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An Ubuntu Paradigm of Property in the South African Context

DOTTORANDA

Christina Refhilwe Mosalagae

TUTORS:

Prof. Ugo Mattei

Prof. Gustav Muller

COORDINATORE DEL DOTTORATO: Prof.ssa Ilenia Massa Pinto

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Declaration of Originality

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work; that I am the sole author thereof (save to the extent explicitly otherwise stated); and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Christina Refhilwe Mosalagae

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Abstract

In classical comparative law taxonomy South Africa is classified as a mixed legal system due to the influence of Roman Dutch law and English Common law, that exist alongside the Customary law of indigenous South African people groups. In this thesis, I explore the history of South African property law, beginning with the communal paradigm of property that was practiced among various South African people groups prior to colonisation. Thereafter, I consider the transplant of an exclusive paradigm of property that occurred with the arrival of the Dutch settlers and continued into the British colonisation of South Africa which caused a seismic shift in property relations.

Moreover, I argue that the notion of an exclusive paradigm of property was entrenched into the fabric of South African society during Apartheid, which was a system of racially based segregation that regulated all aspects of life, property and person. This had a significant impact on the paradigm of property in South Africa that shifted from inclusion to exclusion; access to control; and social cohesion to social fragmentation. Furthermore, in the context of spatial design, it entrenched segregation on the basis of race, creating vast spatial inequality. With the advent of a constitutional democracy, South Africa adopted the Constitution of the Republic of South Africa, 1996 which was designed to be transformative and redress the injustices of the past.

Therefore, I argue that in order to redress the injustices of the past and transform the area of property law and spatial design, it is necessary to adopt an Ubuntu Paradigm of Property. Ubuntu is a concept derived from the Nguni proverb: *Umuntu Ngumuntu Ngabantu* which means *a person is a person through other persons*. Ubuntu can be described as a value, a philosophy and a legal conceptual framework. The primary goal of an Ubuntu paradigm is to re-embed social relations back into property; and to shift the paradigm of property in South Africa from promoting exclusion to inclusion; from control to access; and from social fragmentation to social cohesion. Furthermore, an Ubuntu paradigm is inherently a generative approach to property as it creates the living conditions for all living beings to flourish now and stewards these conditions for future generations.

Abstract (Italian)

La tassonomia classica del diritto comparato descrive il Sudafrica come un sistema giuridico 'misto' a causa dell'influsso del diritto romano (mediato dal diritto olandese) e del *common law* inglese, i quali co-esistono col diritto consuetudinario delle popolazioni indigene del Sudafrica.

Questa tesi esplora la storia della proprietà come istituzione giuridica in Sudafrica, a partire dal paradigma comunitario adottato da varie popolazioni del Sudafrica prima della colonizzazione. Esso rappresenta la base su cui è in seguito stato trapiantato un paradigma proprietario di matrice esclusionaria, con l'arrivo dapprima dei coloni olandesi e quindi con la colonizzazione britannica del Sudafrica, il quale ha comportato uno stacco importante nel modo di intendere le relazioni proprietarie.

La tesi argomenta come tale paradigma proprietario di matrice esclusionaria si sia radicato nella società sudafricana in modo particolare durante l'*apartheid*, un sistema di segregazione razziale applicato a tutti gli aspetti della vita, della proprietà e della persona. Questo periodo ha avuto un impatto significativo sul paradigma proprietario del Sudafrica, spostandone l'asse dall'inclusione all'esclusione, dall'accesso al controllo, dalla coesione alla frammentazione sociale. Un'altra conseguenza di questo periodo storico si è prodotta a livello di concezione degli spazi, innestandovi un principio di segregazione su base razziale, il quale è oggi alla radice di un'importante disuguaglianza in termini di fruizione dello spazio. A seguito dell'avvento della democrazia costituzionale, il Sudafrica ha adottato nel 1996 una nuova costituzione redatta allo scopo di portare a una trasformazione della società e a una riparazione delle ingiustizie del passato.

A tal fine, la tesi sostiene che per correggere tali ingiustizie e trasformare il diritto di proprietà e la concezione degli spazi, sarebbe necessario adottare il paradigma proprietario *Ubuntu*. *Ubuntu* è un concetto tratto dal proverbio in lingua *Nguni*: '*Umuntu Ngumuntu Ngabantu'* (una persona diventa persona attraverso le altre persone). *Ubuntu* può pertanto descriversi come un valore, una filosofia e un quadro concettuale di riferimento. Lo scopo principale di tale paradigma consiste nella reinscrizione delle relazioni sociali all'interno dell'istituzione proprietaria, assieme alla promozione di valori come l'inclusione, l'accesso e la coesione sociale. Inoltre, tale paradigma mette in atto un approccio intrinsecamente generativo alla proprietà, in quanto concorre alla creazione di condizioni di vita adeguate alle esigenze di tutti gli esseri viventi e ne garantisce la conservazione per le generazioni future.

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The primary thesis of my research project is Ubuntu or Botho: *Umuntu Ngumuntu Ngabantu* or *Motho ke Motho ka Batho*. I am grateful for all the people who have made me the person I am (Le Ntirile Motho). I cannot fully capture all the moments of impact for which I am grateful but I will try to convey my gratitude.

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> "For this reason I kneel before the Father, from whom every family in heaven and on earth derives its name. I pray that out of his glorious riches he may strengthen you with power through his Spirit in your inner being, so that Christ may dwell in your hearts through faith. And I pray that you, being rooted and established in love, may have power, together with all the Lord's holy people, to grasp how wide and long and high and deep is the love of Christ, and to know this love that surpasses knowledge—that you may be filled to the measure of all the fullness of God.
>
> Now to him who is able to do immeasurably more than all we ask or imagine, according to his power that is at work within us, to him be glory in the church and in Christ Jesus throughout all generations, for ever and ever! Amen." Ephesians 3v14-21 (NIV)
>
> Selah.

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Chapter 1: Introduction

1.1 Introduction

The paradigm of property in the South African context has had numerous influences over the course of its history. Initially, a communal paradigm of property was practiced among the various indigenous groups that inhabited the region before colonisation. Thereafter, the introduction of Western notions of private property with the arrival of the early Dutch settlers to the Cape in 1652 and later English common law principles during the colonial period subjugated indigenous peoples to foreign rule; and shifted how property was conceptualised and practiced in the region. Colonialism brought with it, the concept of private property based on a model of ownership that had the right to exclude at its core;[1] and justified the expulsion and taking of land from indigenous peoples based on idea that unoccupied land could be acquired for private ownership.[2] Furthermore, the legacy of Apartheid, a policy of systematic racial segregation between 1948 – 1994, which favoured certain race groups over others, entrenched notions of exclusion deeper into the fabric of South African property law as a result of the systematic removal of native South Africans from their land.[3] At the formal end of Apartheid,[4] South Africa was a deeply fragmented society with vast inequality between the races in every area of society, more specifically for the purposes of this thesis, in respect of property rights and spatial equality. The connection between property and spatial equality in South Africa go hand in hand, as it was through property law based on a paradigm of exclusion that executed segregation in spatial design and planning for the country.[5]

Beneath this brief account of South African history lies centuries of injustice and an ongoing struggle for equality on the part of black South Africans. Consequently, section 25 (right to

[1] Merrill TW, "Property and the Right to Exclude II" (2014) 3 *Brigham-Kanner Property Rights Conference Journal* 1 – 25 at 3.

[2] Capra F and Mattei U, The Ecology of Law: Toward a Legal System in Tune with Nature and Community, (Oakland: Berret-Koehler Publishers Inc., 2015) at 75.

[3] Maas S and Van der Walt AJ "The Case in Favour of Substantive Tenure Reform in the Landlord-Tenant Framework: The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele; City of Johannesburg Metropolitan Municipality v Blue Moonlight" (2011) 128 *South African Law Journal* 436 – 451 at 437.

[4] Formal end denoting the end of the institutional system of Apartheid law and policy between 1990 – 1994. Therefore, reference to post-Apartheid denotes the end of Apartheid in time despite the tangible legacy of Apartheid that still haunts the country. South Africa can be more aptly described as a country in transition that exists between prefixes, it is in some sense post-Apartheid but not Trans-Apartheid meaning that it has not completely moved beyond the legacy of Apartheid but it is in the process of transformation.

[5] For example the Native Land Act 27 of 1913 which initially demarcated 7% (then later 13% through the Native Urban Areas Consolidation Act 25 of 1945) of the total land area of the country for black people, who comprised 80% of the population, to live on.

property clause) of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) was wrought in the political compromises that were made to ensure a smooth transition into a constitutional democracy.[6] However, after the euphoria of a new "Rainbow Nation",[7] wore off, the cracks began to show in the new South African constitutional property dispensation as discontentment grew regarding: the lack of transformation in land rights; slow land redistribution; spatial inequality; and the lack of access to land for the black majority.[8] Moreover, it became apparent that the previous spatial lines of segregation during Apartheid (based on race) had been supplanted with segregation based on socio-economic status in post-Apartheid South Africa.[9] However, as a result of the history of the country, these socio-economic lines are inevitably racially skewed and therefore segregation is indirectly racially charged as a vestige of the inequality fostered by Apartheid laws.

Although, the height of exclusion and lack of access for the black majority of South Africa was during Apartheid, racial discrimination and inequality were driving mechanisms of colonialism. In this research project, I propose that that the growing discontent in contemporary South Africa is a reflection of the deep tension between conflicting paradigms in South African property law. On the one hand the exclusion-based paradigm of private property based on individualism; and a socially orientated *Ubuntu* paradigm of property, based on inclusivity, on the other. An exclusion-based paradigm of property has at its core the underlying assumption that the owner has the right to exclude others from their property, as described by Thomas W. Merrill:

> "*Property, according to the exclusion thesis, is characterized by a triadic relationship. The triad consists of an owner, a thing, and the right of the owner to exclude others from the thing....all three elements of the triadic relationship are individually necessary and jointly sufficient to make something property. But the critical point is that the right to exclude others from the thing is essential. Indeed, the scope of the owner's property rights is defined by the extent of the owner's right to exclude.*"[10]

In contrast, the *Ubuntu* paradigm of property entails inclusion, access and social cohesion in view of the interests of the community. The concept of *Ubuntu* comes from the Nguni phrase:

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[6] Van der Walt AJ, *Constitutional Property Law* 2nd ed (Cape Town: Juta, 2005) at 2.
[7] A term referring to the diversity of the nation, which is also depicted in the multi-coloured national flag.
[8] Cousins B, "Embeddedness versus Titling: African Land Tenure Systems and the Potential Impacts of the Communal Land Rights Act 11 of 2004", (2005) 16 *Stellenbosch L. Rev*. 488 – 513 at 488.
[9] Landman K, "Privatising public space in post-apartheid South African cities through neighbourhood enclosures" (2006a) 66 *GeoJournal* 133 – 146 at 143.
[10] Merrill TW, "Property and the Right to Exclude II" (2014) 3 *Brigham-Kanner Property Rights Conference Journal* 1 – 25 at 3.

Umuntu ngumuntu ngabantu; it is also be referred to as *Botho* in Setswana from the phrase *Motho ke motho ka batho* which can be directly translated as: "*a person is a person through other persons*". This proverb reflects the ethos that humans are socially embedded and are connected to one other through the inherent dignity of being human. In the context of property, the ethos of *Ubuntu* transforms the core objective of property to social embeddedness in community; and furthering social cohesion as opposed to exclusion and social fragmentation. Therefore, it is diametrically opposed to Merrill's triadic relationship and perceives of a more circular relationship where there exists social relationships between an owner, a thing, the right of the owner to include or exclude and the relationship of the community in relationship to the owner and the thing. Social cohesion is therefore a crucial aspect of Ubuntu, according to Chammah Kaunda, Social cohesion refers to: "*the search for a socially healed and reconciled, just and equitable, inclusive, participatory society in which restitution have taken place*."[11] Kaunda further cites Stephanus de Beer (2014:2) explaining that this kind of society where social cohesion is emphasised does not:

> "*minimise the reality of diversity and complexity but that displays high degrees of collectivity, interconnectivity, interdependence, acceptance, inclusivity, equity, justice, fairness, mutuality and integration. It speaks of a society that unifies people despite their difference; that builds on local, community and regional assets; that journeys towards a common vision or visions that have been negotiated and constructed despite (initially) competing visions*."[12]

Therefore, seeking social cohesion in the context of Ubuntu allows for unity in diversity and creates the kind of environment where competing interests are negotiated in view of a common goal. This notion of social cohesion rejects the Western notion of freedom through individualism and elucidates that freedom occurs within the context of community.

The unique history of South Africa shows the dire need for social cohesion through the vast inequality and social fragmentation. There is an urgent need to redress the injustices of the past and actively pursue reconciliation of a divided nation. The transformation of land and spatial inequality in particular reveals the depth of the chasm between the competing property interests in South Africa. It is proposed in this research project that the *Ubuntu* paradigm of property should be used in the context of land and spatial planning to bring about a transformation of

[11] Kaunda C., "Towards Pentecopolitanism: New African Pentecostalism and social cohesion in South Africa" (2015) 15(3) *African Journal on Conflict Resolution* 111 – 134 at 115.
[12] Kaunda (2015) at 115.

property rights; and address growing spatial inequality in Post-Apartheid South Africa. To this end, I view the rise in gated communities as a vestige of Apartheid spatial planning that can still be experienced in the landscape of the country. Meaning that in post-Apartheid South Africa racial inequality can be viewed through the spatial inequality which is evident across the country, particularly with spatial planning associated with gated communities. According to Karina Landman:

> "*…Spinks (2001) identifies three similarities between the Apartheid and Post-Apartheid City: use of fear, insider-outsider exclusion and spatial re-settlement. With a sudden post-apartheid potential proximity of difference, citizens have emulated the fear management strategy they previously witnessed that the state operated, that of socio-spatial exclusion and segregation. Therefore, apartheid's strongest legacy is not its physical structure, but rather one of symbolic exclusion (Spinks, 2001, p. 30). Given this context and historic realities one cannot deny that gated communities can contribute to the establishment of a new apartheid city in South Africa as result of physical segregation and social exclusion [(Figure 5)]. The symbolic and physical meaning of enclosed neighbourhoods may surpass that of any other type of gated community due to its reference to the past and severe impacts on urban functioning.*"[13]

Therefore, in light of the detrimental role that exclusion has played in South Africa, an important part of breaking with the past is transformation of the spatial lines that continue to divide the country through the rise of gated communities that have become the new form of symbolic and spatial exclusion. As a modest contribution to ongoing research, I propose that adopting an Ubuntu paradigm of property can serve both theoretical purposes regarding how we conceptualise property; as well as practical purposes for how property law and spatial planning in South Africa can be transformed in tangible ways.

1.2 Research Problem

The broad problem statement of this study to investigate and analyse the tension between an exclusion-based paradigm of property and an *Ubuntu* paradigm of property in the context of South African property law; and further propose that application of the *Ubuntu* paradigm of property should be preferred in view of transformative constitutionalism as well as an approach to constitutional property law that is in tune with a generative and ecological system of law.

1.3 Research Objectives

The aim of this research project is to develop a view of property for the South African context that is in tune with the values and history of the South African people. In order to achieve this,

[13] Landman K, "Privatising Public Space in Post-Apartheid South African Cities through Neighbourhood Enclosures" (2006a) 66 *GeoJournal* 133 – 146 at 143.

I will need to unpack the underlying philosophies that are present in South Africa in relation to how property is conceptualised; as well as the contradictions that exist between these different paradigms or approaches to property. Moreover, I aim to prove that an Ubuntu paradigm of property exists which is demonstrated in three forms: as a value that is fundamental to various South African people groups; as a philosophy that is present in African culture; and as a legal framework for constitutional interpretation. Through this, I aim to assert the role of African concepts in South African jurisprudence; as well as the usefulness of Ubuntu as a paradigm in relation to alternative property theories in other societal contexts. Lastly, the objective of this research project is to show the practical application of an Ubuntu approach to addressing issues of spatial inequality in the South African context which can be considered as a starting point for applying an Ubuntu approach to other areas of law, economics and society. Particularly, with reference to the discourse on generative or regenerative cultures.

1.4 Assumptions

This thesis is based on three main assumptions. Firstly, that the historical narrative of South Africa has created a unique landscape regarding property law in South Africa. Property law in South Africa is a mosaic of pre-colonial customary law practices; the colonial influence of Roman-Dutch law and English Common law; and the customary practices of various people groups that have evolved over time. As a result, there is a plurality of paradigms regarding property. Secondly, transformative constitutionalism is a central theme in the interpretation of the South African Constitution (1996).[14] Meaning that the Constitution has a transformative goal that must be fulfilled n the interpretation of the constitution and its objectives (and that all law must pass constitutional scrutiny, i.e. that it must be filtered through the spirit, object and purport of the Bill of Rights).[15] Furthermore, a transformative guiding purpose can be seen in the Preamble of the Constitution which states: "*We therefore through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:* ***Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights****...*". For the purposes of this study, it is assumed that transformation of all spheres of South Africa from the injustices of the past, includes transformation of property law.

[14] Klare K, "Legal Culture and Transformative Constitutionalism", (1998) 14(1) *South African Journal on Human Rights* 146 – 188.

[15] Van der Walt, A J *Property and Constitution* (Pretoria: PULP, 2012) at 97.

1.5 Research Questions

In this research project, I aim to answer three primary questions: Firstly, to what extent is there tension between the plurality of property paradigms competing for supremacy in South African property law? Secondly, does the *Ubuntu* paradigm of property exist and what does it entail? Lastly, what solution does an *Ubuntu* paradigm of property offer to addressing spatial inequality in the context of gated communities in South Africa?

1.6 Literature Review

1.6.1 An Exclusion Based Paradigm of Private Property

The history of private property is extensively outlined by various authors.[16] Ugo Mattei describes how the current mechanistic paradigm of private property was developed by the seventeenth century scholar Hugo Grotius who adapted the Roman law concept of *res nullius* to justify the colonial taking of unoccupied land as *terra nullius*.[17] Subsequently, the influence of scholars such as Thomas Hobbes who argued for unlimited state sovereignty; and John Locke who argued that when a person exerts labour on natural resource that resource becomes that persons property further entrenched this exclusive paradigm.[18] Although Locke and Hobbes are often depicted as being in opposition to one another, they had the effect of together forming the basis for (i) structural individualisation of power; (ii) the promotion of property as exclusion and (iii) transforming commons to capital.[19] Consequently, for the purposes of this research project these three tenets of private property are challenged through three main theoretical frameworks: A Social Function of Property theory, Progressive Property and A Social Theory of the Commons. These three theories are discussed as part of providing a holistic challenge to exclusive property and unifying the resistance of alternatives against the mainstream approach. In addition, I evaluate the core tenets of these alternative property theories in light of the criteria of Generative Property theory.[20] The aim is not conflate these distinct theories but to try and unify them in a shared objective which is challenging the

[16] A discussion on exclusive property without a mention for William Blackstone's conception of ownership would be amiss. According to Blackstone: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." Blackstone W, Commentaries on the Laws of England Vol. 2; See Merrill TW, "Property and the Right to Exclude" (1998) 77 Nebraska Law Review at 730 – 755 at 734 – 740.

[17] Capra and Mattei (2015) at 75.

[18] *Ibid.*

[19] Capra and Mattei (2015) at 170.

[20] Kelly M, *Owning Our Future: The Emerging Ownership Revolution* (2012) Berrett-Koehler Publishers Inc.: San Francisco.

hegemony of exclusion based paradigm of property.[21] Ubuntu exists, therefore, as a paradigm which is unique to the African context but can be used as the lens through which to view and unite alternative approaches to property as will be discussed below.

1.6.2 Alternative Paradigms of Property

1.6.2.1 Social Function of Property

Anna Di Robilant provides a comprehensive historical account of the development of the modern conception of property, from the late nineteenth century onwards, which she refers to as "Romanist-Bourgeois property" because it selectively drew on Roman law principles to meet the social, political and economic needs of the burgeoning bourgeois societies in Europe.[22] Di Robilant argues that contrary to established belief, Romanist Bourgeois property developed slowly and with some internal contradictions.[23] Furthermore, this conception of property was met with criticism from "social" jurists who also relied on Roman doctrines to challenge Romanist Bourgeois property theorists:

> "*The "social" jurists retrieved the Roman doctrines that spoke to the pluralistic and limited nature of property that the liberal proponents of "absolute" property had overlooked. Inspired by these overlooked Roman "social" doctrines, the critics proposed an alternative concept of property as a variable, limited set of entitlements regulating relations among individuals with regards to specific types of resources. This notion that the scope and shape of the owner's entitlements varies depending on the resources owned, on their specific characteristics as well as on the distinct values and interests they implicate, is the most significant, and underappreciated, legacy of the social jurists.*"[24]

The flexible nature of social property as described above is particularly important for understanding the central argument of this thesis. In that both the nature of the thing and the historical context need to be taken into account in determining the nature of the owner's entitlements and responsibilities. Despite the dominance of mainstream absolutist property, a social function of property made a resurgence through the French jurist Léon Deguit's lectures in Buenos Aires which became highly influential.[25] From his perspective, the end of property

[21] Mosalagae C.R., "A Generative Property Response to the COVID-19" in Z.T. Boggenpoel et al (eds), Property and Pandemics: Property Law Responses to COVID-19 (2021) Stellenbosch: Juta.
[22] Di Robilant A, "The Making of Romanist-Bourgeois Property: The Law of Property between Roman Antiquity and Bourgeois Modernity" (2019) Book Proposal 1 – 55 at 1.
[23] Di Robilant (2019) at 3.
[24] Di Robilant (2019) at 4.
[25] Foster SR and Bonilla D, "The Social Function of Property: A Comparative Perspective", (2011) 80(3) Fordham Law Review 1003-1016 at 1004.

was not the absolute dominium of the owner, instead, he proposed, that there was a positive obligation on owner to use their property productively for the benefit of the community.[26] According to Foster and Bonilla this meant that there exists a internal limitation on private property which exists in tension alongside the owners right to exclude:

> "*The core of property, then, ideally reflects the plurality of values that we as a society believe property should serve, and it is up to the legal system to negotiate them in defining the contours of private property rights. What form this negotiation assumes will vary depending upon the legal, political, and social culture of a particular society.*"[27]

In this regard, the social function of property theory, suggests that the core of property or the role that property should serve in a society should be determined through the values of the society in question in light of the historical and cultural nuances of that society. In terms of this theory, it is neither assumed that exclusion is intrinsically the core value of property nor that it best serves every society. Therefore, different cultures and society can define for themselves which values to prioritise and how property should serve society. The social function of property has been translated into various legal systems in South America;[28] and traces of it can be seen in the American conception of social obligation of property.[29] The fullest expression of the social obligation concept in American jurisprudence is Alexander's conception of human flourishing which will be discussed below as part of the Progressive Property movement which springs from a social function of property.[30]

1.6.2.2 Progressive Property Theory

Progressive Property theorists emphasise the centrality of normative values and social relationships at the core of property.[31] In terms of this theory, property does not and cannot centre around the owners right to exclude.[32] In *A Statement of Progressive Property* by the leading progressive property theorists,[33] the five main tenets of progressive property were

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[26] Nestor MD, "Sketches for a Hamilton Vernacular as a Social Function of Property," (2011) 80(3) Fordham Law Review 1053-1070 at 1053.
[27] Foster and Bonilla (2011) at 1011.
[28] Foster and Bonilla (2011) at 1014 – 1015.
[29] Foster and Bonilla (2011) at 1008.
[30] Foster and Bonilla (2011) at 1009.
[31] Van der Walt AJ, "The Modest Systemic Status of Property Rights" (2014) 1 Journal of Law, Property, and Society 15 – 106 at 24.
[32] Alexander GS, Peñalver EM, Singer JW and Underkuffler LS, "A Statement of Progressive Property" (2009) 94 Cornell Law Review 743 – 744 at 743.
[33] Alexander et al. (2009) at 743 – 744.

recognised as follows: Firstly, “property operates as both an idea and an institution” which should be designed based on “the underlying human values that property serves and the social relationships it shapes and reflects.” [34] Secondly, “property implicates plural and incommensurable values” which may promote individual interests, environmental stewardship, human flourishing, civic responsibility or social relations based on respect and dignity, consequently these plural values cannot be measured by a single metric.[35] Thirdly, “choices about property entitlements are unavoidable, and, despite the incommensurability of values, rational choice remains possible through reasoned deliberation.”[36] Fourthly: “Property confers power. It allocates scarce resources that are necessary for human life, development, and dignity. Because of the equal value of each human being, property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.”[37] And lastly: “Property enables and shapes community life. Property law can render relationships within communities either exploitative and humiliating or liberating and ennobling. Property law should establish the framework for a kind of social life appropriate to a free and democratic society.”[38]

This statement of progressive property brings normative values back into the discussion on property while recognising that these values may vary and be hard to ascertain. Nonetheless, reasoned deliberation in an open and democratic society should allow for these value choices to be made. More interestingly, the recognition of power dynamics inherent to property also need to be taken into consideration. Meaning that property is not a neutral topic and will inevitably lead to discussions on power or phrased differently will inevitably challenge the interests of those in power in the process of resource allocation. Moreover, property should reflect the values of the community because it will shape the life of the community, enabling either ennobling environments or exploitative environments. Lastly, progressive property considers the impact of property decisions on the present, future generations and the non-human world.[39]

In perhaps the most prominent (or most articulated) theoretical framework of progressive property, Alexander argued that the core purpose of property is human flourishing:

[34] Alexander et al. (2009) at 743.
[35] Alexander et al. (2009) at 743.
[36] Alexander et al. (2009) at 744.
[37] Alexander et al. (2009 at 744.
[38] Alexander et al. (2009) at 744.
[39] Alexander et al. (2009) at 744.

> "*At a normative level, I argue that even if one rejects the interpretation of property as resting on a moral foundation of human flourishing, understood as constituted by multiple values, both public and private, the human flourishing theory represents the best approach to develop a morally pluralistic theory of property that relates multiple public and private values, which are commonly seen as in conflict, as coherent and mutually supportive*."[40]

Alexander's proposal to develop a morally pluralistic theory of property forms part of the rationale behind the discussion on the overlap of different alternative property theories. There are three main points of overlap between Deguit, Di Robilant and Alexander's conceptions of the social function (or obligation) of property. Firstly, acknowledgment of the internal limitation of private property, meaning ownership cannot be absolute. Secondly, the recognition of the centrality of relationships and social embeddedness at the core of property, thus displacing exclusion from the core to the periphery. Thirdly, the pluralistic context specific conception of property meaning that property can differ from one society to another based on the needs of that society. Notwithstanding, certain distinguishing aspects between the scholars are also noted. Firstly, Deguit emphasises productivity in favour of the common good as the central goal;[41] whereas Alexander's theory has been used to highlight the (re)distributive aims of the social obligation "*Alexander's robust, or thick, version of the social obligation norm is forthrightly redistributive in its aims and implications*."[42] Di Robilant's analysis highlights that the nature of the property right (or owners entitlements) is variable depending on the resource in question.[43] These similarities and differences are mentioned to show that both the social function of property theory and progressive property challenge the same issues of private property *and* can do so with nuanced approaches (or different points of emphasis) in how they seek to achieve a suitable approach to property for a specific context.

[40] Alexander GS, "Property's Ends: The Publicness of Private Law Values," (2014) 99(3) Iowa Law Review 1257 – 1296 at 1260.
[41] Foster and Bonilla (2011) at 1007.
[42] Foster and Bonilla (2011) at 1010. Although, it should be noted that Alexander himself does not view the human flourishing theory to be resource-redistributive for two reasons. Firstly, the theory recognises the duties that are inherent to ownership itself as opposed to creating new duties; and secondly, the human flourishing theory is focussed on capabilities rather than resources: "*It seeks to provide members of communities with the capabilities that are essential for them to live well- lived lives. Those capabilities will at times require resources, of course, and the human flourishing theory is not indifferent to the distribution of resources. The key point, though, is that provision of resources is a derivative not primary task. It only serves the interest of capabilities, which are the main good that the theory seeks to provide persons*." See Alexander, GS *Property and Human Flourishing* (Oxford University Press 2018) at xix.
[43] Di Robilant (2019) at 4. Distinguishing the nature of the property and associated entitlements is important for addressing concerns around inequality and sustainability resulting from Romanist Bourgeois property.

Which begs the question: what is an appropriate core value of property and how can it be distinguished from the notion of exclusion at the core of property? For the purposes of this thesis, I consider Marjorie Kelly's notion of generative property as instructive in the selection of an appropriate core value of property. According to Kelly:

> I've found five essential patterns that work together to create different kinds of ownership: purpose, membership, governance, capital, and networks. These can be used in extractive ways – aimed at extracting maximum financial wealth in the short term. Or they can be used in generative ways – aimed at creating a world where all living beings can flourish for generations to come."[44]

According to Kelly, design will determine outcome, therefore if exploitation and extraction are at the core of property then institutions of property will reflect this core value. However, if a generative living purpose is at the core of property, then it will produce generative outcomes.[45] Therefore, the indicator of an appropriate core value of property is assessing whether the value produces an extractive or generative outcome. In light of the discussion on progressive property above, it is clear that there is a generative purpose at the core of progressive property as it seeks to create the conditions for living beings to flourish both now and for future generations. It is crucial to keep in mind, as will be illustrated below, that all of the alternative theories to private property (based on exclusion), which I aim to unite under the Ubuntu paradigm, place a living purpose or generative purpose at the core of property. In the next section, I discuss an alternative property theory in the South African context.

1.6.2.3 Modest Systemic Status of Property

In response to progressive property theory (and the main critique against progressive property from information theory which holds at its core a simple and strong exclusion rule), AJ Van der Walt argued that property does not entail a simplified keep off rule but that in the South African context, property actually has a modest systemic status.[46] Meaning that often in property disputes, the protection of the owner's rights is not the absolute rule. Van der Walt illustrated this through select case law from the South African Constitutional Court. He argued that in certain instances where there was conflict between the owners right to exclude and

[44] Kelly M., *Owning Our Future: The Emerging Ownership Revolution* (2012) Berrett-Koehler Publishers at 368 – 369.
[45] Kelly (2012) at 130.
[46] Van der Walt AJ, "The Modest Systemic Status of Property Rights" (2014) 1 Journal of Law, Property, and Society 15 – 106 at 23 – 24.

protecting another non property right, the non-property right was (correctly) protected at the expense of the property right:

> "*The descriptive part of my argument holds that a significant number of cases in this narrow sphere are in fact decided on the basis of upholding or securing non-property rights (life, dignity, equality, free movement, free speech or assembly), while protection of the property rights that might be involved or affected is often relegated to a secondary, modest or marginal status. The normative part of my argument holds that in the context of these cases, there are sound and important systemic reasons why the non-property rights in question should often, if not always, be secured before property rights are even considered and that property rights justifiably enjoy no more than a modest status in these cases. On the basis of these arguments I conclude that the protection of property rights fulfils a modest, rather than central, purpose in the legal system, at least as far as this particular category of conflicts is concerned.*"[47]

The modest systemic status of property approach pushes against the core-periphery concern i.e., whether exclusion is the core tenet of property; and provides a more nuanced approach to the adjudication of property rights for the South African context. It also fits within the Ubuntu paradigm of property and lays out a legal conceptual framework upon which the *Ubuntu* paradigm of property can be further developed in the South African context.

1.6.2.4 Commons Theory

Whereas the modest systemic status of property framework addresses the issue of the core tenet of property, Commons as a critique on private property addresses the broader systemic issues of capitalism and relations of power in the institutional design of private property.

In their book the Ecology of Law, Capra and Mattei paralleled important moments in legal thought with those in scientific thought, showing the interconnected nature of law and science; and advocated for an ecologically embedded legal order with communities at the centre as opposed to the market and state.[48]

The notion of commons exists in multifaceted forms. Commons has been described as a vocabulary for talking about the limits of market and state activity or as a critique on the narrative of neo-liberalism and capitalism;[49] a common pool of natural (land, water, air) and cultural resources open to all members of a society;[50] and as a system of governance. Commons, in relation to property has been described as an "ecological – qualitative category based on

[47] Van der Walt (2014) at 29 – 30.
[48] Capra F and Mattei U, The Ecology of Law: Toward a Legal System in Tune with Nature and Community, (Oakland: Berret-Koehler Publishers Inc., 2015).
[49] Mattei U, "First Thoughts for a Phenomenology of the Commons" 37 – 44 at , in Bollier D and Helfrich S eds., *The Wealth of the Commons: A World Beyond Market and State* (Levellers: Amherst, 2012).
[50] Capra and Mattei (2015) at 194.

inclusion, access and community duties whereas property and state sovereignty are economical – quantitative categories based on exclusion."[51]

Garrett Hardin in "Tragedy of the commons" argued that free access to the commons invariably leads to depletion of the commons, thus relegating the commons as a failed project and proposing privatisation as the only solution.[52] Hardin's conclusion remained largely unchallenged until Elinor Ostrom revitalised the conversation (at least in the field of economics) and made an argument for seven principles for successfully governing common pool resources.[53] An important observation made by Ostrom was that each commons had developed its own contextual set of rules tailored from and for its cultural, economic and political setting.[54] Thus there could be no "one size fits" all definition of commons or commoning (verb form of commons, meaning the social and political activity of taking care of and enjoying something recognised as a common).[55]

Ostrom's work was important for sparking the dialogue on commons that was contrary to the thinking in mainstream economics but further work was needed in order to develop a coherent and defensible legal framework. In this instance, the Italian legal context has become a laboratory for building the legal category of the commons in a distinctive way.[56] It was during the Rodotà Commission under the leadership of Stefano Rodotà that the commons (*beni communi*) was expressed in legal terms for the first time.[57] The experiments in the Italian context (water as commons or the Valle Theatre as examples) have resulted in a spread of what is now described as the social movement of the commons.[58]

When considering the different expressions of the commons it is clear that the element of context specificity is an important factor as highlighted by Ostrom above. The application and development of the commons in the Italian context is different from other contexts as a result of history, geography, politics, economics and any number of contextual issues. Mattei describes law as: *"a process of 'commoning', a long-term collective action in which*

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[51] Mattei U, "First Thoughts for a Phenomenology of the Commons" 37 – 40, in Bollier D and Helfrich S eds., *The Wealth of the Commons: A World Beyond Market and State* (Levellers: Amherst, 2012).
[52] Hardin G, "The Tragedy of the Commons" (1968) 162 Science 1243 – 1248 at 1244.
[53] Ostrom, E *Governing the Commons: The Evolution of Institutions for Collective Action* Cambridge: Cambridge University Press, 1990) at 90.
[54] Ostrom (1990) at 89.
[55] Capra and Mattei (2015) at 153 and 194.
[56] Quarta, A and Ferrando, T "Italian Property Outlaws: From the Theory of the Commons to the Praxis of Occupation", (2015) 15(3) Global Jurist 261 – 290 at 1.
[57] Quarta and Ferrando (2015) at 2.
[58] Quarta and Ferrando (2015) at 6.

communities, sharing a common purpose and culture, institutionalize their collective will to maintain order and stability in the pursuit of social reproduction."[59] Under this pattern, law is neither separate from politics, economics, justice, religion, social norms of good behaviour and morality etc. nor is law separated into a dichotomy of facts and values.[60] This links with the idea that property is a context specific concept that serves the history, culture etc. of the people for which it is designed.

