving or easing this paradox and he did so by introducing indemnity jurisprudence. For him, an indemnity act is “a statute ... to make legal transactions which when they took place were illegal, or to free individuals to whom the statute applies from liability for having broken the law.”¹⁰³ Indemnity releases wrongdoers from liability for having broken the law, thus retrospectively deeming illegal acts legal. Indemnity jurisprudence was used most prevalently during times after a period of martial law had ended; that is, times when the rule of law had been suspended. In this manner, an indemnity act is quite plainly a “legalization of illegality” put in place to restore the rule of law after the instantiation of martial law.¹⁰⁴ At the outset, the condition for indemnity was that perpetrators must have *necessarily* been working from *good faith (bona fide)* or pursuing the public good. Necessity in this sense would be a justification for the contravention of the law at the time of the action.

The colonial and apartheid states used the notion of necessity to indemnify themselves not just retrospectively, but also prospectively, in a way that legalized state repression against natives. The notion of *bona fide* was quite broad, meaning that the state had leverage to interpret for itself what acting in the common good was at any given time. Indemnity jurisprudence was used in the metropole to curb the unnecessary infliction of violence on the citizens, but in the colony, it became a justificatory measure for state repression. In a colony like South Africa, most of the population were not citizens whose best interests or safety were neither a legal nor political priority. The colonial- apartheid state systematically constructed

¹⁰⁰ 54.

¹⁰¹ A Dicey *Introduction to the Study of the Law of the Constitution* (1982) 38.

¹⁰² Sitze *The Impossible Machine* 18.

¹⁰³ Dicey *Introduction* 10.

¹⁰⁴ 11.

blacks as non-citizens to be managed through a comprehensive set of legal, political, and social mechanisms. The "native question" in South Africa refers to the long-running debates and policies around the treatment of black African populations by white settler communities and governments during colonial and apartheid eras. These strategies were designed to maintain white political and economic dominance by denying full citizenship rights to the black majority, treating them instead as a population to be controlled and regulated. As notes, this approach was largely a response to increasing urban black protest in the early 20th century, which "brought the native question to the fore".¹⁰⁵ The result was a system that systematically marginalized and disenfranchised the black population, reinforcing their status as non-citizens within their own country. The report of the South African Native Affairs Commission of Inquiry (SANAC) of 1905, which was commissioned by British High Commissioner for South Africa, Alfred Milner, was laid the groundwork for racial segregation policies.¹⁰⁶ It gathered evidence from various territories in South Africa, Lesotho, Botswana and then Rhodesia, giving some access to African voices, albeit within a framework designed to reinforce white supremacy.¹⁰⁷ The report buttressed the transition from segregationist ideology to apartheid and involved transforming abstract social theories into a consensus ideology among white South Africans, particularly during the inter-war years. SANAC's role in legitimizing these policies was crucial in constructing blacks as non-citizens. The SANAC report recommended "racially exclusive occupation of land areas, separate political representation of blacks and whites, and advocated a policy of gradual and 'assisted evolution' to facilitate the development of Africans," ensuring their development remained distinct from European life.¹⁰⁸ SANAC's recommendations were instrumental in shaping segregationist policies in South Africa. For instance, the recommendation for racially exclusive land occupation was an ideological support for influx control laws that sought to limit and manage the presence of black Africans in urban areas.

These laws, such as the Natives (Urban Areas) Act (1923) and the Natives (Abolition of Passes and Co-ordination of Documents) Act (1952), restricted the movement of black South Africans, requiring them to carry passbooks and obtain permission to be in urban areas.

¹⁰⁵ S Dubow *Racial Segregation and the Origins of Apartheid in South Africa, 1919–36* (1992) 3.

¹⁰⁶ 5.

¹⁰⁷ Emandulo <(emandulo.apc.uct.ac.za)> (accessed 15 April 2024).

¹⁰⁸ M Cross "The foundations of a segregated schooling system in the Transvaal 1900-24" (1987) 16 *History of Education* 264.

These laws aimed to control and limit the urban black population viewed as a threat to white political and economic power. As noted by Saul and Bond, these measures reflect the apartheid government's lack of a "grand design" and instead showcase a series of reactionary policies.¹⁰⁹ Van den Berghe argues that the apartheid government's approach to maintaining control over the native population was characterized by inconsistency and reactionary measures rather than a cohesive, premeditated strategy.¹¹⁰ He identifies two distinct categories of legislation. The first were planned apartheid laws such as the Population Registration Act and the Group Areas Act, both of 1950, which formed a consistent pattern aimed at implementing racial. The second were ad hoc repressive measures like the Suppression of Communism Act of 1950, designed to give authorities broad powers to crush opposition during times of crisis.¹¹¹ The Public Safety Act of 1953 was another example of the reactionary ad hoc type of law. It was enacted, according to the apartheid government,

to provide for the safety of the public and the maintenance of public order during internal unrest or threatening unrest, and for that purpose to empower the said Minister, if he deems it necessary for the combating or prevention of such unrest, to declare any area to be an unrest area; to empower the said Minister to make regulations with relation to an unrest area; and to provide for measures with relation to the validity of action by the State President and the said Minister under the said Act; and to provide for matters connected therewith.¹¹²

This means that the conditions of indemnity such as that of *bona fide* became very relative to the ends and wishes of the state in service of white citizens and came to be a central means to reconcile imperial violence.¹¹³ Under colonial governance, the appropriate governmental measures to quell native resistance, such as a riot, were not as clearly delineated. This approach to governance produced a *permanent and precautionary* instantiation of martial law or "state of necessity" justifying military actions against even quantitatively small acts of native resistance. Indemnity jurisprudence was used by the state so often and so pervasively by the state that it transformed into a self-exculpatory measure that now *illegalized legality*, in Sitze's terms.¹¹⁴ "That is what it took to restore the rule of law" gave way to "whatever it will take to maintain state power". Indemnity ceased to be granted after periods of martial

¹⁰⁹ JS Saul and P Bond *South Africa, the Present as History: from Mrs Ples to Mandela & Marikana* (2014) 14.

¹¹⁰ Van den Berghe *South Africa: a Study in Conflict* 85.

¹¹¹ P van den Berghe *South Africa: a Study in Conflict* (1967) 57.

¹¹² The Public Safety Act of 1953.

¹¹³ Sitze *The Impossible Machine* 7, 70.

¹¹⁴ 76.

law had ended; now, instead of the condition of *bona fide*, *mala fide* was introduced, which means that state agents could act to quell native resistance in whatever manner they deemed *necessary*. The disqualification from indemnity had become that the perpetrator was not acting in “demonstrably bad faith”, and in this way, indemnity for state actors was prospectively guaranteed.¹¹⁵

4.4.2. Commissions of Inquiry as Whitewashing Machines

The TRC reiterated key forms of native governance and colonial jurisprudence in both its logic and operation. This continuity with colonial practices significantly influenced the TRC's approach to reparations and its overall effectiveness in addressing historical injustices. One of the primary ways in which the TRC echoed colonial governance was through its adoption of a "therapeutic" form of biopolitical governmentality. As Jaco Barnard-Naude argues, this approach focused primarily on healing and reconciliation rather than addressing structural changes.¹¹⁶ While this approach appears to be a shift from earlier forms of colonial governance that viewed the nation as a body politic in need of order and control, the TRC's framing of the nation as a community in need of healing did not necessarily lead to more comprehensive reparations. Instead, it resulted in a focus on symbolic gestures and individual reconciliation at the expense of addressing deeper structural inequalities. This therapeutic approach bears striking similarities to the colonial Commissions of Inquiry, which Sitze refers to as "white-washing machines".¹¹⁷ These commissions, like the TRC, tended to frame the colonial government's brutal suppression of native resistance in the form of protests as unfortunate, inevitable, and tragic. The TRC's narrative approach also reiterated what Sitze identifies as "the three existing historiographical modes of accusation, exoneration and mourning".¹¹⁸ This framing had the effect of diminishing individual and institutional responsibility for atrocities, a pattern that was replicated in the TRC's approach. By framing apartheid as something that "happened to all of us," the TRC created a narrative that

¹¹⁵ 9.

¹¹⁶ J Barnard-Naude *Spectres of Reparation in South Africa: Re-Encountering the Truth and Reconciliation Commission* (2023) 54.

¹¹⁷ Sitze *The Impossible Machine* 157.

¹¹⁸ Sitze *The Impossible Machine* 199.

potentially diminished the responsibility of perpetrators and beneficiaries of the system to provide reparations.

Another key similarity between the TRC and colonial governance narrative practice lies in its approach to gathering and interpreting information. As Barnard-Naude points out, colonial Commissions of Inquiry actively gathered knowledge about the population with the aim of better controlling and governing them.¹¹⁹ The TRC, served a similar purpose when collecting vast amounts of information about the apartheid era. The TRC mandate of truth recovery, in this regard, while crucial for documenting apartheid atrocities, also served a governmentality function by providing the state with detailed knowledge about apartheid conflicts and their participants in order to manage the relational dynamics between the races and construct a material and symbolic means to a unified civic identity. This is evident in the TRC's resemblance to what Sitze terms "Tumult Commissions" is particularly striking. These commissions, established to investigate violence during times of unrest, were tasked with preventatively managing race relations to safeguard the "peace" between races. The TRC, while explicitly acknowledging the criminality of apartheid, still functioned as a mechanism to manage race relations in the post-1995 era.

However, it is important to note that while the TRC reiterated many aspects of colonial governance, it also attempted to break from this tradition in significant ways. Unlike colonial Commissions of Inquiry, the TRC sought to make its findings public and accessible. It also attempted to not only address the criminality of state violence during apartheid but also demonstrate the criminality of the apartheid state itself. This is evident in the TRC Report's reference to the United Nations' classification of apartheid as a Crime Against Humanity. Yet, the TRC's attempt to create a discontinuity with the apartheid state was ultimately undermined by jurisprudential and legal state continuity. For instance, the TRC's approach to amnesty further illustrates its continuity with colonial jurisprudence. The use of indemnity, as Barnard-Naude explains, was "an expression of Parliament's sovereign power vis-à-vis the courts, its overarching and explicitly stated purpose was to ensure the restoration of legal sovereignty [constitutionality] as the rule of law."¹²⁰ This practice of granting amnesty in exchange for truth-telling echoes the colonial use of indemnity to manage political crises and maintain state power. The TRC operated within the framework of the same state that had perpetrated apartheid, limiting its ability to fully break from colonial and

¹¹⁹ Barnard-Naude *Spectres of Reparation* 46.

¹²⁰ 41.

apartheid-era practices. This continuity with colonial governance practices significantly impacted the TRC's approach to reparations. By focusing on individual reconciliation and symbolic gestures, the TRC's reparations program often fell short of addressing the systemic inequalities created by apartheid.

Another reiteration of the Tumult Commission pertains to the role of Ubuntu in the PNURA, a role that exposed Ubuntu to epistemic equivalence with the principle *salus populi suprema lex esto* (the common good is the supreme law) in the way it was framed as a governing principle to prevent victimization and retaliation, that is, violence. What Ubuntu inherits from the colonial indemnity jurisprudence in South African law, and that which it must transcend, Sitze contends, “is the deadlock of a maxim that can just as easily justify exceptions to the rule of law as it can justify the norm of the rule of law itself.”¹²¹ Essentially, *salus populi suprema lex esto* was ambiguous and could be used to support both adherence to and deviations from legal norms. Ubuntu, similarly, ran the risk. The TRC would fulfil its mandate to provide a measure of transcendence of historical injustice (human rights violations) to the extent that its conception of Ubuntu managed to *overcome* and not *perform* the maxim’s potential and historical tendency to excuse and indemnify state violence in the name of either the welfare or the security of the country’s population.

Ultimately, while the TRC represented a significant attempt to address the legacy of apartheid, its logic and operation in many ways reiterated key forms of native governance and colonial jurisprudence. This continuity manifested in its narrative framing, its approach to information gathering, its use of amnesty, and its role in managing racial relations. While the TRC sought to make important strides in acknowledging the criminality of apartheid and providing a platform for victims to share their stories, its effectiveness in providing comprehensive reparations and addressing structural inequalities was limited by its inheritance of colonial governance practices. This analysis underscores the challenges of using inherited legal and narrative frameworks to address historical injustices, highlighting the need for more innovative approaches that can more effectively tackle systemic inequalities and provide comprehensive reparations.

¹²¹ Sitze *The Impossible Machine* 227.

4.4.3. Wither the Indemnity Jurisprudence Critique?

The excessive application of indemnity jurisprudence, says Sitze, allowed the state's abuse of the rule of law to such an extent that the rule of law lost its substance in indemnity jurisprudence. Two ways in which this happened was that the reception of indemnity was no longer given just retrospectively but would also be given prospectively, and the state agent was no longer required to prove that they were necessarily acting out of the best interests of the public but rather that they not be acting out of malice against the public. While Sitze's critique shows the colonial logic underpinning the PNURA, his critique assumes that the PNURA, as a colonialist construction, can nevertheless be administered in such a way as to safeguard itself from the worst impunity-sanctioning influence of colonial indemnity jurisprudence. Sitze shows that the genealogy of the PNURA lies in colonial indemnity jurisprudence, and its use of this jurisprudence *enables* state impunity through its reiteration of necessity, as seen, for instance, with a political motive being the requirement for amnesty. He argues that TRC amnesty "functioned as a means for the survival, in 'postapartheid' South Africa, of one of the worst juridical conventions of the apartheid state," that is, the indemnity convention.¹²² Understanding indemnity jurisprudence, then, is crucial for "understanding what seems to many observers to be the renewal of authoritarianism within the 'postapartheid' state."¹²³

To counteract the reiteration of this authoritarianism, there should be a proper administration of the rule of law. It therefore appears that Sitze is placing the rationale for his inquiry into the genealogy of TRC amnesty in the need for a jurisprudential discontinuity with colonial conventions that enabled state repression; the kind of colonial and apartheid governmentality that is anachronistic to a "postapartheid" state".¹²⁴ Understanding indemnity jurisprudence is crucial for recognizing the renewal of authoritarian tendencies within the post-apartheid state. Sitze argues that a proper administration of the rule of law is necessary to counteract these tendencies. In his analysis of the internal paradoxes of the PNURA's pursuit of narrative transcendence, Sitze is assuming the legitimacy of the category of "postapartheid" and the legitimacy of a proper liberal constitutionalism that supports the idea of the importance of upholding the rule of law as a means for good governance and

¹²² 11.

¹²³ 11.

¹²⁴ 11.

accountability and justice. He does not fully address the limitations and failures of the modern liberal democratic paradigm, nor does he consider the ongoing settler colonialist and racial dynamics in South Africa, or the ways in which the colonialism of the transitional justice paradigm emerges from Western juridical and political norms that constrain the capacity of transitional justice mechanisms to account for local manifestations of symbolic and material colonial continuity. That element of the global nature of the transitional justice paradigm's rootedness in Western norms and discourse is explored and elucidated below.

4.5. Transitional Justice as Global Project: Critical Reflections

Authors such as Rosemary Nagy and Kiran Grewal offer a compelling case for reimagining transitional justice to be more attentive to local contexts, power dynamics, and diverse forms of knowledge when developing transitional justice interventions.¹²⁵ Nagy calls for a broader approach to transitional justice that includes structural violence, gender inequality, and foreign involvement, while recognizing and addressing the power dynamics in defining the scope and implementation of transitional justice processes. Her argument is that transitional justice, as a global project, tends to be narrowly constructed and applied in ways that limit its effectiveness and scope. For instance, Nagy points out that transitional justice mechanisms typically focus on "specific sets of actors for specific sets of crimes," resulting in "a fairly narrow interpretation of violence within a somewhat artificial time frame and to the exclusion of external actors".¹²⁶ She lists three ways in which transitional justice is limited: : firstly, when it applies, it's typically implemented only after massive direct violence has ended, ignoring ongoing structural violence.¹²⁷ It is "tied to the very conception of transition".¹²⁸ Secondly, it's often applied to non-Western, developing countries, raising questions about universalism and the tendency of the West to "[arrogate] the universal to itself and then [brings] all others into its fold of humanity".¹²⁹ Lastly, it tends to focus on "gross violations

¹²⁵ R Nagy *Transitional Justice as Global Project: Critical Reflections* (2008); K Grewal "The Epistemic Violence of Transitional Justice: A View from Sri Lanka" (2023) 17 *International Journal of Transitional Justice*.

¹²⁶ Nagy *Transitional Justice as Global Project* 275.

¹²⁷ 280.

¹²⁸ 280.

¹²⁹ 281.

of civil and political rights, neglecting structural violence and social injustice".¹³⁰ These limitations emerge from the epistemic paradigm guiding transitional justice. This narrow Western-centric framing can lead to incomplete or distorted understandings of conflicts and their resolutions. For example, the PNURA's narrow mandate of KATS meant that apartheid was treated as "the context to crime rather than the crime itself."¹³¹ This standard approach that applies Western liberal concepts to transitional justice, claims Nagy, often comes across in non-Western contexts as "alien and distant" to those actually affected by conflict.¹³²

Grewal's critique of the principles and implementation of transitional justice complements Nagy's perspective by emphasizing the importance of understanding the specific historical and cultural contexts in which transitional justice is implemented. He argues that the field's "over-reliance on abstract, universalist liberal democratic theory" fails to grasp "the historical, cultural and socio-political specificity not just of the locations where transitional justice is proposed but of the conceptual foundation of transitional justice itself".¹³³ This observation underscores the need for a more nuanced approach that takes into account local realities and perspectives. He contends that while critics of transitional justice have pointed to the divide between victims and communities rendered passive by transitional justice processes and institutions and 'experts' empowered to speak for them, too often the proposed solution to this is greater incorporation of 'victim's voices' or participation.¹³⁴ Grewal argues for a move towards a more contextualized and nuanced understanding of identity, community, state formation, and the histories and specificities of liberal democracy in the transitional justice framework.¹³⁵ This means not simply integrating 'local' civil society voices that may still operate within a universalist liberal framework, but actually engaging with the diverse experiences and perspectives of the populations affected by conflict and injustice.¹³⁶

Both scholars' critiques point to the potential for transitional justice processes to inadvertently perpetuate power imbalances and reinforce existing inequalities. Nagy's analysis of the South African Truth and Reconciliation Commission (TRC) illustrates this point. By treating apartheid as "the context to crime rather than the crime itself", the TRC's

¹³⁰ 284.

¹³¹ 284.

¹³² 275.

¹³³ Grewal "The Epistemic Violence of Transitional Justice" 322.

¹³⁴ 331.

¹³⁵ Grewal "The Epistemic Violence of Transitional Justice.

¹³⁶ 331.

narrow mandate arguably failed to fully acknowledge and address the systemic nature of apartheid's injustices.¹³⁷ Grewal's concept of "epistemic violence" further illuminates this issue. He argues that the globalization of transitional justice can lead to the imposition of "Eurocentric modes of knowing being elevated to the level of 'universal' and/or 'global' knowledge while alternative epistemologies are denied, erased or denigrated".¹³⁸ This epistemic violence not only silences local voices but also risks perpetuating colonial legacies and power structures. The notion of epistemic violence to which he refers denotes the harm done to communities through the imposition or privileging of certain ways of knowing or understanding the world, while devaluing or silencing others. The term captures the intellectual and cognitive dismissal of local knowledge systems and narratives, which can further suppress the voices of those who have already been marginalized by systemic power imbalances and past injustices. Epistemic violence in this sense is an extension of colonial legacies, where the epistemologies of the colonized are undermined by those of the colonizer.¹³⁹ Grewal advocates for a "move towards a more contextualized and nuanced understanding of identity, community, state formation, and the histories and specificities of liberal democracy in the transitional justice framework".¹⁴⁰ This approach would involve not just integrating local civil society voices, but genuinely engaging with diverse experiences and perspectives of populations affected by conflict and injustice. This might involve, for example, broadening the scope of truth commissions to include investigations of economic crimes and structural violence.

Both scholars' recommendations point towards a more bottom-up approach to transitional justice. This would involve empowering local actors and ensuring that those most affected by transitional justice policies have a meaningful influence over the processes. Such an approach could help address the power imbalances inherent in many current transitional justice interventions and lead to more effective and sustainable outcomes. The solutions proposed by both scholars emphasize the need for a more inclusive and context-sensitive approach to transitional justice. Nagy calls for a broader approach that "encompasses structural violence, gender inequality and foreign involvement".¹⁴¹ This expanded scope

¹³⁷ Nagy *Transitional Justice as Global Project* 284.

¹³⁸ Grewal "The Epistemic Violence of Transitional Justice" 323.

¹³⁹ 323.

¹⁴⁰ 331.

¹⁴¹ Nagy *Transitional Justice as Global Project* 287.

would allow transitional justice processes to address a wider range of injustices and better respond to the complex realities of “post-conflict” societies.

4.6. A Western Imperialist Settler Colonial Racial Polity: The PNURA’s Colonial Context

4.6.1. Settler Colonialism and Colonial Continuity in South Africa

The relation between TRC historiography and the limits of a “apartheid as injustice” framework is that the colonialism of the SA state is obfuscated. Colonial historiography dismisses the injustice that occurred before the system of apartheid. Gerhard Werle for example acknowledges that “the history of discrimination... reaches much further back [than apartheid]. It starts with the seizure of land by Dutch settlers in the mid-seventeenth century.”¹⁴² His erroneous statement then is that “racism became state doctrine in 1948.”¹⁴³ The duplicity of this thinking has been discussed by some such as Ramose, who has argued that “the fundamental problem is that between the colonizer and the colonized in South Africa. It is the conflict over the land or sovereign title to territory.”¹⁴⁴ The framing of apartheid as the fundamental antagonism in South African history is thus expedient for the colonizer in escaping the self-realization of their political responsibility to address injustice that occurred before apartheid.

The terms *colonization*, *colony* and *colonialism* are interrelated but denote different phenomena. Jurgen Osterhammel explains that while a colony is a type of sociopolitical structure, a “new political organization” established through conquest or settlement, colonization is the process of acquiring and possessing the territory on which this structure is constructed.¹⁴⁵ Colonialism, however, “is a system of domination” characterised by the remote control of a foreign territory and the autonomous reproduction of the metropole on that territory.¹⁴⁶ In this system, the colony's foreign rulers are dependent on the metropole, their country of origin, to legitimate their exclusive rights to the colonization of foreign

¹⁴² Werle (1996) *Law and Politics in Africa, Asia and Latin America* 59.

¹⁴³ 59.

¹⁴⁴ MB Ramose ‘Reconciliation & Reconciliation in South Africa’ (2012) 5 *Journal of African Philosophy* 23.

¹⁴⁵ J Osterhammel, *Colonialism: A Theoretical Overview* (2005) 10.

¹⁴⁶ Osterhammel *Colonialism* 10; L Veracini *Settler Colonialism: A Theoretical Overview* (2010) 3.

territory.¹⁴⁷ As maintained by Osterhammel, colonialism is characterised by a relationship between the indigene and the foreigner where the foreigners control the land and impose their self-justified sovereignty over the natives.¹⁴⁸ Further, all decisions pertaining to the colony are made in the metropole.¹⁴⁹ According to Eve Tuck and K. Wayne Yang, colonialism takes on two forms: external colonialism and internal colonialism.¹⁵⁰ In its “external” form settler colonialism expropriates “fragments of Indigenous worlds, animals, plants and human beings, extracting them in order to transport them to – and build the wealth, the privilege, or feed the appetites of – the colonizers, who get marked as the first world.”¹⁵¹ In its internal form, colonialism is the structural and interpersonal “management of people, land, flora and fauna within the ‘domestic’ borders of the imperial nation ... to ensure whites the ascendancy of a nation and its elite.”¹⁵² From the outset of European conquest and colonization in the territory called South Africa, the Boers and the British in South Africa were faced with the “quintessential problem” of legitimizing “the rule and exploitation of the colonized majority by the colonizer minority.”¹⁵³ The fact that the indigenous population vastly outnumbered the settlers was a great problem to the Boer and British and was treated as the *native problem* – how to subdue and subjugate the indigenous people in order to garner and maintain white domination in a scenario where whites were the minority.¹⁵⁴

In colonies, the colonizers have a common heritage, whether a place of origin or religion (or race) and are thus an identifiable community, even if they may not be entirely homogenous.¹⁵⁵ In South Africa, the British and Boers colonizers are descended primarily from European conquerors and colonizers and, although their initial encounter with each other on this territory was one of conflict and animosity, they have come to be racialised as white and have gained an elite socioeconomic position in South Africa on that basis. The reason for this is not achieved through the examination of the apartheid system does not provide the basic rationale for this segregation and exclusion. The founding of South Africa offers a crucial avowal of the notion of South Africa as a colony punctuated by racial capitalism long before the commencement of apartheid in 1948. On 31 May 1902, to

¹⁴⁷ Osterhammel *Colonialism* 10.

¹⁴⁸ 16-17.

¹⁴⁹ 16-17.

¹⁵⁰ E Tuck & KW Yang “Decolonization is not a metaphor” (2012) 1 *Decolonization: Indigeneity, Education & Society* 4

¹⁵¹ 4.

¹⁵² 5.

¹⁵³ Magubane *The Making of a Racist State* 23.

¹⁵⁴ 30.

¹⁵⁵ Marx ‘Settler Colonies’.

conclude the second Anglo-Boer War that began on 11 October 1899, Boer and British delegates signed the Treaty of Vereeniging. Among the terms of the Treaty were that two Boer republics – the Transvaal and the Orange Free State – would become colonies of the British empire, that their self-government would eventually be granted, and that the “question of granting the Franchise to Natives will not be decided until after the introduction of Self-Government.”¹⁵⁶ In 1909, British parliament passed the South Africa Act, which created a polity amalgamated by the Transvaal and Orange Free State, and the British colonies of Natal and the Cape that would come into existence on 31 May 1910. This legislation was a watershed moment in South African history which was “based on a delicate reconciliation and balance between the British and Boer”; a reconciliation which upheld a polity “created *without* and *against* the conquered peoples within its political territory.”¹⁵⁷ Saul and Bond concur that following this Act, South Africa reflected a polity based on racial capitalism supported by a “politics within the dominant white community [which] came to reflect... the vested interests that whites of all classes now had in defending a system that guaranteed their privileges and exclusive claim to power – while also producing a cheap supply of black labour.”¹⁵⁸

A major development consolidating and reinforcing the colony was the implementation of the Natives Land Act on 19 June 1913. The Act was created to “[m]ake further provision as to the purchase and leasing of Land by Natives and other Persons in the several parts of the Union and for other purposes in connection with the ownership and occupation of Land by Natives and other Persons.”¹⁵⁹ It expressed emphatically that a native person was barred from engaging in any trade of land with anyone other than another native, and likewise non-natives were also barred from engaging in any trade of land with a native person.¹⁶⁰ Land commerce and trade were to be at the prerogative of the colonial government. The Land Act relegated “African land ownership to seven percent and later thirteen percent through the 1936 Native Trust and Land Act of South Africa.”¹⁶¹ The Land Act confined Africans to reserves and contributed to the proletarianization of Africans through the migrant labour system that outlawed their ownership of the means of production

¹⁵⁶ Treaty of Vereeniging, 1902, <https://www.sahistory.org.za/> South African History Online.

¹⁵⁷ J Modiri “Azanian Political Thought and the Undoing of South African Knowledges” (2022) 168 *Theoria*, 56; Therborn “From Settler to Postcolonial” in *Persistence of Race*, 83.

¹⁵⁸ Saul and Bond *South Africa, the Present as History* 36.

¹⁵⁹ The Natives' Land Act No. 27 of 1913.

¹⁶⁰ The Natives' Land Act No. 27 of 1913.

¹⁶¹ 1913 Natives Land Act Centenary, South African Government, <https://www.gov.za/1913-natives-land-act-centenary> [accessed 15 May 2022].

but ensured their reliance on the economic system. Reserves for the indigenous population in the African colonies served the function of using territorial racial separation to maintain the colonizer's system of privileges while retaining access to cheap mobile labour.¹⁶² These reserves were not self-governing nor were they created to communicate some form of sovereignty of the indigenous people. The natives' right to occupy the land was defined on the terms set by the European colonizers. Liz Stanley contends that the Land Act is "frequently described as *the* originating and definitional legislation in establishing the apparatus of segregation and apartheid and disappropriating South Africa's black populations from land possession and ownership."¹⁶³

Racialisation and racism are constitutive of colonialism in South Africa. Colonizers were racialised as white and the natives as black, the oppression of the latter being led by "the pursuit of profit... rooted in racist modes of thinking, and in political concerns about white security in the face of a large and growing black population that had come to be thought of as a potentially dangerous 'other'."¹⁶⁴ Colonial logic in South Africa created a polity

that invented and entrenched particular political identities – native and settler, Black and white – and organised and institutionalised these identities in a relentlessly bifurcated, hierarchical, and antagonistic relationship to one another through the mechanisms of political, legal, economic, and cultural power.¹⁶⁵

In other words, South Africa is organised by a race policy characterised by (1) the maintenance of white domination, (2) racial segregation and discrimination (wherever there was any threat of equality or competition between Whites and non-Whites), (3) the perpetual subjugation of non-Europeans, and particularly Africans, as a politically powerless and economically exploitable group, and (4) the superiority of Western jurisprudence and logics of statecraft and political economy.¹⁶⁶

Although colonialism and settler colonialism share certain traits, they are not the same phenomenon.¹⁶⁷ Settler colonialism is distinguished by the "dispossession [of the indigenous population] and the permanent presence of the colonizers."¹⁶⁸ In settler-colonial societies, the

¹⁶² Marx "Settler Colonies".

¹⁶³ Liz Stanley (2019) "Natives' Land Act, 1913" www.whiteswritingwhiteness.ed.ac.uk/Traces/Land-Act/.

¹⁶⁴ JS Saul and P Bond *South Africa, the Present as History: From Mrs Ples to Mandela & Marikana* (2014).

¹⁶⁵ Modiri (2022) *Theoria*, 58.

¹⁶⁶ 58.

¹⁶⁷ Veracini *Settler Colonialism* 4.

¹⁶⁸ J Evans 'Where Lawlessness is Law: The Settler-Colonial Frontier as a Legal Space of Violence' (2009) 30 *Australian Feminist Law Journal* 5.

colonizers come to dominate through the elimination of the native from indigenous land by the permanent annexation and occupation of that land either through genocide or the assimilation of the native into the Eurocentric settler colony structure and order.¹⁶⁹ Patrick Wolfe argues that settler colonialism is not an event that takes place in history but rather a structure because the settler-colonizers intend to create political and socioeconomic relations with the natives that withstand the passage of time.¹⁷⁰ This is demonstrated in the fact that settlers *import* not only citizens of the metropole but also their established norms from their metropole including but not limited to their “social hierarchies, settlement forms, political institutions and the legal systems.”¹⁷¹ The purpose is the domination over indigenous people and their territories through the *settlement* of settlers from the metropole.¹⁷² It is for this reason that Lorenzo Veracini depicts settlers as “founders of political orders” that carry their sovereignty with them and create political orders grounded on the assumption of this sovereignty.¹⁷³ Thus, the sovereignty of the territory lies not with its indigenous people but with the settlers and the metropole.¹⁷⁴

Patrick Wolfe disputes the depiction of South Africa as a settler colony because of this trait of exploitation. He specifically avows that the “primary objective of settler-colonization is the land itself rather than the surplus value to be derived from mixing the labour with it.”¹⁷⁵ Settlers of South Africa depend not only on accumulating land, but also on the exploitation of the native, he argues, which is incompatible with his paradigm of settler colonialism where the native is always dispensable in the settler colony and inessential to its functioning. However, the strategy used by the settler minority in South Africa to control the indigenous majority and maintain settler dominance and white supremacy (beyond genocide and assimilation) was constitutive of the legal foundation of the state itself, as can be deduced by the creation and implementation of the Treaty of Vereeniging in 1902, the Act of South Africa of 1909, and the Natives Land Act of 1913, among others. Further, the logic of the elimination of the native in South Africa is demonstrated through the construction and

¹⁶⁹ P Wolfe ‘Settler Colonialism and the Elimination of the Native’ (2006) 8 *Journal of Genocide Research*

¹⁷⁰ Wolfe (2006) *Journal of Genocide Research* 389.

¹⁷¹ C Marx ‘Settler Colonies’ 2017. <http://ieg-ego.eu/en/threads/europe-and-the-world/european-overseas-rule/christoph-marx-settler-colonies> (accessed 13 March 2020).

¹⁷² Veracini *Settler Colonialism: A Theoretical Overview* 12.

¹⁷³ 3.

¹⁷⁴ L Veracini ‘Introducing: Settler Colonial Studies’ (2011) 1 *Settler Colonial Studies* 12.

¹⁷⁵ P Wolfe *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographical Event* (1999) 163.

execution of “a labour regime” where settler colonizers value “the land and labour, but not the people.”¹⁷⁶

Robert DG Kelley, in a critique of Wolfe, proposes that settler colonialism in South Africa still meets the criteria of the elimination of the native in that while “the expropriation of the native from the land was a fundamental objective, but so was proletarianization.”¹⁷⁷ On this account, while black labour is indispensability in the South African case, the existence of the natives is only made coherent through the fact that natives are fungible assets that are exchangeable for capital. The native is thus eliminated in what Kelly as the settlers’ project to “eliminate stable communities and their cultures of resistance,” and so “what is being destroyed—or at least attempted—are metaphysical and material relations of people to land, culture, spirit, and each other.”¹⁷⁸ As a matter of fact, Wolfe’s dismissal of South Africa as a settler colony on account of the sole pursuit of the settlers being the land and not agriculture or labour is limited by the fact that even the pursuit of land demands more than the pursuit of just land but also favourable conditions for foreign settlement to survive and thrive. This requires, in South Africa’s case, the use of native labour. This need explains the South African state’s separate development policy when confronted by several options to eliminate the native.

4.6.2. South Africa as a Racial Polity

The PNURA and the TRC, despite their intentions to address historical injustices, perpetuate the racial contract and Eurocentric worldviews by failing to confront the underlying structural inequalities and power imbalances inherited from colonialism and apartheid. The focus on tangible outcomes and specific limitations of these mechanisms obscures the deeper systemic issues rooted in the colonial logic and the racial contract. In this context, South Africa can be seen as a racial polity, where the imposition of a "common South African identity" through transitional justice mechanisms is inextricably linked to the Eurocentric assumptions and biases embedded in the social contract theory and the racial contract. This imposition of a shared national identity not only marginalizes and erases the diverse identities and

¹⁷⁶ RDG Kelley “The Rest of Us: Rethinking Settler and Native” (2017) 69 *American Quarterly*, 269-271.

¹⁷⁷ 269.

