Ubuntu in a land reform context: Opportunities and Challenges

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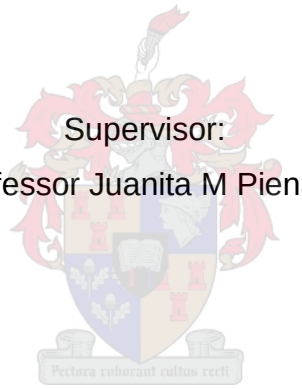

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Declaration

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Inga Dyantyi
February 2021

Summary

It is common cause that South Africa suffers from a racially-skewed unequal distribution of land. The unequal patterns of access to land that continue to plague the country were facilitated by racially discriminatory laws and policies in the colonial and apartheid eras. The legislative framework that emerged from the formation of the Union of South Africa in 1910 merely intensified the legacy of dispossession that had been established from the 17th to the 19th century. Consequently, at the advent of democracy in 1994, the newly-elected African National Congress government embarked on an all-encompassing land reform programme that was aimed at both redressing historical injustices and providing pathways for the future.

The land reform programme in South Africa is three-fold, namely: land redistribution, tenure reform and land restitution. While all of the three sub-programmes are presently arguably in crisis, the main focus of the thesis – given the Ubuntu-dimension – is on particular aspects of the redistribution and restitution sub-programmes specifically. In this light, Ubuntu calls for a more people-centred, as opposed to a market-oriented approach, to land reform. Accordingly, the three specific matters explored within the redistribution and restitution contexts are: concerns related to the willing seller, willing buyer model of land acquisition; the links between land reform and poverty reduction and the lack of post-settlement support. Analysis of the above indicates clearly that innovative and community-based solutions are necessary for a more successful land reform programme.

It is in this context that this study investigates the possible opportunities and drawbacks that could result from the application of Ubuntu in the land reform programme. This study takes a critical look at Ubuntu, both as a socio-cultural ethic and as a legal value. Heeding the lessons learnt from the Truth and Reconciliation process, where Ubuntu also resonated, and thereafter applying the principles, components and aims of Ubuntu to the above identified issues in the land reform programme, recommendations to existing processes and role players; as well as new developments, are made. While challenges may remain in employing Ubuntu in a land reform context, the study shows unequivocally that a more people-centred approach, inherent in Ubuntu, is not only possible, but is necessary for more effective land reform.

Opsomming

Dit is algemene kennis dat ras sentraal is tot die ongelyke verdeling van grond in Suid-Afrika. Die ongelykheid in die toegang tot grond wat steeds die land teister, is vergemaklik deur rasdiskriminerende wette en beleide van die koloniale en apartheidsperiodes. Die wetgewende raamwerk wat ontstaan het na die stigting van die Unie van Suid-Afrika in 1910, het die erfenis van onteiening wat vanaf die 17de tot die 19de eeu gestrek het, verder versterk. As gevolg hiervan, het die nuutverkose African National Congress-regering met die aanbreek van demokrasie in 1994 'n omvattende grondhervormingsprogram begin wat daarop gemik was om tegelykertyd historiese ongeregtighede reg te stel en rigtinggewend vir die toekoms te wees.

Die grondhervormingsprogram in Suid-Afrika het drie subafdelings, naamlik: grondherverdeling, grondbeheerhervorming en grondrestitusie. Alhoewel al drie hierdie subprogramme tans waarskynlik in 'n krisis verkeer, is die hooffokus van die tesis - gegewe die Ubuntu-dimensie - op spesifieke aspekte van die grondherverdeling- en restitusie-subprogramme. Met inagneming van Ubuntu, word 'n meer mensgerigte benadering tot grondhervorming vereis. Dit is in teenstelling met ‘n markgerigte benadering. In hierdie konteks word drie spesifieke aangeleenthede binne die herverdeling- en restitusiekontekste ondersoek, naamlik: aangeleenthede verwant aan die gewillige verkoper-gewillige koper-model van grondverkryging; die verband tussen grondhervorming en die verligting van armoede; en die gebrek aan ondersteuning na finalisering van grondeise. Die ontleding van hierdie kwessies dui duidelik aan dat innoverende en gemeenskapsgebaseerde oplossings nodig is vir 'n meer suksesvolle grondhervormingsprogram.

Dit is in hierdie konteks dat die studie die moontlike geleenthede en nadele wat die toepassing van Ubuntu in die grondhervormingsprogram kan hê, ondersoek. Hierdie studie ontleed Ubuntu krities, beide as sosio-kulturele etiese konsep en as ‘n regswaarde. Met inagneming van die lesse wat geleer is van die Waarheid en Versoeningskommissie se gebruik van Ubuntu tydens hulle proses, word die beginsels, elemente, en doelstellings van Ubuntu toegepas op bostaande kwessies in die grondhervormingsproses. Daar word vervolgens ook aanbevelings gemaak rakende bestaande prosesse en potensiële nuwe areas van ontwikkeling word voorgestel. Alhoewel daar uitdagings kan wees om Ubuntu in 'n

grondhervormingsverband aan te wend, toon die studie onomwonde dat 'n meer mensgesentreerde benadering, inherent aan Ubuntu, nie net moontlik is nie, maar ook noodsaaklik is vir meer effektiewe grondhervorming.

Acknowledgements

This thesis bears my name, contains my ideas and reflects my passion but I could not have done it alone. It truly takes a village.

First and foremost, I have to extend my sincerest gratitude to my supervisor, Professor Juanita M Pienaar. From the start, she provided me with immeasurable support, guidance, encouragement and, most importantly, understanding. Her incisive feedback always encouraged me to think a bit more deeply, to work a bit harder and to express myself a bit more clearly. Thank you for always making me feel heard, Prof.

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I owe a debt of gratitude to Stellenbosch University and the Stellenbosch University Law Faculty for funding my studies, through various bursaries, from the undergraduate level up until this point. I am also grateful to the Stellenbosch University librarians for making my frequent visits to the library during this process very pleasant experiences. You are all truly such lovely people.

The best part about writing a thesis on land reform in South Africa is that every South African you encounter believes to have the solution to this issue – from the Uber drivers to the Engineers. This is the gift of living in a country as opinionated and as politically-conscious as ours. Thank you to all of you – you made this experience an illuminating and entertaining one.

“I come as one but I stand as ten thousand” – Maya Angelou

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Chapter 1: Introduction

1 1 Title of Thesis

Ubuntu in a land reform context: opportunities and challenges.

1 2 Introduction

To say that land reform is a controversial and contentious issue in South Africa seems to be an understatement. In the past few years, various reports have been published highlighting the plethora of concerns relating to and challenges underlying the land reform programme.[1] Some academics have further described the land reform programme in South Africa as "unsatisfactory",[2] "excruciatingly slow"[3] and as being "characterised by uncertainty".[4] On 13 December 2019, the long-awaited Draft Constitution Eighteenth Amendment Bill ("Draft Bill"), aimed at amending section 25 of the Constitution of the Republic of South Africa, 1996 ("Constitution") was published for comment.[5] The aim of the Draft Bill, as contained in the Memorandum to the Bill and in the long title of the Bill, is to amend section 25 of the Constitution to provide specifically for the expropriation of land "without the payment of compensation".[6] The imminent amendment of section 25 of the Constitution seems to have been motivated by the perceived failure of the current land reform programme.[7] The process of amending the property clause has not been concluded yet and even after such amendment has been effected, the actual impact thereof may still not necessarily promote land reform, as ostensibly envisaged. The question thus arises as to whether there may be other possible options, currently already available, that could assist in the land reform endeavour. Of especial concern within a more people-centred

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[1] Parliament of the Republic of South Africa *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 – 601; RSA *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (2019) 1- 132.
[2] M Aliber "Unravelling the 'Willing Buyer, Willing Seller" Question" in B Cousins & C Walker (eds) *Land Divided, Land Restored*: *Land Reform in South Africa for the 21st Century* (2015) 145 159.
[3] 161.
[4] JM Pienaar "Reflections on the South African Land Reform Programme: Characteristics, Dichotomies and Tensions (Part 2)" (2014) 4 *TSAR* 689 701. See also JM Pienaar "Approaching Systemic Failure? A Brief Overview of Recent Land Reform Case Law" (2020) 3 *TSAR* 536 – 546.
[5] Constitution Eighteenth Amendment Bill (Draft) in GN 652 *GG* 42902 of 13 -12-2019. Because of the onset of the Covid-19 pandemic, the process of amending the property clause could not be concluded by the set deadline of 31 December 2020.
[6] Constitution Eighteenth Amendment Bill (Draft) in GN 652 *GG* 42902 of 13 -12-2019.
[7] W Roelf "Vote in parliament moves land reform closer" (28-02-2018) *Moneyweb* <https://www.moneyweb.co.za/news/south-africa/vote-in-parliament-moves-land-reform-closer/> (accessed 01-03-2018).

approach, compared to a market-approach, are the following three matters located in the redistribution and restitution sub-programmes, namely (a) the willing-seller-willing-buyer principle ("WSWB"); (b) whether land reform truly leads to poverty reduction; and (c) the lack of governmental support to land reform beneficiaries. In this context, the proposed research will investigate the possible application of Ubuntu as a constitutional value in the land reform programme generally, and specifically in the redistribution and restitution sub-programmes, and the possible opportunities and drawbacks in this regard.

1 3 Research Aims

This thesis aims to:

- Explore the material, symbolic and socio-cultural importance of access to land.
- Evaluate the main shortcomings of the policy and approach in relation to two of the sub-programmes of the land reform programme, namely land redistribution and land restitution.
- Investigate the socio-cultural and legal meaning of Ubuntu.
- Explore the factors and issues considered to be barriers to a more rigorous application of Ubuntu as a legal value.
- Analyse the desirability of the application of Ubuntu in the land reform programme.
- Explore the possible benefits of the application of Ubuntu in the redistribution and restitution sub-programmes.
- Explore the possible negative implications or drawbacks of the application of Ubuntu in the redistribution and restitution sub-programmes.

1 4 Hypotheses

- The assumption is that access to land would improve the economic circumstances of the beneficiaries; that it would serve the symbolic function of redressing the historical injustices brought about by colonialism and apartheid; and that it would satisfy some of the most pressing socio-cultural needs of the dispossessed black population.

- The policy and approach to the redistribution and restitution sub-programmes in the overarching land reform programme exhibit clear shortcomings – not all to be dealt with in the study. Some of these shortcomings include the unsustainability of the high prices being paid by government for land; the impact of land reform on poverty alleviation and the lack of support given to beneficiaries and claimants post-settlement.
- While the concept of Ubuntu is not easily definable, it is expected that a social and judicial commitment to exploring this concept and legal value more comprehensively (and not merely as an after-thought), would add critical value to the land reform discourse and could result in practical improvements as well.
- Various barriers arguably preclude a more rigorous application of Ubuntu in law, including a lack of conceptual clarity of the term;[8] the collectivist/communitarian focus of Ubuntu which is perceived by some as constituting "group-think" and "uncompromising majoritarianism";[9] and the perception that Ubuntu adds no real value to the legal framework besides adding "local flavour" to existing Western jurisprudence.[10]
- It is expected that some lessons can be learnt from the Truth and Reconciliation process, where Ubuntu also resonated, that may be useful in the land reform domain.
- Building on the above, it is submitted that Ubuntu would improve the land reform programme. This is because of the idea that property rights are negotiated entitlements that arise out of social interactions and shared histories.[11] To redress access to land injustices in a manner that protects the rule of law whilst facilitating true healing and reconciliation (restorative justice) will take a legal and social course of action that is suffused by the spirit of Ubuntu.
- Based on the above, it is submitted that Ubuntu could improve certain elements of land redistribution and restitution because it enables a shift from a market-oriented reform programme to a people-oriented one.

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[8] K Furman "Ubuntu and the Law: Some Lessons for the Practical Application of Ubuntu" in L Praeg & S Magadla (eds) *Curating the Archive* (2014) 150 151.
[9] T Metz "Ubuntu as a moral theory and human rights in South Africa" (2011) 11 *AHRLJ* 532 533.
[10] Furman "Ubuntu and the Law" in *Curating the Archive* 158.
[11] H Holtzhausen *Ubuntu and the quest for land reform in South Africa* D.TH thesis, University of Pretoria (2015) 4.

- An expected drawback to the application of Ubuntu in the land redistribution and restitution sub-programmes is the silencing effect that its focus on civic virtue could have on those who require redistributive as opposed to restorative justice.[12] The risk of obligated consensus and secondary victimisation of the dispossessed forms part of this drawback.[13]

1 5 Methodology

The proposed research will utilise primary and secondary sources of law in an attempt to attain the research aims. In terms of primary sources, the following will be analysed and discussed: (a) colonial-and-apartheid era initiatives and legislation that led to the dispossession of black people; (b) legislation enacted to give effect to land reform, specifically within the redistribution (promoting access to land) and restitution domains, for example, the Restitution of Land Rights Act 22 of 1994; and (c) governmental policy as it relates to the implementation of land reform, specifically concerning redistribution and restitution. With regard to the latter, the focus will be on shortcomings and areas rife for improvement.

In terms of secondary sources of law, journal articles and academic books will be utilised to highlight the issues and failings that continue to plague the land reform programme, in particular the redistribution and restitution sub-programmes. Journal articles and academic books as secondary sources of law will also be used to give content to Ubuntu as a socio-cultural value in order to facilitate a broader understanding of Ubuntu and its transformative potential. The legal formulation of Ubuntu as it appears in case law will be used to comprehensively define it as a legal concept and to identify the possible effect that its application could have within the land reform context.[14]

1 6 Motivation and background for research

[12] C Himonga, M Taylor & A Pope "Reflections on Judicial Views of Ubuntu" (2013) 16 *PER* 370 386.
[13] Secondary victimisation, in this context, refers to the risk inherent in restorative justice measures of further humiliating and victimising the survivor of an injustice and/or atrocity while the perpetrator seems to be absolved from blame and accountability. See J Mcguire "The South African Truth and Reconciliation Commission as a Therapeutic Tool" (2000) 18 *Behav Sci Law* 459 462; See also RA Wilson *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001) 12.
[14] This study covers legal developments up to 31 December 2020.

1 6 1 The significance of access to land

1 6 1 1 The history of dispossession

Access to and control of land can be said to have been a pertinent, foundational tenet of colonialism and apartheid.[15] In 1652, the first white settlers arrived in the Cape with a view of permanent settlement.[16] Beginning from 1658, Khoi people were forcibly removed from their land. Over a period of time, following these evictions, numerous colonial and military conquests that stripped black people of their land ensued.[17] These dispossessions were legitimated by legislation such as the Native Location Act 40 of 1879 in the Cape Colony and the Squatter Laws Act 11 of 1887 in the Transvaal.[18] It is estimated that, by the end of the 19th century, Zulu people had lost 75% of their land while Sotho-Tswana people had lost even more than that.[19]

Arguably, the piece of legislation that had the most devastating effect on the dispossession of black people of their land was the Natives Land Act 27 of 1913 ("Natives Land Act").[20] As described by the court in the matter of *Daniels v Scribante and Another*,[21] Mr Sol Plaatje – one of the most notable freedom fighters alive at the time the Act was passed – expressed the following sentiments regarding the Natives Land Act:

> "Awaking 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".[22]

The Natives Land Act had three important elements to it. Firstly, black people were forbidden from purchasing, leasing or in any other way acquiring land that fell outside of the "scheduled native areas".[23] Secondly, the Act called for the creation of a commission that would determine the areas to be demarcated for occupation by black

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[15] S Greenberg "Redistribution and access in a market-driven economy" in S Greenberg (ed) *Development Update: Piecemeal Reforms and Calls for Action* (2003) 1 3.
[16] SM Pityana "The 'Land Question': The South African Constitution and the Emergence of a Conservative Agenda" in B Cousins & C Walker (eds) *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015) 161 166.
[17] 166.
[18] 166
[19] HM Feinberg *Our Land, Our Life, Our Future* (2015) 9.
[20] Later renamed the Black Land Act 27 of 1913.
[21] 2017 4 SA 341 (CC).
[22] Para 14.
[23] JM Pienaar *Land Reform* (2014) 82.

people.[24] Thirdly, the Act forbade cash rental and sharecropping of land by black people living outside the demarcated areas and it required black people occupying white-owned land to render a 90-day service per year to the land owner.[25]In this way, black people were suddenly converted into a class of labourers.[26] As a result of the Natives Land Act and various other pieces of legislation enacted in the Union of South Africa, analysed in more detail in the study where appropriate, at the dawn of democracy in 1994, black land rights were limited to approximately 13% of the country's land.[27]

1 6 1 2 The material, symbolic and spiritual importance of land

As is highlighted by Pienaar, land is the foundation of humanity's very existence.[28] It provides us with "shelter, food, work and nationhood".[29] However, land is not only significant for economic or political purposes – it also plays a crucial role in terms of African spirituality and the redress of historical injustices. It is in this light that the study aims to contribute to land reform research with Ubuntu as the focus specifically, as elaborated on in more detail below.

1 6 1 2 1 The material importance of land

Zirker provides that land was the pillar of the apartheid structure.[30] She explains that access to land was used as a means to "socially and economically suppress" the black population, and thus the deprivation of property led to great "poverty and social instability" in the black community.[31] Land reform seeks to redress this instability, amongst other objectives. Where land has been transferred, this has been with the main expectation that beneficiaries would implement a commercial farming model with

[24] W Beinart & P Delius "The Natives Land Act of 1913: A Template but Not a Turning Point" in B Cousins & C Walker (eds) *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015) 24 26.
[25] 26.
[26] T Ngcukaitobi *The Land is Ours* (2018) 138.
[27]B McCusker, WG Moseley & M Ramutsindela *Land Reform in South Africa: An Uneven Transformation* (2016) 2.
[28] Pienaar *Land Reform* 200; RSA *Final Report of the Presidential Advisory Panel 15.*
[29] Pienaar *Land Reform* 200; RSA *Final Report of the Presidential Advisory Panel 15.*
[30] M Barry "Now Another Thing Must Happen: Richtersveld and the Dilemmas of Land Reform in Post-Apartheid South Africa" (2004) 20 *SAJHR* 355 356.
[31] 356.

the help of external consultants.[32] One of the aims of the land reform programme is to provide beneficiaries with commercial farming as a method of earning a livelihood and of economic growth.

Some studies have shown that although the proportion of the population that lives below the poverty line remains higher in rural areas than in urban areas, it remains the highest in rural areas without access to land.[33] Further, a study conducted in 2009 and 2010 in the Chris Hani district regarding the effects of the land redistribution projects concluded that the living conditions of those who had received land were better than those who had not.[34]

The Final Report of the Presidential Advisory Panel on Land Reform and Agriculture ("Final Report of the Presidential Advisory Panel") also made reference to the link between economic efficiency and perpetual property rights that are fully tradable.[35] In this regard, the Final Report discussed a group of white farmers who managed to, through the combination of access to land, access to finance and farmer support systems, become globally competitive and contributed significantly to the country's Gross Domestic Product ("GDP").[36] The Final Report emphasised that landlessness amounted to the "economic exclusion" of the majority of South Africans.[37]

Land reform is also considered as a means to ensure black economic empowerment in accordance with the Broad-Based Black Economic Empowerment Act 53 of 2003.[38] Finally, restored farms also provide a place of residence for those who were historically dispossessed of their land.[39] To a certain extent, this seeks to address the overcrowding that prevailed in the former Bantustans.[40]

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[32] SE Shackleton & CM Shackleton "Not Just Farming: Natural Resources and Livelihoods in Land and Agrarian Reform" in B Cousins & C Walker (eds) *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015) 191 202.
[33] H Chitonge & L Ntsebeza "Land Reform and Rural Livelihoods in South Africa: Does Access to Land Matter?" (2012) 2 *RAS* 87 91.
[34] 106.
[35] RSA *Final Report of the Presidential Advisory Panel* v.
[36] RSA *Final Report of the Presidential Advisory Panel* v.
[37] RSA *Final Report of the Presidential Advisory Panel* v.
[38] E Lahiff "Land Reform in South Africa: A Status Report 2008" (2008) *PLAAS* 1 7.
[39] Shackleton & Shackleton "Natural Resources and Livelihoods" in *Land Divided, Land Restored* 203.
[40] Chitonge & Ntsebeza (2012) *RAS* 107.