1.6.3 Ubuntu Paradigm

The Ubuntu paradigm of property is not a completely novel, traces of it that can be seen through-out the history of South Africa and in the living cultures of South African people groups. However, to entrench the legal vocabulary of Ubunttu, I build on the frameworks of transformative constitutionalism and a modest systemic approach to property to provide a more articulated framework for the application of the Ubuntu paradigm in the South African context. Although, an Ubuntu can be the lens through which the aforementioned alternative approaches to property can be united. At this point it is perhaps necessary to summarise how these various theories of property are connected to an Ubuntu paradigm of property as depicted in the table below.

Table. 1 Intersection between Ubuntu Paradigm and Property Theories	
Ubuntu Paradigm of Property	(1) Ubuntu exists as a value, philosophy and legal conceptual framework. (2) Ubuntu prioritises inclusion as opposed to exclusion; access as opposed to control; and social cohesion as opposed to social fragmentation. (3) Places social relationships are at the core of property.
Social Function of Property	(1) Property is not absolute; and (2) there is a positive obligation on the owner to use the property productively for the benefit of the community.
Progressive Property	(1) The right to exclude is not the core of property. (2) Places normative values and social relationships are at the core of property. E.g., Human Flourishing at the core of property.

[59] Capra and Mattei (2015) at 14.
[60] Capra and Mattei (2015) at 14.

Generative Property	(1) Contrasts an extractive property design with a generative property design. (2) Places property at the centre of the design of capitalism and the economy. (3) Places a living purpose that produces generative outcomes at the core of property.
Modest Systemic Status of Property	(1) Exclusion is not the core of property. (2) In certain cases, upholding a non-property right like human dignity or life will take primacy over property rights which would hold a modest or marginal status.
Commons	(1) An ecological qualitative category based on inclusion, access and community duties. (2) Critique on neo-liberalism and a system of governance for the management of common pool resources.

The Ubuntu paradigm of property is an opportunity to challenge an exclusion-based paradigm of property through a socially embedded contextualised legal framework for South African property law. The South African context (and in a broader sense a number of African societies) have for generations functioned on a community orientated basis which still exists today in living cultures despite the destruction of African modes of life due to colonisation. However, there are two important limitations in the study of Ubuntu. Firstly, the words used to translate Ubuntu do not quite capture the essence of its meaning, which is difficult to articulate. For example, it is difficult to differentiate between the applied meaning of communitarianism, communalism and commons in trying to explain the sense of connectedness that is encapsulated in Ubuntu. Secondly, African customary law exists in oral tradition which is often not captured in written text that is much fetishized by Western scholarship. Moreover, historical written texts often reflect more of the biases of the observer than the culture that was observed.[61] Notwithstanding, these issues there is enough of the tangible lived experience of African customary law that can shed some light on the meaning and practice of Ubuntu. Moreover, through the case law of the South African Constitutional Court there has been steady development of the jurisprudence on Ubuntu which will be helpful in unpacking Ubuntu as a value, African philosophy and as a legal conceptual framework.

[61] See Achebe C, Things Fall Apart (2006) Penguin Classics: London for a scathing critique on Western anthropological studies in Africa.

1.7 Chapter Outline

Chapter 1: Introduction

In this chapter, I introduce the concept of Ubuntu, which exists as a value, philosophy and legal conceptual framework. I propose that Ubuntu prioritises inclusion, access and social cohesion. Moreover, in terms of this paradigm, social relationships are fundamental to the conception and function of property. Furthermore, I argue that there exists a plurality of paradigms in the South African context that are in conflict with one another. In terms of comparative law taxonomy, the South African legal system is defined as a mixed legal system due to the influence of Roman Dutch (Civilian) and English Common law traditions; and pluralistic due to the Customary law of the various indigenous people groups that are applicable in South Africa. In terms of Western approach to property, property is absolute and the right to exclude at the core of property. In contrast, in South African Customary law, social relations are at the core of property law and practice. This is exemplified in the concept of *Ubuntu* (Nguni) or *Botho* (Setswana), meaning *a person is a person through other persons*. If we accept Ubuntu as the core ethos underlying South African Customary law, then we can better understand the tensions underlying property law in South Africa. Because, in contrast to a community centred approach to property that was practiced in precolonial South Africa (and to date in traditional communities), a Eurocentric private property approach based on individualism stands in stark contrast. Moreover, the transplant of Western notions of property in South Africa created a private property system that excluded the majority of the population from land ownership; restricted access to certain spatial areas based on race; and caused deep social fragmentation that still exists today. This social fragmentation can be seen through the spatial inequality that exists in the country by observing the phenomenon of gated communities. In this chapter, I also discussed important alternative property theories which challenge an exclusive private property paradigm with the aim of showing the intersection between Ubuntu and other property theories but also unifying these alternative challenges to private property under the concept of Ubuntu. As will be seen in Chapter 3, in an in-depth discussion of Ubuntu, Ubuntu is both a concept that is unique to the African experience or world view but also a concept that can assist other contexts in shifting to a more socially orientated paradigm of property that can be beneficial for the global community in the present and future generations.

Chapter 2: History of South African Property Law

In this chapter, I set out the history of South African property law by looking at four historical periods. The Pre-colonial period prior to 1652; The Colonial period from 1652 - 1948; the

Apartheid period from 1948 - 1994; and the Constitutional Democracy from 1994 to date. In the pre-colonial period I highlight the customary law of the main indigenous people groups that occupied the territory that would later become South Africa. Particularly, how these different people groups interacted with one another with respect to property; as well some cultural nuances within each group. Thereafter, I will show how the arrival of Dutch settlers in 1652 disrupted African legal systems that were already in place. Moreover, I discuss how English colonial policy dismantled these African legal systems and sowed the institutional seeds for segregationist policy in South Africa. In particular the Union of South Africa in 1910 was a key moment of entrenched institutional racism. This then escalated into the most defining period in the history of South African property law with the introduction of the system of Apartheid in 1948 which produced intense fragmentation in South African society; and represented the height of social disintegration. In this regard, I provide a brief explanation of Apartheid ideology and the narrative of fear as a means of control; as well as key legislation in the architecture of Apartheid in general and in property law more specifically. Throughout both the colonial and Apartheid period there was resistance by the black African population against the encroachment and subjugation. Particularly, the anti-Apartheid movement that gained momentum from the 1960s culminated in democratic negotiations from around 1990 between the main opposition the African National Congress (ANC) and the ruling Afrikaans National Party (NP). This led to the first democratic elections in South Africa in 1994 and the beginning of a new constitutional democracy under the Constitution of the Republic of South Africa, 1996. Situated, in between the end of the Apartheid era and the new democracy, I discuss the Truth and Reconciliation Commission (TRC) which was aimed at nation building and uniting a divided Post-Apartheid South Africa. Although, there are many commendable aspects regarding the legacy of the TRC in providing healing for the nation. I argue that this was only the beginning of the healing process and there still remains deep trauma within the nation which was largely left unresolved. Consequently, the tensions in post-Apartheid South Africa that have been brimming to the surface in recent years are merely a symptom of a deeper historical wound that has been left unattended. Lastly, I consider the paradigmatic shift to a constitutional democracy and the implications of history on the future of South African property law.

Chapter 3 Ubuntu Paradigm of Property: Rediscovering a Framework

In this section, I explore the concept of *Ubuntu* as a value, African philosophy and legal conceptual framework. Looking at Ubuntu as a value, I consider how Ubuntu has been defined and translated across different African cultures. Thereafter, I provide a brief history of African

philosophy which I argue was a quest for a uniquely African identity and to promote concepts that are uniquely African like Ubuntu that can be shared with the rest of the world. To this end I distinguish between African humanism (as one of the constituent pillars of Ubuntu) and Western humanism as distinct concepts; and argue that African philosophy should be given equal footing as Western philosophy.

For the remainder of this chapter, I discuss how Ubuntu has been defined and developed as a legal conceptual framework through the case law of the South African Constitutional Court. From the case law it is clear that Ubuntu can be applied to a variety of matters from the right to life, defamation and even property law cases. I argue that Ubuntu played a significant role in the transition from Apartheid as part of the project of national building especially during the Truth and Reconciliation Commission and the first Constitutional Court case that abolished the death penalty. Moreover, Ubuntu continues to be useful in inter-personal dispute resolution and in property related disputes where social relationships are primary. These cases illustrate how social cohesion plays a central role in *Ubuntu*. Furthermore, I reject the notion that property is the guardian of all rights but rather occupies a more modest systemic role as argued by Van der Walt. Therefore, I propose that in the South African context Ubuntu is the guardian of all rights.

Chapter 4: Application of Ubuntu Paradigm in the Context of Gated Communities

In this chapter, I illustrate the correlation between the application of the exclusion-based paradigm in South Africa and social fragmentation through the rise in gated communities. According to Karina Landman, gated communities are physical areas which are fenced or walled off from the rest of their surroundings and either prohibit or control access to these areas by security boom gates.[62] Gated communities include both enclosed neighbourhoods which refer to existing neighbourhoods which may contain public roads and parks which have controlled access; as well as security villages where the entire area was bought and developed by a private developer.[63] Therefore, enclosed neighbourhoods are residential areas with public spaces, access to which has been limited by enclosure. Whereas security villages are private developments which have shared communal areas within the security village access to which

[62] Landman K., "Privatising Public Space in Post-Apartheid South African Cities Through Neighbourhood Enclosures" (2006) 66 *GeoJournal* 133 – 146 at 136 – 137.
[63] Landman (2006) at 136 – 137.

is dependent on membership.[64] Consequently, the nature of the property has an implication for the approach adopted.[65]

In this chapter, I firstly argue that the enclosure of neighbourhoods entrenches the social fragmentation that was familiar in Apartheid and contributes to the disruption of social cohesion in contemporary South African society. In this regard, I compare the practices of access to gated communities with the pass laws of Apartheid which restricted the access and freedom of movement of the black population in the country. Moreover, I discuss the importance of access to the public space, the tragedy of enclosure of common spaces and the negative externalities caused by gated communities. Thereafter, I consider the primary motivation cited for gated communities which include: the desire for insular communities; exclusivity and prestige; and fear of crime. Although, I concur that the fear of crime in the South African context is a legitimate concern, the use of gated communities to counter this fear has its roots in the fear narrative that perpetuated segregation during Apartheid. Moreover, there are less restrictive means of achieving the same end, which would avoid the limitation of Constitutional rights in respect of enclosed neighbourhoods that restrict public access to common spaces; and avoid the spatial disintegration caused by gated communities in spatial planning. Thereafter, I propose that application of an Ubuntu paradigm in the South African context (and global economy) would require both a broader generative paradigmatic shift in the economy; as well as a generative shift in spatial design that promotes the tenets of regenerative spatial design. I conclude, by mentioning challenges to an Ubuntu paradigm shift that should be noted for future research.

Chapter 5: Conclusion

In this chapter, I conclude that in light of the history of exclusion in property; the pluralist nature of South African law; and the pressing concern of addressing the vast inequality in the country. Prioritising an alternative conception of property is both necessary and essential to the transformation of South African property law. In this regard an *Ubuntu* paradigm of property is an appropriate framework for addressing these concerns. Particularly in the context of gated communities this approach promotes inclusion, access and social cohesion as opposed to social fragmentation.

[64] Landman (2006) at 138 – 140.
[65] Landman (2006) at 145.

1.8 Methodology

The aim of this thesis is to show how key conflicts or rather disruptions in social cohesion in South African property law derive from the tension between an exclusion-based paradigm and an *Ubuntu* paradigm of property. This objective will primarily be achieved through desk-based research. In Chapter 2, I aim to provide a historical account of South African Property Law from the 1600s – 2000s by conducting a historical analysis of secondary sources. A historical analysis will reveal the pluralistic nature of South African property law; as well as the nuances and tensions between these paradigms. Additionally, by considering the political and socio-economic circumstances at various points in South African history, I will provide the socio-legal context of property in South Africa.

In Chapters 3, I aim to set out the main tenets of the *Ubuntu* paradigm of property, respectively, by undertaking a review of the case law of the Constitutional Court of South Africa Constitutional Court from 1994 – 2019. This will reveal the manner in which the transformative agenda of the Constitution and the concept of *Ubuntu* have been interpreted and applied by the Court. Furthermore, I apply the transformative constitutionalism framework in analysing the *Ubuntu* paradigm of property.

In Chapters 3 and 4, I aim to connect the spatial reality of Apartheid with the spatial realities of enclosed neighbourhoods and gated communities in Post-Apartheid South Africa by undertaking a brief spatial comparison between town planning maps from both periods. In this respect I will carry out a limited literature review on spatial design in South Africa.

1.9 Limitations

The scope of this research project is limited to a historical analysis of South African property law; and a limited review of private property in European and American property law. Furthermore, I will only consider case law from South African courts for the period 1994 – 2019. The application of the *Ubuntu* paradigm of property is limited to the instance of gated communities. Although, the Ubuntu paradigm could be applied to other urgent areas of property law such as land distribution and expropriation, I selected gated communities because it reveals both the symbolic and practical (daily) experience of all South Africans. Therefore, it should be borne in mind that this research project is only the beginning of proposing a new conceptual framework and further research will need to be done in applying this paradigm to other areas of property law. Lastly, it should be noted that addressing the systemic issues of inequality in South Africa must include consideration of the design of the economy and the kinds of policy

that have deepened inequality, to which I allude briefly. However, an in-depth account of economic institutional design and capitalism fall outside of the scope of this thesis. Additionally, redistributive justice theory falls outside the scope of this research project.

Chapter 2: Historical Overview of Property Law in South Africa

2.1 Introduction

The South African legal landscape has often been described in classical comparative law taxonomy as a mixed legal system. This is indicative of the plurality of influences on South Africa law throughout its history. Understanding the historical development of South African property law in general and particularly the role of property in the institutional design of the nation is an important part of understanding the nuances in South African constitutional property law and how it operates within society in the new constitutional democracy. Therefore, in this chapter, I canvass notable aspects of South African history which I propose had a key role in the legal culture and conceptions of property in South African law.

This historical account also displays the diverse landscape of South Africa and with it diverse paradigms regarding the role of property in society. I begin the discussion by observing pre-colonial paradigms of property among two distinct people groups, the Khoi-Khoi and San, which despite their differences share certain aspects in common regarding the notions of property and community. This is then contrasted with the paradigm of private property that was introduced into the South African context with the arrival of the Dutch East India company. This paradigm of private property was specifically designed to meet the proprietary interests of the company and secondly to establish the justification for control of the territory in Dutch territorial expansion. Later the arrival of the English and the establishment of their territorial expansion and institutions also brought with it another layer of complexity to South African law and sowed the seeds of institutional racism that would become the hallmark of the system of Apartheid.

Apartheid was a system of institutionalised racism that was based on certain ideological beliefs and the politics of the time. Therefore, I will discuss Apartheid ideology in light of three underlying theories: pure race theory; Apartheid theology; and fear as a means of social control. Understanding the Afrikaner national identity provides insight into the manner in which Apartheid legislation (both in general and specifically property legislation) was able to flourish in South African society for nearly five decades. Moreover, the narrative of fear had far reaching implications for spatial design in post-Apartheid South Africa. Although Apartheid was legally over, the narrative that segregation is a means of maintaining safety from the other it is still seen and felt in the spatial inequality in South Africa. I argue that the repercussions of Apartheid can still be seen and felt through spatial inequality in post-Apartheid South Africa.

At the end of Apartheid, part of the process of unravelling the societal knots that were created during Apartheid began with the Truth and Reconciliation Commission. However, although this was an important transitionary moment into a constitutional democracy, there still remains significant injustices that were unaddressed. Therefore, despite a well negotiated constitutional democracy and a supreme constitution, it was inevitable that as South Africa's fledgling democracy grew it would inevitably have to address the fissures created by the past.

Lastly, I use the example of the rise in gated communities in post-Apartheid South Africa as an example of how spatial Apartheid continues and how it has severely impacted social cohesion in South Africa. The aim of this chapter is to lay the historical foundation for the argument that an Ubuntu paradigm of property is the perspective from which we need to view property law in South Africa as it provides answers to the question of how to address spatial inequality; bring about social cohesion and achieve the kind of transformed society that is envisioned in the Constitution, 1996.

2.2 Pre-Colonial Paradigms of Property among South African People Groups

2.2.1 Introduction to African Customary Law

From the onset it is important to note two challenges to providing an extensive exposition of customary law. Firstly, by definition African customary law reflects the practices and customs of a people group that are passed down by oral tradition from generation to the next and is flexible over time to meet the needs of the community from which it arises.[66] In this regard African customary is a generic term to cover the customs and practices of different ethnic groups which are practiced by the different groups.[67] These practices may differ from one group to another but at the same time share important fundamental principles,[68] like Ubuntu that is discussed in more detail in Chapter 3. Secondly, a pure form of indigenous customary law does not exist due to the detrimental impact of colonisation:

> "There is broad agreement that in its present form customary law is distorted. The sources of customary law that are historically and presently accepted as authoritative are a product of social conditions and political motivations. It is influenced by the recent interaction between African custom and colonial rule. In *Alexkor Limited v. Richtersveld Community*,

[66] Morudu N.L. and Maimela C., "The Indigenisation of Customary Law: Creating and Indigenous Legal Pluralism within the South African Dispensation: Possible or Not?" (2021) *De Jure Law Journal* 54 – 69 at 56; Ndulo M., "African Customary Law, Customs and Women's Rights" (2011) *Indiana Journal of Global Studies* 18(1) 87 – 120 at 88.

[67] Ndulo (2011) at 88.

[68] Ndulo (2011) at 88.

> the Constitutional Court of South Africa observed that 'although a number of text books exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied.'"[69]

The tragic loss of a pure African identity is the most problematic aspect regarding research on customary law which is often conveyed through a distorted lens. Therefore, for the purposes of this section the aim is to provide an account of customary law with the caveat that the presentation may lose the cultural nuances that are specific to each group and those nuances that have not been captured in written form.

2.2.2 San and Khoi-Khoi Pre-Colonial Property in the Cape

The KhoiKhoi and San people groups were the original inhabitants of the territory that is now the Western Cape area.[70] The KhoiKhoi were herders,[71] while the San were hunter gatherers.[72] Literature often refers to these people groups as the KhoiSan however, this negates the differences in these distinct groups in general as well their nuanced approaches to land that each people group adopted.[73] The KhoiKhoi were nomadic people who would move from one area to another based on the grazing patterns of their herds.[74] After a grazing season the entire people group would dismantle their homes and move to another area. Guelke in arguing that instead of Hardin's tradgedy of the commons, it should be more aptly described the tragedy of privatisation that devasted the natural ecology of the Cape.[75] As Guelke presents the plains of the Western Cape were in pristine condition due to the nomadic pattern of grazing followed by the KhoiKhoi,[76] where the pastoral lands, like the air, belonged to no one and herds were grazed in areas held in common.[77] The San people were hunter gathers and neighbours to the KhoiKhoi.[78] The San travelled in smaller bands who would hunt and forage together for wild animals and wild plant foods, which were considered free access within the common wealth

[69] Ndulo M., "African Customary Law, Customs and Women's Rights" (2011) *Indiana Journal of Global Studies* 18(1) 87 – 120 at 88.
[70] Hale F., "Constructing the History of the Strandloper and Khoi-Khoi: Hjalmar Thesen's Historical Trilogy" (2018) *SAJCH/SATK* 32(2) 91 – 111 at 91.
[71] Guelke L., "The Tragedy of Privatisation: Some Environmental Consequences of the Dutch Invasion of KhoiKhoi South Africa" (2003) *South African Geographical Journal* 85(2) 90 – 98 at 90.
[72] Sanders A.J.G.M., "The Bushmen of Botswana – From Desert Dwellers to World Citizens" (1989) *Africa Insight* 19(3) 174 – 182 at 174.
[73] Hale (2018) at 100.
[74] Guelke (2003) at 91.
[75] Guelke supra note at 90 & 95 .
[76] Guelke supra note at 93 and 96.
[77] Guelke supra note at 91.
[78] AJGM Sanders supra note at 174.

and shared with all.[79] In this society personal belongings were few and a certain collection of wild plants belonged to the collector and small game that was killed was the property of the hunter but large game was distributed among the band and shared with visitors.[80]

2.3 The Impact of Colonisation on Property in South Africa

2.3.1 Arrival of the Dutch in the Cape of Good Hope

On 6 April 1652 The Dutch East India Company (VoC) led by Jan Van Riebeek arrived on the banks of now South Africa and established a rest station at the Cape of Good Hope to connect their trade routes from Europe to South East Asia.[81] The colonial period is dated from the arrival of the Dutch on 6 April 1652 until 31 May 1910 with the establishment of the Union of South Africa which will be discussed in more detail below.[82] The first peoples that the Dutch encountered were the KhoiKhoi then later the San. Guelke described the meeting between the KhoiKhoi and Dutch quite aptly as: "a clash between resource management systems based upon different institutions and value systems."[83] The communal approach to resource use and management adopted by the KhoiKhoi,[84] that stood in contrast to the individualistic private property model that would be implemented by the Dutch.[85]

The initial objective of the VoC as previously mentioned was to set up a refreshment station and to have the local inhabitant herders provide fresh meat to the Company through trade, but as observed by Guelke, the KhoiKhoi did not act according to the script laid out for them by the company.[86] Thereafter, the Company attempted some farming but rather unsuccessfully and abandoned this to allow for non-indigenous persons (Dutch colonialists) or free settlers to loan out pieces of land, the idea being that the farmers would be incentivised to work for their own profit and trade with the Company.[87] Later on this territory needed to be extended and in 1672 a small outpost was established at what was known as Hottentots Holland, resulting in more

[79] AJGM Sanders supra note at 176.
[80] AJGM Sanders supra note at 176.
[81] Lauren G. Robinson "Rationales for Rural Land Redistribution in South Africa" (1997) 23 Brooklyn Journal of International Law 465 - 504 at 469.
[82] McLachlan J.N., "The History of the Occupation of Land in the Cape Colony and its Effect on Land Law and Constitutionally Mandated Land Reform" (2018) University of Pretoria, Unpublished LLD Thesis on file with author at 1.
[83] Guelke supra note at 90.
[84] Guelke supra note at 91.
[85] Guelke supra note at 94 & 97.
[86] Guelke supra note at 92.
[87] Guelke supra note at 92.

land being used or deemed for the exclusive use of private persons.[88] By 1714 the loan farm system was established which entailed obtaining a license to cultivate the land for an annual fee.[89] Settlers also had the discretion to extend their lands in whichever direction they chose at any rate they wanted and their encroachment on the grazing lands and way of life of the KhoiKhoi was not taken into consideration.[90]

> "The invaders were also agents of institutional change bringing with them as they occupied the land a framework of private holdings that carved up and subdivided the common lands, destroying nomadic ways of life in the process and ensuring that they could not reappear in the future. The new method of settlement produced a pattern of widely dispersed individual holdings which were scattered across a vast and rugged landscape and created a new basis for the exploitation of resources. Th ecology of resources use was not improved by changing the scale of exploitation. In creating a system in which resources were privately controlled, the VOC encouraged settlers to utilize grazing resource on a continuous basis. The livestock could indeed be moved around on a loan farm and additional loan farms could be acquired for seasonal use but these possibilities notwithstanding the very notion of exclusive private control of land put new settlers in an institutional straight jacket."[91]

The institutional change that the Dutch brought to the way of life of the original inhabitants cannot be overstated and reflected the tragedy of privatisation on the natural landscape of the Cape. Furthermore, it is this difference in the institutional and value systems of the invader and inhabitant that would be the source of clashes throughout colonial history as the Dutch came into contact with more African people groups as they extended their institutional control of land further inland. These clashes would result in the decimation of a way of life that had been established for millennia before the arrival of the Dutch.[92] The San people eventually moved from the South West Cape area and moved further inland towards present day Botswana but the evidence of their ancient rock paintings prove that they had been inhabitants of the Cape area for thousands of years.[93] Today, their communal way of life has largely been preserved

[88] Guelke supra note at 93: "With the expansion of settlement the area of cultivated land grew rapidly as did the size of the colonists' flocks and herds. Khoikhoi herders, who were expected to share their land with new comers, found themselves competing with the colonists for diminishing pasture as they sought to maintain their traditional migratory lifeways."
[89] Guelke supra note at 94.
[90] Guelke supra note at 94.
[91] Guelke supra note at 95.
[92] AJGM Sanders supra note at 174.
[93] AJGM Sanders supra note at 174.

through the remaining traditional San people who reside in the Southern African Savannah and Kalahari Desert.[94]

2.3.2 The Development of the Afrikaans Identity

The identity of the Afrikaans people in South Africa is important to understanding some of the policy changes that occurred in South Africa. The Dutch colonialists who had arrived in the Cape in 1652 were later joined by French Huguenots from Holland in 1689.[95] By policy of the Dutch East India Company, the use of the French language was forbidden in official documents and religious services which meant that by the middle of the 18th century the Huguenots had assimilated to the Dutch way of life.[96] Despite pockets of areas that were populated by French and German colonialists that also arrived in the Cape, the Company's policy ensured that: "The distinctive Africander type of character began to appear at the time when the settlers began to move from the coast into the interior of the country."[97] Another important aspect of the development of this particular identity was a loss of connection with the countries that they colonialists originated from:

> "For the most part the Dutch and the Germans belonged to the humbler classes; the situation was isolated; the home ties were few; the voyage to Europe was so long that communication was difficult and expensive; and so they maintained little connection with – and soon lost all feeling for – the fatherlands. As for the Huguenots, they had no home country to look to. France had banished them, and they were not of Holland – neither in blood nor in speech. Thus it came to pass that the whites of South Africa who went into the interior as pioneers went consenting to the feeling that every bond between Europe and themselves was severed – that they were a new people whose true home and destiny, to the latest generations, were to be in Africa."[98]

This mixed group of colonialists who became farmers (boers) and moved from the coast further inland (trekking) became known as Trek Boers.[99] By 1795 the total population of the Boers was approximately 17000, who due to their mixed nature had developed a distinct dialect of Dutch which was spoken in the simplest form possible and had lost the grammar and vocabulary in use in Holland by the end of the 18th century.[100] This distinct people group had a precarious

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[94] AJGM Sanders supra note at 174.
[95] Hooker L., *Africanders: A Century of Dutch-English Feud in South Africa* (Rand, McNally & Co.: Chicago, 1900) at 15.
[96] Le Roy Hooker (1900) at 16.
[97] Le Roy Hooker (1900) at 16.
[98] Le Roy Hooker (1900) at 17.
[99] Le Roy Hooker (1900) at 18.
[100] Le Roy Hooker (1900) at 21.

relationship with the rule of the Dutch East India Company and the Dutch government, with some in favour of maintaining relationships with the Dutch government but resisting the rule of the Company over them.[101] When hostilities broke out between England and France the English in an attempt to secure the strategic point of the Cape as a trade route between and Europe and the East entered into discussions with the Dutch government to send British troops to the Cape to strengthen it against being taken over by the French.[102] The English initially engaged in diplomacy and occupied False Bay on 11 June 1795.[103] Furthermore, by exploiting the divided sentiment between the Boers and the Company, the English claimed that they their intentions were to assist and protect the Boers instead of controlling them:

> "… the English occupation, it went on to say, would give them safety under the wing of the only power in Europe that was able to assure protection of person and property under the existing laws, or any others the colonists might choose to enact; it would secure a free market for all their products at the best prices; it would release trade from the heavy imposts of the Dutch East India Company; it would open and promote commerce by sea and land between all parts of the colony, and it would secure better pay for such of the colonial troops as might choose to enter the British military service.[104]

This appeal to the protection of person and property; and being loosed from paying rents to the Company resonated with the desire for autonomy among some of the Boers. However, by the end of June 1795 it became clear that attempts at a peaceful possession of the Cape colony would not be possible and the British then resorted to using force to possess the Cape.[105] After various scuffles between the British and the Dutch Cape government, the Cape government and the Dutch East India Company eventually agreed to terms of surrender on 16 July 1795.[106] As accounted by Hooker:

> "Thus it was, after an almost bloodless war, that [the] Cape Colony, founded by the Dutch and governed continuously by the Netherlands for one hundred and forty-three years, passed into the possession of Great Britain and become a crown colony thereof."[107]

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[101] Le Roy Hooker (1900) at 25: "It is important to remember that at this time the colonists were divided in sentiment as to the government of the Dutch East India Company, but united in loyalty to the States-General and the Stadtholder of Holland."
[102] Le Roy Hooker (1900) at 28.
[103] Le Roy Hooker (1900) at 31.
[104] Le Roy Hooker (1900) at 41.
[105] Le Roy Hooker (1900) at 46.
[106] Le Roy Hooker (1900) at 64.
[107] Le Roy Hooker (1900) at 65.

Although this initial possession of the Cape by the British ended fairly quickly and bloodlessly, this would be only the beginning of conflicts between the British and the Afrikaans people that would span intermittently over a century. In 1802 due to the peace of Amiens the Cape Colony was given back to the Dutch but then again seized back by the British in 1806,[108] and in 1814 the Cape Colony was formally ceded to the British crown.[109] The seizure of the Cape further drove the Afrikaans people northwards toward the interior to get away from the British rule in the Cape.[110] However, this would eventually lead to new hostilities as the Afrikaans would also encounter hostility from the people groups that originally occupied the interior the Xhosa,[111] Zulu,[112] and Sotho,[113] people groups. Inevitably, the Anglo-Boer war from 1899 – 1902 would be the scene of a crushing defeat for the Afrikaans. In particular British concentration camps, would become the source of enmity between the English and the Afrikaans, wherein Afrikaans women and children were held in concentration camps by the British resulting in over 27 000 deaths: "… 27 927 persons died in the camps, 1 676 men, mainly those too old to be on commando, 4 177 women and 22 074 children under sixteen."[114] The British kept separate concentration camps for black people and white people and it is estimated that there were over 14000 deaths in the black concentration camps.[115] After a century of fighting for control of the

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[108] Le Roy Hooker (1900) at 66.

[109] Le Roy Hooker (1900) at 67.

[110] Le Roy Hooker (1900) at 66.

[111] A series of nine frontier wars in the Eastern Cape over the course of a century 1779 - 1878 that saw the Xhosa people disposed of their land. See South African History Online "Eastern Cape Wars of Dispossession" South African History Online [Available from: https://www.sahistory.org.za/article/eastern-cape-wars-dispossession-1779-1878] Accessed on 31 December 2021.

[112] Another in the series of Boer Wars during the Great Trek, the Zulu-Boer war occurred between 1838 – 1840. This was followed by the Anglo-Zulu war of 1879 – See Michał Leśniewski "The Zulu-Boer War 1837 – 1840" (2021) Koninklijke Brill NV Leiden at 1 [Available from: https://brill.com/view/book/9789004449589/BP000008.xml?language=en] Accessed on 31 December 2021.

[113] A series of three wars wherein the Boers suffered substantial losses and ended with the area that would become the Orange Free State being taken over but the impenetrable fortress of Thaba Bosiu remaining intact. However, King Moshoeshoe was compelled to ask the British for assistance who annexed the area as a British protectorate on 12 March 1868 thus keeping Basutoland out of the reach of the Boers. South African History Online, "Basotho Wars 1858 – 1868" South African History Online [Available from: https://www.sahistory.org.za/article/basotho-wars-1858-1868] Accessed on 31 December 2021.

[114] South African History Online, "Women and Children in White Concentration Camps During Anglo Boer War 1900 – 1902", South African History Online [https://www.sahistory.org.za/article/women-and-children-white-concentration-camps-during-anglo-boer-war-1900-1902] Accessed on 30 December 2021.