¹⁷⁸ 269.

experiences of indigenous and non-white communities but also perpetuates the racial hierarchies and systemic inequalities that have characterized South Africa's colonial and apartheid legacies.

4.6.2.1. *The Social Contract*

To explore the idea of South Africa as a racial polity buttressed by the law of the constitution, I will use the ideas of Charles Mills as outlined in his book, *The Racial Contract*, where he argues that white supremacy has shaped the way the modern world is currently. He argues that race has been a marker of entitlement or dispossession, civilization or barbarism, and normative inclusion or exclusion.¹⁷⁹ Traditional Western theories of the state as a social contract have failed to address this reality. He demonstrates how while one of the major tasks of social contract theory is to outline how a society is organized through agreement for mutual cooperation, the tradition largely excludes an inquiry into how the organization of society has been based on an exclusive contract historically limited to white men, who have been historically deemed the only persons privy to the contract without qualification. His descriptive element is a deviation from how the social contract has been discussed by figures such as John Rousseau, Thomas Hobbes, John Locke, and more recently, John Rawls. These theorists tend to use ideal theory to describe how normative obligations would possibly or hypothetically arise in society, whereas Mills uses actual history to describe how these normative obligations have come to exist. He argues that the former theories have made the social contract “just a normative tool, a conceptual device to elicit our intuitions about justice”.¹⁸⁰ Mills reckons that his own non-ideal theory explains how an oppressive and immoral political elite is central to the formation of a society governed by injustice and exploitation.¹⁸¹ Mills’ fundamental assumption that underlies his theory of the Racial Contract is that, historically, white supremacy - as a political system - has always functioned as a contract between whites to further only *their* interests.

Social contractarianism is a school of thought regarding how political societies or states come into being. The foremost thinkers in this school in classical European thought are

¹⁷⁹ C Mills *The Racial Contract* (1997).

¹⁸⁰ 5.

¹⁸¹ 5.

Thomas Hobbes (1588-1679), John Locke (1632-1704), and Jean Jacques Rousseau (1712-1778). Themes that are common to these theorists regard the events or circumstances ‘men’ find themselves in before the move from *prepolitical* society to *postpolitical* society, the agreements they reach in order for this move to happen, and the moral/political obligations which arise from these agreements. For Hobbes, men initially find themselves in a State of War, which is a period of time where there “is no society; and - worst of all - continual fear and danger of violent death, and the life of man [is] solitary, poor, nasty, brutish, and short”.¹⁸² In this state men “are equal and are judges of the reasonableness of their own fears”.¹⁸³ In order to act in the interests of preserving their own lives, they come into agreement with one another to end this State of War. The agreement is that they will all transfer their individual right over each of their lives to a single man called a sovereign. The sovereign is “a common power [whose role it is to] keep [men] in awe and direct their actions to the common benefit”.¹⁸⁴

Locke’s view is that ‘men’ are “naturally free” in the State of Nature.¹⁸⁵ The primary reason why “men” would give up this freedom of self-governance would be for the sake of preserving their property, which extends not only to possessions, but also to their life and liberty.¹⁸⁶ By entering into an agreement with each other, they waive their right to self-governance. In this waiving this right, they render themselves obligated to be bound by the decisions of the majority.¹⁸⁷ Rousseau’s take on the social contract is that it is the solution to ‘men’s’ fundamental problem in the State of Nature. This problem is “to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before”.¹⁸⁸ Rousseau argues that “[w]hat man loses by this social contract is his natural liberty and an unrestricted right to anything he wants and can get; what he gains is civil liberty and the ownership of everything he possesses.”¹⁸⁹ This freedom is natural to the State of Nature, and men enter into a social contract with each other in order to preserve it when it is compromised by obstacles. The body of individuals in this society is

¹⁸² T Hobbes *Leviathan* <<https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf>> (accessed 15 May 2012) 78.

¹⁸³ 84.

¹⁸⁴ 105.

¹⁸⁵ J Locke *Two Treatises Of Government* (1764) 149.

¹⁸⁶ 164.

¹⁸⁷ 166.

¹⁸⁸ JJ Rousseau *The Social Contract* (1762) 6.

¹⁸⁹ 8.

called the Sovereign, and it is understood that it has what is called the general will, of which the primary characteristic is to preserve the interests of each member of the body politic. Men's moral and political obligations to each other stem from this understanding of the general will as being sovereign over their own.

From the above, it is clear that for these three theorists, the primary motive of why the individuals in the State of Nature - or Hobbes's State of War - would come together to form a political society would be for the sake of protecting and *preserving their individual interests*, whether it be just their lives or their property as well. Secondly, these individuals have the *freedom* whilst in the State of Nature to consent to waiving their right to self-government and enter into an agreement with other individuals who have also waived their right to absolute self-government. Thus, their consent is integral to the legitimacy and force of the agreement. Lastly, the agreement into which these individuals enter has *moral force* upon them to act in the interests of the other parties to the contract without sacrificing their own, meaning that the parties all have *civic equality* brought about by the contract.

4.6.2.2. *The Racial Contract*

This above presentation of social contractarianism gives the background to Mills's charge that the world today operates according to the Racial Contract, which is the actual instantiation of social contract theory.¹⁹⁰ Mills's analysis underscores the pervasive influence of the Racial Contract in shaping contemporary society, challenging conventional social contract theories by exposing racial hierarchies and exploitation embedded within societal structures.

Mills argues that, historically, social contractarians have pursued freedom and egalitarianism as the main benefits of citizens of the polity, but "the colour-coded morality of the Racial Contract restricts the possession of this natural freedom and equality to *white men*".¹⁹¹ This natural freedom and equality is attached to an epistemology with "its own norms and procedures for determining what counts as moral and factual knowledge of the world".¹⁹² Mills posits the Racial Contract as a historical reality shaped by European

¹⁹⁰ Mills *The Racial Contract*.

¹⁹¹ 16.

¹⁹² 17.

domination and white supremacy over the past five hundred years. While lacking a physical contract, it is evident in declarations, pronouncements, and treaties privileging white interests, including colonial, slavery, and exploitation agreements. The Racial Contract operates as an exploitation mechanism, facilitating global European economic domination and national white race privilege by economically exploiting nonwhites in white-controlled polities. Economic structures perpetuate wealth disparities, favouring whites over nonwhites.¹⁹³ Since the “Racial Contract demarcates space, reserving privileged spaces for its first-class citizens”, that is white people, the struggle for space is raced.¹⁹⁴ Unlike classical social contract theories, which assume equality and homogeneity, the Racial Contract perpetuates heterogeneity and inequality, norming and racializing space. It reserves privileged spaces for whites, rendering nonwhite spaces subordinate and denying indigenous people full membership in the political community.

There are two ways in which space is normed and raced. Firstly, space is normed at the epistemological level and secondly, at the moral level. With regards to the epistemological, only the European cognizer can legitimately claim to possess knowledge, and so non-European spaces are truly only real once they are cognized by the European cognizer. Secondly, at the moral level, On the epistemological level, Mills argues that knowledge is legitimized only through European cognition. This means that non-European spaces are considered "real" only after they have been recognized and understood by European cognizers. This perspective reinforces a Eurocentric view of knowledge and space. On the moral level, Mills posits that the Racial Contract creates a link between space, race, and personhood.¹⁹⁵ Mills emphasizes that the fundamental conceptual division in this framework is between whites and non-whites, or as he puts it, between persons and subpersons. This division underpins the spatial and moral hierarchies established by the Racial Contract.¹⁹⁶ The crucial conceptual divide is between “whites and nonwhites, persons and subpersons”.¹⁹⁷ As the white male body gains personhood in the social contract, the terms of the Racial Contract simultaneously enshrine subpersonhood to nonwhite bodies, making them subpersons. This means that rules, rights and laws are applied differentially to both groups. The white body is perceived as the epitome of human rationality, which is deemed a necessary condition of taking part in the agreement. “The social contract,” contends Mills,

¹⁹³ 36.

¹⁹⁴ 49.

¹⁹⁵ 50.

¹⁹⁶ 50.

¹⁹⁷ 57.

“...is a specific discrete event that founds society... [B]y contrast, the Racial Contract is *continually being rewritten* to create different forms of the racial polity.”¹⁹⁸

In the Racial Contract, there exists in human history two periods: the first period is that of pure white supremacy, and the second period is that where laws that have been used to further the interests of white supremacy are formally extended to nonwhites, even though this extension does not guarantee equality for everyone in the white polity. In fact, as per the Racial Contract, these laws continue to further the interests of white supremacy. This is typical of the Racial Contract, says Mills, because “the Racial Contract manifests itself in white resistance to anything more than the *formal* extension of the terms of the abstract social contract”.¹⁹⁹ The way in which the Racial Contract stays the same is that the “fundamental conceptual cut, the primary division ... remains that between whites and nonwhites”, and that whites enjoy privilege over nonwhite, privilege which is maintained regardless of how white polities construct their laws.²⁰⁰

Within the social contract the legitimacy of the state is perceived to be predicated on the consent of the individuals in the “prepolitical” society. However, with the Racial Contract, which cannot be the case because the demarcation between and white and nonwhite is insurmountable. Thus, nonwhites cannot consent to the social contract since they supposedly lack the full capacity for rationality. Mills suggests that the Racial Contract goes further, prescribing self-loathing for non-white individuals and requiring them to defer to white citizens. Mills asserts, “[i]f the social contract requires that all citizens and persons learn to respect themselves and each other, the Racial Contract prescribes nonwhite self-loathing and racial deference to white citizens.”²⁰¹ This negation of self ensures that whites and nonwhites view the status quo as politically, socially, morally and epistemologically legitimate, which serves only to further entrench white supremacy. Since social contract theory has been influenced at the core by society, it is disingenuous for the social contract theory to posit that all individuals in the state of nature are equal, unless it is explicitly states all these individuals are white males because that is in how the social contract has actually been applied.²⁰² Furthermore, Mills argues that we are often blind to the constructed nature of these racial hierarchies, mistaking them for natural phenomena.²⁰³ Finally, Mills links the

¹⁹⁸ 72.

¹⁹⁹ 75.

²⁰⁰ 80.

²⁰¹ 89.

²⁰² 89.

²⁰³ 123.

emergence of the racial world system to the simultaneous rise of domestic liberalism in Europe and European colonial expansion. Most critically, the racial world system crystallizes in the modern period with the simultaneous emergence of liberalism domestically and Europe's external expansion. This connection underscores how racial dynamics have been integral to the development of modern political and social structures.²⁰⁴

The concept of the Racial Contract in South Africa elucidates how the country operates within a framework that systematically privileges white supremacy and perpetuates racial hierarchies. Mills argues that the Racial Contract reinterprets the State of Nature differently for whites and black people, categorizing the latter as prepolitical or nonpolitical, thereby denying them full participation in the political state. This racialized framework rooted in European domination and white supremacy has been embedded in South Africa since 1652. It norms and racializes space according to white supremacist concerns, reserving privileged spaces for whites while rendering the spaces of indigenous people subordinate. This division extends to epistemological and moral levels, where European cognition and personhood are privileged, while black people are relegated to subpersonhood. Laws and rights are applied differentially based on racial categorization, perpetuating inequality and reinforcing white supremacy.

4.6.2.3. *The Racial Polity and Constitutional Exclusion*

Mills's analysis below of European constitutional founding and modern political institutions reveals how the South African constitution, like its American counterpart, redefines sovereignty in a way that excludes black people and legitimizes European settlement and domination. He critiques Frederick Douglass's assimilationist perspective, which rests on four theses: the reliance on natural law, the importance of original intent, the inconsistency between principles and practice, and optimism about black inclusion. Mills argues that European constitutional founding and modern political institutions redefine sovereignty, leading to the dispossession and legitimization of European settlement over Aboriginal nations.²⁰⁵ To elucidate his portrayal of the link between the racial polity and constitutionalism, Mills critically examines the key assumptions in Frederick Douglass's

²⁰⁴ See C Mills *The Racial Contract* (1997) 19-31

²⁰⁵ C Mills *Blackness Visible* (1988) 153.

political thought, primarily focusing on a speech and Douglass's other writings. Mills aims to identify potential issues within the assimilationist tradition, particularly Douglass's integrationist perspective.²⁰⁶ Mills presents four theses summarizing Douglass's assimilationist stance:

1. Natural law is the appropriate framework for considering moral and jurisprudential issues.
2. The "original intent" of the Framers is of primary importance, and this intent was antislavery and anti-white supremacy.
3. The actuality of the American polity is therefore inconsistent with its founding principles, and those who are agitating for racial equality can use that inconsistency to exert moral suasion on white Americans.
4. Thus, there is reason to anticipate that blacks will eventually be accepted as full citizens in the American polity.²⁰⁷

The first thesis focuses on natural law as the appropriate theoretical framework. Douglass believed in natural law, tracing its origins to classical Greece and evolving through the Enlightenment.²⁰⁸ Natural law, according to Mills, aligns law with morality, asserting its universality and reflecting the immanent moral structure of the universe. Mills discusses the distinct theses within natural law theory, including moral realism, moral absolutism, human equality as foundational principles, and the embodiment of these principles in a natural law guiding human law.²⁰⁹ In the second thesis, Mills explores Douglass's reliance on the original intent as anti-white supremacy. Douglass considers original intent crucial, anti-slavery, and anti-white. Douglass interprets "all men are created equal" inclusively, perceiving an inconsistency between the original intent of the Framers and the institution of slavery:

But what exactly is the putative inconsistency? It is supposedly centred on Thomas Jefferson's famous proclamation in the opening paragraph of the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights." Since this

²⁰⁶ Mills *Blackness Visible* 190.

²⁰⁷ 194.

²⁰⁸ 196.

²⁰⁹ 196.

statement is usually taken to govern the provisions of the Constitution also, there is an apparent tension between the Declaration and the latter's (coded) acceptance of the enslavement of some men.²¹⁰

The analysis expands into the racial logic present in Enlightenment thinkers' contractarian texts. Mills discusses how race became an epistemic marker in the modern period, dividing populations into persons and subpersons. Enlightenment theorists, including Locke and Kant, created racial hierarchies, justifying inferior treatment based on perceived racial differences.²¹¹ Mills contends that the Framers would not have been “conceptually discommoded” by endorsing universal equality while allowing for racial subordination.²¹² The section concludes by challenging the idea of a contradiction, suggesting that framing it as a deviation is misleading.²¹³ Moving to the fourth thesis, Mills questions Douglass's optimism about black inclusion. He posits two opposing scenarios: if the U.S. is a nonracial liberal democracy or a racial polity. In the former, there is an internal contradiction, but in the latter, it is an external contradiction between the system and the facts of black personhood. Mills argues that morality and racism are intertwined, with a racial moral economy reconciling American ideals with black subordination. He questions the efficacy of constitutional reform, suggesting it is subject to racialized interpretive logic determined by the white majority, maintaining historic white privilege.²¹⁴ Critiquing Douglass's misplaced faith in official institutions and ideals, Mills argues that the institutions were never race-neutral. He highlights historical figures like John Locke, invested in the slave trade, to emphasize that the Enlightenment thinkers Douglass invoked had racial biases.²¹⁵ The section concludes by challenging all four theses extracted from Douglass's speech, asserting that natural law hinders understanding sociohistoric law shaping, the Framers' original intent is dubious, inconsistency should be understood differently, and optimism about black inclusion is unfounded.²¹⁶ To emphasize the exclusion of black people in the epistemic framework of constitutionalism in a white polity, Mills quotes James Tully:

In the stages view of human history, all cultures and peoples are mapped hierarchically in accordance with their location on a historical process of progressive

²¹⁰ 206.

²¹¹ 211.

²¹² 211.

²¹³ 212.

²¹⁴ 215.

²¹⁵ 222.

²¹⁶ 223.

development. European constitutional nation states, with their distinctive institutions and cultures of manners and civility, are at the highest and most developed or improved stage...²¹⁷

The PNURA, despite its purported commitment to equality and democracy as its fundamental principles as inherited from the Interim Constitution, is fundamentally rooted in Western imperial thought, which inherently excludes indigenous people except as subjects to be subdued. This exclusionary nature can be understood through Mills's critique of modern European constitutionalism, which has its manifestation in the Racial Contract as explained earlier. The process of redefining sovereignty is evident in the Interim Constitution, which, while seemingly inclusive, is built upon Western liberal concepts that inherently exclude indigenous epistemology and moral norms. The PNURA's reliance on individual human rights thought as inherited from the Interim Constitution (which aligns with Mills's critique of Frederick Douglass's assimilationist perspective) presents a theoretical framework that claims to align law with morality and assert human equality as a foundational principle. However, this perspective fails to acknowledge the historical trajectory that has perpetuated racial hierarchies in South Africa, effectively excluding indigenous people from true sovereignty or inclusion in the south African polity. Furthermore, Mills's critique of Douglass's "faith" in the American constitution's emphasis on "original intent" and the so-called inconsistency between principles and practice mirrors how, in the South African context, this "gap" is a deliberate bifurcation between the rights of full citizens (who give consent to be governed) and those of indigenous people (whose consent is usurped as the Interim Constitution and PNURA are imposed on them and their land. The PNURA's epistemic and juridical sleight of hand is similar to what Mills critiques in Douglass's fourth thesis, that these legal documents operate within what Mills describes as the "racial moral economy" that reconciles liberal ideals with continued black subordination.²¹⁸ In essence, the Interim Constitution and the PNURA, provide a mechanism for formal legal equality while maintaining underlying structures of white supremacy, effectively subduing rather than empowering indigenous populations.

²¹⁷ 152.

²¹⁸ 215.

4.6.3. Tracking Western Constitutional Imperialism in South Africa

Mills's critique of Douglass's assimilationist perspective discussed above highlights the flaws in relying on natural law, original intent, inconsistency arguments, and optimism about black inclusion in the context of the South African constitution. These flaws underscore how the constitution perpetuates racial hierarchies and excludes black people from territorial political sovereignty, despite claims of equality and non-discrimination. By going even further back to the *legitimization* of constitutional democracy – to the creation of the modern Western state and its exclusionary boundaries and assumptions. The role of the TRC in legitimizing the constitutional democracy in the constant subjection of black people will be evident. Tully's analysis below reveals how the South African constitution operates within a framework of constitutional democracy that excludes black people from true citizenship and sovereignty. Despite the rhetoric of democracy and equality, the constitution effectively renders black people as subjects beholden to European dominance and control.

4.6.3.1. The Grand Discursive Formation of Control in Constitutional Democracy

James Tully investigates the historical and contemporary ties between modern representational constitutional democracy and Western imperialism, highlighting the transition from overt colonialism to subtler control during and “post”-decolonization.²¹⁹ Colonial powers sought to influence non-European nations through legal and political mechanisms, securing access to resources and markets without traditional colonial methods. A new global framework emerged, governing a “persistent imperial network” marked by the dependency and “economic exploitation” of their imperialized victims.²²⁰ This dynamic showcases a complex interplay of power, economic interests, and governance evolution beyond traditional colonial structures. The articulation of this form of imperialist intervention that Tully adopts is “informal and interactive imperialism”; with the “informal” referring to the Western world’s move away from terming their relationships with the countries they exploit and imperialise as “colonialism proper”, and with the “interactive” referring to the superficial recognition of colonized countries as “self-governing constitutional states”, whilst

²¹⁹ J Tully “Modern Constitutional Democracy and Imperialism” (2008) 46 *Osgoode Hall Law Journal*.

²²⁰ 462.

interacting with them within deeply unequal relations established over centuries.²²¹ Tully's objective with the text is to "describe the imperial roles that the spread of modern constitutional forms and constituent powers have played in this interpretation of global governance."²²²

Tully notes that the "modern arrangement of constituent powers and constitutional forms commonly called constitutional democracy" has seven features.²²³ He does so by illuminating six processes of "constitutionalisation, representative democratization, centralization of sovereignty, economic and military modernization, governmentalization, and citizenisation in the state sphere and the transnational and international spheres," which constitute the seventh feature: "the grand discursive formation of control."²²⁴ Tully explains that these processes produce "the grand discursive formations (or meta-narratives) of constitutional democratic modernization."²²⁵ These processes, he argues, are given discursive legitimation through terms such as "civilization, development, modernization, decolonization, globalization, democratization, opening to free trade, and so on."²²⁶ Despite arising from the formation and consolidation of the West, they are assumed to be the *telos* towards which every nation in the world should aspire, with the West as the embodying these ideas in their modern constitutional democracies, and the rest of the world as in need of the tutorship and guidance of the West to reach that highest stage of political formation.²²⁷

Proper understanding of this arrangement, he explains, requires an engagement with the history of how European states came into being and spread their imperial power and influence through the six processes of constitutional democracy referred to above. Tully calls his first element of modern constitutionalism "the formality or autonomy condition".²²⁸ To illustrate this condition, he points to two kinds of constitutional forms of constitutional democracy. One is the constitutions governing the internal matters of European states, and the other is the constitutions that serve to govern the relations "beyond the state in empire-building and international law".²²⁹ This first constitutional form, argues Tully, has a level of autonomy to it that distinguishes itself from and is detached from the actions and personal

²²¹ 463-464.

²²² 464.

²²³ 480.

²²⁴ 480.

²²⁵ 480.

²²⁶ 478.

²²⁷ 478.

²²⁸ 466.

²²⁹ 480.

interests of those who are subject to it, while having the capacity to make these people conform their interactions according to its normative and epistemic structure.²³⁰ This autonomy obviously shows a paradoxical tension between the idea of the autonomy of the “rule of law” as encapsulated in the constitutional form on the one hand, and on the other hand, the autonomy of the constituent powers who are subject to this constitutional form.

Furthermore, argues Tully, constitutional forms like a state’s constitution are not the only governing juridical authorities holding power over constituent powers. Tully explains that these “supra-state constitutional forms” have developed and taken hold in the form of “international law (the basic laws among modern constitutional states) but also subsystems of other supra-state bodies of law that have at least some of the properties of a modern constitutional form.”²³¹ These subsystems include institutions such as “the United Nations (UN)...and notably, “basic international human rights law”.”²³² While these particular constitutional forms and others like them are considered a feature of and evidence of a pervasive level of decolonization because of their perceived detachment from European imperialist colonial law and governance, nevertheless, their epistemic, ethical and legal foundations are inherited from “much older bodies of transnational law that were developed along with the European constitutional states when they were formal empires,” such as “the old law of nations, *ius commercium* and *lex mercatoria* that were designed to regulate inter-imperial competition.”²³³

Per Tully, the second feature of constitutional democracy, constituent powers, encompass “the powers of humans to govern themselves”, regardless of the way in which they are practised in actuality.²³⁴ These constituent powers are often termed “the people, the nation, representative democracy, modern citizenship, federalism, self-determination, participatory democracy, revolution” and the like.²³⁵ The bifurcation of political formations characteristic of constituent powers, according to Tully, arise from the first (constitutional forms within the state such as constitutions, and supra-state constitutional forms).²³⁶ The first category of constituent powers arising from within the constitutional form is representative democracy or constitutional democracy. Examples of the constituent power that is

²³⁰ 466.

²³¹ 467.

²³² 467.

²³³ 467.

²³⁴ 468.

²³⁵ 469.

²³⁶ 470.

constitutional democracy include modern citizenship and representation in tandem with the administration of their the legislative, judicial, federative, military, and administrative powers.²³⁷ Constituent powers in the normative framework of constitutional democracy seek to transform how a particular constitutional democracy operates, such as labour strikes by union forces and extra-parliamentary opposition in the form of social movements that abstain from participating in formal civic engagements such as national elections.²³⁸ The second category of the constituent powers of the people, which take on representative formations oppose the "governing institutions of the old imperial systems," which have evolved into major global institutions such as the "European congresses and conferences of the nineteenth century," and twentieth-century institutions like the United Nations and the European Union.²³⁹ These supra-state political formations face opposition from global civil society movements that represent people on the ground, whether superficially or substantively, which are engaged in a "struggle to democratize these supra-state constitutional forms and constituent power complexes."²⁴⁰ Examples of these democratic oppositions include decolonization movements, representative international cooperatives, and other organizations operating outside government structures.

Third feature of constitutional democracy to which Tully refers is an element inherent in the relationship between constitutional forms and constituent powers: the sovereign body. The appeals to sovereignty between constitutional forms and constituent powers is highlighted by the fact that popular sovereignty did not give rise to the constitutional forms that govern "the people". Rather, constituent powers are subservient to the decisions of traditional sovereign bodies such as aristocracies, the political elite, or "the sovereign state" who create constitutional forms such as constitutions.²⁴¹ While sovereign bodies derive their legitimacy from the consent of constituent powers, they retain sovereignty over both the constitutional forms and the constituent powers that seek to prevent and curtail the sovereign body's abuse of power.²⁴² In essence, the struggle for sovereignty appears to be between constituent powers and constitutional forms, but in actuality it is between constituent powers and the sovereign bodies that legitimise those constitutional forms, i.e., the state as a constitutional democracy.

²³⁷ 470.

²³⁸ 470.

²³⁹ 470.

²⁴⁰ 471.

²⁴¹ 471.

²⁴² 471.

The fourth feature of constitutional democracy that Tully identifies is that modern constituent power is divided and institutionalized by modern constitutions into three: political power as discussed above, labour/economic power, and military defence power in the form of the military and policing.²⁴³ Tully is basically saying that, to understand how there is an unequal relationship between constitutional forms and constituent powers, we have to look to the interplay between the military and economic arrangements of a constitutional democracy, That is, while the military and the economic arrangements within a state are portrayed as beholden to the constitutional forms within a state, they act as sovereign over the constituent powers, while they are simultaneously beholden to the global economic and military sovereigns. These sovereigns mirror the colonial and post-colonial governance of European colonial powers, which are in actual fact the sovereignty in control of their economies and the military. With regards to labour power (which operates in a capitalistic mode), workers are compelled to sell their labour to corporations on a national and multinational scale, a capitalistic arrangement that dictates the regulations pertaining to “private property, means of production, and contractual relations,” and their regulation is effectively under the control of these capitalist corporations.²⁴⁴

With regards to the fifth element of constitutional democracies, Tully argues that there is a historical bond and parallel between the “regimes of formal colonial governmentality [and] postcolonial governmentality” as expressed in various forms of non-governmental initiatives that orders the subjectivities of individuals and collective constituent powers (political power, labour power, and military defence power).²⁴⁵ With the sixth feature of constitutional democracies concerns the ways in which constituent powers interact with constitutional forms when seeking to effect change in the constitutional formation.²⁴⁶ In two scenarios, the “constituent-power actors” seek to interact with the constitutional forms either through means that align with the political framework giving rise to those constitutional forms, or through changing the constitutional form altogether but still in the context of a “modern, constitutional, and democratic order.”²⁴⁷ In the third type of relationship between constitutional forms and constituent powers, the constituent powers organise themselves to work collectively to “bring into being a new kind of constitutional formation, which in turn

²⁴³ 472.

²⁴⁴ 473.

²⁴⁵ 476.

²⁴⁶ 476.

²⁴⁷ 477.

must be subject to ongoing constituent transformation.”²⁴⁸ The final type of relationship is the exact opposite: the constituent powers attempt to organise themselves to change the constitutional form, but they find that they “are unable to transform the hegemony of the prevailing sovereigns and constitutional forms,” and can only hope to adjust how they exercise their agency within the unequal relations in which they act.”²⁴⁹

4.6.3.2. *The Imperial Right*

In essence, Tully is trying to “show the many ways that legal and political prototypes of constitutional democracy have been extended around the world by formal and informal imperial means to subalternise non-European peoples.”²⁵⁰ The West, Tully argues, interacts with non-Western people from the assumption of the West that it has an “imperial right” composed of its duty to civilize non-Western people and the right to trade in their territories, while non-Western people have the duty to welcome Western trade in their territories, as well as its “civilizing” efforts.²⁵¹ This “imperial right”, argues Tully, finds expression in constitutional democracy, the role of which is to spread the imperialism of the West in three ways. All three roles are imperial and abhorrent in their inequalities and injustices, yet each is composed of features of constitutional democracy in its dominant narrow sense:

- (1) low intensity constitutional democratization has been imposed on non-western peoples without their consent or democratic participation;
- (2) these colonies and post-colonial replicas are subject and subordinate to a cluster of regimes of transnational and international laws over which they have no or little say; and
- (3) these regimes in turn are governed by the most powerful constitutive sovereign states through global institutions and military networks in which the governed have no or little say, even though they are the vast majority of the world's population.²⁵²

²⁴⁸ 477.

²⁴⁹ 477.

²⁵⁰ 464.

²⁵¹ 480.

²⁵² 464.

To elaborate on these three modes of domination, Tully explains how they have historically emanated. The imperial right, that is, the Europeans' self-justified entitlement to political, juridical and economic sovereignty over non-European people, is an assumption that arises from European scholarship justifying – by its own jurisprudential norms – the nature of the natural rights of the individual and society that come from natural law, and the law of nations that governs the relations between states. This scholarship, the jurisprudence of international law, including the rights justifying and emanating from European colonization and conquest, justifies the assertion that European imperial powers have the “right and duty to impose coercively the conditions of trade, hospitality and civilization: namely, the appropriate features of modern constitutional forms and constituent powers.”²⁵³ The assumption of global European sovereignty and superiority and the imperial right that accompanies it, finds its expression in the declarations of Christian popes from the 11th century, through Renaissance jurisprudence, and the philosophical legitimacy it fashioned for itself finding momentum in the social contract tradition that was at its height in the 1600s – 1800s. The social contract tradition – prevalent during the modern era – is notable for its aggressive creation of the European expression of constituent powers and constitutional forms especially when considering the attempt it made to explain the genealogy of state forms such as constitutional democracies and the legitimacy of such states.

There are three means by which the imperial right has been implemented and reproduced in colonized states: colonization, informal rule, and indirect rule.²⁵⁴ Colonization displaces indigenous people in order to open up trade of indigenous resources with other European states. With indirect rule, the goal of the imperial powers is to reach a situation whereby “resources and labour are privatized and opened to trade, labour discipline, and investments and contract law dominated by the European trading companies” and small colonial administrations that are installed by imperial powers.²⁵⁵ This imposition of European trade law is done through superficially recognising yet acutely modifying existing indigenous relations between constituent powers and constitutional forms as a strategy that bolsters other methods to consolidate imperial power, including involving the cooperation of indigenous elites through treaties and economic benefits to legitimize of Western trade law, dividing the unity of different sectors of the indigenous population, and forming an indigenous military force so that the indigenous population is prevented from resisting what has now

²⁵³ 480.

²⁵⁴ 481.

²⁵⁵ 482.

become the law of the land. This is one iteration of whites working with elites in South Africa to divide and conquer and to consolidate European privatization through law.

With informal rule, which according to Tully is “the dominant form of imperialism since decolonization,” imperial powers maintain their influence over indigenous people by recognising them as “independent” of and liberated from colonial rule, yet still maintaining legal, political and economic control over them through the reproduction of imperial access to indigenous “resources, labour and markets...thereby combining empire and liberty.”²⁵⁶ I imagine this is when constitutional democratization and neoliberalism have gained a powerful foothold and chokehold, where they accompanied by what Tully terms “open door or intervention imperialism”, which enables imperial powers to threaten punishment or the coercion of indigenous states into cooperation through the threat of military intervention when they don’t cede to this legal, political and economic dominance of imperial powers.²⁵⁷

The West self-identifies as the standard of civilization. Civilization is the process of conforming to the standards of the West, and it is also the fulfilment of this process.²⁵⁸ These days the process is called modernization or democratization, the goal of which is to attain the standard of being a modern constitutional democracy, just like the great powers of the West. Given that the self-proclaimed bearers of the duty to civilize, that is, modernize and democratize the rest of the world rests on the West, the West has the power to define what modern constitutional democracy entails according to its present and future expediencies.²⁵⁹ That is, the West decides whether or not a former colony is on the path to meeting or has met the requirements for modern constitutional democracy, and if not, then the West takes upon itself the responsibility to transform local political, legal, and labour systems and replace them with Western norms of political organisation and economic trade.²⁶⁰ The West consolidates this process of dispossession and replacement is by shaping the subjectivity of the colonised to align with Western forms of governmentality of Western ideals of individualism and capitalist competition/exploitation in the global sphere. This economic coercion has been devised by the West to regulate their own intra-statal competition for the resources of former colonies through mechanisms such as the League of Nations and the Mandate System.²⁶¹ The goals of these mechanisms, the “modernization and dependency

²⁵⁶ 482-483.

²⁵⁷ 482-483.

²⁵⁸ 483.

²⁵⁹ 484.

²⁶⁰ 484.

²⁶¹ 485.

project”, are taken further and facilitated by third-world elites planted by Western nations to curb popular indigenous efforts at liberation, and when these elites do not have quell “violence in self-defence”, the West, assuming its imperial right to lead and control, intervenes in what they term failed states or terrorism.²⁶² This justification for Western “intervention”, that is, Western *interference*, is based on the presupposition that the non-western ‘other’ is uncivil and untrustworthy because it is not already subject to a structure of civil law and the civilizing effects of subjection. Therefore, before democratic dialogue and negotiation over legal and political arrangements can begin a structure of western law has to be imposed. Constitutionalism precedes democracy.²⁶³

The transition of South Africa into a neoliberal constitutional democracy reveals deep connections between liberal historiography, colonial jurisprudence, and Western imperialism. The intricate connections between liberal historiography and colonial jurisprudence manifest in both legal and economic domains, creating a comprehensive system of Western dominance that continues to shape South African society. This understanding helps position the PNURA within the broader context of colonial jurisprudence and Western international jurisprudence, demonstrating how its approach, far from breaking with colonial patterns, actively reinforces them through modern legal and economic mechanisms.

The PNURA's role in perpetuating Western imperialism operates through Tully's grand discursive formation of control prevalent in liberal and transitional justice discourse. This framework legitimizes the imposition of Western-style governance structures while failing to adequately address underlying racial and economic inequalities. The process of constitutionalisation, as Tully describes it, frames South Africa's transition as inevitably directed towards a Western constitutional order, marginalizing alternative political formations rooted in African traditions. This transition, as evidenced through both the PNURA and broader economic reforms, demonstrates how Western legal and economic frameworks continue to shape post-colonial societies under the guise of democratization and reconciliation. In South Africa's *Shrinking Sovereignty: Economic Crises, Ecological Damage, Sub-Imperialism and Social Resistances*, Trevor Ngwane and Patrick Bond outline the economic dimension of this colonial continuity. Ngwane and Bond argue that the 1994 political liberation occurred during an "unfavourable" global conjuncture. The collapse of the USSR's support and decline of European social democratic traditions led to what they

²⁶² 486-487.