1 6 1 2 2 The spiritual importance of land

In 1912, John Dube – former President of the South African Native National Congress (SANNC) – had the following to say about access to land, "From land, we derive our existence".[41] The founding document of the Black First Land First movement, founded in 2015, contains the following statement regarding access to land:

> "The bones of our ancestors are crying out for land. . . It is the land that gives us life and when we die, it's the land that takes care of our bodies. Without land we are nothing! With land we are everything! That is why we must be black first through getting the land first!"[42]

These sentiments serve to illustrate the spiritual importance of land to black people. Access to land and its ownership goes beyond considerations of its productivity and its economic potential – it extends to spiritual and cultural needs. In many African families, the umbilical cord of a new-born baby is buried on the family's plot of land; the foreskin and blood are also buried where circumcision is practised in that particular community.[43] The significance of land also relates to the fact that ancestors are buried in it.[44] Land is sacred in African culture because it is the link to those who have passed on and who are perceived to protect and guide the living from the other side. In African philosophy, communion with the ancestors (the departed) facilitates more meaningful prayers with God.[45]

1 6 1 2 3 The symbolic importance of land reform

The symbolic importance of land reform to black people in South Africa lies in the idea of it representing the redress of historical injustices. As Kepe states, "…inequalities in land ownership 'stand for' and evoke the broader inequalities that post-apartheid policies have yet to undo".[46] The restoration and redistribution of land then becomes

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[41] Feinberg *Our Land* 1.
[42] Black First Land First "Black Agenda" (2016) *Black First Land First* <https://blf.org.za/policy-documents/black-agenda/> (accessed 02-02-2018).
[43] Z Nkosi "Spirituality, Land and Land Reform in South Africa" (1999) *The Earth as Mother* < http://www.wcc-coe.org/wcc/what/jpc/echoes-16-05.html#nkosi/> (accessed 12-03-2018).
[44] Nkosi "Spirituality, Land and Land Reform in South Africa" *The Earth as Mother*. See also S6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 which confers upon occupiers of land burial rights in accordance with their culture or religion. See also *Nhlabathi and Others v Fick* 2003 2 All SA 323 (LCC) para 30.
[45] A Ufumeli "Why land evokes such deep emotions in Africa" (27-02-2015) *The Conversation* <https://theconversation.com/why-land-evokes-such-deep-emotions-in-africa-42125> (accessed 20-03-2018).
[46] Pienaar (2014) *TSAR* 699.

an acknowledgement of the varied forms of violence that were perpetrated on people through dispossession and it becomes a commitment to empower those who were systematically disempowered. In the words of Aliber, "land redress redresses the totality of dispossession".[47]

1 6 2 Challenges within the land reform programme

As alluded to above, there are various issues and difficulties in land reform.[48] It is beyond the scope of the proposed research to explore all of them. In light of the main focus of the study, namely the possible utilisation of Ubuntu in the land reform context, thus endorsing a more people-centred approach, three specific issues are highlighted for further exploration: (a) the willing-seller-willing-buyer principle ("WSWB"); (b) the uncertainty as to whether land reform truly leads to poverty reduction; and (c) the lack of governmental support given to beneficiaries after the restoration of land.

Apart from the link between these issues and the possibility of employing Ubuntu at an overarching level, these particular issues also exhibit communal and interpersonal aspects. It is thus envisaged that the application of Ubuntu to these particular aspects of the programme could lend more tangible results and thus promote more effective land reform overall.

1 6 2 1 Issues with the WSWB-principle

The WSWB-principle, which underlies South Africa's land reform programme as far as it relates to market value and the acquisition of land, has been described as an "arguably deeply flawed" policy.[49] Some critics have argued that this policy protects the interests of white land owners to the detriment of the disenfranchised.[50] According to Ntsholo, market-led reform was "paradoxical" because the would-be beneficiaries of land reform were once the victims of the "market forces" that now had the power to determine the progress of land reform.[51] The WSWB-principle has also been identified as the cause of the slow pace of land reform and it has been said that it leads to higher

[47] Aliber "Wiling Buyer, Willing Seller" in *Land Divided, Land Restored* 153.
[48] See generally Pienaar (2020) *TSAR* 536 – 546.
[49] E Lahiff "Redistributive Land Reform and Poverty Reduction in South Africa" (2007) *PLAAS* 1 25.
[50] Aliber "Willing Buyer, Willing Seller" in *Land Divided, Land Restored* 145.
[51] L Ntsholo *Land Dispossession and Options for Restitution and Development: A case study of the Moletele Land Claim in Hoedspruit, Limpopo Province* MPhil thesis, University of the Western Cape (2009) 1.

remuneration prices than would exist under other policies.[52] In his 2013 State of the Nation address, former President Jacob Zuma asserted that the WSWB-principle would be discarded in favour of a "just and equitable" approach to compensation as set out in the Constitution because "the WSWB-approach forces the state to pay more for the land than the actual value".[53]

A former Minister of Rural Development and Land Reform,[54] Gugile Nkwinti, commented in 2018 that the WSWB-principle had decelerated the pace of land reform as it had led to prolonged land price negotiations and it was increasingly making land reform financially unsustainable for the state.[55] The WSWB-principle has even been criticised by some land owners – who seem to be the chief beneficiaries of this policy – for its cumbersome bureaucratic process and slow payments.[56] The last and perhaps most profound challenge to the WSWB-principle lies in the fact that it is seen by some as legitimating the land theft that happened in the apartheid era. As Dladla argues, under colonialism and apartheid, black people were wrongfully dispossessed of their land to the benefit of settlers, therefore the protection of property rights in the Constitution – irrespective of the dubious means of their acquisition – really becomes the protection of land owners who are the beneficiaries of former racist property laws.[57]

Whereas various problems inherent in the WSWB-principle have been identified,[58] as alluded to above, there has already been some movement away from the principle. An example of this lies in the promulgation of the Property Valuation Act 17 of 2014. Under this Act, "market value" is defined and approached in such a manner so that the WSWB-principle is not dominant.[59] This is the case where property is acquired for land

[52] Lahiff (2007) *PLAAS* 25.
[53] Aliber "Willing Buyer, Willing Seller" in *Land Divided and Land Restored* 149.
[54] Since May 2019 the Department is referred to as the Department of Agriculture, Rural Development and Land Reform.
[55] RSA "Willing buyer-willing seller slowing land reform, says minister" (01-03-2012) *South African Government News Agency* <https://www.sanews.gov.za/south-africa/willing-buyer-willing-seller-slowing-land-reform-says-minister> (accessed 01-05-2018).
[56] Lahiff (2007) *PLAAS* 25.
[57] N Dladla "Towards an African Critical Philosophy of Race: Ubuntu as a Philo-Praxis of Liberation" (2017) 6 *AJOL* 41.
[58] See also JM Pienaar "Willing-Seller-Willing-Buyer and Expropriation as Land Reform Tools: What Can South Africa Learn from the Namibian Experience?" (2018) 10 *NLJ* 41-64.
[59] S1 of the Property Valuation Act 17 of 2014 defines market value as an "estimated amount for which the property should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion". See also the definition of "value" in terms of s1 of the Act which is

reform purposes. The process of amending the property clause to enable expropriation with nil compensation is a further example of moving away from the WSWB-principle. While these developments have the potential to make the acquisition of land more affordable and/or more sustainable, the use of Ubuntu in this context still needs to be explored and its potential optimised. Combined, these measures and Ubuntu have the potential to address the problems and difficulties highlighted above.

1 6 2 2 The lack of governmental support afforded to beneficiaries

A further issue of the market-led reform programme, specifically in South Africa, is the lack of support afforded by government to beneficiaries who have acquired land.[60] Recent studies indicate that most beneficiaries struggle to access services such as funding, training, veterinary services and so forth.[61] This often leads to the lack of profitability on the land received by these beneficiaries.[62]

1 6 2 3 The relevance of land reform to contemporary South African issues

There seems to be divided opinions in academic literature regarding the feasibility and impact of land reform. Some academics argue that the world population – including that of South Africa – is moving to urban areas where the more relevant issues are access to adequate housing and chronic unemployment as opposed to access to land, while others continue to argue that land reform leads to poverty alleviation.[63] Given this mixed review and in light of a more people-centred approach, rather than a market-dominated approach to land reform, it is thus useful to explore whether land reform

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"the value of property identified for purposes of land reform, which must reflect an equitable balance between the public interest and the interests of those affected by the acquisition, having regard to all the relevant circumstances, including the—
(a) current use of the property;
(b) history of the acquisition and the use of the property;
(c) market value of the property;
(d) extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) purpose of the acquisition."

[60] Lahiff (2007) *PLAAS* 30.

[61] 30.

[62] R Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in B Cousins & C Walker (eds) *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015) 127 139.

[63] S Joseph, P Magni & G Maree "Land and the Battle for the Nation's Soul" (2015) *The Urban Land Paper Series* 1 2 <http://www.sacities.net/wp-content/uploads/2015/10/Urban-Land-Series-Vol-1-SACN-2015.pdf> (accessed 30-03-2018).

truly does enhance livelihoods, especially within the redistribution and restitution sub-programmes.

1 6 2 4 The possible role of Ubuntu

As explained, the particular issues identified above all have communal and interpersonal dimensions. Therefore, it is possible that Ubuntu can make a difference with regard to these particular issues, the extent and scope of which to be explored in detail in this study.

The WSWB-principle requires a determination of the price of the land by the seller, and negotiations with the government on behalf of the buyer. The role that Ubuntu could play in this regard could involve negotiations that are conscientious of South Africa's unjust past, and the need to redress this, which could lead to more just and equitable prices being accepted for the land as opposed to market-value ones. This remains the case even when new developments within this domain are taken into account and even though the possibility already exists that market value can be adjusted upwards or downwards, depending on the circumstances.[64] How and at what point Ubuntu is to be incorporated in the process therefore need further study and clarification.

The issue of the lack of governmental support after the restoration of farms could also be rectified by the exhibition of compassion and communitarianism in the programme through the seller's continued involvement on the farm – through training and assisting the beneficiaries – to ensure the prosperity of the land. As was previously stated, it has been argued by some that land reform is irrelevant to the economic issues plaguing contemporary South Africa.[65] It is submitted that these arguments in themselves lack an understanding of African custom and spirituality. By focussing on the possible utilisation of Ubuntu, these issues can be unpacked and analysed more effectively.

[64] *Uys N O and Another v Msiza and Others* 2018 3 SA 440 (SCA) para 12.
[65] See discussion under 1 6 2 3.

Land reform is not the solution to all the issues experienced in South Africa – as Pienaar states, it is "impossibly the 'be all and end all' of all social, economic, developmental and political problems".[66] However, it is part of the solution. Even if land reform does little to improve the economic circumstances of its beneficiaries, a further consideration enters into the picture: African customary law and Ubuntu underscore *ityala aliboli,* namely that there is no prescription period on a wrongdoing/a wrong is a wrong until it is rectified.[67] Land was wrongfully taken from black people, and Ubuntu requires that that wrong be corrected. Given the true spirit of Ubuntu, this is not, however, a retributive or punitive concept, as elaborated on in more detail below.

1 6 3 The transformative potential of Ubuntu

1 6 3 1 Ubuntu as a legal value

The first appearance of Ubuntu as a legal value in the South African legal system was in the post-amble of the interim Constitution.[68] The post-amble mandated the creation of the Promotion of National Unity and Reconciliation Act 34 of 1995 on the basis that there was a "need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation".[69] Although Ubuntu was not included in the final Constitution, the commitment to recognising it as a jurisprudential value has been evident through its application in case law. Ubuntu was first recognised as a Constitutional value in *S v Makwanyane and Another*.[70] For the majority judgment, Chaskalson P held that "[t]o be consistent with the value of ubuntu, ours should be a society that wishes to prevent crime [not] to kill criminals simply to get even with them".[71]

The landmark matter of *Port Elizabeth Municipality v Various Occupiers*[72] showed the potential of Ubuntu as an interpretive value in the adjudication of socio-economic rights.[73] In this matter, the Municipality sought an eviction order against 68 people who

[66] Pienaar *Land Reform* 38.
[67]T Madlingozi "Social justice, decolonisation and legal education" (Video) (2016) *Stellenbosch University* < http://learn.sun.ac.za/mod/resource/view.php?id=403088> (accessed 16-05-2018).
[68] Furman "Ubuntu and the Law" in *Curating the Archive* 151.
[69] 151.
[70] 1995 3 SA 391 (CC).
[71] Para 130.
[72] 2005 1 SA 217 (CC).
[73] Furman "Ubuntu and the Law" in *Curating the Archive* 155; 2005 1 SA 217 (CC) para 37.

had been living in shacks on private property for years. In his judgment, Justice Sachs held that the spirit of Ubuntu "suffused" the entire constitutional order and that it combined the importance of individual rights with a communitarian philosophy.[74]The court held that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 had to balance competing interests in a manner that would promote the "constitutional vision of a caring society based on good neighbourliness and shared concern".[75]

In the *Afriforum and Another v Malema and Others* matter,[76] Lamont J adjudicating on behalf of the Equality Court, held that Julius Malema's publicly singing of the "shoot the boer" protest song amounted to hate speech. In reaching this decision, the court held that Ubuntu as a "recognised source of law" had to be considered.[77] The court held that in the duration of the trial, testimony that would generally be inadmissible in court was allowed so that the "wound [could be] open" allowing the parties to "re-experience the pain and search for a solution".[78] The court held that complying with the court's order would not only be a matter of law, but also a matter of Ubuntu.[79]

1 6 3 2 General difficulties in applying Ubuntu as a legal value

While the transformative potential of Ubuntu in the land reform context is clear – given its particular community dimension, it is not without challenges. Kunene refers to Ubuntu as "the potential of being human".[80] The value of Ubuntu is said to have its basis in the quest for "compassion, communalism and concern for the collective respect for the dignity of personhood".[81] It has been argued that the concept of Ubuntu is "insufficiently or too vaguely defined".[82] Some critics have even argued that the Constitutional Court's conceptions of Ubuntu have been filled with terms that are "by and large empty" and with no "self-evident meaning".[83] This view gains some credibility when considered in light of statements made by persons such as former Constitutional

[74] Para 37.
[75] Para 37.
[76] 2011 4 All SA 293 (EqC).
[77] Furman "Ubuntu and the Law" in *Curating the Archive* 156; 2011 4 All SA 293 (EqC) para 18.
[78] 156.
[79] 156.
[80] JY Mokgoro "Ubuntu and the law in South Africa" (1998) *PELJ* 1 3.
[81] 3.
[82] Himonga et al (2013) *PER* 382.
[83] 384.

Court Justice Mokgoro when she claimed that Ubuntu seemed to be one of those things you recognised upon seeing.[84]However, there are already existing legal concepts that remain difficult to succinctly define, such as human dignity. As Furman argues, a clear definition is not a necessary condition for a concept to add legal value.[85] Furman argues that it is in the nature of the law for courts to apply legal concepts before they have crystallised the meanings of such concepts – the example of the frequent invocation of human dignity by the courts even though its meaning remains conceptually unclear, is used by Furman to illustrate this point.[86] The Constitutional Court has, in the past, referred to dignity as "a notoriously difficult concept".[87] This echoes former Justice Mokgoro's sentiments that one would recognise Ubuntu upon seeing it.[88] Additionally, it has been argued that it is in the nature of constitutional values – such as Ubuntu and dignity – to be "open-ended, contested and evolving" and it is from such flexibility of meaning that they hold their transformative power.[89]

As Bohler-Muller states, the mere fact that Ubuntu does not fit snugly into our legal system does not preclude the value it has to offer.[90] Defining an African value in a foreign language such as English will always pose conceptual difficulties. However, there should be caution given in the legal fraternity to avoiding the "Western hegemonic" tendency to categorise anything that is different as "inferior", "threatening" or "useless".[91]

1 6 3 3 The potential benefits of the application of Ubuntu to land reform

The value that Ubuntu could bring to the land reform issue lies in its link to restorative justice. Ubuntu emphasises some of the most important characteristics that are currently lacking in the land reform debate. Its focus is on group solidarity and interests as opposed to private interests.[92] This means that it supports an adjudication process that is based on the promotion of peace and harmony between the parties instead of

[84] Mokgoro (1998) *PELJ* 2.
[85] Furman "Ubuntu and the Law" in *Curating the Archive* 155.
[86] 157.
[87] *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) para 50.
[88] Mokgoro (1998) *PELJ* 2.
[89] Himonga et al (2013) *PER* 386.
[90] N Bohler-Muller "The story of an African value" (2005) 20 *SAPL* 266 275.
[91] 274-275.
[92] Mokgoro (1998) *PELJ* 8.

an adversarial and retributive approach to justice.[93] This is further aligned with its capacity to encompass a genuine sense of community because it confesses a sense of "universal vulnerability".[94] Like De Beer writes in her poem, "when you start a sentence with 'I am, because you are', the instinct to dominate disappears".[95] Accordingly, the study has as one of its aims unpacking the potential benefits of Ubuntu more and contextualising them in the land reform domain specifically.

1 6 3 4 The possible challenges in employing Ubuntu in a land reform context

Naturally, there are also challenges to the application of Ubuntu in the land reform programme. Some of these challenges include the manner in which the communal ideal of Ubuntu could be in conflict with the liberal individualism upheld in the Constitution;[96] the silencing effect that Ubuntu's emphasis on "public-spiritedness" could have on those who demand redistributive justice;[97] problems of definition and the danger that Ubuntu could be used at whim by the powerful to lend legitimacy to any judgment or policy decision.[98] Integral in this study is also providing some guidelines or recommendations as to how the potential difficulties inherent in utilising Ubuntu in the land reform context could be addressed.

1 7 Outline of chapters

Chapter 1: Introduction

This chapter will contain the aims of the research, the motivation and background for the research, the hypotheses and the manner in which the hypotheses will be tested, which will be contained in the methodology.

Chapter 2: The legislative history of land dispossession

This chapter will explore the most important legislation that mandated, enabled and facilitated the dispossession of millions of black people in the colonial and apartheid years. The link between this legislative history of dispossession and the unequal

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[93] 8.
[94] Holtzhausen *Ubuntu and the quest* 6.
[95] M de Beer *A Seventh Moment Bricoleurship and Narrative Turn to Poetics in Educational Research* (2003) paper presented at the British Educational Research Association Annual Student Conference at Heriot-Watt University, Edinburgh, 10-09-2003 (available at http://www.leeds.ac.uk/educol/documents/00003137.htm).
[96] Himonga et al (2013) *PER* 417.
[97] 419.
[98] Bohler-Muller (2005) *SAPL* 273.

distribution of land that still plagues South Africa will also be shown. Chapter 2 lays the groundwork for the land reform sub-programmes to be explored in more detail in chapter 3 and the need for more emphasis on Ubuntu, culminating in findings and recommendations contained in chapter 5.

Chapter 3: Selected problematic elements of the land reform programme

This chapter will evaluate the development of the land reform programme, and its aims and objectives. The policy and implementation issues regarding land redistribution and land restitution, in particular, will form the main points of discussion in this chapter. In light of the overarching theme of the study, the focus in the redistribution and restitution contexts is specifically on aspects that have communal or interpersonal dimensions. The issues to be explored in more detail are thus (a) the willing-seller-willing-buyer principle ("WSWB"); (b) the uncertainty as to whether land reform truly leads to poverty reduction; and (c) the lack of governmental support given to beneficiaries after the restoration of land.

Chapter 4: Ubuntu as a socio-cultural and legal value

As the historical background had been provided in chapter 2, contextualising the need for land reform, and the main issues within the contexts of redistribution and restitution – as regards policy and implementation - were set out in chapter 3, the focus of the study turns to Ubuntu specifically.

In this chapter, the socio-cultural and legal conceptions of Ubuntu are explored. What these concepts entail and how they may be approached will be set out in detail. As the concept has transformative potential, the particular opportunities in this regard are explored. However, the employ of the concept may also have specific challenges. This chapter is thus aimed at providing a detailed analysis of both the jurisprudential and legislative possibilities on the one hand and the possible drawbacks from such an application, on the other.

Chapter 5: Possible opportunities and challenges of the application of Ubuntu in the land reform programme

Having dealt with the socio-cultural and legal conceptions of Ubuntu in chapter 4, this chapter goes further and analyses the utilisation of Ubuntu in the land reform context specifically.

Given that Ubuntu featured prominently in the Truth and Reconciliation process that was conducted in South Africa, part of this chapter also explores the lessons to be learnt in that regard. In light of that exercise, various recommendations for the application of Ubuntu in a land reform context follow. The chapter also highlights the key arguments that can be made both in favour of and against the utilisation of the constitutional value of Ubuntu in the land reform discourse and finally, summarises the main findings uncovered by this research.

Chapter 2: The legislative history of land dispossession

2 1 Introduction

It is common cause that South Africa suffers from a racially-skewed unequal distribution of land.[99] It has been argued that any land reform process or policy that ignores or downplays the history of colonial conquest and land dispossession in South Africa is one that cannot hope to gain any legitimacy.[100] The absence of legitimacy has obvious profoundly negative implications for a land reform programme. It is in this context, and with the understanding that history cannot be discussed separately from land,[101] that this study aims to explore the main laws that were fundamental in facilitating the unequal patterns of access to land that continue to plague South Africa. The aim of this section of the study is two-fold: the first goal is to highlight the most important pieces of legislation that led to the dispossession and dislocation of generations of people and thus necessitated the employment of the land redistribution and land restitution programmes; and the second goal of this section is to highlight the multidimensional harm that was caused to indigenous South Africans through their dispossession over the centuries. The purpose of this historical expedition, in relation to the broader study, is to lay the foundation in showing the ways in which the current land redistribution and land restitution programmes fall short in their attempt to mitigate the injustices of colonialism and apartheid because the focus of the programmes seems to be merely on providing access to land, and not facilitating the realisation of any greater psychological, sociological or even economic needs. This line of argument will be explored more comprehensively under chapters 3 and 4 of this study. It is hypothesised that the greater utilisation of Ubuntu in land reform could significantly improve the current state of the land reform programme. The possibilities and

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[99] F Hendricks "Rhetoric and Reality in Restitution and Redistribution: Ongoing Land and Agrarian Questions in South Africa" in F Hendricks, L Ntsebeza & K Helliker (eds) *The Promise of Land: Undoing a Century of Dispossession in South Africa* (2013) 50. See also C Walker & B Cousins "Land Divided, Land Restored: Introduction" in B Cousins & C Walker (eds) *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015) 1; R Hall & L Ntsebeza "Introduction" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 3; S Rugege "Land Reform in South Africa: An Overview" (2004) 32 *Int'l J. Legal Info* 283 284; RSA *Final Report of the Presidential Advisory* Panel 15 - 18.