[115] South African History Online "Black Concentration Camps During the Anglo Boer War 2, 1900 – 1902" South African History Online [https://www.sahistory.org.za/article/black-concentration-camps-during-anglo-boer-war-2-1900-1902] Accessed on 30 December 2021: "The total Black deaths in camps are officially calculated at a minimum of 14 154 (more than 1 in 10), though G. Benneyworth estimates it as at least 20 000, after examining actual graveyards. According to him incomplete and in many cases non-existent British records and the fact that many civilians died outside of the camps, caused the final death toll to be higher . The average official death rate, caused by medical neglect, exposure, infectious diseases and malnutrition inside the camps was 350 per

territory between the English and Afrikaans, the Union of South Africa was formed in 1910 which brought together the four colonies in the Cape, Natal, Transvaal and Orange Free State under one government as a self-governing territory of the British empire.

2.3.3 Legislative Pre-cursors to Apartheid: The Native Land Act 27 of 1913

Although Apartheid was officially legislated from 1948 – 1994 there were a number of legislative measures that were taken decades earlier that allowed for the institutional framework that would eventually give rise to Apartheid. In this regard it is important to note the role of British colonial policy in the unfurling of segregationist policy in South Africa through their customary law policy (e.g. the repugnancy clause);[116] as well as legislation adopted under the Union Government such as the Native Land Act of 1913 which will be discussed in greater detail.[117] Sol Plaatje's book *Native Life in South Africa* published in 1916, which provided an account of the destruction caused in the wake of the Native Land Act of 1913, which precluded indigenous Africans in South Africa from owning land, begins with the most ominous and poignant words as pointed out by Kader Asmal:[118]

> "Awakening on Friday morning, June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth."

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thousand per annum, peaking at 436 per thousand per annum in certain Free State camps. Eighty-one percent of the fatalities were children."

[116] Morudu and Maimela (2021) at 56, argue that it was the British that set out a distinct colonial policy in respect of customary law in 1806, the application of customary law was applicable to disputes between Africans and subject to the repugnancy clause which made any customary law in conflict with English common law repugnant or inapplicable. Moreover, according to Morudu and Maimela (2021) at 57: "*In the Unionisation of the Republic in 1910, the position of customary law differed drastically from one part of the country to the other. In the Cape and Transvaal, customary law had no official recognition in British held territories and to a lesser extent in Natal and the Transkei territories, customary law was regularly applied subject to the supervision of higher courts. This created a system of confusion and complexities in terms of court application and interpretation because of the fragmented system of customary law. The Native Administration Act 38 of 1927 was passed. Although the government's ostensible purpose was to revive African tradition, its actual intention was to establish a separate system of justice to match segregation in land and society*."

[117] Plaatje (1916) at 70 describes an interesting encounter with a white police officer from the Transvaal to whom they spoke while on their journey in the wake of the Natives Land Act who remarked that the calamity that had come upon black people in the country was largely due to British rule: "*'I think' said the policeman, 'the it must serve them right. They had no business to hanker after British rule, to cheat and plot with the enemies of their republic for the overthrow of their government. Why did they not assist the forces of their republic during the war instead of supplying the English with scouts and intelligence? Oom Paul would not have died of a broken heart and he would still be there to protect them*." Putting aside the prejudice with which this statement was made as the police officer still believed black people to be generally inferior to white people; and the obvious propaganda regarding how wonderful the situation for black was prior to the Union of South Africa in 1910, this account serves to point out that the British played a role in creating the institutional framework for racial segregation in South Africa. Thereafter, it was the Afrikaans who would then entrench such deep racial contempt through Apartheid policy.

[118] Sol T. Plaatje, *Native Life in South Africa* (Reprint 2007) Picador Africa: Northlands at xi.

The Native Land Act of 1913 was an important pre-cursor to Apartheid legislation as it institutionalised the discrimination of black people specifically in respect of land. It was also the basis on which many Africans were forced into the labour market which was the backbone of the economic growth needs of the country while simultaneously disempowering Africans from being able to achieve any economic independence:

> "… such a measure would be exploitation of the cruellest kind, that it would not only interfere with the economic independence of the natives, but would reduce them forever to a state of serfdom, and degrade them as nothing has done since slavery was abolished at the Cape."[119]

As noted by Plaatje, the Act was hotly debated but the majority of Parliament eventually passed the Act despite public opinion to the contrary.[120] Instead the racist ideology that hitherto fuelled the legislation in the Orange Free State was extended to the rest of the country. A notable piece of the Parliamentary roll that Plaatje cites which deserves to be quoted at length, is particularly indicative of the ideological position at the time:

> "MR J.G. KEYTER (Ficksburg) said he wished to openly denounce, and most emphatically so, that the people or the government of the Orange Free State had treated the coloured people unreasonably or unjustly, or in any way oppressively. On the contrary, the OFS had always treated coloured people with greatest consideration and the utmost justice. The OFS had made what Mr Merriman called stringent laws. He (Keyter) called them just laws. They told the coloured people plainly that the OFS was a white man's country, and that they intended to keep it so. (Hear, hear.) They told the coloured people that they were not to be allowed to buy or hire land, and that they were not going to tolerate an equality of whites and blacks; and he said they were not going to tolerate that in the future, and if an attempt were made to force that on them, they would resist it at any cost to the last,[footnote omitted] for if they did tolerate it, they would very soon find that they would be a bastard nation. His experience was that the native should be treated firmly, kept in his place and treated honestly. They should not give him a gun one day and fight him for it the next day. They should tell him, as the Free State told him, that is was a white man's country, that he was not going to be allowed to buy land there or to hire land there, and that if he wanted to be there he must be in service."[121]

[119] Plaatje (Reprint 2007) at 59.
[120] Plaatje (Reprint 2007) at 47 and 59.
[121] Plaatje (Reprint 2007) at 40.

The particularly disturbing aspect of this excerpt from the Parliamentary discussions is the manner in which the discrimination, deprivation of property and derogation of another race group was discussed in such a normalised way. Plaatje's book in particular contrasts the innocuous descriptions of the legislation by officials with the lived experiences of people he encountered along his journey.[122] These encounters included a family that was evicted from a farm while their young child was sick and the child subsequently died during the family's wandering in search of a new home, the parents were forced to bury their child in cover of night under a tree with no ceremony or grave and then carry on their journey.[123] In another account an elderly couple aged 119 years and 98 respectively along with their son aged 80 had been evicted, and forced to relocate from the Free State to the Transvaal.[124] However, despite the appeals of Plaatje and others to the British Crown, the situation would only get worse with increasingly oppressive legislation on black people and other non-white people groups.

The Native (Urban Areas) Act 21 of 1923 segregated urban residential spaces and created influx controls into urban areas to keep black people, who were not defined as permanent residents ("temporary sojourners") from both living in and accessing the cities.[125] The Urban Areas Act controlled the access to and the conduct of black people in the urban areas which meant that it frequently needed to be amended to restrict their activities.[126] Thereafter, the Native Trust and Land Act 18 of 1936 (later renamed the Development trust and Land Act) increased the amount of land available for ownership for black people from 7/8% that had been designated in Native Land Act of 1913 to 13.6%.[127] As a result of the Native Trust and Land Act, black people were sent to the reserves or so called "Black-spots" identified by the South African Native Trust (SANT).[128]

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[122] Plaatje (Reprint 2007) at 78: "We may here add that we read a confirmation of this case in the English weekly newspaper of Harrismith. The paper's reference to this case will also illustrate the easy manner in which these outrageous evictions are reported in white newspapers. There is no reference to the sinister undercurrent hardships attending these evictions."

[123] Plaatje (Reprint 2007) at 73 – 74.

[124] Plaatje (Reprint 2007) at 78.

[125] Britannica Available from: https://www.britannica.com/topic/Native-Urban-Areas-Act [Accessed on 30 November 2021]

[126] O' Malley Archive "1923. Native Urban Areas Act No 21" The Nelson Mandela Foundation Available from: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01758.htm [Accessed on 30 November 2021].

[127] South African History Online "List of Laws on Land Dispossession and Segregation" South African History Online Available from: https://www.sahistory.org.za/article/list-laws-land-dispossession-and-segregation [Accessed on 30 November 2021].

[128] South African History Online "List of Laws on Land Dispossession and Segregation" South African History Online Available from: https://www.sahistory.org.za/article/list-laws-land-dispossession-and-segregation [Accessed on 30 November 2021]. By 1945 The Native (Urban Areas) Consolidation Act 25 of 1945 allowed for

2.3.4 Conclusion

In this section I discussed the impact of colonisation on property in the South African context. Firstly, I provided an account of the initial mode of living of the indigenous inhabitants which was severely disrupted by the arrival of the Dutch East India Company. The Dutch East India Company began to privatise and allocate land in terms of private property principles that they brought with them from the Roman-Dutch civilian law tradition. Thereafter, the takeover of the English in the extensive feud between the English and the Boer settlers resulted in the transplant of English Common Law principles. Furthermore, it was English colonial policy that instituted customary law policy which diluted customary law and subjected it to the repugnancy clause.[129] Thus significantly altering the practice of customary law among African indigenous peoples;[130] and creating a system of confusion in respect of customary law that could be manipulated to fit into segregationist policies.[131]

Moreover, I discuss the implementation of race based segregation laws from 1913 after the Union of South Africa was formed in 1910. These legislative precursors are important because firstly, they show that the foundation for Apartheid was set long before it actually became institutionalised meaning that the systematic oppression of black people runs a lot deeper than the four decades of Apartheid. Secondly, the promulgation of shocking pieces of legislation had the effect of normalising horrific injustices numbing society to the plight of non-white people in the country that would reach its climax in Apartheid. Lastly, I argue that although the seeds of segregation were sown under the British, the fruition of Apartheid was a result of the rise in the Afrikaans nationalist identity. Understanding the relationship between the politics of Apartheid and the social practice of Apartheid in light of the Afrikaans nationalist identity in particular is the focus of the next section.

2.4 Apartheid

2.4.1 Ideology

The word Apartheid is a combination of two words "apart" meaning separate or segregated, and "heid" which refers to a state of being (denoted by the suffix "-ness"), thus directly translated referring to the state of being apart or "separateness". However, Apartheid means

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Africans to have permanent residence in an urban area if that person could prove that they had stayed in that area since birth; or had lived there lawfully for 15 years; or had worked for the same employer for 10 years.

[129] Morudu N.L. and Maimela C., "The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism within the South African Dispensation Possible or Not?" (2021) *De Jure Law Journal* 54 – 69 at 56 – 57.

[130] Morudu N.L. and Maimela C., "The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism within the South African Dispensation Possible or Not?" (2021) *De Jure Law Journal* 54 – 69 at 57.

[131] Morudu and Maimela (2021) at 57.

more than this and is underwritten by a number of ideological perspectives that are, and or were, key to the Afrikaner national identity from as far back as the early Dutch settlers and into Apartheid. Apartheid ideology was the meeting point of pure race theory; a religious liberation theology that morphed into a unique Apartheid theology; which in turn gave rise to the distinct Apartheid segregationist ideology. These will be discussed in turn in the next section.

2.4.1.1 Pure Race Theory

Pure race theory is underlined by two core ideas, the first being that an original race exists from which other races diverged from; and secondly, that this original race is superior to the other deviants.[132] More specifically, this theory is espoused with reference to the white (or Caucasian) race as the original superior race from which other races diverged and which holds superior intelligence and the strength of which must not be mixed with the other inferior races.[133] According to Carmen Baker:

> "… theorists such as French historian Author Gobineau, argued that white and non-white races can amalgamate but that that racial mixture will lead to the eventual downfall of western civilizations due to the gradual degeneration of the superior Caucasian race. de Gobineau (1853/2000) argued: 'So long as the blood and institutions of a nation keep to a sufficient degree the impress of the original race, that nation exists…But if, like the Greeks, and the Romans of the later Empire, the people have been absolutely drained of its original blood, and the qualities conferred by the blood, then the day of its defeat will be the day of its death. It has used up the time that heaven granted at its birth for it has changed its race, and with its race its nature. It is therefore degenerate. (p.52)' Gobineau's ideas were extremely influential in the construction of racist ideologies used as justifications for oppressive policies required in the production of 'white nations' in the nineteenth century, and for outlawing marriages between 'the races.'"

Through Baker's analysis of Gobineau's work above it is evident that pure race theory was a part of the justification for colonialism, as this was the prevalent idea in Western Europe at the time; and more specifically in the execution of Apartheid through legislation that prohibited sexual relations between different races, to avoid the miscegenation of the races. In the instance of the Afrikaans national identity this threat to the survival of the Afrikaans race became a

[132] Baker C., "Historical Racial Theories: Ongoing Racialization in Saskatchwan" (2006) *LLM Thesis* University of Saskatchwan Available from: https://www.collectionscanada.gc.ca/obj/s4/f2/dsk3/SSU/TC-SSU-01162007134258.pdf [Accessed on 7 December 2021] at 46.

[133] Baker (2006) at 46 – 48.

particularly formative aspect of their identity because they were the minority population in the country. A secondary application of pure race theory in respect of superiority of the white race is evident in the unlikely alliance between the Afrikaans and English speaking people groups in South Africa. The Afrikaans had always held their national identity in high esteem and distinct from an English identity due to the long feud for control between the two people groups.[134] However, in the face of maintaining power against a black majority the binding factor between these two groups was defense of a "European-type civilization" as described by Charles Manning in his defense of Apartheid:

> "Just as the National Party originally had its rationale in a danger to the Afrikaner *volk*, so today its apartheid policy has its justification in a threat to the European-type civilization which has in the course of three centuries been so hopefully built up in the South of Africa. And, as the party's original preoccupation with the needs of Afrikanerdom implied no necessary disrespect for British culture as such, so now its concern for the safeguarding of what white men have created in South Africa need imply no reflection on the quality of African civilization in itself."[135]

Ironically, despite Manning's claim of neutrality on the "quality of African civilization", this already implies racial superiority or at the very least that the difference between European civilisation and African culture was unpalatable for Afrikanerdom. For instance Manning argued that although the British are culturally different to the Afrikaans they at least belong to European civilisation, whereas African culture is different and must be ruled over, kept separate and restricted from challenging European civilisation.[136] At the core of this European style civilisation is the idea of a superior European Caucasian culture in light of which all other people groups fell short. Thus, the notion of white superiority in European civilisation that underlies pure race theory was significant unifier for the white population in the South African

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[134] Manning C.A.W., "In Defense of Apartheid" (1964) 43 *Foreign Affairs* 135 – 149 at 141.
[135] Manning C.A.W., "In Defense of Apartheid" (1964) 43 *Foreign Affairs* 135 – 149 at 141 – 142.
[136] Manning (1964) at 144 - 145: "Fortunately, the Africans in South Africa have in general not as yet become impatient of European rule. Indeed, there is a considerable reservoir of good will toward the whites, and certainly a disposition to look to them for much of the leadership, the enterprise, the initiative, the giving of employment. And maybe it is this comparative absence of hostility on the side of the Africans that explains the sense of responsibility with which they still are generally regarded by the whites. Individually the behavior of white men may in many instances be unforgivable. But collectively and officially the Europeans still reveal a sense of paternalistic concern which could all too easily be lost if the non-whites should be seen by the whites as potential political rivals, and therefore eventual rulers. No one who questions the sincerity of the white leadership to "do the right thing" for the African can hope to understand the philosophy of apartheid; and it is presumably the fact that so many do seemingly doubt that sincerity which accounts for some of the incomprehension with which current policies are viewed."

context. Moreover, it should be noted that Manning's strategic use of cultural differences as opposed to explicit racial differences in order to justify segregation during Apartheid was a response to the circumstances at the time. This shift in language was in line with the changing international sentiment as a result of the atrocities committed by Nazi Germany during World War Two on the basis of racial superiority.[137] Nonetheless, whether the terminology was culture or race the effect was the same, discrimination against non-white people groups in South Africa.

2.4.1.2 Apartheid Theology

However, on its own pure race theory does not capture the complete ideological basis for Apartheid. The Great Trek in particular solidified the Afrikaans religious identity which formed a new kind of justification for the conquest of land in the interior of the country. As mentioned by Hooker, wherever the Africander went a Bible went with them.[138] As a result the Afrikaans identified themselves with the people of Israel, God's chosen people who wandered in the desert for 40 years before arriving in the promised land which they had to clear out of people groups who opposed them. Based on this misguided self-identification the Afrikaans perceived themselves as righteous possessors of the land that had been previously occupied by indigenous South Africans. Although classical liberation theory was not the primary narrative that would eventually become the theological underpinning of Apartheid for the Dutch Reformed Church it was nevertheless a formative aspect of the Afrikaans Nationalist Christian identity.[139]

According to Dubow racial separation was based on three claims: "… scriptural injunction, the historical experience of Afrikanerdom and the findings of science, lie at the heart of apartheid ideology."[140] Dubow referring to the work of J.D. Du Toit and Abraham Kuyper, who were influential in the formation of Apartheid ideology, canvasses how the scriptural underpinning for Afrikaans theology was based on the account of the Tower of Babel,[141] where Du Toit

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[137] Dubow S., "Afrikaner Nationalism, Apartheid and the Conceptualization of 'Race'" (1992) The Journal of African History 33(2) 209 – 237 at 230.

[138] Le Roy Hooker (1900) at 18: "*In all their wanderings the Bible went with them as an oracle to be consulted on all subjects, and the altar of family worship never lacked its morning and evening sacrifice. And they retained a passionate love of personal freedom which no effort of the Company's government could bring under perfect discipline*."

[139] Loubser J.A. "Apartheid Theology: A Contextual Theology Gone Wrong" (1996) *Journal of Church and State* 38(2) 321 – 337 at 336.

[140] Dubow S.,"Afrikaner Nationalism, Apartheid and the Conceptualization of 'Race'" (1992) The Journal of African History 33(2) 209 – 237 at 217.

[141] Genesis 11 v 1 – 8: "*1 Now the whole world had one language and a common speech. 2 As people moved eastward,[a] they found a plain in Shinar[b] and settled there. 3 They said to each other, 'Come, let's make bricks and bake them thoroughly.' They used brick instead of stone, and tar for mortar. 4 Then they said, 'Come, let us build ourselves a city, with a tower that reaches to the heavens, so that we may make a name for ourselves;*

depicted God as the Great Divider, who gave different languages to different groups of people who exist in pluriformity.[142] This became the scriptural basis to justify the separation of different languages and cultural groups. The Biblical account of a unified Church (or body of Christ) was also described as something to only to be realised at the second coming of Jesus as a future spiritual reality and not a physical present reality.[143] However, even before the throne of Jesus as described in the Book of Revelations, the picture of people from different tribes and tongues worshipping before the throne justified the idea that even in this future spiritual reality there would still be differentiated people groups.[144]

Throughout Apartheid the Dutch Reformed Church would form a close allegiance with the Nationality Party, often justifying the political decisions taken in respect of Apartheid through Biblical texts. The most apparent example being the Immorality Act 21 of 1950, which

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otherwise we will be scattered over the face of the whole earth.' 5 But the LORD came down to see the city and the tower the people were building. 6 The LORD said, 'If as one people speaking the same language they have begun to do this, then nothing they plan to do will be impossible for them. 7 Come, let us go down and confuse their language so they will not understand each other.' 8 So the LORD scattered them from there over all the earth, and they stopped building the city. 9 That is why it was called Babel[c]—because there the LORD confused the language of the whole world. From there the LORD scattered them over the face of the whole earth."

[142] Dubow S.,"Afrikaner Nationalism, Apartheid and the Conceptualization of 'Race'" (1992) The Journal of African History 33(2) 209 – 237 at 217 – 218: "*Du Toit adopted a wide-ranging approach, mixing biblical exegesis with a global conception of Afrikaner history and philosophy. At the core of his argument is the notion of God as 'Hammabdil' - the Great Divider. Not only did God separate light and dark, heaven and earth, man and woman, He also ordained the separation of one nation from the other. The key passage for du Toit and for most subsequent apartheid theology refers to the story of Babel. Here, it is claimed, God intervenes to disperse the builders of the tower who wished to create a single nation by causing them to speak in mutually incomprehensible tongues. By contrast, the Boers who trekked away from the liberal Cape to create their own nation exemplify God's will. They ventured out into a 'barbarous' black continent, the inhabitants of which are the accursed sons of Ham. Africa was a 'black morass' which would swallow up the unwary. Yet, out of this darkness God was about to bring forth something wonderful: the Boer nation, a 'new type', developed from a miraculous intermingling of (white) blood. This is the gist of du Toit's message and from it he derives two major conclusions: 'first, what God has joined together, man must not separate. This is the core of our plea for the unity of the people (volkseenheid).' Second, 'we should not bring together that which God has separated. In pluriformity the counsel of God is realised. The higher unity lies in Christ and is spiritual in character. Thus, there can be no equalising (gelykstelling) and no miscegenation (verbastering). Du Toit cites a number of authorities in the course of his address, including the Rev. J. G. Strydom and F. G. Badenhorst, whose doctoral thesis at the Free University of Amsterdam considered the South African race question in the context of reformed theology.36 However, the chief inspiration and the source of most of his ideas was the Dutch theologian and statesman, Abraham Kuyper (I837-I920). It is from Kuyper that du Toit derived the notion of God as the Great Divider, as well as such central concepts as pluriformity, diversity and the theological distinction between common and special grace*."

[143] J.A. Loubser "Apartheid Theology: A Contextual Theology Gone Wrong" (1996) *Journal of Church and State* 38(2) 321 – 337 at 323.

[144] J.A. Loubser "Apartheid Theology: A Contextual Theology Gone Wrong" (1996) *Journal of Church and State* 38(2) 321 – 337 at 323: "*Rev. S. J. du Toit who emphasized the uniqueness of the Afrikaans language. He used Genesis 11 to demonstrate that the diversity of tongues (peoples) was the will of God. He further referred to Acts 2:5-12, Revelation 5:9, 7:9, and 14:6 to prove his view that God even maintains the diversity of nations and languages before His throne in heaven. A logical consequence of the idea of calling was that every nation must maintain its separate identity. Here the seeds of later apartheid theology are found*." It should be noted that Rev. S.J. du Toit was the father of J.D. du Toit, see footnote 37 in Dubow (1992) at 218.

prohibited sexual relations between the race groups not only from the perspective of pure race theory per se but from the commandments given to the Israelites not to inter marry with nations who lead them astray from God. This became the moral justification for Afrikaans people to uphold segregation as a matter of good conscience and not just as a matter of law or survival of the race group.

The role of the church during Apartheid continues to be a contentious issue in Post-Apartheid South Africa and at the same time as displayed by Bishop Desmond Tutu in the Truth and Reconciliation Commission it is also a point where healing of the nation was able to begin and continues to be instrumental in closing the gap between neighbours of different races in post-Apartheid South Africa. This will be discussed in more detail below in section 2.5.

2.4.1.3 Fear of the "Other"

Fear was a particular feature of Apartheid which has persisted till today. Both then and now the appeal to the need for security against the supposed threat of black people to the white population continues to be a persistent narrative. Fear as a tool in the justification of racial segregation in South Africa took two forms. Firstly, the term "swart gevaar" directly translated means "black danger" in reference to the idea that black people were a perceived threat to the safety and security of the Afrikaans people due to the overwhelming numbers of black people. The Afrikaner people being the minority population perceived that they could be easily over run by the majority black population. This meant that vigilance was meant to be maintained against the black danger. Secondly, fear of racial contamination and miscegenation which would lead to the disintegration of the Afrikaner people was also a deep concern. As Dubow pointed out: "Such dangers were highlighted by reference to scriptural injunction and historical precedent, as well as biological degeneration."[145] Nonetheless, both of these fears pointed to the same insecurity in the Afrikaans identity: a fear that the Afrikaans identity would essentially be wiped out or diluted to the extent of disintegration. Consequently, the rhetoric of warding off the black threat became an important feature during elections; and in the design of the state to institutionalise segregation and racism.

2.4.1.4 Key Tenets of South African Segregation Theory

As pointed out by Dubow theories of segregation in South Africa were flexible to accommodating practical political realities. For example when it seemed that the Axis powers were going to win World War II more ideas around biological determinism were popular but

[145] Dubow (1992) at 236

with the condemnation of Nazi policy this approach noticed a steep retreat.[146] Later on Manning would admit that the segregationist policies of the United States were not desirable but rather articulated Apartheid within the language of cultural preferences rather than racial supremacy.[147] The flexibility of Apartheid segregation theories was part of its pervasiveness. Thus over time the combination of pure race theory, Apartheid theology and fear narratives gave rise to the unique brand of Apartheid segregationist ideology that would endure for five decades.

Apartheid was often touted by intellectuals, theologians and politicians as a practical matter of cultural relativism;[148] or as self-determination of the ethnic groups, recommending each to their own, with the white race playing a paternalistic guardianship role until the native could govern themselves.[149] This particular brand of self-determination was also problematic in that it safe guarded the Afrikaans people groups right to self-determination but parcelled out to other people groups the extent to which they were allowed to govern themselves.[150] This will be elaborated on below in respect to the Bantustan system.

2.4.2 Key Legislation in the Institutionalisation of Apartheid

In addition to the pre-Apartheid legislation mentioned above which formed the foundation for Apartheid. There was specific legislation that became the pillars of upholding an Apartheid system of separate development. These included the Immorality Act 21 of 1950 which prohibited extra marital sexual relations between Europeans and non-Europeans.[151] This was one of the first acts of legislation of Apartheid that encroached into the private life of all South Africans but confirmed the ruling party's ideology regarding the "purity" of the Afrikaans race as a moral obligation.[152] The Population Registration Act 30 of 1950 required people to be classified and registered from birth in one of four racial groups: White, Coloured, Black (Bantu) and Indian. Thereafter, The Pass Law Act of 1952 required those classified as black South Africans over the age of 16 to carry a pass book with them at all times, severely restricting and controlling the movement of black South Africans. If indigenous South Africans had become

[146] Dubow (1992) at 235.
[147] Manning (1964) at 142.
[148] Dubow (1992) at 237.
[149] Dubow (1992) at 237.
[150] Manning (1964) at 148 – 149.
[151] O' Malley Archive "1950. Immorality Amendment Act No 21" The Nelson Mandela Foundation Available from: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01837.htm [Accessed on 30 November 2021].
[152] Ironically, this Act restricted sexual relations between white people and coloured people, who are a race group in South Africa that was created through the intermingling of white men with black women often by force which resulted in unwanted children that formed eventually formed their own people group.

pariahs with the advent of the Natives Land Act in 1913, the Pass Laws Act of 1952 made indigenous South Africans foreigners in the land of their birth required to adhere to an internal passport system. Additionally, the Suppression of Communism Act 44 of 1950 was used to criminalise the activity of anti-Apartheid activists and it was on the basis of a very loosely defined definition of communism,[153] that a number of activists were detained, tortured and imprisoned.[154]

2.4.3 Property Legislation During Apartheid

As previously mentioned the Native Land Act 27 of 1913 prohibited native South Africans from purchasing, leasing or acquiring land outside of the designated native areas which initially constituted approximately 7% or 8% of the total land area of South Africa and was later increased to 13.6%.[155] The Group Areas Act 41 of 1950 amended and promulgated as the Group Areas Consolidated Act 77 of 1957,[156] divided urban areas in racially segregated zones where members of certain race could live or work and made it a criminal offence for a member of a non-designated race group to reside or own land in the area designated for another race.[157] Mabin argued that it was this act of legislation that laid the basis for skewed land planning.[158] Thereafter, the Native Resettlement Act 19 of 1954 was promulgated to implement the Group Areas Act in Johannesburg which allowed for the forced removal of native South Africans from the suburbs of Sophiatown, Martindale, Newclare and Pageview with ones months' notice and

[153] O' Malley Archive "1950. Suppression of Communism Act No 44" The Nelson Mandela Foundation Available from: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01840.htm [Accessed on 30 November 2021]: "Communism" was defined as "any doctrine or scheme… which aims at bringing about any political, industrial, social or economic change within the Union… by unlawful acts or omissions or by the threat of such acts or omissions.. or under the guidance of any foreign or international institution".

[154] O' Malley Archive "1950. Suppression of Communism Act No 44" The Nelson Mandela Foundation Available from: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01840.htm [Accessed on 30 November 2021]. It was on this basis that the Rivonia Trial in which Nelson Mandela and others were sentenced to imprisonment.

[155] Margaret Cornell, "The Statutory Background of Apartheid: A Chronological Legislation" (1960) The World Today 16(5) 181 – 194 at 188.

[156] Margaret Cornell, "The Statutory Background of Apartheid: A Chronological Legislation" (1960) The World Today 16(5) 181 – 194 at 188.

[157] O' Malley Archive "1950. Group Areas Act No 41" The Nelson Mandela Foundation Available from: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01839.htm [Accessed on 30 November 2021].

[158] O' Malley Archive "1950. Group Areas Act No 41" The Nelson Mandela Foundation Available from: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01839.htm [Accessed on 30 November 2021] referring to Mabin (1992; 406 – 407).

without corresponding property rights in their area of resettlement.[159] By 1959 the Promotion of Bantu Self Government Act 46 of 1959 was implemented which although was not strictly speaking property legislation it set up the political framework for the eight Bantustans where native Africans were to develop as separate nations which had a significant impact on the geographical landscape of South Africa as the map below illustrates.[160]

Map 1: South Africa pre-1994 Bantustans[161]

A seen from the map each of the Bantustans were designated their own territory of self-governance where they would allegedly develop equally. A policy for the socio-economic separate development of the Bantustans was set out by the Tomlinson Commission (which was set up to investigate socio-economic development of the native areas) in their report in 1956.[162] However, in spite of all the plans for the separate development of the Bantustans the fact remained that development would never be achieved on an equal basis and would continue to

[159] Cornell M., "The Statutory Background of Apartheid: A Chronological Legislation" (1960) The World Today 16(5) 181 – 194 at 189.
[160] Cornell M., "The Statutory Background of Apartheid: A Chronological Legislation" (1960) The World Today 16(5) 181 – 194 at 185.
[161] South African History Online "Archive Category: Maps" *South African History Online* [Available from: https://www.sahistory.org.za/archive/map-south-africa-pre-1994-bantustans] Accessed on 20 December 2021.
[162] Margaret Cornell, "The Statutory Background of Apartheid: A Chronological Legislation" (1960) The World Today 16(5) 181 – 194 at 181.

institutionalise racial inequality. As written by the Secretary Bantu Administration and Development in an article in 1959:[163]

> "… the maintenance of white political supremacy over the country as a whole is a sine qua non for racial peace and economic prosperity in South Africa."

Keeping the Bantustans in an inferior economic position was a part of the institutional design of Apartheid. Any window dressing claims that the Bantustans were intended to give the indigenous African people groups the right to self-determination was confronted with the reality that there was deep spatial inequality in the very lines that marked out the territories themselves. The reality remained that the majority of the population was deprived of access to most of the countries land and resources. However, it was this racial oppression that would be the undoing of the Apartheid system as resistance against the restrictions on life, liberty, movement and the derogation of human dignity would begin to intensify.

2.4.4 The Struggle Movement Against Apartheid

A complete canvass of the struggle movement against Apartheid falls outside of the scope of this thesis. Suffice to state that the resistance against racial oppression in South Africa was a slow and incremental process that spanned as far back as the first resistance against colonial rule and thus can be divided into three phases.[164] Firstly, the wars of resistance against colonial rule between various native South African tribes like the Zulus, Xhosas and Sothos and Dutch colonialists as they moved further inland and up until the formation of the Union of South Africa in 1910.[165] Secondly, the struggle liberation period from 1910 to 1960,[166] can also be seen through various stages of peaceful resistance. Sol Plaatje illustrates this kind of peaceful resistance in his attempt at stopping the Native Land Act as early as 1913, showing that there were always pockets of resistance, and attempts at peaceful liberation, from the cruelty of white domination. From the 1950s the African National Congress would begin to play a more active role in organising mass protests and engaging in social disobedience. However, it was not until the Third phase of the liberation struggle from 1960 – 1994,[167] where the increase in violence

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[163] Cornell M., "The Statutory Background of Apartheid: A Chronological Legislation" (1960) The World Today 16(5) 181 – 194 at 185.

[164] Houston G.F, "The State of Research On, and Study of, the History of the South African Liberation Struggle", (19 – 21 November 2015) Paper presented at the African Studies Association Meeting, San Diego, USA at 3.

[165] Houston G.F., "The State of Research On, and Study of, the History of the South African Liberation Struggle", (19 – 21 November 2015) Paper presented at the African Studies Association Meeting, San Diego, USA at 3.

[166] Houston G.F, "The State of Research On, and Study of, the History of the South African Liberation Struggle", (19 – 21 November 2015) Paper presented at the African Studies Association Meeting, San Diego, USA at 3.

[167] Gregory F. Houston, "The State of Research On, and Study of, the History of the South African Liberation Struggle", (19 – 21 November 2015) Paper presented at the African Studies Association Meeting, San Diego, USA

and surveillance against native South Africans during Apartheid intensified resistance into an armed struggle resulting in clashes between the Apartheid government and citizens from all walks of life. This phase was precipitated by the Sharpeville Massacre that occurred on 21 March 1960 where 69 people were killed while approximately 189 were injured; and resulted in the banning of anti-Apartheid political organisations.[168] Thereafter, the Soweto Uprising on 16 June 1976 where it was estimated that 176 students were killed after the police opened fire on students protesting against the introduction of Afrikaans as the medium of instruction in schools.[169] These two watershed moments would be but two examples of the clashes between citizens and the police or security forces of the Apartheid state. Later the Suppression of Communism Act would form the basis for the arrest of struggle leaders Nelson Mandela and others who would receive life imprisonment sentences at the Rivonia Trial for organising resistance activities. The arrest of these leaders would send the struggle underground and continue to increase the exiled community abroad but would not deter the fight for liberation from Apartheid. By 1990 the resistance proved effective and resulted in the then Prime Minister FW De Klerk conceding to begin negotiations with ANC leaders to effectively end Apartheid and set up the framework for the first democratic election in South Africa in 1994.