²⁶³ 490.

describe as the ANC's moderation and eventual adoption of a "home-grown structural adjustment programme." This economic capitulation parallels the PNURA's legal and constitutional frameworks, both serving to reinforce Western modes of governance and control. The governmentalization aspect of Tully's framework finds practical expression in the economic policies adopted post-1994. As Ngwane and Bond explain, capital abandoned the apartheid regime in favour of a "pro-capitalist neoliberal democratic regime". This economic transformation paralleled the PNURA's promotion of Western modes of governance and administration, effectively delegitimizing indigenous forms of social organization. This constitutional reorientation occurred alongside what Ngwane and Bond detail as the acceptance of numerous constraints on economic sovereignty. The ANC leadership's acceptance of IMF loans, relaxation of exchange controls, and reduction of corporate tax rates exemplifies how both economic and legal sovereignty were compromised even before the formal transition to democracy. This aligns with Tully's observation that former colonies become "subject and subordinate" to transnational and international legal regimes over which they have limited influence.

The PNURA's employment of discursive legitimation through concepts like "reconciliation" and "democratization" serves to normalize Western political and legal structures. This is in tandem with the process of citizenisation in South Africa, which excludes forms of belonging and participation that do not conform to Western models of citizenship. This exclusion is mirrored in the economic sphere, where, as Ngwane and Bond note, leading ANC intellectuals like Thabo Mbeki justified neoliberal policies through the concept of "two economies," effectively marginalizing alternative economic frameworks and perpetuating colonial economic structures. The practical consequences of this dual legal and economic subordination are significant. Ngwane and Bond point to the obligation to repay apartheid-era debt and accept disadvantageous trade terms, while the PNURA's framework ensures compliance with Western legal norms and standards. Together, these mechanisms perpetuate what Tully identifies as "low intensity constitutional democratization," integrating South Africa into global institutions where, as he notes, "the governed have no or little say, even though they are the vast majority of the world's population."

The colonial roots of this imperialism are evident in how both economic and legal frameworks continue traditions established during the age of conquest. As Ngwane and Bond argue, the fundamentals of capital accumulation, based on "super-exploitative extractive industries," were never genuinely questioned in the post-1994 era. Similarly, the PNURA's

legal framework perpetuates colonial power structures under the guise of progress and reconciliation.

4.7. Conclusion

Chapter 4 has made the argument that while the PNURA presented itself as a mechanism for reconciliation and transformation through its emphasis on forgiveness, truth-telling, and Ubuntu, it operated within and reinforced Western colonial jurisprudence and liberal democratic ideals. The discussion systematically demonstrated how the PNURA's narrative-building, its approach to victimhood, and its legal framework were fundamentally limited by their embeddedness in colonial thinking and neoliberal ideology. By contextualizing South Africa as a Western imperialist settler colonial racial polity, the chapter ultimately suggested that the PNURA's approach to transitional justice served to maintain rather than dismantle existing power structures and historical patterns of oppression.

The analysis began by examining the PNURA as an ethical predicament. The analysis revealed how the PNURA's approach perpetuated historical injustices through its emphasis on forgiveness as mandatory for reconciliation. It critiqued the problematic dichotomy of "good" versus "bad" victimhood, which reinforced power imbalances and limited justice. The chapter also scrutinized the superficial application of Ubuntu, questioning whether it genuinely reflected traditional African values or merely served as a facade for Western liberal ideals,

Thereafter, the chapter analysed the PNURA's grand historical narrative and its implementation by the TRC through transitional justice scholarship. The analysis revealed weaknesses in the narrative's construction, highlighting its incoherent and incomplete nature. Drawing on Teeger and Vinitzky-Seroussi's work, it demonstrated how the PNURA's framework manipulated collective memory. The concept of "plural truth" was exposed as a mythmaking device rather than genuine historical representation. Through Scott's concept of "ideological problem-space" and the AZAPO case, the discussion showed how the PNURA's commitment to liberal constitutional democracy constrained its approach to historical injustice.

Next, the argument was made that the PNURA exemplifies how colonial structures persist in "progressive" legislation by framing apartheid as the primary historical injustice

while obscuring earlier colonial atrocities. This selective historiography mirrors colonial discourse and jurisprudence from the beginning of European conquest, where European powers justified expansionism through of civilization and progress. Sitze's analysis underscores how this jurisprudence, derived from colonial indemnity, enables the state to evade accountability for usurping the sovereignty of citizens. However, I showed Sitze's critique to be constrained a Western constitutional lens. The chapter emphasizes the distinction between colonization and colonialism, highlighting how South Africa's settler colonialism aimed at displacing or subjugating the indigenous population reflects earlier colonial endeavours.

Moreover, the concept of the Racial Contract in South Africa elucidates how the country operates within a framework that systematically privileges white supremacy and perpetuates racial hierarchies. Charles Mills argues that the Racial Contract reinterprets the State of Nature differently for whites and black people, categorizing the latter as prepolitical or nonpolitical, thereby denying them full participation in the political state. This racialized framework is rooted in European domination and white supremacy, functioning as an exploitation mechanism that privileges whites over black people in political and social spheres. The PNURA, despite its purported commitment to equality and democracy, is fundamentally rooted in Western imperial thought, which inherently excludes indigenous people except as subjects to be subdued. This exclusionary nature, critiqued by Mills, underscores how European constitutional founding legitimizes settlement and domination over indigenous populations.

Mills's critique reveals how the Interim Constitution and PNURA, while professing equality, operate within a framework that perpetuates the Racial Contract. They provide a mechanism for formal legal equality while maintaining underlying structures of white supremacy, effectively subduing rather than empowering indigenous populations. The PNURA's approach to reconciliation and democratization follows James Tully's concept of "constitutionalisation," imposing Western constitutional models that marginalize indigenous governance systems and perpetuate colonial power structures. This ongoing settler colonialism is critiqued for reinforcing Western dominance and control while marginalizing alternative forms of historical redress rooted in African traditions.

Ultimately, Chapter 4 reveals that the PNURA's colonial jurisprudence facilitates the continuity of historical injustice, rather than eradicating it, urging a reconsideration of transitional justice mechanisms and their potential to either challenge or reinforce colonial

legacies. As the chapter concludes, it calls for a deeper examination of the historical roots of constitutional democracy and its exclusionary boundaries. By tracing the Eurocentric logic underpinning the conqueror-conquered antagonism, the chapter prepares to explore the doctrine of discovery in shaping South African law and politics. This exploration in chapter 5 will shed light on the enduring legacies of coloniality and Western imperialism, highlighting the complexities of power, sovereignty, and justice in South Africa's landscape. What is this logic, and how did it find its way to the shores of what was renamed the Cape of Good Hope by European colonialists? Chapter 5 is an attempt for provide an answer.

5. CHAPTER 5: THE LOGIC OF DISCOVERY

5.1. Introduction

Chapter 4 tracked the PNURA's jurisprudence's rootedness in colonial and Western imperialism. The chapter argued that despite its progressive intentions, the PNURA perpetuates historical injustices by framing apartheid as the primary injustice while obscuring earlier, deeper and current colonial injustices. It explored the political ramifications posed by the PNURA's alignment with the Racial Contract and the imposition of Western constitutional models that undermine indigenous sovereignty. The chapter concluded by highlighting the need to examine the historical roots of constitutional democracy and its exclusionary boundaries, setting the stage for Chapter 4.

In chapter 5, the logic behind the doctrine of discovery will be delineated, a crucial step in understanding the colonial underpinnings of the PNURA and the role of mechanisms like it in colonial contexts. The chapter seeks to expose the epistemic assumptions and beliefs that justify and legitimize global European dominance across time and space, with the ultimate goal of deconstructing the colonial logic inherent in transitional justice narratives and exploring alternative approaches. It will begin with the historical contextualisation of European conquest and colonization. This section will focus particularly on the influence of the Roman Catholic Church and canon law in shaping the early stages of colonial expansion. It then traces the evolution of the doctrine from canon law to international law, examining Renaissance-era scholarship on natural law and just war theory. This scholarship, the chapter posits, entrenched the belief that European sovereignty was natural and just, while indigenous sovereignty was inherently limited, and this belief remains the "unconscious" logic of the PNURA.

The chapter will explore key elements of the doctrine of discovery, providing a comprehensive analysis of its components. These include the roles of Christianity and civilization in justifying colonial expansion, the concepts of first discovery and occupancy, the principle of terra nullius (empty land), the right of pre-emption, and the systematic negation of indigenous sovereignty. Each of these elements contributed to the legal and philosophical framework that supported European colonization. Following this, the chapter will elucidate the justifications for European sovereignty over indigenous lands. This section

will discuss the European perspective on the nature of human beings and society, the concept of a universal law applicable to all nations, and the legal justifications for conquest.

Thereafter, both the legal principles of *jus ad bellum* and *jus in bello* will be extracted to demonstrate how legal theory was used to justify both the drive to conquer and the means of conquest. Following this explication, analysis will then focus on the coherence of the logic of discovery, examining Eurocentrism as the driving force behind conquest. The logic of discovery is fundamentally about negating indigenous sovereignty and naturalizing European conquest through law. Next, the chapter will explore how the logic of discovery functions as a legal enterprise, discussing the relationships between law, hegemony, and control; law and Eurocentric universalism; and law and cultural oppression.

The chapter concludes by demonstrating the epistemic correlation between the PNURA and the logic of discovery, arguing that the PNURA serves as a legal tool for perpetuating the negation of indigenous sovereignty and the naturalization of European conquest. This section will include case studies, such as Johnson versus M'Intosh and Richtersveld Community versus Alexkor Ltd, to illustrate how the logic of discovery continues to influence contemporary South African law transitional justice mechanisms and discourses. By thoroughly examining the historical, philosophical, and legal foundations of the doctrine of discovery, this chapter aims to provide a comprehensive understanding of its pervasive influence. This analysis will serve as a foundation for deconstructing the colonial logic inherent in transitional justice narratives and exploring alternative approaches to addressing historical injustices in colonial contexts.

5.2. The Commencement of the Regulation of European Conquest and Colonization

The influence that the Church enjoyed during the proliferation of European conquest and colonization in the 15th century was inherited from a time when the territory of what came to be known as Europe was characterized by “Latin or Western Christendom, a community of Christian kingdoms and peoples with a shared religious tradition” maintained and regulated by the Roman papacy.¹ The Popes of the Roman Catholic Church “vied with emperors, sometimes successfully, for supremacy over the Christian world and also to assert their rights

¹ BE Whalen "The Papacy" in RN Swanson (ed) *The Routledge History of Medieval Christianity* (2015) 6.

of direct lordship over the Papal States on the Italian peninsula.”² According to Christian scripture, before Jesus Christ ascended into heaven, he designated the Apostle Peter to “the care of all souls”.³ As one historical account explains, “[t]he Pope’s pre-eminence in matters of doctrine and sacramental orthodoxy rested upon this simple, compelling, and pervasive view of a past event... and Peter had passed that position down to his successors, the bishops of Rome.”⁴ Robert Williams cites Christ’s command to Peter, “Feed my sheep”, as the command that the Roman Church conceived to be the legitimation of the notion that the Pope’s divine mandate necessarily included non-Christians, as the “sheep” were considered to be constituted by all the peoples of the world.⁵ Thus, the Pope, the Church believed, “was responsible for infidels even though they might deny his lawful authority.”⁶

The regulation of European conquest during that period was influenced largely in part by the Roman Catholic Church’s justification of the Crusades between the years 1096 and 1271. The Crusades against the Muslims were sanctioned by the papacy based on their justification of Christians dispossessing non-Christians of their property and land.⁷ The key concern of Pope Innocent III (head of the Catholic Church from 1198 to 1216), a canon lawyer, was whether “infidel societies” were under natural law and thus had natural law rights that included property ownership and sovereignty, and if not, whether, consequently, “Christians [could] legitimately dispossess infidels of their lordship and property.”⁸ Innocent argued that the Crusades were justified because “the use of armed force was permissible in order to prevent or punish the persecution of Christians.”⁹ For Innocent III, infidels had the right “to elect their own leaders and to exercise dominium over property” but it was limited in accordance with the Pope’s divine mandate.¹⁰ European sovereigns and monarchs, therefore, often used “the Pope’s authority to legitimize their invasions of heathen territory; in expanding the Christian world by military conquest, these rulers were making real their jurisdiction which the Pope possessed in theory.”¹¹

² 5.

³ Williams *The American Indian in Western Legal Thought* (1992) 5.

⁴ Whalen “The Papacy” in *The Routledge History of Medieval Christianity* 6.

⁵ Williams *The American Indian in Western Legal Thought* 14.

⁶ 4.

⁷ Williams *The American Indian in Western Legal Thought* 44.

⁸ 45.

⁹ A Heraclides & A Dialla “The Origins of the Idea of Humanitarian Intervention: Just War and Against Tyranny” in A Heraclides & A Dialla (eds) *Humanitarian Intervention in the Long Nineteenth Century: Setting the Precedent* (2017) 18.

¹⁰ 13.

¹¹ A Anghie “Francisco de Vitoria and the Colonial Origins of International Law” (1996) 5 *Social & Legal Studies* 323.

The cosmology of European Christianity was characterized by a binary structure. In this framework, the celibate clergy served as the intermediary between God and human beings and wielded worldly authority. The binary opposition included the flesh-spirit dichotomy, with "spiritual redemption" sought to liberate humanity from the "sexual enslavement of flesh" due to Adamic Original Sin.¹² The overarching goal was to achieve salvation for entry into the Augustinian *civitas dei* (city of God), as outlined in the Judeo-Christian origin narrative and cosmogonic schema, reflecting theological absolutism.¹³ Medieval Christian geography held that the world was divided into two: the "habitable temperate zone of Europe" and the "inhabitable torrid zones" beyond "Cape Bojador on the bulge of West Africa".¹⁴ Through the delegitimization of the geographical framework of the medieval Church and its scholarship, the drive to procure gold and slaves using a route independent of the Islamic trade route monopoly was a reiteration of the same drive that had driven Portugal to conquer the people and territory of the Canary Islands via a "mode of juro-theological legitimation" overseen by the Pope on the basis that those non-Christian non-European peoples were heathens and idolators.¹⁵ Given this state of being, these indigenous peoples then were considered not sovereign over themselves and over their lands.

Portuguese and Spanish expansion had come to conflict in the 1300s over the right to conquer the Canary Islands.¹⁶ Portugal wanted to annex the territory and appealed to Pope Eugenius as the reigning Pope of the time to adjudicate the matter. In justifying its appeal to the Church to annex the Canary Islands, Portugal invoked the Pope's Petrine mandate to facilitate the proselytization of the Canary Islanders and to protect them from their susceptibility to the violation of their natural rights by other nations. In 1436, Pope Eugenius IV granted issued the Papal bull *Rex Regum*, which gave Portugal title to the Canary Islands, and to all new lands. In 1455 Pope Nicholas V issued the *Bull Romanus Pontifex*, which essentially gave Portugal's King Alfonso the right of conquest, that is, "the right of the victor, in virtue of military victory or conquest, to sovereignty over the conquered territory and its inhabitants."¹⁷ It stated that he had the right to all of Africa and allowed him to:

¹² S Wynter 14.

¹³ S Wynter "1492: A New World View" in VL Hyatt & R Nettleford (eds) *Race, Discourse, and the Origin of the Americas: A New World View* (1997) 14.

¹⁴ 9.

¹⁵ 11.

¹⁶ Miller (2011) *Lewis & Clark Law Review* 857.

¹⁷ S Korman *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (1996) 8.

invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and to convert them to his and their use and profit -- by having secured the said faculty, the said King Alfonso, or, by his authority, the aforesaid infante, justly and lawfully has acquired and possessed, and doth possess, these islands, lands, harbours, and seas, and they do of right belong and pertain to the said King Alfonso and his successors.¹⁸

In other words, *Rex Regum* granted Portugal title to the Canary Islands and any newly discovered territories, while Romanus Pontifex extended this by bestowing upon King Alfonso the "right of conquest." By framing Portuguese conquests as a holy mission to spread Christianity and combat non-believers, the papacy endowed these actions with a sense of divine righteousness. This endorsement not only legitimized Portugal's expansion but also set a precedent for other European nations to seek similar Papal approval for their colonial endeavours. Consequently, the papacy's support provided European powers with the moral authority to pursue territorial expansion, often leading to the subjugation and exploitation of indigenous populations, all under the guise of a divinely sanctioned mission.

Nonetheless, the place of the Church in Spanish society was not that of an absolute monarch, and the Church faced opposition internally and externally with regards to its authority and jurisdiction in the context of secular politics. Given that Spain had been in competition with Portugal over the Canary Islands when it lost the fight it decided to consider other territories to colonize. In 1492, King Ferdinand and Queen Isabella of Spain paid the Italian navigator Christopher Columbus to find a route to India for trade as well as acquire any lands he discovered on behalf of Spain.¹⁹ Portugal disputed Spain's claim to its acquisition of the Bahamas, the first territory on which Columbus made landfall, because of the territory's contiguity to the Azore islands, which Portugal already owned. To adjudicate the dispute, the Pope at the time, Pope Alexander VI, issued the Papal bull *Inter Caetera II*, which essentially divided the earth into two halves, one for Portugal and one for Spain, and

¹⁸ Nicholas V "The Bull Romanus Pontifex" in P De Noxeto *European Treaties Bearing on The History of the United States and Its Dependencies to 1648* / 20-26.

¹⁹ Miller (2011) *Lewis & Clark Law Review* 858.

gave them jurisdiction over the territories and their indigenous peoples for the sake of expanding the influence and proliferation of the Church.²⁰

Sylvia Wynter argues that in order to understand the perception of 1492 from the perspectives of the triad of populations involved in European conquest as it presented from the “1492 event”, one has to look to the “epochal shift” leading to that event.²¹ This epochal shift, she says, was the replacement of Europe’s theological subjective understanding with the intellectual paradigm of humanism.²² Consequently, “the *Christian* church, of which the earlier feudal states of Latin Europe had been the temporal and military arm, would now be made into the spiritual arm of these newly emergent absolute states.”²³ These absolute states would go on to reconfigure the world according to their “secularized” and “degodded” mode of subjective understanding.²⁴ Wynter explains Europe’s intellectual shift from the theological mode of subjective understanding to the humanist mode of subjective understanding the epochal transfer of the other-worldly goal of the *civitas dei* to the this-worldly goal of the *civitas secularis*.²⁵

The transition from the *civitas dei* to the *civitas secularis* was notably catalysed by challenges to the Church's cosmology, exemplified by Copernicus's assertion that the Earth revolved around the sun. For the humanist secular schema, authority rested with the state, displacing the clergy as the intermediary. The supraordinate goal became the attainment of the *civitas secularis* through "rational redemption" of the individual citizen.²⁶ This entailed adopting a behaviour-orienting ethic aligned with the political and economic interests of the state.²⁷ Individuals were seen as enslaved to the irrational or sensory aspects of their human nature. This perspective, characterized by civic humanism and political absolutism, emphasized the importance of state-centred values and governance.²⁸

This paradigm shift, by questioning established beliefs, contributed to the circumstances that rendered Columbus's journey not inevitable but conceivable. Columbus's maritime activities was propelled by multiple factors, including economic imperatives to repay his financial backers and political motives to bring glory to Spain, thereby elevating his

²⁰ 859.

²¹ Wynter “1492” in *Race, Discourse, and the Origin of the Americas* 13

²² 13.

²³ 13.

²⁴ 13.

²⁵ 13.

²⁶ 14.

²⁷ 14.

²⁸ 14.

societal status if wealth were to be discovered during his voyages. Beyond these pragmatic considerations, a theological orientation played a significant role in motivating Columbus. As a millenarian, he subscribed to the belief that the Second Coming of Christ was imminent, fostering a sense of urgency in contributing to the global dissemination and expansion of Christianity. In the new statal order under “crusading Christianity”, the notion of “discovery” held specific significance. Individuals of the state were granted particular privileges if they could demonstrate that they were the first among other European nations to land on non-Christian territory and claim it as their own.²⁹ Therefore, asserting to have 'discovered' such lands amounted to a form of *land-grant*.³⁰ Columbus's correspondence with the monarchy indicates that he believed it was his own intellectual realization that “God could indeed have placed land there in the West” which prompted the papacy to effectively grant sovereignty over the lands and peoples of the New World to Spain.³¹

Columbus's theological and ideological motivations guided his interpretations and interactions with the indigenous peoples he encountered and the land they occupied. Columbus's conviction in a divine destiny for the expansion of Christendom through territorial conquest prompted him to challenge existing geographic paradigms. Upon reaching foreign territories, Columbus perceived the indigenous peoples as "idolaters" and their lands as “legitimately expropriable”³². This perspective reflects an evolving logic of subjective understanding associated with the institution of the state, contrasting with the feudal order he had previously confronted.

5.3. Naturalising European Conquest: The Development of the Doctrine of Discovery

Miller identifies ten elements of the doctrine that were used to validate sovereignty rights.³³ I categorize them according to the necessary conditions for the acquisition of sovereignty through discovery, the contingent conditions for the possession of sovereignty through discovery, and the implications of the possession of sovereignty through discovery. The discussion of the elements of the Doctrine of Discovery I will give will reveal a key insight:

²⁹ 24.

³⁰ 24.

³¹ 24.

³² 28.

³³ 852-854.

there are two senses in which the Doctrine addresses the title of sovereignty despite its varied applications: title of sovereignty could either be *lost* as opposed to *acquired* or *lacked* as opposed to *possessed*. By virtue of being Christian and being civilized in conformity with their own Eurocentric norms, only European countries could *acquire* and *possess* sovereignty at the colonial encounter. In keeping with the doctrine of discovery, indigenous people could not possess sovereignty because they were not Christian were “uncivilized”, and thus they *lacked* sovereignty over the lands they occupied. Further, where they were considered to possess some level of limited sovereignty, as far as the terms of the Doctrine, they could *lose* this sovereignty. The right of discovery hinged on this proposition. Further in the chapter, I will elucidate how this insight informs the logic of discovery. In the section below, I give an overview of the different justifications for European colonizers’ acquisition and possession of sovereignty over colonized indigenous land.

5.3.1. Christianity and Civilization

At the outset, according to the doctrine, countries that qualified for the possession of sovereignty at all had to have *Christian* leadership.³⁴ A second qualification for the possession of sovereignty was that countries had to be *civilized* according to European standards, and if countries were not deemed to be such, Europeans then had guardianship and paternalism over them.³⁵ From the outset, these two elements set separated European conquerors from the majority of indigenous people in the world; however, even though they were necessary, they were insufficient for any claim to sovereignty over foreign land. While they were enough to conquer foreign land and peoples, they were not sufficient to acquire the recognition of other European countries as sovereign over those territories. They had to be complemented by certain *contingent conditions* for the acquisition and possession of sovereignty through discovery. These contingent conditions were (1) conquest; (2) first discovery; (3) actual occupancy and current possession; (4) terra nullius or (5) contiguity.

³⁴ 854.

³⁵ 854.

5.3.2. First Discovery and Occupancy/Possession

For conquest to result in the acquisition and possession of sovereignty over indigenous people and their territory, it had to be accompanied by the fulfilment of the condition of *first discovery* and the condition of *actual occupancy and current possession*.³⁶ In the absence of conquest first discovery of a foreign territory by a European country was not sufficient for the acquisition of sovereignty. The acquisition and possession of sovereignty through discovery required that the European colonizer show valid evidence of their occupancy in order to signify current possession. They used “words, gestures, and ceremonies that accompanied conquests, whether it be erecting crosses, planting flags, emblems, and insignia; uttering certain ritualistic pronouncements; or measuring, counting, assessing, and mapping the territory, the population, and the geography”.³⁷ Different countries used different methods to fulfil the requirement. For instance, the particular manner in which the English would show their occupancy and possession was through “building fences, planting gardens, constructing houses.”³⁸ In contrast, the Spanish were wont to kneel on the land to claim it, plant crosses, unfurl banners, and make and solemn declarations.³⁹ These declarations were at times read and proclaimed to the indigenous people they conquered in Spanish, another indicator that the agency of indigenous people was not a factor in the conquest of their lands but that these declarations or symbols of discovery were meant to express the need for European conquerors to fulfil the requirements set by themselves to achieve sovereignty through discovery.

5.3.3. Terra Nullius

A further condition for sovereignty through discovery was *terra nullius*. First discovery consisted of being the first Christian European country to arrive at an unoccupied territory, and a territory that was *terra nullius*, a Latin term denoting “land belonging to no one.”⁴⁰

³⁶ 852.

³⁷ Y Winter “Conquest” in *Political Concepts: A Critical Lexicon* (2012)

<<https://www.politicalconcepts.org/conquest-winter/#ref37>> (accessed 2 June 2021).

³⁸ P Seed *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* (1995) 39

³⁹ 16.

⁴⁰ C Boisen "The Changing Moral Justification of Empire: From the Right to Colonise to the Obligation to Civilise" (2013) 39 *History of European Ideas* 321; A Hinsdale *The Right of Discovery* (1888) 15.

Terra nullius derives from the notion of *res nullius*, making it a term for which property ownership is central. Burke Aaron Hinsdale explains the distinction between *res nullius* and *terra nullius* thus: *res nullius* was a term used by the Romans to refer to property that “never had had an owner, and property that had no owner at the time of the appropriation,” or, in the case of land, was abandoned or deserted at the time of “discovery.”⁴¹ Thus *terra nullius* can also denote “empty land”. Where indigenous people were occupying the land but were neither Christian nor European, they could not possess the land in the sense recognised by Europe, so their presence was inconsequential to sovereignty over the land.⁴² “The category *nullius*,” explains Steven Newcomb, “served the purpose of mentally assigning indigenous peoples to a category of political nonexistence so far as a completely free and independent nationhood was concerned.”⁴³ It can be surmised, therefore, that Europeans considered indigenous people themselves devoid of moral or legal agency; they were “empty people” on empty land, devoid of humanity, as it were, and thus their very humanity was negated in the conqueror’s negation of their presence.

5.3.4. Pre-emption

Those European nations that colonized foreign land could claim territorial rights up to the middle point between the land they colonized and that colonized by another European country.⁴⁴ This was the condition of *contiguity*. If the European colonizer fulfilled the necessary conditions of Christianity and civilization as well as a certain combination of the contingent conditions of conquest, first discovery, actual occupancy and current possession, *terra nullius* and/or contiguity, the “discovering” country had a legitimate claim to sovereignty over foreign people and their territory, including the right to regulate indigenous peoples’ trading rights. “This right, known as pre-emption, gave the discovering power a monopoly over land transactions with the natives, who were prevented from disposing of their land to any other European power.”⁴⁵ Pre-emption prioritised European wants over native agency; it was an explicit expression of the sovereignty that Europe imposed upon

⁴¹ A Hinsdale *The Right of Discovery* 15.

⁴² Miller (2011) *Lewis & Clark Law Review* 862; C Boisen “From Land Dispossession to Land Restitution: European Land Rights in South Africa” (2017) 7 *Settler Colonial Studies* 339.

⁴³ S Newcomb *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (2008) 132.

⁴⁴ Miller (2011) *Lewis & Clark Law Review* 853.

⁴⁵ Wolfe (2006) *Journal of Genocide Research* 391.

native people and their nullifying of the sovereignty of native people over themselves and their land.⁴⁶ It is important to note too that pre-emption was not primarily for the sake of limiting native sovereignty, as it is clear that native sovereignty was hardly ever recognised, but rather for consolidating individual claims to sovereignty against *other European nations*.⁴⁷

5.3.5. The Negation of Indigenous Sovereignty

The doctrine of discovery, as a legal set of binding principles, was not applied in the same way everywhere. The doctrine was applied in different ways by different countries according to their specific contexts. For instance, whereas Miller asserts in his comparative analysis that Portugal, Spain, England, and their colonies applied the doctrine, Patrick Wolfe points to how *terra nullius*, when it referred not directly to physically unoccupied land but to ‘uncultivated’ land, was not applied in Australia because Aboriginal people were not considered human enough to be worthy of have the idea of cultivation apply to them, and so were summarily executed like animals.⁴⁸ This was in contrast to the situation in North America, where “treaties between Indian and European nations were premised on a sovereignty that reflected Indians' capacity to permute local alliance networks from among the rival European nations.”⁴⁹ This critical fact demonstrates the veracity of the reality that the Doctrine was based on fixed on intra-European relations.

An analysis of the components of the doctrine of discovery reveals, crucially, that the doctrine, despite its diverse applications, addressed the concept of sovereignty in two distinct ways—either as something that could be lost rather than gained, or as something lacking rather than possessed. According to the doctrine, only European countries, identified as Christian and civilized by their Eurocentric norms, could acquire and maintain sovereignty during colonial encounters. In alignment with this doctrine, indigenous populations were deemed unable to possess sovereignty due to their non-Christian and "uncivilized" status, resulting in their lack of control over the lands they inhabited. Moreover, even if indigenous

⁴⁶ 391.

⁴⁷ RJ Miller *Discovering Indigenous Lands: the Doctrine of Discovery in the English Colonies* (2012) 25.

⁴⁸ RJ Miller et al *Discovering Indigenous Lands* 21; P Wolfe “Settler Colonialism and the Elimination of the Native” (2006) 8 *Journal of Genocide Research* 390-391.

⁴⁹ 390-391.

groups were considered to have limited sovereignty, the doctrine allowed for the possibility of losing this sovereignty. The premise of the right of discovery rested on this principle. The implications of the acquisition of the right of discovery were the European usurpation of native title and the limitation of native sovereignty and commercial rights. According to the Doctrine, the recognition of the occupation of the foreign territory by indigenous people did not necessarily translate into having full property rights over that territory. It was a right they either *lost* upon European discovery or a right which was *not recognized at all*, depending on the conquering European country.⁵⁰ The acquisition of the right of discovery involved the customized assessment of the sovereignty of indigenous people by individual European conquerors. Indigenous nations were considered by different European conquering countries to either not possess full sovereignty, possess partial sovereignty, or to not possess any sovereignty in choosing with whom to trade and “enter into diplomatic relations.”⁵¹ Moreover, once indigenous sovereignty had been usurped, the European country that had claimed discovery was given the exclusive right to buy land from indigenous people where that particular European conqueror permitted them to sell it; that is, the right of pre-emption.⁵² In essence, conqueror European nations had the exclusive authority over the land, labour and trade of indigenous people. That is, they had the exclusive authority to trade with indigenous victims, the exclusive authority to dispense of and withhold the rights of indigenous victims, and the exclusive authority to dictate how much autonomy or self-determination the indigenous people possessed.

5.4. Justifications For European Sovereignty Over Native Land

In the previous section, I explained that the doctrine of discovery was composed of certain conditions that, if met, resulted in the usurpation of indigenous land by European conquerors on legal grounds. This “usurpation”, in essence legalised conquest, meant that a European country could acquire and/or possess sovereignty of indigenous land *against* other European countries. Having discussed the rights that accompanied title of sovereignty, I now clarify the justifications grounding the claim of sovereignty of European conquerors over indigenous people and their land with the aim to later elucidate the centrality of sovereignty to the logic

⁵⁰ Miller (2011) *Lewis & Clark Law Review* 853.

⁵¹ 853.

⁵² 853.

of discovery. I will establish the philosophical and theological considerations of medieval international law scholars that Europeans appealed to in their conquest and colonization of foreign territories. I will begin with expounding the concepts of natural law and just war theory. Then I will determine the convergences and divergences of these scholars' theories and thereafter demonstrate their connection to their respective deliberations on the law of nations and what just war entails; that is, lawful and just conquest. Following that, I will discuss the implications of these deliberations on the perceptions of European conquerors about the sovereignty of indigenous people.

Papal bulls were not the final authority for the European conquest of land. In fact, Thomas McMahon asserts that Papal bulls were ignored by some countries at some points in time in their colonial endeavours.⁵³ For instance, even in Spain, the public conversation on the justification of colonial conquest proliferated Spanish scholarship, so the "Spanish Crown was always careful *not* to base its rights in the Americas exclusively on Papal donation."⁵⁴ The public conversation on the sovereignty of the conquered indigenous people prompted two things: the Spanish Crown sought to justify its colonial conquests not only theologically but also legally, and the investigation into whether indigenous people had rights that the Spanish had to respect unequivocally.⁵⁵ The philosophical principles underpinning its justifications for conquest survived beyond the decline of the authority of the Church in Europe. In particular, European conquest and colonization were fundamentally informed by the ideas of natural law and just war theory. Natural law and just war theory were pivotal for the justification they provided for the nature and protection of sovereignty.

5.4.1. On the Nature of Human Beings and Human Society

In 1512, Spain convened *juntas* or (assemblies) of jurists and theologians which we commissioned to replace the theological justification for Spain's sovereignty over the foreign territories it conquered.⁵⁶ Initially predicated on the condition of evangelizing and converting indigenous peoples to Christianity, this theological basis was abandoned and replaced by

⁵³ T McMahon "The Great Commission, Papal Bulls and the Doctrine of Discovery: from the 4th Century to Current Law" (2021) *SSRN* 58.

⁵⁴ Y Winter "Conquest" (2012).

⁵⁵ Winter (2012).

⁵⁶ Wynter "1492" in *Race, Discourse, and the Origin of the Americas* 35.

Aristotelian principles, particularly from Aristotle's *Poetics*. Specifically, as opposed to addressing indigenous people of their conquered territories as *idolators*, “the juntas adapted the category of *natural slaves* from Aristotle, in order to represent the indigenous peoples as ones who were *by nature different from the Spaniards*.”⁵⁷ They argued that inherent differences in “degrees of rationality” between the two groups, where natural law intended for the indigenous peoples of the Americas to be “natural slaves [while] the Spaniards had been also intended to be natural masters.”⁵⁸ This reconceptualization of Spanish sovereignty was rooted in the perceived “ostensibly ‘savage’ and irrational” nature of the conquered people.⁵⁹ This system aimed to portray cultural differences “geopolitically and socioenvironmentally determined” by natural law.⁶⁰

The scholarly work of Pope Innocent III, who I indicated earlier in this chapter to be a key advocate of the military conquests that were the Crusades, was greatly influenced by the writings of the Christian philosopher Saint Augustine (354-430 AD). Augustine appealed to the concept of natural law to guide his thought on the conditions for a just war. Augustine argued that human beings are wicked by nature (where did he get this? Wynter), so there was always a need for civil order and the correction of the transgression of natural law. The jurisprudential idea of natural law can be traced as far back as Greek and Roman antiquity to the philosophers Aristotle and Cicero. Natural law is often characterized as reasonable universal rules that originate “from a universal human nature”.⁶¹ In the Stoic and Aristotelian senses, nature refers to that which is “rationally ordered” in the universe.⁶² An example of a universally existent trait of human nature is human beings as social beings that desire to live together with others.⁶³ This being the case, our priority will be

the preservation of society, from which unfold the constituent parts of natural law: (1) abstinence from other people's property; (2) obligation to keep promises; (3) reparation for damages done to others; (4) and recognition that punishments are deserved for failing to do any of these things.”⁶⁴

⁵⁷ 34.