[100] L Ntsebeza "Land Redistribution in South Africa: The Property Clause Revisited" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 124. See also CM Coles "Land Reform for Post-Apartheid South Africa" (1993) 20 *Envtl Aff L Rev* 699 733. HJ Kloppers & G Pienaar "The Historical Context of Land Reform in South Africa and Early Policies" (2014) 17 *PELJ* 677 679.

[101] Pienaar *Land Reform* 33.

drawbacks in this regard will be comprehensively discussed under the final part of the study, in chapter 5.

It is beyond the scope of this research to discuss all the legislation that was promulgated in furtherance of the dispossession of indigenous South Africans,[102] therefore this chapter will deal specifically with the legislation that had the most notable impact on the dispossession of people and that set the tone for other land-related legislation. The legislation that will be discussed in this regard, to the extent of its relevance, will be the Natives Land Act 27 of 1913 ("the Natives Land Act");[103] the Native Trust and Land Act 18 of 1936 ("the Native Trust and Land Act")[104] and the Group Areas Act 41 of 1950 ("the Group Areas Act"). The reason for the selection of these particular pieces of legislation is that they, combined, played a "framework" role in that the broad parameters of a focused rural and urban racial approach to land were embodied in their aims, approaches and structures. Together, they had the cumulative effect of banishing black people to the rural outskirts of the country (in terms of the Natives Land Act and the Native Trust and Land Act); restricting the free movement of people of colour in the country; dispossessing generations of indigenous people and creating racially segregated and unequally developed urban areas (elsewhere referred to as "the apartheid city")[105] in terms of the Group Areas legislation.

Although the legislative measures identified above emerged in the twentieth century, some discussion of earlier developments is also necessary. In this light, a brief discussion of the arrival of Europeans in South Africa and the subsequent colonial conquest is required to provide context and to demonstrate that a substantial number of land dispossessions in South Africa preceded the formation of the Union of South Africa in 1910; the promulgation of the above legislative measures and the official beginning of apartheid. The ramifications of early dispossessions could be that the date of dispossession that is the focus of the restitution programme might not be

[102] Sources that could be consulted in this regard : D Van der Merwe "Land Tenure in South Africa: A Brief History and Some Proposals" (1989) 4 *TSAR* 663 673-676 681 684; L Changuion & B Steenkamp *Disputed Land: The Historical Development of the South African Land Issue* (2012) 44-129; DL Carey Miller & A Pope *Land Title in South Africa* (2000) 16-42; CH Feinstein *An Economic History of South Africa: Conquest, Discrimination and Development* (2005) 43-60.
[103] Later renamed the Black Land Act.
[104] Later renamed the South African Development Trust and Land Act.
[105] P Maylam "Explaining the Apartheid City: 20 Years of South African Urban Historiography" (1995) 21 *JSAS* 19 34.

encompassing enough. However, amending the relevant period to 1652 for purposes of land reform might be financially and evidentially untenable, which then means that a more conciliatory approach to land reform might be necessary.

2 2 European arrival in South Africa

2 2 1 Introduction

The period between 1652 and 1910 in South African history will be explored to illustrate the ways in which the dispossession of indigenous South Africans, often through deceit and military force,[106] predated the formation of the Union of South Africa, and laid the foundation for the promulgation of subsequent notorious[107] and discriminatory[108] laws, such as the Natives Land Act and the Native Trust and Land Act, elaborated on in more detail below. Arguably, these two Acts had the most devastating effect on the land rights of indigenous South Africans.[109] While not the main focus of this study as explained, it is necessary to provide a brief overview of the era in which territorial and racial segregation in South Africa was pioneered.

2 2 2 The Dutch settlement in South Africa (1652-1795)

The first permanent white settlers arrived in South Africa in 1652 under the directive of the Dutch East India Company.[110] This settlement was established to provide refreshments and supplies to ships travelling to the Far East passing through the Cape of Good Hope.[111]These Dutch settlers proceeded to assert sovereignty over the Cape area.[112] In 1657, Governor Jan van Riebeeck concluded an agreement with the Khoi people that determined that the Liesbeeck and Salt Rivers constituted the boundaries of the Cape Peninsula, which was declared an independent territory from the rest of South Africa.[113]By 1700, the production of wine, wheat and livestock had increased

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[106] Rugege (2004) *Int'l J. Legal Info* 284.
[107] Feinberg *Our Land* 33.
[108] Z Skweyiya "Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and Models" (1989)21 *Colum Hum Rts. L Rev* 211 213.
[109] McCusker et al *Land Reform in South Africa* 47
[110] Pityana "The 'Land Question' in *Land Divided, Land Restored* 166. See also Skweyiya (1989) *Colum Hum Rts. L Rev* 211; Pienaar *Land Reform* 54 for a brief discussion of the various reasons for this settlement by Dutch people.
[111] A Lester *From Colonization to Democracy: A New Historical Geography of South Africa (*1996) 15.
[112] Coles (1993) *Envtl Aff L Rev* 706.
[113] Changuion & Steenkamp *Disputed Land* 19. See also Pityana "The Land Question" in *Land Divided Land Restored* where it is argued that the Khoi people were "forcibly removed" from their land and thus there was no consensus reached with regards to Cape Peninsula boundary – the argument is that the

and so had the need for more land.[114] Consequently, the Dutch settlers moved further eastward and inland, thereby dispossessing the communities of Khoi and San people who were occupying most of the Cape area.[115]The existing land tenure systems of these communities were disturbed.[116] As the settler community increasingly expanded, so did their demand for land.[117] The Khoi people were continuously forced to move eastward and northward into the country due to this expansion.[118]Both Khoi and San people attempted to resist this dispossession – both peacefully and with force.[119] However, the European powers, with military technology on their side,[120] proved to be insurmountable.[121]In 1795, the British annexed the Dutch Cape Colony.[122]

2 2 3 The first British occupation of South Africa (1795-1803)

By the time of the first British occupation in the period of 1795 to 1803, the Great Fish River had been established as the eastern frontier of the Cape Colony.[123]This had been achieved through a number of wars that had been waged against the Xhosa people as the Europeans started moving inland for further cultivation and stock-raising.[124]This period was characterised by the emergence of frontier communities and the numerous clashes between the settlers and the Xhosa people. In general, land was acquired by the European settlers either by negotiation[125] or by way of conquest.[126]In 1803, the Dutch were restored possession of South Africa through the adoption of the Treaty of Amiens.[127]

Khoi people were merely instructed of the boundary; see also Coles (1993) *Envtl Aff L Rev* 707 for a brief discussion on the "treaties" between the settlers and the Khoi people.

[114] Lester *From Colonization to Democracy* 16.

[115] Rugege (2004) *Int'l J. Legal Info* 283.

[116] Coles *Land Reform* 706.

[117] R Hall "Reconciling the Past, Present, and Future" in C Walker, A Bohlin, R Hall & T Kepe (eds) *Land, Memory, Reconstruction & Justice: Perspectives on Land Claims in South Africa* (2010) 17 18.

[118] McCusker et al *Land Reform in South Africa* 43. See also Coles (1993) *Envtl Aff L Rev* 707; Pienaar *Land Reform* 55.

[119] R Davenport & C Saunders *South Africa: A Modern History* 5 ed (2000) 23-24.

[120] Lester *From Colonization to Democracy* 19.

[121] Coles (1993) *Envtl Aff L Rev* 707. See also McCusker et al *Land Reform in South Africa* 42; Pienaar *Land Reform* 64.

[122] A Sparks *The Mind of South Africa* (1990) 45.

[123] McCusker et al *Land Reform in South Africa* 43.

[124] Coles (1993) *Envtl Aff L Rev* 707.

[125] The doubt surrounding the legitimacy of these "negotiations" has been indicated under footnote 113.

[126] Pienaar *Land Reform* 64.

[127] Lester *From Colonization to Democracy* 19.

2 2 4 The Dutch occupation of South Africa (1803-1806)

The occupation by the Dutch during this period had no real impact on the existing approach to land tenure in South Africa, for two main reasons: (a) extant approaches to land use and control were essentially endorsed and continued;[128] and (b) the occupation was short-lived as the British repossessed the country in 1806.[129]

2 2 5 The second British occupation of South Africa (1806-1910)

2 2 5 1 The exodus out of the Cape Colony

At the time of the second British occupation, the settler community had established itself in the Cape Colony and had begun gradually moving inland.[130]There were two mass migrations in the 1820s and 1830s that significantly changed the South African landscape in this period.[131] One of these mass migrations was the Great Trek and the other one was caused by the Mfecane (also known as Difaqane). The Great Trek was the mass movement of Afrikaner[132] settlers, commonly referred to as Voortrekkers, from the Cape colony into the interior of the country.[133] This exodus began in 1835 and continued until the early 1840s[134] and the reasons for it were complex and diverse.[135] However, it seems that the dominant economic motivations for this movement were the shortage of land in the Cape[136] and the lack of a labour force.[137]

2 2 5 2 Indigenous migrations - Mfecane

Mfecane was the large-scale migration/movement of ethnic black communities from the interior of the country and it is widely asserted to have been caused by the series of wars waged by the Zulu nation under the leadership of Shaka Zulu in the early

[128] Carey Miller & Pope *Land Title* 6.
[129] Davenport & Saunders *South Africa: A Modern History* 42-43.
[130] Pienaar *Land Reform* 62.
[131] See Feinstein *Economic History* 30; H Giliomee & B Mbenga *New History of South Africa* (2007) 108-111; Sparks *The Mind of South Africa* 109-110 for discussions of the various motivations behind the Great Trek.
[132] The farming community comprising of Dutch settlers in the Cape started referring to themselves as “Afrikaners” and “Boers” in less than two centuries after the arrival of the first settlers. See Changuion & Steenkamp *Disputed Land* 24.
[133] Feinstein *Economic History* 30.
[134] 30.
[135] Giliomee & Mbenga *New History* 108-111.
[136] Feinstein *Economic History* 30. See also Giliomee & Mbenga *New History* 108-109.
[137] Giliomee & Mbenga *New History* 109.

1820s.[138]This pattern of wars persisted in the interior until the late 1830s.[139]Both the Mfecane and the Great Trek impacted on the utilisation of land in the interior. However, the precise manner in which the Mfecane and the Great Trek influenced each other in the acquisition of land by the Voortrekkers in the interior is contested.[140] Some have argued that the Great Trek led to great dispossession and disorder for the indigenous population,[141] while others have referred to cartography evidence as indicating that the Voortrekkers occupied uninhabited land in-between African territories.[142]A compromise between these two positions seems to be the one advanced by Changuion and Steenkamp that the significance of the Great Trek lies not necessarily in the perceived mass dispossession that it caused, but rather in the expansion of the terrain of the settlers to the interior of the country amongst black communities that were already there.[143] The conflict caused by this expansion would last centuries and would, to some extent, come to define black and settler relations.[144]

2 2 5 3 Independent republics and concomitant land control

The inland movement by the Afrikaners led to the declaration of independent Boer Republics.[145] These initially included: the Orange Free State, Transvaal and the Natal Republics.[146]However, Natal was later annexed by the British in 1844.[147]This meant that both the Cape and Natal were under British control in the mid-1840s.[148]

In light of the different ”independent” areas and the remaining land under British control, different approaches to access to land emerged, as elaborated on forthwith. In the Cape, the Glen Grey Act 25 of 1894 was promulgated.[149] In essence, this Act

[138] Carey Miller & Pope *Land Title* 13 quoting GM Theal *History of South Africa From 1795-1872* (1910) 10; Changuion & Steenkamp *Disputed Land* 27; Sparks *The Mind of South Africa* 95-96. For a discussion of reasons behind the Mfecane that seek to portray it as a reaction to the developments that were occurring in the country, see Giliomee & Mbenga *New History* 127-128; Davenport & Saunders *South Africa: A Modern History* 13-20.
[139] Changuion & Steenkamp *Disputed Land* 27.
[140] Carey Miller & Pope *Land Title* 13. See also Giliomee & Mbenga *New History 127* for a brief discussion on the argued falsity of the “empty land” assertion.
[141] Sparks *The Mind of South* Africa 109 quoting Dr Abdurahman who was the President of the African People’s Organisation in 1913.
[142] Van der Merwe (1989) *TSAR* 671; Carey Miller & Pope *Land Title* 13.
[143] Changuion & Steenkamp *Disputed Land* 29.
[144] 29.
[145] Feinstein *Economic History* 31.
[146] Pienaar *Land Reform* 65.
[147] 70.
[148] Feinstein *Economic History* 31.
[149] Lester *From Colonization to Democracy* 57.

abolished communal landholding and promoted individual tenure.[150]It has been argued that this Act's directives on certain socio-political aspects of landholding greatly influenced the black territories that would be formed later.[151]In Natal, a Commission was established under the Zululand Annexation Act 37 of 1897 to survey land for the occupation of Zulu people.[152] This land would consist of approximately 10% of the area of Natal.[153] However, the allocated land was generally found to be arid, small and uninhabitable.[154] This land was to be held in trust for the Zulu people.[155]

In the Orange Free State, barring the areas of Thaba Nchu and Witzieshoek,[156] black people could not acquire any rights in relation to land.[157]In the Transvaal, the Pretoria Convention of 1881 established the Native Location Commission which was responsible for demarcating locations[158] (also known as reserves) for black occupation and for receiving, in trust, the transfer of land by purchasers.[159]Black persons who did not want to relocate to the reserves could occupy white farms as "squatters" on the basis that they provided labour and that a maximum of five families per farm was not exceeded as per the provisions of the Squatters Law Act 11 of 1887 (later amended by Squatters Law Act 21 of 1895).[160]The link between access to a labour force and control over land and the tendency to bestow white trusteeship over land belonging to black people were increasingly starting to emerge in this period.[161]

2 2 5 4 The discovery of natural resources

The discovery of mineral resources, especially gold in the 1870s and 1880s led to, *inter alia*, a demand for cheap labour.[162]This meant that the colonial focus shifted from allowing indigenous people to remain farmers to compelling them to become wage

[150] Pienaar *Land Reform* 74. See also Changuion & Steenkamp *Disputed Land* 47.
[151] Carey Miller & Pope *Land Title* 16. See also Changuion & Steenkamp *Disputed Land* 47.
[152] Changuion & Steenkamp *Disputed Land* 52.
[153] 52.
[154] Pienaar *Land Reform* 71-72.
[155] Changuion & Steenkamp *Disputed Land* 52.
[156] 58.
[157] Van der Merwe (1989) *TSAR* 677.
[158] Locations where areas wherein black people could reside provided that they were employed. There were specific exceptions provided for those who were unemployed: Pienaar *Land Reform* 105.
[159] Carey Miller & Pope *Land Title* 18. See also Van der Merwe (1989) *TSAR* 677.
[160] Changuion & Steenkamp *Disputed Land* 94.
[161] Pienaar *Land Reform* 72-73.
[162] Hall & Ntsebeza "Introduction" in *Land Question* 3.

labourers.[163]The development of the mines drew a substantial migrant labour force, mainly comprising of black people, to the urban areas.[164] Yet there were strict regulations regarding the residential areas of the black workers.[165] For example, workers were not allowed to live close to the mines and they were prohibited from living with their family members.[166]

2 2 5 5 The Union of South Africa

In 1910, the Union of South Africa ("the Union"), which comprised of the four South African colonies, namely the Cape, Orange Free State, Natal and Transvaal, was formed.[167] At that stage, approximately seven percent of the total area of the Union was reserved for non-white South Africans.[168] This area consisted of the reserves and "black spots" which were sections of land occupied by black people outside of the scheduled reserves.[169]

2 3 Conclusion

It seems clear from the brief discussion above that although the system of apartheid formally commenced in 1948, its foundational tenets were already established in the era between 1652 and 1910. Pienaar identifies three pillars of apartheid, namely influx control strategies, group areas legislation and the regulation of prevention of unlawful occupation.[170]As discussed, the free movement of black persons in areas deemed as belonging to white persons was already restricted; the creation of locations had already begun; and the unequal racial division of land was in full force prior to the ascension to power of the National Party in 1948. Lester persuasively contends that the infamous Natives Land Act was an inevitable consequence of colonial dispossession.[171] Therefore, although much of the groundwork regarding a racial approach to land had already begun before the promulgation of the Natives Land Act

[163] 3; See also Coles (1993) *Envtl Aff L Rev* 709.
[164] Coles (1993) *Envtl Aff L Rev* 709.
[165] 709.
[166] 709.
[167] GE Devenish "The South African Act Revisited: Some Constitutional and Political Reflections on Lessons Learnt from the Centenary of the Union of South Africa in 1910" (2011) 32 *Obiter* 108 108.
[168] Coles (1993) *Envtl Aff L Rev* 710.
[169] Lester From *Colonization to Democracy* 59.
[170] Pienaar *Land Reform* 104.
[171] Lester *From Colonization to Democracy* 59

in 1913, the commencement of the Act changed the face of South Africa forever, as explored in more detail below.

2 4 The Natives Land Act 27 of 1913

2 4 1 Introduction

There seems to be consensus among historians regarding the significance of the Natives Land Act in the history of land dispossession in South Africa, although different authors highlight or emphasise particular implications differently.[172] It has been said that the Natives Land Act marked the first official racial division of land on a grand scale.[173] Many reasons and postulations have, throughout time, been given for the promulgation of this piece of legislation.[174] The aim of this section of the study is to examine the context that facilitated the promulgation of this Act and to explore the possible motivations that have been proffered for its drafting and adoption into law. This section of the study will also explore the content and major effects of the Act, given the main focus of this chapter.

2 4 2 Background to the Act

In 1903, Lord Milner appointed the South Native Affairs Commission ("the Lagden Commission" or "the Commission") to address the "native problem".[175]The aim of the Lagden Commission, as articulated by Lord Milner, was the investigation of native affairs and the provision of possible recommendations that would inform the national policy as it related to black South Africans.[176]After interviewing a host of South Africans - both black and white - the Lagden Report was published on the 30th of January 1905.[177]The Lagden Report is widely viewed as having advanced the principle of territorial segregation that would later define the apartheid era.[178]

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[172] Feinberg *Our Land* 35.
[173] Pienaar *Land Reform* 82.
[174] H Giliomee *The Afrikaners: Biography of a People* (2003) 203; Sparks *The Mind of South Africa* 138; McCusker et al *Land Reform in South Africa* 49; EM Letsoalo *Land Reform in South Africa: A Black Perspective* (1987) 35; S Plaatje *Native Life in South Africa* (1916) 408.
[175]Changuion & Steenkamp *Disputed Land* 120. See also Feinberg *Our Land* 11; Ngcukaitobi *The Land is Ours* 26.
[176] Changuion & Steenkamp *Disputed Land* 120. See also Feinberg *Our Land* 11; Pienaar *Land Reform* 76.
[177] Feinberg *Our Land* 11. See also Pienaar *Land Reform* 76; Van der Merwe (1989) *TSAR* 680.
[178] 680. See also Pienaar *Land Reform* 78; Feinberg *Our Land* 11.

For purposes of this study, some of the most notable recommendations contained in the Report included that:[179]

(a) the purchase of land by Natives should be restricted to certain areas as to be defined by legislation;

(i) preferably, occupation by black people on white farms should be for labour purposes only, unless otherwise provided for by the government.

(ii) the purchase of farms by black people should be restricted so far as possible and that the purchase of land which may lead to tribal, communal or collective possession or occupation by Natives should be prohibited; and

(b) locations should be near labour centres.

Pienaar notes that although reserves and the trustee approach to black people's possession of land had already been well-established at the time of the Report's publication, the recommendations made by the Lagden Report introduced a more formalised and systematic approach to land.[180]Some believe that the Report acted as a potential guide for subsequent racially-based land legislation such as the Natives Land Act.[181]

As mentioned, various reasons are proffered for the promulgation of the Act. It has been argued that one of the reasons for the promulgation of the Natives Land Act was the ascension to power of General Hertzog, who became the Minister of both Native Affairs and Justice in 1912, and who was convinced that only segregation would ensure the survival of the white man in Africa.[182]Sparks, on the other hand, argues that there were two motivations behind the implementation of the Act. The first was to ensure a constant and sufficient labour supply for mines and farms.[183]McCusker *et al* clarify that the need was not for labour *per se*, but rather for (cheap) black labour that could be exploited.[184]

[179] Feinberg *Our Land* 11. See also Pienaar *Land Reform* 76; Ngcukaitobi *The Land is Ours* 142.
[180] Pienaar *Land Reform* 77.
[181] Feinberg *Our Land* 18. See also Pienaar *Land Reform* 77; Ngcukaitobi *The Land is Ours* 142.
[182] Giliomee *The Afrikaners: Biography of a People* 203.
[183] Sparks *The Mind of South Africa* 138.
[184] McCusker et al *Land Reform in South Africa* 49.