2.4.5 Conclusion: The End of An Era - The Legacy of Apartheid

The negotiations to move from Apartheid to a democratic era was a difficult negotiation of the economic power of the minority and the mass mobilisation power of the majority. The process of dismantling the legislation that had established Apartheid occurred through various pieces of legislation like the Abolition of Racially Based Land Measures Act 108 of 1991 which repealed significant Apartheid legislation related to land tenure and land ownership like the Native Land Act of 1913, the Development Trust and Land Act of 1936 and the Group Areas Act of 1966. Furthermore, the former Bantustans were abolished and one South Africa was formed comprising of nine provinces. The diagram below depicts the change in the boundary lines within South Africa from 1910 – 2019.

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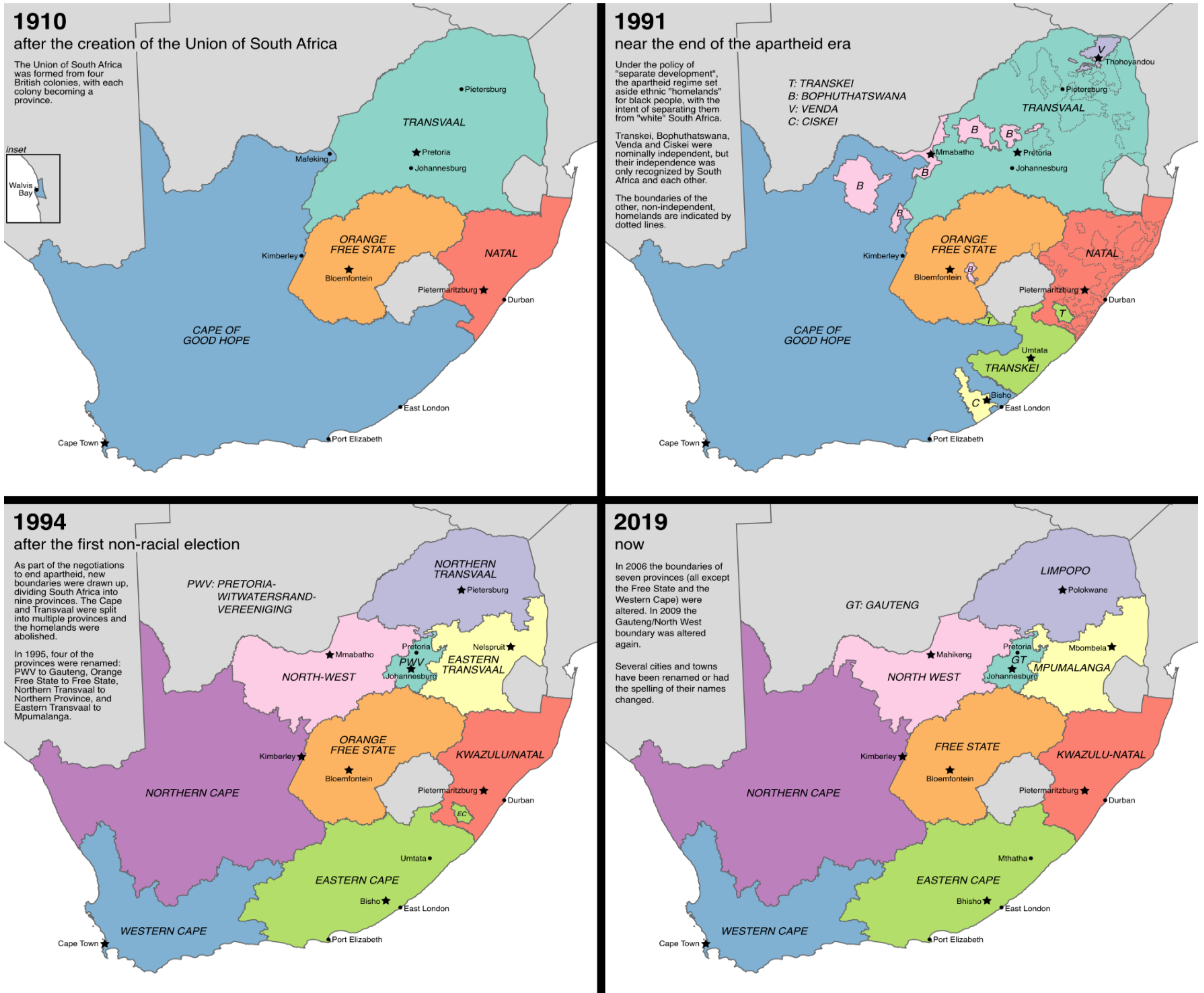
at 3-4 dates the Third phase from 1960 – 1994, however 1990 saw the stalemate between the UMkhonto We Sizwe (MK) armed resistance and the security forces that among things forced the beginning of negotiations for end the Apartheid.

[168] Matthew McRae "The Sharpeville Massacre" *The Canadian Museum for Human Rights* [Available from: https://humanrights.ca/story/the-sharpeville-massacre] Accessed on 29 December 2021.

[169] South African History Online, "The June 16 Soweto Youth Uprising" *South African History Online* [Available from: https://www.sahistory.org.za/article/june-16-soweto-youth-uprising] Accessed on 20 December 2021.



Map 2: Change in Internal Boundaries of South Africa 1910 – 2019[170]

The end of Apartheid was an important moment in the history of South Africa and saw the dawn of a new era that many freedom fighters did not live to see in their lifetime because change came slow or because their lives were cut short by the violence of Apartheid. Apartheid represented the worst part of institutionalised racism in South African history and left deeply entrenched inequality. Over the process of five decades numerous atrocities and immense bloodshed had occurred making it difficult to transition to a reconciled racially diverse nation. Consequently, the Truth and Reconciliation Commission was established to begin to untie the knots within South African society.

[170] Source Unknown.

2.5 Truth and Reconciliation Commission

2.5.1 Role of Truth and Reconciliation in the Transition to Democracy

During the negotiations to transition from Apartheid to a constitutional democracy an important question that needed to be addressed was the significant human rights violations that occurred during Apartheid.[171] The systematic oppression of the non-white population of South Africa and the inherent distrust amongst the various people groups needed to be addressed in the nation building initiative that was on the agenda for a new South Africa. To this end the Truth and Reconciliation Commission (TRC) was established to come to terms with the political history of South Africa especially from 1960 when the Sharpeville massacre occurred and began a particularly violent time in the history of the country until 1994.[172] The TRC comprised of three committees: the Committee on Human Rights Violations which would inquire into human rights violations; the Committee on Amnesty which would rule on individual amnesty applications; and the Committee on Reparation and Rehabilitation which would gather information on the identity of victims, their fate, present whereabouts and the type of harm suffered.[173]

The Committee with the most notoriety in the TRC was the Amnesty Committee which allowed for the granting of amnesty to individuals who committed crimes during Apartheid on the condition that the crime must have had: i) a political motive; and ii) the Applicant made complete disclosure of all relevant facts of the crime. This was a particularly contentious aspect of the TRC in that in order to incentivise full disclosure of atrocities that had been committed during Apartheid, amnesty was granted to perpetrators meaning that they could not be held civilly or criminally liable for their actions.

2.5.2 Legacy of the Truth and Reconciliation Commission

The TRC abounds in both admirers and detractors both of which have their place in evaluating the legacy of the Commission. As the late Arch Bishop Desmond Tutu was at pains to stress in the TRC Report, the Commission was an overwhelming success given the circumstances at the time and this an important factual reality to not lose sight of:

> "It is certain that we would not, in such circumstances, have experienced a reasonably peaceful transition from repression to democracy. We need to bear this in mind when we

[171] Henrand K., "Post-Apartheid South Africa: Transformation and Reconciliation" World Affairs (2003) 166(1) 37 – 55 at 40.
[172] Truth and Reconciliation Commission of South Africa "Truth and Reconciliation Commission of South Africa Report" (29 October 1998) Vol. 1(1) at 1.
[173] Henrand K., "Post-Apartheid South Africa: Transformation and Reconciliation" World Affairs (2003) 166(1) 37 – 55 at 40.

> criticise the amnesty provisions in the Commission's founding Act. We have the luxury of being able to complain because we are now reaping the benefits of a stable and democratic dispensation. Had the miracle of the negotiated settlement not occurred, we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa."[174]

Nonetheless, a critique of the TRC is necessary to ensure the very objectives of the TRC, healing and national building, continue to be realised. As correctly identified by the late Arch Bishop amnesia is impossible when the wounds run deep, instead these wounds must be confronted and cleansed for a nation to properly heal:

> "The other reason amnesia simply will not do is that the past refuses to lie down quietly. It has an uncanny habit of returning to haunt one. "Those who forget the past are doomed to repeat it" are the words emblazoned at the entrance to the museum in the former concentration camp of Dachau. They are words we would do well to keep ever in mind. However painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future."

The process of nation building is not a static process nor is it a one-time process. The TRC was critical in the transition to a democracy but left the rehabilitation process of the nation lacking in three key instances. Firstly, misconception that the work of the TRC was the end of the healing process when it actually it was only the beginning, is a problematic feature of the legacy of the TRC. The idea that all the wounds of Apartheid were opened and cleansed is a fallacy. Indeed significant healing took place. However, there still remain mysteries regarding missing struggle activists, meaning there still remains families and communities that did not receive closure from the past and continue to experience the harsh realities of loss and grief that cannot be consoled.[175] Secondly, there remains numerous untold stories of rights abuses that occurred under Apartheid that were never heard by the TRC:

[174] Truth and Reconciliation Commission of South Africa "Truth and Reconciliation Commission of South Africa Report" (29 October 1998) Vol. 1(1) at p5, para 22.

[175] Truth and Reconciliation Commission of South Africa "Truth and Reconciliation Commission of South Africa Report" (29 October 1998) Vol. 1(1) at p8, para 30: "*I recall so vividly how at one of our hearings a mother cried out plaintively, 'Please can't you bring back even just a bone of my child so that I can bury him.' This is something we have been able to do for some families and thereby enabled them to experience closure*."

> "It is important to emphasise here that silence, as a discursive strategy of control, is not particular to the 'old' South Africa. It is also to be found in the 'new' South Africa, even if this is a different sort of silencing to that of the active material silencing of the past. The TRC itself presents us with an example of such a 'new' South African silence, through those who have not been allowed to speak at the commission. These are the majority of people who were 'victimised' under Apartheid, but who have not been defined as "victims" by the TRC. People who have suffered "racialised poverty" via pass laws, the migrant labour system, bantu education, employment exploitation, forced removals - "structural injustices" (Mamdani, 1998, p. 7) -have not been addressed as "victims". They have not really been addressed at all, other than in academic forums or preliminary "South African NGO Coalition poverty hearings", which attracted a "low level of interest" from the media (Kollapen, 1998, p. 43). These people, remain as silent and silenced within the 'new' social order, as they were in the 'old'."[176]

The harsh reality is that not all stories of the past (or present) have been fully given voice but this does not mean that these wounds do not exist or that they will go away on their own. Hook and Harris acknowledge those who could not be classified as victims and the harm that silence has created. This has become a new kind of injustice as argued by Hook and Harris above.

Thirdly, the lack of remorse or reparation on the part of the perpetrator remains a glaring critique on the legacy of the TRC. Remorse and reparation is not a forced reaction but rather a response when a true understanding of one's wrong doing has been realised. The missed opportunity in this regard was a sense that the amnesty applicants and key state officials did not demonstrate genuine remorse in light of the atrocities committed. In some instances the disturbing nature in which perpetrators confessed their actions could be seen as part of the reason for the criticism that amnesty amounted to impunity.[177] Consequently, there is a prevailing sense in post-Apartheid South Africa when the past or reparation are brought up that many in the Afrikaans community view this as a settled issue that should not be raised anymore. However, the reality is that South Africa must still undergo significant structural changes and redistribution of wealth before what was plundered in the past has been adequately addressed.

[176] Hook D. and Harris B., "Discourses of Order and their Disruption: The Texts of the South African Truth & Reconciliation Commission" (2000) *South African Journal of Psychology* 30(1) 14 – 22 at 17.
[177] Truth and Reconciliation Commission of South Africa "Truth and Reconciliation Commission of South Africa Report" (29 October 1998) Vol. 1(1) at p9, para 35.

This is not to advocate for retribution but rather reparation and redistribution as a part of reconciliation as articulated in the TRC Report:

> "… We believe, however, that there is another kind of justice - a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation. Such justice focuses on the experience of victims; hence the importance of reparation."[178]

The lack of reparations remains the most glaring shortcoming of the TRC. Moreover, reconciliation, restoration and reparation are necessarily linked. We can question whether true reconciliation has been reached where reparation was not provided nor restoration achieved.

2.5.3 Truth and Reconciliation Commission Conclusion

The TRC was chaired by the late Arch Bishop Desmond Tutu which brought the feel of both a political exculpation of the process but also a kind spiritual relief through the kind of public confession of wrongdoing that the TRC was designed to achieve.[179] The Commission placed an emphasis on the importance of confession, forgiveness and reconciliation. The process of truth telling by public confession from perpetrator and the reciprocal extension of forgiveness in the process of reconciliation are important Biblical narratives. This is interesting for two reasons. Firstly, as previously described the Afrikaans Christian Nationalist identity was based on untenable theological strands of liberation theory and segregation theory that formed the basis of Apartheid segregation ideology. In paragraphs 65 and 66 of Volume 1 of the TRC Report the approach that was taken by the late Arch Bishop in reasoning with the Afrikaans or white community in particularly feels like the apologist approach of the Apostle Paul in Acts 17 when he reasons with the Jews by reference to Jewish tradition in the synagogue (Acts 17v1-9); while using the philosophical beliefs of the Athenians to reason with the Athenians (Greeks) (Acts 17v16-34).

> "66 To lift up racism and apartheid is not to gloat over or to humiliate the Afrikaner or the white community. It is to try to speak the truth in love. It is to know the real extent of the sickness that has afflicted our beloved motherland so long and, in making the right diagnosis, prescribe the correct medicine. We would not want to be castigated as the prophet Jeremiah condemned the priests and prophets of his day (Jeremiah 6:13-14): 'For

[178] Truth and Reconciliation Commission of South Africa "Truth and Reconciliation Commission of South Africa Report" (29 October 1998) Vol. 1(1) at p9, para 36.
[179] Truth and Reconciliation Commission of South Africa "Truth and Reconciliation Commission of South Africa Report" (29 October 1998) Vol. 1(1) at 4.

> from the least to the greatest of them, every one is greedy for unjust gain; and from prophet to priest, everyone deals falsely. They have healed the wound of my people lightly, saying 'Peace, peace' when there is no peace."

The use of the Biblical analogy of speaking the truth in love in paragraph 66 is a way of using the Biblical principles familiar to the Afrikaans to appeal to them on the moral decrepitude of Apartheid in a way they can understand. However, this was not only an appeal to pander to aggrieved white South Africans. Bishop Tutu in himself represents the deep religious conviction that is prevalent in South African black society. Whether it be Christianity or spiritualism that is rooted in African tradition there is great similarities in the importance of reconciliation in the community when an atrocity against the community has occurred. The public acknowledgment of a wrong, because it was not only harmful to an individual but also to the community, is paramount to social harmony and unity in an African community. Therefore, in light of the late Arch Bishop Desmond Tutu's unique approach, the spiritual absolution of the nation and the peaceful transition to democracy can correctly be attributed in part to the extensive work of the TRC. However, the sustainability of national building will only be seen in a continued process of reconciliation, reparation and confronting the wounds that persist. As said by One Mokgatle: "There can be no reconciliation without confrontation." This continued dialectic regarding the past and the present is an essential part of building the future of non-racialism, equality and unity in the South African context. This perhaps the most important legacy of the TRC that needs to be carried forward.

Although the new democracy was heralded as a miracle and indeed given the circumstances at the time was an unprecedented occurrence of a peaceful transition from deep racial division to a new egalitarian society. The scars of Apartheid continue to exist in the psyche of the South African identity. The vast inequality that existed then continues to persist and affect the poorest and most marginalised members of society. Particularly with regard to land tenure, spatial inequality, socio economic stagnation and racial tensions that can still be seen and felt, the legacy of Apartheid persists.

2.6 Constitutional Democracy

2.6.1 Supremacy of the Constitution

According to section 2 of The Constitution of the Republic of South Africa, 1996, the Constitution is the supreme law of the land. Furthermore, the Constitution recognises the other

sources law: legislation, common law and customary law.[180] However, all sources of law derive their legitimacy from the Constitution and cannot be in conflict with the Constitution. Legislation can be declared unconstitutional by the Constitutional Court but the legislation must then be repealed or amended through an Act of Parliament;[181] common law can be developed to be in line with the Constitution, or declared unconstitutional by the Constitutional Court and deemed without legal force without any further processes as common law exists through court made precedent.[182] Customary law can also be developed in line to be in line with the Bill of Rights or be declared unconstitutional and deemed without legal force similar to common law.[183]

The Constitution is often heralded as a model constitution and indeed this is true for two reasons. Firstly, it is a combination of the best constitutional models across the world. The benchmarking process that occurred to ensure that the Constitution was detailed enough and on par with the rest of the world was taken very seriously. Constitutional law scholars from the across the world were invited to be part of the drafting process. Secondly, the Constitution is a miracle document in that despite the tough political negotiations that took place in the transition to a Constitutional democracy, all the relevant parties were able to arrive at a comprise that at least at the time satisfied all the representatives and their constituencies.

However, herein lies the fundamental issues that have arisen from the Constitution as it has been critiqued as a document that is beautifully drafted in theory but difficult to actualise in practice. Millions of South Africans who are most in need of the protections and liberties it affords are the ones for whom it is most inaccessible. Secondly, it has been critiqued as a document that accommodated the interests of the white ruling elite which has made the

[180] Section 39 (2) of the Constitution, 1996.

[181] In this instance there is often legislation which is of an Apartheid vintage which periodically becomes the point of issue before the Constitutional Court. For example in the *Haffejee N.O. and Others v eThekwini Municipality and Others [2011] ZACC 28* case certain aspects of the Expropriation Act 63 of 1975 were in conflict with Section 25(2) of the Constitution.

[182] Section 8(3) and 39(2)of the Constitution makes allowance for the development of the common law in order to give effect to a right in the Bill of Rights.

[183] See section 39(2). Also see for example in the *Bhe v Khayelitsha Magistrate 2005 1 BCLR 1 (CC)* case where the customary law concerning the rule of male primogeniture in inheritance (where the passing of property and title is to the first born male heir) was challenged before the Constitutional Court. In that case, the CC held that the customary law rule forbidding two female daughters from inheriting their father's property was unconstitutional on the basis that it unfairly discriminated against women contrary to the Equality Clause in section 9 of the Constitution. This was an example of how the Constitution is changing South African customary law for the various indigenous people groups. See Morudu and Maimela (2021) at 61 – 62 for a critique on the case.

redistribution of wealth particularly cumbersome and difficult. For example, expropriation clause has been debated in recent times as the cause for the slow or often stagnant process of redistribution of land. This will be discussed briefly in respect of Constitutional Property in South Africa below.

2.6.2 Constitutional Property Law in South Africa

Section 25 of the Constitution also known as the property clause,[184] guarantees the right to property in South Africa. The clause reflects the tensions regarding property in South Africa as a result of its history. Section 25(1) guarantees that no one may be arbitrarily deprived of their property except in terms of a law that is of general application with the caveat that no law may arbitrarily deprive people of property. This is in response to the arbitrary removal of black people from property as far back as the Native Land Act and during Apartheid. The Native Land Act was firstly discriminatory as it was applicable solely to black people; and secondly it arbitrarily deprived black people of property on the basis of race. Section 25(1) therefore was

[184] Section 25 of the Constitution of the Republic of South Africa "25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application— (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including— (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation. (4) For the purposes of this section— (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land. (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1). (9) Parliament must enact the legislation referred to in subsection (6)."

aimed at ensuring that such laws which are discriminatory and arbitrary are not passed in a democratic era.

Thereafter, section 25(2)-25(4) provides for the instances in which expropriation can be carried out by the government. These clauses are important in light of the constitutional project to redress the injustices of the past in respect of restoring land to people who were previously arbitrarily dispossessed. It also makes allowance for the government to pursue a land reform project in redressing the injustices of the past. These clauses have been the subject of much debate in the past couple years which was exacerbated by the slow land reform measures that have been unfurled. More recently, the ruling party indicated that they would pursue a policy of expropriation without compensation in order to meet the land reform needs of the country. Section 25(5) mandates the state to take reasonable legislative measures to allow citizens to gain access to land on an equitable basis. Section 25(6) creates an entitlement for those who have insecure land tenure as a result of past racially discriminatory laws to obtain secure tenure or comparable redress, in terms of legislation enacted by Parliament as mandated by Section 25(9); while Section 25(7) makes provision for those whose property was dispossessed after 19 June 1913 (after the promulgation of the Native Land Act of 1913) to obtain restoration or equitable redress, to the extent provided by an Act of Parliament. Lastly Section 25(8) provides that none of the above provisions may impede the state from taking legislative measures to achieve land, water and related reform in order to redress the effects of past racial discrimination as long as it in conformity with the Limitation Clause in Section 36(1) of the Constitution. Section 36(1) states:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

The Limitation Clause allows for the extenuating circumstances of each case to be given their proper weight by taking into account the relevant factors listed above. Particularly in respect of adjudication of property related disputes, the constitutional Property Clause has been the basis of many challenges before the Constitutional Court which has seen the development of the

jurisprudence on socio-economic rights.[185] In particular what has become evident in South African property law is that the previous notion of absolute property under Common law is not compatible with section 25 of the Constitution. Instead the rights of property owners are not absolute and may be limited in light of other rights in the Bill of Rights like human dignity for example. In particular, the late AJ Van Der Walt argued that property enjoys a modest systemic status in post-Apartheid South Africa:

> "The descriptive part of my argument holds that a significant number of cases in this narrow sphere are in fact decided on the basis of upholding or securing non-property rights (life, dignity, equality, free movement, free speech or assembly), while protection of the property rights that might be involved or affected is often relegated to a secondary, modest or marginal status. The normative part of my argument holds that in the context of these cases, there are sound and important systemic reasons why the non-property rights in question should often, if not always, be secured before property rights are even considered and that property rights justifiably enjoy no more than a modest status in these cases. On the basis of these arguments I conclude that the protection of property rights fulfils a modest, rather than central, purpose in the legal system, at least as far as this particular category of conflicts is concerned."[186]

As I have argued elsewhere the modest systemic status of property in the South African context is an important aspect of realising the goals of transformation in the Constitution in redressing the injustices of the past.[187] Property has played an important institutional role in the marginalisation of the non-white population through-out the colonial history of South Africa and during Apartheid. Therefore, reforming the institutional design of property to allow for inclusion and access is vital to redressing this history. The paradigm of transformational constitutional property begins the aspirational process of inclusion in light of the history of exclusion in the country. However, constitutional property law in general lacks a solid footing within the traditions and philosophical roots of the indigenous people of the country and should

[185] See *First National Bank SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank SA Limited t/a Wesbank v Minister of Finance 2002 (7) BCLR 702 (CC)* for principles on analysing section 25; *Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC)*; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC).

[186] AJ Van der Walt, 'The Modest Systemic Status of Property Rights' (2014) 1 Journal of Law, Property, and Society at 29 – 30.

[187] C.R. Mosalagae, "A Generative Property Response to the COVID-19" in Z.T. Boggenpoel et al (eds), Property and Pandemics: Property Law Responses to COVID-19 (2021) Stellenbosch: Juta, forthcoming;

still be developed further in light of the concept of Ubuntu, as will be discussed in Chapter 3. The remnants of the colonial and Apartheid past continue to haunt the country today and have been (in part),[188] responsible for the social issues that the country has been experiencing in recent times as will be discussed below.

2.7 South Africa: A Country in Crisis

2.7.1 Challenges Facing South Africa

The challenges facing South Africa are more complex than has been laid out here. However, the aim of this section is to draw a causal link between the history of the country, the social challenges and spatial inequality specifically in respect of the rise in enclosed neighbourhoods. I argue that these neighbourhoods should not be viewed in isolation as a response to the high crime rate but as a part of an institutional design that has trapped the country in a cycle of segregation and inequality. Furthermore, the more we reinforce these lines of exclusion and segregation (whether it be on the grounds of race or socio economic status) we will continue to experience social tensions and spatial inequality that may prove to be the undoing of unity and nation building in post-Apartheid South Africa.

The year 2019 marked the 25th year of a new constitutional democracy but also represented the height of racial tension and looming frustration over the numerous challenges facing the country which included political tension, poverty, inequality, unemployment, increasing crime levels and slow redistribution of wealth. In recent years South Africa has been in the midst a politically precarious time with various factions forming within the ruling party the African National Congress (ANC). On 14 February 2018, the then President Jacob Zuma was ousted from his position as head of the party and was recalled from his position as head of the country due to growing allegations of corruption.[189] Moreover, corruption at all levels of government further exacerbated the difficult position in which the economy found itself. There was a growing sense of betrayal of the vision of the ANC that liberated the country from repression. Although post-Apartheid neoliberal policy did create a new black middle class, after 25 years of neoliberal policies,[190] that had promised to redistribute wealth to the black majority that had been side-lined for centuries before, the income inequality gap has also increased. The rise in

[188] For the purposes of this research project I limit the discussion to the role of historical injustices due to colonialism and Apartheid. This not to negate other factors such as corruption, mismanagement and inappropriate neoliberal policies that have played a contributing role to the state of affairs in the country.

[189] BBC News, "South Africa's Jacob Zuma resigns after pressure from party" *BBC News* 15 February 2018 Available from: https://www.bbc.com/news/world-africa-43066443 [Accessed on 14 November 2021].

[190] Schneider G., "Neoliberalism and economic justice in South Africa: Revisiting the debate on economic apartheid" (2003) 61(1) Review of Social Economy 23-50 [DOI: 10.1080/0034676032000050257].

inequality, discussed in the next section, is perhaps one of the most important consequences of neoliberal policy in post-Apartheid South Africa.

2.7.2 Inequality

Although last measured in 2014 South Africa is currently the country with the highest inequality in the world based on the Gini coefficient as a measure of income inequality.[191] The Gini coefficient is represented as a number between 0 and 1, 0 meaning absolute income equality and 1 representing full inequality meaning that one person holds all the income, although it is often expressed in percentage form.[192] South Africa's Gini coefficient is currently 63% although it was higher in 2005 at 65%,[193] it remains the highest recorded income inequality gap in the world. Moreover, the rate of inequality in the country has been steadily growing in the period 1960 – 2015.[194] It was further argued by McLennan et al. that there is causation between income inequality on the one hand and social unrest, crime and the decrease in social cohesion on the other, that should also be taken into consideration.[195] Furthermore, Hansungule et al. argue that the level of inequality has been further exacerbated by the COVID-19 pandemic as can be seen through the rise in unemployment and the significant education inequality that can be seen through education losses during the pandemic.[196] The political unrest that sparked looting mainly in the KwaZulu Natal province and some parts of the country in July 2021 exposed how the inequality and growing desperation among the poorer parts of the country will increasingly disrupt social harmony. The unrest also exposed the unfortunate attitude towards inequality from the various class groups. Anecdotally commentators remarked that the poorer classes were frustrated with the status quo and resorted to violence to disrupt the system of inequality; the middle class were particularly vocal in commenting on the issues that the country was facing but with few solutions; while the upper class remained apathetic to

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[191] World Population Review, "Gini coefficient by country 2021" Available from: https://worldpopulationreview.com/country-rankings/gini-coefficient-by-country [Accessed on 14 November 2021].

[192] Eurostat Statistics Explained "Glossary: Gini coefficient" Available from: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Gini_coefficient [Accessed on 14 November 2021].

[193] World Population Review, "Gini coefficient by country 2021" Available from: https://worldpopulationreview.com/country-rankings/gini-coefficient-by-country [Accessed on 14 November 2021].

[194] Mtapuri O. and Tinarwo P., "From Apartheid to Democracy: Patterns and Trends of Inequality in South Africa" (2021) *South African Journal of Demography* 21(1), 104 – 133 at 105.

[195] McLennan D., Noble M. and Wright G., "Developing a spatial measure of exposure to socio-economic inequality in South Africa" (2016) *South African Geographical Journal* 98(2) 254 – 274 at 254 – 255.

[196] Hansungule Z., Hlongwane K., Mosalagae C.R., Nkadimeng K.M. and Reddy S., "Reinforcing Inequality: First 100 days of South African COVID-19 Policy" in Stojanović A., Scarcella L. & Mosalagae C.R. (eds), First 100 Days of COVID-19 -Law and Economics of Global Pandemic Policy (2022) Singapore: Palgrave McMillan, forthcoming.

the plight of the country. All three of these responses are indicative that there can be no social harmony when significant inequality exists for a majority of the population. Moreover, although the middle to upper classes can remain financially and geographically insulated from the plight of the country this is way of life is unsustainable; and growing inequality will eventually disrupt the country as a whole.

2.7.3 The Rise of Enclosed Neighbourhoods

The rise in enclosed neighbourhoods and gated communities in South Africa can be seen as a response to two factors. The first I argue is a new application of the fear narrative that existed during Apartheid. The old lines of segregation based on race have merely been replaced with segregation based on socioeconomic status. The second is the perceived need for security in response to the increase in the crime rate which can in part be attributed to the deep inequality and poverty within the country. Enclosed neighbourhoods have created an insider-outsider culture that is very similar to the pass law system during Apartheid. Now in democratic South Africa, people need to provide identification and state their purpose for walking on public streets in enclosed neighbourhoods in a manner akin to Apartheid pass laws. This is neither an argument that crime is not an issue in South Africa, nor that South Africans have an unwarranted fear for their personal safety. However, I argue that the solution to the tensions that exist is not building more walls, creating us and them narratives and living in enclaves that are insulated from the struggles of the rest of the nation. The nature of being in community is understanding that we are all connected. The liberties enjoyed by one part of society will inevitably be infringed when that part of society turns a blind eye to the inequalities that keep others from enjoying the same. Drawing closer together rather further apart is a more sustainable process of nation building and addressing both the societal and spatial inequality in the country. The precarious nature and implications of gated communities will be discussed in greater detail in Chapter 4.

2.8 Conclusion

In this chapter I have broadly canvassed pre-colonial paradigms of property which began with a communal way of life practiced by indigenous South Africans who inhabited the area. This way of life stood in stark contrast to the paradigm of private property exclusive ownership that was introduced to the Cape by the Dutch colonialists in 1652. The arrival of the English further institutionalised private property and racial segregation. The conquest of Dutch and English from the Cape further into the interior resulted in the formation of the Union of South Africa in 1910. Under the Union, legislative measures to systematically deprive Africans from owning

land would implemented through the Native Land Act, 1913 which relegated 80% of the population to 7% then later 13.6% of the total land area of the country. Thereafter, the climax of land deprivation and racial segregation would reach its institutional climax in the system of Apartheid implemented from 1948. Apartheid was a system of institutionalised racism that precluded non-whites from, among other things owning land other than in designated areas; intermarrying with other races; and from voting. Furthermore, Apartheid government created Bantustans where the different racial groups were supposed to develop separately. However, the proposed separate development of the different races was always riddled with inequality that served only to perpetuate the servitude of black labour to white economic prosperity. Throughout this time the non-white population would resist the systemic oppression of the Apartheid state, which would eventually shift from peaceful resistance to violent resistance in the 1960s after the Sharpeville Massacre and the Soweto Uprisings. The struggle for liberation eventually led to a stalemate between the Apartheid State and the resistance movement which forced negotiations for a transition to a democracy. In this regard, the country witnessed the great miracle of a peaceful transition from repression to a constitutional democracy in 1990. The country also began the process of nation building and overcoming the hurts of the past through the Truth and Reconciliation Commission (TRC). The TRC provided important reprieve to the nation but was only the beginning of the process of reconciliation. Beneath the surface of the "Rainbow Nation" remained deep inequality that would slowly began to unravel the social unity and cohesion achieved in 1994. Among other things, this can be seen in the rise in gated communities that reinforced the spatial lines of Apartheid on the grounds of socio economic status which inevitably has a racial complexion. Therefore, the need to transform the country in light of Constitution remains an important objective specifically in the area of property law and spatial inequality. In particular South African property law has been the stage upon which at least 3 different paradigms of property have played a part: a communal paradigm; absolute or exclusive private property paradigm; and a constitutional property paradigm. I argue in the next chapter (3) that developing an Ubuntu paradigm of property in light of the Constitution and the communal values of South Africans taking into consideration the history of the country is an important step in addressing the inequality and social tensions that have plagued the country in recent times. This approach is in line with the objectives of nation building and reconciliation that began with the TRC at the transition to democracy and will again be important in the transformation to an egalitarian, non-racist, non-sexist and inclusive society as envisaged in the Constitution.

Chapter 3: Re-Embedding An Ubuntu Paradigm

Umuntu Ngumuntu Ngabantu

Motho Ke Motho Ka Batho

3.1 Introduction

The term *Ubuntu* is derived from the Nguni proverb: *Umuntu Ngumuntu Ngabantu* directly translated means: *a person is a person through other persons*.[197] The Setswana language equivalent is *Motho Ke Motho Ka Batho* summarised in the word *Botho*.[198] The existence of this concept is found in both the Nguni cultures comprising of the Zulu, Ndebele and Swati traditions; as well as in the Northern Sotho, SeTswana and SePedi traditions among others.[199] Ubuntu is foremost a value that describes the most basic and yet fundamental value for how one is to perceive themselves and others.[200] Each human is imbued with inherent dignity and worth which should be respected. This entails both a recognition of one's own worth and the worth of others. From this value flows various cultural norms that give effect to this value in African societies.[201] This means that there are both philosophical and practical out-workings of Ubuntu. Moreover, Ubuntu is also the lens through which life and social behaviour are filtered through. A lack of respect towards others would attract the criticism that the person lacks Botho or Ubuntu.[202]

In recent years there has been wide discussion regarding the adoption of African values in the socio-legal fabric of the new South African constitutional dispensation.[203] At the end of

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[197] Kamga, SD "Cultural values as a source of law: Emerging trends of ubuntu jurisprudence in South Africa" (2018) 18 *African Human Rights Law Journal* 625 – 649 at 626.