⁵⁸ 35.

⁵⁹ 36.

⁶⁰ 35.

⁶¹ Shaw *International Law* 13; Waswo (1996) *New Literary History* 10.

⁶² Williams *The American Indian in Western Legal Thought* 42.

⁶³ Waswo (1996) *New Literary History* 750.

⁶⁴ 750.

This reveals then why for Augustine, in order for a war to be just, it has to be in the correction of the violation of natural law rights to the defence of one's person or their property, or "to defend a state from invasion, to safeguard its safety and honour, to avenge injuries or to punish another state for its wrongdoing."⁶⁵ This is the natural law to which Pope Innocent IV referred and in the defence of which he believed a just war could be waged.

The key logic of Augustine's perception of natural law involves the notions of the defence and protection of one's being or property, as well as the corrections to the violation of property rights, such as retribution and punishment. From this discussion of Pope Innocent III's justifications for the Crusades, it is clear that the idea of natural law holds import in conceptualising which of a society's behaviours and practices require intervention by another society for the sake of justice and whether that intervention may be implemented with the suspension of the natural rights of that society's people. These are key concerns of laws regulating the relations between states, that is, what came to be known as international law. The focus of international law writes Anghie, "is the problem of how order is created among sovereign states."⁶⁶ European conquest and colonization presented a significant opportunity for European conquerors to refine the terms of engagement between sovereign European states "due in large part to their competing claims over territory and trading privileges in the new world and with the vexed question of the respective 'rights' of the colonizers and the colonized."⁶⁷ The principles that would have to be devised would be in relation to the international (intra-European) law of conquest and colonization.⁶⁸

5.4.2. "A "Law for All Nations"

It is key to mention here that the scholarly conversation on the rights of European conquerors to be elucidated below did not take place in order to create the doctrine of discovery but rather developed along with the principles of the doctrine. Wars of conquest were waged before the instantiation of what came to be known as international law. In fact, international law was fundamentally shaped by the colonial encounter, and, consequently, it was a law of

⁶⁵ Heraclides & Dialla "The Origins of the Idea of Humanitarian Intervention" in *Humanitarian Intervention in the Long Nineteenth Century* 15.

⁶⁶ Anghie (1996) *Social & Legal Studies* 323.

⁶⁷ Waswo (1996) *New Literary History* 744.

⁶⁸ Heraclides & Dialla "The Origins of the Idea of Humanitarian Intervention" in *Humanitarian Intervention in the Long Nineteenth Century* 15.

the “frontier”.⁶⁹ Thus, international law is a key legitimating discourse of colonialism.⁷⁰ The relationship between international law, the colonial frontier and settler sovereignty is constitutive. The idea of law as inherently authoritative is challenged by the fact of the unfolding production and reproduction of the notion of sovereignty at the colonial frontier, where space and temporality are not predetermined by pre-existing laws, but are defined by their existence outside pre-existing law, giving the colonizers at the frontier the opportunity to create a jurisprudence of sovereignty over the frontier as a state of exception. Consequently, international law was not inherently authoritative but is that continually legitimated by decisions made by colonialists as colonialism unfolds. Coupled with the violence often meted out on indigenous people at the frontier in order to actualize sovereignty, it can be deduced that the frontier was

a legal space of violence where European sovereignty was in the process of constitution, and other laws and other sovereignties were in the process of suppression, and where exceptions to the rule of law were unfolding to reveal a common template of dispossession across Europe’s jurisdictional orders in the never-ending process of the mutual constitution of law and nation.⁷¹

A towering figure in the early inception and development of Europe’s international law was Francisco De Vitoria (1483-1546), a theology professor and jurist at the University of Salamanca in Spain.⁷² He was one of the first scholars to theorize international law as deriving from natural law and not canon law.⁷³ He helped develop the international law that arose out of Europe’s colonial encounter with the indigenous peoples of the Americas.⁷⁴ He is also credited with having “the most popular official defence of... conquest.”⁷⁵ Vitoria’s work contemplates issues involving the nature of sovereignty, the identity of the sovereign, the sovereignty of indigenous people, and the rights and duties of the colonizers and the colonized.⁷⁶ His conclusions therewith have a direct impact on his answers to the questions, “who may wage war? When can war be waged? What limits must be observed in the waging

⁶⁹ A Anghie *Imperialism, Sovereignty, and the Making of International Law* (2012) 15.

⁷⁰ Evans (2009) *Australian Feminist Law Journal* 3.

⁷¹ 21.

⁷² Shaw *International Law* 16-17; A Fitzmaurice “Discovery, Conquest, and Occupation of Territory” in B Fassbender & A Peters (eds) *The Oxford handbook of the History of International Law* (2012) 12.

⁷³ Anghie (1996) *Social & Legal Studies* 324.

⁷⁴ 322.

⁷⁵ R Tuck *Natural Rights Theories: Their Origin and Development* (1979) 75.

⁷⁶ Anghie (1996) *Social & Legal Studies* 322.

of war? What constitutes a just war?”⁷⁷ Instead of trying to apply pre-existing principles of international law, he was refining the logic behind the international law principles of the time that were based on canon law as he did not believe that these principles were sufficient or even appropriate to address the legal challenges of the colonial encounter. American Indians, Vitoria believed, possessed reason and were therefore under the authority of natural law and not divine law or a divine mandate.⁷⁸ The Dutch jurist, humanist, lawyer and diplomat Hugo Grotius (1583-1645) was another primary figure in medieval scholarship whose “analyses and juristic opinions... were crucial” to the development of international law.⁷⁹ Grotius’s position on natural law and indigenous peoples was that by virtue of their social and civil nature as human beings, natural law dictated that they should strive to preserve the integrity of social relationships.⁸⁰ German philosopher and jurist Samuel von Pufendorf (1632- 1694) posited that universal human nature was characterized by the affinity for social organisation.⁸¹ As can be gleaned from this discourse on natural law, natural law was perceived to be composed by the adherence of human beings to the preservation of human society due to their nature as reasonable, social, and civil beings.

5.4.3. Justifying Conquest Through Law

As I have shown above, the concepts of the defence and protection of property rights and redress for their violation are central to the European understanding of natural law. European thought conceived of universal human nature as embodied by rationality, socialization and civilization, and thereby natural law was composed of principles and rules that preserved the integrity of this nature. I now turn to discussing the different justification for war as presented by the medieval scholars referred to in the previous section. Natural law as it applied beyond individual humans and extended to nations and societies was referred to as *jus gentium* (the Law of Nations). Accordingly, just war theory addresses the contravention of the Law of Nations. This discussion is key for the examination of the place that conduct in wars of

⁷⁷ 328.

⁷⁸ Boisen (2013) *History of European Ideas* 340.

⁷⁹ Shaw *International Law* 84; Boucher (2012) *European Journal of Political Theory* 84; Heraclides & Dialla "The Origins of the Idea of Humanitarian Intervention" in *Humanitarian Intervention in the Long Nineteenth Century* 21.

⁸⁰ Fitzmaurice “Discovery, Conquest, and Occupation of Territory” in *The Oxford handbook of the History of International Law* 842-843.

⁸¹ 854.

conquest had with the justification of conquest, which will illuminate whether indigenous people were considered to deserve conquest and, if so, in which manner it could be waged.

Medieval scholars of the justification for European conquest and colonization envisaged the Law of Nations as consisting of “rational principles common to all civilised nations” (European Christian nations) and which “regulated commerce and contracts [and] dealt with relations between states”.⁸² The international law regulating sovereignty over the territory was *jus gentium*, the idea of the Law of Nations. “The whole world,” writes Vitoria, “which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the Law of Nations (*jus gentium*).”⁸³ This Law of Nations, he reckons, contains a principle of “natural society and fellowship”, which confers on all people “the right to travel, visit, settle, trade, and mine in the territories of others - so long as they do no harm.”⁸⁴ To this he also adds the rights to proselytize and to be received with hospitality in the exercise of that right.⁸⁵ For Pufendorf, in contrast, the Law of Nations is based not on natural law but on the need for the self-preservation of nations. Contrasting viewpoints such as these shaped the scholarship concerning the reasons why war may be waged and the manner in which it may be undertaken, which is the core topic of just war theory. In just war theory, there are two interrelated elements: *jus ad bellum* (the conditions under which the war is justified) and *jus in bello* (the conditions of justified conduct in war).

5.4.3.1. Jus Ad Bellum: Justifying the Drive to Conquer

The scholars under current discussion conceived of just reasons for the waging of war distinctively. As has been previously indicated, the scholars were writing particularly in response to the European encounter with American Indians. Vitoria’s main assertion with regards to proper justification for Spanish conquest was that there were five rights through which they may conquer and wage war against the American Indians: 1) the right to self-defence, “2) the right of humanitarian intervention, 3) the right of hospitality, 4) the right to missionize, and 5) the argument based on the mental incapacity of the natives.”⁸⁶ If American

⁸² Shaw *International Law* 13; Waswo (1996) *New Literary History* 743.

⁸³ F Vitoria *Vitoria: Political Writings* (1991) 40.

⁸⁴ Waswo (1996) *New Literary History* 745.

⁸⁵ Anghie (1996) *Social and Legal Studies* 328.

⁸⁶ G Cavallar "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans" (2008) 10 *Journal of the History of International Law* 188.

Indians prevented the Spanish from exercising these rights of travel, trade, mining activities, and proselytization, “then Spain could 'protect its rights' and 'defend the faith' by waging lawful and 'just wars' against Indigenous peoples.”⁸⁷ This was Vitoria’s interpretation of the right of self-defence. In agreement with Vitoria, right causes for war, as per Swiss diplomat and international lawyer Emer de Vattel (1714-1767), would be “self-defence and the maintenance of one's rights.”⁸⁸

Pufendorf advocated for war as a natural part of human social life and as a legitimate way to secure the goal of a peaceful human society. However, war would have to always be the last resort in defending natural law rights. As far as Pufendorf is concerned, his explanation of self-defence as a just condition for the waging of war is that the “aim of force is not primarily to reform the offender, but to protect my security, property and rights: to secure such ends it is permissible to use whatever means I think will best prevail against such a person, who, by the injury done me, has made it impossible for me to do him.”⁸⁹ Grotius’ justification of the right to self-defence as a reason to wage war against an aggressor as primarily as a means of preserving peace, and thus war was considered just if it was a last resort. Further, he considered all measures to arrive at peace as acceptable.⁹⁰ Just causes for war in the service of peace, according to Grotius, were

- (1) defence of persons and territory, (2) recovery of what is due to the aggrieved state,
- (3) inflicting punishment on the wrongdoer, (4) sufficient justification, (5) costs and evil from the war not greater than the good that would come about from the war, and
- (6) war as a last resort.⁹¹

Pufendorf’s position shares with that of Grotius an insistence upon resort to war fulfilling the criteria of *jus ad bellum* (such as right intention and last resort). Of note is how Vitoria also introduces the idea of humanitarian intervention as a legitimate condition of war. Vitoria says this of the American Indians (whom he calls “the barbarians”):

these barbarians, though not totally mad, as explained before, are nevertheless so close to being mad, that they are unsuited to setting up or administering a commonwealth both legitimate and ordered) in human and civil terms. Hence, they

⁸⁷ Miller et al *Discovering Indigenous Lands* 14.

⁸⁸ D Boucher "The Just War Tradition and its Modern Legacy: *Jus Ad Bellum* and *Jus In Bello*" (2012) 11 *European Journal of Political Theory* 100.

⁸⁹ 100.

⁹⁰ 95.

⁹¹ Heraclides & Dialla in "The Origins of the Idea of Humanitarian Intervention" *Humanitarian Intervention in the Long Nineteenth Century* 16.

have neither appropriate laws nor magistrates fitted to the task. Indeed, they are unsuited even to governing their own households (*res familiaris*); hence their lack of letters, of arts and crafts (not merely liberal, but even mechanical), of systematic agriculture, of manufacture, and of many other things useful, or rather indispensable, for human use. It might therefore be argued that for their own benefit the princes of Spain might take over their administration and set up urban officers and governors on their behalf, or even give them new masters, so long as this could be proved to be in their interest.⁹²

Anghie explains that “the universal norms Vitoria enunciates regulate behaviour, not merely between the Spanish and the Indians but among the Indians themselves; thus, the Spanish acquire an extraordinarily powerful right of intervention and may act on behalf of the people seen as victims of Indian rituals.”⁹³ This right of intervention gives the Spanish the power to depict any part of Indian culture as a punishable violation of natural law or the Law of Nations. Vitoria indicated Vitoria writes:

From this, it follows that those who break the Law of Nations, whether in peace or in war, are committing mortal crimes, at any rate in the case of the graver transgressions such as violating the immunity of ambassadors. No kingdom may choose to ignore this Law of Nations, because it has the sanction of the whole world.⁹⁴

Grotius’s own view is that war is just if it is waged as a result of the violation of the law of nature and that the rights “to use force [and] to punish” belonged to both “natural individuals and states.”⁹⁵ Furthermore, this Spanish right of intervention extended to when the Spanish conceived of American Indians as unable to administer their own societies in accordance with natural law. In this instance, the European conqueror would be justified in conquering, governing and dominating the conquered indigenous people. Vitoria’s support of the condition of human intervention is contentious. For Grotius, it is unacceptable to conquer others on the pretext that it is for their own good, so he was actually against humanitarian intervention as a just cause for war, along with Vattel, for whom the welfare of a state did not constitute just cause for violent excesses in war.⁹⁶ According to Vattel, further unjust causes

⁹² Vitoria *Vitoria* (2001) 290.

⁹³ A Anghie (1996) *Social and Legal Studies* 327.

⁹⁴ Vitoria *Vitoria* 40.

⁹⁵ Cavallar (2008) *Journal of the History of International Law* 195-196.

⁹⁶ Heraclides & Dialla in “The Origins of the Idea of Humanitarian Intervention” in *Press Humanitarian Intervention in the Long Nineteenth Century* 16; Boucher (2012) *European Journal of Political Theory* 101.

for war would be “[v]engeance, hatred or the desire for conquest.”⁹⁷ That is, pure malice or greed. Pufendorf agrees with Vattel. He asserts that an unjust cause for war is the desire of amassing fortune and glory.⁹⁸

Another criterion that these scholars endorse for the waging of war or colonial conquest is the circumstance where the indigenous people are not using the land according to the commercial and agricultural norms of Europeans, particularly as it pertains to the matter of cultivation. As specified by Vattel, the acquisition of uncultivated land is just cause for war because cultivation of the land, says Vattel, “is an obligation of natural law.”⁹⁹ Accordingly, Vattel does not support conquest as a just cause in itself, but he allows it in the case where it is for the sake of appropriating the property of indigenous people if they do not affirm the right of the conquerors to the “uncultivated” land. This idea of cultivation as a necessary condition for land rights aligns with Grotius’s belief that no individual or group of people had the right to deny other people access to land that was not being used or cultivated in the European sense. For Grotius, settlers are entitled to occupy indigenous land “as long as occupation is effective.”¹⁰⁰ As per Grotius, if the American Indians barred the Europeans from settling in their land, “this would be to violate the natural law, and a just war could be waged against them.”¹⁰¹

5.4.3.2. Jus In Bello: Justifying the Means by which to Conquer

Even though European conquerors rarely acknowledged the sovereignty of indigenous people, some conquerors yet conceived of their conduct in war against indigenous people as requiring moral deliberation. While some scholars would be influenced by Grotius’s assertion that conduct in war had to be tempered with moderation and had to be humane, Pufendorf maintains that threats of unjust violence contravene the first Law of Nature which forbids hurting people unjustly and requires us to act humanely towards fellow human beings, although the specification of the notion of “humane” is not clear.¹⁰² However, Pufendorf

⁹⁷ Boucher (2012) *European Journal of Political Theory* 100.

⁹⁸ 98.

⁹⁹ Cavallar (2008) *Journal of the History of International Law* 206.

¹⁰⁰ 197.

¹⁰¹ Boisen (2013) *History of European Ideas* 339.

¹⁰² Boucher (2012) *European Journal of Political Theory* 96-99; Cavallar (2008) *Journal of the History of International Law* 199.

makes the point that, if in the conduct of war a country violated the Law of Nations by violating others' rights to self-preservation, this act led to the loss of the protection that the Law of Nations gives to the violator and gives the violator the right to wage war, meaning that any measures used to protect one's rights and conclude the war are justifiable.¹⁰³ Grotius broadens this reasoning by arguing contending that once war had been waged, the victor could claim the benefits that came with the right of conquest, that is "[l]and, goods, governments [and] privileges, debts, powers... possessed vis-a-vis other nations by the loser, whose people may be lawfully compelled to anything, including changing their language and their way of life."¹⁰⁴ Vattel does not endorse the maxim of achieving justice by any means necessary; that the ends of war (peace) justify the means of war, yet he does concede that there may be no way to ascertain which side of the hostilities have just cause for war, and in fact, that may be secondary to ensuring the "humane conduct of warfare."¹⁰⁵

5.5. European Conquest as a Scholarly Affair

Vitoria's lasting contribution to scholarship on European international law and its refinement is the positing of European international law and norms as universal. By prioritising "humanitarian intervention" and government administration of natural law as just causes for conquest, Vitoria redefined the logic of international law principles. However, "in Vitoria's understanding of the *jus gentium*, discovery was a legitimate basis to title but one could not claim a right of discovery in a land that was already occupied by another people."¹⁰⁶ To circumvent this complexity, European conquerors inspired by his writings would appeal to the fact that he expanded/redefined the reasons for conquest based on the incapacity of indigenous people and their supposed inferiority to Europeans. His response to the question of whether American Indians may lose territorial sovereignty through European conquest is that American Indians may lose territorial sovereignty provided that they violate the law of nations, specifically by denying the Spanish their rights to sojourn and trade and proselytize. The Spanish could defend these rights through war, which was actually in reality the basis for Spanish conquest of American Indians and their land. Cavallar commends Vitoria for this

¹⁰³ Boucher (2012) *European Journal of Political Theory* 98.

¹⁰⁴ Waswo (1996) *New Literary History* 751.

¹⁰⁵ Boucher (2012) *European Journal of Political Theory* 101.

¹⁰⁶ Fitzmaurice "Discovery, Conquest, and Occupation of Territory" in *The Oxford Handbook of the History of International Law* 842.

approach because it brought to the fore a universal natural law that is “applied to all human beings” and is “not limited in scope.”¹⁰⁷ In contrast, Shaw points out that “international law was founded on the universal law of nature and this meant that non-Europeans must be included within its ambit, however, Vitoria by no means advocated the recognition of the Indian nations as equal to the Christian states of Europe.”¹⁰⁸ In agreement with Shaw, Miller *et al* argue that the indigenous people’s violation of natural law principles given in the law of nations that is, *jus gentium*, gave Europeans the grounds for a just war against them, and “an ample excuse to dominate.”¹⁰⁹

Grotius’s legacy was distinguishing between discovery and occupation as cultivation and European agricultural norms.”¹¹⁰ Fitzmaurice argues that “Grotius opened up the distinction between discovery as seeing, and occupation, taking hold of [territory].”¹¹¹ Discovery, he argued, was insufficient for possession, and had to be accompanied by occupation and cultivation of the land to amount to possession of a territory. Grotius’s response to the question of whether American Indians may lose territorial sovereignty through European conquest is that American Indians have sovereignty over their land by virtue of the fact that their societal organization showed that they understand natural law and opposes the notion that the Papal bulls were legitimate sources of European nations’ sovereignty over indigenous people and their lands. Thus, he avers, neither discovery nor conquest confers legitimate claims to sovereignty and the dominion and jurisdiction still reside with the native population. Indigenous people held supreme jurisdiction over their own lands: “That is called Supreme, whose Acts are not subject to another’s Power, so that they cannot be made void by any other human Will.”¹¹² For Grotius, although indigenous people have sovereignty over their territory, they are bound by natural law and the Law of Nations to use only what was necessary for their sustenance and to allow others to cultivate unused territory. American Indians’ supposed violation of the law of nature is grounds for complete European domination and servitude and punishment of indigenous people as this violation results in the negation and revocation of the sovereignty of indigenous people over their territory. He gave significant credibility to the European practice of colonialism based on the

¹⁰⁷ Cavallar (2008) *Journal of the History of International Law* 185.

¹⁰⁸ Shaw *International Law* (2017) 17.

¹⁰⁹ Miller et al *Discovering Indigenous Lands* 14.

¹¹⁰ Cavallar (2008) *Journal of the History of International Law* 196.

¹¹¹ Fitzmaurice “Discovery, Conquest, and Occupation of Territory” in *The Oxford Handbook of the History of International Law* 843.

¹¹² H Grotius *The Rights of War and Peace Book 1* (2005) 259 .

priority of settler rights to occupy over the consent of the indigenous people. However, Cavallar seeks to point to what he considers the positive aspects of Grotius's thought, the concept of "a moral community of humankind."¹¹³

Pufendorf regarded property rights over the rights to settle on others' property as the most fundamental natural law right. For Pufendorf, indigenous sovereignty over land meant the right to self-defence, and, in opposition to Grotius' prioritization of settler rights, Pufendorf argued for indigenous people's "perfect right of ownership" and conferred on the indigenous people "the final decision on the question, whether he wishes to share with others the use of his property."¹¹⁴ Pufendorf argues that the sovereignty of indigenous people over themselves and their land is not dependent on an agricultural argument, as was the case with Grotius, but rather on their rights as individuals in a state of nature to exercise their natural liberties in defence against 'unjust violence'.

Vattel, like Grotius, had an agricultural argument for the limited sovereignty of indigenous people over their land. Vattel's take on indigenous people's sovereignty over their land is based on the idea that the earth belongs to all who live in it, and, consequently, sovereignty is contingent on the proper use of land (cultivation), and thus occupation is not enough. Naturally, considers Vattel, the proper purpose of land is to be used by humans to meet their needs, and only through cultivation is the absolute freedom of people from foreign intervention protected.¹¹⁵ Vattel affirms the appropriation of uncultivated land; this affirmation tended to support European conquest and colonization on the basis that European cultivation is that which brings value to land and meets the purpose of land. His distinction between occupation and sovereignty/dominion legitimated the appropriation of indigenous land on the basis that the presence of indigenous people on it was immaterial if they did not conform to European standards of cultivation. However, Vattel maintains that if European countries wanted to claim indigenous land, they could not rely solely on first discovery because first discovery, he asserts, is "merely *ius ad occupationem*, a rudimentary and inceptive title contingent upon follow-up effective occupation."¹¹⁶ In order for discovery and occupation to be legitimate, the Europeans would have to show that they are capable of better using the land, that is, cultivating it. Nevertheless, Vattel argues, discovery still plays an

¹¹³ Cavallar (2008) *Journal of the History of International Law* 195.

¹¹⁴ 198-199.

¹¹⁵ Miller et al *Discovering Indigenous Lands* 23.

¹¹⁶ Cavallar (2008) "*Journal of the History of International Law* 205.

important role because it could act as an *exclusive and legal claim* to conquer indigenous land against other European conquerors.¹¹⁷

Following this discussion, it is evident that the notions of natural law and the law of nations are central to the notion of civilisation and consequently, to the question of discovery. Discovery, being an exclusive right to conquer indigenous land against other European conquerors, is the expression of a particular logic of European sovereignty. In the following section, I extricate a logic of discovery that subtended the conditions, justifications and implications of the European doctrine of discovery.

5.6. The Logic of Discovery

In this section I argue that the logic of discovery is a philosophical comprehensive framework of codified legal principles and standards naturalising European conquest and negating indigenous sovereignty by the institution of law. The logic the doctrine of discovery was that European sovereignty is natural, and this logic depended on the legal negation of indigenous sovereignty. It was composed of three suppositions: global European sovereignty is natural, global European sovereignty is just, and non-European sovereignty is naturally limited.

5.6.1. “Global European Sovereignty Is Natural”

Despite the complexity in European international law, “the vocabulary of international law, far from being neutral, or abstract, is mired in this history of subordinating and extinguishing alien cultures.”¹¹⁸ The law takes on a double function: it is deployed as a weapon to negate indigenous sovereignty at the frontier, but also to validate the sovereignty of individual European countries within indigenous territory. European justification for sovereignty through discovery was preoccupied with “the natural”. Nature has a certain order, it was believed, and so what is natural adheres to this order. For human nature, this order manifests in rational thinking and sociability. Accordingly, human society has to be organized around

¹¹⁷ Fitzmaurice “Discovery, Conquest, and Occupation of Territory” in *The Oxford handbook of the History of International Law* 844.

¹¹⁸ Anghie (1996) *Social & Legal Studies* 333.

rational principles which were materialised in political formations instead of chiefdoms or tribes, for instance. These phenomena are the embodiment of *law*. Law was sovereign over all human interaction, and, in Europe, it manifested in canon law, natural law, and the law of nature. If what is natural is that which adheres to law, then law has the power to naturalize. These all contributed to the law of warfare as deliberated in the just war theory of European medieval scholars. The law of warfare, in turn, naturalized European conquest through discovery.

5.6.1.1. The Pope Says So

The papacy, through canon law, authorized European nations to rule over other countries in order to spread Christianity and increase the power of the Pope, who they perceived to be God's earthly representative. A key example of the applied canon law referred to in this chapter is the Papal bull *Romanus Pontifex*, giving Portugal the right of conquest; which is the right to “invade, search out, capture, vanquish, and subdue” foreign people and the consequent *acquisition* and *possession* of sovereignty over those people’s territory.¹¹⁹ As has been explained earlier in the chapter, the Pope was considered to possess the power to grant the right of conquest for the sake of “bringing infidels into the realm of Christianity.”¹²⁰ “Infidels” were not considered to be sovereign over their territories but rather under the jurisdiction and dominion of the Church, which meant that their territories could be conquered and their societies “extinguished” regardless of their occupation of those territories.¹²¹ This essentially meant that indigenous people, classified by Europe as “heathens, pagans and infidels”, were subhuman and *lacking* in the capacity to possess sovereignty.¹²²

¹¹⁹ Nicholas V “The Bull Romanus Pontifex” in P De Noxeto *European Treaties Bearing on The History of the United States and Its Dependencies to 1648* / 20-26.

¹²⁰ P Gümplová "Rights of Conquest, Discovery and Occupation, and the Freedom of the Seas: A Genealogy of Natural Resource Injustice" *Isonómia* 54 (2021) 6.

¹²¹ 6.

¹²² Newcomb *Pagans in the Promised Land* 108.

5.6.1.2. The Natural Law Says So

As I demonstrated in a previous section, for European conquerors, indigenous people either lacked the capacity to be sovereign or lost their sovereignty due to their contravention of natural law. Their ways of life were considered *unnatural* and *uncivilized*. Thus, for Europeans, their conquest was inherently prospectively justified (inchoate). As a result of the fact that the power lay in European conquerors' subjective perceptions of natural law and how the use of land may be appropriate or "civilized", individual European conquerors were assumed to automatically possess or acquire land rights where they did not recognise the sovereignty of indigenous people over the land they occupied. The justification for this conquest was placed on the "cultural and economic inferiority" of indigenous people "and the failure to meet standards of Western civilization."¹²³ The cultural inferiority referred to greatly pertained to the idea that natural law required cultivation of land, and so the indigenous people did not have the right to the land that they did not exploit for economic means.¹²⁴ Further, cultivation is what distinguished mere occupancy of the land from ownership of the land. Cultivation was a sign that the land was not *terra nullius*. The condition of *terra nullius* could be used by European conquerors to claim sovereignty through discovery if the land which indigenous people occupied was not utilized in according to European agricultural norms. Lack of cultivation meant lack of civilization, and that in turn meant a deviation from the natural law. This deviation from the natural law meant that the indigenous people were not the owners of their land, so the land was substantively empty; *terra nullius*. Due to the strategic conquests that European conquerors embarked on, Indigenous people were negated in order to *construct* the conditions of *terra nullius* as opposed to European conquerors encountering a territory devoid of human occupation. In this sense, the sovereignty of indigenous people was often *prospectively* negated.

5.6.2. "Global European Sovereignty Is Just"

Just war theory as it was theorised in Europe derived its logic from natural law, specifically the notion of universality (. As per varied European scholarship on just causes for conquest,

¹²³ P Gümplová (2021) *Isonomía* 8.

¹²⁴ Cavallar (2008) *Journal of the History of International Law* 206.

countries were entitled to invading other countries on the basis of self-defence for being denied entry, humanitarian intervention for the sake of “defending” the natural law rights of indigenous people, punishing indigenous people for the “contravention” of natural law, and for the sake of cultivating and civilizing a territory. Just war theory was grounded on the notion of a law of nations, *jus gentium*, that applied to all human societies, and it was used to “naturalize” and “legitimate” a “comprehensive, indeed inescapable system of norms” to which indigenous people were incapable of adhering.¹²⁵ Indigenous cultural difference was an unacceptable deviation from these European norms, in this regard and doomed them to perpetual exclusion from the realm of sovereignty by Europeans.¹²⁶ Europeans considered indigenous people to be “possessing universal reason and yet “backward, barbaric [and] uncivilized.”¹²⁷ The idea of a universal nature of an acceptable social organization thus condemned indigenous societies to the perpetual negation of their sovereignty. Indigenous people’s supposed contravention of this nature led European conquerors to bestow upon themselves the right of conquest and the right of discovery.

5.6.2.1. The Right of Conquest and the Right of Discovery

The right of conquest, “confer[red] the right of ownership through force of arms [and] bequeathed sovereignty over enemy lands and ownership of the enemy’s possessions to the conquering country.”¹²⁸ It was a right that legitimated political domination and complete the “violence and destruction” of indigenous societies.¹²⁹ Burke Aaron Hinsdale attempts a rigorous delineation of the right of conquest and the right of discovery by pointing out a number of essential features. Firstly, “the [r]ight of discovery was a rule which governed, not the relations of discoverers and discovered, but the relations of different discoverers.”¹³⁰ Secondly, discovery was not enough for sovereignty; it had to be consummated by “possession and use.”¹³¹ Before possession and use, the discovery would be inchoate, meaning that it was not substantive. Third, a European country could lose discovery could be lost if a European country did not occupy or possess a territory for an unspecified duration.

¹²⁵ Anghie *Imperialism, Sovereignty, and the Making of International Law* 21.

¹²⁶ 22.

¹²⁷ Anghie *Imperialism, Sovereignty, and the Making of International Law* 29.

¹²⁸ P Gūmplová (2021) *Isonomia* 4.

¹²⁹ 9.

¹³⁰ Hinsdale *The Right of Discovery* 19.

¹³¹ 20.

Fourth, discovery could be demonstrated through certain rituals to mark the claiming of a territory.¹³² Fifth, the right of discovery “carried with it the right to deal with the native occupants of the soil as each power saw fit.”¹³³ In essence, the right of discovery, as encapsulated by Petra Gumplova , is “the principle that title to a territory comes from its discovery and its occupation and an effective appropriation of its land and resources.”¹³⁴

5.6.3. “Indigenous Sovereignty Is Naturally Limited”

Discovery was a justification that European conquerors used for their usurpation of indigenous sovereignty over their land, and, in cases where a limited form of sovereignty (which is not sovereignty at all) was alluded to, the trade powers of indigenous people (pre-emption). Pre-emption imposed European sovereignty on the agency of indigenous people who were recognised as existing on the land. Crucially, pre-emption was an unmistakable demonstration of Europe's jurisprudential distinction between the *occupation* of a territory and the *ownership* of a territory. For Europeans, prior occupation did not translate to ownership, and this negated indigenous sovereignty. Negation, as explained by Gumplová, “derives from the Latin *negare*” and refers to “something without real existence, not real, a non-entity.”¹³⁵ Consequently, to negate an entity is to deny its existence or to treat it as the deprivation or lack of *that which exists*. Using the example of the Spanish conquistadors and their approach to Indian territory, Indian sovereignty was negated in two ways: through the “exclusion of the Indian from the sphere of sovereignty”, and through the ontological positioning of the Indian as the negation of sovereignty, those against whom sovereignty is properly exercised in the most extreme ways.¹³⁶ This ontological positioning mirrors that of canon law, where infidel or the heathen is a category based on negation: “not Christian, not positive, not good, not fully human, not civilized.”¹³⁷ The American Indians at the colonial encounter (and by extension all indigenous people conquered by Europe), when not physically annihilated, were relegated to nonexistence as they lacked that which Europeans

¹³² 25.

¹³³ 25.

¹³⁴ Gumplová *Isonomía* 12.

¹³⁵ Newcomb *Pagans in the Promised Land* 103.

¹³⁶ Anghie *Imperialism, Sovereignty, and the Making of International Law* 27.

¹³⁷ Newcomb *Pagans in the Promised Land* 103.

possessed: full humanity and full sovereignty. Not only was their land terra nullius, but so were they; not only was their land empty, so were they.

5.7. A Coherent Logic

It may be tenuous to speak of an overarching logic of discovery, especially because I have shown that the Doctrine was not consistently applied by European conquerors and that there was diversity of thought regarding the most relevant parts of natural law for international law. Patrick Wolfe rejects the idea of a single doctrine of discovery and posits instead that justifications for the claims that European conquerors made for conquest and colonization “were derived from a disputatious arena of scholarly controversy that had been prompted by European conquests in the Americas and is misleadingly referred to, in the singular, as the doctrine of discovery.”¹³⁸ Moreover, Miller points out that “Europeans occasionally disagreed over the exact meaning of discovery, and even sometimes violently disputed their divergent claims.”¹³⁹ However, Miller explains, “one principle they never disagreed about was that the Indigenous peoples and nations lost sovereign, commercial, and real property rights immediately upon their 'discovery' by Europeans (despite ceaseless adaptations to specific frontiers).”¹⁴⁰ For the Doctrine to regulate and control European conquest and colonialism, there had to be set elements which embody it. These are different from set rules that had to be strictly followed as the elements could be more contextually applied. These elements were derived from the logic of discovery, which is the naturalisation of European conquest through the legal negation of indigenous sovereignty. They are embodied in the principles: global European sovereignty is natural, global European sovereignty is just, and non-European sovereignty is naturally limited.

5.7.1. Eurocentrism: The Drive to Conquer

Marimba Ani’s analysis of Eurocentrism and the underlying ideological foundations of European cultural thought and behaviour, outlined in her 1994 book *Yurugu: An Afrikan-Centered Critique of European Cultural Thought and Behaviour*, provides a powerful lens

¹³⁸ Wolfe (2006) *Journal of Genocide Research* 391.

¹³⁹ RJ Miller et al *Discovering Indigenous Lands* 22.