The second possible motivation behind the adoption of the Natives Land Act, as opined by Sparks, was to provide land for the alleged poor white people who were migrating into the cities.[185]Other possible reasons for the promulgation of the Act are that there were concerns about black land purchases complicating mineral exploration[186] and that there were fears about the possibility of a racial competition ensuing if the unrestricted purchase of land by black persons was to be allowed.[187]For his part, Plaatje viewed the purpose of the Act as not being segregation, but rather the reduction of black subjects from a state of partial independence to one of complete servitude.[188]

2 4 3 Relevant provisions of the Act and their effect

The Natives Land Act has been hailed by many historians and legal scholars as "notorious";[189] "disastrous";[190] "exceedingly important";[191] and "vicious".[192] Many argue that the Act was a key instrument in legalising colonial land patterns[193] and that it created a system of serfdom for black people.[194] Officially, the Act had two main objectives:[195]

Firstly, black people were prohibited from purchasing, leasing or otherwise acquiring land outside of the areas "scheduled" for black occupation; and secondly, sharecropping[196] was discouraged.

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[185] Sparks *The Mind of South Africa* 138.
[186] McCusker et al *Land Reform in South Africa* 49.
[187] Letsoalo *Land Reform in South Africa* 35.
[188] Plaatje *Native Life in South Africa* 408.
[189] Pienaar *Land Reform* 80.
[190] McCusker et al *Land Reform in South Africa* 50.
[191] Feinberg *Our Land* 2.
[192] 33.
[193] Letsoalo *Land Reform in South Africa* 43; L Ntsebeza "The Land Question: Exploring Obstacles to Land Redistribution in South Africa" (2007) *Yale* <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.589.4382&rep=rep1&type=pdf> (accessed 15-10-2018).
[194] Ngcukaitobi *The Land is Ours* 137.
[195] Pienaar *Land Reform* 82. See also Letsoalo *Land Reform in South Africa* 35-36; Beinart & Delius "The Natives Land Act" in *Land Divided Land Restored* 26; Coles (1993) *Envtl Aff L Rev* 712; JL Gibson "Land Redistribution/Restitution in South Africa: A Model of Multiple Values, as the Past Meets the Present" (2010) 40 *BJPolS* 135 137-138
[196] Sharecropping entailed black persons being allowed to farm on white-owned land on the condition that they shared a certain portion of their crops with the land owners *in lieu* of paying rent : W Beinart & P Delius "The Historical Context and Legacy of the Natives Land Act of 1913" (2014) 40 *JSAS* 667 671.

The immediate and long-term effects of the Act, whether intended or not, were extensive and worse than anyone could have anticipated.[197]Firstly, apart from physically dividing the country, the Act also created symbolic divisions.[198]This is because the race-based unequal distribution of land[199] created different classes or categories of people.[200] Coupled herewith a sentiment was promoted that white people required greater portions of land due to their superior needs as opposed to the primal needs of black people.[201]Secondly, there was a loss of land and a drastic limitation on the security of tenure for black people to an extent where they could be evicted at whim by the government or by any white person.[202]These evictions were often carried out in inhumane and cruel ways.[203]There was also a loss of property at this stage, specifically in the form of cattle, which were often confiscated by white farmers.[204]Thirdly, there was the abrupt conversion of black people into a class of rural wage labourers.[205]This was because they became dependent on employment in order to survive and they were exploited as cheap labour on white farms and in mines.[206]The migratory labour system that was created that compelled black men to leave their homes and migrate to the cities in order to work at the mines or on farms led to, in many instances, the destruction of families and the fragmentation of social life.[207] Finally, the rapid growth of the black population and soil erosion in the reserves, mainly caused by overgrazing, disrupted the agricultural life of black people.[208]Therefore, the Natives Land Act is said to have impoverished black people generally and also inhibited their economic growth.[209]

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[197] McCusker et al *Land Reform in South Africa* 50. See also Feinberg *Our Land* 22.
[198] Pienaar *Land Reform* 83.
[199] Although sources differ regarding the exact percentage of land that was scheduled for black occupation, there is consensus that there was gross race-based inequality – in favour of white people – in this land division. Beinart & Delius "The Natives Land Act" in *Land Divided Land Restored* 26 quotes 7-8% of the total surface area of the country as comprising the areas scheduled for black occupation; Pienaar *Land Reform* 83 lists 8,3% as the final percentage; Feinberg *Our Land* 22 says it was less than 7,5%; Sparks *The Mind of South Africa* 135 claims that it was "less than 10% of the total country".
[200] Pienaar *Land Reform* 83.
[201] Letsoalo *Land Reform in South Africa 35*.
[202] Ngcukaitobi *The Land is Ours* 138. See Coles (1993) *Envtl Aff L Rev* 712.
[203] Feinberg *Our Land* 34. See also Ngcukaitobi *The Land is Ours* 138 for an example of these "heartless" evictions where one black worker was forced to walk to the Basutoland border as punishment for his perceived "insolence" since he could read, write and owned property.
[204] Ngcukaitobi *The Land is Ours* 138.
[205] McCusker et al *Land Reform in South Africa* 60. See also Ngcukaitobi *The Land is Ours* 138; Coles (1993) *Envtl Aff L Rev* 712.
[206] Rugege (2004) *Int'l J. Legal Info* 285.
[207] 285.
[208] Feinberg *Our Land* 22.
[209] Rugege (2004) *Int'l J. Legal Info* 285.

2 4 4 Conclusion

Some have argued that the impact of the Natives Land Act as an instrument of land dispossession has been overemphasised[210] and that the Act was an acknowledgement of dispossession rather than a cause for it.[211]While this may be true, to some extent, the significance of the Natives Land Act lies in the fact that it was the first piece of legislation that provided a distinctive racial approach to land on a national scale.[212]The Act is often said to have set the foundation for apartheid policy and legislation that followed.[213]Furthermore, the impact of the Act, as discussed, superseded land occupation concerns as it also adversely affected the employment, economic, social, family and agricultural life of the black population.

For the abovementioned reasons, it is contended that an understanding of the draconian[214] piece of legislation that is the Natives Land Act and its consequences is essential for understanding the land and social issues that continue to plague South African society, despite the all-encompassing land reform programme that was embarked on post-1994.

2 5 The Native Trust and Land Act 18 of 1936

2 5 1 Introduction

The Native Trust and Land Act was presented as an extension on the Natives Land Act.[215]This portion of the study seeks to examine the context in which this Act was promulgated, as well as its content and effect.

2 5 2 Background to the Act

Section 2 of the Natives Land Act mandated the appointment of a commission to report on the areas that would be demarcated for black occupation and to investigate the possibility of more land being allocated in this regard.[216]In accordance with this

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[210] Beinart & Delius “The Natives Land Act” in *Land Divided Land Restored* 39.
[211] 26. See also Feinberg *Our Land* 35.
[212] Pienaar *Land Reform* 134.
[213] Coles (1993) *Envtl Aff L Rev* 712. See also Pienaar *Land Reform* 134.
[214] McCusker et al *Land Reform in South Africa* 69.
[215] Pienaar *Land Reform* 89. See also C Walker “Commemorating or Celebrating? Reflections on the Centenary of Natives Land Act of 1913” (2013) 32 *JAS* 282 285.
[216] Changuion & Steenkamp *Disputed Land* 140. See also Van der Merwe (1989) *TSAR* 679.

provision, the Beaumont Commission, chaired by former Judge WH Beaumont, was established in 1913 to investigate the delimitation of areas to be set aside for occupation by Europeans and "natives".[217]After widespread consultations,[218] the Beaumont Report was published in 1916.[219]Changuion and Steenkamp argue that this Report should be regarded as one of the most important documents concerning policy on land tenure and segregation because of some of the guidelines that it set.[220]The recommendations contained in the Beaumont Report included that:[221]

(i) as a matter of urgency, more land had to be allocated for black settlement;

(ii) the land that should be included in the reserves could comprise of, in order: mission land, land occupied by black people, state land and unoccupied land owned by white people; and

(iii) a further 8,3 million morgen of land should be allocated for black settlement.

The Native Affairs Administration Bill of 1917 was drafted as a direct response to the Beaumont Report.[222] It authorised the additional allocation of land for the black population and it called for the creation of "native governments".[223] However, the Bill was never passed through Parliament.[224] Instead, the Native Trust and Land Act was promulgated in 1936 to satisfy the promise that was made in the 1913 Natives Land Act that more land would be allocated for black settlement.[225] Some authors have argued that, in hindsight, the Beaumont Report had little significance in history.[226] This is mostly because the subsequent Native Trust and Land Act ignored a substantial number of the proposals that were contained in the Report because they were perceived to be over-indulgent.[227]

2 5 3 Relevant provisions of the Act and their effect

[217] Changuion & Steenkamp *Disputed Land* 140.
[218] See Pienaar *Land Reform* 84-85 for a brief discussion on the divergent opinions that emerged among white South Africans through these consultations regarding the way in which the land question should be answered.
[219] Changuion & Steenkamp *Disputed Land* 147.
[220] 147.
[221] 145-147. See also Pienaar *Land Reform* 85.
[222] Pienaar *Land Reform* 85.
[223] 85.
[224] 85.
[225] Feinberg *Our Land* 59. See also Pienaar *Land Reform* 87; Van der Merwe (1989) *TSAR* 679.
[226] Changuion & Steenkamp *Disputed Land* 140.
[227] Letsoalo *Land Reform in South Africa* 39.

The goals of the Native Trust and Land Act as contained in its Preamble were to:[228]

(i) provide for the establishment of a Native Trust and to determine its objectives;

(ii) make provision for the extended acquisition and procurement of land for black and other persons' occupation;

(iii) amend the Natives Land Act; and

(iv) address related matters.

It has been held that the purpose of this Act was, partly, to prevent the total dispossession of black people.[229]A discussion in the House of Assembly in 1936 regarding the Bill that preceded the Act highlighted further intentions behind the Act, which included:[230] preventing the large scale migration of black people to the cities; protecting the industrial progress of white people; addressing the issue of poor white people; ensuring that black farmers were successful in their own areas; and preventing class conflicts in urban areas. It was said that this Act would place black people in a much better position[231] and that its objectives were viewed as a display of the altruism[232] of white South Africans.

Overall, 13% of the total surface area of South Africa was reserved for black occupation which, admittedly, was an improvement on the 7,5% that was reserved under the Natives Land Act.[233] The allocation of only 13% percent of land to the majority of the population was justified on the grounds that the areas reserved for black occupation were the most fertile and thus the most agriculturally beneficial.[234]However, critics of the Act maintained that the amount of land that was being earmarked for black settlement was insufficient, far too small and inadequate.[235]Due to the population growth and the size of land that was scheduled

[228] Changuion & Steenkamp *Disputed Land* 166.
[229] McCusker et al *Land Reform in South Africa* 55. See also Changuion & Steenkamp *Disputed Land* 166.
[230] Pienaar *Land Reform* 88. See also Changuion & Steenkamp *Disputed Land* 166.
[231] Changuion & Steenkamp *Disputed Land* 167.
[232] Pienaar *Land Reform* 90.
[233] Gibson (2010) *BJPolS* 712. See Pienaar *Land Reform* 92. See also Pienaar *Land Reform* 89 for a discussion on why the habitation, use and exploitation of the land by black people was, for many decades, far less than the 8,4% that is often cited. See also Letsoalo *Land Reform in South Africa* 40-41 for a similar discussion.
[234] Pienaar *Land Reform* 92. See also Changuion & Steenkamp *Disputed Land* 174.
[235] Feinberg *Our Land* 61-62.

for black people, the reserves increasingly became overcrowded with people and livestock.[236] This led to the erosion of the soil and the conversion of black farmers to wage labourers in the cities.[237]A further consequence of the Native Trust and Land Act was that black people had to be content with living in areas that had minimal industries, no big cities or ports, and hardly any adequate infrastructure.[238]

Essentially, the Natives Land Act and the Native Trust and Land Act could be viewed as a prelude to the homeland theory that would be developed and implemented in the apartheid era.[239] The establishment of the "independent"[240] ethnically-segregated black territories that were referred to as homelands (or national states) significantly worsened the living conditions of black people.[241]

Furthermore, chapter 1 of the Native Trust and Land Act provided for the establishment of the South African Native Trust (later renamed the South African Development Trust).[242]The purpose of this Trust was to own and administer the areas isolated for black occupation, and to acquire further land in this regard.[243] However, the maximum amount of land that the Trust could possess was limited to 7, 25 million morgen (including the land that had already been released for black occupation).[244] The importance of the existence of this trust, in relation to land ownership, is that it propagated a trust-based land tenure for black people while the white population retained individual landholding rights.[245]

2 5 4 Conclusion

The Native Trust and Land Act extended the territorial segregation that had been established in the era preceding the Union of South Africa which was then

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[236] Feinberg *Our Land* 65. See also Changuion & Steenkamp *Disputed Land* 174.
[237] Ntsebeza "The Land Question: Exploring Obstacles to Land Redistribution in South Africa" *Yale.* See also McCusker et al *Land Reform in South Africa* 55; Letsoalo *Land Reform in South Africa* 35.
[238] Changuion & Steenkamp *Disputed Land* 174.
[239] Pienaar *Land Reform* 87-88. See also Carey Miller & Pope *Land Title* 24.
[240] Sparks *The Mind of South Africa* 212: Sparks explains that this supposed independence was a sham because all the major black political parties were banned by the government and chiefs were appointed and approved by the white government.
[241] Pienaar *Land Reform* 123.
[242] Changuion & Steenkamp *Disputed Land* 174. See also Carey Miller & Pope *Land Title* 26.
[243] Kloppers & Pienaar (2014) *PELJ* 683.
[244] Pienaar *Land Reform* 90. See also Kloppers & Pienaar (2014) *PELJ* 683.
[245] Carey Miller & Pope *Land Title* 26.

subsequently reinforced by the Natives Land Act.[246] By employing the trust concept, the Native Trust and Land Act went further than the Natives Land Act in that it did not only enlarge the reserves, but it also contained the basis on which land could be held in those areas.[247]Although this Act was said to be in the best interests of the black population,[248] this does not seem to have been the case. The underlying considerations of the Act, as argued, seem to have rather been in favour of white people.[249]Coupled with the 1913 Land Act, the Native Trust and Land Act laid the foundation for the homeland policy that was central to the aims and objectives of the apartheid government that was officially established in 1948.[250]

Collectively, the Natives Land Act and the Native Trust and Land Act are seen as having had the most negative impact towards the land rights of black South Africans than any other legislation.[251] This is because these two Acts provided a harsh precedence for subsequent laws.[252] Furthermore, these two pieces of legislation were key instruments in the expulsion of black people from South Africa, compelling them to settle into demeaning and dehumanising bantustans; [253] and in the reduction of black people from land owners to landless tenants in the remainder of the country.[254] Cumulatively, the Natives Land Act and the Native Trust and Land Act formally initiated the racially-based land ownership and settlement patterns that would be reinforced during apartheid and that would necessitate the current land reform programme in South Africa.[255]

While the Natives Land Act and the Native Trust and Land Act, as discussed, banished black people into reserves in the rural fringes of the country; the Group Areas Act, forcibly moved non-whites (black, coloured and Indian people) to the outskirts of the urban areas.[256] All three of these discriminatory laws had features that were informed

[246] Pienaar *Land Reform* 93.
[247] 93.
[248] Changuion & Steenkamp *Disputed Land* 167; Pienaar *Land Reform* 90.
[249] Pienaar *Land Reform* 89.
[250] 88.
[251] McCusker et al *Land Reform in South Africa* 47.
[252] 47.
[253] 47.
[254] Letsoalo *Land Reform in South Africa* 32.
[255] Pienaar *Land Reform* 88.
[256] See the discussion under 2 6 below.

by the need for influx control, separate racial development and the national spatial organisation that informed the system of apartheid and that ultimately facilitated the extended mass displacement and mass dispossession of generations of people.

2 6 The Group Areas legislation

2 6 1 Introduction

Soon after the National Party won the elections in 1948 to become the governing party in the Union of South Africa, the Group Areas Act 41 of 1950 was promulgated.[257]The Prime Minister at that time, Dr DF Malan, described the Act as "the essence of apartheid".[258] This Act solidified racial segregation in urban areas[259] and it was also linked to another foundational tenet of apartheid which was the Population Registration Act 30 of 1950 ("the Population Registration Act"). However, since the Group Areas Act had its own methods of racial classification, such as obvious appearance and the societal acceptance into the alleged racial group,[260] the Population Registration Act had merely evidential value, but was not decisive in determining racial classification for purposes of the Group Areas Act.[261] Although the Group Areas Act did not pioneer territorial, racial segregation; it set the precedence for a larger scale of state intervention in property rights;[262] it empowered the state to impose nation-wide policies that were aimed at dictating the residential and commercial lives of South Africans on a racial basis;[263] and most importantly, it formed part of the three pillars of apartheid, as identified by Pienaar.[264]

This section of the study aims to outline the historical factors that led to the promulgation of group areas legislation; to examine certain key provisions of the Group Areas Act and their socio-economic and psychological effect, and, finally, to draw a conclusion on the significance of the Act to the spatial inequality, instability and

[257] Rugege (2004) *Int'l J. Legal Info* 285.
[258] M Festenstein & C Pickard-Cambridge *Land and Race: South Africa's Group Areas and Land Acts* (1987) 6.
[259] McCusker et al *Land Reform in South Africa* 67.
[260] FP Rousseau *Handbook on the Group Areas Act* (1960) 14.
[261] 17.
[262] Festenstein & Pickard-Cambridge *Land and Race* 6.
[263] 6.
[264] Pienaar *Land Reform* 104.

separate development that continue to plague South African urban areas, even today.[265]

2 6 2 Background to the Act

Unlike with the Natives Land Act and the Native Trust and Land Act, no Commission was formed as a precursor to the promulgation of the Group Areas Act. Therefore, there is no single body or Report that could be identified as having been directly responsible for the adoption of the Group Areas Act into law.[266] Instead, various factors have, throughout time, been proffered as having encouraged and enabled the promulgation of this Act.[267] It is commonplace that the group areas legislation was not the first piece of legislation to restrict the ownership and occupation of land in urban areas on a racial basis.[268]Thus, it has been argued that the Group Areas Act simply extended and intensified an already existing pattern of discriminatory and segregationist legislation.[269] In this light, a brief exploration of the racially discriminatory legislation that preceded the Group Areas Act follows forthwith.

The first important piece of legislation in this regard was Law 3 of 1885 which sought to curtail the influx of "Coolies, Arabs and other Asiatics" into areas that were not specifically designated for their occupation by denying them the right to acquire immovable property in areas other than those specifically designated for them.[270]The Asiatics (Transvaal) Land and Trading Act 28 of 1939 provided for a blanket prohibition on the occupation of land by Asiatics[271] in areas that were occupied by persons other than other Asiatics or coloured persons on the 30th of April 1939.[272]The Asiatic Land Tenure and Indian Representation Act 28 of 1946 extended the impact of the previous

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[265] Maylam (1995) *JSAS* 20.
[266] A Mabin "Comprehensive Segregation: The Origins of the Group Areas Act and Its Planning Apparatuses" (1992) 18 *JSAS* 405 406.
[267] Mabin (1992) *JSAS* 429; H Keyser *The Legacy of the Group Areas Act and the Possible Consequences of the Repeal of the Act* Master's Thesis in Town and Regional Planning, Stellenbosch University (1991) 12; GH Pirie "Race Zoning in South Africa: Board, Court, Parliament, Public" (1984) 3 *Polit Geogr Q* 207 209; Festenstein & Pickard-Cambridge *Land and Race* 6.
[268] Pirie (1984) *Polit Geogr Q* 208; Mabin (1992) *JSAS* 408; Rousseau *Handbook on the Group Areas Act* 1-2.
[269] Pirie (1984) *Polit Geogr Q* 209; AO Tayob *The Aims and Purposes of Group Areas Legislation in South Africa* LLM thesis, University of the Witwatersrand (1991) 3; Rousseau *Handbook on the Group Areas Act* 6.
[270] Rousseau *Handbook on the Group Areas Act* 2-3
[271] 2. "Asiatics" is a term that was used to denote people of Asian descent and this grouping included so-called "Coolies, Malays and Mohammedan subjects of the Turkish empire".
[272] Rousseau *Handbook on the Group Areas Act* 6.

piece of legislation by prohibiting the occupation of land by Europeans in areas that were still occupied by Asiatics by the 15th of March 1946.[273]This series of laws aimed at people of Asian descent in the Transvaal and Natal seem to have significantly inspired the Group Areas Act.[274]

Economic factors, white fears and certain ideological narratives also motivated the promulgation of the Act.[275]Dr Eben Dönges, the then Minister of the Interior, presented the legislation as an attempt to establish racial harmony and to ensure the ultimate protection of the white population and its interests in South Africa.[276]The government argued that racial riots and the tensions between races occurred as a result of integrated development.[277]Dr Malan claimed that the Act would protect Western culture[278]and that it would protect the white working class from economic competition.[279]Pirie argues that one of the covert goals of the Act was to diminish the commercial economic force of the Indian population.[280] It has also been argued that the Act sought to undermine the economic power of black people in the cities by complicating the means in which they could acquire vested interests in urban areas.[281]

Furthermore, there was also rapid urbanisation and industrialisation in the 1930s and 1940s which led to some racially-integrated peri-urban settlement that was a cause for concern for the government.[282]As such, in the 1940s, the Smuts cabinet became increasingly preoccupied with “reconstruction”.[283]

2 6 3 Relevant provisions of the Act and their effect

The Group Areas Act proclaimed its purpose to be the creation of group areas, and the control of the acquisition of immovable property and the occupation of land and premises.[284]It was clear that the dominant aim of the Act was to create separate

[273] 6.
[274] 6.
[275] Festenstein & Pickard-Cambridge *Land and Race* 6.
[276] 6.
[277] Changuion & Steenkamp *Disputed Land* 192.
[278] Festenstein & Pickard-Cambridge *Land and Race* 6.
[279] 6.
[280] Pirie (1984) *Polit Geogr Q* 209.
[281] 7.
[282] Mabin (1992) *JSAS* 413.
[283] 414.
[284] Tayob *The Aims and Purposes of Group Areas Legislation* 4.

commercial and residential areas for the different racial groups.[285]In this regard, the Act provided for the:[286]

(i) procedure for the identification of group areas for residential and commercial purposes for the different racial groups and the qualification of who would be entitled to reside and occupy land and premises in the respective group areas;
(ii) reallocation of persons disqualified from a designated group area. These persons had to give up their rights of ownership and occupation in that area; and the
(iii) obtainment of a racial identity by a company through the racial classification of its controlling interest shareholder(s).