[198] Kamga, SD "Cultural values as a source of law: Emerging trends of ubuntu jurisprudence in South Africa" (2018) 18 African Human Rights Law Journal 625-649 at 626.

[199] Ngomane M., *Everyday Ubuntu: Living Better Together, The African Way* (2020) Harper Design at loc 100 and 107 of 258: "*The concept of ubuntu is found in almost all African Bantu languages. It shares its roots with the word 'bantu' – meaning 'people' – and almost always denotes the importance of community and connection. The idea of ubuntu is best represented in both Xhosa and Zulu by the proverb "umuntu, ngumuntu, ngabantu," meaning "a person is a person through other persons." It is a proverb that exists in all the African languages of South Africa. The word "ubuntu," or closely related words, are found in many other African countries and cultures. In Rwanda and Burundi it means 'human generosity.' In parts of Kenya 'utu' is a concept that means that every action should be for the benefit of the community. In Malawi it's 'uMunthu,' an idea that on your own you are no better than a wild animal, but two or more people make a community. The sense that 'I am only because you are' runs throughout*."

[200] *S v Makwanyane & Another* 1995 (3) SA 391 (CC) at par 308.

[201] Mokgoro J.Y., Ubuntu and the Law in South Africa (1997) First Colloquium Constitution and Law held at Potchefstroom on 31 October 1997 at 2:

[202] Ngomane (2020) at loc 91 of 258.

[203] Kamga, SD "Cultural values as a source of law: Emerging trends of ubuntu jurisprudence in

Apartheid Ubuntu was placed in the post amble of the 1993 Interim Constitution of the Republic of South Africa,[204] but was eventually left out of the final Constitution of the Republic of South Africa, 1996.[205] However, in spite of this, the term Ubuntu was discussed in the first judgment by the newly formed Constitutional Court, which dealt with the right to life, *S v Makwanyane*.[206] Consequently, the use of Ubuntu as a legal concept came to life primarily through the Constitutional Courts decisions that invoked Ubuntu as a legal principle. However, this was met with opposition and Ubuntu as a legal concept was criticised as lacking the content, clarity and certainty that is much fetishized in dogmatic legal traditions.[207] The influence of Roman-Dutch Law and English Common Law followed by 46 years of positivistic Apartheid law in South Africa had the triple effect of firstly prioritising Western legal principles as superior; secondly, creating a kind of rigidity in thinking in legal academia; and thirdly, instilling a resistance to African modes of legal and societal ordering. What is ironic about the resistance of some legal scholars to engage with Ubuntu as a legal concept is that they assume that Western legal concepts inherently had content and supposed clarity and certainty, forgetting that a number of concepts took several hundred years to develop and evolve into what we know them to be today. Anna di Robilant's exposition on the slow, incremental design of Romanist-Bourgeois property is a good example of how even "absolute property" which is touted as the norm in mainstream property law was developed intentionally over time to meet the needs of a specific society.[208] By the same logic developing Ubuntu as a legal concept to meet the needs of an African society that is defining the legal principles that are analogous to the needs, aspirations and identity of its people seems reasonable.

As elucidated in the second chapter of this thesis, the historical narrative of South Africa primarily due to Apartheid created deep societal schisms that still haunt the country twenty seven years into a constitutional democracy. These include substantial inequality, more

South Africa" (2018) 18 *African Human Rights Law Journal* 625-649.

[204] Constitution of the Republic of South Africa Act 200 of 1993 repealed by Constitution of the Republic of South Africa, [No. 108 of 1996], G 17678, 18 December 1996.

[205] The Constitution of the Republic of South Africa, 1996.

[206] *S v Makwanyane & Another* 1995 (3) SA 391 (CC).

[207] Keevy I, "Ubuntu versus the core values of the South African Constitution" (2009) Journal for Juridical Science 34(2) 19 – 58; Malan K, ""The suitability and unsuitability of ubuntu in constitutional law – inter-communal relations versus public office-bearing" (2014) 47 *De Jure* 231 – 257.

[208] Di Robilant A, "The Making of Romanist-Bourgeois Property: The Law of Property between Roman Antiquity and Bourgeois Modernity" Book Proposal [Available at: http://www.jalafca.com/research-faculty/colloquium/legal-history/documents/the-tensions-of-absolute-property_1.pdf Accessed on 12 October 2020].

specifically reflected in spatial inequality and exclusion of those who were previously disadvantaged from access to certain residential areas. Additionally, underlying unresolved racial tension has caused a breakdown in social cohesion; in addition to the new tensions caused by the new socio-economic exclusion that has replaced the previous racially based exclusion of Apartheid. All of these cleavages are reaching crisis levels which calls for an approach that resonates within South African society; recognises the dignity of each human being; and creates a communal culture of inclusion that fosters social cohesion.

Therefore, for the purposes of this chapter, I endeavour to define some of the content of Ubuntu as a value, philosophy and legal concept. A discussion on Ubuntu as a value will begin with an exposition of African humanist philosophy and communitarian values that are intrinsic to Ubuntu. In respect of Ubuntu as a legal concept, I analyse case law by South African courts that have attempted to define the concept. Finally, I sketch out the Ubuntu Legal framework that exists and can be further developed and applied in the South African context.

3.2 Ubuntu as a Value and African Philosophy

3.2.1 History of African Philosophy

A systemised account of African philosophy is dated as originating during the 1920s as a response to the narratives of slavery, colonialism and racism that Africans were facing.[209] African philosophers were concerned with the search for a truly African identity that was not subsumed into a European colonial identity.[210] From this perspective, African Philosophy could be described as a question of identity. What are those uniquely African values and ideas that could accurately reflect the history, thinking and aspirations of African people. However, this account is incomplete in that it discounts oral tradition in the passing down of African philosophy and only attributes that which could be translated into a Western format of knowledge as systematised philosophy.[211] Whereas, for example, proverbs passed down in language are indicative of the modes of constructing reality that defined the way of life of African people groups through time immemorial.[212] Therefore, although I discuss systematised

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[209] Chimakonam J.O., "History of African Philosophy" Available from: https://iep.utm.edu/history-of-african-philosophy/ Accessed on 2 June 2021.

[210] *Ibid.*

[211] Maqutu T.M., "African Philosophy and Ubuntu: Concepts Lost in Translation" (2018) Unpublished L.L.M. Thesis, University of Pretoria at 6. Available from: https://repository.up.ac.za/bitstream/handle/2263/69906/Maqutu_African_2018.pdf?sequence=1&isAllowed=y [Accessed on 2 June 2021].

[212] Black View "Mbiti Lectures on African Philosophy" *Black View* (December 8, 1970) 1(2) p 1, 4 at 1: "Because there are no sacred books in traditional African religious life, one must study religion and philosophy through their manifestations: music, drama, art, symbols, ceremonies. Also, one must examine proverbs, myths, legends,

African Philosophy it does not negate the fullness of African Philosophy that pre-dates the 1920s. The selection of this period is a result of its peculiar preoccupation with identity. The shock of colonialism changed African societies significantly and created a kind of self-conscientiousness that African Philosophy had not experienced before. Consequently the need for self-determination and self-justification regarding what it meant to be African in a post-colonial period became a core concern, which is still being interrogated in Post-Apartheid South Africa today.

Notwithstanding, there is significant debate regarding whether "African Philosophy" actually exists from two perspectives which will be mentioned here. The first pertains to whether Africans have a unique experience that would justify its own subset of philosophy, which aligns with the traditionalist view that holds that philosophy is context and culture dependent;[213] in contrast the universalist view is that philosophy by nature must be universally applicable in order to be deemed philosophy.[214] For the purposes of this thesis, I hold the view that philosophy is culture dependent and context specific; and yet within those cultural nuances we find that different cultures and contexts can relate to one another. This is evident in the concept African Philosophy in itself. The African continent is incredibly diverse in respect of languages, cultures and people groups which should not understated; and yet within those differences concepts like Ubuntu can be traced across the lived experiences of these different people groups.[215] In this regard Ngomane's list of the terms for the concept of Ubuntu across different African cultures signifies the diversity and unity of African philosophy through the concept of Ubuntu.[216] Therefore, for the purposes of this thesis, I assume that African philosophy exists and that it describes the unique experiences of African communities which are worthy of further study. In this regard, it is necessary to draw some distinguishing characteristics between African philosophy and Western philosophy,[217] so as to draw out the uniqueness of African

the language and the customs of a particular people from within. Understanding the philosophy, therefore, requires a knowledge of the language of the respective peoples. To observe how a proverb is used, for example, is to understand something which people use and live daily in concreate situations."

[213] Maqutu (2018) at 15.

[214] Maqutu (2018) at 17.

[215] Ngomane (2020) at loc 100 and 107 of 258.

[216] *Ibid.*

[217] Eastern Philosophy will not be discussed, as a result of needing to narrow down the scope of the thesis. However, anecdotally, in the brief literature review that I conducted, there are very interesting culture similarities between Asian and African cultures which are deserving of further study. My study of the Korean language revealed how honour and respect are built into the language which is strikingly similar to the Bantu languages of South Africa. The way in which these languages are structured provided insight into the culture

philosophy and highlight important tenets of African philosophy that are a helpful springboard into understanding the concept of Ubuntu. Therefore, in the next section I discuss African Humanism which is in contrast to European notions of humanism and thereafter I consider African communitarian or communal values as one of the defining characteristics of African philosophy.

3.2.2 African Humanism

Obioha and Okaneme,[218] stated that:

> "Kwame Gyekye succinctly captures the meaning of African humanism when he defines the concept of African humanism as follows, 'a philosophy that sees human needs, interests and dignity as of fundamental importance and concern. For, the art, actions, thought, and institutions of the African people, at least in the traditional setting, reverberate with expressions of concern for human welfare' (Gyekye, 1997: 158). This philosophy extols the virtues of a community-based society which recognizes certain "self-interest" among men and women but that self-interest is subordinated to communal well-being."

From this definition, Obioha and Okaneme argued that African Humanism by definition rejects extreme individualism; is community based; and is ontologically theistic.[219] This conception of African Humanism differs from Western humanism in three significant ways. Firstly, it rejects the Cartesian view of individualism espoused in Descartes' maxim: *I think therefore I am*.[220] On the contrary African humanism holds at its core a community orientated view of the self; as stated by John Mbiti: " *I am because we are, since we are, therefore I am*."[221] Secondly, it rejects Hobbes account of the state of nature.[222] Thirdly, the recognition of ones humanity stems from a spiritual understanding of the self. All human beings are connected to a God who gave life to humans; and are therefore connected to one another through all generations of time. This stands in contrast to an atheistic account of Western humanism.[223] This aspect of theism is of importance as will be discussed later in respect of one of the critiques on Ubuntu that it is a religious concept.[224] On the contrary it is not that Ubuntu is a religious concept but rather that

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beliefs, values and philosophy of these people groups. This again revealed that although the Korean and Setswana culture are both unique there is significant overlap in shared values that cannot be ignored.

[218] Obioha U.P. and Okaneme G., "African Humanism as a Basis for Social Cohesion and Human Well-Being in Africa", (2017) 4(5) *International Journal of Humanities Social Sciences and Education (IJHSSE)* 43 – 50.

[219] Obioha and Okaneme (2017) at 43.

[220] Obioha and Okaneme (2017) at 46.

[221] Mbiti J., *African Religions and Philosophy* (1969) Praeger Publishers: New York at 78, referred to in Maqutu (2018) at 22.

[222] Obioha and Okaneme (2017) at 46.

[223] Obioha and Okaneme (2017) at 49.

[224] Keevy (2009) at 82 – 85 .

it exists within a cultural milieu that is theistic, or often poly theistic. This may be attributed to the notion that inherent worth of human beings comes from a deity or deities that created them; and the centrality of the idea that a person is embedded in community and that these communities are connected in the physical and spiritual sense across generations through ancestors. These three difference are significant for understanding African humanism in the broader discussion that Ubuntu falls under. The central idea being the role of community in defining the individual, which stands in stark contrast to individualism in Western philosophy.

3.2.3 Communitarian Values and Communalism

According Etzioni, the concept of communitarianism refers to a social philosophy that emphasises the centrality of society in articulating the good.[225] This definition encompasses the various communities that an individual may belong to i.e. family, schools or voluntary associations.[226] Communitarianism can also be viewed as a critique on liberalism, which, in contrast, emphasises that the individual alone should formulate the good for himself or herself.[227] Etzioni mentioned that communitarianism is a concept that dates as far back as Old Testament theology.[228] However, the first wave of communitarianism in academia occurred during the 1980s in response to John Rawls' *A Theory of Justice*.[229] The second wave of communitarianism occurred in the 1990s, branded as "responsive communitarianism" which aimed to respond to the trend towards atomization by Western societies by arguing that the preservation of the social bond is essential for the flourishing of individuals and society.[230] This led to the formulation of the "new golden rule" crafted by A Etzioni and William A Galston which was: "*Respect and uphold society's moral order as you would have society respect and uphold your autonomy to live a full life*".[231] The liberalist critique on communitarianism was that it may lead to a state prescribed definition of the good which may contradict with what citizens may view as the good or tend to exclude minorities.[232] Furthermore, it was argued that the state should remain neutral and avoid the possibility of authoritarianism.[233] However, the aim of responsive communitarianism is not to do away with individual rights but rather to locate

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[225] Etzioni A, "Communitarianism" in The Encyclopaedia of Political Thought 1st edition (2015) Edited by Michael T Gibbons [Available from: https://icps.gwu.edu/sites/g/files/zaxdzs1736/f/downloads/Communitarianism.Etzioni.pdf] at 1.
[226] *Ibid.*
[227] *Ibid.*
[228] *Ibid.*
[229] *Ibid.*
[230] Etzioni (2015) at 2.
[231] *Ibid.*
[232] Etzioni (2015) at 2 & 4.
[233] Etzioni (2015) at 3 & 4.

and balance these rights within a concern for the common good and the discharge of social responsibility.[234] Communitarianism in African society is also not aimed at being exclusionary or authoritarian. On the contrary it is in community that one expresses the fullness of self and a recognition of the good of others serves to enhance one's own good. This resonates with Gregory Alexanders concept of human flourishing which means that a *person has the opportunity to live as life as fulfilling as possible* which he argues is *morally pluralistic*.[235] According to Alexander, a flourishing life is embedded in community and that being embedded in a community is flexible to accommodate the differences within a community:

> "Among the values that I shall discuss are autonomy, self-realization, personhood, community, and equality. As these values indicate, the conception of human flourishing upon which I shall draw here is, broadly speaking, Aristotelian. It is based on Aristotle's understanding of human character as inherently social. Life within a society and webs of social relationships are necessary conditions for humans to flourish, i.e., for human lives to go maximally well. The conception adopted here rejects interpretations of human character-the sorts of beings we are-as what is often described as atomistic. The interpretation of human character upon which my conception of human flourishing is based sees humans as dependent upon each other literally from birth through death. They depend upon each other in a wide range of matters, from health to education to practical reasoning to socialization. The core values that I have identified reflect humans' sociability and inherent and unavoidable interdependency."

The sociability and unavoidable interdependency is therefore not something to be ignored or rejected but rather should be seen in a positive light as a part of communitarian or communal ethic that accommodates diversity.

3.2.4 Conclusion

The aim of this brief account on African philosophy is to reiterate two points. Firstly, like African philosophy, African jurisprudence is in a continuous journey of identity. Articulating this identity is an important project for African scholars in order to reflect the values of the

[234] Etzioni (2015) at 3.

[235] Alexander G.S., "Property's Ends: The Publicness of Private Law Values" (2014) Vol. 99(3) *Iowa Law Review* 1257 – 1296 at 1260: "*I understand human flourishing to mean that a person has the opportunity to live a life as fulfilling as possible for him or her. This account of human flourishing is morally pluralistic; that is, it rejects the notion that there exists a single, irreducible, fundamental moral value to which all other moral values may be reduced. However, the theory is also objectivist, and does not claim that value determinations are simply matters of agent sovereignty. Thus, the theory conceives of human flourishing as including (but not limited to): individual autonomy, personal security/privacy, self-determination, self-expression, and responsibility (along with other virtues).*"

people on terms that are accepted by the people as representative and legitimate. For the purposes of this thesis, I have only discussed the defining humanistic and communitarian aspects of African philosophy that form the bedrock for understanding Ubuntu as a value.

The second aim is to reiterate that values construct reality. [236] Ubuntu is not an empty term or a trendy catch phrase but a constructive term that has both philosophical and practical realities in African culture that is worth understanding. In the next section I explore how it has been defined in South African Constitutional Court case law, establishing it as a legal principle.

3.3 Ubuntu as Developed through South African Case Law

3.3.1 S v Makwanyane

3.3.1.1 Introduction

The landmark decision of *S v Makwayane,*[237] holds special significance in South African jurisprudence as it was the first interpretation on the Republic of South Africa Constitution, 1993 (Interim Constitution, 1993) in a post-Apartheid South Africa, specifically on the Bill of Rights, with regard to the right to life and human dignity. In this case Makwanyane and Mchunu had been found guilty of four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances.[238] Consequently they were sentenced to death for each count of murder in terms of section 277(1)(a) of the Criminal Procedure Act No. 51 of 1977.[239] The Constitutional Court was tasked with deciding whether the death penalty contravened the right to life in terms section 9 of the Interim Constitution, 1993 that had come into effect after sentencing of the appellants had been concluded;[240] and whether the death penalty contravened section 11(2) of the Interim Constitution, 1993 which prohibited "cruel, inhuman or degrading treatment or punishment".[241]

The Interim Constitution, 1993 extended the right to life among other rights to all persons within the Republic of South Africa. However, it was silent on whether the death penalty was permissible which meant that the Constitutional Court had to clarify the matter.[242] Moreover,

[236] La Porta F., *Il Bene E Gli Altri: Dante e Un'etica Per il Nuovo Millennio* (Bompiani: Firenze, 2018) at 8: "*I cosiddetti 'valori' , spesso collocati in una sfera nobilissima ma un po' fumosa, non sono altro che precondizioni dell'esperienza della realtà (la fanno esistere).*" Translated by Luigi Russi: "*So called 'values', which are often misplaced on a hazy if noble plane, are nothing but pre-conditions for experiencing reality (they let it exist).*"
[237] S v Makwanyane & Another 1995 (3) SA 391 (CC).
[238] *S v Makawnyane* at par 1.
[239] *S v Makawnyane* at par 2.
[240] *S v Makawnyane* at par 2.
[241] *S v Makawnyane* at par 8.
[242] *S v Makawnyane* at par 5.

this decision was particularly precarious because of the political history of South Africa.[243] Previously under the Apartheid regime, it was common place for black people to be denied basic liberties such human dignity, the freedom of movement and the right to life.[244] Therefore, in a post-Apartheid context, laws that infringed on these rights were dealt with more circumspection in order to make a clear break between the past and the new constitutional dispensation. Moreover, the spirit, purport and object of the Constitution in this dispensation was that it be transformational. Transforming a fragmented society into a cohesive society; and ensuring liberty and freedoms for all. The Preamble of the Interim Constitution, 1993 stated as follows:

> "In humble submission to Almighty God, We, the people of South Africa declare that- WHEREAS there is *a need to create a new order* in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is *equality* between men and women and people of *all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms*; AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a *solemn pact recorded as Constitutional Principles*; AND WHEREAS it is necessary for such purposes that provision should be made for the *promotion of national unity and the restructuring* and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution; NOW THEREFORE the following provisions are adopted as the Constitution of the Republic of South Africa:…" [Own emphasis added]

The emphasis added, firstly, highlights the urgency of the need to create a new egalitarian order. This aspect is often negated in more contemporary writing. Twenty-seven years after this decision by the Constitutional Court, it is tempting to take for granted how severe the curtailment of life and liberty was for the majority non-white population during Apartheid; and

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[243] *S v Makawnyane* at par 21.

[244] Justice Langa's stinging remark in par 226 – 227 of *S v Makwanyane* touches on the disregard for human life and dignity during the Apartheid era: "We have all been affected, in some way or other, by the 'strife, conflict, untold suffering and injustice' of the recent past. Some communities have been ravaged much more than others. In some, there is hardly anyone who has not been a victim in some way or who has not lost a close relative in senseless violence. Some of the violence has been perpetrated through the machinery of the State, in order to ensure the perpetuation of a *status quo* that was fast running out of time. But all this was violence on human beings by human beings. Life became cheap, almost worthless. [227] It was against a background of the loss of respect for human life and the inherent dignity with attaches to every person that a spontaneous call has arisen among sections of the community for a return to *ubuntu*."

further how this inequality was so deeply entrenched within the architecture of the nation since its inception. Consequently, the need for new constitutional principles and to place all citizens in the nation on equal footing was and remains critical in and of itself; and also for the purpose of building a cohesive and unified nation. Moreover, I argue that at the core of the nation building project is fostering Ubuntu which is infused into the spirit, purport and object of the Constitution.

Ubuntu was included in the post amble of the Interim Constitution, 1993 but not included in the final Constitution of the Republic of South Africa, 1996. Notwithstanding, relying on the post amble of the Interim Constitution in their judgments in S v Makwanyane, Justices Chaskalson CJ, Langa J, Madala J, Mahomed J, Mokgoro J and Sachs J, all made reference to the importance of Ubuntu, each highlighting an important and unique aspect of Ubuntu that allows us to build the foundation of a legal framework for Ubuntu, each of these will be discussed in turn as this was the seminal case that set the foundations of Ubuntu in South African jurisprudence.

3.3.1.2 The Centrality of Ubuntu in the South African Constitutional Democracy

Chaskalson CJ in the majority judgment began by pointing out that the primary application of the concept of Ubuntu in the post amble of the Interim Constitution, 1993 was in the field of political reconciliation but that application of the concept should not be limited to it.[245] The post amble of the Interim Constitution 1993's provision on National Unity and Reconciliation stated:

> "This Constitution provides a *historic bridge between the past of a deeply divided society* characterized 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 color, race, class, belief or sex. *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.*
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to *transcend* the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need

[245] *S v Makwanyane* at 131.

> for understanding but not for vengeance, a need for reparation but not for retaliation, *a need for ubuntu* but not for victimisation."[246] (Own Emphasis added).

The emphasis added highlights the aspirational nature of the Interim Constitution, 1993; as well as the idea of the Constitution being transcendent in its nature. Furthermore, we can observe the importance of the pursuit of national unity in a deeply fragmented society which could only be fostered through reconciliation and reconstructing society. In this respect Ubuntu is a one of the foundational concepts at the core rebuilding the kind of society that was envisaged in the Constitution. The emphasis here also hints at a central argument within this thesis, which is that social cohesion and Ubuntu are interconnected. As displayed in this text, the fostering of national unity and peace which I shorthand as social cohesion is a fundamental objective of the Constitution which is aimed at reconstructing society. Rethinking the paradigm of property in a post-Apartheid South Africa, I argue, can and should be seen under this vision of reconstructing society. Hence, the extension of Ubuntu from the political arena and diffusing it into all aspects of the foundational nature of the Constitution as the Constitutional Court proposed is in my view in line with spirit, purport and objectives of the Constitution. Both Mokgoro J and Madala J made the same assertion in their concurring judgments, According to Mokgoro J:

> "Not only is the notion of ubuntu expressly provided for in the epilogue of the Constitution, the underlying idea and its accompanying values are also expressed in the preamble. These values underlie, first and foremost, the whole idea of adopting a Bill of Fundamental Rights and Freedoms in a new legal order. They are central to the coherence of all the rights entrenched in Chapter 3 - where the right to life and the right to respect for and protection of human dignity are embodied in Sections 9 and 10 respectively."[247]

Similarly Madala J stated:

> "The concept 'ubuntu' appears for the first time in the post-amble, but it is a concept that permeates the Constitution generally and more particularly Chapter Three which embodies the entrenched fundamental human rights. The concept carries in it the ideas of humaneness, social justice and fairness."[248]

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[246] Post-amble of the Interim Constitution of the Republic of South Africa, 1993.
[247] *S v Makwanyane* at par 307.
[248] *S v Makwanyane* at par 237.

Subsequently, although the final Constitution, 1996 didn't expressly mention Ubuntu we can observe traces of the wording and reasoning in this judgment pertaining to Ubuntu that were used to refine the Constitution, 1996. The preamble of the Constitution, 1996 states:

> "We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to - *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights*; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a *united and democratic* South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people. Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika."

The adoption of the Bill of Rights and the spirit of reconciliation, social justice, fairness and unity mentioned above show the influence of Ubuntu. Thus although, Ubuntu was not expressly included in the Constitution, 1996 its influence can be traced through-out the Constitution, 1996. Moreover, the Constitutional Courts judgments have consistently infused Ubuntu as a (an African) value for legal interpretation. As I will discuss below each of the Justices highlight certain characteristics of Ubuntu which are not mutually exclusive but rather mutually supportive and construct a fuller judicial content of Ubuntu as a legal principle.

3.3.1.3 The Development of African Jurisprudence through Ubuntu

Firstly, Madala J, emphasised the aspects of humaneness, social justice and fairness.[249] A further noteworthy contribution by Madala J made in his concurring judgment in *S v Makwanyane* was in respect of the role of traditional African values in the decision making of the Court and to what extent African values have been sufficiently researched in order to be used as an interpretative tool.[250] Madala J, acknowledged the Black Advocates Forum's submission regarding the need to acknowledge the values of the predominantly black

[249] *S v Makwanyane* at par 237.
[250] *S v Makwanyane* at par 252.

population which had been historically neglected in interpretation of the Constitution in the new dispensation;[251] However, on the method to arrive at infusing African values in legal interpretation, he rejected the notion that it is the Courts role to canvass for public opinion.[252] According to Madala:

> "In order to arrive at an answer as to the constitutionality or otherwise of the death penalty or any enactment, we do not have to canvass the opinions and attitudes of the public. Ours is to interpret the provisions of the Constitution as they stand and if any matter is in conflict with the Constitution, we have to strike it down."[253]

I agree on the principle that public opinion should not sway the court in the face of justice, equity and fairness i.e. courts should not buckle under public pressure which undermines justice and the independence or legitimacy of the court. This point was also made by Mokgoro J in her concurring judgment: "The described sources of public opinion can hardly be regarded as scientific. Yet even if they were, constitutional adjudication is quite different from the legislative process, because 'the court is not a politically responsible institution' to be seized every five years by majoritarian opinion."[254] However, as further reasoned by Mokgoro J, the Court in deciding on constitutionality inevitably are drawn into making necessary value choices:[255]

> "By articulating rather than suppressing values which underlie our decisions, we are not being subjective. On the contrary, we set out in a transparent and objective way the foundations of our interpretive choice and make them available for criticism… I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality."[256]

Mokgoro J's judgment in my view deals with the issue of how to go about appropriate value laden decision making, canvassing public opinion may not be the most appropriate way to arrive at decision making but that does not mean that decision making is value neutral as even the judges values themselves have a bearing on cases. This is in contrast to Madala J's

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[251] *S v Makwanyane* at par 252.
[252] *S v Makwanyane* at par 254-255.
[253] *S v Makwanyane* at par 256.
[254] *S v Makwanyane* at par 305.
[255] *S v Makwanyane* at par 303; Also at par 304 "To achieve the required balance will of necessity involve value judgements."
[256] *S v Makwanyane* at par at 304.

somewhat positivistic mechanistic approach to the role of interpreting the Constitution. Madala J's view is mechanistic in that it ignores the reality that values are a necessary (or unavoidable) part of constitutional interpretation. If not societal values being brought into the decision making, the values of the judges themselves are fused into decision making. Furthermore, Mokgoro J highlights that a home grown approach of infusing African values from African value systems is part of giving effect to the representativity and equality of the Constitution. Notwithstanding, the question remains, how do we canvas the values of the majority of the South African population and give credence and weight to African values in the legal architecture of a post-Apartheid South Africa in concrete terms? Furthermore, can the voice of the people only be heard through the filtered mechanism of academic research? Twenty six years after this judgment by the Constitutional Court we are still having debates regarding whether African jurisprudence exists, if it has sufficient content, and whether or not it can or should be applied. In this regard, I argue that we should give credence and weight to African jurisprudence which may be found in forms, styles and processes which are deemed non-academic by Western jurisprudence. This may include the oral traditions, proverbs, wisdom sayings of communities that reveal these values. Notwithstanding, there is a growing body of literature written by African scholars within the continent that can be relied on. Moreover, sources of African jurisprudence are both rich in depth and diversity in that borrowing from African contexts across the continent makes for good comparative literature and sharing. Sachs J, described Ubuntu as a constitutionally acknowledged principle,[257] and lamented:

> "Our libraries contain a large number of studies by African and other scholars of repute, which delineate in considerable detail how disputes were resolved and punishments meted out in traditional African society. There are a number of references to capital punishment and I can only repeat that it is unfortunate that their import was never canvassed in the present matter."[258]

The risk in not heeding Sachs J's lament in legal interpretation in a post-Apartheid South Africa is that the wider the gap between Constitutional values and the values of the people the lesser the perceived legitimacy of the Constitution. The Constitution needs to reflect the values of those it represents in order for it to be truly accepted by the society it serves. Although, the Constitution describes an aspirational society that is equal and united in diversity that society factually does not yet exist, thus the Constitution must at least be rooted in the aspirations and

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[257] *S v Makwanyane* at par at 374.
[258] *S v Makwanyane* at 375.

values of the fragmented society that presently exists in order to achieve its goal. This I argue can be achieved by infusing African values such as Ubuntu into the legal framework of the nation in tangible ways through legal interpretation; as well as borrowing wisdom from other African countries within the spirit of Ubuntu.

3.3.1.4 Ubuntu and Community

Langa J in his concurring decision cited a decision from the Court of Appeal of the Republic of Tanzania, *DPP v Pete*.[259] The significance of this is twofold. Firstly, the reference to the jurisprudence of another African court is an important part of building African jurisprudence in respect of the broader conversation regarding the unique aspects of African values that should be given legal standing. This shows that the notions of community, communitarian values and interdependence which underlie Ubuntu are not only a South African phenomenon but find application in other African contexts. Also, by placing value on the experiences and wisdom of other African nations we can further develop the content of a truly unique African jurisprudence; and combat the scourge of Xenophobia against fellow Africans that has swept through the nation in post-Apartheid South Africa which is opposed to the spirit of Ubuntu.[260] In respect of the latter point, Ubuntu recognises the inherent dignity of every human being and treats each life as worthy of respect within the community (defined broadly to include all members of society).

Secondly, Langa J, in his concurring judgment emphasised the link between Ubuntu and community.[261] According to Langa J: "An outstanding feature of Ubuntu in a community sense is the value it puts on life and human dignity."[262] This entails the recognition of one's own inherent worth as well as the responsibility to value the humanity of others in community as members of a community are interdependent.[263] Similarly, with reference to the post amble, Mahomed J stated:

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[259] DPP v Pete [1991] LRC (Const) 553 at 566b-d per Nyalali CJ, Makame and Ramadhani JJA: "The second important principle or characteristic to be borne in mind when interpreting our Constitution is a corollary of the reality of co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society on the other. In effect this co-existence means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa."

[260] Claassen C., "Explaining South African Xenophobia" Afrobarometer Working Paper No. 173, June 2017 [Available from: https://afrobarometer.org/sites/default/files/publications/Documents%20de%20travail/afropaperno173_xenophobia_in_south_africa.pdf]

[261] *S v Makwanyane* at par 223 – 227.

[262] *S v Makwanyane* at par 225.

[263] *S v Makwanyane* at par 224.

> "'The need for ubuntu' expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by."[264]

This notion of the collective community and reciprocity as emphasised by Mahomed J is as an important feature in the interpretation of the concept of Ubuntu, and is made all the more precious in light of the history of South Africa where reciprocating the humanity in others was not prioritised during Apartheid. In this regard, Mahomed J, also emphasised that it is important to keep in mind the historical background and ethos that inspires interpretation of the Constitution.[265] Although, Ubuntu is a value that was present in African culture prior to Apartheid, it was the atrocities of that time that re-emphasised the need to return to a society characterised by Ubuntu:

> "We have all been affected, in some way or other, by the 'strife, conflict, untold suffering and injustice' of the recent past. Some communities have been ravaged much more than others. In some, there is hardly anyone who has not been a victim in some way or who has not lost a close relative in senseless violence. Some of the violence has been perpetrated through the machinery of the State, in order to ensure the perpetuation of a status quo that was fast running out of time. But all this was violence on human beings by human beings. Life became cheap, almost worthless. It was against a background of the loss of respect for human life and the inherent dignity with attaches to every person that a spontaneous call has arisen among sections of the community for a return to ubuntu."[266]

3.3.1.5 Ubuntu as an Interpretive Tool

Mokgoro J in her concurring judgment relied extensively on the concept Ubuntu as the basis for her decision. Acknowledging that the Constitution was the product of political negotiation in the reconstruction and reconciliation project of the nation she reasoned that Ubuntu is a common shared value that should be the basis of interpreting the Constitution:

[264] *S v Makwanyane* at par 263.
[265] *S v Makwanyane* at par 264.
[266] *S v Makwanyane* at par 226 – 227.