¹⁴⁰ RJ Miller et al *Discovering Indigenous Lands* 22; Wolfe (2006) *Journal of Genocide Research* 390.

through which to understand the logic of discovery.¹⁴¹ The separation, control, domination, and expansionism that characterize European cultural ideology, as highlighted by Ani, are inextricably linked to the logic of discovery and its role in facilitating the negation of indigenous sovereignty and the naturalization of European conquest. Ani's critique lays bare the ideological roots that enabled the logic of discovery to become a tool of subjugation and imperialism in the hands of European colonizers.

Drawing from Swahili language concepts, Ani's core idea of "*asili*," meaning "origin" or "essence" in Swahili, was complemented by Ani's coined terms "*utamawazo*" and "*utamaro*," derived from Swahili words related to civilization, thought, and spirit essence.¹⁴² These latter concepts were positioned as manifestations emerging from and reaffirming the fundamental *asili*.¹⁴³ Within this model, the *utamawazo* (thought processes) of European culture derive from ideology and bio-cultural experiences.¹⁴⁴ Its *utamaro* (vital force) is characterized as domination, manifested through European-based structures imposing Western values and civilization globally, leading to the destruction of other cultures and languages under the pretext of progress.¹⁴⁵ As an example, Europe's historical narrative of "The Age of Exploration" is replete with tales of conquest, exploration, and colonization, reflecting a deep-seated drive for expansion and control. From the Roman Empire's relentless march across continents to the age of European colonialism, the continent has continually sought to extend its influence and assert its supremacy over other cultures and civilizations. This expansionist impulse is deeply ingrained in European cultural identity, shaping its collective consciousness and driving its actions on the world stage.¹⁴⁶

Ani's analysis sheds light on how this quest for power is not merely a historical artifact but a fundamental aspect of European cultural ideology. The European spirit, or *utamaro*, is characterized by an adventurous mindset fixated on conquest and exploration.¹⁴⁷ However, this adventurousness often transforms into a fanatic form of expansionism fuelled by an insatiable thirst for control and domination.¹⁴⁸ For Europeans, the pursuit of power is not merely a means to an end but an end in itself, driven by an inherent desire to impose their will upon the world. This obsession with power permeates every aspect

¹⁴¹ M Ani *Yurugu: An Afrikan-Centered Critique of European Cultural Thought and Behaviour* (2014).

¹⁴² 10-22.

¹⁴³ 10-22.

¹⁴⁴ 14.

¹⁴⁵ 11-14.

¹⁴⁶ 563.

¹⁴⁷ 561.

¹⁴⁸ 562.

of European cultural ideology, shaping its worldview and modus operandi in profound ways. Ani argues that the European concept of power is fundamentally centred on the ability to manipulate and control, to render others passive and submissive.¹⁴⁹ This principle of domination becomes the pivotal tenet underpinning all aspects of European cultural ideology, from politics and economics to religion and philosophy.

Moreover, the European spirit is intricately tied to the notion of expansionism, wherein the quest for power is inexorably linked to the conquest and subjugation of others. Ani contends that the existence of cultural "Others" is paradoxically essential for defining the European identity, as without them, there is no possibility of power.¹⁵⁰ This interdependence of expansionism and cultural diversity lies at the root of European imperialism, driving the continent's relentless pursuit of global dominance. Ani's critique further illuminates how Europe's obsession with power manifests itself in its cultural narratives and intellectual frameworks. Concepts like "scientism" and "humanism" are leveraged to justify and rationalize the subjugation of other cultures under the guise of progress and enlightenment.¹⁵¹ The European belief in its own intellectual superiority serves as a justification for imposing its values and systems of governance on other civilizations, perpetuating a cycle of imperialism and domination.

Furthermore, Europe's drive for power is not limited to physical conquest but extends into the realm of cultural imperialism. Ani argues that European nationalism is a form of cultural imperialism, wherein the imposition of European values and norms is seen as a means of asserting cultural superiority.¹⁵² This relentless quest to impose its cultural identity on others inevitably clashes with the self-determination of other cultures, resulting in conflict and resistance on a global scale. In conclusion, Ani's analysis offers a profound insight into Europe's obsession with power and expansionism, revealing how these driving forces have shaped its cultural identity and worldview. From ancient empires to modern nation-states, the quest for dominance has been a defining feature of European civilization, permeating every aspect of its history and shaping its interactions with the wider world. Understanding this complex interplay of historical, cultural, and psychological factors is essential for

¹⁴⁹ 563.

¹⁵⁰ 565.

¹⁵¹ 565-566.

¹⁵² 567.

comprehending the development of the dynamics of European cultural ideology and its enduring impact on global affairs, as discussed below.

There is a clear link between Marimba Ani's analysis of Eurocentrism and the logic of discovery. Ani's critique of European cultural thought and behaviour highlights the underlying ideological foundations that enabled and justified the logic of discovery employed by European colonizers. Ani's framework identifies the core essence (*asili*) of European culture as being dominated by the notions of separation and control. This separation creates dichotomies that negate and subordinate the "other" to European priorities. The logic of discovery, which facilitated the negation of indigenous territorial sovereignty and the naturalization of European conquest, can be seen as a manifestation of this very separation and control. By creating a divide between Europeans and non-Europeans and positioning the latter as the subhuman or non-human "other," the logic of discovery effectively negated the sovereignty and humanity of indigenous peoples. This separation allowed European colonizers to justify their conquest and control over these "others," subjugating them to European dominance under the pretext of progress and civilization.

Ani's concept of "utamarocho," the vital force of European culture characterized by domination, aligns with the underlying motivations behind the logic of discovery. The logic of discovery was a legal and philosophical framework designed to impose European values, systems of governance, and ultimately, European sovereignty on indigenous populations across the globe. This quest for domination, as Ani highlights, is a defining feature of European cultural ideology, driven by an obsession with power and expansionism. Moreover, Ani's critique of European *scientism* and *humanism* as tools to justify the subjugation of other cultures resonates with the logic of discovery. The idea of European intellectual and cultural superiority, which underpinned the logic of discovery, was used to rationalize the imposition of European sovereignty and the disregard for indigenous rights and self-determination. The logic of discovery, in essence, exemplifies the European belief in its own superiority and the perceived necessity to impose its values and systems on others, which Ani identifies as a form of cultural imperialism. By naturalizing European conquest through legal frameworks, the logic of discovery became a means of asserting cultural and political dominance over indigenous populations, perpetuating the cycle of imperialism and subjugation that Ani critiques, and that Kenneth Nunn exposes in the following section.

5.7.2. The Logic of Discovery as a Legal Enterprise

The Logic of Discovery is a powerful in the legal legitimation of European colonialism. Nunn offers a helpful articulation how law can act as a colonial enterprise. There are certain methods by which the European legal enterprise works to preserve European domination of the global world order from the beginning of European conquest to the present day. They are the modes by which the logic of discovery survives despite what has been deemed the postcolonial or decolonization era.

Building on Ani's analysis of European culture and its drive to dominate, in Nunn's critique of Eurocentricity, he advances the point that while it presents itself as universal and objective, law as a cultural production of Europe "organizes the world according to Eurocentric values, then defends and legitimates that organization, while simultaneously limiting the ability of African-centred activists to contest white cultural domination."¹⁵³ He argues for an understanding that Eurocentric law produces social malaise not merely as a consequence of individual actions or material conditions but from the fundamental nature of European society and culture.¹⁵⁴ Eurocentricity, per Nunn, is defined as "a conceptual system or world-view that is grounded in materialism and that exhibits an epistemology, aesthetics and ethos based in material values [and] consists of those values, attributes and modes of behaviour that are at the core of European-derived cultures."¹⁵⁵ The Eurocentric worldview fosters a culture centred on acquisition and narcissism that treats life as a "zero-sum game" grounded in self-interestedness, and thereby producing an intensely "competitive and aggressive" social norms and behaviour.¹⁵⁶ Nunn identifies this materialistic paradigm of Eurocentric societies as the hermeneutic source of the culture, which directs "all social productions within the culture," including *dichotomous reasoning; employment of hierarchies; analytical thought; objectification; abstraction; extreme rationalism; and desacralization.*¹⁵⁷ While these traits manifest differently in different contexts and are not unique to Eurocentric society, nonetheless their unique configuration in this specific form renders Europeans predisposed to have certain assumptions about the nature of reality and

¹⁵³ K Nunn "Law as a Eurocentric Enterprise" (1997) 15 *Law & Inequality: A Journal of Theory and Practice* 370.

¹⁵⁴ 370.

¹⁵⁵ 332.

¹⁵⁶ 332.

¹⁵⁷ 334-337.

society and their place within it that “reflect the materialism, aggression and individualism” that Eurocentricity generates.¹⁵⁸

Nunn presents dichotomous reasoning as the conflation of difference with opposition and incompatibility, leading to "either/or" conclusions and impeding holistic an understanding of reality that operates by other forms of juxtapositions between phenomena, such as “both/and” instead of just “either/or”.¹⁵⁹ Hierarchical thinking, as described by Nunn, involves organizing “dichotomies into hierarchies of greater and lesser value,” establishing grounds for relationships defined by power imbalances.¹⁶⁰ This concept suggests that in Western thought, binary oppositions often carry implicit value judgments, where one side is seen as inherently superior. These hierarchies have historically privileged reason over emotion and masculinity over femininity.¹⁶¹ Regarding negation, this hierarchical conceptual system implies a more complex relationship between opposites than simple absence. Rather than one pole being the mere lack of the other, it becomes a necessary counterpart - defining what the privileged term is not. The "inferior" pole thus serves as a constitutive outside, giving meaning and boundaries to the "superior" concept. In this view, the relationship between opposites is interdependent. The existence of one relies on the existence of the other, creating a dialectical tension rather than a vacuum. This challenges the idea of absolute opposites, suggesting instead a more nuanced interplay where each concept helps define and sustain the other within the cultural framework.

Nunn points to how analytic thought guides Eurocentric enquiry, which requires dismantling the composition of phenomena into their “constituent parts before each part is then “separately examined.”¹⁶² Objectification perceives “the world beyond the self” as composed of objects the value of which is to reflect the value or superiority of their owners over others, reflecting an ethos of the constant pursuit of dominance over others.¹⁶³ The Eurocentric element of abstraction, per Nunn, involves valuing the abstract over its manifestation in the material, leading to the reification of the abstract, and thus “abstraction [then] becomes a tool of control” used to present it as having an immanent authority that functions as a universal and indubitable presentation of truth.¹⁶⁴ The extreme rationalism of

¹⁵⁸ 338.

¹⁵⁹ 334.

¹⁶⁰ 335.

¹⁶¹ 335.

¹⁶² 335.

¹⁶³ 336.

¹⁶⁴ 336.

Eurocentrism, posits Nunn, assumes that all of existence can be explained purely “in rational terms”, emphasizing especially the primacy of the interplay between the principles of cause and effect, with the goal of being in control of directing the cause and effect.¹⁶⁵ Desacralization denies room for supernatural or sacred forces, and thus nature finds meaning or purpose only under the circumstance that it can be or is exploitable and amenable to human manipulation.¹⁶⁶ This means that nature exists for the purposes of human intent, and the secular worldview that separates that perceives of the natural as divorced from the supernatural results in a subjectivity that considers itself to be master over nature.¹⁶⁷

5.2.7.1. Law, Hegemony and Control

Nunn draws on three functions of Eurocentric law to elaborate on the manner in which this legal framework organises society and social relations for the purposes of the preservation and expansion of Eurocentric hegemony.¹⁶⁸ Firstly, law buttresses its control over white institutions and cultural norms through purposeful “organizing and directing”.¹⁶⁹ Secondly, it acts as a regulator of the acceptance or rejection of ideas and practices within Eurocentric culture in order to eliminate perceived "threats" through the means of “coercion or force”.¹⁷⁰ Lastly, law plays a role in giving legal credence to white institutions and normative behaviour by endorsing European practices as universal, reinforcing the perception of the “desirability and inevitability of white dominance.”¹⁷¹ Thus, law works to expand and maintain white dominance by organising the norms and practices of whiteness and its institutions, by protecting to said norms and practices and institutions from perceived threats, and by legitimating white dominance.

5.2.7.2. Law And Eurocentric Universalism

¹⁶⁵ 337.

¹⁶⁶ 337.

¹⁶⁷ West-Pavlov *Temporalities* (2013) 5.

¹⁶⁸ Nunn “Law as a Eurocentric Enterprise” 351.

¹⁶⁹ 351.

¹⁷⁰ 351.

¹⁷¹ 351.

Nunn's analysis is that the use of law to expand, protect and legitimate white dominance and Eurocentricity requires the employment of a dubious depiction of the universalism and normalising of the "European historical experience".¹⁷² In this manner, Eurocentric law is reified to exemplify that which is "rational, transcendent, objective, without ideological content and applicable to all."¹⁷³ This points to the fetishization of the rule of law in liberal constitutional democracies, where it is "depicted as a necessity [without which] chaos would reign and civilization would perish."¹⁷⁴ The absoluteness of European terms is equated with universality, and anything outside this framework is deemed absolutely different. While Eurocentric culture tolerates difference, it does so only within hierarchical structures, elevating European standards to a universal level.¹⁷⁵ This legalizing of conquests served the dual purpose of disarming victims and reinforcing the European self-image, highlighting the narcissistic aspects of Eurocentricity.¹⁷⁶ The European belief in linear progress and the superiority of white culture fuelled conquests, as they believed later historical developments were inherently superior.¹⁷⁷ Eurocentric legal ideologies justified these conquests and instilled a sense of pride and self-esteem. Nunn argues that the concept of "codified law" in European ideology equates civilization with order, using legality to impose European structures on those treated immorally.¹⁷⁸ Contrary to pragmatic perspectives that view law as a positive force for change, Nunn contends that the law primarily serves to extend white power globally. He challenges the idea that the law brings peace, suggesting that it is more about maintaining order and control. This raises questions about the relationship between law and justice, emphasizing the need to trust that justice will emanate from the rational application of law.¹⁷⁹

5.2.7.3. Law And Cultural Oppression

In the context of cultural oppression, Nunn argues that law is employed by Eurocentric culture to infiltrate and subjugate other cultural spheres, legitimating European domination

¹⁷² 358.

¹⁷³ 358.

¹⁷⁴ 358.

¹⁷⁵ 39.

¹⁷⁶ 41.

¹⁷⁷ 41.

¹⁷⁸ 41.

¹⁷⁹ 41.

through rulings and judgments. He suggests that contesting Eurocentricity requires a cultural struggle, advocating for the creation of a separate cultural base that values different cultural logics.¹⁸⁰ Summarily, Nunn posits that law, with its apparatus of justification, silently subjugates Africa and Africans by organizing the world according to Eurocentric values. It defends and legitimates this organization while limiting the ability of African-centred activists to contest white cultural domination. To resist Eurocentricity successfully, Nunn proposes interpreting the law through African cultural perspectives.¹⁸¹

Both the logic of discovery and Nunn's analysis underscore the central role of law in perpetuating European dominance and colonialism. They demonstrate how legal frameworks were used to justify conquests, regulate societies, and uphold Eurocentric values, ultimately contributing to the subjugation of non-European peoples. The logic of discovery involves the legal negation of indigenous sovereignty and the naturalization of European conquest through law. This legal framework provided the basis for European colonialism by justifying the assertion of European sovereignty over non-European peoples. Similarly, Nunn's analysis highlights how Eurocentric law functions as a tool for preserving and expanding European hegemony. He argues that Eurocentric law organizes society and social relations to maintain white dominance by regulating norms, practices, and institutions. This legal framework reinforces the perception of white dominance as desirable and inevitable while coercing conformity to Eurocentric cultural values. Moreover, Nunn contends that Eurocentric law employs a narrative of universalism to justify European superiority and conquests. This narrative equates European standards with universality, portraying Eurocentric culture as rational, objective, and transcendent. This parallels the logic of discovery, wherein European sovereignty is portrayed as natural and just, legitimizing the subjugation of non-European peoples.

5.8. The PNURA and Logic of Discovery

5.8.1. Johnson versus M'Intosh

¹⁸⁰ 43.

¹⁸¹ 49.

The Johnson v. M'Intosh case of 1823 arose from conflicting land claims in Illinois. In the 1770s, William Murray purchased land from the Piankeshaw Nation, despite the Royal Proclamation of 1763, which prohibited such transactions.¹⁸² Later, the United States acquired these lands through treaties and sold a portion to William McIntosh. Additionally, in 1775, Thomas Johnson and other British citizens purchased land in Virginia from the Piankeshaw tribe under a 1763 proclamation by the King of England. Upon his death, Johnson bequeathed this land to his heirs. In 1818, William M'Intosh purchased 11,000 acres of this land from Congress.¹⁸³ Johnson's heirs sued M'Intosh in the United States District Court to reclaim the land. The central dispute concerned whether private citizens could purchase land directly from Native American tribes. The court ruled that the Piankeshaw tribe did not have the right to sell the land, thus invalidating Johnson's initial purchase and the subsequent chain of title. In essence, the court ruled that "[a] title to lands, under grants to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773, and 1775, cannot be recognised in the Courts of the United States".¹⁸⁴ The court established the "Doctrine of Discovery," which stated that European nations gained sovereign and property rights over American lands upon "discovering" them. Explains Miller:

Marshall arrived at a succinct statement of the Doctrine of Discovery which he alleged that all European and American governments had accepted for acquiring land in North America: the 'principle [...] that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession'. He also stated that 'the original fundamental principle' governing American land titles and transfers of title was 'that discovery gave exclusive title to those who made it'.¹⁸⁵

Robert Miller explains how Marshall articulated the doctrine of discovery, which European nations used to regulate their claims in the Americas. Marshall outlined that "*discovery gave title* to the government by whose subjects, or by whose authority, it was made, against all other European governments".¹⁸⁶ This principle allowed the discovering nation the sole right of acquiring the soil from the natives and establishing settlements upon it.¹⁸⁷ Importantly, the doctrine affected relations between European powers but left the discoverer to determine its

¹⁸² Miller *Discovering Indigenous Lands*(2012) 53.

¹⁸³ 54.

¹⁸⁴ Johnson 21 US (8 Wheat) 543 (1823).

¹⁸⁵ Miller *Discovering Indigenous Lands* 55.

¹⁸⁶ 55.

¹⁸⁷ 55.

relationship with native peoples. Miller notes that this resulted in significant losses for indigenous peoples, including "the valuable governmental and property right of free alienability" and "significant sovereign and commercial powers".¹⁸⁸ These losses occurred "without their knowledge or consent" effectively allowing European powers to claim rights over indigenous lands and limit native sovereignty.¹⁸⁹

5.8.2. Richtersveld Community v Alexkor Ltd

The significance of this case lies in its close resemblance to a prominent legal case about indigenous land rights in South Africa. It is also, as supported by Edward Cavanagh, an illustration of how "the decision to define 'dispossession' with starting points and ending points has marginalised many South Africans from justice."¹⁹⁰ The Richtersveld Community sought restitution of land rights, compensation for mineral extraction, and environmental damage repair from state-owned diamond-mining company Alexkor Ltd, after they were unjustly removed from Richtersveld after diamond discovery.¹⁹¹ It appealed to the Restitution of Land Rights Act 22 of 1994. In terms of the Restitution of Land Rights Act "a community is entitled to restitution of a right in land if it was dispossessed of such right after 19 June 1913 as a result of past racially discriminatory laws and practices."¹⁹² The law allows communities to reclaim land rights lost due to racial discrimination after 19 June 1913.¹⁹³ The case involved a strip of diamondiferous land along the Western Coast of the Northern Cape, from which the community claimed they were dispossessed after diamond discovery.¹⁹⁴

Before the Land Claims Court, the plaintiffs sought restitution of ownership, compensation for diminished land value due to mineral extraction, and environmental damage repair or compensation. One of the reasons the LCC held for dismissing the plaintiff's case was that

"no indigenous land rights survived the [British] annexation. It held (para 37-41) that the Colonial Government regarded the Richtersveld as *terra nullius* because the inhabitants were insufficiently civilised and 'simply assume sovereignty of, and full

¹⁸⁸ 55-56.

¹⁸⁹ 55.

¹⁹⁰ E Cavanagh "Land Rights that Come with Cut-Off Dates: A comparative Reflection on Restitution, Aboriginal Title, and Historical Injustice" (2012) 28 *SAJHR* 451.

¹⁹¹ *Richtersveld Community v Alexcore Ltd* 2001 (3) SA 1293 (LCC).

¹⁹² *Richtersveld Community v Alexcore Ltd* Para 90.

¹⁹³ Restitution of Land Rights Act 22 of 1994.

¹⁹⁴ *Richtersveld Community v Alexcore Ltd*.

ownership over, the entire Little Namaqualand (including the subject land)'. As I will show, the LCC erred in finding that the Richtersveld was terra nullius and that it was so regarded by the Colonial Government, or that the land became Crown land.¹⁹⁵

Initially, the Land Claims Court dismissed the restitution claim, but the Supreme Court of Appeal overturned this decision, recognizing the community's customary law interest in the land and its mineral resources.¹⁹⁶ The Constitutional Court and the Supreme Court of Appeal ruled in favour of the plaintiffs, ordering restitution of ownership to the community, including rights to minerals and precious stones, as well as exclusive beneficial use and occupation.¹⁹⁷ The Constitutional Court judgement highlights several key points that challenge colonial-era assumptions about indigenous land rights and ownership. The judgement affirmed that "the Richtersveld community was in exclusive possession of the whole of the Richtersveld, including the subject land, prior to annexation by the British Crown in 1847."¹⁹⁸ This recognition is significant as it establishes the community's pre-colonial claim to the land. Importantly, the ruling states that the community's rights to the land "were akin to those held under common law ownership" and constituted a "customary law interest" and a "right in land" as defined by the Act.¹⁹⁹ This acknowledgment elevates indigenous customary law to a status comparable with common law, challenging the colonial-era dismissal of indigenous legal systems. It criticizes the earlier finding by the Land Claims Court that the community had lost its rights "because it was insufficiently civilised to be recognised," highlighting the racist underpinnings of such reasoning.²⁰⁰

The same logic of discovery that negates indigenous sovereignty in the United States' Johnson case pervades the negation of indigenous sovereignty in South Africa's Richtersveld case. While the South African case did not explicitly invoke the Doctrine of Discovery, it addressed the lingering effects of colonial dispossession. The Constitutional Court's decision aimed to correct historical injustices and recognized that the community's rights to the land survived annexation by the British Crown. However, the judgment is a partial victory due to the time cut-off, as the decision still reflects the "the decision to define 'dispossession' with starting points and ending points" based on the categories of racial discrimination after 1913. This judgement still reflects the negation of indigeneity and the naturalization of European

¹⁹⁵ *Alexkor Ltd & another v Richtersveld Community & others* 2003 BCLR 1301 (CC) Para 35.

¹⁹⁶ *Richtersveld Community v Alexcore Ltd*.

¹⁹⁷ *Alexkor Ltd v Richtersveld Community* Para 8.

¹⁹⁸ *Alexkor Ltd v Richtersveld Community* Para 8.

¹⁹⁹ *Alexkor Ltd v Richtersveld Community* Para 8.

²⁰⁰ *Alexkor Ltd v Richtersveld Community* Para 8.

conquest through the law of extinctive prescription. While it may seem that the state is recognising indigenous people and giving some space to customary law, the real reason Alexkor's actions were found to be unlawful does not come from within customary law itself. Instead, it draws from a Eurocentric legal framework established through settler colonialism. This legal system positions itself as the natural and legitimate source of authority, presenting its norms as universal and neutral. In doing so, it reinforces its own sovereignty while sidelining Indigenous legal traditions. Customary law is not treated as an equal system, but rather as something that must be interpreted through—and validated by—the Constitution. This approach effectively denies Indigenous sovereignty, reducing customary law to a supporting role within the dominant legal order shaped by colonial rule. In the final analysis, it is not much better than the judgement of the Land Claims Court that the indigenous people of the Richtersveld lost their land because of their lack of civilisation.

In *Johnson v M'Intosh*, the negation of indigenous rights occurred through the judgement that indigenous territorial rights are by nature limited because of the perceived negation of Christianity and civilisation of indigenous people. The judgement favoured the sovereignty of Europeans over the indigenous people of the US and affirmed that the rights or capacities rather, of indigenous people were limited to occupation. This was the negation of indigenous sovereignty through the naturalisation of European sovereignty. In *Richtersveld v Alexkor*, the negation of indigenous rights occurred through the negation of indigeneity as a category for territorial sovereignty because of the nature of South Africa as a sovereign state. The judgement favoured the rights of the indigenous people over the land in the sense that they could make decisions about it but only under the auspices of the South African constitution and not as indigenous people, meaning that the violation they suffered was not the conquest of sovereignty but the unfair racially discriminatory dispossession of rights in the land they occupied. This too is the negation of indigenous sovereignty through the naturalisation of European sovereignty.

The Richtersveld case is a prime illustration of the logic of discovery and its operations in matters pertaining to sovereignty over title to territory in conqueror South Africa. Through its narrative construction of legal “beginnings and endings” for land dispossession of the indigenous people of the territory, the PNURA uses the same logic to negate indigenous sovereignty and naturalize European conquest through Eurocentric law.

5.9. Conclusion

Chapter 5 embarked on a comprehensive analysis of the logic underpinning the doctrine of discovery and its enduring impact on legal frameworks, with a particular focus on its relation to the PNURA. The exploration began by examining the historical context of European conquest and colonization, tracing the development of the doctrine of discovery from its roots in canon law to its evolution into international law. This historical perspective provided the foundation for understanding the complex interplay between religious, legal, and philosophical justifications for colonial expansion.

The chapter then examined the key elements of the doctrine of discovery, including concepts such as Christianity and civilization, first discovery and occupancy, terra nullius, pre-emption, and the negation of indigenous sovereignty. By dissecting these elements, the chapter revealed how European powers constructed a narrative that legitimized their expansionist endeavours and systematically undermined indigenous rights and sovereignty. A significant portion of the analysis was dedicated to exploring the justifications used for European sovereignty over native lands. This included examining arguments based on the nature of human beings and society, the concept of a universal law, and legal justifications for conquest (*jus ad bellum* and *jus in bello*). The chapter highlighted the role of European scholars in developing and refining the logic of discovery through discussions on natural law and just war theory, demonstrating how academic discourse served to reinforce and legitimize colonial practices. At the core of the chapter's argument was the articulation of the fundamental assumptions underlying the logic of discovery: that global European sovereignty is natural and just, while indigenous sovereignty is naturally limited. These assumptions were shown to form a coherent logic that drove European conquest and colonization, emphasizing the role of Eurocentrism and the use of law as a tool for hegemony and cultural oppression.

The chapter then applied this understanding to an analysis of the PNURA, revealing how the Act, despite its intentions to address historical injustices, reiterates aspects of the logic of discovery in its approach to historical justice. This critical examination exposed the limitations of the PNURA in addressing the root causes of inequality and dispossession in South Africa. To illustrate this ongoing influence of the logic of discovery in modern legal systems, the chapter included examinations of relevant legal cases, such as *Johnson v M'Intosh* and *Richtersveld Community v Alexkor Ltd*. These case studies provided concrete

examples of how colonial thinking continues to shape legal decisions and approaches to land rights and indigenous sovereignty.

Throughout the analysis, the chapter offered critical reflections on the implications of the logic of discovery for indigenous sovereignty, land rights, and the pursuit of justice in post-colonial contexts. By systematically unpacking the logic of discovery and relating it to contemporary legal frameworks like the PNURA, this chapter aimed to reveal the persistent influence of colonial thought in transitional justice discourse. Building on Chapter 4's critical analysis of the logic of discovery and its implications for indigenous sovereignty in colonial conquest, Chapter 5 introduces the concept of "chronopolitics" to further unpack how this logic persists in the PNURA narrative. By examining the PNURA through the excavation of the logic of discovery in Eurocentric chronoscopy and historiography, Chapter 6 aims to reveal how the PNURA enables the negation of indigenous sovereignty through subtle narrative and temporal structures that continue to benefit colonial interests.

6. CHAPTER 6: THE PNURA TIME OF DISCOVERY

6.1 Introduction

Chapter 5 analysed justifications for European sovereignty over native lands, examining theories based on human nature, universal law, and conquest theories. It highlighted how European scholars developed the logic of discovery, legitimizing colonial practices through academic, religious and legal discourse. The chapter exposed fundamental assumptions underlying this juridical logic: the naturalness of European sovereignty versus limited indigenous sovereignty. These underpin European colonization, emphasizing Eurocentrism and law as a tool for conquest and continued racial domination. Applying this understanding to the PNURA reveals how the Act reiterates aspects of the discovery logic in its transitional justice paradigm, exposing its limitations in addressing root causes of inequality and dispossession in South Africa. This underscores the need for nuanced historical and legal reinterpretation of South Africa's history from an anti-colonialism perspective.

Chapter 6 uses the concept of "chronopolitics" to demonstrate how this logic of discovery persists in the PNURA narrative. By analysing the PNURA through the lens of Eurocentric chronosophy and historiography, the chapter extends the historical analysis to introduce valuable theoretical tools - such as the concepts of reversible and irreversible time - to critically examine how narrative and time structures in law continue to benefit colonial interests. By doing so, Chapter 5 deepens our understanding of how the logic of discovery operates in subtle ways within contemporary legal and political systems, particularly transitional justice discourse as revealed in the PNURA. The aim of the chapter is to establish the critical link between the logic of discovery, which naturalizes European conquest, and the PNURA. This connection is fundamental to understanding how contemporary legal and political systems, particularly in transitional justice discourse, continue to benefit colonial interests in various ways.

The chapter begins by exploring the concept of chronosophy - the conception of time as a function of human self-understanding and social identity. This discussion serves as a foundation for exploring the phenomenon of chronopolitics, focusing specifically on Eurocentric chronosophy and its far-reaching political implications. The chapter makes the argument that Western chronopolitics not only dominates global understanding of time and

history but also actively suppresses efforts to redress the loss of indigenous territorial sovereignty.

Following this, the relationship between historical narrative and political responsibility for historical injustice is examined in depth. This section introduces the crucial concepts of reversible and irreversible time, which are central to understanding how Eurochronopolitics operates within narrative structures to create a rupture between historical injustice and political responsibility. The chapter then explores the notion of a historicizing discourse, demonstrating how European colonizers have wielded chronosophy as a weapon to facilitate and perpetuate global European supremacy and sovereignty. This discussion lays the groundwork for understanding the coloniality inherent in the PNURA by explaining how Eurochronopolitical historiography functions to maintain colonial power structures.

The second part of the chapter focuses on a detailed analysis of how the PNURA's historiography negates indigenous sovereignty by naturalizing European conquest. This is achieved through a careful exploration of the PNURA's alignment with Eurocentric chronosophy and historiography, particularly in its application of reversible and irreversible time concepts. The narrativity of the PNURA's liberal historiography is elucidated in order to demonstrate its correlation with the logic of discovery, revealing how the act's temporal framing serves to limit the scope of addressable historical injustices. This analysis helps to unveil the ways in which the PNURA's temporal framework may inadvertently perpetuate colonial power dynamics by restricting the range of injustices considered relevant and addressable.

Thereafter, the chapter introduces indigenous epistemic resistance to Eurochronopolitics as a powerful critique of the PNURA's colonial logic. The jurisprudential principle of *Molato ga o Bole* is presented as a counterpoint to the PNURA's temporal framework. This principle, which resists the notion of a temporal lapse for historical redress, challenges the PNURA's approach to historical injustice and responsibility. It offers an alternative perspective that places injustice in a realm of irrevocable time, outside linear progression, suggesting that the debt incurred through historical injustices persists across generations until proper restitution is made. The chapter concludes by exploring the implications of applying *Molato ga o Bole* to the PNURA, exposing the limitations of its temporal framework and pushing for a more expansive understanding of historical responsibility. This critique opens up possibilities for addressing long-standing injustices

related to land ownership, sovereignty, and the enduring legacies of colonialism that may have been sidelined in the focus on apartheid-era reconciliation.

6.2. Chronosophy

Time is a fundamental concept that structures human experience and social organization. While it may seem straightforward, time is actually a complex subject that has been debated and theorized about for centuries. As Russell West-Pavlov notes, time "underpins virtually all aspects of everyday life" and is "riddled with issues of power and hegemony".¹ Temporality refers to how time is experienced, measured, and conceptualized in different contexts. Liaquat Ali Khan, for example, expands that time is conceived both linearly (past, present, future) and cyclically (recurring events like seasons or elections).² Some societies may measure time according to a lunar calendar, while others may adhere to a solar calendar. To demonstrate the elements of how time is experienced and described, Khan distinguishes between "point in time" and "duration of time".³ Many languages reflect this distinction, and he expands on this phenomenon thus: "[w]ords such as now, before, and after refer to points in time [while] words such as always, awhile, and a short time express durations of time."⁴

This concept of time at the root of the experience of temporality is what Julius Thomas Fraser terms *chronosophy*.⁵ Fraser asserts that "[r]egardless... of the method we employ to understand the idea or represent the feeling of time, our concern with it is always characterised by a specific human skill or knowledge (*Sophia*), pertaining to time (*chronos*), which skill and knowledge may therefore be called *chronosophia*."⁶ In other words, regardless of the methods we use to understand or articulate the notion of time, our engagement with it is invariably characterized by a particular human expertise or understanding, and this understanding enables human beings to conceive of the nature of duration and temporal order, for instance. Further, chronosophy is fundamental to personal and social identity. In order to describe their life, humans mention that which *they did* and

¹ R West-Pavlov *Temporalities* (2013) 3.

² LA Khan "Temporality of Law" (2009) 40 *McGeorge Law Review* 59.

³ 62.

⁴ 63.

⁵ B Bevernage "Time, Presence, and Historical Injustice" (2008) 2 *History and Theory* 149.

⁶ JT Fraser *The Voices of Time: A Cooperative Survey of Man's Views of Time as Expressed by the Sciences and Humanities* (1981) xvii.

that which *happened to them* within the realm of the temporal; that is, their history in the form of a historical narrative. Time and temporality are basic components of narrative since “narrative time” involves a key division within the idea of a story itself that separates the raw, causal, and chronological sequence of events from their representation in a narrative.⁷

Given that one experiences their temporality in a social setting, their chronosophy relates to others in a way that creates a social chronosophy. Temporality is not just about clock time, but about how societies organize, perceive, and value time. This broader concept of temporality acknowledges its deep connections to cultural, social, and political systems. How we envision time, our chronosophy, is socially determined when meaning is incorporated into or “deduced” from that chronosophy as a result of inter-subjective engagement with other people in the social formation. Chronosophy, therefore, further exists as a mental historical outlook shared by members of a community. A community’s chronosophy influences their identity through where they perceive themselves to be in time and history. Without a chronosophy, historical understanding is not possible since a chronicle or a narrative operates only with the connection of events or temporal phenomena; that is, chronicles and narratives require a perception of continuity and discontinuity in the passage of time. This chronosophy affects how they interpret and understand history and how that interpretation influences their interaction with the world, knowing what is possible and what is not. It enables self-understanding, and a group identity and understanding of the group identity and one’s place in it, as well enabling an understanding of the group identity and the group’s place in the world and in relation to other groups. Social identity, then, garners its form through the society’s chronosophy and governing collective historical narrative about that which it has *commonly* experienced through time, and the historians of a society are the arbiters of this common narrative chronosophy.