The Group Areas Act led the era of widespread forced removals.[287]Disqualified persons who were in lawful occupation were given at least a year in which to vacate the proclaimed group area; where large scale relocations were envisioned, the disqualified communities were given three, four and sometimes seven years to relocate.[288]The time-frames seem to indicate that the underlying aims were long-term, part of the grand plan of apartheid and that there was no rush, in all instances, to effect segregation overnight, although in some instances such segregation was indeed immediate. Failure to vacate by the determined period rendered the occupation unlawful, unless a permit had been granted allowing for continued occupation.[289] There were two enforcement mechanisms that followed the Act, namely the Prevention of Illegal Squatting Act 52 of 1951 and the Natives Abolition of Passes and Coordination of Documents Act 57 of 1952, which, respectively, prohibited "squatting" on land outside of the control of the municipality and required black people to carry passes containing their legal and residency statuses.[290]Anyone who was residing or occupying land or premises in an area outside of his/her scheduled residential area, without justification or a permit, could be evicted.[291]

[285] Tayob *The Aims and Purposes of Group Areas Legislation* 5; Pienaar *Land Reform* 107; Pirie (1984) *Polit Geogr Q* 210.
[286] Keyser *The Legacy of the Group Areas Act* 13; Pienaar *Land Reform* 107.
[287] McCusker et al *Land Reform in South Africa* 67.
[288] Rousseau *Handbook on the Group Areas Act* 13.
[289] 13.
[290] McCusker et al *Land Reform in South Africa* 67.
[291] 67. See also Festenstein & Pickard-Cambridge *Land and Race* 13.

The Group Areas Act had far-reaching adverse consequences for affected persons. These included:[292]coloured and Indian families and business people being forcibly moved from their homes and premises; the break-down of communal ties; increased poverty and social disintegration in numerous urban and surrounding areas, including for example, the Cape Flats[293] and Sophia Town; a growing housing crisis; and "separate but unequal" standards of amenities such as schools, residential areas and trading zones. The Group Areas Act also had less tangible but just as devastating consequences, such as the loss of trading goodwill to coloured and Indian business people;[294] the indignity and distress of being uprooted and displaced;[295] and the many disadvantages involved in being moved to marginal and undeveloped areas on the periphery of city centres.[296]

Although various versions of the Act followed, including the Group Areas Act 77 of 1957 and the Group Areas Act 36 of 1966,[297] the guiding principles of the 1950-Act remained essentially the same.[298]In accordance with the Group Areas Act, the ability to choose where to live and to settle was removed from non-white persons, especially coloured and black people.[299] Although this Act was paraded as an indiscriminate piece of legislation that would apply equally to all racial groups,[300] the protection of the white population from its harsh consequences was clear.[301] This bred frustration and hostility towards white people in black and brown communities and even more racial intolerance in South Africa.[302]

2 6 4 Conclusion

Due to the types of cities created during apartheid, urban areas in South Africa continue to epitomise the land crisis that the country faces with islands of wealth being

[292] Festenstein & Pickard-Cambridge *Land and Race* 20-25.
[293] See, for example, the exposition of the prevailing socio-economic impact of forced removals in the District Six area in *District Six Committee and Others v Minister of Rural Development and Land Reform and Others* 2019 4 ALL SA 89 (LCC).
[294] Pirie (1984) *Polit Geogr Q* 214.
[295] 214.
[296] 214.
[297] Pienaar *Land Reform* 107.
[298] Changuion & Steenkamp *Disputed Land* 192. See also Festenstein & Pickard-Cambridge *Land and Race* 8.
[299] 107. See also Changuion & Steenkamp *Disputed Land* 192.
[300] Pirie (1984) *Polit Geogr Q* 210.
[301] 212-214.
[302] 214.

often situated directly next to polarities of abject poverty.[303]This material inequality has led to a great deal of protest, struggle and resistance action in the country's urban areas.[304]As previously discussed, the Group Areas Act is not solely responsible for the continued segregation and inequality in South African cities as similar, racially discriminatory and segregationist legislation can be traced back to the 19th century.[305]However, the systematic, extensive and draconian manner in which this Act was implemented makes it an important piece of legislation to consider when discussing land dispossession and land reform. To some extent, the current spatial justice issues related to access to land – for residential as well as business and trade purposes - and tenure security in urban areas and surrounding areas can thus also be laid at the feet of this Act.[306]

2 7 Conclusion

The history of racial dispossession in South Africa begins in 1652. The permanent settlement of Europeans under the auspices of the Dutch East India Company and the planting of a "bitter almond hedge"[307] to separate the Dutch settlers from the indigenous people marked the beginning of centuries of wars, segregation, dispossession, discriminatory laws and the disenfranchisement of indigenous people in South Africa.

The legislative framework that emerged from the formation of the Union of South Africa in 1910 merely intensified the legacy of dispossession that had been established from the 17th to the 19th century. The Natives Land Act and the Native Trust and Land Act initiated a systemic approach to dispossession and racially-based segregation. These two pieces of legislation led to large-scale dispossession of black people; the

[303] Maylam (1995) *JSAS* 20. See also generally S Swanepoel *Efficacy of the Spatial Planning and Land Use Management Act in the Promotion of Spatial Justice in An Urban Land Reform Context* LLM thesis, Stellenbosch University (2020).
[304] Maylam (1995) *JSAS* 20.
[305] See the discussion under 2 6 3.
[306] See generally : C Newton & N Schuermans "More Than 20 Years After The Repeal of The Group Areas Act: Housing, Spatial Planning and Urban Development in Post-Apartheid South Africa" (2013) 28 *J Hous and the Built Environ* 579-587; See also M Strauss *A Right to the City for South Africa's Urban Poor* LLD thesis, Stellenbosch University (2017) 49-50. See generally: DJ Du Plessis "A Critical Reflection on Urban Spatial Planning Practices and Outcomes in Post-Apartheid South Africa" (2014) 25 *Urban Forum* 69-88; RSA *Final Report of the Presidential Advisory Panel* 34-35; Swanepoel *Efficacy of the Spatial Planning and Land Use Management Act* (2020).
[307] Pienaar *Land Reform* 53.

conversion of black people from relatively successful farmers[308]to wage labourers on farms and in mines; the breakdown of familial ties because of the migratory labour system; and the expulsion of black people to under-resourced and impoverished areas outside of the Union of South Africa.

Upon the ascension into government of the National Party in 1948, the Group Areas Act was enacted to fulfil the promises of the protection of white interests and "Western civilisation"[309] that had been made in the run-up to the elections. The Group Areas Act solidified racial segregation in residential and commercial areas. It was entrenched through forced removals that led to incredible economic, psychological and social damage in especially the black, coloured and Indian communities.[310]

South Africa's colonial and apartheid-era land policy was multi-layered and devastatingly far-reaching in its impact. Therefore, it seems imperative that the redistribution and restitution programmes that are aimed at redressing these inequities are also multi-layered, dynamic and innovative. The focus cannot only be on the land that was lost; the healing of psychological wounds and an attempt to heal the symbolic divisions engendered by the past must also be made – possibly through the application of Ubuntu in these land reform sub-programmes. Before that possibility is explored further, particular concerns within the land reform context, specifically within the redistribution and restitution sub-programmes, are discussed first.

[308] Hall "Reconciling the Past" in *Land, Memory* 18.
[309] Festenstein & Pickard-Cambridge *Land and Race* 6.
[310] *District Six Committee and Others v Minister of Rural Development and Land Reform and Others* 2019 4 ALL SA 89 (LCC).

Chapter 3: Selected problematic elements of the land reform programme

3 1 Introduction

A combination of circumstances led to the unravelling of the apartheid regime in the late 1980s and early 1990s.[311] These circumstances included the imposition of international sanctions and widespread international condemnation of the apartheid government, and increasingly effective political resistance by white and non-white activists in the country and in exile by non-white South Africans.[312] Although the liberation struggle in South Africa was not waged, primarily, because of land, there was a general expectation that the advent of democracy would result in the redress of land dispossessions that occurred in the colonial and apartheid eras.[313] The Freedom Charter ("the Charter"), which was adopted by the Congress of the People on 25 and 26 June 1955, made specific reference to land.[314] The Charter provided that, "the land shall be shared among those who work it".[315] The Charter elaborated that, "restriction of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it, to banish famine and land hunger".[316]

In, arguably, the anticipation of the demise of apartheid and the probable ensuing demand for access to land,[317] the De Klerk government tabled the White Paper on Land Reform in Parliament on the 12th of March 1991.[318] This policy document was heavily criticised by political and legal scholars alike in not going far enough,[319] including by the African National Congress ("the ANC")[320] and non-governmental

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311 Pienaar *Land Reform* 203.
312 Coles (1993) *Envtl Aff L Rev* 724-725.
313 Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 109.
314 S Mazibuko "The Freedom Charter: The Contested South African Land Issue" (2017) 38 *TWQ* 436 445: Participant organisations in the adoption of the Freedom Charter at Kliptown, Johannesburg were the South African Indian Congress, the African National Congress, the Coloured People's Organisation and the Congress of Democrats.
315 H Bernstein "The Freedom Charter (With a Note By Hilda Bernstein)" (1987) 9 *TWQ* 672-677; G Dominy "Overcoming the Apartheid Legacy: The Special Case of the Freedom Charter" (2013) 13 *Arch Sci* 195 201-202 The Charter has been described as the articulation of an alternative vision for the country and an articulation of popular aspirations comparable to the final Constitution.
316 Bernstein (1987) *TWQ* 672-677.
317 AJ Van der Walt *Constitutional Property Law* (2005) 285. See also Carey Miller & Pope *Land Title* 245.
318 Coles (1993) *Envtl Aff L Rev* 726.
319 Carey Miller & Pope *Land Title* 246-247. See also Coles (1993) *Envtl Aff L Rev* 733-734.
320 C Walker *Landmarked* (2008) 56: The ANC denounced the 1991 White Paper from a position of "outrage and deep disappointment". See also Carey Miller & Pope *Land Title* 246-247. The African

organisations.[321]In 1994, the democratically-elected ANC government adopted the Restitution of Land Rights Act 22 of 1994 and, in 1997, the Department of Land Affairs released its White Paper on Land Policy.[322] The essential elements of this policy were land redistribution, tenure reform and land restitution.[323]While all of these sub-programmes are integral to the topic, as discussed in chapter 1,[324] the focus of this study is specifically on the land redistribution and land restitution sub-programmes.

In this chapter, it will be argued that the land redistribution and land restitution sub-programmes are failing to meet their objectives. Various difficulties and problem areas are tied to these sub-programmes specifically, including but not limited to : (a) institutional issues, such as the long delays in the delivery of land to claimants;[325] the lacklustre and disorganised conduct of the officials charged with implementing the land reform programme;[326] and the alleged corruption and elite capture in the programmes;[327] funding issues including the arguably insufficient budget allocated for land reform purposes[328] and the lack of post-settlement governmental support given to land reform beneficiaries;[329] the lack of equal gender representation in the beneficiary pool of land reform;[330] the doubt surrounding whether land reform leads to improved livelihoods;[331] and the questions regarding the continued relevance of land reform in the face of issues such as unemployment and increasing poverty levels;[332] (b) substantive issues such as the slow pace of land reform in general,[333] with the

National Congress was founded in 1912 and it was the leading anti-apartheid party in South Africa: Coles (1993) *Envtl Aff L Rev* 732.

[321] Walker *Landmarked* 56.

[322] Pienaar *Land Reform* 204.

[323] Department of Land Affairs *White Paper on Land Policy* (1997) 7. See also Gibson (2010) *BJPolS* 135 139.

[324] See Chapter 1 2.

[325] Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 119.

[326] Pienaar (2020) *TSAR* 538.

[327] Parliament *Report of the High Level Panel* 552.

[328] Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 48. See also V Gumede "Land Reform in Post-Apartheid South Africa: Should South Africa Follow in Zimbabwe's Footsteps?" (2014) 9 *IJARS* 50 61.

[329] McCusker et al *Land Reform in South Africa* 181. See also Gumede (2014) *IJARS* 63.

[330] C Walker "Redistributive Land Reform: For What and For Whom?" in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 132 141.

[331] F Hendricks, L Ntsebeza & K Helliker "Land Questions in South Africa" in F Hendricks, L Ntsebeza & K Helliker (eds) *The Promise of Land: Undoing a Century of Dispossession in South Africa* (2013) 1 10-11.

[332] Hall & Ntsebeza "Introduction" in *Land Question* 5.

[333] Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 119.

government struggling to meet its own targets;[334] issues with the outcomes of the sub-programmes such as the lack of secure land rights after acquisition of immovable property though land reform;[335]and the controversy regarding the WSWB-approach to land acquisition by the government;[336]and, finally, (c) procedural issues such as the beneficiary selection criteria for land redistribution;[337] and the 1913 cut-off date for land restitution.[338] Evidently, the issues plaguing the land redistribution and restitution sub-programmes are extensive and varied and it is outside the scope of this study to discuss them all.[339] Therefore, in this chapter, only select issues in the relevant land reform sub-programmes will be discussed and these are the issues, it is submitted, that the application of Ubuntu could possibly ameliorate.

The issues that will be explored in this chapter are: the WSWB principle, the potential of land reform to effect poverty reduction and the lack of post-settlement support and the implications thereof. These particular issues were chosen because of their links to reconciliation and notions of justice and harmony, thus, it is argued that an Ubuntu-centred approach to resolving these issues would conceivably be beneficial (as will be discussed in chapter 5 of this study).

In this chapter, the main tenets of the history of land reform will be discussed briefly; the identified selected issues in the relevant land reform sub-programmes will be explored critically and a tentative conclusion will be reached regarding the relevance of Ubuntu in this context.

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[334] McCusker et al *Land Reform in South Africa* 181. See also Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 48-49.
[335] Parliament of the Republic of South Africa *Report of the Joint Constitutional Review Committee On The Possible Review of Section 25 of the Constitution* (2018) 29.
[336] Gumede (2014) *IJARS* 60.
[337] Parliament *Report of the High Level Panel* 211-213. The National Policy for Beneficiary Selection and Land Allocation (Draft) in GN 2 *GG* 42939 of 03-01-2020 which aims to, *inter alia*, provide a uniform, fair, credible and transparent process and criteria for land allocation, was published for comment on 3 January 2020. This is a draft measure at this point and a more elaborate discussion thereof falls outside the scope of this study.
[338] See MA Yanou "The 1913 Cut-Off Date for Restitution of Dispossessed Land in South Africa: A Critical Appraisal" (2006) 31 *Afr. Dev. Rev.* 177 179-180 for a discussion regarding the issues surrounding the 1913 cut-off date for land restitution claims. See also M Brown, J Erasmus, R Kingwill, C Murray & M Roodt *Land Restitution in South Africa: A Long Way* Home (1998) 47; Van der Walt *Constitutional Property Law* 294.
[339] See generally Parliament *Report of the High Level Panel* 200-299; RSA *Final Report of the Presidential Advisory Panel* 4-132; Pienaar (2020) *TSAR* 536-546.

3 2 The history of the Land Reform programme

3 2 1 Introduction

It has been argued that because the injustices of apartheid were so firmly entrenched and manifested in the unequal distribution of land and the prevalent land insecurity for non-whites, any legitimate transformation process in South Africa would necessarily involve land reform.[340] In this context, South Africa has, arguably, had two main phases of land reform: an exploratory programme under the De Klerk government and the second, all-encompassing programme under the post-apartheid government.[341]It is conceivable that South Africa may be entering into a further phase in light of the possible amendment of the property clause, section 25 of the Constitution, so as to provide for expropriation with nil compensation, for purposes of land reform. As highlighted in the introductory chapter above, whether the process is concluded or not, does not impact on the possibility of utilising Ubuntu more optimally.

In this section of the study, a comprehensive discussion of the past and current land reform programmes in South Africa will ensue in order to provide context for the selected issues in the land reform sub-programmes that will be focussed on in this chapter.

3 2 2 White Paper on Land Reform (1991)

The publication of the White Paper on Land Reform in March 1991 was the De Klerk government's first focussed attempt at addressing the land issues that resulted from the main pillars of apartheid.[342] Some believe that this attempt at land reform by the apartheid government was necessitated by political pressure[343] and constituted an attempt to dictate the direction that land reform initiatives could take.[344]

The White Paper indicated its main policy objectives as being: (i) the promotion of the accessibility of land rights to the whole population; (ii) the advancement of the quality

[340] Van der Walt *Constitutional Property Law* 285.
[341]JM Pienaar "Reflections on the South African Land Reform Programme: Characteristics, Dichotomies & Tensions (Part 1)" (2014) 3 *TSAR* 425 437.
[342] Coles (1993) *Envtl Aff L Rev* 725.
[343] Walker *Landmarked* 55. See also Van der Walt *Constitutional Property Law* 285.
[344] Walker *Landmarked* 55.

and security of land title; and (iii) the effective utilisation of land as a national asset.[345] Although this policy was praised by some as a monumental step in reversing the inequities engendered by apartheid,[346] it was also met with some criticism and condemnation.[347] The White Paper rejected extensive restoration of land to those who had been dispossessed on the grounds that such restoration would be unfeasible and that it would disrupt the country's development to the detriment of all.[348] Accordingly, the ANC criticised the government for absolving the white population of any blame in relation to the dispossession of black people and it argued that any land reform proposal wherein the government failed to publicly commit itself to addressing the misdeeds of the past would be illegitimate.[349]The White Paper was also met with some protest action and symbolic land re-occupations by some communities and non-governmental organisations.[350] Pienaar argues that although the land reform measures encompassed in this policy were important and necessary, they were also short-sighted and restricted.[351]

The publication of the White Paper on Land Reform coincided with the promulgation of enabling legislation such as the Abolition of Racially Based Land Measures Act 108 of 1991 ("the Abolition Act"); the Upgrading of Land Tenure Rights Act 112 of 1991[352] and the Less Formal Township Establishment Act 113 of 1991. Notably, chapter 1 of the Abolition Act repealed all racially discriminatory land laws, including the Natives Land Act[353] and the Native Trust and Land Act and related laws.[354] Likewise, chapter 2 of the Abolition Act repealed the Group Areas Act and related laws.[355] The effect of the promulgation of the Abolition Act was that there was no longer any statutory race-based prohibition on the acquisition, letting or occupation of immovable property in

[345] See Carey Miller & Pope *Land Title* 245; Coles (1993) *Envtl Aff L Rev* 726; Van der Walt *Constitutional Property Law* 287.
[346] Coles (1993) *Envtl Aff L Rev* 732.
[347] Carey Miller & Pope *Land Title* 246-247; Walker *Landmarked* 56; Coles (1993) *Envtl Aff L Rev* 733-736.
[348] Carey Miller & Pope *Land Title* 246.
[349] Coles (1993) *Envtl Aff L Rev* 733.
[350] Walker *Landmarked* 56.
[351] Pienaar (2014) *TSAR* 437.
[352] Interestingly, the Constitutional Court recently declared certain sections of the Upgrading Act unconstitutional in *Rahube v Rahube and Others* 2019 2 SA 54 (CC) on the basis that it discriminated on the basis of gender.
[353] S1-10.
[354] S11.
[355] S48-54.

South Africa.[356] Nonetheless, shortcomings in the first phase of land reform – including that it lacked a constitutional dimension - necessitated the second phase of land reform under the post-apartheid government.[357]

3 2 3 White Paper on Land Policy (1997)

Unlike in the first phase of land reform, the land reform programme under the post-apartheid government is constitutionally-based.[358] The Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution") was a product of the negotiated transition to democracy that South Africa underwent.[359] As a result of these negotiations, there was an agreement that existing property rights would be legally recognised with the understanding that meaningful redress of past land inequities would also be a priority.[360]

Section 28 of the interim Constitution provided for the guarantee and protection of rights in property,[361] while sections 121-123 provided for land reform – specifically land restitution – separately. In order to clarify the differences between the interim "property" clause and the current one, section 28 of the interim Constitution will be discussed briefly below.