> "In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence. Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines, is the value of ubuntu - a notion now coming to be generally articulated in this country."[267]

Both specifically among the indigenous African population Ubuntu is indeed a common value finding expression in the Nguni languages as Ubuntu and Botho in the Sotho-Sepedi-Setswana language group. More generally if Mokgoro's thesis that Ubuntu is a value that encapsulates a value for humaneness, life, dignity and community then it can also be extended to the common values of the rest of the South African population that are of European and Asian by descent. Keevy argued against this very point stating that Ubuntu was unconstitutional on the basis that because of its religious content contravened the right to freedom of religion in the Constitution, 1996.[268] However, this argument misses the point altogether. As previously mentioned Ubuntu is morally pluralistic which allows flexibility in its application. It neither excludes or precludes a specific religious view point in order to find application. The recognition of ones humaneness may be inspired by a plurality of sources some religious or purely ethical, the core content of Ubuntu is not the imposition of particular religious viewpoint but the recognition and respect of the humanity of others, which includes respecting the diversity of others.

In the hallmark of the S v Makwanyane judgment Mokgoro J, stated:

> "Generally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa ubuntu has become a notion with particular resonance in the building of a democracy. It is part of our "rainbow" heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life,

[267] *S v Makwanyane* at par 307.
[268] Keevy (2009) at 79 – 85.

manifested in the all-embracing concepts of humanity and menswaardigheid are also highly priced. It is values like these that Section 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality."[269]

Additionally, she remarked that: "life and dignity are like two sides of the same coin. The concept of *ubuntu* embodies them both."[270] She further emphasised that the spirit of Ubuntu can be compared to how The International Covenant on Civil and Political Rights concludes: "that human rights derive the from the inherent dignity of the human person." In Mokgoro J's judgment we see the emphasis on Ubuntu as humaneness relating to human dignity and life being two sides of the same coin and thus inseparable. Moreover, this recognition cannot take place in isolation but occurs within the context of community. Community in this regard is an expansive term and extends to the whole of society as community.

3.3.1.6 S v Makwanyane Conclusion

From the above we can glean that similar concepts are present in other languages and cultures which can be related to Ubuntu, so although Ubuntu has a unique African expression it is not a foreign concept that cannot find resonance in other cultures. Therefore, unwarranted fears of Ubuntu,[271] should be put at ease; but as will be discussed below the unique expression of Ubuntu in African philosophy is an important contribution to African jurisprudence which deserves to be unpacked and defined further.

3.3.2 Strategic Value of Ubuntu

In her address to the first Colloquium Constitution held in Potchefstroom in 1997 Mokgoro argued:

> "Without doubt, some aspects or values of ubuntu are universally inherent to South Africa's multi cultures. It would be anomalous if dignity, humaneness, conformity, respect, etc. [were] foreign to any of South Africa's cultural systems. It is however, in respect of methods, approaches, emphasis, attitude etc. of those and other uncommon aspects and values of ubuntu that the concept is unique to African culture. It is thus in respect of those unique aspects that there has now arisen a need to harness them carefully, consciously, creatively, strategically and with ingenuity so that age-old African social innovations and

[269] *S v Makwanyane* at par 308

[270] *S v Makwanyane* at par 311.

[271] See Keevy (2009) 79 – 85: who presents a particularly alarmist account of Ubuntu that has the undertones of Apartheid notions of "die swart gevaar" (black danger) as an example of an unwarranted fear of African values that is deeply rooted in the history of Apartheid South Africa.

historical cultural experiences are aligned with present day legal notions and techniques if the intention is to create a legitimate system of law for all South Africans."[272]

Mokgoro's account of Ubuntu highlights the similarity and uniqueness of Ubuntu and argues that as part of creating a society that reflects the values of its people it is important to recognise the strategic importance of Ubuntu. Although, some may criticise the fact that Ubuntu is difficult to define,[273] it is in this flexibility wherein Ubuntu's conceptual strength lies. According to Mokgoro, Ubuntu can be defined as a world view,[274] a philosophy of life,[275] and a social value.[276] All of which display the multifaceted nature of Ubuntu as an interpretive tool. However, Mokgoro argues that it's through highlighting its social value the meaning of Ubuntu becomes clearer:

> "The meaning of the concept however, becomes much clearer when its social value is highlighted. *Group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity* have, among others been defined as key social values of ubuntu. *Because of the expansive nature of the concept, its social value will always depend on the approach and the purpose for which it is depended on*. Thus its value has also been viewed as a basis for *a morality of co-operation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood*, all the time *emphasising the virtues of that dignity in social relationships and practices*. For purposes of an *ordered society*, *ubuntu was a prized value, an ideal to which age-old traditional African societies* found no particular difficulty in striving for."[277] [Own emphasis added].

The emphasis on the collective nature of Ubuntu is particularly important for the South African context that was and still remains fragmented. At the end of Apartheid Ubuntu as part of social

[272] Mokgoro J.Y., Ubuntu and the Law in South Africa (1997) First Colloquium Constitution and Law held at Potchefstroom on 31 October 1997 at 4.
[273] See Keevy (2009) and Malan (2014).
[274] See Mokgoro (1997) at 2 in reference to Broodryk's (1997) definition of Ubuntu: "In an attempt to define it, the concept has generally been described as a world-view of African societies and a determining factor in the formation of perceptions which influence social conduct."
[275] Mokgoro (1997) at 2: "It has also been described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which, literally translated, means a person can only be a person through others. In other words the individual's whole existence is relative to that of the group: this is manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive. It is a basically humanistic orientation towards fellow beings."
[276] Mokgoro (1997) at 3.
[277] Mokgoro (1997) at 3.

reconciliation meant prioritising reparation over retaliation;[278] and Ubuntu over victimisation.[279] Twenty seven years into democracy and an Ubuntu response remains valid. As will be discussed in the next chapter valuing reparation over retaliation has significant implications in the area spatial inequality. If we are to truly adopt an Ubuntu response this will have implications for how how we consider access and spatial design to those who were excluded from society. I argue that part of the tensions that we see in the area of spatial design (and more broadly wealth) distribution in the country is a failure to truly embrace the spirit of Ubuntu in building a new constitutional democratic South Africa. Furthermore, I will explore that the aim of prioritising Ubuntu over victimisation is not advocating a "new Apartheid" or new victimisation of the previously advantaged population but rather that the tenets of Ubuntu require that regard for the welfare of the community be given importance over individualistic notions. That in light of the history of the country achieving true national unity and social cohesion will require society to prioritise the collective in a way that is fundamentally at odds with the current individualistic design paradigm of property within the South African context. I argue that the recent tensions specifically in respect of land, access and spatial inequality are actually a loss of Ubuntu and point to the need to prioritise the concept for this purpose. This is but one of the purposes for which Ubuntu can be developed as explained by Mokgoro:

> "Whether it is for purposes of promoting the values of the Constitution by translating them into more familiar ubuntu values and tendencies, or whether it is for purposes of harnessing some unique ubuntu value, tendency, approach and/or strategy, or further whether it is for purposes of promoting and/or aligning these aspects of ubuntu with core constitutional demands ubuntu(-ism), it seems, can play an important role in the creation of responsive legal institutions for the advancement of constitutionalism and a culture of rights in South Africa."

In the subsequent Constitutional Court cases and an Equality Court case I observed, how the interpretation and application of Ubuntu has been developed as part of building a legal framework of Ubuntu which can be later applied to the instance of spatial inequality and the rise in gated communities in the South African context.

[278] Mokgoro (1997) at 5.
[279] Mokgoro (1997) at 6.

3.3.3 Ubuntu in South African Case Law

3.3.3.1 Introduction

As stated by Malan, Ubuntu is replete with cases,[280] therefore for the purposes of this section I will focus on the cases that brought about a new dimension of Ubuntu as a concept or where the concept found a new field of application. After the seminal case of *S v Makwanyane* the Constitutional Court continued to develop the scope of Ubuntu in respect of legal content and its fields of application.

From the case law it is clear that the field of application of Ubuntu has been progressively expanding. From the initial socio-political field in respect of national building and reconciliation, the concept was used in interpreting the right to life in the field of criminal law;[281] migrant rights;[282] administrative law and public policy;[283] eviction;[284] delict particularly defamation;[285] and the application of customary law in a constitutional democracy.[286] In the next section, I will discuss selected cases of the Constitutional Court and Equality Court which had a unique bearing on the development of Ubuntu in post-Apartheid South Africa.

3.3.3.2 Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa[287]

The transition from Apartheid to a constitutional democracy was the scene of many socio-political, legal and economic negotiations.[288] At the core of socio-political negotiations was the issue of uniting a highly fragmented and divided society which was the direct consequence of an Apartheid system that fostered separate and unequal treatment of the various race groups in the country for almost five decades.

There are two historical or contextual factors that should be taken into account when considering the AZAPO case. The first was already mentioned in the discussion on *S v*

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[280] Malan (2014) at 234.
[281] S v Makwanyane & Another 1995 (3) SA 391 (CC).
[282] See Khosa v Minister of Social Development 2004 (6) SA 505 (CC); Koyabe & Others v Minister for Home Affairs & Others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC); Union of Refugee Women v Private Security Industry Regulatory Authority 2007 (4) SA 395; 2007 (4) BCLR 339 (CC).
[283] See Koyabe & Others v Minister for Home Affairs & Others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC); Barkhuizen v Napier 2007 7 BCLR 691 (CC); Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).
[284] See Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC).
[285] See Dikoko v Mokhatla 2006 6 SA 235 (CC); The Citizen 1978 (Pty) Ltd & Others v McBride (Johnstone & Others as Amici Curiae) 2011 (4) SA 191 (CC); Afri-Forum & Another v Malema & Others [2011] ZAEQC 2;20968/2010.
[286] See Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; South African Human Rights Commission v President of the Republic of South Africa 2005 (1) SA 580 (CC).
[287] 1996 (4) SA 671 (CC).
[288] Azanian People Organisation (AZAPO) and others v. President of the Republic of South Africa 1996 (4) SA 671 (CC) at par 2.

Makwanyane,[289] the lives of the majority black population were in effect considered as meaningless and the treatment that black people were often subjected to was degrading and inhumane.[290]

The second was that this discrimination was both societally and institutionally executed. Societally, black people were treated as lesser than human and incapable of being right bearers. As a result Apartheid society fostered a societal attitude of turning a blind eye to the violence and injustices suffered by black people.[291] From an institutional perspective, the legislature promulgated thousands of pieces of legislation that were implemented in order to set up the legal and institutional framework of systematised racism and discrimination.[292] Moreover, the role of the courts was to apply the law not question it, thus reinforcing the doctrine of parliamentary sovereignty.[293] In order to enforce these measures, the role of the national police force was particularly prominent during this time, to maintain the status quo and to ensure the subjugation of the black population to Apartheid laws.[294] The use of fear as tool of social control in Apartheid South Africa is an important aspect of understanding part of the societal distrust between the different race groups. The narrative of "die swaart gevaar" (black danger) was often touted as an imminent danger that white people had to guard against.[295] At an institutional level the manner in which the national police force operated was in effect to protect the white population from the dangerous black population; and to keep black people in their place, often by any means necessary.[296]

The stories of many South Africans who were deplorably treated during Apartheid are by far under documented. To mention a few, the deprivation of liberty that opposition leaders endured; government ordered assassinations of opposition members; torture and murder of

[289] S v Makwanyane at par 226 – 227.
[290] AZAPO at par 17.
[291] Blakemore E., "The Harsh Reality of Life Under Apartheid in South Africa" (2021) History Available from: https://www.history.com/news/apartheid-policies-photos-nelson-mandela Accessed on 23-03-2022: It was only after international sanctions on South Africa began to gain momentum that there began to be growing discomfort in Apartheid society regarding South Africa's diminishing international prestige rather than the injustice of Apartheid laws in and of themselves.
[292] Roberts M., "The Ending of Apartheid: Shifting Inequalities in South Africa" *Geography* (1994) 79(1) 53 – 64 at 54 "The term apartheid has also been commonly used to mean one or more of the thousands of apartheid laws, passed between 1948 and 1988, which determined who could live, work, eat, travel, play, learn, sleep and be buried, where and with whom. If these laws are removed from the statute book is that the end of apartheid."
[293] Chaskalson A., "From Wickedness to Equality: The Moral Transformation of South African Law" (2003) International Journal of Constitutional Law 1(4) 590 - 601 at 591 – 592.
[294] Frankel P.H., "The Politics of Police Control" (1980) *Comparative Politics* 12(4) 481 – 499.
[295] Blakemore (2021).
[296] Frankel P.H., "The Politics of Police Control" (1980) *Comparative Politics* 12(4) 481 – 499.

citizens who offended the political order; kidnappings and disappearances; assault and harassment.[297] Some of these atrocities were carried out by the police and others by citizens. As part of the resistance against the Apartheid government the ANC established the armed wing of the struggle, Umkhonto We Sizwe, whose role was to attack various aspects of the Apartheid regime which sometimes included civilian targets. As a result of this ongoing battle between state and the people, society was rife with animosity, suspicion and hatred. Consequently, in order to reconcile the nation and bring about reconciliation the Truth and Reconciliation Commission was set up in terms of the Promotion of National Unity and Reconciliation Act, it's main objective to: "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past."[298]

As previously mentioned, the Commission consisted of three Committees: Committee on Human Rights Violations, Committee on Reparation and Rehabilitation, and the Committee on Amnesty.[299] As noted in the judgment, many offences were committed during Apartheid that were shrouded in secrecy and it was necessary to unearth what had happened to missing members of communities; and to bring about healing and closure for family members.[300] However, to bring about full disclosure by perpetrators, section 20(7) of the Promotion of National Unity and Reconciliation Act allowed the Committee on Amnesty the authority to grant amnesty for any act, omission or offence provided that the applicant made a full disclosure of all relevant facts; and that the act or omission was associated with a political objective and committed prior to 6 December 1993. Amnesty from the offence meant that the perpetrator was absolved of any criminal or civil liability in respect of the offence; and the state body or other body, political organisation that would have been vicariously liable was also absolved of liability.[301] Consequently, the tension between incentivising the need for full disclosure,[302] and

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[297] AZAPO at par 44.
[298] AZAPO at par 4.
[299] AZAPO at par 5.
[300] AZAPO at par 17: "Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales."
[301] Azanian Peoples Organisation (Azapo) And Others v The President Of The Republic Of South Africa CCT17/96 Constitutional Court 25 July 1996 Case Summary, Available from: https://www.justice.gov.za/trc/legal/azaposum.htm Accessed on 29-03-22.
[302] AZAPO at par 17: "Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order."

the very pertinent question of justice for the victims of these atrocious acts came to fore when the Azanian People's Organisation applied to have section 20(7) declared unconstitutional on the basis that it prevented the victims of Apartheid from remedying the violation on their rights that the Constitution guaranteed:

> "The applicants sought in this court to attack the constitutionality of s 20(7) on the grounds that its consequences are not authorised by the Constitution. They aver that various agents of the state, acting within the scope and in the course of their employment, have unlawfully murdered and maimed leading activists during the conflict against the racial policies of the previous administration and that the applicants have a clear right to insist that such wrongdoers should properly be prosecuted and punished, that they should be ordered by the ordinary courts of the land to pay adequate civil compensation to the victims or dependants of the victims and further to require the state to make good to such victims or dependants the serious losses which they have suffered in consequence of the criminal and delictual acts of the employees of the state."[303]

In this judgment Justice Mahomed reasoned that the objective of national building and reconciliation envisaged by the legislature was not unconstitutional in light of the object of transcending the conflict and division of the past:

> "Even more crucially, but for a mechanism providing for amnesty, the "historic bridge" itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimised by abuse but also those threatened by the transition to a "democratic society based on freedom and equality". 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. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation."[304]

This decision has been criticised as a misinterpretation of Ubuntu, According to Kamaga:[305]

[303] AZAPO at par 8.
[304] AZAPO at par 19.
[305] Kamga at 629 referring to Ramose MB., "The ethics of ubuntu" in PH Coetzee & APJ Roux (eds) Philosophy from Africa (2003) Oxford University Press: London at 324.

> "Ramose is of the view that the implementers of apartheid strategically relied on ubuntu to avoid taking responsibility for their crimes. They tapped into the African philosophy of humanness to shield themselves against having to repair the wrongs of the past. In this register ubuntu, which is loaded with the notions of patience, kindness and communal cohesion, and cultural uniqueness and interpretive challenges are undermined to make room to advance the notion of a joint and manageable project to be completed under the notion of 'nation building'. In this context, ubuntu is not a precise cultural tradition, but is the result of false and 'bloodless historiography', to quote Ramose."

In this respect, I agree with Ramose's assessment. The use of Ubuntu in this instance was particularly convenient for the state institutions and employees of the state who had committed atrocities during Apartheid and it absolved any institution from vicarious liability for the greater good of nation building. Although Mahomed J correctly illustrated the tensions that existed during the negotiations for the transition and acknowledged the incalculable damages owed by the state to victims,[306] the judgment left much to be desired in constitutional interpretation,[307] and the correct use of the principle of Ubuntu. Furthermore, the concurring judgment of Didcott J missed an important opportunity,[308] to expand on the application of section 33(1) of the Interim Constitution, 1993 which states that any right within the Interim Constitution could be limited on the following grounds:

> "**33 Limitation** (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation- (a) shall be permissible only to the extent that it is- (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and (b) shall not negate the essential content of the right in question, and provided further that any limitation to- (aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2);…"

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[306] AZAPO at par 55.

[307] Moloi F., "A Constitutional Debacle: Amnesty to Perpetrators and Denial of Victims' Right of Access to Court" (December, 1997) *De Rebus* 823, 825 and 827.

[308] AZAPO at par 66: "Such are the reasons for my eventual agreement with the full range of the order dismissing the present application. But for one problem posed by s 33(1), which strikes me as wellnigh intractable, I would probably have come to the same conclusion, and could no doubt have reached it more easily, by treading the path indicated there. Negating the essential content of a constitutional right is, however, a concept that I have never understood. Nor can I fathom how one applies it to a host of imaginable situations. Baffled as I am by both conundrums, I would have been at a loss to hold that the denial of the right in question either had or had not negated its essential content. It is therefore with a sigh of relief that I find myself free to say, as I end this judgment, that my reliance on ss (2) of s 33 dispenses altogether with the need for me to bother about ss (1)."

The Limitation clause, firstly allows the Court to balance the interests at stake in each case. It allows for the acknowledgement of the seriousness of the violation against the right that has been infringed; as well as the extenuating circumstances that justify the infringement. Secondly, it makes explicit what is valued most in each case. At the time of this judgment the primary focus was on nation building and reconciling a fragmented society. Therefore, the limitation could have been considered reasonable and justifiable given the circumstances. In contrast, by using Ubuntu as the basis for the majority decision in AZAPO, it created a misunderstanding about Ubuntu which can be felt in Malan's critique on Ubuntu.

Malan argued that Ubuntu is only appropriate in the context of defamation cases,[309] and interpersonal or inter-communal relations, but not in the field of public office bearing.[310] According to Malan once an individual takes on the public office they assume a public identity: "*Public office-bearing demands public office bearers to adopt an artificial public identity as it were, in terms of which the public office concerned has to play an (artificial) role in terms of the script, that is, in terms of the legally defined duties attaching to the public office concerned*." Although, I find the notion of following a prescribed script in office bearing rather positivistic and dangerous in light of South Africa's history. Malan's argument is reflective of some spill over effects of the AZAPO case being decided on the basis of Ubuntu. Malan essentially argues that when it comes to office bearing interpersonal relations should not play a central role but rather the ability to fulfil the role. He further cites various instances where corruption in public office may occur because of what he interprets as the relationally orientated spirit of Ubuntu that may result in office bearers not being held accountable or misconduct being looked over because good relations are being maintained. This he argues is against the duties of an office bearer and consequently against the common good that public office bearers are sworn to uphold. I could not agree more that corruption (the scourge of the nation) should not be glossed or ignored while public office bearers achieve private gains at the expense of the public good. However, I disagree with Malans's interpretation of Ubuntu as blanket cover for misconduct in the interest of preserving peaceful relationships. Notwithstanding, in light of the AZAPO judgment Malan can hardly be blamed for his misunderstanding of Ubuntu because in that instance Ubuntu was used a blanket to cover for all the misdeeds that were committed by public office bearers during Apartheid. Amnesty was granted in respect of acts committed in the scope of ones work and for a political purpose; the perpetrators not only benefitted personally during

[309] Malan (2014) at 254.
[310] Malan (2014) at 255.

Apartheid through forms of promotion for executing their horrendous tasks but also after Apartheid by escaping criminal and civil liability for simply disclosing the truth.

On this basis, I argue that the AZAPO case would have been better decided based on the Limitation clause because given the circumstances at the time limiting certain rights was justifiable in light of the legislatures objective to avoid a society based on retaliation. However, since the decision implicated Ubuntu it gave the wrong impression that Ubuntu is a value that blindly covers over misconduct in order to achieve social cohesion. I propose that a correct reading of Ubuntu is that reconciliation also prioritises reparation; and that reparation does not amount to retaliation. Ubuntu in interpersonal and intercommunal relations means that the perpetrator is willing to make reparation as a form of recognition for how they have harmed the community. This I perceive as the great missed opportunity of the TRC: The lack of perpetrators showing remorse and seeking to make reparation of their own volition. In all of these instances Ubuntu was expressed by the victims in forgiving and letting go of grievances but not always by the perpetrator willing to, for example, expose other co-conspirators; refuse promotion; or cede the benefits gained from their offences.

Reciprocity highlights the truly relational aspect of Ubuntu, it entails that in terms of Ubuntu, reconciliation is incomplete without showing reciprocity to others. The distinction between reciprocity and retaliation is important. Although Ubuntu entailed not retaliating from the perspective of the offended or aggrieved, the opposite reciprocal duty on the offender is to make amends either by restitution or reparations, thus through this reciprocal execution of Ubuntu reconciliation can be achieved. It is unfortunate that often in post-Apartheid South Africa any conversations regarding restitution and reparations especially in the context of land or wealth redistribution is often met with hostility.[311] Mahomed J in the AZAPO judgment did not venture to answer the question of what kind of reparation is "enough" but he did make a poignant remark which should be borne in mind:

> "The families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who have endured "untold suffering and injustice" in consequence of the crass inhumanity of apartheid which so many have had to endure for so long.

[311] The discussion on expropriation of land without compensation is a case in point. Although expropriation falls outside of the scope of this thesis, it is nonetheless an important area in which an Ubuntu paradigm of property can and should be developed. However, at this stage, I do not claim to be able to answer what it would practically look like if both restitution and reparation were central in property relationships in the context of expropriation without further in depth research from an inter-disciplinary approach of law, economics and politics.

> Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many. The country has neither the resources nor the skills to reverse fully these massive wrongs. It will take many years of strong commitment, sensitivity and labour to "reconstruct our society" so as to fulfill the legitimate dreams of new generations exposed to real opportunities for advancement denied to preceding generations initially by the execution of apartheid itself and for a long time after its formal demise, by its relentless consequences. The resources of the state have to be deployed imaginatively, wisely, efficiently and equitably, to facilitate the reconstruction process in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire nation the latent human potential and resources of every person who has directly or indirectly been burdened with the heritage of the shame and the pain of our racist past."

The burden of bearing the injustices of the past not only belongs to the state but to all of society. If, Ubuntu underpins the whole constitutional order as reasoned by Justice Sachs and the Bill of Rights has both horizontal and vertical justiciability then there is reciprocal duties among members of society to treat one another with Ubuntu. This has far reaching implications but perhaps brings us closer to the transformed society envisioned in the Constitution that has not yet been fully realised in reality. Therefore, from the AZAPO case we glean the tension in how Ubuntu has been applied by the Constitutional Court and begin to grasp the difficulties in its practical application in a society that has a history of injustice. These tensions continue to be exposed in the discussion on Ubuntu in the context of defamation. In the next section, I discuss two defamation cases, one of which emanated as a result of the amnesty granted by the Amnesty Commission; one in the context of public office bearing; and the final from the Equality Court.

3.3.3.3 Ubuntu and Defamation

Ubuntu has been applied in the context of the law of delict specifically in defamation cases due the relational and public nature of defamation. Defamation has the effect of injuring the dignity of a fellow member of the community and injuring their reputation and good standing in the community.

3.3.3.3.2 Dikoko v Mokhotla

The Dikoko case involved the immunity granted to public office bearers against civil liability for exercising their freedom of speech while carrying out their functions as municipal

councillors.[312] In this case Dikoko and Mokhatla were public office bearers in a municipality. The councillors were granted R300 for telephone expenses, anything in excess of this amount was to be paid personally by the councillors. Mokhatla was responsible for sending the bills to the councillors and in particular attempted to retrieve the debt that Dikoko had accumulated. However, Dikoko's resistance eventually led to him being brought before a committee of inquiry.[313] At the meeting Dikoko accused Mokhatla of being political motivated to make him look bad by how his phone bill was billed to him.[314] Mokhatla thereafter sued Dikoko for defamation. In the Constitutional Court Mokgoro's judgment on the merits was the majority judgment but in respect of the quantum of damages payable to the Mokhatla was the minority.[315] It was in the minority opinion that Mokgoro made an appeal to the philosophy of Ubuntu in calculating damages in defamation. She proposed that especially in defamation cases the aim is to restore the dignity and reputation of a person.[316] Issuing a hefty punitive fine against the defamer was not the objective but to restore the broken relationship in the community.[317] Furthermore, the giving of a sincere apology is an important part of the reconciliation process between the parties and serves to show the community the restoration of one's dignity.[318] Sachs concurred with Mokgoro's judgment,[319] and argued that the use of the constitutional value of Ubunut-Botho is an important part in the defamation cases whose chief aim should be to repair rather than punish.[320] In this sense Ubuntu is in alignment with the principles of restorative justice.[321]

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[312] Dikoko v Mokhatla at par 1.
[313] Dikoko v Mokhatla at par 5.
[314] Dikoko v Mokhatla at par 6.
[315] Dikoko v Mokhatla at par 81 – 83.
[316] Dikoko v Mokhatla at par 68.
[317] Dikoko v Mokhatla at par 68 – 69.
[318] Dikoko v Mokhatla at par 69 – 71.
[319] Dikoko v Mokhatla at par 105.
[320] Dikoko v Mokhatla at par 112.
[321] Dikoko v Mokhatla at par 114: "Ubuntu - botho is highly consonant with rapidly evolving international notions of restorative justice. Deeply rooted in our society, it links up with world-wide striving to develop restorative systems of justice based on reparative rather than purely punitive principles. The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than on doling out punishment. Reintegration into the community depends upon the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate. These concepts harmonise well with processes well-known to traditional forms of dispute resolution in our country, processes that have long been, and continue to be, underpinned by the philosophy of ubuntu - botho."

3.3.3.3.3 Afriforum v Malema

The following defamation case was heard in the Equality Court. The Equality Court is institutionalised in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), in order to give effect to the right to equality in section 9(4) the Bill of Rights.[322] In this instance Afriforum an Afrikaans political organisation brought an application against politician Julius Malema, for hate speech.[323] Malema had on three occasions,[324] sang songs that had the words "shoot the Boer",[325] the boer referring to the Afrikaans people who are technically a minority group in the country.[326] The Court determined that Malema's words were hate speech and was interdicted and restrained from using them.[327] Part of the reasoning of the Court applied Ubuntu in its reasoning.[328] The judgment provides a comprehensive summary of the legal content of Ubuntu in Constitutional Court decisions which is worthy of being mentioned for reference:

> "Ubuntu is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more mutually acceptable remedies for the parties in such cases. Ubuntu is a concept which: 1. is to be contrasted with vengeance; 2. dictates that a high value be placed on the life of a human being; 3. is inextricably linked to the values of and which places a high premium on dignity, compassion, humaneness and respect for humanity of another; 4. dictates a shift from confrontation to mediation and conciliation; 5. dictates good attitudes and shared concern; 6. favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant; 7. favours restorative rather than retributive justice; 8. operates in a direction favouring reconciliation rather than estrangement of disputants; 9. works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant; 10. promotes mutual understanding rather than punishment; 11. favours face-to-face encounters of disputants with a view to

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[322] Equality Clause of the Constitution, 1996: Section 9(4): "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."
[323] AfriForum v Malema at par 1.
[324] AfriForum v Malema at par 67.
[325] AfriForum v Malema at par 49 – 54.
[326] AfriForum v Malema at par 34 – 36.
[327] AfriForum v Malema at par 121.
[328] AfriForum v Malema at par 108, 111 – 112.

> facilitating differences being resolved rather than conflict and victory for the most powerful; 12. favours civility and civilised dialogue premised on mutual tolerance."[329]

This summary is helpful in understanding the development of Ubuntu in case law until 1995 – 2011;[330] and indicates the courts consistency of the application of Ubuntu as well as its versatility in a diverse range of issues.

3.3.3.3.4 Ubuntu and Eviction

Evictions are particularly contentious aspect of South African history. Even before Apartheid the Native Land Act of 1916 assigned 13% of the land in the country to 80% of the population forcing large numbers of native South Africans to leave their land into designated areas. During Apartheid forced evictions of black people were used to force them into the designated areas where each race group was allowed to live giving effect to Apartheid spatial design which was wrought with inequality.[331] In order to maintain the status quo of segregated spatial design and to keep black people from squatting, the Prevention of Illegal Squatting Act 52 of 1951 (PISA),[332] was promulgated to not only allow for summary eviction but also criminalised squatting which meant that eviction was followed by eviction.[333] As described by Sachs J in *Port Elizabeth Municipality v Various Occupiers*:

> "PISA was an integral part of a cluster of statutes that gave a legal/administrative imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations. For all black people, and for Africans in particular, dispossession was nine-tenths of the law. *Residential segregation was the cornerstone of the apartheid policy.* This policy was aimed at creating separate "countries" for Africans within South Africa. Africans were precluded from owning and occupying land outside the areas reserved for them by these statutes… *Through a combination of spatial apartheid, permit systems and the creation of criminal offences the Act strictly*

[329] AfriForum v Malema at par 18.
[330] Afriforum v Malema at par 18 extracted the Ubuntu principles from the following cases: "… S v Makwanyane and Another 1995 (3) SA 191 (CC) (para [131], [225], [250], [307]); Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 517 (CC) at para [37]; Dikoko v Mokatla 2006 (6) SA 235 (CC) at paras [68]-[69], [112] and [115]-[116]; Masethla v President of RSA 2008 (1) SA 566 (CC) at para [238]. See also Union of Refugee Women v Private Security Industry Regulatory Authority 2007 (4) SA 395 (CC); Hoffmann v South African Airways 2001 (1) SA 1 (CC) (para [38]); Barkhuizen v Napier 2007 (5) SA 323 (CC) (para [50]); Bhe and Others v Magistrate Khayelitsha and Others 2005 (1) SA 580 (CC) at paras [45] and [163]."
[331] South African History Online "Forced Removals in South Africa" South African History Online Available from: https://www.sahistory.org.za/article/forced-removals-south-africa Accessed on 29-03-222.
[332] *Port Elizabeth Municipality v Various Occupiers* 2005(1) SA 217 (CC) at par 8.
[333] Port Elizabeth Municipality v Various Occupiers at par 8.

> *controlled the limited rights that Africans had to reside in urban areas*."[334] [Own emphasis added].

Residential segregation as the cornerstone of Apartheid policy gave rise to the spatial Apartheid that still lingers on the landscape of South Africa to this day as evident through the way: "well-established and affluent white urban areas" can be seen to co-exist "side by side with crammed pockets impoverished and insecure black ones."[335] Moreover, during Apartheid, the extent to which PISA targeted black people was downplayed as the principles of ownership in Roman-Dutch law provided the façade of neutrality and impartiality in the application of discriminatory laws.[336] Consequently, with the advent of a constitutional democracy, PISA among others was a key piece of legislation with an Apartheid vintage, that needed to be repealed. Consequently, the Prevention of Illegal Evictions Act 19 of 1998 (PIE) was promulgated.[337] PIE not only repealed PISA but also provided a judicial process that must be followed in order to give effect to evictions and provided criteria for the courts to apply when doing so.[338]

In *the Port Elizabeth Municipality v Various Occupiers* case, the Port Elizabeth Municipality on petition from 1600 people, applied for the eviction of 68 people which included 23 children who occupied shacks erected on privately owned land.[339] In its consideration the Court contextualised PIE within the matrix of section 25 (right to access to adequate housing) and 26 (right to property) of the Constitution, 1996. Moreover, Sachs J for the majority stated that the Constitution and PIE must have regard for fairness and other constitutional values that produce just and equitable result,[340] which includes infusing the spirit of Ubuntu:

> "Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. *The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order*. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which

[334] Port Elizabeth Municipality v Various Occupiers at par 9.
[335] Port Elizabeth Municipality v Various Occupiers at par 10.
[336] Port Elizabeth Municipality v Various Occupiers at par 10.
[337] Port Elizabeth Municipality v Various Occupiers at par 11.
[338] Port Elizabeth Municipality v Various Occupiers at par 12.
[339] Port Elizabeth Municipality v Various Occupiers at par 1.
[340] Port Elizabeth Municipality v Various Occupiers at par 36.

is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."[341] [Own emphasis added]

The PE judgment highlights three important aspects: firstly, that residential segregation in particular was a crucial tool in the Apartheid machinery. Consequently, breaking down this cornerstone is of utmost importance in a transformed constitutional democracy. Secondly, control of spatial design; and the freedom of movement of black people were previously extensively limited. Consequently, a transformed society in Post-Apartheid South Africa should be one that is spatially inclusive and provides the freedom of movement to all. Lastly, Ubuntu is reflected as being an important part of unity, social cohesion and reconciliation in the context of property and eviction cases. Consequently, it could be applied to other areas such as spatial inequality in the context of gated communities in South Africa, as will be discussed in the next chapter.