A society’s common chronosophy fundamentally influences the way in which that society orders its historical narrative; that is, the periodization of its historiography. When writing history, historians’ reporting of “historical facts” will depend on the sequential logic that the historian identifies, and this identification is predetermined by their personal and social chronosophies. Invariably, historians in a community are most often considered a credible authority about a community’s history and purveyors of the social chronosophy. They must categorise the events by kind and structure and also devise a method by which to

⁷ T Martin “Temporality” (2016) *Oxford Research Encyclopedia of Literature* 1.

categorise and interpret historical data, and these choices are directly relate to their personal and social chronosophy. The historian then becomes a custodian of the history of a certain society and contributes to the communal perception of the continuity of its identity through time. In this manner, the historian contributes to the character and legitimation of the social chronosophy. In the section that follows, I will explain how this periodization manifests in order to later showcase the chronosophy of the PNURA by exploring the periodisation in its narrative.

6.3. Continuity and Discontinuity in Narrative Time

Periodization rests on the belief that time is measurable and consists of temporal units (periods) that are endowed with a unique character, and these units can be described in multiple ways.⁸ In *The Social Structure of Memory*, Eviatar Zerubavel delves into how societies conceptualize and organize history, posing questions about cultural interpretations of past events and their implications. Zerubavel highlights how societies construct narratives and establish continuity or discontinuity in historical timelines. His analysis sheds light on the social and cognitive processes involved in the construction of historical narratives and their cultural significance.⁹ Human memory, argues Zerubavel, structures unstructured events into coherent historical narratives through a specific periodisation technique. There is a certain conceptual infrastructure required to cut up historical time, and historical narratives utilise “conventional schematic formats that help us mentally string past events” according to social traditions of remembering.¹⁰ These narratives, emplotted to understand historical events, construct continuity between events retroactively.¹¹ Narrative continuity can be constructed through a linear or cyclical chronosophy.

6.3.1. Unilinear Narrative Continuity

⁸ Zerubavel *Time Maps* 202.

⁹ 11.

¹⁰ 7.

¹¹ 11.

Zerubavel identifies two prevalent types of historical narratives based on linear chronosophy: progressionist and declinist.¹² These narratives are not mere reflections of historical trends but rather mental constructs shared by mnemonic communities.¹³ Progressionist narratives emphasize improvement over time typically exemplified in narratives where “modern”, “civilized” societies are compared to so-called “underdeveloped”, “primitive” societies.¹⁴ This progressionist narrative style, argues Zerubavel, “is a brainchild of the Enlightenment” emerging from modernity.¹⁵ Essentially, progress narratives align with stories of persistent triumph, growth, glory or advancement and tend to reflect romantic emplotments.

While progressionist narratives are backward-looking in the sense that they trace progression until the present, declinist narratives, in contrast, are forward looking and predict depict loss and deterioration.¹⁶ For example, proponents of regression in social formation and civilization might argue that modern technological advancements and societal complexities have led to a deterioration in moral values and social cohesion. They may cite historical periods characterized by simpler social structures and closer-knit communities as examples of an idealized past. This regressive perspective might view contemporary urbanization, globalization, and technological dependence as contributing to societal decay rather than progress. Declinist narratives find expression in stories about humiliation, depression and loss and tend to reflect comic narrative emplotments or tragic narrative emplotments.

Progressionist and declinist narratives reflect different forms of shared social traditions of remembering. A key similarity of theirs is that they reflect linear time; and yet, their emplotments do not necessarily make or portray continuities between events as smooth. While continuity is a given, there may be periods in the narrative that show that progression, for instance, while retroactively perceived to be the governing theme, there were moments in the narrative where it was not predictable or there was a temporary decline, in which case that narrative would be reflecting a Comic emplotment to a particular degree and the motif of *warning*. Likewise with the declinist narrative, while continuity defines the general plot of the narrative, there are moments in the narrative that indicate hope for the future if the

¹² 11.

¹³ 14.

¹⁴ 15.

¹⁵ 15.

¹⁶ 16.

warning of the trajectory of the past and present is heeded, once again reflecting a comic plotment with the motif of *promise*. These "zigzag narratives," as Zerubavel argues, combine upward and downward trajectories, characterized by rise-and-fall or fall-and-rise scenarios.¹⁷ They frequently incorporate dramatic turning points, symbolizing significant shifts in historical trajectories. Such narratives illustrate the complexity of historical interpretation and the dynamic nature of societal development, highlighting the interplay between progress and regression within mnemonic communities' collective memory.¹⁸

The chronoscopy used in progressionist, declinist and zigzag narratives assumes that the passage of time occurs in a unilinear fashion. Unilinearity, argues Zerubavel, has as its "essence" the vision of a serial progression, a one-dimensional sequence of unmistakably *successive* episodes."¹⁹ In Western discourse, unilinear narratives depict cultures hierarchically on a ladder with modernity at the peak and as the telos of history.²⁰ For example, unilinear narratives of cultural evolutionism depict cultures on a hierarchical ladder, with "lower" cultures depicted as "living fossils, essentially frozen relics of *our* ancient past."²¹ These narratives often impose a teleological view of history, attributing purposeful design to cultural evolution. In contrast, multilinear narratives offer a non-teleological perspective on the passage of time. A case in point is wherein, instead of viewing cultural development as a linear progression towards modernity, scholars analyse the interactions and exchanges between different societies over time. These interactions would be in the form of the spread of ideas, technologies, and customs, resulting in the exchange of knowledge and cultural practices among diverse populations. By examining the interconnectedness and diversity of cultural trajectories, researchers employing multilinear narrative approaches gain insights into the dynamic and multifaceted nature of human history, highlighting the absence of a singular teleological direction and emphasizing the complexity of historical processes.

¹⁷ 7.

¹⁸ 18-19.

¹⁹ 20-21.

²⁰ 21.

²¹ 21.

6.3.2. Cyclical versus anti-linearist/progressive narratives

Cyclical and anti-linearist narratives, rejecting linear progression, see history repeating or “rhyming”. Mark Twain's quote, "history doesn't repeat itself, but it rhymes," encapsulates this notion, suggesting that historical events may not recur identically but bear resemblance.²² This historical "rhyming" suggests essential similarities between past and present, creating a sense of *déjà vu*. Recurrence narratives often blend similar characters or situations, structuring history. These repetitions, much like rhymes, allow us to understand and merge historical cycles, highlighting the familiar patterns that continue over time despite different appearances of events.²³

To understand “how history is typically organized in our minds,” Zeruvabel suggests that we need “a sociomental topography of the past.”²⁴ Each community or social collective has a time map. In much the same way that geography maps show the topography of a certain territory – its natural features and how they are organised in relation to one another – time maps depict the temporal organization of the past, present and future in relation to one another.²⁵ In the same way that the geography map has selected boundaries around the territory that it represents, the time maps represent select temporal boundaries around the history of the community. That which comes before the beginning of the narrative is considered temporally real but historically irrelevant.²⁶ Geography maps answer the question: where am I in *space*? Time maps answer the question: in which period am I in *history*, and what is the temporal relation between this period and others? To this extent, periodization plays the role of defining historical origins, continuities, discontinuities and *closures*. Historical continuity and discontinuity are imperative for narrative formation because they demarcate the nodal points at which the historical narrative develops from one stage to another and imbues the narrative with structural coherence, aiding in the understanding and rasp of the narrative as disjointed parts made into a meaningful whole.

²² 25.

²³ 25.

²⁴ 1.

²⁵ 109.

²⁶ 94.

6.4. The Chronosophy of the PNURA Narrative

The PNURA's narrative strategy, as demonstrated below, aims to create a collective memory that acknowledges "the painful past" while fostering hope for a better future. This approach serves the TRC's goal of promoting reconciliation by providing a historical framework that adjures South Africans to confront their past while envisioning a more positive shared future. The periodization of the PNURA, as explained in the Report, can be said to distinguish between three epochs: a distant past (from conquest to 1960), a contemporary era (from 1960 to 1994) and the future (1994 onwards). With regards to the distant past, the Report is replete with references to conquest and colonization but relegates them to a distant past. For instance, the slavery of the 1600s at the Cape, "wars of dispossession and colonial conquest", the San and Khoi-Khoi genocide, the Mfecane, the "South African War" and the Herero genocide in the early 1900s are all depicted in the report as relevant but distant, and relevant only insofar as they provide context for the *actually relevant* and *recent* period, post-1960 to 1994.²⁷ In fact, while the Report acknowledges that the "recent" history was preceded and subtended by the white supremacist logic propagated and realized in colonial conquest, it is asserted therein that the "contemporary history...with which we have had to come to terms" began in 1 March 1960 and ended on 10 May 1994.²⁸ This period from 1960, the legislation of which is explained in the Report as "of a qualitatively different type", was ushered in by the Sharpeville "disaster" and culminated in the inauguration of Nelson Mandela as president of South Africa.²⁹ Although it seems to be an arbitrary date given that the report does acknowledge prior human rights abuses, the historian Colin Bundy posits that this period was chosen because of the maximization of state repression through brutal and authoritative policies that heightened the occurrence and international notoriety of the state's human rights violations.³⁰ In the report, it is explained therein that one of the reasons underpinning this periodization was that it was "possibly the worst and... the bloodiest in the long and violent history of the human rights abuse in this subcontinent [and] the climactic phase of a conflict

²⁷ Truth and Reconciliation Commission of South Africa Report 25-27.

²⁸ 156.

²⁹ 1, 29.

³⁰ Colin Bundy "The Beast of the Past" In W. James, & D. P. van der Vijver (eds.) *After the TRC: Reflections on Truth and Reconciliation in South Africa* 17.

that dated back to the mid-seventeenth century, to the time when European settlers first sought to establish a permanent presence on the subcontinent.”³¹

The TRC’s narrative of South African history can be understood as a linear "zigzag narrative," combining elements of both progressionist and declinist perspectives to ultimately convey a message of hope for the future. This approach posits a complex historical trajectory and creates a narrative that acknowledges past injustices while paving the way for reconciliation, a periodization that provides “an account of the genesis of the South African nation that is commensurate with the origins of apartheid.”³² The distant past period is presented as a long decline, characterized by colonial conquest, oppression, and the gradual erosion of indigenous rights and historical justice claims. However, it also includes moments of resistance and resilience, creating a zigzag pattern within the overall declinist trajectory. The contemporary period phase represents a sharp downward turn, with the formalization of apartheid and the “maximization of state repression”. While marked by increased state repression and violence, it also saw the growth of the anti-apartheid movement, international solidarity, and eventual negotiations for a peaceful transition. This era embodies both the motif of "warning" (the consequences of continued oppression) and "promise" (the potential for change through resistance and dialogue). “The future” period is meant to culminate in reconciliation, representing an upward turn in the historical trajectory. This zigzag narrative depicts an understanding of the past incorporating both the "warning" of continued injustice and the "promise" of a better future.³³ By periodizing the narrative in this way, the TRC creates the impression that “only a reconciliatory politics could provide the necessary moral and lasting closure of violence, the inauguration of which symbolized a new order of existence coinciding with transition to the new regime.”³⁴

Time serves as a structuring principle of narrative, providing a framework within which stories unfold and gain coherence. These narratives, in turn, give meaning to the law by providing the context and justification for legal principles and actions. The law then legitimizes these narratives by codifying them into doctrines and statutes that enforce and perpetuate the underlying stories. Consequently, the legislation concerning liability and responsibility for injustice emerge from the legally legitimated narrative. As elucidated in

³¹ 24-25.

³² Moon “Narrating Political Reconciliation” 270.

³³ Zerubavel *Time Maps* 18-19.

³⁴ Moon “Narrating Political Reconciliation” 270.

chapter 2, while the PNURA narrative is primarily comic, it also consists of romantic and tragic elements. The romantic narrative aligns with reversible time because it assumes that people and nations can correct for historical injustice and once that is done, there is no longer any need to address the past and the past and present are severed forever. In transitional justice discourse, this would take the form of “turning the page” or “closing the chapter” of the past. This narrative correlates with a conservative politics where the political system is deemed to work, and historical injustice is an unfortunate and temporary flaw that can be redressed with measures such as apology or once-off reparations. The tragic narrative aligns with irreversible time in historical injustice is in the past and the past is “gone”, it is inaccessible, therefore nothing can be done in the present to remedy it. Injustice itself is a fact of human existence that one cannot escape or transcend; the challenge for humans is to make meaning in the brutality of life. There is no legitimate conception of political responsibility in the tragic narrative. In transitional justice discourse, the psychic state of tragedy is lamentation and mourning and catharsis. Justice is recognition and acknowledgement of one’s pain. The comic narrative employment aligns with reversible time in that historical injustice can be addressed in the present, but it will only be progressively overcome. This narrative employment correlates with liberal politics because the system is deemed to be imperfect but progressively improving. In transitional justice discourse, this narrative type would be complemented by transformative remedies to injustice such as assimilationist policies like affirmative action measures. In a transitional justice context, this may involve assimilating people into a polity as citizens when they were initially not allowed to be part of the citizenry. This is the case for South Africa; the plan was to create South African identity anew.

6.5. Chronopolitics: The Political Nature of Chronosophy

Periodization in history and historiography is not simply a natural phenomenon, but a construct shaped by various “technological, economic and geo-political “ forces throughout history.³⁵ The chronosophies of social collectives are political in so far as they are characterized by “amnesias, excisions, forgettings that are not arbitrary but politically required—producing pasts that are ‘usable’, utilitarian, functional for the group’s identity and

³⁵ R West-Pavlov *Temporalities* 3.

trajectory in time, not pasts that are awkward, refractory, raising disturbing and untimely questions.”³⁶ This means that groups often use history and narrative time strategically to support their political agendas. By selectively remembering certain events and excluding others, they craft a version of the past that legitimizes their current identity, goals, and policies. This constructed history helps to unify the group, reinforce its values, and provide a sense of continuity and purpose. It also avoids confronting problematic or controversial aspects of the past that might undermine the group's authority or legitimacy to itself and others. In essence, history becomes a tool for political manipulation, shaping collective memory in ways that serve specific, utilitarian objectives. Consequently, to choose a particular periodization is always already a political move; an execution of chronopolitics.³⁷

Chronopolitics, explains Ian Klinke, refers to how time is used to “conserve or challenge (geopolitical) order.”³⁸ Charles Mills characterizes the term chronopolitics as referring to how power relations between political communities influence social representations of these groups as well as their “material experience of the world in their specific temporal dimension.”³⁹ Historians too are located in specific temporal dimensions or at least take certain temporal dimensions for granted. In other words, chronopolitics has to do with how chronoscopy shapes the symbolic representation and material experience of groups and their power relations to each other.⁴⁰

These attributes of modernist chronoscopy “work to structure human existence” where Western chronopolitics dominate.⁴¹ The Eurocentric political imaginary of time prioritizes a chronological progression of history and assigns value to historical phenomena according to their chronological closeness to the present.⁴² “In the Western temporal framework, the present is imagined as the temporal anchor from which the relation to some broader temporal narrative can be apprehended.”⁴³ This prioritization of the present expediencies over historical injustice in a hierarchy of time is based on faulty logic that does not consider the persistence of the past into the present. The present then becomes temporally local, and the past is absent and distant, depicting their distinctiveness and separateness. To

³⁶ CW Mills “White Time: The Chronic Injustice of Ideal Theory” (2014) 11 *Du Bois Review: Social Science Research on Race* 30.

³⁷ I Klinke “Chronopolitics: A Conceptual Matrix” (2013) 37 *Progress in Human Geography* 686.

³⁸ 685.

³⁹ CW Mills “The Chronopolitics of Racial Time” (2020) 29 *Time & Society* 299.

⁴⁰ 299.

⁴¹ West-Pavlov *Temporalities* (2013) 5.

⁴² Bevernage (2008) *History and Theory* 149.

⁴³ Hunfeld (2022) *Journal of Global Ethics* 106.

expand on this assertion, Eurocentric chronopolitics uses “a... unitary narrative of political time” discussed in the previous section.⁴⁴

The political dimension of the distinction between this *absent* past and the *present* present bears a “temporal linearity and progress [that] are not neutral and universal frameworks for thinking about time, but instead carry with them the heavy weight of coloniality.”⁴⁵ Coloniality as it developed in the West is a direct element of Eurocentrism and white supremacy, with the latter referring to “the attitudes, ideologies, and policies associated with the rise of blatant forms of white or European dominance over ‘nonwhite’ populations.”⁴⁶ Further, it is racial and racist in the sense that it is a determination to create a racial qualifications of civic participation in colonies and a global racial hierarchy in general.⁴⁷ Indigenous and non-European chronosophies are relegated to inferior status with regards to Eurocentric time and rendered irrelevant in terms of general global time.⁴⁸ Consequently, with regards to the entanglement between geopolitics and chronopolitics, Eurocentric and white supremacist chronopolitics is “predicated on time maps that delegitimize the temporal origins, the timelines of descent, of those disqualified in advance from being ... genuine members of civil society.”⁴⁹

6.6. Reversible and Irreversible Time

Bevernage elucidates this chronopolitics that demonstrates the so-called dichotomy narrated by historicising discourse between the past and the present. He uses the notions of the *time of justice* or *time of jurisdiction* and the *time of history*.⁵⁰ With the Time of Jurisdiction, time is reversible. Reversible time employs a certain chronosophy whereby the past persists into the present in a juridical sense; the past matters in the present, but only insofar as it can be addressed. This means that a historical injustice can be reversed, so that the offence no longer exists in the present; thus, it is the *negation of a historical injustice* given that reversal implies a status quo where the capacity of the historical injustice to have power over the

⁴⁴ Katharina Hunfeld 102.

⁴⁵ 114 .

⁴⁶ GM Frederickson *White Supremacy: A Comparative Study of American and South African History* (1981) xi.

⁴⁷ Xi.

⁴⁸ Hunfeld (2022) *Journal of Global Ethics* 105, 113.

⁴⁹ Mills (2020) *Time & Society* 306.

⁵⁰ B Bevernage *History, Memory, and State-Sponsored Violence: Time and Justice* (2012) 2-5.

present is annulled. A historical injustice can be “reversed, annulled, or compensated by... punishment” or reparation.⁵¹ Justice is seen as the instant *temporal closure* or negation of an injustice; it is as if it never existed because in its place is its negation. The relationship between temporality and justice in reversible time is such that justice severs the past (historical injustice) from the present with the negation of the injustice. It is often employed in a juridical setting where a crime is addressed through redress, and thus the juridical measure to address this crime creates temporal discontinuity between a historical injustice and the present.

In contrast, the time of history employs irreversible time whereby injustice is acknowledged as an event in the past, and it cannot be reversed by an action in the present or in the future. As opposed to the Time of Jurisdiction as expressed in reversibility the negation of a crime through punishment or reparation, in the paradigm of the time of history, it is the passage of time that negates historical injustice as a metaphysical reality. The passage of time *instantaneously* extinguishes and closes off the past; it is the *essence* of the discontinuity between a historical injustice and the present. With both reversible time and irreversible time negation of the past can be achieved either because historical closure is materialised in redress for historical injustice or because historical closure is materialised in the passage of time. It follows that for reversible and irreversible time, historical injustice is ultimately made legible through the strict separation between the past and the present. In positing certain events as past and in differentiating them from the present,” Bevernage avers, “the irreversible time of history in fact actively exorcises [*negates, extinguishes, dismisses*] the haunting past, at least as much as merely describing or analysing it.”⁵² The implications for the politics that derive from the detachment of the past from the present is that, while the paradigm of reversible time makes redress for historical injustice legible and possible and can be addressed, with the paradigm of irreversible time, the tragedy of the passage of time is that it can only offer the “consolation” of the acknowledgement of historical injustice and not justice itself.⁵³ To elucidate on the “tragedy” of the passage of time in the *Time of History*, modern colonial historiography presupposes the conclusion of a time period when narrating the past; a presupposition reinforced by the negation of the past by virtue of its irreversibility.⁵⁴

⁵¹ Bevernage *History, Memory, and State-Sponsored Violence* 2.

⁵² 86.

⁵³ 162.

⁵⁴ 162.

Modern Western chronosophy prioritizes that which is newer and considered unprecedented and tends to describe the present and the future as superior in value to the past, which implies an obsession with and presupposition of the linearity of time. Event A is only valuable if it contributes to a preferable successive event. This illuminates why there would be popular ideas such as certain commodities attaining their current value from their projected use in the future (e.g., “cryptocurrency is the currency of the future) as well as seeing the present time as “definitive moments which are historically unprecedented.”⁵⁵ To expand on this modern chronosophy, contemporaneity is a core value in a hierarchy of time and is characterized by *presentism*, an evaluation of the present as of greater value than the past. The emphasis that the modern Western chronosophy places on the present is expressed is with the notions of contemporaneity and simultaneity. That which is contemporary means belonging to the same time. Simultaneous means happening at the same time. Western chronosophy’s emphasis on the present aims toward uniform contemporaneity. The past is neither contemporaneous nor simultaneous with the present. The past is only of value if the knowledge of it can lead to such an advancement in the present and into the future. The linearity of time must be progressive and point to a more technologically, scientifically, and ontologically advanced world or it is of no value. This prioritization of the present expediencies over historical injustice in a hierarchy of time is based on faulty logic that does not consider the persistence of the past into the present.

6.7. The Logic of Discovery and Modernist Narrative Time

This narrative is portrayed by Europe as a romance, while for indigenous people it is portrayed as an inherently tragic narrative and state of being. A substantial epistemic assumption that maintains this perspective is the past-present dichotomy as expressed in reversible and irreversible time. This dichotomy is identifiable in the logic of discovery. Given that Europe sees “equal territorial partners” to be an intra-European affair, its usurpation of territorial sovereignty of indigenous peoples – where it recognises said sovereignty – is considered, an offence is in the realm of *irreversible* time. The logic of discovery performs a separation between a temporality before conquest and the temporality beginning at conquest.

⁵⁵ M Andrews *Shaping History: Narratives of Political Change* (2007) 188.

6.7.1. The Logic of Discovery and Narrative Periodisation

“Discovery narratives,” explains Zeruvabel, function as a cognitive “obliteration of entire populations” by depicting “non-Western cultures and societies as prehistorical and ahistorical, uncivilised, immature, and stuck in premodern development.”⁵⁶ This kind of “white time”, as extrapolated by Mills, is the particular temporal topographies and chronological colonisations imposed on” indigenous colonised people, and these chronopolitical colonisations are typical and constitutive of Eurocentric historiography about historical injustice pertaining to the colonial encounter and the political responsibilities that Europe bears for redress.⁵⁷ White time, argues Mills, sets the historical “chronometer” to zero at the colonial encounter, meaning that “before [the arrival of the White settler state], no history has taken place, no real passage of time, since a time in which no history passes is a time that has not really itself passed.”⁵⁸ In depicting indigenous societies so, Europeans negate the temporal existence of indigenous people before their so-called “discovery” by Europeans.

We can understand the idea of a chronometer through an analogy with a thermometer. The historical narrative measures the movement of history (narrative) just like an oven dial functioning as a thermometer would indicate the movement of heat or lack of heat in an oven, or even set the temperature in an oven. When using an oven, one turns the dial from zero the set it to the desired temperature. With an oven, the unit of measurement is Fahrenheit or Degree Celsius. With a historical narrative, the dial is a chronometer, and the unit of measurement is historical periodization. Discovery narratives set the chronometer to zero when they conquer a land or so-called discover a foreign territory. When they do this, they are basically saying historical time begins with conquest or discovery and so whatever happened before that is prehistorical or historically irrelevant. An oven does start as at zero because there is no heat prior to the initial action by the baker, while the colonial historian manipulates the chronometer by creating historical narratives that starts at zero (there is no prior history). The colonial historian approaches a foreign territory as if it is without history or with the belief that the territory is without history. Although the colonial historian sets the

⁵⁶ Zeruvabel *Time Maps* 92; Hunfeld (2022) *Journal of Global Ethics* 105.

⁵⁷ Mills “White Time” 30-31.

⁵⁸ 31.

chronometer to zero, unlike with an oven, the narrative is not a correct measurement of history as there is history in foreign lands before the colonial encounter. The colonial historian is cutting up time even if they may approach their historical narrative as if the beginning of the colonial narrative is the beginning of time on a given indigenous territory. To extend the analogy, if the baker wants to extinguish the heat, they have to turn off the stove first. Correspondingly, we can say that the historian extinguishes the time before the historical narrative, through the presentation of the historical narrative as the beginning of history on that territory. In this way, there is an appearance of the extinguishment of indigenous history; it is an ineffective and impossible action because indigenous history cannot be extinguished since it exists and has historical continuity despite the narrativization of the colonial historian. However, indigenous history can be negated in the sense that it is treated as if it does not exist.

6.7.2. The Logic of Discovery and Narrative Emplotment

A further way in which indigenous history is negated is through the emplotment of the colonial narrative. Colonial narratives depict indigenous people as victims of the passage of time so that their land is rendered substantively empty even where they are present; their presence is immaterial, insignificant, inconsequential, and devoid of meaning in the same way that their land is devoid of meaning before the encounter with Europeans. The colonial historian interrupts indigenous history by imposing a veneer of non-existence to indigenous history and time. Indigenous people “are typically spectral, implied and felt, but remain as lamentable casualties of national progress ... and are destined to disappear with the frontier itself.”⁵⁹ The colonial narrative virtually erases and negates not only the sovereignty of indigenous people but their existence as well. Mills shows the link between chronopolitics and *terra nullius* thus:

Conquest not merely brings this space into Euro-space, redeeming and civilizing its wildness, but it also establishes a new temporal regime over the land in question. Its time has changed: it is now part of the Euro-story, the Euro-narrative and timeline.

“Civilization,” then, involves an annexation of both space and time, a transmutation

⁵⁹ Byrd, *The Transit of Empire*, xx.

of red space (wasted, valueless) and red time (wasted, valueless) into white space and time.⁶⁰

6.7.3. The Logic of Discovery and Extinctive Prescription in Narrative

The logic of discovery as expressed in *terra nullius* gives expression to a Eurochronopolitic where the territorial sovereignty of indigenous people belongs to a past that is no longer accessible; a temporal phenomenon that is inaccessible from the present state of the distribution of territorial power. Moreover, indigenous rights to sovereignty, given their relegation to the past, can be revoked or lost, in essence, be made extinct from the past. This is a chronosophy that aligns with and is consistent with the past-present dichotomy of the West. This false dichotomy presents the past as present as non-contemporaneous, hence the proliferation of indigenous peoples' territories being made permanent European colonies as being given names that reflect the conquest and triumph of the conqueror, essentially obfuscating the presence of the original occupants and owners of those territories. Once this tragic narrative of indigeneity has taken hold, there is no political responsibility for historical injustice because the past is irrelevant to the fact of the presence of the colonizers; the time that matters is the present and the future. Historically, in Western jurisprudence, sovereignty is unchanging over time except in the event of "acquiescence or lapse of time" or war.⁶¹ With the logic of discovery, there is no indigenous sovereignty to transgress because indigenous sovereignty does not exist in time and in history. This shows that the logic of discovery, as a Eurochronopolitical instrument that severs the past from the present, assumes that this chronosophical distinction has a bearing on entitlement to and loss of sovereignty, which is emblematic of the concept of prescription. "Europeans," posits Edward Cavanagh, "have long justified a right to something or other by invoking 'prescription' (that is, the creation of a legal entitlement by the passage of time)."⁶² The passage of time is thus wielded as a juridical tool by which to negate the sovereignty of indigenous people and naturalise the dominance of European settlers on indigenous land.

⁶⁰ Mills (2020) *Time & Society* 309.

⁶¹ MB Ramose "I Conquer Therefore I Am the Sovereign: Reflections upon Sovereignty, Constitutionalism, and Democracy in Zimbabwe And South Africa" (2002) 569.

⁶² E Cavanagh "Prescription and Empire from Justinian to Grotius" (2017) *The Historical Journal* 273.

6.7.4. The Logic of Discovery and the Settler Time in Narrative

A significant way in which the logic of discovery is shown to be duplicitous is in the continuity of the chronopolitical structures that sustain European colonies, for instance in the case of settler colonialism and the narratives employed to sustain its power structures. Since settler colonialism is a structure and not an event, settler colonies pursue political and legal continuity as a political formation. Chronopolitics is used to administer this logic that “undergirds the historical development and complexification of settler society.”⁶³ With regards to settler colonialism, “rival claims to land grounded in rival historical accounts, conflicting time maps. Whose space it is depends in part on whose time it is, on which temporality, which version of time, can be established as hegemonic.”⁶⁴ If people can be convinced that it is a certain time (for instance, a present which is detached from the past), the one who ascribes the time gains the power to interpret the meaning of the time. This has implications for what people consider a possible and appropriate society and social relations, because, as Mills writes, “[s]pace, time, and normative entitlement or normative illegality are thus all tied up with one another.”⁶⁵ In settler colonial chronopolitics, time is teleological and linear, pointing towards an irreversible time of the settler, white time, white power and dominance and indigenous inferiority. Mills argues that chronopolitical historiography encompasses a chronopolitics grounded in a certain relation between conceptions of the relationship between the past, present and future social chronopolitics will select those “historical narratives that also seek to explain the present and stake particular claims on the future.”⁶⁶ Settler colonial narratives, according to Veracini, utilise “a particular set of narrative refrains and a specific understanding of history where ‘progress’ is typically understood as a measure of indigenous displacement (i.e., transfer) and ultimate erasure.”⁶⁷ The logic of discovery’s negation of indigenous sovereignty and the naturalisation of European conquest is thus manifested as a chronopolitical component of settler colonial logic.

⁶³ P Wolfe ‘Settler colonialism and the elimination of the native’ (2006) 8 *Journal of Genocide Research* 402.

⁶⁴ Mills (2020) *Time & Society* 301.

⁶⁵ 301.

⁶⁶ Mills (2014) *Du Bois Review: Social Science Research on Race* 312.

⁶⁷ Veracini *Settler Colonialism* 100.

6.8. The PNURA and the Exculpation of Liability through Time

The PNURA's settler colonial politics of time is used by perpetrators to create themselves anew and relegate their complicity to the past (to escape accountability and responsibility) by controlling the conversation on what the past is and problematizing their relationship to the events of the past. In employing a human rights discourse, this valuing of a liberal future is then strengthened by the notion of individual human rights. Human rights are considered to be natural, universal, supreme, and untethered from matters relating to other concerns of justice such as redress for wrongs that are pinned to the idea of the need for historical injustice perpetuated against groups, such as the conquest and colonization of indigenous people that undermined the sovereignty due to their indigeneity. Conquest and colonization are considered part of an irreversible past. This facet was also evident in its narrativity.

Presentism in the PNURA can be identified in its focus on apartheid, which then materializes as the obscuring of the historical fact of the indigenous people's wars of resistance that ensued with the advent of conquest by Dutch settlers in the 17th century. Therefore, it dismisses the injustice that occurred before the system of apartheid. Gerhard Werle for example acknowledges that "the history of discrimination... reaches much further back [than apartheid]. It starts with the seizure of land by Dutch settlers in the mid-seventeenth century."⁶⁸ His erroneous statement then is that "racism became state doctrine in 1948."⁶⁹ This relegation of racism as a recent phenomenon is the view reiterated in the report.⁷⁰ The duplicity of this thinking has been discussed by some such as Ramose who has argued that "the fundamental problem is that between the colonizer and the colonized in South Africa. It is the conflict over the land or sovereign title to territory."⁷¹ The framing of apartheid as the fundamental antagonism in South African history is thus expedient for the colonizer in escaping the self-realization of their political responsibility to address injustice that occurred before apartheid. This liberal politics of time is used by perpetrators to create themselves anew and relegate their complicity to the past (to escape accountability and responsibility) by controlling the conversation on what the past is and problematizing their relationship to the events of the past. In employing a human rights discourse, this valuing of a

⁶⁸ Werle (1996) *Law and Politics in Africa, Asia and Latin America* 59.

⁶⁹ 59.

⁷⁰ Truth and Reconciliation Commission of South Africa Report 25.

⁷¹ MB Ramose "Reconciliation & Reconciliation in South Africa" (2012) 5 *Journal of African Philosophy* 23.

liberal future is then strengthened by the notion of individual human rights. Human rights are considered to be natural, universal, supreme, and untethered from matters relating to other concerns of justice such as redress for wrongs that are pinned to the idea of the need for historical injustice perpetuated against groups, such as the conquest and colonization of indigenous people that undermined the sovereignty due to their indigeneity. Conquest and colonization are considered part of an irreversible past. This facet was also evident in its narrativity.

The PNURA's chronosophy undermined its historical redress because of a modernist politics of time that employs a historicising discourse. Colonial historiographers perpetuate this obfuscation by periodizing apartheid and colonialism as two separate temporal phenomena with a start date and an end date and portraying them as past. According to Bevernage, there are three roles that historians tend to play in transitional justice processes: delineating truth from myth or lie; preserving the historical narrative, and "demonstrating the fundamental differences that exist between past and present."⁷² When historicising, they are creating a strict delineation between past, present and future. What has often come to the fore in conversations on the relationship between transitional justice and historiography is the importance of "reconciliation through truth telling and about the healing force of remembering or remembrance as justice."⁷³ As Bevernage intimates, although some historians saw their role in relation to the TRC as preserving the historical narrative, "many critics, including several historians, precisely, argued that the TRC was a sort of 'exercise in forgetting', that it induced 'social amnesia', that it provided 'a nod at remembering in the interests of a profounder forgetting'."⁷⁴

In expressing this linear and universal historical progression, colonial historiography conveys the past as inferior and detached from what is desirable, which is progression towards modernity, not regression or contemporaneity with the past. The reason why this is relevant is that Western chronosophy has a bearing on the western idea of historical injustice and the remedy of injustice, especially seeing as some philosophers contend that "we have in the present all the normative resources to assess and address contemporary injustices, even those that have their roots in the past, past injustices do not matter ... and need not concern

⁷² B Bevernage "Transitional Justice and Historiography: Challenges, Dilemmas and Possibilities" (2014) 13 *Macquarie Law Journal* 8, 13, 16.