In the multiparty negotiations that preceded the country's first democratic elections,[362] the ANC was adamant on ensuring that the constitutional protection of the right to property did not amount to an obstacle to legislative measures aimed at redressing the considerable disparities in wealth that existed due to colonialism and apartheid.[363] The National Party ("NP"), on the other hand, was intent on protecting the interests of white property owners from the future laws and policies of a democratic

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[356] Carey Miller & Pope *Land Title* 252. See also Kloppers & Pienaar (2014) *PELJ* 687.
[357] Pienaar (2014) *TSAR* 437.
[358] Pienaar *Land Reform* 167.
[359] 168. See also Walker *Landmarked* 65-66.
[360] Pienaar *Land Reform* 168-169.
[361] Much has been written about section 28 of the interim Constitution. For a broader discussion on this topic, see Walker *Landmarked* 66; see Carey Miller & Pope *Land Title* 285-289 for a discussion on the interpretation and continued relevance of the section; see Pienaar *Land Reform* 169-171 for a brief interpretation of the section; see generally M Chaskalson "Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution" (1995) 11 *SAJHR* 222-240; M Chaskalson "The Property Clause: Section 28 of the Constitution" (1994) 10 *SAJHR* 131-139.
[362] Chaskalson (1994) *SAJHR* 131.
[363] Chaskalson (1995) *SAJHR* 223; Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 111-112.

government.[364] Section 28 reflected a compromise between these two positions.[365] The following provisions were contained in this section:[366]

(i) section 28(1) provided for the protection of everyone's right to acquire and hold rights in property;

(ii) section 28(2) provided that the deprivation of rights in property could only occur in accordance with the law; and

(iii) section 28(3) provided that expropriation was only permissible for a public purpose[367] subject to the payment of an agreed amount or to just and equitable compensation as determined by a court of law. The factors that were to be considered by a court in determining just and equitable compensation were listed as including: the use to which the property was being put, the history of its acquisition, the market value, the value of the investments in it by those affected and the interests of those affected.

Notably, sections 121-123 of the interim Constitution, which dealt with the various components of the land restitution programme,[368] were excluded from section 28 and the Bill of Rights.[369] Pienaar offers that this exclusion might have occurred because the (initial) land restitution programme was meant to be temporary and not a permanent feature of land reform.[370] Contrastingly, Chaskalson argues that this exclusion was due to the NP's belief that the separation between the protection of rights to property and land restoration efforts would, somehow, protect the interests of white landowners.[371]

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[364] Chaskalson (1995) *SAJHR* 224; Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 113.
[365] Pienaar *Land Reform* 170; Chaskalson (1994) *SAJHR* 131-132.
[366] S28 of the interim Constitution; See also Chaskalson (1995) *SAJHR* 236; Chaskalson (1994) *SAJHR* 133-139; Pienaar *Land Reform* 170-71; Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 114-115.
[367] This is another notable difference between section 28 of the interim Constitution and section 25 of the current Constitution. Unlike section 28, section 25 permits expropriation for both a public purpose and in the public interest. See generally: Pienaar *Land Reform* 176-184; Carey Miller & Pope *Land Title* 293-294; Van der Walt *Constitutional Property Law* 287-289.
[368] Section 121 of the interim Constitution dealt with the requirements that needed to be met by a person or a community claiming for restitution of a right in land from the state; section 122 provided for the establishment of a Commission on Restitution of Land Rights which would be competent to, *inter alia*, investigate the merits of any claim for restitution; section 123 provided for the land claims court to be established.
[369] Pienaar *Land Reform* 171.
[370] 171.
[371] Chaskalson (1995) *SAJHR* 231.

Conversely, in the Constitution of the Republic of South Africa, 1996 ("the Constitution"), section 25 combined the protection of private property with a strong commitment to land reform.[372] In this regard, the relevant provisions of section 25 for purposes of land reform are:[373]

(i) section 25(1) which provides for the protection against the arbitrary deprivation of property except in terms of law of general application;[374]

(ii) section 25(2) confirms that expropriation is valid when certain requirements are met and 25(3) which confirms that just and equitable compensation must be paid in cases of expropriation;

(iii) section 25(4) which clarifies the manner in which section 25 should be interpreted and underlines that land reform is indeed in the public interest;

(iv) section 25(5) which requires the state to take reasonable legislative and other measures in order to promote equitable access to land for its citizens. This subsection embodies the redistribution programme;

(v) section 25(6) which places an obligation on the state to improve the security of tenure of persons and communities whose tenure of land is legally insecure due to past discriminatory laws or practices. This subsection, read with section 25(9), embodies the tenure reform programme;

(vi) section 25(7) which entitles persons or communities who were dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practises to restitution or equitable redress, as provided for in legislation. This subsection embodies the restitution programme; and

(vii) section 25(8) which empowers the state to redistribute resources as necessary in order to address past imbalances, provided that such measures are aligned with the limitation requirements in section 36 of the Constitution.

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[372] Van der Walt *Constitutional Property Law* 288.

[373] See Pienaar *Land Reform* 176-184; Carey Miller & Pope *Land Title* 293-294; Van der Walt *Constitutional Property Law* 287-289; AJ Van der Walt *Property and Constitution* (2012) 27-29, 132-139.

[374] There is a strongly held belief by some that the constitutional protection of property is in conflict with the ambitions of land reform. For further reading on this subject, see Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 107-129; Parliament *Report of the Joint Constitutional Review Committee* 4-35; Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 27-33.

(viii) section 25(9) which mandates the state to enact legislation that gives effect to section 25(6).

The constitutional obligations notwithstanding, land reform is guided by various policy choices.[375]In the 1997 White Paper on Land Policy,[376] the government recognised the need for land reform as being four-fold, namely to:[377]

(i) redress the injustices of apartheid;
(ii) foster national reconciliation and spirit;
(iii) underpin economic growth; and
(iv) improve household welfare and alleviate poverty.

As explained, the White Paper listed the principal components of the government's land reform programme as comprising of land redistribution, tenure reform and land restitution.[378]This policy document also highlighted the government's commitment to the WSWB principle of land acquisition.[379]In the context of land restitution, the White Paper indicated that the government's policy and procedure would be based on the relevant provisions of the Constitution and the Restitution of Land Rights Act 22 of 1994 ("Restitution Act").[380]In the context of land redistribution, the government expressed that it had to consider the conflicting interests of various stakeholders and the impact that its land acquisition model would have on the land market and possible investments.[381] Therefore, instead of the government being directly involved in land acquisition, the policy specified that the government would instead make it possible for poor and disadvantaged people to buy land through financial assistance.[382] In this context, the WSWB principle was entrenched and a market-based or market-assisted approach was embarked on.

3 2 4 Green Paper on Land Reform (2011)

[375] Pienaar (2014) *TSAR* 433.
[376] Walker & Cousins "Introduction" in *Land Divided, Land Restored* 19.
[377] Department of Land Affairs *White Paper on Land Policy* 7.
[378] 7.
[379] 9.
[380] 14.
[381] 9.
[382] 7.

The then Department of Rural Development and Land Reform published the Green Paper on Land Reform in 2011.[383]The Green Paper identified challenges and weaknesses within the current land reform programme that had necessitated a change of direction.[384]These issues were identified as being:[385]

(i) the willing seller, willing buyer model of land acquisition;
(ii) the disjointed beneficiary support system;
(iii) beneficiary selection for land redistribution;
(iv) the administration of land, especially in communal areas;
(v) meeting the redistribution target that was set for 2014;
(vi) declining agricultural contribution to the GDP;
(vii) rampant rural unemployment; and
(viii) a problematic restitution model and support system thereof.

The Green Paper identified the principles underlying land reform as being:[386]

(i) the deracialising of the rural economy;
(ii) the democratic and equitable access and allocation to land across racial, gender and class lines; and
(iii) a sustained production discipline necessary for food security.

The proposed policy envisages social cohesion and development as constituting the long term goals of land reform.[387]Although the Green Paper is said to contain some useful proposals and ideas,[388] it has also attracted some criticism.[389]The criticism levelled against the Green Paper includes concerns about the suggested removal of the judiciary from the process of determining and/or approving compensation for purposes of expropriation;[390]concerns about the institution charged with determining

[383] W Erlank "Green Paper on Land Reform: Overview and Challenges" (2014) 17 *PELJ* 614 614.
[384] Department of Rural Development & Land Reform *Green Paper on Land Reform* (2011) 5.
[385] 5.
[386] 4.
[387] 4.
[388] Erlank (2014) *PELJ* 616: The positive contributions of the Green Paper are said to include the introduction of the concept of the Land Management Commission; the Land-Valuer General and the Land Rights Management Board.
[389] See generally Erlank (2014) *PELJ* 614-633; E Du Plessis "Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform" (2014) 17 *PELJ* 798-822; H Mostert "Land as a 'National Asset' Under the Constitution: The System Change Envisaged by the 2011 Green Paper on Land Policy and What This Means for Property Law under the Constitution" (2014) 17 *PELJ* 760-780; Pienaar (2014) *TSAR* 434.
[390] Mostert (2014) *PELJ* 760.

the value of land for purposes of taxation, rating and expropriation;[391]its alleged lack of guidance on the manner to calculate compensation for purposes of expropriation[392] and it has also been accused of being vague and containing excessive and elaborate political rhetoric.[393]

3 2 5 Conclusion

As the above discussion indicates, land reform is an ongoing process.[394]It is also a complex process that is characterised, to an extent, by constant amendments and adjustments.[395]At this stage, the 1997 White Paper on Land Policy, with its various amendments, is still the authoritative measure guiding land reform in South Africa. That remains the case despite critical reports published in 2017[396] and 2019 respectively that impact on land reform.[397] It is in this context that the next section of the study seeks to highlight certain issues in this policy, with the possibility of an application of Ubuntu in resolving them.

3 3 A discussion of select issues in the land restitution and land redistribution sub-programmes of land reform

3 3 1 Introduction

As is discussed in the Green Paper on Land Reform[398] and in the introduction of this chapter,[399] there are various dissatisfactions with the land reform programme. It is outside the scope of this study to address all of these dissatisfactions.[400]

As mentioned, this study has elected to address those issues which it is believed Ubuntu could potentially be applied to. As was already stated, this is due to the links

[391] 760.
[392] Du Plessis (2014) *PELJ* 819.
[393] Erlank (2014) *PELJ* 616.
[394] Pienaar (2014) *TSAR* 438.
[395] 439.
[396] Parliament *Report of the High Level Panel* 200-299.
[397] RSA *Final Report of the Presidential Advisory Panel* 4-132
[398] Department of Rural Development & Land Reform *Green Paper on Land Reform* 5.
[399] Chapter 3 1.
[400] These issues are canvassed in more detail in the following sources: Ntsebeza “Land Redistribution in South Africa” in *The Land Question* 119; McCusker et al *Land Reform in South Africa* 181; Gumede (2014) *IJARS* 60; Parliament *Report of the High Level Panel* 211-213, 552; Hendricks “Rhetoric and Reality in Restitution and Redistribution” in *The Promise of Land* 48; Parliament *Report of the Joint Constitutional Review Committee* 4-35; Brown et al *Land Restitution in South Africa* 47.

between these particular issues and notions of reconciliation, justice and harmony. This view will be explored more comprehensively in chapter 5 of this study.

In this section of the chapter, the following issues which pertain to both land restitution and land distribution will be critically discussed: the WSWB principle, the question of whether land reform leads to poverty reduction and the lack of post-settlement support that is given to beneficiaries of land reform. This discussion will occur with the view of illustrating the magnitude of these issues and of highlighting the need for improvement in the land reform programme in this regard. A brief contextualisation of each of these land reform sub-programmes provides the necessary background below.

3 3 2 Exploring the land redistribution programme

Section 25(5) of the Constitution embodies the redistribution programme. Land redistribution is generally understood to refer to the state taking reasonable legislative and other measures to create conditions which enable citizens to have access to land on an equitable basis.[401]

Pursuant to the 1994 Reconstruction and Development Programme policy framework, land redistribution in the 1997 White Paper was aimed at the empowerment of poor and disadvantaged persons by the government to access land for productive and residential purposes.[402] The category of poor and disadvantaged persons as identified by the White Paper included the "rural and urban poor, labour tenants, farm workers and new entrants to agriculture".[403] Women in need were also identified as a priority group for redistribution projects.[404] The key mechanism to effect redistribution as identified in the 1997 White Paper was the Settlement/Land Acquisition Grant ("the SLAG") which was to be used for "land acquisition, home improvements, investment in internal infrastructure and the enhancement of tenure rights".[405] In 2001, the Department of Agriculture and Land Affairs launched the Land Redistribution for Agricultural Development ("the LRAD") programme which provided for a sliding scale

[401] S25(5) Constitution; Parliament *Report of the High Level Panel* 202.
[402] Department of Land Affairs *White Paper on Land Policy* 12.
[403] 12.
[404] 12.
[405] 7.

of grants per individual.[406]The amount of the grant that an individual could receive would depend on the contribution that the applicant could add, therefore the more money one had, the higher his/her grant would be.[407] The LRAD programme is said to have shifted the focus of land redistribution from being pro-poor to one that was aimed at creating a class of black commercial farmers.[408]

In 2006, the Proactive Land Acquisition Strategy ("the PLAS") began and in 2011, it replaced the LRAD and all other grant-based programmes.[409] This programme entails the government purchasing land and then leasing it, instead of transferring it, to beneficiaries, at discounted prices.[410] The eligibility requirements for the PLAS are said to be broad and clear but that the focus that the strategy places on "production discipline" leads to the inference that those with the resources necessary to continue commercial farming operations will be prioritised; while those beneficiaries unable to do so may be evicted.[411] This programme has been criticised for failing to advance agrarian reform.[412]

As an example of this criticism, Kepe and Hall argue that the PLAS' focus on "efficiency" and "trusteeship" is reminiscent of the colonial logic wherein the conquest of certain parcels of land was justified on the basis that the land was not being used productively by its owners.[413] The trusteeship component is argued to be similar to the "patronising" attitude of colonists towards the capabilities of black landowners.[414] They argue that the current trend of redistribution – as manifested by PLAS – is in conflict with the project of decolonisation as it, arguably, keeps black people in a position of subservience despite its purported just aims.[415]

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[406] R Hall "Transforming Rural South Africa? Taking Stock of Land Reform" in L Ntsebeza & R Hall (eds) (2007) *The Land Question in South* Africa 87 90-91.
[407] Hall "Who, What, Where, How, Why?" in *Land Divided, Land Restored* 136.
[408] Parliament *Report of the High Level Panel* 208.
[409] Hall "Who, What, Where, How, Why?" in *Land Divided, Land Restored* 138. See also T Kotzé *The Regulation of Agricultural Land in South Africa: A Legal Comparative Perspective*, LLD thesis, Stellenbosch University (2020) 162-180.
[410] 138.
[411] Parliament *Report of the High Level Panel* 208.
[412] Hall "Who, What, Where, How, Why?" in *Land Divided, Land Restored* 138-139; See also Pienaar *Land Reform* 219.
[413] T Kepe & R Hall "Land Redistribution in South Africa: Towards Decolonisation or Recolonisation?" (2018) 45 *Politikon* 128 133.
[414] 133.
[415] 128, 132.

Recently, in *Rakgase and Another v Minister of Rural Development and Land Reform and Another,*[416] the haphazard approach in dealing with potential redistribution beneficiaries was pointed out. In this regard various disconnects and misalignment between policy and departmental conduct were highlighted in particular, operating together to the detriment of applicants who had been waiting for many years to benefit from redistribution mechanisms.[417]

3 3 3 Exploring the land restitution programme

Section 25(7) of the Constitution authorises land restitution. Land restitution is defined in the 1997 White Paper as involving the return of land, alternative land or the payment of compensation to those who were dispossessed of such land, since 19 June 1913, as a result of racially discriminatory laws or practises.[418]The enabling legislation in this regard as contemplated in section 25(7) of the Constitution is the Restitution of Land Rights Act.[419]This is the only one of the three sub-programmes where one main Act regulates the process as a whole.

The requirements for restitution claims are set out in section 2 of the Act. Part-and-parcel of the requirements is that the dispossession must have occurred after 19 June 1913. This limitation has attracted significant comment and criticism.[420] However, the 1997 White Paper expresses the view that it would be impossible to settle claims predating 1913 through a judicial process because of undesirable possibilities, such as the instigation of racial and ethnic politics and competing claims to land because of successive occupation.[421]

While it is difficult to determine exactly how successful (or not) the respective sub-programmes have been,[422] it is sometimes put forward that land restitution has been

[416] 2020 1 SA 605 (GP) (4 September 2019).
[417] Pienaar (2020) *TSAR* 538-539.
[418] Department of Land Affairs *White Paper on Land Policy* 7.
[419] AJ Van der Walt *Constitutional Property Law* 290.
[420]293-294; See Yanou (2006) *Afr. Dev. Rev.* 177 179-180 for a discussion regarding the issues surrounding the 1913 cut-off date for land restitution claims. See also Brown et al *Land Restitution in South Africa* 47.
[421] Department of Land Affairs *White Paper on Land Policy* 77-78.
[422] Tenure reform is notoriously difficult to determine because changes in tenure and their efficacy cannot be measured as such, whereas it is more straight forward to determine how many hectares of

the most successful out of all three of the pillars of the land reform programme.[423] The reason often proffered for this assertion is that a large number of the claims in the restitution programme have been settled.[424] In this regard, the exposition of the current state of affairs concerning restitution in the recent judgment of *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others*[425] is pertinent. According to the judgment, at the time that the Restitution of Land Rights Amendment Act 15 of 2014 ("the Amendment Act") came into effect, there were already over 20 000 land claims from the first "wave of claims" that had not yet been finalised.[426]The Amendment Act re-opened the restitution process and enabled the lodgement of further claims between the time period 1 July 2014 and 30 June 2019.[427] Subsequently, the Amendment Act was invalidated, two years after its promulgation, and the result of which is that an additional 163 383 second "wave of claims" are still waiting to be processed.[428]

Also impacting on the statistics of settlement is the fact that the majority of settled claims had been in urban areas,[429] comprising the payment of compensation as opposed to actual land restoration.[430]

3 4 The willing seller, willing buyer principle

As Lahiff states, the WSWB principle is not enshrined in the Constitution.[431] It is instead a policy choice by the government.[432]The possible explanations for this choice

land had, for example, been redistributed or restored. Yet, even if the amount of land can be measured with respect to restitution or redistribution, it remains very difficult to determine the actual success thereof.

[423] Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 39. See also W Freedman "The Restitution of Land Rights in South Africa as Reparation for Past Injustices" (2003) 22 *WYAJ* 157 176.

[424] Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 39. See also Freedman (2003) *WYAJ* 176.

[425] 2019 5 BCLR 619 (CC).

[426] Para 6.

[427] Para 7.

[428] Para 46.

[429] Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 39. See also C Beyers "Urban Land Restitution and The Struggle for Social Citizenship in South Africa" (2013) 44 *Dev. Change* 965 969.

[430] McCusker et al *Land Reform in South Africa* 177. See also Freedman (2003) *WYAJ* 176; See also Beyers (2013) *Dev. Change* 970.

[431] E Lahiff "Willing Buyer, Willing Seller: South Africa's Failed Experiment in Market-Led Agrarian Reform" (2007) 28 *TWQ* 1577 1580.

[432] 1580. See also Parliament *Report of the High Level Panel* 228.

involve the influence wielded by the World Bank, during South Africa's negotiated transition, in favour of market-based reform;[433] the international climate at the time[434] and the need to encourage investor confidence.[435]The WSWB principle has attracted considerable criticism from scholars and politicians alike.[436]Before attempting to provide an overview of some of these identified issues, the concept of and functioning of this principle will first be set out.