3.3.3.4 Ubuntu as the Guardian of all Rights

In the PE case Sachs J stated: "*The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order*." In light of this, the central argument in this thesis is that if Ubuntu as a constitutional value suffuses the whole legal order, then Ubuntu is the guardian of all the rights in the South African Constitution. This is in contrast to other assertions like property as the guardian of all rights.[342] Ubuntu safeguards the humanity, dignity, social cohesion and reconciliation that is key to the constitutional transformation of South Africa. In the South African context, without Ubuntu, a peaceful transition from Apartheid to a constitutional democracy would not have been possible. Moreover, Ubuntu continues to repair the fragmented relationships of South African society bringing about the much needed transformation envisioned in the Constitution. Therefore, it is through the recognition of the centrality of Ubuntu to the constitutional order and its application in concrete cases as described above that the crises facing South Africa can progressively continue the process of reconciliation.

3.4 Conclusion

In this section I began with a historical understanding narrative of African philosophy as a question of identity. I propose that this question of identity continues to inspire a post-Apartheid

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[341] Port Elizabeth Municipality v Various Occupiers at par 37.

[342] See AJ Van der Walt, 'The Modest Systemic Status of Property Rights' (2014) 1 Journal of Law, Property, and Society at 32 – 43 for a critique on property as guardian of all rights.

South African society in its endeavour to define values and legal principles that resonate within African culture. In this regard, Ubuntu was introduced as a value, philosophy and legal conceptual framework. It is clear from the aforementioned cases that Ubuntu is a legal principle with content sufficient to form a legal conceptual framework for legal interpretation. Although it is difficult to define the exact nuances of Ubuntu as a value or philosophy in African languages and cultures without losing some of its richness, through the decisions of the Constitutional Court over the past 27 years it has built up a significant jurisprudence that has sufficient content to call it a legal principle for interpretation in Court decisions.

As seen above the legal principle of Ubuntu can be applied to a variety of cases not only those pertaining to interpersonal or intercommunal relations. For our purposes it is specifically in the area of property law that Ubuntu can and should be used in interpreting cases related to the right to access to adequate housing and the right to property in the Constitution, 1996. In this section I propose firstly that Ubuntu can and should be used in decision making as an interpretive tool. I propose that Ubuntu is the guardian of all other rights in the Constitution and should therefore play a central role in constitutional interpretation. For the purposes of this thesis, I focus the area of application on the area of property law and spatial inequality. In terms of an Ubuntu paradigm, social relationships are at the core of property and as such Ubuntu must be a consideration in governing those relationships. In the next chapter, I will show a failure to apply an Ubuntu paradigm of property has resulted in social fragmentation as evidenced through spatial inequality and the rise in gated communities in post-Apartheid South Africa.

Chapter 4: Application of an Ubuntu Paradigm in the Context of Gated Communities in South Africa

4.1 Introduction

Gated communities have been on the rise in post-Apartheid South Africa. The cause of which has been attributed to a range of different factors that include a response to the high crime rate in South Africa;[343] the social status and recognition of living in an exclusive community;[344] or lifestyle choices of people which vary according to different tastes.[345] However, only considering these factors without taking into account the historical context neither captures the full picture nor accounts for the negative externalities that the rise in gated communities has caused. Moreover, gated communities are merely a response or symptom of deeper systemic issues that need to be addressed like: inequality, poverty and institutional design. Furthermore, by ignoring the symptomatic rise in gated communities, negates the danger that this phenomenon will entrench the legacy of segregation from Apartheid along new socio-economic lines.[346] As described in Chapter 2 of this thesis, South Africa has a long history of exclusion, denial of access to particular race groups and social fragmentation. It is no coincidence that as governmental control of movement and the areas in which people could live were no longer governmentally monitored, with the demise of Apartheid, that there was a sudden rise in the privatised control of movement and access into residential communities. Referring to Spinks, Landman stated:

> "In this way she [Spinks] emphasises the meaning of physical space. Urban fortification[s] do not only have certain consequences for physical segregation and use patterns, but also embody meaning and often ignites memory. As such Spinks (2001) identifies three similarities between the Apartheid and Post-Apartheid City: use of fear, insider-outsider exclusion and spatial re-settlement. With a sudden post-apartheid potential proximity of difference, citizens have emulated the fear management strategy they previously witnessed that the state operated, that of socio-spatial exclusion and segregation. Therefore,

[343] Landman K., "Gated Communities in South Africa: Comparison of Four Case Studies in Gauteng" (2004) *CSIR Building and Construction Technology* at 19 – 21, Available from: https://www.saferspaces.org.za/resources/entry/gated-communities-in-south-africa [Accessed on 15 February 2022].

[344] Landman (2004) at 24.

[345] Landman (2004) at 23.

[346] Landman K., "Privatising Public Space in Post-Apartheid South African Cities Through Neighbourhood Enclosures" (2006) 66 *GeoJournal* 133 – 146 at 140 – 141.

apartheid's strongest legacy is not its physical structure, but rather one of symbolic exclusion (Spinks, 2001, p. 30)."[347]

Through an exclusion based paradigm of property, the government defined the boundary lines of the spaces people could inhabit. White only and black only spaces were designed into the architecture of the cities and periphery; and people could not legally purchase property in an area they were not designated to live in. Consequently, in an era where transformation of South African society is constitutionally required it is counter-productive to maintain the vestiges of the past. Therefore, I propose that adopting an Ubuntu paradigm of property has important theoretical and practical implications for spatial design within the South African context. Theoretically, an Ubuntu paradigm challenges the underlying assumptions of exclusion, control and social fragmentation; and practically this can be made visible in how spatial design is executed most visibly through gated communities.

According to Karina Landman Gated communities can be defined as follows:

"**Gated communities** refer to a physical area that is fenced or walled off from its surroundings, either prohibiting or controlling access to these areas by means of gates or booms. In many cases the concept can refer to a residential area with restricted access so that normal public spaces are privatised or use is restricted. It does not refer only to residential areas, but may also include controlled access villages for work (office parks) and/or recreational purposes. Gated communities in South Africa can broadly be categorised as security villages and enclosed neighbourhoods. '**Security villages'** refers to private developments where the entire area is developed by a private developer. These areas/buildings are physically walled or fenced off and usually have a security gate or controlled access point, with or without a security guard. The roads within these developments are private and, in most cases, the management and maintenance is carried out by a private management body. Security villages not only include residential areas (such as townhouse complexes and high-rise apartment blocks), but also controlled-access villages for business purposes (office blocks) and mixed use developments, such as large security estates. '**Enclosed neighbourhoods**' refer to existing neighbourhoods that have controlled access through gates or booms across existing roads. Many are fenced or walled off as well with a limited number of controlled entrances/exits, and security guards at these points in some cases. The roads within these neighbourhoods were previously, or still are,

[347] Landman (2006) at 143.

> public property, depending on the model used within different local authorities. The majority in the country are based on the public approach (where the roads remain public)."[348]

For the purposes of this study I will firstly consider the theoretical implications of gated communities in general by considering the issues of exclusion, access and social fragmentation particularly in light of the historical context of South Africa. Thereafter, I will consider the structural nuances of the two kinds of gated communities differentiated by Landman: Security villages and Enclosed neighbourhoods. Each of these types of gated communities are structurally different and therefore need to considered individually to find solutions to the unique problem each of them raises.[349] On the one hand, Security villages are inherently private as they are usually residentially or controlled access villages developed and managed by private companies. Whereas, Enclosed neighbourhoods are established neighbourhoods with public roads that are enclosed with restricted access and are usually managed by an association of home owners within the neighbourhood. Despite this difference both play an important role in the physical spatial design of cities;[350] and in the design of social relations within South African society by creating seclusion, exclusion and potentially conflict.[351] In proposing alternatives to gated communities, I discuss the need for an Ubuntu paradigm shift in general. In this regard, I argue that an Ubuntu paradigm represents an autochthonous generative shift in the paradigm of property. More specifically, in relation to gated communities an Ubuntu paradigm creates the environment for generative or sustainable spatial design. I conclude with a brief discussion on the limitations of the concept of Ubuntu in relation to gated communities that will require further research for the future.

4.2 Theorical Implications of Gated Communities

4.2.1 The Importance of the Public Space in Society

In the Setswana traditional culture the governance structure entails a chief who is the ruling monarch of the people known as Kgosi. One of the core institutions of Batswana, is the Kgotla (or Lekgotla) which is the forum where the entire community can engage in policy formulation; and decision making that affects the social, economic and political life of the community.[352]

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[348] Landman (2006) at 136 – 137.
[349] Landman (2006) at 145.
[350] Landman (2006) 138 – 140.
[351] Landman (2006) 140 – 143.
[352] Moumakwa P.C., "The Botswana Kgotla System: A Mechanism for Traditional Conflict Resolution in Modern Botswana. Case Study of the Kanye Kgotla" (2010) LLM Thesis University of Tromsø at 3, Available from:

Kgosi presides over the Kgotla and also adjudicates disputes among the community members.[353] The Kgotla is a forum where both royals and commoners have equal standing in bringing matters before the Kgosi and the community as a whole. The Kgotla allows for public debate and discussions regarding resource management.[354] According to Kgathi and Ngwenya, the Kgotla has at least 5 functions:

> "Firstly it provides the village-community with the means to come to an agreement on the implementation of specific community development programmes/projects. Secondly, traditional leaders can use the *kgotla* to discuss or solicit views from the village-community on government policy decisions, or any other interest groups. Thirdly, government officials, including members of parliament and councillors, see the *kgotla* as a means of informing various village-communities about new legislations and programmes. Fourthly, the *kgotla* is a judicial institution in which cases are heard by the chief and his advisors. Lastly, the *kgotla* has been translated into a site of resistance or a place where voices clash and strive to reach a compromise."[355]

In the South African context the Kgotla is recognised in terms of the customary law applicable to the Batswana in South Africa, however its power is limited and decisions can be appealed to the general court system. The Kgotla system like any institution is not without its faults and has been critiqued for discrimination on the basis of gender and for being inaccessible for those who might live far away from where the kgotla is being held. Nonetheless, the kgotla highlights an important aspect regarding African traditional societies which is the importance of open dialogue and access to the public space. In the public space both the rich and poor have a voice to speak freely. Public participation in decision making and accountability to the community

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[Accessed on 22-02-22]. Although, this study is on the Kgotla system among the Batswana in Botswana, it should be noted that the Batswana in South Africa apply the same traditional system although it may have different implications in terms of the recognition of customary law in South Africa. Batswana in Botswana and South Africa were the same people group there were separated by arbitrary colonial borders. Consequently, the separated groups who have remained linguistically and culturally consistent may experience differences due to national laws and historical facts that are unique to each country. For example Botswana was a British protectorate that received independence in 1966 while South Africa was colonised by the Dutch then the British and in 1966 was at the height of Apartheid. Moreover, Botswana has a population size of 2.35 million which is a fairly homogenous population comprised of the Batswana as the dominant people group and few other smaller groups like the San People. Whereas South Africa has a population size of 59.3 million people with at least 11 cultural groups of which the Batswana comprise approximately 7% of the population.

[353] Moumakwa (2010) at 3.

[354] Ngwenya B.N. and Kgathi D.L. "Traditional Public Assembly (Kgotla) and Natural Resources Management in Ngamiland, Botswana" in Kgathi D.L. , Ngwenya B.N. et al. eds *Rural Livelihoods, Risk and Political Economy* (2011) Nova Science Publishers Inc.

[355] Ngwenya and Kgathi (2011) at 1.

has always been at the core of Setswana civilisation. Similarly, these notions of public space; public dialogue; and public participation in governance or resource management are also a fundamental aspect of notions of democracy in Western political thought. Moreover, throughout different cultures in history, the importance of maintaining access to the public space has been central to nation building and democracy.[356]

Gated communities reflect a restriction in access to the public space particularly in respect of enclosed neighbourhoods. Enclosed neighbourhoods are inherently public in nature, these may contain residential homes, parks, business parks and recreational centres that are cordoned off by boom gates with private security usually hired by the relevant Home Owners Association (HOA) for that neighbourhood. With respect to enclosed neighbourhoods, control and limited access privileges home owners over non-owners to the public space. Particularly, only home owners in a specific neighbourhood are allowed to vote on the enclosure. This on a micro scale is reminiscent of the distinction between property owners and non-owners in Roman antiquity, where only male property owners were allowed the right to vote.[357] This similarity should raise some concern regarding the practice of enclosure of common places and what Henri Lefebvre described as the "right to the city".[358] In the context of the enclosure of neighbourhoods it is provincial and municipal by laws that allow for enclosure. Killander in relation to municipal by-laws related to homelessness observed:

> "The French Marxist philosopher Henri Lefebvre coined the phrase of the 'right to the city' 50 years ago, on the eve of the student uprisings of May 1968. Marius Pieterse has given his interpretation of this concept in the context of contemporary South Africa and argues that, '[T]he right to the city shifts the attention to the local government as the embodiment of public power in the everyday urban realm.' This reflects, as will be discussed later in this article, how municipalities in South Africa has become more powerful in the constitutional era. It is the argument of this article that this power comes with responsibility and that municipalities must seriously reflect on the consequences of their by-laws for the

[356] During the COVID-19 pandemic, public participation, freedom of movement and access to the public space were significantly limited. During this time it was impossible to gather to engage in public dialogue; or to physically protest and organise resistance against oppressive measures, when people did not have access to the public space and their movement was restricted. This has reinforced both the symbolic meaning of access to the public space and participatory democracy; and the practical value of public participation from the bottom up in decisions regarding the well-being of the community.

[357] Kelly (2012) at 153: "In the Anglo-Saxon tradition, there was a time when only white , property-owning men were considered members of the democratic polity and eligible to vote. But over time, democratic society redrew those boundaries to include blacks and women."

[358] Killander (2019) at 72.

> urban poor. This is necessary because some of them may violate the Bill of Rights. It should also be noted that this is not only a question of rights but also of what Wessel Le Roux refers to as 'street democracy'. He notes that, 'The street, much like politics, requires constant exposure and risk-taking as an' existential and ethical obligation of living together. This is ideal. However, to uphold many of the by-laws discussed in this article in their current form is to promote segregation. This segregation is racialised and has its origin in vagrancy laws that the white elite adopted to control the rest of the population and secure cheap labour."[359]

This ethical obligation of living together requires giving access to the public space and promoting a culture of co-operation instead of a culture or separation or segregation. Although, the instance of enclosed neighbourhoods most clearly displays this tension between separation and segregation, the instance of security villages also reflects the promotion of segregation. Through the municipal laws that allow for security villages to operate as enclaves of privilege within the broader spatial planning of the city, which are only accessible to owners and non-owners who can afford membership fees,[360] acts as a mechanism for exclusivity. It should be noted, I do not argue against individual preferences or the plethora of reasons for why one might decide to live in a gated community, however, I do argue that for whichever reason one chooses, the effect of gated communities reinforces segregation and exclusivity; and whether or not this is justifiable must be questioned in light of the history of segregation and on the basis of constitutional principles that have become the bulwark of transformation in South African society.

4.2.2 Exclusion and Enclosure of the Commons

Karina Landman discussing the symbolic nature of seclusion highlights how the Oxford Dictionary,[361] defines "enclosure" as "*the process or policy of enclosing wasteland or common land so as to make it private property, as carried out in Britain in the 18th century and early 19th century*",[362] and that this points to the relationship between physical and social space; and physical action and meaning.[363] Furthermore, Landman states that the Oxford Dictionary states

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[359] Killander (2019) 72 – 73.
[360] Security villages although bought and developed by private companies who then sell the individual plots of land, have shared communal areas for the residents which could be viewed as a quasi-public space. For example, some of the luxury golf estates have a golf course or spa that is accessible to the public for a substantial membership fee and at a discounted rate for residents of the golf estate.
[361] Pearsall, J. (ed.) *The Concise Oxford Dictionary* 10th ed. (1999) Oxford: Oxford University Press at 469.
[362] Landman (2006) at 140.
[363] Landman (2006) at 140.

that "exclosure" refers to "*an area that is sealed off by a barrier*".[364] Although, enclosure did not begin in the 18th century and had been present even in ancient Rome, this moment in history intensified the legitimation of primitive accumulation.[365] Moreover, according to Mattei and Mancall:

> "Whether enclosure is carried out through the agency of the increasing hegemony of private property (as in the West) or through the development of state bureaucracy (as in China), the enclosure of the commons and social and economic consequences attendant upon that enclosure serve as a starting point for the analysis of modern capitalism."

Therefore, the implications of enclosure are not only spatial but also have direct socioeconomic consequences. In the South African context colonisation was the first mass enclosure of common lands and privatisation that systemically excluded native South Africans from their land. Thereafter, the intensified exclusion that took place from 1910 onwards with the adoption of the Native Land Acts which reserved 13% of the land area for 80% of the population, entrenched the model of exclusion and enclosure. All of these historical moments had socioeconomic consequences for those who were excluded and those who were included. This has resulted in the dire socioeconomic position of those who have been historically disadvantaged and privilege for those who were historically included. Moreover, the spill-over effect is that even with the official end of Apartheid, exclusion has already been entrenched in the spatial inequality and the socioeconomic standing of people of colour, meaning that it is difficult if not impossible for those who have been disadvantaged to access spaces that have been enclosed. Furthermore, the current neoliberal policy of the new democratic government,[366] has only served to increase the coffers of the black elite and small black middle class while still maintaining the majority of the wealth of the country in the hands of the minority (white) population. On 9 February 2022, the unemployment (which includes those who have stopped looking for work) had increased by 0.5% from the previous year to 46.6% with youth unemployment rate at 66.5%.[367] Meaning that there is very little possibility for a significant

[364] Landman (2006) at 141.
[365] Mattei, U. and Mancall, M. "Communology: The Emergence of a Social Theory of the Commons" (2019) 118(4) The South Atlantic Quarterly 725 – 746 at 729.
[366] Hansangule et al. forthcoming.
[367] Maimane M., "Sona 2022: South Africa Needs Urgent Course Correction to Reinvigorate State's Capacity to Run an Efficient Government" (9-02-2022) Daily Maverick [Available from: https://www.dailymaverick.co.za/opinionista/2022-02-09-sona-2022-south-africa-needs-urgent-course-correction-to-reinvigorate-states-capacity-to-run-an-efficient-government/#:~:text=South%20Africa's%20unemployment%20rate%20has,youth%20unemployment%20rate%20is%2066.5%20%25.] Accessed on 15-03-2022.

portion of the population to escape the cycle of poverty in order to attain the socioeconomic status to access enclosed city spaces.

Therefore, enclosure of the commons should not only be viewed from a spatial perspective and symbolic historical perspective but also from a socioeconomic perspective in view of modern capitalism.[368] As argued elsewhere the institution of property is central to the design of capitalism.[369] Therefore, overcoming exclusion and enclosure will require a shift in spatial design as well as in the design of capitalism and economic policy in the South African context and in global capitalism in general. In this regard, I propose a shift towards a generative economy on a broader institutional design of capitalism level as argued by Marjorie Kelly,[370] which is encapsulated in the Ubuntu paradigm of property. This aspect will be discussed in more detail in respect of alternative solutions recommended below. For the purposes of this section it is important to bear in mind the impact of exclusion and enclosure of the commons on spatial inequality as well as in terms of the institutional design of the economy in respect of capitalism.

4.2.3 Control of Movement and Access in South African History

One of the hallmarks of Apartheid was the pass book system. The pass book system had its roots in the British vagrancy laws,[371] that had been implemented in the Cape Colony as early as 1809 with the Caledon Code,[372] both of which were intended to subjugate and control the indigenous population.[373]

> "The 1809 Caledon Code 'marked the final step in the transformation from independent peoples to 'Hottentots', that is, subjugated Khoikhoi in the permanent and servile employ of white settlers'. As noted by Elizabeth Elbourne, 'The Caledon Proclamation made pass laws more systematic and expanded the power of local officials to control and punish those taken up for 'vagrancy'.' The Khoi became 'aliens in their own territory'."

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[368] For decades mainstream economics held onto Garrett Hardin's argument of the Tragedy of the Commons where he argued that anything held in common would inevitably be subject to depletion and overuse. Thus he argued the only way to overcome this issue was privatisation and enclosure. However, as previously mentioned in Chapter 2, Guelke showed that the true tragedy was of privatisation that displayed more destructive and extractive effects of enclosure on the commons in the design of capitalism.

[369] Mosalagae, C.R. "A Generative Property Response to COVID-19" 329 – 351 in Boggenpoel Z.T. et al. (Ed.) *Property and Pandemics: Property Law Responses to COVID-19* (2021) Juta: Cape Town.

[370] Kelly, M. *Owning Our Future, The Emerging Ownership Revolution* (2012) Berrett-Koehler Publishers.

[371] Killander (2019) at 71.

[372] Killander (2019) at 73.

[373] Killander (2019) at 73.

In Elbourne's description of the plight of the KhoiKhoi we see a similar narrative as with the Native Land Act that would later be implemented under the Union of South Africa in 1910. The KhoiKhoi in the Cape found themselves as aliens in the land of their birth and later, under the unified rule of the Union, all black South Africans would find themselves as aliens in the land of their birth. Therefore, these vagrancy laws were not only the precursor for pass laws but also segregationist land policies as well. Although the vagrancy laws of the early 1800s were initially reversed they were reintroduced in 1879 with even more stringent requirements than before.[374] The Prevention of Vagrancy and Squatting Act 23 of 1879 defined a 'vagrant' as:

> "a 'person found wandering abroad and having no visible lawful means, or insufficient lawful means of support' and who cannot 'give a good and satisfactory account of himself'."[375]

The preamble of the Act further stipulated:

> "Whereas it is expedient, as far as possible, to suppress idleness and vagrancy, and whereas serious losses of stock by thefts are experienced by the farmers of this colony, and there is reason to believe that the same are in a great measure traceable to the facilities afforded to unemployed persons, and persons without sufficient means of support, of residing upon crown and other lands, and of roaming about without proper control, and it is expedient that such facilities as aforesaid should be restricted."[376]

The reasoning for the adoption of the vagrancy legislation bears some striking similarities to the reasoning behind the installation of boom gates in enclosed neighbourhoods. The requirement that one must give a satisfactory account themselves before being allowed to enter a part of the city is an example of this. Also, the preamble harkens to similar concerns regarding safety and crime prevention in the 1800s and now.

The Population Registration Act No. 30 of 1950 divided all people within the country into one of the four main people groups: White, Black (Native), Coloured, Asian (or Indian). Thereafter, the Pass Laws Act of 1952, required black South Africans (primarily men) over the age of 16 years old, to carry a pass book with them at all times, which specified to which race group they belonged. Furthermore, along with other personal information, one's behavioural history while

[374] Kiallnder (201) 73 – 74.
[375] Killander (2019) at 74.
[376] Killander (2019) at 74.

in working in white only areas was included. The pass book acted like an internal passport which allowed people access to certain areas within the country based on their racial designation. If a black person wanted to access a white only space for work purposes their pass book had to be endorsed with permission from the government to allow them to access the area.[377] Routinely, black people were stopped in white only areas by police or state security forces and asked to show their pass book to justify their presence in neighbourhoods designated for white people. Additionally pass books also provided a description from the employer of the individuals behavioural conduct during employment in the white only area.[378] According to Michael Savage, between 1916 – 1984 approximately 17,745,000 Africans were arrested for infringing the pass laws.[379] The pass book system in particular was one of the most detested symbols of Apartheid and numerous protests were organised against it. Most notably the Sharpeville Massacre was a protest in violation of pass laws that resulted in 69 Africans killed and 180 injured.[380] In an iconic photograph taken on 26 March 1960 Nelson Mandela burned his pass book in protest against the Sharpeville Massacre and never carried one again.[381]

Pass laws were eventually abolished with the advent of a new constitutional democracy. However, despite this private security has now replaced state security in patrolling enclosed neighbourhoods; and access restrictions have been placed routinely in neighbourhoods across the country. No longer directly based on pass laws but on socioeconomic status that privileges some over others to live in exclusive neighbourhoods. The similarity between pass laws and boom gate pass requirements for enclosed neighbourhood are startling in their banality. It is often argued as the most natural response to the high crime rate in the country that these measures are taken to keep the pervasive "them" out and to keep "us" safe within the enclave.

[377] Helen Suzman Foundation "Key Legislation in the Formation of Apartheid" Available from: https://www.cortland.edu/cgis/suzman/apartheid.html#:~:text=The%20Pass%20Laws%20Act%20of,information%20than%20a%20normal%20passport. Accessed on 25-02-2022.

[378] Boddy-Evans A., "Pass Laws During Apartheid" (10-12-2020) ThoughtCo. [Available from: https://www.thoughtco.com/pass-laws-during-apartheid-43492] Accessed on 15 March 2022.

[379] Savage M., "The Imposition of Pass Laws on the African Population in South Africa 1916-1984" (1986) vol. 85 no. 339 *African Affairs* 181 – 205 at 181.

[380] Nelson Mandela Foundation "1952. Natives Abolition of Passes & Coordination of Doc's Act No 67" Available from https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01853.htm [Accessed on 25-02-2022].

[381] Nelson Mandela Foundation "On this day – 26 March 1960" Available from: https://www.nelsonmandela.org/on-this-day/entry/nelson-mandela-burns-his-passbook-in-protest-against-the-sharpeville-massac [Accessed on 25-02-2022].

Among other externalities, this has led to racial profiling and stereotyping in the enforcement of security access rules:

> "Social cohesion can also be influenced by perceptions, which play a very important role in the fear of crime. They often lead to gross generalisation and stereotyping. It is however, not only blacks that are often stereotyped, but also groups of males. One of the people involved with the security in the enclosed neighbourhood in Johannesburg explained the role of the security guards: 'They basically know who they should keep in and who they should keep out. They know who looks suspicious – e.g. any 3 males in a car, any two or three males. They will actually stop at the gate and go through a questioning process. Any family situation, irrespective of colour, they will never question. Any single person, especially a female they will never question, even if that person is a stranger.'"[382]

This kind of stereotyping not only perpetuates the exclusion but also disrupts social cohesion through the creation of us and them narratives that criminalise certain groups in society.[383] As will be discussed in the next section the fragmentation of South African society has been exacerbated by the maintenance of dividing walls and barriers in post-Apartheid South Africa.

For the purposes of this section it is important to keep in mind the theoretical implications for how we conceptualise gated communities. In light of the history of the country gated communities are not neutral artifacts of spatial design. Firstly, I tried to show how the concept of the public space is an important part of participatory democracy in the South African context; this was exemplified from the perspective of African customary law in the Batswana culture, with the Kgotla as an example. Secondly, exclusion and enclosure of the commons or common places has the effect of restricting the rights of access to the public. In light of the historical restrictions on access and movement these kinds of restrictions should not be taken for granted in post-apartheid South Africa. Lastly, I tried to show how exclusion hinders social cohesion and continues the colonial heritage of exclusion. From colonial laws on vagrancy, to Apartheid pass laws to municipal by laws that allow for the enclosure of common places we see the continued alienation of the poor and people of colour from society continued.

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[382] Landman (2004) at 31.

[383] Killander M., "Criminalising Homelessness and Survival Strategies Through Municipal By-laws: Colonial Legacy and Constitutionality" (2019) South African Journal on Human Rights 35(1) 70 – 93. Provides a historical account of how colonial vagrancy laws were transmuted into the Pass laws of the 1950s which specifically criminalised homelessness and poverty causing both social exclusion and criminalisation of vulnerable groups. See also Hansungule et. al forthcoming in respect of the criminalisation of poverty.

An important aspect regarding the application of an Ubuntu paradigm of property on gated communities is that the nature of the property needs to be taken into account. Enclosed neighbourhoods are existing neighbourhoods which were never designed to be enclosed and have public roads which are then cordoned off. Whereas security villages are private properties developed by private companies and sold to residents. Therefore, although these two types of gated communities share certain similarities they have different implications for spatial design.

4.3 Enclosed Neighbourhoods

As previously discussed, in chapter 2, the narrative of the swart gevaar "black danger" has been a pervasive narrative for a long part of South Africa's colonial history. Therefore, it is simplistic to believe that this narrative has ceased to exist in the new rainbow nation. Instead these narratives have become more subtle as opposed to overt. The rise in gated communities was noted as being a phenomenon throughout the country but more prevalent in the Gauteng Province which also has the highest crime rate in the country.[384] In this regard, gated communities can be seen as a reaction to the fear of crime and for security purposes.

4.3.1 Urban Fortification of Post-Apartheid South Africa

With reference two major cities in the Gauteng Province of South Africa, Johannesburg and Pretoria, Landman remarked:

> "Both cities are products of the apartheid ideology that guided development for 40 years prior to 1994. Despite many recent initiatives to address the spatial patterns of segregated development, including fragmentation, separation and low-density sprawl, with consequent well-developed white suburbs around the CBD and marginalised townships on the urban periphery, many of these patterns are still in place today."

As reflected by Landman these patterns are still in place today on a broader level and continue to be reinforced through the enclosure of neighbourhoods and the development of security villages. As depicted below neighbourhood enclosures have the effect of transforming the urban space into inaccessible urban fortifications.[385]

[384] Landman (2004) at 5.
[385] Landman (2004) at 33.

Figure 16: Existing road network and urban form around Gallo Manor

Figure 17: Transformed road network and urban form around Gallo Manor, resulting in a gross urban fabric and a structure of super-blocks

Figure 18: Existing road network and urban form around Strubenkop

Figure 19: Transformed road network and urban form around Strubenkop, resulting in a gross urban fabric and a structure of super-blocks

Figure 1: Example of Urban Fortification through Neighbourhood Enclosure[386]

4.3.2 Inefficiency and Environmental Concerns

In addition to urban fortification, neighbourhood enclosures resulting in the closure or limited access to roads have had an impact on both vehicle and pedestrian traffic. Whether by car or by foot every person in South Africa has experienced the frustration of being forced to drive or walk an extra kilometre or two due to road closures.[387] This has an impact on the access to livelihood of many South Africans who have to commute long distances for work and creates more pollution with traffic jams on limited roadways. These issues may seem minor and in fact have become part and parcel of everyday life in South Africa but it should not be taken for granted. This norm can be changed and municipalities can take greater involvement in regulating the spatial planning of enclosed neighbourhoods.

4.3.3 Safety and Enclosed Neighbourhoods

Similar to Killander's argument in respect of the criminalisation of homelessness, there are less restrictive measures that can achieve the same purpose that could be adopted before measures

[386] Landman (2004) at 33.
[387] Landman (2004) at 32.

that foster social exclusion.[388] Moreover, any measures adopted (whether laws or by-laws) in post-Apartheid South Africa should meet the scrutiny of constitutional principles like proportionality.[389] In the *V& A Waterfront* case,[390] the V&A Waterfront sought to interdict two homeless from entering, begging and loitering on the Waterfront property. The property was defined as quasi-public as it contained access to public facilities like the harbour to Robben Island and a post office. In the reasoning of the Court, it held that in light of the history of South Africa, restricting the movement and access of the homeless was too high an infringement on their right to freedom of movement, access to livelihood and human dignity. In light of this the private interests of the property owners had to give way to more important fundamental rights. Moreover, the court held that there were less restrictive ways that could achieve the same purpose rather than denying the homeless people their constitutional rights. Alexander Van Der Walt argued that this reasoning of the Court reflects the fact that property holds a modest systemic status in South African law. Meaning that in some instances where there is public or quasi-public property, property may be required to be limited in order to vindicate other rights such as human dignity, freedom of movement and the right to life. This is important for three reasons: firstly, the modest systemic status of property is in alignment with an Ubuntu paradigm of property; secondly, this reflects a practical way in which social relationships in property are prioritised; and thirdly, in the context of enclosed neighbourhoods it calls for less restrictive means of protecting property rights.

4.4 The Rise in Security Villages

As previously mentioned, the end of Apartheid brought with it the end of segregation along racial lines. However, this did not mean that the distrust among the races had completely dissipated. Instead these lines of segregation became defined along socio-economic lines. It was trite that the black majority could not afford to buy property n historically white neighbourhoods. As time went on and black people began to be able to afford property in more affluent neighbourhoods this led to white flight to new neighbourhoods and the development of large security villages further away from city centre. The distinctive feature of these affluent neighbourhoods was the excessive use of private security measures in order to guarantee safety from in part the rising crime rate in the country, and to maintain the separation between us and the pervasive "them".

[388] Killander (2019) at 90.
[389] Killander (2019) at 91.
[390] V & A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape (4543/03) ZAWCHC 75; [2004] 1 All SA 579 (C) (23 December 2003).

Furthermore, a negative externality that has received little attention is the rise in surveillance capitalism.[391] Shoshana Zuboff defines surveillance capitalism as: the unilateral claim on human experience as free raw material for translation into behavioural data.[392] During Apartheid the pass laws required black people to produce their passbook to security officers when they entered white neighbourhoods. In post-Apartheid South Africa, private security officers can stop people trying to enter neighbourhoods or security villages and request all kinds of personal information ranging from: driver's license; a photo of the driver; number of passengers in the vehicle; the reason the person is entering the premises; the address that the person is visiting; signature of the driver or finger print. All of this information is stored in the databases of private security firms without any clear explanation of how the information is being used to profile citizens. There are two notable issues of concern: Firstly, the similarity between Apartheid practices and private security is no coincidence seeing as private security became the primary employer for police officers from the Apartheid era as Apartheid ended. This should cause us to reflect on the kinds of private security norms that have been instituted in post-Apartheid South Africa that are reinforcing the same limitations of privacy and freedom of movement that harken back to Apartheid. Secondly, the access of private security companies to the personal information and habits of citizens is a concerning aspect in the rise of surveillance capitalism in the South African context.[393]

The post-Apartheid time saw a rise in security villages with controlled access as a response to fears for safety and security. However, in addition to safety concerns, there are various reasons why people have chosen to live in security villages, which include the sense of community; and status or prestige, these will be discussed below.