⁷³ 8.

⁷⁴ 15.

us.”⁷⁵ This relegates historical injustice as irreversible and lost to time. In the subsequent section, Zinaida Miller’s discussion of temporal governance demonstrates how Transitional Justice employs a framework that privileges a specific form of historical consciousness, one that selectively portrays certain aspects of historical injustice as relevant, addressable, and urgent for achieving a just future.⁷⁶ She illustrates how the selection of which historical events to focus on, and how to frame them, is far from neutral, but rather reflect and reinforce particular power structures and narratives. In a latter part of the chapter, I will build on this critique and will explore the possibilities for alternative temporal governance, drawing insights from indigenous pluralities and perspectives.

6.9. The Political Governance of Time

Miller examines how transitional justice shapes dominant narratives about time, violence, memory, and judgment, forming a 'temporal governance' that emphasizes linear progress and clear separations between past and present.⁷⁷ This approach often marginalizes economic issues and imposes limitations on understanding the relationship between past and future. She defines temporal governance as the way institutions and practices shape our understanding of the relationship between time and justice. While transitional justice discourse may present notions of past, present, and future as straightforward, it actually carries "certain prescriptions and delimitations as to what the past, the present and the future entail or should entail".⁷⁸ Miller argues that transitional justice institutions have the power to legitimize particular "facts, practices, memories, histories and modes of harm, recovery, mourning, and accountability".⁷⁹ Miller is thus critical of this approach and its power, noting that it obscures and delegitimizes other options for addressing historical injustices. The framework "tends to reinforce a singular, catastrophic narrative of the past, which can obscure and complicate the recognition of diverse temporalities, alternative histories, and various harms".⁸⁰

⁷⁵ Hunfeld (2022) *Journal of Global Ethics* 107.

⁷⁶ Z Miller “Temporal Governance: The Times of Transitional Justice” (2021) 21 *International Criminal Law Review*.

⁷⁷ Miller “Temporal Governance”.

⁷⁸ 849.

⁷⁹ 853.

⁸⁰ 875.

6.9.1. The Limited Accountability of Temporal Governance in Transitional Justice

Miller discusses how transitional justice mechanisms, particularly their temporal governance, can delegitimize certain narratives of historical injustice. According to Miller, the dominant form of temporal governance in transitional justice relies on a linear, rupturing narrative of progress that separates the present from the past.⁸¹ The past is portrayed as inherently "horrific" while the future is depicted as better or at least able to be manipulated in that direction.⁸² Temporal governance, she avers, makes legal and political distinctions between recent reparable pasts and distant irretrievable ones, narrowing individual responsibility to immediate acts while decontextualizing broader systemic conditions. This approach "privileges some harms as eligible for justice while others are relegated to a prehistory", effectively determining and delimiting only "recent" injustices as relevant for redress.⁸³ The temporal governance of transitional justice operates through various means, including explicit mechanisms like statutes of limitations and implicit ones such as limited definitions of victimhood.⁸⁴

For instance, the TRC employed a form of "statute of limitations" by limiting its scope of human rights violations to those committed before March 1960, meaning that those victims who did not meet these criteria were not treated as victims at all. This approach tends to marginalize injustices from the more distant past and nullify their continuity into the present. Miller argues that this focus on individual guilt and recent crimes "obfuscates the conditions that made those crimes 'possible' and 'plausible'," limiting the ability to address structural injustices and colonial legacies.⁸⁵ Distancing is, therefore, a political decision rather than an objective fact of time. Furthermore, Miller critiques the heavy emphasis on trauma as the primary framework for understanding societal experiences of conflict and repression. Miller contends that this trauma-centric approach prioritizes discontinuing the trauma itself while downplaying how perpetrator groups have benefited and continue to benefit economically and materially from the infliction of that trauma.⁸⁶ Moreover, this focus on trauma narratives tends to portray victims as "wounded" and "helpless," potentially overshadowing other critical forms of injustice such as economic deprivation and lack of

⁸¹ 853.

⁸² 853.

⁸³ 856.

⁸⁴ 856.

⁸⁵ 858.

⁸⁶ 862.

political rights. The temporal governance of transitional justice, combined with its emphasis on trauma narratives, can result in an incomplete and skewed historical portrayal of historical and continuing historical injustice in a state implementing transitional justice mechanisms. By determining that the pasts that are relevant for adjudication are those that relate to the scope of individual responsibility, this approach fails to fully capture the multifaceted economic, social, and political dimensions of systemic injustices experienced by victims.

6.9.2. The Limited Reparative Opportunities of Temporal Governance in Transitional Justice

The temporal governance of transitional justice delegitimizes other temporalities by managing the link between past and present to control the remembrance of the past. This process involves imposing a particular historical consciousness to support a political agenda, particularly the establishment of a liberal democratic future. Miller argues that temporal governance in transitional justice creates a "complementary relationship between 'the discovery and description of the recent past' and a future of healed trauma".⁸⁷ This means that the narrativization that emerges from this temporal governance always links "the recent past" to present trauma, trauma that will be transcended with the arrival of the future.

Paradoxically, the incorporation of amnesty in transitional justice reveals how temporal governance utilizes selective forgetting to impose limits on the nature of the past and the trajectory of the future. The granting of amnesty to perpetrators who fully disclosed their crimes also involved a form of "forgetting" by legally absolving individuals of crimes in exchange for their testimonies. This demonstrates how selective forgetting was built into the truth commission paradigm. The historiography promoted by temporal governance encourages selective memory, highlighting individual trauma in the recent past while obscuring "other types of violence and other types of harm".⁸⁸ This selective approach legitimizes certain historical narratives while marginalizing others. Additionally, justice practices associated with temporal governance often overlook both routine harms of past dominant orders and present injustices. By presenting the past primarily as a landscape of trauma and victimization, temporal governance risks depoliticizing and immobilizing narratives of resistance, potentially hindering meaningful political action.⁸⁹ In other words,

⁸⁷ 865.

⁸⁸ 866.

⁸⁹ 868.

the framing of the past primarily through a lens of victimization overshadows narratives of resistance and agency within anti-apartheid and anti-colonial movements. Miller critiques how this dominant framing "curtails the horizons of the future, substituting revolutionary vocabularies with transitional discourses that perpetually delay more radical action".⁹⁰ In essence, temporal governance in transitional justice imposes a specific historical consciousness incorporating forms of forgetting by controlling which aspects of the past are remembered and forgotten and how they are remembered. This approach limits the potential for alternative narratives and more radical transformative actions, constraining the efficacy of transitional justice in envisioning and realizing a truly just future.

6.9.3. Transitional Justice and Temporal Governance: Possibilities for Reform?

While scholars are calling for a reimagining of temporal governance to address the intergenerational harms of colonialism, moving beyond "punctual accountability towards multigenerational responsibility," Miller highlights key challenges and limitations to reforming or decolonizing temporal justice within the framework of transitional justice.⁹¹ The integration of Indigenous perspectives into transitional justice initiatives has exposed the severe constraints imposed by dominant temporal governance paradigms. For example, transitional justice assumes a linear progression from past injustice to future reconciliation, while a more cyclical or multilinear perspective of historical injustice points to a more enduring form of historicity of injustice. It may be thought that perhaps the decolonization of transitional justice may involve resisting the linear trajectory inherent in temporal governance. This transformation requires rejecting and overturning colonial chronosophies, potentially by incorporating non-linear indigenous historiographical viewpoints to reveal enduring colonial power dynamics.⁹² Plural chronosophies and indigenous temporalities could presumably decolonize justice processes and unveil enduring colonial power dynamics. Miller emphasizes that addressing these issues requires not just expanding existing frameworks but fundamentally re-evaluating them to acknowledge plural temporalities, address intergenerational harms, and redefine notions of responsibility.⁹³ She notes that these

⁹⁰ 867.

⁹¹ 875.

⁹² 872.

⁹³ 871.

efforts have "reignited discourse on the interplay between historical injustices and present-day inequities."⁹⁴ These efforts "centre continuities between historical and contemporary injustices rather than reinforcing breaks".⁹⁵

Miller concludes that temporal governance in transitional justice imposes limits on understanding the past and envisioning the future. It imposes a particular historical consciousness to support a specific political agenda, preventing multiple and conflicting historiographies that might threaten the project of a liberal democratic future. This approach perpetuates certain forms of injustice by limiting the scope of what is considered relevant for redress and reconciliation. To dismantle the restrictive temporal governance of transitional justice, Miller suggests adopting approaches that recognize the continuous and intergenerational impacts of historical injustices. She advocates for initiatives that trace benefits and harms over time, such as those examining the enduring legacies of slavery and colonialism. These efforts would require the expansion of the sense of responsibility and create space for plural and alternative temporalities. Such efforts, however, do not operate with the temporal governance of transitional justice as transitional justice operates on the assumption that there is a rupture between the past and the present and there is a form of justice that can be drawn upon to govern the "transition" from the past to the present. In my discussion below, I aim to show that the plural temporalities found in indigenous temporal frameworks such as ubuntu put this transitional justice temporal governance in crisis and reveal it to be incapable of addressing the long *durée* of colonialism in South Africa. I begin with an elucidation of the notion of *irrevocable time* as a means by which to place the Ubuntu critique.

6.10. Irrevocable Time

In both reversible and irreversible time, the past is either negated or can be negated, and thus distinct and completely distinct from the present. Bevernage calls attention to an alternative paradigm of time that, despite its view of the past as irreversible (as with the paradigm of irreversible time), does not presuppose that the passage of time negates the past nor that there is a strict delineation between the past and the present. This paradigm of *irrevocable time*,

⁹⁴ 871.

⁹⁵ 873.

conceptualised by Wladimir Jankélévitch.⁹⁶ Jankélévitch argues that, despite this commonality, there is an analytical distinction between the irreversible and the irrevocable conceptions of time. He posits

the irreversible, a having taken-place (*avoir-eu-lieu*) that should primarily be deciphered as a having-been (*avoir-été*), refers to a transient or fleeting past. The irrevocable, a having-taken-place most often associated with the having-been-done (*avoir-fait*), in contrast, is stubborn and tough.

The similarity between the irreversible and the irrevocable is that the event cannot be altered or reversed. However, while irreversible time tends to favour the present over the past according to the linear progressive chronosophy, irrevocable time does not relegate the past to an inferior form of time that has to be disregarded or interiorized or not prioritized. Further, irrevocable time does not make the strict linear delineation between past and present and considers the two temporal phenomena to not be mutually exclusive in the sense that the past can coexist, that is, be contemporaneous. Irrevocable time is most aptly encapsulated in the phenomenon of memory. Memory is composed of an irrevocable experience of time that can manifest as a circular kind of time or the kind of chronosophy where there is simultaneity and contemporary and an anachronism at the same time. While the linear idea of time can be said to be working with chronology, with memory, chronology cannot be taken for granted or assumed and “tends to develop a ‘durational time’ that disrupts chronology” in history.⁹⁷ It can be argued that it is a disruptive memory because it disrupts the Western chronosophy’s assumption of the inherent continuity of historical time. As Bevernage explains

Instead of dispelling the ghosts of the past by (re)enforcing the divide between past and present and turning the ‘persistence’ or ‘proximity’ of the irrevocable into the safe ‘absence’ of the irreversible, memory of offense ignores the ‘hierarchies of time,’ refuses to let the atrocious past go, and keeps the irrevocable in all its frightening closeness.⁹⁸

However, an indigenous lens on this irrevocable time would point to the fact that it is European conquest that disrupts indigenous time. While it is true that Europe seeks geopolitical and chronopolitical continuity, it does so through infestation of time and space to the point of perpetual subjugation. To do so, it must seek continuity through disruption.

⁹⁶ V Jankélévitch *Flammarion* (1974) quoted in B Bevernage *History, Memory, and State-Sponsored Violence* 4.

⁹⁷ Bevernage *History* (2011) 14.

⁹⁸ 87.

Meryem-Bahia Arfaoui contends that perhaps the struggle of indigenous people is not to perforate the seal of white chronopolitical hegemony but rather to “restore continuity by building bridges across the ruptures imposed by the colonizer. Resistance reaffirms a process of construction in the face of the Western State, which seeks to convince us that nothing exists outside of its definition.”⁹⁹ Conquest has set the territorial chronometer to zero, and resistance requires the demonstration and emphasis of an indigenous time map that affirms the pre-colonial existence of people and their history and their sovereignty on the territory now called South Africa. Memory is not necessarily a counter to historiography; rather, indigenous memory is a counter to colonial time, and thus colonial historiography. It is thus because, first and foremost, it presupposes the contemporaneity of the categories of indigenous and settler, as opposed to the negation of these categories through the historiographical negation of indigeneity. Resistant indigenous memory transmitted across generations “is essential to our struggle because it is what characterizes continuous time — social collective organization is a process in permanent reaffirmation and mutation of itself.”¹⁰⁰ Memory is transmitted for the sake of preserving continuity in identity, history is told for the sake of investigating identity. Collective memory justifies who we are, history investigates who we are. We need to know who we are as a collective in order to know how to survive as individuals and as a collective. Collective memory is a tool against extinction and for social continuity.

6.11. A Critique of the Chronosophy of the Logic of Discovery through *Molato ga o Bole*

Historiographies by indigenous people confronted with conquest have sought to address the question of the place of black people in the history of the territory and the state of South Africa. They are centred on the question “To whom does the land belong?” The answer to this question would then indicate “what rights can Africans claim within the land of their birth?”¹⁰¹ These traditions portray the struggle of Africans as either the fight to be recognised as equals in the white power structure (assimilationism) or as the fight to delegitimize/dismantle that structure. Here I argue that ubuntu jurisprudence would require a

⁹⁹ Meryem-Bahia Arfaoui “They have Clocks, We Have Time: Time and the Colonial State” (2021) *The Funambulist* <<https://thefunambulist.net/magazine/they-have-clocks-we-have-time/time-and-the-colonial-state>>.

¹⁰⁰ Arfaoui (2021) *The Funambulist* <<https://thefunambulist.net/magazine/they-have-clocks-we-have-time/time-and-the-colonial-state>>

¹⁰¹ Suttner “African Nationalism” in *Intellectual Traditions in South Africa* (2014) 122.

confrontation with the founding injustice of conquest in order to give a critique of the chronosphy of the logic of discovery through indigenous jurisprudence. This is key because it shows just how far-reaching the epistemic injustice was in nullifying and negating the humanity of indigenous people. Ramose argues that the political transition to democracy in South Africa was a "limited success" because while it addressed racial discrimination, it did not restore the pre-conquest sovereignty and land rights of indigenous peoples based on their rejection of extinctive prescription.¹⁰² He contends that from an ubuntu legal standpoint, "the conqueror must renounce title to South African territory and sovereignty over it" to "dissolve the categories of conquered and conqueror".¹⁰³ Only by remedying these fundamental historic injustices can a "post-conquest" constitutional order be established with "justice as equilibrium" as its basis.¹⁰⁴ Colonial chronopolitics seeks to create discontinuity between past and present in order to escape liability for redress. An alternative historiography is a historiography informed by the legal principle of *molato ga o bole, go bola nama* as it follows from the African ethic of *Ubuntu*. It is an exposition of an indigenous resistance of Eurochronopolitics. Resistance to conquest and colonialism in its various forms requires "a corollary the rejection of its temporally tendentious time maps, and the chrono- and geopolitics they have rationalized."¹⁰⁵

In her influential essay *'Kafir Time': Preindustrial Temporal Concepts and Labour Discipline in Nineteenth-Century Colonial Natal*, Keletso Atkins demonstrates how colonialism in colonial Natal involved not just political or economic domination but also the cultural conquest of time itself.¹⁰⁶ In her exploration of how the "temporal perceptions" of AmaZulu shifted "from peasant to industrial time", Atkins shows that "time was at the nexus of the 'kafir labour problem'", meaning that colonial employers saw African timekeeping as a fundamental obstacle to the regulation and discipline required for capitalist production.¹⁰⁷ This cultural transformation was achieved by replacing indigenous, cyclical temporalities with linear, industrial time rooted in European capitalist norms. Atkins describes how isiZulu-speaking communities understood time in relation to nature and the cosmos: "Like

¹⁰² MB Ramose "An African Perspective on Justice and Race" (2001) 3 *Polylog: Forum for Intercultural Philosophy* 7.

¹⁰³ 8.

¹⁰⁴ 8.

¹⁰⁵ Mills (2020) *Time & Society* 314.

¹⁰⁶ K Atkins "'Kafir Time': Preindustrial Temporal Concepts and Labour Discipline in Nineteenth-Century Colonial Natal" (1988) *Journal of African History* 244

¹⁰⁷ 230

most preindustrial people, the Zulu used the moon and stars to keep track of time”.¹⁰⁸ For example, months were marked by “thirteen ‘moons,’ each associated with ecological changes and social activities”. This cyclical system was rooted in “the phases of the moon”.¹⁰⁹ For instance, “*Inyanga [i]file* (the ‘moon is dead’), that is the interlunary period, ‘the moonless day when everyone paid respect to the darkness’, was traditionally observed as an unlucky or sacred day of abstinence from work and pleasure seeking.”¹¹⁰ Colonial employers in the sugar industry also found it difficult to enforce longer work hours. Atkins observes that Africans typically worked only between “puma langa” (about an hour after sunrise) and “shuna langa” (an hour before sunset) and resisted work beyond these hours.¹¹¹ This highlights how traditional time norms clashed with colonial capitalist demands. Atkins notes that “whites contemptuously referred to the lunar reckonings as the ‘kafir month’”, which reflects a broader pattern of racialised denigration of African ways of knowing.¹¹² Demonstrably, isiZulu/Ubuntu chronosophy is deeply embedded in the rhythms of the natural world. Time is not abstract, linear, or mechanical—it is lived and experienced in relation to the environment, seasons, the cycles of the moon, and communal life. In contrast, European time—particularly as it developed under capitalist and industrial conditions—is constructed around the abstraction of time from nature. Clocks, calendars, and timekeeping systems aimed to standardise, measure, and control time to suit production schedules. This version of time treats nature as an obstacle to be overcome: using the examples Atkins employs in her essay, winter is something to work through with artificial light and heating; night is no barrier to activity with the help of electricity; seasons are to be flattened into year-round productivity through mechanisation and global trade. To further illustrate the difference between Western and Ubuntu chronosophies, I use a river and the sea as a metaphor for time. In the Western perspective, time is likened to a river - a linear, directional flow always moving towards a destination. This view conflates the state of water with its flow, and in its proper state it has been flowing in a certain direction, its end. Similarly, the Western perception conceives of time as an empty resource to be conquered and utilized efficiently for a certain telos, for an end. This same linear conception buttresses the idea of extinctive prescription. The Western legal doctrine of “extinctive prescription”, which holds that certain rights or claims can be extinguished or invalidated by the mere passage of time. Injustice is perceived to be an event

¹⁰⁸ 231

¹⁰⁹ 231

¹¹⁰ 231

¹¹¹ 236

¹¹² 231

or set of events as opposed to a state of affairs. As time flows like a river, always moving towards a destination, it is conceived that there is a point at which past events are seen as too distant to address effectively. This aligns with the emphasis on productivity and "making the most" of time, suggesting that at some point, it becomes more productive to focus on the present and future rather than continually addressing the past.

In contrast, the Ubuntu worldview conceptualizes time more like the sea. This perspective sees time as influenced by various factors, much like how a body of water is affected by the moon, weather, and wind. Time in this view is neither static nor empty flowing, but rather a medium that allows for multiple possibilities and transformations. The movement within this conception of time is based on "currents" which can be complex and multidirectional, unlike the unidirectional flow of a river. Examples of these currents would be human actions and relationships, for instance. In the ubuntu philosophy of law, justice is viewed as the restoration of equilibrium, much like maintaining the balance of a sea's ecosystem. This equilibrium is not determined solely by the visible currents on the surface, but also by unseen forces beneath - akin to how a sea is influenced by underwater currents and geological factors. Just as a sea is shaped by its present state (the surface), its history (the seabed), and its potential future (incoming streams or weather patterns), similarly, in the Ubuntu tradition, justice is seen as an ongoing process of restoring harmony and equilibrium, without a sense of finality. This suggests that historical redress would be viewed as a continuous necessity, not limited by a unilinear flow of time. Consequently, this perspective does not recognize the concept of extinctive prescription or statute of limitations. This pursuit of equilibrium is an ongoing process that does not have a sense of finality. Consequently, "justice as the restoration of equilibrium" is central to law rather than "a static codification".¹¹³ This restoration of equilibrium is "a central element of the ubuntu philosophy of law."¹¹⁴

The central issue with the Western legal doctrine of extinctive prescription from an ubuntu jurisprudential perspective is that it allows historic injustices like colonization to be rendered legally valid and unavailable for redress merely by the passage of time. The ubuntu view rejects the idea that time alone can invalidate claims to restorative justice for enduring harms. This conflict highlights a deeper epistemological divide – the linear, chronological historiography prevalent in European thinking enables the colonizer to argue that centuries-

¹¹³ 2-3.

¹¹⁴ 2.

old injustices have reached prescription and finality. However, ubuntu jurisprudence operates outside this constrained temporal framework, viewing injustices as persisting wrongs requiring the restoration of ethical equilibrium across generations. The point to be understood is that ubuntu philosophy embodies a unique temporal logic that facilitates interconnectedness between the past, present, and future. This perspective has significant implications for historical redress and ethical considerations over time.

Ramose states that for indigenous conquered peoples, "extinctive prescription is untenable in the African understanding of law" because "molato ga o bole" - the debt or injustice "is never extinguished till the equilibrium has been restored, even if several generations elapse".¹¹⁵ The adage *molato ga o bole, go bola nama*, a guiding jurisprudential principle in communities practicing ubuntu can be most directly translated as *an offence does not rot; it is meat that rots*. Molato ga o bole places the offence in the metaphysical realm outside of linear time, as opposed to the tendency of meat to rot when it is left unattended for *too long*. There is a point where the meat loses its integrity through the passage of time as demonstrated in the decomposition process. This is not the same with an offence or injustice. An offence is in the realm of irrevocable time, a time that cannot expire. Therefore, to use the word *rot* with regard to the effect of the passage of time on an offence is a categorical mistake. Other interpretations are: "A case does not rot, i.e. it does not *cease to exist*"; "a debt does not *lapse*"; "a debt does not *rot*"; "debt does not *become obsolete*".¹¹⁶ The key theme connecting the expressions is that an offence is a debt that demands restitution, and that demand persists despite the passage of time until the due restitution has been made. Restitution makes the debt obsolete and cease to exist and lapse; in other words, to rot. In the case where an offender is unable to pay the debt, the case may be closed in the sense that the matter has passed before the courts and has been adjudicated and the debt acknowledged, but the closure of a legal dispute does not transform into the closure of an interpersonal moral debt. In this case, the adjudicators may pronounce "*Aowa, molato ga o bole; o tla go nyakela; di fedile*" (well, debt does not rot; [the offended party] will search for you; the case is closed!)¹¹⁷ The offended party would then still be justified to seek restitution in spite of the pronouncements of the court that the legal case has ended. In fact, molato, the debt, does not lapse with the death of the original debtor but may become a matter of a generational demand

¹¹⁵ 6.

¹¹⁶ Joubert *Ethnography from the Mission Field* 632-637.

¹¹⁷ 632.

for restitution. As Bapedi elders intimate, a “debt does not grow old, it simply has to be paid. It can even remain to be negotiated by the grandchildren.”¹¹⁸

The main point is that a debt never lapses until it is paid. It’s not that it cannot lapse; it’s that there are only two conditions under which the debtor or offender would not have to pay the debt: if the one who is owed the debt decides to write it off, in which case the guilt and liability remain but the obligation or responsibility to pay is no longer expected. In this scenario it becomes obsolete purely due to the decision of the one owed compensation: a direct indication of the primacy of the agency of the victim in the event of their victimization and their response to it. It is a form of *amnesty*. The other condition freeing the offender from paying the debt is if the victim *pays* the debt, in which case, while their guilt remains, they are no longer liable. It is a form of *restitution*. The victim is not required to forgive the offender at all. The requirement to regain one’s status as *umuntu* is contrary to the Western conception of punishment where liability for an offence is considered extinguished or negated either by a “proportionate” punishment however construed, or by the passage of time, such as in the case of extinctive prescription. In this Western worldview, the moral standing of individuals depends on their individual rights being respected by others and their own respect of the individual rights of others. In this manner, punishment primarily serves as protection against those who offend and not the reformation of the offender.

6.12. PNURA and the Time of *Molato*

A historiography informed by *molato ga o bole* calls for the recollection of that which has been obfuscated, erased and qualified: the sovereignty of the indigenous people over their land and the epistemological and ethical ramifications of this recollection. Ramose’s argument is not reserved for the limits of the PNURA’s enquiry into apartheid abuses. He is calling for a problematizing and a remedying of the focus on apartheid as the core antagonism between the indigenous peoples conquered in the unjust wars of colonization and their conquerors. *Molato ga o bole* chronosophy calls not for amnesia, but for the addressing of historical justice by starting from its foundations – a logic of the qualified humanity of indigenous people. Echoing the ubuntu jurisprudential approach to historical injustice, Benezet Bujo argues that the injustices of conquest and colonization cannot be dismissed

¹¹⁸ 637.

because the “history of those who were killed and exploited and robbed of their dignity [through colonization] is not yet buried,” what is needed is anamnestic solidarity from the descendants of those still alive, whether as victims or beneficiaries of colonization.¹¹⁹

Anamnestic solidarity in this instance would be solidarity that is based on the recollection of injustice perpetrated on those who are no longer living and the will to redress it. This recollection “of what has been, of acts of commission or omission, of a responsibility abdicated... shall not be erased until substantive justice in the form of recovery and restoration of lost sovereignty remedies the situation”.¹²⁰ Rather, “the restoration of title to territory and the reversion of sovereignty over it is the basic problem” and “an exigency of historical justice” that must be addressed to achieve true equilibrium.¹²¹

The principle of *molato ga o bole* offers a powerful critique of the chronosophy embedded in transitional justice discourse, particularly as manifested in the PNURA by fundamentally challenging the temporal assumptions and historical framing employed by transitional justice mechanisms.¹²² *Molato ga o bole* reveals the ethical crisis inherent in the politics of time employed by transitional justice discourse such mechanisms. The logic of discovery, which naturalizes European conquest and negates indigenous sovereignty through law, operates on the assumptions that European colonial sovereignty is just and natural, while indigenous territorial sovereignty is inherently limited. Transitional justice mechanisms like the PNURA, despite their reconciliatory aims, often perpetuate aspects of this logic through their chronosophy and narrative framing. *Molato ga o bole* offers an alternative framework that prioritizes indigenous conceptions of justice and time.

Molato ga o bole challenges the colonial discovery logic underpinning the PNURA in several key ways. First, it asserts temporal continuity in contrast to the linear conception of time often employed in transitional justice discourse. While mechanisms like the PNURA tend to focus on specific periods (such as the apartheid from 1960-1994), *molato ga o bole* posits that injustices persist across time until properly addressed. This perspective forces a recognition of the ongoing impacts of colonial conquest and land dispossession that predate more recent periods of conflict or oppression. Secondly, *molato ga o bole* expands the scope of justice. By asserting that debts do not lapse, it broadens the range of injustices that must be

¹¹⁹ B Bujo *The Ethical Dimension of Community: The African Model and the Dialogue Between North and South* (1998) 177.

¹²⁰ MB Ramose ‘In Memoriam: Sovereignty and the ‘New’ South Africa’ 16 *Griffith Law Review* 310.

¹²¹ Ramose “An African Perspective” 7.

¹²² 6.

addressed. This directly confronts the tendency of transitional justice mechanisms to focus on recent, well-documented abuses while sidelining historical colonial injustices, particularly those related to land and sovereignty. *Molato ga o bole* also problematises notions of intergenerational responsibility. While transitional justice mechanisms often struggle with questions of individual versus collective responsibility across generations, *molato ga o bole* suggests that responsibility for historical injustices cannot expire or be limited to specific actors. This confronts the implicit exculpation of settler communities from responsibility for earlier colonial actions often seen in transitional justice processes. Furthermore, *molato ga o bole* operates outside the linear, progressive time frame typically employed in transitional justice discourse. It rejects the notion that societies can "move on" from past injustices through specific mechanisms and within defined timeframes. Instead, it insists that unaddressed injustices remain present and active, regardless of chronological time passed.

The incompatibility between *molato ga o bole* and transitional justice discourse reveals a fundamental ethical crisis in the politics of time employed by these mechanisms. This crisis manifests in the arbitrary limitation of responsibility, the imposition of closure that may not align with lived experiences, the perpetuation of power imbalances, inadequate redress for long-standing injustices, and the erasure of indigenous temporalities. By arbitrarily focusing on recent periods of conflict or oppression, transitional justice often limits the scope of historical responsibility, potentially leaving deeper, structural injustices unaddressed. The linear time concept imposes a sense of closure that may not reflect the ongoing suffering from historical injustices. Moreover, by prioritizing Western legal concepts and timeframes, these mechanisms reinforce the very power structures they aim to address. The limited temporal scope often results in inadequate redress for long-standing injustices, particularly those related to land dispossession and loss of sovereignty. Additionally, the imposition of a linear, Western conception of time erases and marginalizes indigenous understandings of time and justice. By employing *Molato ga o bole* to critiques of transitional justice discourse, the PNURA's narrative chronosophy can be deconstructed to reveal the ethical crisis of the Eurocentric assumptions underlying its logic of "closing the chapter of the past".

6.13. Conclusion

Chapter 6 has sought to demonstrate that the chronopolitics embedded in the historical narrative of the Promotion of National Unity and Reconciliation Act (PNURA) reiterates the logic of discovery in several crucial ways, while the principle of *molato ga o bole* presents a powerful challenge to this injustice. The PNURA's chronosophy is fundamentally rooted in a Eurocentric understanding of time and progress. It employs a linear, progressive narrative that aligns with modernist conceptions of history, reinforcing the logic of discovery that has historically justified European conquest and colonization. This temporal framework creates a periodization that focuses primarily on a portion of the apartheid era (1960-1994), relegating earlier colonial injustices to a "distant past". By doing so, it obscures the longstanding and ongoing impacts of colonialism and conquest, which predate apartheid by centuries. The narrative structure of the PNURA implicitly suggests that the primary historical injustice to be addressed is apartheid, rather than the broader and deeper issues of land dispossession and loss of sovereignty that occurred during colonial conquest. This narrative employment, identified as primarily Comic, utilizes concepts of both reversible and irreversible time. It suggests that certain wrongs can be rectified in the present (reversible), while others may continue to "haunt" the future (irreversible) without any possibility for redress. However, this framing still operates within a linear temporal logic that fails to fully account for the persistent and cyclical nature of colonial injustices. By focusing on citizenship and individual rights through a liberal lens, the PNURA's narrative strategy effectively distances the colonial past. This distancing creates a present and future that protects European colonial sovereignty and settler colonialism. The PNURA thus uses narrative structure to negate settlers' liability for historical injustice and to naturalize the idea of "South Africans," which incorporates settlers into the "natural" body politic.

In contrast, the principle of *molato ga o bole* presents a strong challenge to this injustice. This indigenous concept, which translates to "an offence does not rot," offers a fundamentally different understanding of time, justice, and historical responsibility. It challenges the linear, progressive narrative employed by the PNURA and exposes how the act's focus on apartheid-era reconciliation inadvertently sidelines longer-standing injustices related to land ownership, sovereignty, and the enduring legacies of colonialism. *Molato ga o bole* pushes for a more expansive understanding of historical responsibility. It recognizes that the effects of historical injustices persist across generations and cannot be neatly confined to specific periods or easily resolved through limited reparative measures. This principle calls

for a reconsideration of how we conceptualize time, justice, and responsibility in post-colonial contexts.

The application of *molato ga o bole* presents an opportunity to rethink the political governance of time in transitional justice, and even the philosophical underpinnings of transitional justice. It highlights the need for approaches that can account for cyclical or non-linear understandings of time and justice, rather than relying solely on unilinear narrative continuity. This perspective has the potential to transform how we approach issues of land restitution, sovereignty, and the ongoing impacts of settler colonialism. By applying *molato ga o bole* to critique the PNURA, we expose the act's limitations in addressing the full scope of historical injustices in South Africa. This indigenous perspective challenges the temporal boundaries set by the PNURA, insisting on the persistent relevance of earlier injustices, particularly those related to land dispossession and loss of sovereignty, which continue to shape contemporary realities. Ultimately, *molato ga o bole* opens up a broader conversation about decolonizing transitional justice. It challenges us to develop frameworks that can genuinely confront the assumptions of the logic of discovery and centre indigenous perspectives on justice and temporality. This approach has the potential to lead to more nuanced, culturally responsive, and ultimately more effective approaches to addressing the complex legacies of colonialism and apartheid in South Africa and beyond.

7. CONCLUSION

This thesis was an effort to provide a satisfactory response to the provocation: how does the Promotion of National Unity and Reconciliation Act reinforce the continuity of European colonialism in South Africa? It offered a critical rereading of the PNURA as a legitimating tool not only of the state of South Africa but also of the oppressive colonial power dynamics that continue to plague especially the indigenous people of the territory. The thesis is structured around a critical analysis of the logic of discovery, aiming to dismantle the oppressive conceptual framework inherent in the PNURA and similar legislation. Through this examination, the study aims to unravel the invisible threads of colonial legacy woven into South Africa's post-apartheid legal and moral fabric, exposing the enduring influence of colonialism on the nation's legislative landscape.

The TRC's narrative approach also had implications beyond South Africa. As Claire Moon notes, "[s]ince the TRC's highly publicized operation, reconciliation is now a popular and widespread discourse governing the various contexts within which regime change or transition from conflict occurs."¹ This suggests that the South African model has influenced how other nations approach reconciliation and transitional justice. Given that the TRC in South Africa derived its credibility and legitimacy from the state apparatus and existed as an implementation of legislation, it is inevitable that it would not only lend credibility to transitional justice discourse grounded in human rights, the legitimacy of liberal democratic constitutionalism, and the primacy of the rule of law but also stand as the predominant narrative to be confronted and contended against when seeking alternative interpretations of the current political order in South Africa. A profound consequence of this monopoly on credibility and legitimacy is the marginalization of alternative narratives.