The WSWB approach to land reform is a land acquisition model in which the state purchases properties offered on the market, as a willing buyer, from private land owners, as willing sellers, usually at market prices – on behalf of land reform beneficiaries.[437] Essentially, the WSWB approach concerns the freedom of private land owners to sell land to the buyer of their choice or to the highest bidder and the intended beneficiaries of land reform having to compete for available land at, commonly, market prices.[438]It has been argued that the deeply skewed and racialised land patterns in South Africa cannot be adequately addressed by a voluntary system that is mainly dependent on willing sellers.[439]The WSWB approach has been accused of protecting the interests of white landowners to the detriment of the disenfranchised.[440]This is argued on the basis of the discretionary powers that are conferred on the landowners as they are neither compelled to sell their land nor to settle at a price that is not to their satisfaction,[441] whereas the potential beneficiaries of land reform are fettered by restraints, such as limited grant sizes, limited budgets and protracted approval processes.[442]The discretionary powers that landowners wield

[433] M Weideman "Who Shaped South Africa's Land Reform Policy?" (2004) 31 *Politikon* 219 224. See also Lahiff (2007) *TWQ* 1577; C Walker "The Limits to Land Reform: Rethinking 'the Land Question'" (2005) 31 *JSAS* 805 815.
[434] Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 126.
[435] Pienaar *Land Reform* 281.
[436] E Lahiff "From 'Willing Seller, Willing Buyer' to a People-Driven Land Reform" (2005) 17 *PLAAS* 1-4; Aliber "Willing Buyer, Willing Seller" in *Land Divided and Land Restored* 145-160; Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 27-51; Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 129.
[437] RSA *Final Report of the Presidential Advisory Panel* 78.
[438] Lahiff (2005) 17 *PLAAS* 1.
[439] Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 28. See also Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 129.
[440] Aliber "Willing Buyer, Willing Seller" in *Land Divided, Land Restored* 145.
[441] Lahiff (2005) *PLAAS* 2.
[442] Lahiff (2007) *TWQ* 1586.

through the WSWB principle are said to be tantamount to a veto power over the land reform process.[443]

Further, the WSWB-principle is argued to lead to the purchase of less sought-after land at prices that are sometimes higher than the "open-market" value of such land.[444] This approach is also believed by some to be one of the reasons for the slow pace of land reform.[445]

An additional issue of the WSWB-principle is that the beneficiaries of land reform often have to settle for land that is incongruent with their needs and priorities simply because it is the land that is available for sale by the landowners.[446]

There is also a morality component to the objections to the WSWB approach. Some believe that it is unconscionable that a land reform programme that is intended to address the injustices of the past seemingly ignores colonial conquest, dispossession and the exploitation of black labour that formed part of the successes of current and previous generations of commercial farming in the country.[447]In this regard, it has been argued that the WSWB principle legitimises land dispossessions.[448]

There have been recent developments in the legal landscape indicating the possible relinquishment of the WSWB principle. The first of which is that both the 2011 Green Paper on Land Reform[449] and the Final Report of the Presidential Advisory Panel identified the WSWB model of land acquisition as a barrier to successful land reform.[450]Further, on the 15th of November 2018, the Joint Constitutional Review Committee of Parliament issued a report recommending the amendment of section 25 of the Constitution to render the possibility of the expropriation of land with nil

[443] Lahiff (2005) *PLAAS* 2.
[444] Lahiff (2007) *TWQ* 1591.
[445] Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 28. See also Aliber "Willing Buyer, Willing Seller" in *Land Divided, Land Restored* 145.
[446] Parliament *Report of the High Level Panel* 228.
[447] Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 129.
[448] Aliber "Willing Buyer, Willing Seller" in *Land Divided, Land Restored* 148 quoting Andile Mngxitama, the founder and leader of Black First Land First.
[449] Department of Rural Development & Land Reform *Green Paper on Land Reform* (2011) 5.
[450] RSA *Final Report of the Presidential Advisory Panel* 78-79.

compensation more explicit.[451] The report and the recommendations contained therein were approved by the National Assembly on the 4th of December 2018 and by the National Council of Provinces on the 5th of December 2018.[452]

On 21 December 2018, the Draft Expropriation Bill of 2019 ("Draft Expropriation Bill") was published for comment.[453] Notably, section 12(3) of the Draft Expropriation Bill provides for five categories of land in which expropriation with nil compensation would be a possibility, where land is expropriated in the public interest, namely:

(i) "where the land is occupied or used by labour tenant, as defined in the Land Reform (Labour Tenants) Act 3 of 1996;
(ii) where land is held for purely speculative purposes;
(iii) where the land is owned by a state-owned corporation or other state-owned entity;
(iv) where the owner of the land has abandoned the land;
(v) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land".[454]

As previously mentioned in chapter 1 of this study,[455] the Draft Constitution Eighteenth Amendment Bill was published for comment on 13 December 2019.[456] The long title of the Draft Bill expresses the aim of the Bill as "to provide that where land and any improvements thereon are expropriated for the purposes of land reform, the amount of compensation payable may be nil".[457] The preamble of the Draft Bill recognises the "need for urgent and accelerated land reform" and the imperative of addressing the skewed land ownership pattern in the country.[458]

[451] Parliament *Report of the Joint Constitutional Review Committee* 34-35.
[452] Parliament of the Republic of South Africa "NCOP Approves Recommendation To Amend Section 25 of Constitution" (05-12-2018) *Parliament of the Republic of South Africa* < https://www.parliament.gov.za/press-releases/ncop-approves-recommendation-amend-section-25-constitution> (accessed 19-08-2019).
[453] Expropriation Bill (Draft) of 2019 in GN 1409 *GG* 42127 of 21-12-2018.
[454] Expropriation Bill (Draft) of 2019 in GN 1409 *GG* 42127 of 21-12-2018.
[455] Chapter 1 2.
[456] Constitution Eighteenth Amendment Bill (Draft) in GN *GG* 42902 of 13 -12-2019.
[457] Constitution Eighteenth Amendment Bill (Draft) in GN *GG* 42902 of 13 -12-2019.
[458] Constitution Eighteenth Amendment Bill (Draft) in GN *GG* 42902 of 13 -12-2019.

The most recent development in this regard is the publication for comment of the Draft Expropriation Bill of 2020 on 9 October 2020.[459] Of specific importance to the land debate and the use of expropriation as a possible tool to enhance and promote land reform, is clause 12(3) of the Bill. Where land is expropriated in the public interest, it may be just and equitable that nil compensation is payable - having regard to all relevant circumstances, including but not limited to certain categories of land set out in section 12(3)(a)-(e):

(a) "where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from the appreciation of its market value;

(b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;

(c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 47 of 1937, where an owner has abandoned the land by failing to exercise control over it;

(d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and

(e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property)".

Further, clause 12(4) provides that when a court or arbitrator determines the amount of compensation under section 23 of the Land Reform (Labour Tenants) Act 3 of 1996, it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances.

As the Bill has been published for comment only and as the process has not been completed yet, it is at this stage unclear to what extent the impending amendment of section 25 on the one hand and the 2020 Expropriation Bill on the other, will have on the WSWB land acquisition model of land reform. Arguably, acquisition of land may

[459] Expropriation Bill (Draft) of 2020 in GN 1082 *GG* 43798 of 09-10-2020. See for a detailed discussion of the Bill, JM Pienaar "Land Reform" (2020) 4 *JQR* at 1.2.

be more sustainable in that it may be more affordable, but the real impact of these developments remains to be seen.

It is also unclear what influence the Property Valuation Act 17 of 2014 ("Property Valuation Act") will have on the existence or the application of the WSWB principle of land reform. The main objectives of the Property Valuation Act are to provide:[460]

(i) "for the establishment, functions and powers of the Office of the Valuer-General;
(ii) for the appointment and responsibilities of the Valuer-General;
(iii) for the regulation of the valuation of property that has been identified for land reform as well as property that has been identified for acquisition or disposal by a department; and
(iv) for matters connected therewith".

Pienaar argues that the foremost contribution of the Property Valuation Act is that it provides increased legal certainty regarding the value, specifically market value, of property earmarked for land reform purposes and that it clarifies the procedure through which this determination is to be made.[461]

The fifth chapter of this study will examine the opportunities that the application of Ubuntu could provide on land acquisition methods for land reform purposes – with these proposed and adopted changes to the WSWB principle in mind.

3 5 The links between land reform and poverty reduction

Poverty reduction is one of the objectives of land reform.[462]However, there remains uncertainty as to whether the current land reform programme indeed leads to poverty reduction. This uncertainty is, partly, because it is, in practice, considerably difficult to measure, determine or ascertain whether a particular land reform measure has led to a decrease in poverty. This is, possibly, due to the varied and subjective factors involved in such an analysis, such as the selection of a time period in which to measure the impact of the relevant land reform programme; the determination of criteria that

[460] S2 of the Property Valuation Act.
[461] Pienaar (2018) *NLJ* 56.
[462] Department of Land Affairs *White Paper on Land Policy* 7.

would be an accurate measure of such poverty reduction as a consequence of land reform; the manner in which to determine whether it was land reform – and not any other change in environment – that led to the improved livelihood; and so forth. Therefore, perhaps understandably, the academic views regarding the links between land reform and poverty reduction are contentious.

This section of the study will highlight the different perspectives on the subject, with the view of highlighting this issue as one in which an Ubuntu-centred approach might be useful.

Pienaar argues that broadening access to land has the potential to generate economic activity and that because land redistribution increases the number of smaller farms, this also increases employment opportunities because of the labour required at these farms.[463]Therefore, in the context of subsistence farming, it can be argued that land reform contributes to family livelihoods.

In a similar vein, others have maintained that access to land may not be the only income-generating source for beneficiaries, however it fulfils a notable supplementary income function.[464]Shackleton and Shackleton argue that restored or redistributed farms fulfil functions such as a place of residence, food production through food gardens and satisfying emotional needs related to maintaining family and historical connections.[465]Further, a study conducted in the Chris Hani District in the Eastern Cape, in 2009 and 2010, found that land reform beneficiaries were, on average, better off than their counterparts with limited access to land.[466]

Conversely, some have argued that market-based reform has exacerbated poverty by intensifying, instead of eliminating, class, race and gender disparities.[467]Others have argued that because of increased urbanisation and decreasing dependence on

[463] Pienaar *Land Reform* 27.
[464] Hendricks, Ntsebeza & Helliker "Land Questions" in *The Promise of Land* 10-11: An example is made regarding a certain sphere of the black middle class in Ncambedla, in the Eastern Cape whose success is partly attributed to their ability to combine their "meagre" governmental incomes with land ownership.
[465] Shackleton & Shackleton "Natural Resources and Livelihoods" in *Land Divided, Land Restored* 203.
[466] Chitonge & Ntsebeza (2012) *RAS* 91.
[467] BI Logan "Towards A Reorientation in Land Reform: From a Market to Locality-Driven Approach in South Africa's Land Restitution Programme" (2012) 12 *Prog.Dev.Stud.* 173 176.

subsistence farming, an excessive focus on agriculture as a means of poverty alleviation is misguided.[468] This is part of a bigger question and also impacts on access to land in urban and peri-urban areas where the need for land for shelter and housing is, arguably, greater.[469] Upon conducting a case study, in the Northern Cape, between 2002 and 2004, involving eight groups of redistribution and restitution beneficiaries, Bradstock determined that although, on average, the household income of the sample groups had increased, there was little indication that the land reform programme had contributed to this improvement.[470]He concluded that, in its incarnation at the time, the land reform programme was unlikely to be a tool of poverty reduction in the Northern Cape.[471] Similarly, relying on the data available through the South African Labour Force Survey and the General Household Survey in 2009, Valente concluded that land redistribution beneficiaries did not seem to have lower incidents of food insecurity as a result of land reform.[472]Contrastingly, the analysis is said to have indicated that land grant recipients were, actually, in a worse-off position, in terms of food security, than their counterparts, with similar profiles, who had not benefited from land reform.[473]

Opposingly, upon conducting a case study of three land reform sites in the Limpopo Province between 2004 and 2006, Manenzhe concluded that the food security of some of the communities had indeed improved through their access to productive land.[474] This led the author to conclude that access to land is important for purposes of poverty alleviation.[475] Chitonge also reached a similar conclusion upon investigating the impact of land reform on the livelihoods of its beneficiaries.[476] Using micro-data from smallholder and subsistence rural households, the author surmised that, if

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[468] Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 49.
[469] See LJ Bank & TGB Hart "Land Reform and Belonging in South Africa: A Place-Making Perspective" (2019) 46 *Politikon* 411 419; See generally I Turok & J Borel-Saladin "Is Urbanisation in South Africa on a Sustainable Trajectory?" (2014) 31 *Dev South Afr* 675-691; M Huchzermeyer, P Harrison, S Charlton, N Klug, M Rubin & A Todes "Urban Land Reform in South Africa: Pointers for Urban Policy and Planning" (2019) 75 *Town Reg Plan* 91-103.
[470] A Bradstock "Changing Livelihoods and Land Reform: Evidence from the Northern Cape Province of South Africa" (2005) 33 *World Dev* 1979 1990.
[471] 1990.
[472] C Valente "The Food (In)Security Impact of Land Redistribution in South Africa: Microeconometric Evidence from National Data" (2009) 37 *World Dev* 1540 1549.
[473] 1549.
[474] TJ Manenzhe *Post-Settlement Challenges for Land Reform Beneficiaries: Three Case Studies from Limpopo Province* MPhil thesis, University of the Western Cape (2007) 103.
[475] 103.
[476] H Chitonge "Land Redistribution and Zero Hunger Programs: Can South Africa Reap A Triple Dividend?" (2014) 6 *Pov. & Pub. Policy* 380 381.

implemented in an integrated manner, especially with the Zero Hunger Programme,[477] land reform could contribute significantly to, among others, reducing the incidence of hunger and poverty in the country.[478]

Through analysing the Livelihoods After Land Reform Study that was carried out between 2007 and 2009 in order to understand the livelihood and poverty reduction outcomes of land reform, Aliber and Cousins concluded that the overall impact of land redistribution has been mixed – with some failures and some modest to substantial improvements.[479] The Presidential Advisory Panel concluded that there was inadequate evidence on the livelihood impact of land redistribution as there was a shortage of continuous data collection, panel data and clear "outcome indicators".[480]

The Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change ("High Level Panel Report") reported that the livelihoods of land reform beneficiaries had not substantially improved[481] while the Presidential Advisory Panel asserted that there was inadequate evidence on the livelihood impact of land reform.[482]

As should be evident from the discussion in this section of the study, it is nearly impossible to conclude – with absolute certainty – that land reform leads to a reduction in poverty. However, there are considerable economic and social benefits, as shown, that can accrue as a result of increased access to land.

3 6 The lack of post-settlement support

The 1997 White Paper on Land Policy acknowledges that providing post-settlement support to beneficiaries of the land reform programme is an institutional weakness of

[477] The Zero Hunger Programme was launched in 2011 by the Department of Agriculture, Forestry and Fisheries to ensure the optimal usage of land, successful land reform and land tenure for food security and better production inputs. See Parliamentary Monitoring Group "Zero Hunger Programme Provincial Implementation: Department of Agriculture, Forestry and Fisheries Briefing" (15-05-2012) *Parliamentary Monitoring Group* <https://pmg.org.za/committee-meeting/14379/> (accessed 20-08-2019).
[478] Chitonge (2014) *Pov. & Pub. Policy* 381.
[479] M Aliber & B Cousins "Livelihoods After Land Reform in South Africa" (2013) 13 *J Agrar. Change* 140 162.
[480] RSA *Final Report of the Presidential Advisory Panel* 13.
[481] Parliament *Report of the High Level Panel* 512.
[482] RSA *Final Report of the Presidential Advisory Panel* 13.

the Department of Land Affairs (later renamed the Department of Rural Development and Land Reform and currently the Department of Agriculture, Rural Development and Land Reform).[483]A former Minister of the Department of Rural Development and Land Reform, Gugile Nkwinti, echoed these sentiments in the Department of Rural Development and Land Reform Strategic Plan 2015-2020.[484] He expressed that little attention had been given to the post-settlement support that was necessary to sustain the transformation that land reform was envisaged to introduce.[485]

Currently, there are two notable policies dealing with the provision of post-settlement support to land reform beneficiaries, respectively, the Comprehensive Agricultural Support Programme ("CASP")[486] and the Recapitalisation and Development Programme ("RADP").[487]

The CASP was launched on the 31st of August 2004 by the Department of Agriculture and Land Affairs.[488] The aim of the CASP is said to be the provision of support services to land and agrarian reform beneficiaries that are necessary for agricultural development.[489] The CASP identifies four categories of beneficiaries, namely: "the hungry and vulnerable, subsistence and household food producers, farmers and those operating within the agricultural macro-economic system, such as commercial farmers".[490] The areas of support that are offered through the CASP include: "information and knowledge, management, advisory and regulatory services, training and capacity building, finance, on farm and off-farm infrastructure".[491]

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[483] Department of Land Affairs *White Paper on Land Policy* 9. The Department of Land Affairs was renamed the Department of Rural Development and Land Reform.
[484] Department of Rural Development and Land Reform *Department of Rural Development and Land Reform Strategic Plan 2015-2020* (2015) 4.
[485] 4.
[486] Department of Agriculture *Progress Report on the Implementation of the Comprehensive Agriculture Support Programme (CASP)* (2004) 1.
[487] Department of Rural Development and Land Reform *Policy for the Recapitalisation and Development Programme of the Department of Rural Development and Land Reform* (2013) 10.
[488] NB Sibisi *Agricultural Extension and Post-Settlement Support of Land Reform Beneficiaries in South Africa: The Case of Ixopo in the Province of KwaZulu-Natal* Master of Agriculture thesis, University of KwaZulu-Natal (2015) 18.
[489] Department of Agriculture *Progress Report* 7.
[490] 1 8.
[491] 1 7-8.

In 2009, the Department of Rural Development and Land Reform conducted a study wherein it evaluated the successes and failures of the Land Reform programme since the programme's inception.[492]The study indicated that many land reform projects were in "distress" and unsuccessful due to a lack of appropriate and sufficient post-settlement support.[493]In response to this, in 2013, the Department of Rural Development and Land Reform launched the RADP.[494] The objectives of this policy include ensuring that all land reform farms are 100% productive and rectifying the negative impact that the Natives Land Act and the Native Trust and Land Act had on the class of black commercial farmers.[495] Necessarily, the RADP targets properties that have been acquired, since 1996, through both the restitution and redistribution programmes.[496] The ways in which the policy aims to address the issue of insufficient post-settlement support include the encouragement of: mentorships,[497] co-management,[498] share-equity arrangements,[499] and contract farming and concessions.[500]

Despite the existence of these policies, the High Level Panel Report acknowledges that post-settlement support offered by the government has generally been inadequate due to poor coordination among governmental departments and the different layers of government.[501] This is supported by previous studies that have shown that beneficiaries struggle to access services such as training, credit, ploughing services,

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[492] Department of Rural Development and Land Reform *Policy for the Recapitalisation and Development Programme* 11.
[493] 11.
[494] 11-12.
[495] 15.
[496] 12.
[497] 12: Mentorship is defined as the relationship whereby the mentee, who already possesses a fair amount of knowledge, skills and experience, would receive strategic support such as financial management, markets and marketing from the mentor.
[498] 12: Co-management is said to be an arrangement wherein there is a fair and defined sharing of the management functions, duties and entitlements to a given territory or a share of natural resources.
[499] 14: Share-equity arrangements occur, according to the RADP, when partners from the private sector buy shares in existing agricultural farms or enterprises across the value chain. It is said that in this way, the LRAD objectives are achieved through the contribution of finances and skills by the private sector.
[500] 14: Contract farming is said to consist of an agreement between, generally, small-scale farmers and processors or marketing firms whereby the farmers commit to providing a specific commodity at a particular quantity and quality to the purchasers and the companies commit to supporting the farmers' production and to purchasing that commodity.
According to the RADP, all other economic but non-agricultural activities that may arise from land reform projects – such as tourism and mining – can be developed through concessionary partnerships.
[501] Parliament *Report of the High Level Panel* 214-215.

transport and so forth.[502] A study conducted, based on three case studies in the Limpopo province, to investigate the post-settlement experience of land reform beneficiaries found that the beneficiaries experienced challenges such as a lack of support from governmental agencies, poor infrastructure on the farms, a lack of access to credit and other necessary resources, and a lack of proper coordination between governmental institutions.[503]The study concluded that the result of these post-settlement challenges was that the developmental potential of land reform projects was not fully met and that this hindered the improvement of livelihoods that is one of the goals of land reform.[504]

In the same vein, the Presidential Advisory Panel provides that there is no law that requires the state to provide post-settlement support to redistribution and restitution projects.[505] The Panel elaborates that there is evidence that many projects lack post-settlement support in the form of farming and production elements and even basic forms of support.[506] The Panel also expresses that the RADP, which is the main mechanism for support, is typically delayed and only a small portion of projects receive it.[507]

The government's failure to provide sufficient post-transfer support to beneficiaries is said to limit the beneficiaries from deriving maximum benefit from the land.[508]A study conducted by Olubode-Awosola, van Schalkwyk and Jooste determined that land reform projects performed worse when there were delays in transferring land to the beneficiaries; where the beneficiaries were not adequately trained and experienced; and where there was a lack of post-settlement support and project monitoring.[509]Accordingly, the projects performed better where the necessary training, post-settlement support and monitoring services were indeed available and employed.[510]

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[502] Lahiff (2007) *TWQ* 1590.
[503] Manenzhe *Post-Settlement Challenges* 101-108.
[504] 101, 111.
[505] RSA *Final Report of the Presidential Advisory Panel* 13.
[506] 13.
[507] 13.
[508] Hall "Transforming Rural South Africa?" in *The Land Question* 100.
[509] OO Olubode-Awosola, HD Van Schalkwyk & A Jooste "Mathematical Modeling of the South African Land Redistribution for Development Policy" (2008) 30 *J Pol Mod* 841 853.
[510] Olubode-Awosola et al (2008) *J Pol Mod* 853.