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[391] Zuboff S, (2019) *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, Public Affairs.

[392] Zuboff (2019).

[393] Although the Protection of Personal Information Act 4 of 2013 (POPI) regulates the way in which personal information is collected and used in the South African context, the Act is still fairly new and only came into force on 11 April 2014 for sections relating to the making of regulations and setting up the institutional framework for the Act; and 1 July 2020 for the remainder of the Act with some exceptions. Moreover a one year grace period to comply with the regulations was granted until 30 June 2021. POPI Act Available from: https://popia.co.za/ [Accessed on 11-03-2022].

4.4.1 Insulated Communities

According to Landman, part of the appeal for residents living in security villages was the sense of community and social control.[394] These kinds of estates are usually private developments run by a governing body for the estate. The governing body provides extensive rules regulations and enforces control measures. This social contract grants residents the feeling that both them and their neighbours share common values that will be upheld in the security of their private village. However, what is concerning about the trajectory of these kinds of insular communities is how they become increasingly detached from the broader society; and entrenches stereotypical profiling of those on the outside. It should be noted that I am not arguing for the dissolution of small communities. However, I am arguing that small communities should foster inclusiveness instead of reifying attitudes of exclusion that lead to further social fragmentation. Moreover, it is short sighted that the sense of community that people desire is created within small enclaves but not within the rest of society.

4.4.2 Exclusivity and Prestige

A by-product of the rise in security villages being associated with affluence was the sense of status and prestige that became associated with in living in a particularly expensive or exclusive estate that had restricted access control.[395]

> "High-powered people prefer to socialise with like-minded people, and need a private and secure space to do so. The creation of such a space is ensured through strict access-control. Residents choose to keep out people who have no business on the estate through spatial measures, such as access-controlling gates, walls, electric fences and private security patrols. Defining space becomes more than just creating a place safe from natural threats, for example wind, rain, extreme heat or cold, etc, but also a place safe from human threats. Living on the estate becomes a status symbol."[396]

Although individual preferences for socialisation should not be controlled and people are free to associate as the choose, the role of the state in spatial planning should be to encourage greater integration of spaces in the city. Furthermore, the state should at least attempt to close the gap in the vast inequality in living standards between the rich and the poor. The exclusivity of security villages some with direct access to private hospitals and private schools would become

[394] Landman (2004) at 21.
[395] Landman (2004) at 24 – 25.
[396] Landman (2004) at 25.

less appealing when these services are made accessible to people in the ordinary course of life. However, this remains an unrealised dream of the majority of South Africans who exist on the periphery.

4.4.3 Safety Concerns

Studies show that crime is reduced in security villages due to surveillance and access controls, although it is not completely prevented.[397] The aim of this research project is not to deny or negate the seriousness of the crime rate in South Africa. Instead it is a plea for a new approach to reimagine a society where the trauma of the past can be healed in tangible ways and the inequality that has led to dire circumstances can be eliminated. I propose that addressing the systemic and institutional issues of the country will be more effective in the long term eradication of crimes against person and property.

4.5 Application of Ubuntu Paradigm

In proposing an Ubuntu paradigm, I recognise that rediscovering Ubuntu will require a paradigm shift in South Africa that is bigger than the limited application to property and gated communities that I have identified. This will require a generative paradigm shift in general that I will describe below.

4.5.1 Systemic Generative Shift

Systemic thinking entails an ecological view of the world that perceives that all of life as interconnected and interdependent.[398] According to Capra and Mattei:

> "In science, this new way of thinking is known as 'systems thinking', or systemic thinking. We have also realized that nature sustains life though a set of ecological principles that are generative rather than extractive. A corresponding paradigm shift has not yet happened in jurisprudence or in the public understanding of law."[399]

Capra and Mattei further proposed that this paradigm shift in jurisprudence should be an ecological view of law that is in tune with nature and community. Similarly, Marjorie Kelly argued that the current design of the global economy is based on a notion of ownership that prioritise maximum physical and financial extraction:[400]

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[397] Landman (2004) at 25.
[398] Capra and Mattei (2015) at 4.
[399] Capra and Mattei (2015) at 4.
[400] Kelly (2012) at 11.

> "Ownership is the gravitational field that holds our economy in its orbit, locking us all into behaviors that lead to financial excess and ecological overshoot."[401]

Therefore, Kelly proposes a shift from an extractive design of ownership and property to a generative design of property and ownership.[402] According to Kelly, a generative design of ownership entails upholding certain principles in generative ways which create the conditions for all living beings to flourish now and for generations to come.[403] These proposals by Capra, Mattei and Kelly indicate that there is growing momentum for a paradigm shift in the broader design of property and the global economy. These sentiments are also echoed in progressive property theories like Alexander's concept of Human Flourishing.

The central argument of this thesis is that an Ubuntu paradigm of property represents an autochthonous African solution to the systemic ecological crises that South Africa and the world is facing. As discussed in Chapter 3, Ubuntu prioritises social relationships, promotes access, fosters social cohesion and considers future generations in a generative way. Therefore, the ultimate solution for addressing the symptomatic aspects of inequality and social fragmentation in the South African context is by a paradigm shift that is familiar to the cultures of South Africa. This is no small feat and requires an inter-disciplinary approach to law, economics and politics in the South African context. However, this shift is not impossible, as there is growing momentum for alternative paradigms to the current design of global capitalism. For example, in response to the financial crisis and climate change, both of which according to systems thinking are interconnected, there has been a surge in the return to indigenous knowledge in the context of climate change;[404] and burgeoning fields of research on regenerative economics based on similar ecological principles.[405] According to John Fullerton, of the Capital Institute, a Regenerative economy is based on the core idea that: "The universal

[401] Kelly (2012) at 244, 259.
[402] Kelly (2012) at 353.
[403] Kelly (2012) 368- 369.
[404] UNESCO "Indigenous Knowledge and Climate Change" UNESCO [Available from: https://en.unesco.org/links/climatechange Accessed on 30-03-2022].
[405] According to the Capital Institute led by John Fullerton, a regenerative economy is: (1) In right relationship; (2) views wealth holistically; (3) Innovative, Adaptive, Responsive; (4) Empowered Participation; (5) Honours Community and Place; (6) Edge Effect Abundance; (7) Robust Circulatory Flow; and (8) Seeks balance. See Capital Institute, "8 Principles of a Regenerative Economy" Capital Institute [Available from https://capitalinstitute.org/8-principles-regenerative-economy/ Accessed on 30-03-2022].

patterns and principles the cosmos uses to build stable, healthy, and sustainable systems throughout the real world can and must be used as a model for economic-system design."[406]

All of which points to the necessity of a new way of thinking, or more accurately returning to a way of thinking and living that had been previously disregarded by colonisation, but is increasingly proving to be the only way to avoid ecological overshoot. Furthermore, in the context of gated communities a shift in paradigm would mean a regenerative shift that goes beyond the adoption of sustainability principles of spatial design but goes to the heart of systemic challenges.[407]

4.5.2 Systemic Shift in Spatial Design

In the area of spatial design, Landman et al. also argue that a paradigm shift will be necessary to build resilient and regenerative cities:[408]

> "Cities of the world are experiencing multiple and unprecedented crisis and face an ever more uncertain future. Within this shifting environment we need to consider our current approaches to city planning as these are inadequate and ineffective in dealing with many of the challenges. In many cases they exacerbate the problems, as while improving the perceived quality of life for a few, the systemic effects are largely destructive. There is a growing realisation that these outdated approaches are based on a worldview that cannot deal with the complexity of living and evolving systems, resulting in flawed paradigms of practice. Alternative paradigms are presented by the discourses of resilience and regenerative development and design. Drawing on the theoretical constructs of complexity thinking, resilience thinking and whole systems thinking, this paper proposes a set of eight planning and design directives to build adaptive capacity and enable urban transformation and regeneration."[409]

Landman et. al argue that these 8 planning and design principles are the following: (1) Identifying transformational leverage points – Leverage points are a concept based in systemic thinking (which views systems as interconnected), therefore the leverage point is the point in

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[406] Capital Institute [Available from https://capitalinstitute.org/8-principles-regenerative-economy/ Accessed on 30-03-2022].

[407] Wahl D.C., "Sustainability is Not Enough: We Need Regenerative Cultures" (2017) Design for Sustainability [Available from: https://designforsustainability.medium.com/sustainability-is-not-enough-we-need-regenerative-cultures-4abb3c78e68b Accessed on 30-03-2022].

[408] Landman K., Du Plessis C., Nel V., and Nel D., (2019) "Directives for Resilient and Regenerative Cities" Conference Paper: CIB World Building Congress, Hong Kong [Available from: https://www.researchgate.net/publication/334465410_Directives_for_Resilient_and_Regenerative_Cities Accessed on 29-03-2022.

[409] Landman et al. (2019) at 1.

the system that is the most effective point to change, in order to maximally affect the whole system.[410] (2) Working from potential – which entails releasing the potential of the system by allowing what it is known about the system to also point the direction for the intervention that will bring about systemic change. In this regard tools such as community engagement practices, spatial analysis and physical mapping are used in releasing this potential.[411] (3) Controlling the hard lines – which means identifying the boundaries of what is essential for the objective.[412] (4) Building adaptive capacity and evolutionary potential.[413] (5) Thinking across the urbs and the civitas – which means recognition of: "*the whole socio-ecological system, including exterior and interior systems such as form, structure, ecosystem services, regulatory aspects, rules, values and norms. The city is not just a physical artefact (urbs). It also includes the noosphere or minds of people, leading to complex social behaviour and interaction that has a direct bearing on the organisation, management and experience of human settlements (civitas). The greatest leverage in such a system can be achieved through changing values and worldviews (Dilts 1996). A change of worldview and mental models of how to engage with the city is therefore needed to create long-term transformation in the urban system.*"[414] (6) Valuing the power of creative destruction in the process of reorganisation will mean "*Removing the 'dead-wood', such as old paradigms, dysfunctional systems, inappropriate policies and inefficient urban forms can enable renewal and change and allow the release and relocation of resources in a more appropriate way*."[415] (7) Working from place involves understanding the memory, history and story of a place.[416] Lastly, (8) Contributing to the health and well-being of the whole system entails fostering deep connections among the living beings of the ecosystem.[417]

Applying these principles to the South African context, will require a paradigm shift and a re-organisation process of removing flawed paradigms. Rooting this paradigm shift in place means an understanding of the history, culture and living memory that is attached to the South African socio-spatial environment. By promoting an Ubuntu paradigm which is attached to the place, there is an opportunity for greater regenerative efficacy. Lastly, the idea of contributing to the well-being of the whole system by fostering connectedness is at the heart of Ubuntu, a

[410] Landman et al. (2019) at 3 – 4.
[411] Landman et al. (2019) at 4.
[412] Landman et al. (2019) at 5.
[413] Landman et al. (2019) at 5 – 6.
[414] Landman et al. (2019) at 6.
[415] Landman et al. (2019) at 7.
[416] Landman et al. (2019) at 7.
[417] Landman et al. (2019) at 8.

recognition of the inherent worth of all living beings within the ecological system and that nature is not outside the system but within the system produces the living conditions for all to flourish both now and for future generations.

4.6 Challenges or Limitations of an Ubuntu Paradigm Systemic Shift

One of the things that I often find striking when visiting my hometown of Serowe in Botswana is the lack of high walls. This does not mean there are no walls or fences to demarcate boundary lines. However, the wall is always low enough and the fence transparent so that one can see and greet to those who live there. As a child I found it frustrating that one could not walk down the street without stopping to greet every neighbour or being requested by an adult to relay a message to my family. The African concept of Ubuntu or Botho in the Setswana culture has implications for how community properties are organised, not as isolated silos but as part of a network of community. As an adult living in the city of Pretoria, South Africa, the former political home of Apartheid, I find it disheartening that despite so much more affluence we have lost the neighbourliness and connection with those around us.

From Setswana traditional practices, I have learned that community acts as the form of social protection that ensures that rules are adhered to and the safety of the community is prioritised. Moreover, both unity and hospitality are practiced as recognition of one's inherent humanity. Both community members and visitors are granted access to be part of the community. Almost to a fault, African cultures have always promoted access to all people for centuries, this is most obviously reflected in the conflict of paradigms between the Khoi San people and colonialists. The Khoi and San perceived the colonialists as visitors to be welcomed and were instead dispossessed. This and other moments of historical dispossession have altered South African society significantly. This historical abuse and exploitation from colonisation to Apartheid (especially during Apartheid) led many to decry the loss of Ubuntu.[418] Healing the nation of this trauma in order to recapture systemic Ubuntu will prove a difficult but it is possible. South Africa is again at a critical moment of history, where as a society we need to recapture the meaning of Ubuntu theoretically and practically in order to transform our society, but this time we have the precedent of how Ubuntu facilitated a democratic transition to both guide and inspire us.

[418] S v Makwanyane at 226 – 227.

Nonetheless, any systemic shift in paradigm will take time. Therefore, this is a modest contribution to the ongoing discussions regarding a generative shift. My aim is to show that South Africa and other African societies already have the vocabulary to conceptualise an alternative paradigm. One of the biggest obstacles to this is overcoming the trauma of the past to recapture the values that have been central to our cultures and implement those in legal institutions and systems that to a large extent were handed down by colonisation. In addition, addressing the real economic challenges that the country is facing will need to be addressed from a regenerative economics perspective, a full analysis of which falls outside the scope of this research project.

4.7 Conclusion

In this chapter, I propose the adoption of an Ubuntu paradigm of property both on a broader systemic level and in the area of spatial planning in respect of gated communities more specifically. In light of systemic thinking, I argue that the rise of gated communities is only a symptom of deeper social fragmentation and systemic inequality. By adopting a generative approach to property and the economy there is the potential to shift from an extractive paradigm to a generative that creates the conditions of flourishing for now and for future generations. Furthermore, an Ubuntu paradigm represents an autochthonous African concept that can accommodate the generative shift that is required in South Africa and (by extension, in light of our interconnectedness) into the world. More specifically, a generative shift in the area of gated communities will entail the adoption of generative principles for sustainable spatial design and planning.

Chapter 5: Conclusion

5.1 Introduction

The primary argument of this argument is that in light of the history of South Africa which was based on exclusion, inequality and segregation, there is a need to adopt an Ubuntu paradigm of property which is based on inclusion, access and social cohesion. Furthermore, an Ubuntu paradigm is in inherently a generative approach to property as it promotes the creation of living conditions for all living beings to flourish now and stewards these conditions for future generations. In the context of gated communities, I argue that these are a remnant of previous lines of segregation based on race but now based on socioeconomic status. Particularly, enclosed neighbourhoods have reinforced the pass laws of Apartheid that restricted movement and access to marginalised groups; while security villages have created enclaves of exclusivity on the landscape of spatial design. Thus, gated communities are reinforcing the us and them narratives of fear and entrenching social fragmentation. Despite real concerns regarding crime in South Africa, I argue that in the context of enclosed neighbourhoods there are less restrictive means of achieving safety objectives; and in general, a more effective approach than fostering an environment of separation would be addressing the systemic issues that have created the vast inequality in the economy and by implication spatial design. This will require an inter-disciplinary approach to law, economics and politics and a generative paradigm shift from exclusion to an Ubuntu paradigm. Moreover, not only will this be beneficial in the South African context but is has theoretical potential for providing the vocabulary for the generative movement that is taking place in climate change, generative property and regenerative economics.

5.2 Chapter Summary

In Chapter 1, I provided a brief overview of an exclusive paradigm of property characterised by the right to exclude at the core of property that was introduced to South African property law through colonisation. Thereafter, I introduced alternative property theories that are characterised by their rejection of an exclusive notion of property, and which are relevant for understanding the concept of Ubuntu. I argued that at the core of these alternative property theories is the notion of a generative purpose at the core of property. For example, the social function of property holds a positive obligation on the owner to use the property productively for the benefit of the community; Alexander's Progressive property theory places human flourishing as the core value of property; A modest systemic status of property prioritises non-property rights like life and human dignity over property in certain instances of public and

quasi-public property; A social theory of the Commons places an ecological view of inclusion, access and community at its core; and Generative property approach places a living purpose at the core of property. The overarching conclusion of the first chapter is that an Ubuntu paradigm of property resonates with these alternative property theories in that it places social relationships at the core of property. Moreover, Ubuntu is inherently generative as the flourishing of the community is emphasised and the community exists in relation to its natural environment and generations across time. Therefore, an Ubuntu paradigm can be used as the prism through which to unite the alternative property theories and to further challenge an exclusive paradigm of property both in the South African context and beyond.

In Chapter 2, I provide a historical account of South African property law to show the plural paradigms of property that exist in the South African context. In this regard, I contrast the communal property paradigm practiced by indigenous people groups with the exclusive paradigm of property introduced by the Dutch and British colonialists. It should be noted that the lack of research on the indigenous property systems of the Setswana and Nguni people groups remains the most glaring aspect of this historical account. Notwithstanding, I argue that within the language of these groups we find the concepts of Ubuntu and Botho which is discussed in more detail in Chapter 3. Thereafter, I provide a description of Apartheid ideology which was the fusion of pure race theory; Apartheid theology; and segregationist ideology which held fear of the "other" as a central narrative. Moreover, the system of Apartheid laws that flowed from this ideology entrenched notions of exclusion, segregation and inequality in the whole of society and institutional design of South Africa. Apartheid laws were met with increasing resistance from the anti-Apartheid struggle movement led by the African National Congress (ANC) which eventually resulted in negotiations in 1990 to transition to a constitutional democracy in 1994. However, the history of South Africa was so marred by the injustices and atrocities of the past that in order to facilitate a peaceful transition, the Truth and Reconciliation Commission (TRC) was established. The TRC was effective in facilitating dialogue and an atmosphere of healing the trauma of the nation. However, the idea that the TRC represented the end of healing when it was only the beginning of healing the deep division of the past, is a key shortcoming of the project. Also, the TRC left much to be desired in respect of the stories that went unheard; for the those who were not classified as victims of Apartheid; and the lack of reparations that were made to victims. In this regard, I concluded (as said by One Mokgatle) that there can be no reconciliation without confrontation of the past or reparations. Thereafter, I presented the current challenges facing South Africa, which in part

are a legacy of the past and the wounds that have yet to be healed brimming to the surface. I propose the rise in gated communities is an example of the narrative of fear re-packaged in post-Apartheid South Africa. The overarching aim of this chapter is to draw the historical connection between colonisation, Apartheid and post-Apartheid notions of exclusive property that entrenched inequality and segregation in the South African context.

In Chapter 3, I unpack the concept of Ubuntu as a value, philosophy and a legal conceptual framework. All of which have important implications. As a value, Ubuntu forms the basis for generative purpose. Ubuntu as a value encapsulates notions of respect, human dignity and life among others. As described by Mokgoro J:

> "The meaning of the concept however, becomes much clearer when its social value is highlighted. *Group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity* have, among others been defined as key social values of ubuntu. *Because of the expansive nature of the concept, its social value will always depend on the approach and the purpose for which it is depended on*. Thus its value has also been viewed as a basis for *a morality of co-operation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood*, all the time *emphasising the virtues of that dignity in social relationships and practices*. For purposes of an *ordered society*, *ubuntu was a prized value, an ideal to which age-old traditional African societies* found no particular difficulty in striving for." [Own emphasis added].[419]

As a philosophy, Ubuntu responds to the search for a purely African identity that characterised African philosophy in the 1920s. Ubuntu as a philosophy is the prism through which social relations are conceptualised and valued, summarised by African humanist philosopher John Mbiti as: "*I am because we are, since we are, therefore I am*". This ontological view of existence is both community based and inherently theistic as all human beings derive their inherent worth from a creator and exist within the context of community, which includes past, present and future generations. Lastly, through the judgments of the Constitutional Court of South Africa, Ubuntu as a legal conceptual framework has been useful in the adjudication of disputes such as the right to life; defamation; hate speech; in the context of nation building; and in property disputes related to eviction. As stated by Sachs J in the *Port Elizabeth Municipality v Various Occupiers* case with reference to the Prevention of Illegal Evictions Act (PIE):

[419] Mokgoro (1997) at 3.

> “Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. *The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order*. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.”[420] [Own emphasis added]

Thus, the overarching conclusion of this chapter is that Ubuntu occupies a central role in the South African constitutional order; and I propose that Ubuntu is the guardian of all the other rights in the Bill of Rights.

In Chapter 4, I apply the notion of an Ubuntu paradigm of property to the context gated communities. I begin by drawing the historical connection between segregation practices and fear in Apartheid and the rise in gated communities in post-Apartheid South Africa. However, I note that, previously segregation was explicitly based on race, now it is based on socioeconomic status in a context where poverty tends to be overwhelming black. There are two main types of gated communities: enclosed neighbourhoods and security villages. Enclosed neighbourhoods are spaces that were never design to be enclosed and are comprised of residential areas with public roads and parks. Whereas Security villages are private developments by private companies with residential areas and shared communal spaces. Due to the difference in the nature of these two kinds of gated communities I considered the different implications that each raises. Enclosed neighbourhoods reflect the most concerning infringement of constitutional rights in post-Apartheid South Africa, as the rights of movement and human dignity are restricted, causing exclusion and lack of access, usually of the poor, from public spaces. Security villages tend to form large enclaves of exclusivity creating vast separation between economic elites and the rest of society which contributes to social fragmentation. Moreover, both of these forms of gated communities perpetuate the legacy of exclusion carried down from Apartheid causing social fragmentation in both the physical environment and symbolically as a result of the history of the country. In proposing an

[420] Port Elizabeth Municipality v Various Occupiers at par 37.

alternative to gated communities, I argued that an alternative to gated communities can only be achieved through a broader generative paradigm shift; and that an Ubuntu paradigm of property represents an autochthonous paradigm shift for which South Africa is ripe in view of its transformational aims. Therefore, applying an Ubuntu paradigm of property to gated communities will mean adopting generative sustainable spatial design. However, regenerative economics and an in-depth discussion on sustainable spatial design falls outside of the scope of this research project and presents the opportunity for future research.

5.3 Research Outcomes

At the outset of this research project, I aimed to answer three questions: Firstly, to what extent is there tension between the plurality of property paradigms competing for supremacy in South African property law? Secondly, does the *Ubuntu* paradigm of property exist and what does it entail? Lastly, what solution does an *Ubuntu* paradigm of property offer to addressing spatial inequality in the context of gated communities in South Africa?

I argued that there exists deep tension between an exclusive paradigm of property and an Ubuntu paradigm of property derived from the communal practices of indigenous South Africans. These paradigms are not only diametrically opposed but also are in a continuous struggle for supremacy. The end of Apartheid marked a critical moment in the transformation of South Africa and began to heal the trauma caused by an exclusive paradigm of property. However, this transformation is incomplete without a shift to an Ubuntu paradigm of property. The constitutional property paradigm was an important marker of transition from Apartheid into post-Apartheid South Africa and the next evolutionary step to a transformed society will require an Ubuntu paradigm shift that is tune with a generative systemic ecological world view. In the context of spatial inequality, I argued that a broader systemic shift will result in generative sustainable spatial design and planning which is inclusive; promotes access to the commons; recognises human dignity and integration; produces social cohesion and furthers the aims of transformative constitutionalism.

5.4 Concluding Remarks

As previously, stated the overarching objective of this research project is to develop a truly autochthonous approach to property law in South Africa that is tune with the values and history of its people. I propose that an Ubuntu paradigm that recognises the inherent dignity and worth of all people is most suited to achieve the transformational aims of South Africa to truly become an egalitarian society that is non-racist, non-sexist but inclusive society as envisaged in the Constitution. On 8 May 1996, the former President of the Republic of South Africa, Thabo

Mbeki made a speech titled: I am an African.[421] This speech, like no other describes the history of South Africa and its aspiration. It recognises the sacrifices of those that have gone before us and reminds those in the present of our responsibility to the past, present and future. It connects us to nature and the land we call home. It recognises the beauty of the diversity of South Africa as a strength. This encapsulates Ubuntu: I am, because we are. Therefore, I conclude that this research project is a modest contribution to ongoing research on South African property law; to healing the injustices of the past and transforming South Africa into the aspirational society the Constitution envisages. Moreover, not only is an Ubuntu paradigm, the self-actualisation of the values of the African people but also our contribution to creating connectedness and Ubuntu in the world. I conclude with the words of Thabo Mbeki, I am an African:

> *Chairperson, Esteemed President of the democratic Republic, Honourable Members of the Constitutional Assembly, Our distinguished domestic and foreign guests, Friends, On an occasion such as this, we should, perhaps, start from the beginning. So, let me begin. I am an African. I owe my being to the hills and the valleys, the mountains and the glades, the rivers, the deserts, the trees, the flowers, the seas and the ever-changing seasons that define the face of our native land. My body has frozen in our frosts and in our latter day snows. It has thawed in the warmth of our sunshine and melted in the heat of the midday sun. The crack and the rumble of the summer thunders, lashed by startling lightening, have been a cause both of trembling and of hope. The fragrances of nature have been as pleasant to us as the sight of the wild blooms of the citizens of the veld. The dramatic shapes of the Drakensberg, the soil-coloured waters of the Lekoa, iGqili noThukela, and the sands of the Kgalagadi, have all been panels of the set on the natural stage on which we act out the foolish deeds of the theatre of our day. At times, and in fear, I have wondered whether I should concede equal citizenship of our country to the leopard and the lion, the elephant and the springbok, the hyena, the black mamba and the pestilential mosquito. A human presence among all these, a feature on the face of our native land thus defined, I know that none dare challenge me when I say - I am an African! I owe my being to the Khoi and the San whose desolate souls haunt the great expanses of the beautiful Cape - they who fell victim to the most merciless genocide our native land has ever seen, they who were the first to lose their lives in the struggle to defend our freedom and dependence and they who,*

[421] Mbeki T., "I Am An African" (1996) National Assembly Available from: http://afrikatanulmanyok.hu/userfiles/File/beszedek/Thabo%20Mbeki_Iam%20an%20African.pdf Accessed on 28 March 2022.

as a people, perished in the result. Today, as a country, we keep an audible silence about these ancestors of the generations that live, fearful to admit the horror of a former deed, seeking to obliterate from our memories a cruel occurrence which, in its remembering, should teach us not and never to be inhuman again. I am formed of the migrants who left Europe to find a new home on our native land. Whatever their own actions, they remain still, part of me. In my veins courses the blood of the Malay slaves who came from the East. Their proud dignity informs my bearing, their culture a part of my essence. The stripes they bore on their bodies from the lash of the slave master are a reminder embossed on my consciousness of what should not be done. I am the grandchild of the warrior men and women that Hintsa and Sekhukhune led, the patriots that Cetshwayo and Mphephu took to battle, the soldiers Moshoeshoe and Ngungunyane taught never to dishonour the cause of freedom. My mind and my knowledge of myself is formed by the victories that are the jewels in our African crown, the victories we earned from Isandhlwana to Khartoum, as Ethiopians and as the Ashanti of Ghana, as the Berbers of the desert. I am the grandchild who lays fresh flowers on the Boer graves at St Helena and the Bahamas, who sees in the mind's eye and suffers the suffering of a simple peasant folk, death, concentration camps, destroyed homesteads, a dream in ruins. I am the child of Nongqause. I am he who made it possible to trade in the world markets in diamonds, in gold, in the same food for which my stomach yearns. I come of those who were transported from India and China, whose being resided in the fact, solely, that they were able to provide physical labour, who taught me that we could both be at home and be foreign, who taught me that human existence itself demanded that freedom was a necessary condition for that human existence. Being part of all these people, and in the knowledge that none dare contest that assertion, I shall claim that - I am an African. I have seen our country torn asunder as these, all of whom are my people, engaged one another in a titanic battle, the one redress a wrong that had been caused by one to another and the other, to defend the indefensible. I have seen what happens when one person has superiority of force over another, when the stronger appropriate to themselves the prerogative even to annul the injunction that God created all men and women in His image. I know what i[t] signifies when race and colour are used to determine who is human and who, subhuman. I have seen the destruction of all sense of self-esteem, the consequent striving to be what one is not, simply to acquire some of the benefits which those who had improved themselves as masters had ensured that they enjoy. I have experience of the situation in which race and colour is used to enrich some and impoverish the rest. I have seen the corruption of minds and souls in the pursuit of an

ignoble effort to perpetrate a veritable crime against humanity. I have seen concrete expression of the denial of the dignity of a human being emanating from the conscious, systemic and systematic oppressive and repressive activities of other human beings. There the victims parade with no mask to hide the brutish reality - the beggars, the prostitutes, the street children, those who seek solace in substance abuse, those who have to steal to assuage hunger, those who have to lose their sanity because to be sane is to invite pain. Perhaps the worst among these, who are my people, are those who have learnt to kill for a wage. To these the extent of death is directly proportional to their personal welfare. And so, like pawns in the service of demented souls, they kill in furtherance of the political violence in KwaZulu-Natal. They murder the innocent in the taxi wars. They kill slowly or quickly in order to make profits from the illegal trade in narcotics. They are available for hire when husband wants to murder wife and wife, husband. Among us prowl the products of our immoral and amoral past - killers who have no sense of the worth of human life, rapists who have absolute disdain for the women of our country, animals who would seek to benefit from the vulnerability of the children, the disabled and the old, the rapacious who brook no obstacle in their quest for self-enrichment. All this I know and know to be true because I am an African! Because of that, I am also able to state this fundamental truth that I am born of a people who are heroes and heroines. I am born of a people who would not tolerate oppression. I am of a nation that would not allow that fear of death, torture, imprisonment, exile or persecution should result in the perpetuation of injustice. The great masses who are our mother and father will not permit that the behaviour of the few results in the description of our country and people as barbaric. Patient because history is on their side, these masses do not despair because today the weather is bad. Nor do they turn triumphalist when, tomorrow, the sun shines. Whatever the circumstances they have lived through and because of that experience, they are determined to define for themselves who they are and who they should be. We are assembled here today to mark their victory in acquiring and exercising their right to formulate their own definition of what it means to be African. The constitution whose adoption we celebrate constitutes and unequivocal statement that we refuse to accept that our Africanness shall be defined by our race, colour, gender of historical origins. It is a firm assertion made by ourselves that South Africa belongs to all who live in it, black and white. It gives concrete expression to the sentiment we share as Africans, and will defend to the death, that the people shall govern. It recognises the fact that the dignity of the individual is both an objective which society must pursue, and is a goal which cannot be separated from the material well-being

of that individual. It seeks to create the situation in which all our people shall be free from fear, including the fear of the oppression of one national group by another, the fear of the disempowerment of one social echelon by another, the fear of the use of state power to deny anybody their fundamental human rights and the fear of tyranny. It aims to open the doors so that those who were disadvantaged can assume their place in society as equals with their fellow human beings without regard to colour, race, gender, age or geographic dispersal. It provides the opportunity to enable each one and all to state their views, promote them, strive for their implementation in the process of governance without fear that a contrary view will be met with repression. It creates a law-governed society which shall be inimical to arbitrary rule. It enables the resolution of conflicts by peaceful means rather than resort to force. It rejoices in the diversity of our people and creates the space for all of us voluntarily to define ourselves as one people. As an African, this is an achievement of which I am proud, proud without reservation and proud without any feeling of conceit. Our sense of elevation at this moment also derives from the fact that this magnificent product is the unique creation of African hands and African minds. But it is also constitutes a tribute to our loss of vanity that we could, despite the temptation to treat ourselves as an exceptional fragment of humanity, draw on the accumulated experience and wisdom of all humankind, to define for ourselves what we want to be. Together with the best in the world, we too are prone to pettiness, petulance, selfishness and shortsightedness. But it seems to have happened that we looked at ourselves and said the time had come that we make a super-human effort to be other than human, to respond to the call to create for ourselves a glorious future, to remind ourselves of the Latin saying: Gloria est consequenda - Glory must be sought after! Today it feels good to be an African. It feels good that I can stand here as a South African and as a foot soldier of a titanic African army, the African National Congress, to say to all the parties represented here, to the millions who made an input into the processes we are concluding, to our outstanding compatriots who have presided over the birth of our founding document, to the negotiators who pitted their wits one against the other, to the unseen stars who shone unseen as the management and administration of the Constitutional Assembly, the advisers, experts and publicists, to the mass communication media, to our friends across the globe - congratulations and well done! I am an African. I am born of the peoples of the continent of Africa. The pain of the violent conflict that the peoples of Liberia, Somalia, the Sudan, Burundi and Algeria is a pain I also bear. The dismal shame of poverty, suffering and human degradation of my continent is a blight that we share. The blight on our happiness

that derives from this and from our drift to the periphery of the ordering of human affairs leaves us in a persistent shadow of despair. This is a savage road to which nobody should be condemned. This thing that we have done today, in this small corner of a great continent that has contributed so decisively to the evolution of humanity says that Africa reaffirms that she is continuing her rise from the ashes. Whatever the setbacks of the moment, nothing can stop us now! Whatever the difficulties, Africa shall be at peace! However improbable it may sound to the sceptics, Africa will prosper! Whoever we may be, whatever our immediate interest, however much we carry baggage from our past, however much we have been caught by the fashion of cynicism and loss of faith in the capacity of the people, let us err today and say - nothing can stop us now!"

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