This study aimed to build on the understanding of how colonial logics persist through transitional justice mechanisms, particularly in South Africa. By examining the PNURA and TRC through the lens of the doctrine of discovery, it revealed how these supposedly transformative processes actually reinforced settler colonial power by legitimizing European legal frameworks while continuing to negate indigenous sovereignty and personhood. The research demonstrated how transitional justice, despite its progressive rhetoric, served as a sophisticated mechanism for naturalizing settler colonialism and maintaining colonial control

¹ C Moon *Narrating Political Reconciliation: South Africa's Truth and Reconciliation Commission* (2008) 258.

through legal violence. The study's theoretical contribution lies in exposing how the logic of discovery operates within contemporary legal and political frameworks. It showed how transitional justice processes, while claiming to address historical injustices, actually perpetuate colonial hierarchies by forcing indigenous experiences and claims into Western legal paradigms. This theoretical framework helps explain why formal transitions to democracy often fail to deliver genuine decolonization, as they remain rooted in colonial logics that fundamentally deny indigenous sovereignty.

In Chapter 2, I examined the logic behind the PNURA and its role in justifying South Africa's transition to a liberal democracy. The central argument posits that the PNURA's human rights framework functioned as a tool for fostering a shared national identity, asserting the moral legitimacy of the new democratic state. The chapter began by outlining the PNURA's mandate and historical context, illustrating it as a political solution designed to address state instability through legal indemnity. Key political developments paved the way for negotiations culminating in the Interim Constitution's amnesty requirement. At the surface level, the PNURA aimed to uphold the rule of law through transitional justice focused on accountability and valuing both victims and perpetrators equally. It facilitated hearings as a means to reclaim dignity and promote reconciliation, ostensibly portraying its ethos and actions as based on the pursuit of documenting truth to build an inclusive democracy centred on the injustices of apartheid. The chapter emphasized that forgiveness was essential for restoring victims' dignity. By embedding restorative justice into the national narrative, the PNURA sought to legitimize the transition to a constitutional democracy. A case study on AZAPO illustrated how the focus on restorative justice and reconciliation reinforced the narrative of a legitimate departure from an unjust past.

Chapter 3 critically examined how the PNURA shaped South Africa's political transition through a duplicitous use of narrative that served specific political ends. While presenting itself as a vehicle for truth-telling and reconciliation, the PNURA strategically framed liberal constitutional democracy as the only viable political future, dismissing alternative paths as inherently disastrous. This sleight of hand obscured the constructed nature of this narrative, masking its alignment with the dominant liberal ideology and historiographical traditions that had historically privileged settler perspectives. The chapter began by exploring how collective memory was manipulated as a tool for nation-building, with the TRC creating a "reusable text" that prioritized a version of the past aligned with liberal democratic ideals. This narrative effectively severed ties with apartheid-era

interpretations while downplaying deeper colonial and racial tensions. By positioning apartheid as a mere deviation from an otherwise progressive historical path, the PNURA concealed the complex realities of colonial oppression. Through selective periodization and emplotment, the PNURA framed historical injustices in a way that supported the political legitimacy and ideals of a liberal state. This approach minimized the significance of colonial antagonisms and reinforced a narrative that rendered the transition to constitutional democracy as an inevitable progression.

Chapter 4 pursued the line of argument that the PNURA's narrative construction served to reinforce Western imperialism and colonial domination within South Africa's 1994 "transition" through several sophisticated mechanisms. The analysis reveals how the PNURA, while presenting itself as a tool for reconciliation and transformation, actually operated within and legitimized Western colonial jurisprudence and liberal democratic ideals that maintained existing power structures. The PNURA's approach strategically emphasized forgiveness and reconciliation while creating problematic distinctions between "good" and "bad" victimhood, effectively controlling how historical injustices could be addressed. Its superficial incorporation of Ubuntu demonstrated how African concepts were appropriated to give a veneer of indigenous legitimacy to what remained essentially Western frameworks. The concept of "plural truth" functioned more as a mythmaking device than genuine historical representation, allowing for selective interpretation of the past that privileged colonial perspectives.

Through Charles Mills's concept of the Racial Contract, the analysis showed how the PNURA operated within a framework that systematically privileged white supremacy while providing only formal legal equality. The process of "constitutionalisation," as described by James Tully, revealed how Western constitutional models were imposed in ways that marginalized indigenous governance systems. This arrangement effectively subdued rather than empowered indigenous populations while maintaining structural white supremacy. The PNURA's selective historiography particularly served imperial interests by framing apartheid as the primary historical injustice while obscuring earlier colonial atrocities. This narrative strategy, rooted in colonial jurisprudence, enabled the state to evade accountability for its fundamental usurpation of indigenous sovereignty while presenting constitutional democracy as an inevitable and progressive development, rather than a continuation of colonial domination through new means.

Chapter 5 demonstrated colonial discovery logic through its strategic manipulation of time and legal frameworks, effectively preserving white supremacy and European colonial dominance. Its chronopolitical structure operates through several key mechanisms: First, it employs a distinctly Eurocentric, linear conception of time that frames history as progressive, allowing it to artificially compartmentalize and distance colonial injustices. By focusing narrowly on the apartheid period (1960-1994), it deliberately pushes centuries of colonial conquest and land dispossession into a "distant past" deemed too remote for redress. Second, the PNURA's narrative structure weaponizes time by creating a selective framework of what can and cannot be remedied. Through its ethical paradigm of irreversible time, it suggests some wrongs are reversible while rendering others - particularly colonial land theft and sovereignty violations - as irreversible and beyond address. This temporal manipulation effectively protects settler colonial interests and European sovereignty. Third, by emphasizing citizenship and individual rights through a liberal lens, the PNURA naturalizes the incorporation of settlers into the "natural" body politic of "South Africans," while simultaneously negating their liability for historical injustices.

However, the indigenous principle of *Molato Ga O Bole* ("an offence does not rot") powerfully challenges this chronopolitical arrogance. It rejects the PNURA's linear temporality and artificial time boundaries, asserting instead that historical injustices persist across generations and cannot be arbitrarily confined to specific periods. This principle demands recognition that colonial wrongs - particularly regarding land and sovereignty - continue to shape present realities and require address. *Molato Ga O Bole* thus exposes how the PNURA's chronopolitics serve to maintain colonial power structures, while offering an alternative framework for conceptualizing time, justice, and responsibility in post-colonial contexts.

Throughout the analysis, this thesis offered profound reflections on the implications of the logic of discovery for indigenous sovereignty, land rights, and the pursuit of justice in post-colonial contexts. By methodically deconstructing the logic of discovery and relating it to contemporary legal frameworks like the PNURA, this chapter aimed to unveil the enduring influence of colonial thought in transitional justice discourse. The prevailing narrative of South Africa's transition from apartheid to democracy frequently overlooks the nuanced complexities of its historical and colonial legacies. This oversimplification obscures the ongoing struggles for justice and reconciliation, relegating them to the periphery of political discourse. Consequently, calls for redress and acknowledgment of past injustices are

marginalized, maintaining a status quo that serves the interests of those in power while ignoring the voices of marginalized communities. Within this framework, legitimate calls for addressing historical injustices are often dismissed, perpetuating a political system that disregards the pleas of history for transformative change. The discourse surrounding transitional justice fails to adequately diagnose the systemic origins of societal degradation and racial tensions. It is imperative to recognize the deep-rooted historical injustices and power dynamics that continue to shape contemporary South African society. By way of invitation, this thesis investigation has the potential to make significant contributions to academic discourse, push the boundaries of philosophical thinking on justice and reconciliation, and provide a critical perspective that challenges established narratives. By explicitly connecting transitional justice processes to broader colonial contexts, the research addresses a crucial gap in existing literature, potentially reshaping how we understand and approach reconciliation in post-colonial societies.

7.1. An Endnote

The central critique advanced in this study revolved around the pervasive influence of the vast body of literature within the field of transitional justice, which consistently overlooks the enduring problem of colonialism and the dynamics of colonial power in countries endeavouring to transcend historical injustices because it operates within a “post”-colonial lexicon. Furthermore, this discourse often portrays historical injustice as a relic of the past, disregarding the tangible and symbolic lived experiences of Black and indigenous peoples in the so-called post-colonial states, which belie any notion of a clean break from the past. These experiences serve as a stark rebuke to the claim that historical injustice belongs solely to bygone eras. The logic of discovery's manifestation in contemporary South Africa through the PNURA and TRC processes reveals the persistent colonial structures underlying the nation's transition to democracy. The PNURA's strategic deployment of human rights discourse and liberal democratic principles to legitimize the new state mirrors how the doctrine of discovery historically used European legal frameworks to legitimize colonial conquest. This legitimation process occurred without fundamentally questioning the colonial structures that shaped South African society, effectively naturalizing Western political frameworks as the only valid path to democracy.

Further lines of research should build on these insights by examining alternative indigenous legal and political frameworks that could inform genuine decolonial transformation. This includes studying successful examples of indigenous sovereignty assertion that challenge liberal democratic frameworks, developing theoretical approaches that better capture colonial continuities in "post-colonial" states, and conducting comparative analyses of how the logic of discovery persists across different contexts. Such research would contribute to understanding how genuine decolonization might be achieved beyond the limitations of liberal constitutional frameworks that currently serve to legitimize and perpetuate settler colonial power relations. Key to this future work is the recognition that transitional justice, as currently conceived, often serves as a tool for maintaining colonial control rather than achieving rectification of historical injustice transformation. This understanding necessitates a fundamental rethinking of how justice and reconciliation can be achieved in ways that genuinely recognize and restore indigenous sovereignty and personhood.

Bibliography

Journal Articles

A Abizadeh "Historical Truth, National Myths and Liberal Democracy: On the Coherence of Liberal Nationalism" 3 (2004) 12 *The Journal of Political Philosophy* 291–313

Allen, J. "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission." *The University of Toronto Law Journal* 49 (1999): 332

Anghie, A. "Francisco de Vitoria and the Colonial Origins of International Law." *Social & Legal Studies* 5, no. 3 (1996): 321-336.

Arthur, P. 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009): 31 *Human Rights Quarterly* 337

Assmann, J, and Czaplicka, J. "Collective Memory and Cultural Identity." *New German Critique* 65 (1995): 125-133

Atkins, KE. "'Kafir Time': Preindustrial Temporal Concepts and Labour Discipline in Nineteenth Century Colonial Natal." *The Journal of African History* 29, no. 2 (1988): 229-244.

Azanian People's Organization (AZAPO) v President of the Republic of South Africa 1996 SA 671 (CC)

Bachmann, S. and Frost, T. "Colonialism, Justice and the Rule of Law: A Southern African and Australian Narrative." *SSRN Electronic Journal* (2012): 306-328.

Bank, A. The Great Debate and the Origins of South African Historiography. *The Journal of African History* 38, no 2 (1997): 261-281.

Berenskotter, F. "Parameters of a National Biography" *European Journal of International Relations* 20 (2014)

Bevernage, B. "Time, Presence, and Historical Injustice." *History and Theory* 47, no. 2 (2008): 149-167.

Bevernage, B. "Writing the Past out of the Present: History and the politics of Time in Transitional Justice." In *History Workshop Journal* 69, no 1, (2010): 111-131

Bevernage, B. "Transitional Justice and Historiography: Challenges, Dilemmas and Possibilities." *Macquarie Law Journal* 13, no. 2014 (2014): 7-24

Boisen, C. "The Changing Moral Justification of Empire: From the Right to Colonise to the Obligation to Civilise." *History of European Ideas* 39, no. 3 (2013): 335-353.

Boisen, C "From Land Dispossession to Land Restitution: European Land Rights in South Africa" *Settler Colonial Studies* 7 (2017): 321–339

- Boraine, A. "Transitional Justice: A Holistic Interpretation" *Journal of International Affairs* 60 (2006): 17–27
- A Bothmann *Transitional Justice in Nicaragua 1990–2012: Drawing a Line Under the Past* (2015) 27.
- Boucher, D. "The Just War Tradition and its Modern Legacy: Jus ad Bellum and Jus in Bello." *European Journal of Political Theory* 11, no. 2 (2012): 92-111.
- LJ Bremmer "Memory, Nation Building and the Post-apartheid City: The Apartheid Museum in Johannesburg" *Desire Lines: Space, Memory and Identity in the Post-Apartheid City* (2007) 85-103.
- Cavallar, G. "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans." *Journal of the History of International Law* 10 (2008): 181.
- Cavanagh, E. "Prescription and Empire from Justinian to Grotius" *The Historical Journal* 60, no. 2 (017): 273-299
- Cobley, A. "Does Social History have a Future? The Ending of Apartheid and Recent Trends in South African Historiography." *Journal of Southern African Studies* 27, no. 3 (2001): 613-625.
- Conversi, D. "Sovereignty in a changing world: From Westphalia to food sovereignty." *Globalizations* 13, no. 4 (2016): 484-498.
- Corder, H. "Towards a South African Constitution" 57 *The Modern Law Review* 57 (1994)
- Dladla, N. "The Liberation of History and the End of South Africa: Some Notes Towards an Azanian Historiography in Africa" *South African Journal on Human Rights* 34 (2018): 433
- Dladla, N "Towards an African Critical Philosophy of Race: Ubuntu as A Philo-Praxis of Liberation" *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 6 (2017): 53
- Eisikovits, N. "Rethinking the Legitimacy of Truth Commissions: "I Am the Enemy You Killed, My Friend" *Metaphilosophy* 37 (2006):489–514
- Eisikovits, N. "Peace versus Justice in Transitional Settings" *Quinnipiac Law Review* 32 (2014): 708-711
- Evans, J "Where Lawlessness is Law: The Settler-Colonial Frontier as a Legal Space of Violence" *Australian Feminist Law Journal* 30 (2009): 3-22
- Eze, C. "The Ethical Dimension of Community: The African Model and the Dialogue between North and South by Bénézet Bujo." *Philosophia Africana* 4, no. 1 (2001): 79-82.
- Fitzmaurice, A. "The Genealogy of Terra Nullius." *Australian Historical Studies* 38, no. 129 (2007): 1-15.

- Gilbert, MJ & Settles, TL "The Next Step: Indigenous Development of Neighbourhood-Restorative Community Justice" *Criminal Justice Review* 32, no 7 (2007)
- Gümplová, P "Rights of Conquest, Discovery and Occupation, and the Freedom of the Seas: A Genealogy of Natural Resource Injustice" *Isonomía* 54, no 6 (2021)
- Hamber B & Wilson RA "Symbolic Closure Through Memory, Reparation and Revenge in Post-Conflict Societies" *Journal of Human Rights* 50 (2002)
- Hunfeld, K. "The Coloniality of Time in the Global Justice Debate: De-Centring Western Linear Temporality" *Journal of Global Ethics* 18, no. 1 (2022)
- Ignatieff, M. "Articles of Faith" *Index on Censorship* 25 (1996): 113
- Joubert, A. "Ethnography from the Mission Field: The Hoffmann Collection of Cultural Knowledge." In *Ethnography from the Mission Field*. Brill, 2015.
- Kaminsky, MM *et al* "Normative and Strategic Aspects of Transitional Justice" *The Journal of Conflict Resolution* 50 (2006): 296
- Keal, P. "'Just Backward Children': International Law and the Conquest of Non-European Peoples." *Australian Journal of International Affairs* 49, no. 2 (1995): 191-206.
- Kelley, R.D.G. "The Rest of Us: Rethinking Settler and Native", *American Quarterly* 69, no. 2 (2017):267-276
- LA Khan "Temporality of Law" (2009) 40 *McGeorge Law Review* 59.
- Klinke, I 'Chronopolitics: A Conceptual Matrix', *Progress in Human Geography* 37, no. 5 (2013)
- Krygier, M "Why the Rule of Law Matters" *Jurisprudence*, no 9 (2018)
- Lenta P. "Transitional Justice and Retributive Justice" *Ethical Theory and Moral Practice* (2019)
- Mamdani, M. "Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism" *Comparative Studies in Society and History* 43 (2001): 651–664
- M Mamdani "When Does Reconciliation Turn into a Denial of Justice?" in CH Heyns & K Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A Reader* (1998) 382.
- Mangena, F. "Towards a hunhu/ubuntu dialogical moral theory." *Phronimon* 13, no. 2 (2012): 1-17.
- Miller, R J. "The International Law of Colonialism: A Comparative Analysis." *Lewis & Clark Law Review* 15 (2011): 847.
- Mills, CW "The Chronopolitics of Racial Time" *Time & Society* 29 (2020): 299
- Mills, CW "White time: The Chronic Injustice of Ideal Theory" *Du Bois Review: Social Science Research on Race* 11, no 30 (2014)

- Minow, M. "Forgiveness, Law, and Justice" *California Law Review* 103 (2015): 1629
- Modiri, JM. "Conquest and constitutionalism: first thoughts on an alternative jurisprudence." *South African Journal on Human Rights* 34, no. 3 (2018): 300-325.
- Modiri, JM "Azanian Political Thought and the Undoing of South African Knowledges" *Theoria* 168 (2022)
- Claire Moon "Narrating Political Reconciliation: Truth and Reconciliation in South Africa" *Social and Legal Studies* 15 (2006).
- Ramose, B. "An African Perspective on Justice and Race" (2001) 3 *Polylog* <<https://them.polylog.org/3/frm-en.htm>> (Accessed: 11—05-2024).
- Ramose, B. "In memoriam: Sovereignty and the 'New' South Africa." *Griffith Law Review* 16, no. 2 (2007): 310-329.
- Ramose, B. "Reconciliation and Reconciliation in South Africa." *Journal on African Philosophy* 1, no. 5 (2012)
- Ramose, B. "Towards a Post-Conquest South Africa: Beyond the Constitution of 1996." *South African Journal on Human Rights* 34, no. 3 (2018): 326-341.
- Sachs, A. "Truth and reconciliation" *SMUL Rev.* 52 (1999)
- Samuels, GEM "Epistemic Trauma and Transracial Adoption: Author(iz)ing Folkways of Knowledge and Healing" *Child Abuse & Neglect* 130 (2022) <<https://doi.org/10.1016/j.chiabu.2022.105588>>
- Saunders, C "Perspective on the Transition from Apartheid to Democracy in South Africa" *South African Historical Journal* 51 (2004): 162
- Shaw, M. "International Law and Intervention in Africa." *International Relations* 8, no. 4 (1985): 341-367.
- Simpson. T. "Toyì-Toyì-ing to Freedom: The Endgame in the ANC's Armed Struggle, 1989-1990" *Journal of Southern African Studies* 35 (2009): 512
- Stevens, G *et al.* 'The Apartheid Archive: Memory, Voice and Narrative as Liberatory Praxis' *Psychology in Society* 12 (2010)
- Temin, DM and Dahl, A. "Narrating Historical Injustice: Political Responsibility and the Politics of Memory" *Political Research Quarterly* 70, no. 4 (2017): 905-917
- Teitel, R. "Transitional Justice Genealogy" *Harvard Human Rights Journal*, 16 (2003): 69-94
- Tempelhoff, JWN "Writing Histories and Creating Myths: Perspectives on Trends in the Discipline of History and its Representations in Some South African Historical Journals 1985-1995" *Scientia Militaria - South African Journal of Military Studies* 27 (2012): 121-147
- Tuck, E, & Yang, E "Decolonization is not a Metaphor" *Decolonization: Indigeneity, Education & Society* 1, no 5 (2012)

- Turgis, N “What is Transitional Justice?” *International Journal of Rule of Law and Transitional Justice* 1 (2010): 14-20
- Van der Walt, C et al “The South African Truth and Reconciliation Commission: ‘Race’, Historical Compromise and Transitional Democracy” *International Journal of Intercultural Relations* 27 (2003): 251–267
- Veracini, L. “Introducing: Settler Colonial Studies.” *Settler colonial studies* 1, no. 1 (2011): 1-12.
- Walker, M. “Restorative Justice and Reparations”, *Journal of Social Philosophy* 37, no. 3 (September 2006): 377–95
- Waswo, R. "The Formation of Natural Law to Justify colonialism, 1539-1689." *New Literary History* 27, no. 4 (1996): 743-759.
- Werle, G. 'Without Truth, No Reconciliation. The South African “Rechtsstaat” and the Apartheid Past' *Law and Politics in Africa, Asia and Latin America* 29 (1996): 58–72
- Wertsch, James & Roediger, Henry “Collective Memory: Conceptual Foundations and Theoretical Approaches” *Memory* 16 (2008) 324
- Wolfe, P. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* 8, no. 4 (2006): 387-409.

Books and Book Chapters

- Allsobrook, C. “A Genealogy of South African Positivism”, in *Intellectual Traditions in South Africa: Ideas, Individuals and Institutions*, ed. Peter C. J. Vale, Lawrence Hamilton, and Estelle H. Prinsloo. University of KwaZulu-Natal Press, 2014.
- Andrews, M. *Shaping History: Narratives of Political Change*. Cambridge University Press, 2007.
- Anghie, A. *Imperialism, Sovereignty and the Making of International Law*. Vol. 37. Cambridge University Press, 2007.
- Bevernage, B. *History, Memory, and State-Sponsored Violence: Time and Justice*. Routledge, 2012.
- Berat, L "South Africa: Negotiating Change? Impunity and Human Rights in International Law and Practice”, in *Impunity and Human Rights in International Law and Practice*, ed. N Roht-Arriaza. Oxford University Press, 1995
- Bundy, C. “The Beast of the Past”, in W. James, & D. P. van der Vijver (Eds.), *After The TRC: Reflections on Truth and Reconciliation In South Africa*. Cape Town: David Phillip, 2007.
- Butler, J. 2002 (1827). *Upon Resentment and the Forgiveness of Injuries*. Boston: Hilliard, Gray, Little, and Wilkins.

Byrd, J *The Transit of Empire: Indigenous Critiques of Colonialism*. University of Minnesota Press, 2011.

Christie, K. *The South African Truth Commission*. Palgrave Macmillan, 2000.

Collingwood, RG. *The Idea of History*. Oxford University Press, 1994.

Cooper, Frederick. *Colonialism in Question*. University of California Press, 2005.

Derrida, Jacques. *On Cosmopolitanism and Forgiveness*. Routledge, 2001

Dicey, AV. *Introduction to the Study of the Law of the Constitution*. Indianapolis, 1982.

A du Toit “The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition” in *Truth versus Justice: The Morality of Truth Commissions*, ed. R Rotberg & D Thompson, 2000.

Duvenage, P ‘Afrikaner Intellectual History: An Interpretation’, in *Intellectual Traditions in South Africa: Ideas, Individuals and Institutions*, ed. Peter C. J. Vale, Lawrence Hamilton, and Estelle H. Prinsloo, University of KwaZulu-Natal Press, 2014.

Fassbender, B, Peters, A, Peter, S and Högger, D. *The Oxford Handbook of the History of International Law*. OUP Oxford, 2012.

Fischer, M. “Transitional Justice and Reconciliation, Theory and Practice” in *Advancing Conflict Transformation: The Berghof Handbook II* Austin, B. et al (eds.) Opladen, 2011.

Fitzmaurice, A. "Discovery, Conquest, and Occupation of Territory." In *The Oxford Handbook of the History of International Law*, 2012.

Fraser, J. T. *The Voices of Time: A Cooperative Survey of Man's Views of Time as Expressed by the Sciences and Humanities* (2nd ed.). Amherst: The University of Massachusetts Press, 1981.

Frederickson, GM. *White Supremacy: A Comparative Study of American and South African History* xi [New York] Oxford University Press, 1981.

Friedman, S. “The Ambiguous Legacy of Liberalism: Less a Theory of Society, More a State of Mind”, in *Intellectual Traditions in South Africa: Ideas, Individuals and Institutions*, ed. Peter C. J. Vale, Lawrence Hamilton, and Estelle H. Prinsloo. University of KwaZulu-Natal Press, 2014.

Garcia-Godos, J “Reparations” in O Simić (ed) *An Introduction to Transitional Justice*, 2021.

Gillis, J “Memory and Identity: The History of a Relationship” in John Gillis (ed) *Commemorations: The Politics of National Identity* 1994

Glissant, E. *Poetics of Relation* University of Michigan Press, 1997

Gohar, A & Zehr, Ho. *The Little Book of Restorative Justice*: Good Books, 2002

Grotius. *The Rights of War and Peace Book 1*, Indianapolis, 2005.

- Yusuf, HO & Van der Merwe, H. *Transitional Justice: Theories, Mechanisms and Debates*. Routledge, 2021.
- Hampton, J. *Forgiveness, Resentment and Hatred* in Murphy, JG & Hampton, J, *Forgiveness and Mercy*. *Cambridge Studies in Philosophy and Law*: Cambridge University Press, 1988.
- Hayner, P. *Transitional Justice and the Challenge of Truth Commissions*. Opladen, 2011.
- PB Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2011) 166.
- Heraclides, A & Dialla A. "The Origins of the Idea of Humanitarian Intervention: Just War and Against Tyranny." In *Humanitarian Intervention in The Long Nineteenth Century*. Manchester University Press, 2017.
- Hinsdale, A. *The Right of Discovery*. 1888.
- Korman, S. *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*. Clarendon Press, 1996.
- Koselleck, R. *Sediments of Time*. Stanford University Press, 2018.
- M Lavabre "Historiography and Memory" in A Tucker *A Companion to the Philosophy of History and Historiography*, 2009.
- Lollini, Andrea. *Constitutionalism and transitional justice in South Africa*. Vol. 5. Berghahn Books, 2011.
- Madlingozi, Tshepo Good *Victim, Bad Victim: Apartheid's Beneficiaries, Victims, and the Struggle for Social Justice* in Le Roux, W & Van Marle, K (Eds.) *Law, Memory, and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa*: Pretoria University Law Press, 2007.
- Magubane, Bernard Makhosezwe. *The Making of a Racist State: British imperialism and the Union of South Africa, 1875-1910*. Africa World Press, 1996.
- Magubane, Bernhard Makhosezwe, BM *Whose Memory – Whose History? The Illusion of Liberal and Radical Historical Debates*, in: Stolten, HE *History Making and Present-Day Politics: The Meaning of Collective Memory in South Africa*. Elanders Gotab, 2007
- Mamdani, M. "Sam Nolutshungu Memorial Lecture - When Does Reconciliation Turn into a Denial of Justice?" in Heyns, CH & Steffiszyn, K (eds) *Human Rights, Peace and Justice in Africa: A Reader*: HSRC Publishers, 1998.
- Mamdani, Mahmood. *Citizen and subject: Contemporary Africa and the legacy of late colonialism*. Princeton University Press, 2018.
- Manier, David & Hirst William 2008 *A Cognitive Taxonomy of Collective Memories* in Erll, A & Nunning, A (eds) *Cultural Memory Studies: An International and Interdisciplinary Handbook* 253
- Maylam, P. *South Africa's Racial Past*. Aldershot: Ashgate, 2003.

- Miller, RJ et al. *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*. Oxford University Press, 2010.
- Mills CW. *The Racial Contract*
- Minow, M *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Beacon Press, 1998.
- Moyn, S. *The Last Utopia: Human Rights in History*. Belknap Press of Harvard University Press, 2010.
- Munslow, A. *Deconstructing History*. Routledge, 2006.
- Murphy, JG. *Getting Even - Forgiveness and Its Limits*, Cambridge Studies in Philosophy and Law. University Press, 2003.
- Newcomb, ST, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery*. Colorado: Fulcrum Pub: 2008.
- Osterhammel, J. *Colonialism: A Theoretical Overview*. Markus Wiener Publishers, 2005
- Pillay, T "From Apartheid to Democracy in South Africa: a Reading of Dominant Discourses of Democratic Transition" in HE Stolten (ed) *History Making and Present Day Politics: The Meaning of Collective Memory in South Africa* 2007
- Posel, Deborah & Simpson, Graeme (eds.). (2002) *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*: Witwatersrand University Press
- Rachels, J. 'Justice: Punishment and Desert', in *Ethics in Practice*, ed. LaFollette H. Oxford: Basil Blackwell, 1997.
- Ramose, MB. "I conquer therefore I am the sovereign: Reflections upon Sovereignty, Constitutionalism, and Democracy in Zimbabwe and South Africa." *Philosophy from Africa: A text with readings*,2002.
- Ramose, MB. "Motho ke motho ka batho, an African Perspective on Popular Sovereignty and Democracy." *The Oxford handbook of comparative political theory*, 2019.
- SABC TRC Commissions *Special Report* <<https://sabctrc.saha.org.za/reports.htm>> (accessed 20-05-2019)
- Saul, JS., and Bond, P. *South Africa--the Present as History: From Mrs Ples to Mandela & Marikana*. Boydell & Brewer Ltd, 2014.
- Saunders, C. *The Making of the South African Past: Major Historians on Race and Class*. Barnes & Noble Books, 1988.
- Scarre, G. *After Evil: Responding to Evil-Doing*. Aldershot: Ashgate, 2004.
- S Sharpe "The Idea of Reparation." In G Johnstone & DFW van Ness (eds.) *Handbook of Restorative Justice* (2013) 27.

Simić, O ed., *An Introduction to Transitional Justice*, 2nd edition (Milton Park, Abingdon, Oxon; New York, NY: Routledge, 2020).

Scott *Conscripts of Modernity: The Tragedy of Colonial Enlightenment*. Duke University Press, 2004

Seed, P. *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640*. Cambridge University Press, 1995.

Sitze, A. *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*. University of Michigan Press, 2013.

Smith, K. *The Changing Past: Trends in South African Historical Writing*. Ohio University Press, 1989.

Sparks A. *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* (1994) 140.

Stolten H *History Making and Present-Day Politics: The Meaning of Collective Memory in South Africa*, 2007

Suttner, R, "African Nationalism", in *Intellectual Traditions in South Africa: Ideas, Individuals and Institutions*, ed. P.C. J. Vale, L Hamilton, and E. H. Prinsloo. University of KwaZulu-Natal Press, 2014.

Szablewska, N and Bachmann, SD, eds., *Current Issues in Transitional Justice* (Cham: Springer International Publishing, 2015

Terreblanche, S J. "Lost in Transformation: South Africa's Search for a New Future Since 1986." 2012.

Trouillot, M. *Silencing the Past: Power and the Production of History*. Beacon Press, 2015. Tuck, R. *Natural Rights Theories: Their Origin and Development*. Cambridge University Press, 1979.

Tutu, D. *No Future without Forgiveness*: Doubleday, 2000.

Vale, P, Hamilton, L & Hamilton, E. eds., 'Afrikaner Intellectual History: *An Interpretation*', in *Intellectual Traditions in South Africa: Ideas, Individuals and Institutions*. University of KwaZulu-Natal Press, 2014.

Veracini, L. *Settler Colonialism: A Theoretical Overview*: Palgrave Macmillan, 2010.

Villa-Vicencio, C & Doxtader, E & Goldstone, R. *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice*. Cape Town: Institute for Justice and Reconciliation, 2004.

M Vimalassery, JG Pegues & A Goldstein "Introduction: On Colonial Unknowing" (2016) 19 *Theory & Event*.

Vitoria, Francisco. *Vitoria: Political Writings*. Cambridge University Press, 1991.

Whalen, Brett Edward "The Papacy." In *The Routledge History of Medieval Christianity*. Routledge, 2015.

White, H. *Metahistory: The Historical Imagination in Nineteenth-Century Europe*. JHU Press, 1973.

Williams Jr, R A. *The American Indian in Western Legal Thought: The Discourses of Conquest*. Oxford University Press, 1992.

Wilson, R. A. "Justice and Legitimacy in the South African Transition", in *The Politics of Memory: Transitional Justice in Democratizing Societies*, eds., A B De Brito, C González Enríquez, and P Aguilar, Oxford University Press, 2001

Ashby, R. *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge Univ. Press 2008

West-Pavlov, R. *Temporalities*. New York: Routledge. 2013.

Wilson, R. *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2008)

Wolfe, P. *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographical Event*, Cassell, 1999

Worden, N. *The Making of Modern South Africa*: Wiley-Blackwell, 2012.

Yusuf, Hakeem & Van der Merwe, Hugo *Transitional Justice: Theories, Mechanisms and Debates*, 1st ed. London: Routledge, 2021.

Zeruvabel, E. *Time Maps: Collective Memory and the Social Shape of the Past*. University of Chicago Press, 2003

Documents And Websites

Constitution of the Republic of South Africa Act 200 of 1993

Constitutional Court Trust. "Background to CODESA"
https://www.concourtrust.org.za/uploads/files/Background_to_CODESA_1.pdf (accessed 20 May 2018)

Explanatory Memorandum to the Parliamentary Bill (1995)
<https://www.justice.gov.za/trc/legal/bill.htm> (accessed 30 January 2019).

Geneva Conventions and their additional protocols
https://www.law.cornell.edu/wex/geneva_conventions_and_their_additional_protocols
(accessed 22 November 2021)

INCORE International Conflict Research Institute "Groote Schuur Minute"
<https://www.incore.ulster.ac.uk/services/cds/agreements/pdf/sa3.pdf> (accessed 10 November 2022)

G Kasapas "An Introduction to the Concept of Transitional Justice: Western Balkans and EU Conditionality" (2008) *UNISCI Discussion Papers*

Z Jolobe *Getting to CODESA: An Analysis on Why Multi-Party Negotiations in South Africa Began, 1984-1991* DPhil thesis University of Cape Town (2014) 386.

Lackey, J. "Epistemic Reparations and the Right to be Known", 2022.

Mallinder, L. *Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa. Working Paper No. 2, Institute of Criminology and Criminal Justice: Queen's University, 2009.*

Marx, C 'Settler Colonies' 2017. <http://ieg-ego.eu/en/threads/europe-and-the-world/european-overseas-rule/christoph-marx-settler-colonies> (accessed 13 March 2020).

McMahon, T. "The Great Commission, Papal Bulls and the Doctrine of Discovery: from the 4th Century to Current Law" *SSRN* (2021)

Posel, D "The TRC Report: What Kind of History? What Kind of Truth?" Wits History Workshop and the Centre for the Study of Violence and Reconciliation, TRC: Commissioning the Past', 1999.

Promotion of National Unity and Reconciliation Act 34 of 1995 2

Savage, K "Negotiating the Release of Political Prisoners in South Africa" *Centre for the Study of Violence and Reconciliation Report*
<www.csvr.org.za/docs/correctional/negotiatingtherelease> (accessed 10 November 2022)

South African Press Association <justice.gov.za/trc/media/1998/9810/s981029r.htm>
(accessed 22- November 2021)

Stanley, L. "Natives' Land Act, 1913" www.whiteswritingwhiteness.ed.ac.uk/Traces/Land-Act/ (2019)

The Natives' Land Act No. 27 of 1913

Truth and Reconciliation Commission of South Africa Report

United Nations "Human Rights and Constitution Making" (2018) 10.

Visser, W. (2004) 'Trends in South African Historiography and the Present State of Historiographical Research' <http://fliphtml5.com/blbz/zrzp/basic>. (accessed 11 October 2019)

Winter, Y "Conquest" (2012) <https://www.politicalconcepts.org/conquest-winter/#ref37>
(accessed 2 June 2021).