There have also been criticisms regarding the difficulty that beneficiaries experience when attempting to access the governmental funds that are supposed to assist them in the start-up phases of their projects. [511] This is said to be especially damaging in a farming context where certain inputs, such as fertiliser, are time and season-specific.[512] It is argued that post-settlement support is integral to ensuring the productive use of land by land reform beneficiaries, and thus the improvement of the quality of their lives.[513]

3 7 An overview of the exploration of the select issues affecting land redistribution and restitution

The directive for the government to embark on land redistribution and land restitution programmes is found, respectively, in sections 25(5) and 25(7) as supported by section 25(8) of the Constitution. Satisfying the provisions contained in these subsections is not discretionary. However, the method in which the government elects to fulfil these constitutional obligations remains a policy choice.[514]

In this regard, the land restitution programme is guided by the Restitution of Land Rights Act. The land redistribution programme, after various adjustments, is currently based on the PLAS. The issues that plague both these sub-programmes of land reform that were discussed in this section of the study are: the WSWB-principle; the links between land reform and poverty reduction and the inadequate post-settlement that is available to land reform beneficiaries. With regards to the WSWB approach to land reform projects, the following issues were highlighted: the process was argued to be skewed in favour of landowners;[515] it was argued to be expensive[516] and time-

[511] McCusker et al *Land Reform in South Africa* 136.
[512] 136.
[513] NS Masoka *Post-Settlement Land Reform Challenges: The Case of the Department of Agriculture, Rural Development and Land Administration, Mpumalanga Province* Master of Public Administration thesis, North-West University (2014) 3; Sibisi *Agricultural Extension and Post-Settlement Support* 30; Manenzhe *Post-Settlement Challenges* 101, 111.
[514] Pienaar (2014) *TSAR* 433.
[515] Aliber "Willing Buyer, Willing Seller" in *Land Divided, Land Restored* 145.
[516] Lahiff (2007) *TWQ* 1591.

consuming;[517] and it was said to be a legitimisation of land dispossession[518] and an erasure of South Africa's colonial and apartheid past.[519]In terms of the investigation regarding the links between land reform and poverty alleviation, conflicting studies and conflicting academic opinions emerged. It is thus not completely certain that land reform leads to poverty reduction as such. However, other economic and social benefits to improved access to land emerged in the academic literature. Finally, it was argued that the government provides inadequate post-settlement support to the detriment of land reform beneficiaries and their land reform projects.[520]

3 8 Conclusion

As discussed in chapter 2 of this study, the colonial and apartheid regimes found prominent expression in the dispossession of and denial of land rights to the black majority.[521] Because of this, it was commonly understood that the demise of apartheid would necessarily involve land reform.[522]

The first exploratory phase of South Africa's land reform process began under the apartheid government through its adoption of the 1991 White Paper on Land Reform Policy.[523] This policy was celebrated for its abolishment of racially discriminatory laws that related to land acquisition, ownership and occupation.[524] However, it was criticised for its failure to support land restitution fully and for not being embedded in a Bill of Rights.[525] Consequently, a second phase of land reform was embarked upon under the post-apartheid government.[526] This land reform programme was constitutionally-based,[527] was much more encompassing and consisted of three sub-programmes, namely: land redistribution, tenure reform and land restitution.[528]

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[517] Hendricks "Rhetoric and Reality in Restitution and Redistribution" in *The Promise of Land* 28. See also Aliber "Willing Buyer, Willing Seller" in *Land Divided, Land Restored* 145.
[518] Aliber "Willing Buyer, Willing Seller" in *Land Divided, Land Restored* 148 quoting Andile Mngxitama, the founder and leader of Black First Land First.
[519] Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 129.
[520] Hall "Transforming Rural South Africa?" in *The Land Question* 100. See also Olubode-Awosola et al (2008) *J Pol Mod* 853.
[521] Chapter 2 2 – Chapter 2 6.
[522] Ntsebeza "Land Redistribution in South Africa" in *The Land Question* 109.
[523] Coles (1993) *Envtl Aff L Rev* 726.
[524] 732.
[525] Carey Miller & Pope *Land Title* 246-247. See also Coles (1993) *Envtl Aff L Rev* 733-734.
[526] Walker & Cousins "Introduction" in *Land Divided, Land Restored* 19.
[527] Pienaar *Land Reform* 167.
[528] Department of Land Affairs *White Paper on Land Policy* 7.

It has been argued that the land redistribution and restitution sub-programmes are failing, in various ways, to meet their objectives.[529] In this chapter, the WSWB-principle; the question of whether land reform leads to poverty reduction and the lack of adequate post-settlement support given to land reform beneficiaries were focussed on specifically. Although some developments have occurred, for example, movement towards the amendment of section 25, these issues remain largely unresolved by the current land reform programme. Likewise, it remains uncertain to what extent the recommendations in the 2011 Green Paper, the adoption of the Property Valuation Act and the imminent amendment of section 25 of the Constitution[530] will contribute to possible solutions. Therefore, it is necessary to consider a possibly alternative approach: one that involves Ubuntu as its driving force.

[529] Chapter 3 1.
[530] Parliament *Report of the Joint Constitutional Review Committee* 4-35.

Chapter 4: Ubuntu as a socio-cultural and legal value

4 1 Introduction

The preceding chapters of this study have explored the colonial and apartheid histories of land dispossession that necessitated the introduction of an all-encompassing land reform programme.[531] An analysis of certain failings of the land redistribution and restitution sub-programmes that are aimed at redressing the racialised inequality in land distribution that continues to plague South Africa, was also provided.[532] Consequently, this chapter aims to explore, in detail, Ubuntu as both a socio-cultural value and as a legal value. This is necessary in order to highlight the possible benefits that could accrue from the increased utilisation of Ubuntu in our legal system – specifically in the areas that have been identified, in this study, as problematical in the relevant land reform sub-programmes.

Various criticisms have, however, been advanced against the inclusion of Ubuntu in the South African legal system. These criticisms include claims that the concept lacks conceptual clarity,[533] that it is a "bloated" concept that "means everything to everyone"[534] and that it is redundant to constitutional interpretation. In this chapter these claims are likewise interrogated.[535] Further, a tentative conclusion will be reached regarding the contribution that Ubuntu could make in improving the land reform programme.

4 2 Ubuntu as a socio-cultural value

4 2 1 Introduction

As former Justice Mokgoro expresses, it is nearly impossible to define Ubuntu with any precision.[536] It has been argued that this may be due to the dynamic nature of the concept[537] and the difficulty inherent in capturing the essence of the value in a foreign language – such as English - where there is no direct translation or no specific word

[531] Chapter 2.
[532] Chapter 3.
[533] Furman "Ubuntu and the Law" in *Curating the Archive* 157.
[534] D Cornell & K van Marle "Exploring Ubuntu: Tentative Reflections" (2005) 5 *AHRLJ* 195 196.
[535] Himonga et al (2013) *PER* 387.
[536] Mokgoro (1998) *PELJ* 2.
[537] SB Radebe & MR Phooko "Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of Ubuntu" (2017) 36 *SAJP* 239 239.

that is exactly equivalent in meaning.[538]However, if Ubuntu is to be used as a tool to facilitate meaningful progress, it seems vital that it be possible for it to be discussed and understood in varied contexts, including in a linguistic context that may be deemed as ”foreign”.[539]Therefore, in this section of the study, an attempt will be made to give substantive content to the value of Ubuntu as it is understood in Sub-Saharan Africa, specifically in an English language context. This will be done through an exploration of the defining components of the value and through an analysis of the aims that the value seeks to achieve. Understandably, the conceptualisation that is to follow is neither definitive nor exhaustive.

4 2 2 The conceptualisation of Ubuntu

4 2 2 1 Personhood, communitarianism and solidarity as components of Ubuntu

In South African languages specifically, the word Ubuntu forms part of the Nguni languages of IsiXhosa, IsiZulu and IsiNdebele.[540]Botho is the equivalent of this word in the languages of Sesotho and Setswana.[541]

Ubuntu is said to be the foundation of African philosophy.[542]While this is uncontested, an in-depth investigation into the historical genealogy and anthropology of what defines an African philosophy is beyond the scope of this study.[543] Therefore, for purposes of this study, it is accepted that Ubuntu forms a crucial part of African philosophy and that its essence is captured in the Nguni maxim, “umntu ngumntu ngabantu”.[544]The literal translation of this phrase is “a person is a person through other

[538] Mokgoro (1998) *PELJ* 2; Radebe & Phooko (2017) *SAJP* 240.
[539] Himonga et al (2013) *PER* 375.
[540] T Metz & JBR Gaie “The African Ethic of Ubuntu/Botho: Implications for Research on Morality” (2010) 39 *J Moral Educ* 273 274-275.
[541] 274-275.
[542] MB Ramose *African Philosophy Through Ubuntu* (1999) 35. See also T Bennett & J Patrick “Ubuntu, The Ethics of Traditional Religion” in TW Bennett (ed) *Traditional African Religions in South African Law* (2011) 223 223.
[543] For more information on the philosophical aspect of Ubuntu, see generally M Letseka “In Defence of Ubuntu” (2012) 31 *Stud Philos Educ* 47-60; C Tagwirei “The Nucleation of *Ubuntu* Discourse” (2020) 18 *Afr Identities* 392-406; MF Murove “Ubuntu” (2012) 59 *Diogenes* 36-47; A Nolte & C Downing “Ubuntu: The Essence of Caring and Being – A Concept Analysis” (2019) 33 *Holist Nurs Pract* 9-16.
[544] C Vervliet *The Human Person: African Ubuntu and the Dialogue of Civilisations (*2009) 20; See also Bennett & Patrick “The Ethics of Traditional Religion” in *Traditional African Religions* 238; Metz (2011) *AHRLJ* 532 537; Mokgoro (1998) *PELJ* 2.

persons".[545] At times, it has also been translated as "I am because you are".[546]This phrase consists of one of the distinguishing components of Ubuntu, which is its conceptualisation of personhood.[547]

In a society grounded on Ubuntu, the development of personhood is attached to the notion of a shared identity and one's humanity is fostered through a network of relationships.[548]In the words of Shutte, an Ubuntu-based understanding of personhood provides that at the inception of one's life, one only has the potential to be a person.[549] This means that the existence of one's personhood is dependent on personal relationships with others that will facilitate the exercise and fulfilment of those capacities that will enable the achievement of personhood.[550]By implication, to be human – in accordance with Ubuntu – is to recognise the humanity of others and to establish humane relationships with others, on that basis.[551] In this regard, persons do not exist in isolation, but are inherently destined to co-exist. Accordingly, community is thus a necessary means for human beings to achieve their full capacity.[552]

Community, which is another component of Ubuntu, is also concerned with the ideal of identifying as part of the same group of people and engaging in shared projects with coordinated efforts aimed at realising shared outcomes.[553] Communitarianism in the philosophy of Ubuntu emphasises group solidarity and the importance of the protection of the group's interests.[554] Group solidarity obliges people to engage in mutual aid and to act in ways that are reasonably expected to benefit each other.[555] As members of

[545] Vervliet *The Human Person* 20; See also DJ Louw *Ubuntu and the Challenges of Multiculturalism in Post-Apartheid South Africa* (2002) 5; A Shutte *Ubuntu: An Ethic for a New South Africa* (2001) 12; Bennett & Patrick "The Ethics of Traditional Religion" in *Traditional African Religions* 238.
[546] J Ogude "Introduction: Ubuntu and Personhood" in J Ogude (ed) *Ubuntu and Personhood* (2018) 1 1. See also Bennett & Patrick "The Ethics of Traditional Religion" in *Traditional African Religions* 238.
[547] Ogude "Introduction" in Ubuntu *and Personhood* 1.
[548] 1.
[549] Shutte *Ubuntu* 12.
[550] 12.
[551] Ramose *African Philosophy* 106.
[552] Shutte *Ubuntu* 13. See also Bennett & Patrick "The Ethics of Traditional Religion" in *Traditional African Religions* 238.
[553] Metz (2011) *AHRLJ* 538.
[554] Mokgoro (1998) *PELJ* 8. See also A Sachs "Towards the Liberation and Revitalization of Customary Law" in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) 303 310.
[555] Metz (2011) *AHRLJ* 538.

the same community, people are expected to show mutual care for each other and to be responsible for one another.[556]

4 2 2 2 Truth, restorative justice and harmony as the aims of Ubuntu

As explained, personhood is inextricably linked to community or co-existence. At its core, Ubuntu aims to provide harmonious and peaceful coexistence.[557]The philosophy of Ubuntu highlights the importance of reaching consensus and pursuing reconciliation.[558] For example, the nature of the adjudication process under customary law[559] – which arguably has Ubuntu as its foundation[560] – is conciliatory as it is aimed at restoring peace and harmony between the members of the community.[561]In accordance with Ubuntu, the focus is placed on promoting reconciliation as opposed to punishment or retribution.[562]The reparation of broken relationships is the ultimate goal of criminal justice in accordance with the philosophy of Ubuntu.[563] The punishment of an offender is often abandoned in favour of issuing an apology and/or compensation, except when the imposition of a punishment is viewed to be the best course of action for resolving that particular conflict.[564]Further, the commission of a crime is viewed as an offence against not only the victim, but the community as a whole.[565] As such, it is necessary for the offender to atone to the whole community through measures or means, for example, a cleansing ceremony or by way of an offering in the form of goats and cattle.[566] It has been argued that Ubuntu mandates a more demanding form of justice in that it requires, amongst others, that wrongdoers and the beneficiaries of injustice seek to restore and affirm their own humanity through

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[556] Bennett & Patrick "The Ethics of Traditional Religion" in *Traditional African Religions* 227.
[557] A Graness "Becoming a Person: Personhood and its Preconditions" in J Ogude (ed) *Ubuntu and Personhood* (2018) 39 44. See also TW Bennett *Ubuntu: An African Jurisprudence* (2018) 35.
[558] Louw *Ubuntu and the Challenges of Multiculturalism* 9. See also Vervliet *The Human Person* 28.
[559] T Nhlapo & C Himonga (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 44, 50: Customary law consists of two basic forms of law, namely: living customary law and official customary law. Living customary law is the customs and traditions actually observed by an indigenous community in regulation of the relationships in that community. Official customary law is the law applied by the courts and other state institutions. These two forms often differ drastically in format and impact. See also TW *Bennett Customary Law in South Africa* (2004) 1-462.
[560] Ramose *African Philosophy* 72. See also I Keevy "Ubuntu Versus The Core Values of the South African Constitution" in L Praeg & S Magadla (eds) *Ubuntu: Curating the Archive* (2014) 54 60.
[561] Mokgoro (1998) *PELJ* 8-9.
[562] Himonga et al (2013) *PER* 381.
[563] Metz & Gaie (2010) *J Moral Educ* 278.
[564] 278.
[565] Radebe & Phooko (2017) *SAJP* 242.
[566] 242.

acts of reparation and contrition.[567]In this way, Ubuntu is also considered to be one of the tools necessary for conflict resolution and peace-building, for example after instances of massive human rights violations and deep societal conflicts.[568]

Ubuntu also emphasises the importance of reaching consensus.[569]Ubuntu is aimed at achieving a consensual and "participatory democracy" that will encourage group solidarity.[570]The imperative to reach agreement is said to have been necessitated by the desire to protect the interests of individuals and minorities.[571]However, there remains concerns that the emphasis which Ubuntu places on group solidarity and the need to reach consensus might have the effect of enforcing an "oppressive conformity".[572]In response to this criticism, it is also argued that Ubuntu, like any other value, can be misused or misapplied.[573] However – when it is used correctly, it acts as a guiding principle for a more equitable society and not as a means to silence dissent.[574]

In encouraging dialogue, the philosophy of Ubuntu is also concerned with the revelation and acknowledgement of truths – both historical and otherwise.[575]For instance, the post-amble of the interim Constitution[576] expressed both the need for Ubuntu and the need for understanding in healing the divisions caused by colonialism and apartheid.[577]

4 2 2 3 Ubuntu as a living philosophy

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[567] D Cornell *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation* (2014) 73.
[568] Graness "Becoming a Person" in *Ubuntu and Personhood* 51.
[569] Louw *Ubuntu and the Challenges of Multiculturalism* 9.
[570] Vervliet *The Human Person* 28. To illustrate this point, Vervliet discusses African tribal decision-making bodies that were characterised by lengthy discussions (known as "indaba") where everyone's opinion was heard and consensus was eventually reached.
[571] Louw *Ubuntu and the Challenges of Multiculturalism* 9.
[572] 9. See also Cornell *Law and Revolution in South Africa* 163-164; Bennett *Ubuntu* 38; Shutte *Ubuntu* 13.
[573] J Modiri "Race, Realism And Critique: The Politics of Race and *Afriforum v Malema* in the (In)Equality Court" (2013) 130 *SALJ* 274 291-292; Radebe & Phooko (2017) *SAJP* 247.
[574] Graness "Becoming a Person" in *Ubuntu and Personhood* 55-56.
[575] Cornell *Law and Revolution in South Africa* 113.
[576] Ubuntu also appeared in the preamble to the Promotion of National Unity and Reconciliation Act 34 of 1995.
[577] See generally CBN Gade *A Discourse on African Philosophy: A New Perspective on Ubuntu and Transitional Justice in South Africa* (2017) 1-89.

Some have argued that Ubuntu is an outdated principle that no longer finds usage or relevance in modern-day South Africa.[578]To dispute this assertion, this section of the study will show the ways in which Ubuntu continues to be applied and to be relevant in contemporary South Africa.

The communitarian aspect of Ubuntu affects, among others, child-rearing;[579] burials;[580] informal social security[581] and the approach to property and redistribution.[582] While all of these contexts are not equally applicable to the particular focus of the study, each context is explored in more detail below so as to indicate the spectrum of Ubuntu in law, generally. In relation to child-rearing, the communitarian component of Ubuntu dictates that a child belongs to everyone in the community and as such, the child can be nurtured and cared for by anyone in the community, in the absence of the biological parents.[583] This also means that any adult can discipline any child who may be misbehaving.[584]In this context, a child is expected to show respect to all adults and not just his/her parents.[585]Ubuntu is also evident in the instance of death. Typically, when a family has experienced a death, the neighbours in the community show their support and solidarity to the bereaved family through the contribution of food, cutlery, vegetables and even tables and chairs. There is also a corresponding outpouring of human capital, in the form of cooking and slaughtering animals, in preparation for the funeral.[586]There is also the existence of burial societies in terms of which certain community members contribute money and services to a society, as a contingency plan, and when the need arises (ie. a death occurs), they are entitled to claim money and services from that society.[587]Much like a stokvel, this is a form of informal social security based on communitarian values.[588]Stokvels constitute societies in which willing community members make monthly monetary

[578] Metz (2011) *AHRLJ* 533-534; Bennett *Ubuntu* 39; Cornell & Van Marle (2005) *AHRLJ* 196.
[579] Radebe & Phooko (2017) *SAJP* 240-241. See also MJS Masango "African Spirituality That Shapes The Concept of Ubuntu" (2006) 27 *Verb et Eccl* 930 938.
[580] CI Tshoose "The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa" (2009) 3 *AJLS* 12 15. See also Radebe & Phooko (2017) *SAJP* 241-242.
[581] See generally Tshoose (2009) *AJLS* 12-20.
[582] Graness "Becoming a Person" in *Ubuntu and Personhood* 51-56. See also Metz & Gaie (2010) *J Moral Educ* 277-278.
[583] Radebe & Phooko (2017) *SAJP* 240.
[584] Masango (2009) *AJLS* 938. See also Radebe & Phooko (2017) *SAJP* 240.
[585] Radebe & Phooko (2017) *SAJP* 240.
[586] 241-242.
[587] Tshoose (2009) *AJLS* 15.
[588] 15.

contributions and each month, a different member of the stokvel gets the total amount of the contributions in order to buy items such as furniture and school clothes.[589] Stokvels are said to be based on an Ubuntu-driven communitarian perspective whereby all involved are considered to be brothers and sisters.[590]

It has been argued that Ubuntu mandates a more equitable distribution of resources to ensure a harmonious communal life.[591] It is argued that this is because poverty manifests itself as a form of social alienation[592] and that it would be difficult to foster a sense of community in a grossly unequal society.[593] The community-focused approach of Ubuntu also affects the relationship that the adherents of Ubuntu have with land. Land is, traditionally in rural settings, viewed as a communal entity that is held in custodianship by a traditional authority for the benefit of the community.[594] These considerations have potentially important implications for land reform specifically.

4 2 3 Conclusion

As was previously stated, it is notoriously difficult to provide a precise definition of Ubuntu.[595] However, it has been argued that an expectation for precision in defining Ubuntu may be unreasonable when considering the multifarious contexts in which it is employed and the variety of roles it has to play.[596]Further, Bennett argues that it may be unwise to demand an exact definition at this point, in South African history, where values are still in the process of being forged and crystallised.[597]Accordingly, in this section of the study, no specific definition was afforded to Ubuntu, although different meanings could be ascribed to it. Specifically, the foundational components of the value that are relevant for this study were discussed, namely communitarianism,

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589 15.
590 Louw *Ubuntu and the Challenges of Multiculturalism* 15.
591 Graness "Becoming a Person" in *Ubuntu and Personhood* 51-53. See also Metz & Gaie (2010) *J Moral Educ* 277-278; Shutte *Ubuntu* 144.
592 Graness "Becoming a Person" in *Ubuntu and Personhood* 53.
593 Metz & Gaie (2010) *J Moral Educ* 277. See also Shutte *Ubuntu* 144.
594 Radebe & Phooko (2017) *SAJP* 243. See also B Cousins "More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy" (2007) 7 *J Agrar Change* 281 293-294; W du Plessis & J Pienaar "The More Things Change, The More They Stay The Same: The Story of Communal Land Tenure in South Africa" (2010) 16 *Fundamina* 73 75-76.
595 Mokgoro (1998) *PELJ* 2; See also L Praeg *A Report on Ubuntu* (2014) 244; Bennett *Ubuntu* 37; R English "Ubuntu: The Quest For An Indigenous Jurisprudence" (1996) 12 *SAJHR* 641 646.
596 Bennett & Patrick "The Ethics of Traditional Religion" in *Traditional African Religions* 237-238.
597 237-238.

achieving consensus and solidarity. Further, the aims which Ubuntu seeks to achieve were also highlighted, including the acknowledgement of truth, restorative justice and the achievement of harmony in communities and in society. It was also shown that Ubuntu is a dynamic philosophy that is still relevant and alive in contemporary South Africa.[598] This was done through a brief exposition of prevailing societal norms related to child-rearing, burials and informal social security measures that have Ubuntu as their foundation. A brief discussion related to the ways in which Ubuntu promotes an equitable distribution of resources was also had in this section. In this way, an attempt was made to give substantive content to Ubuntu as a socio-cultural value.

The following section of the study will discuss, comprehensively, the ways in which Ubuntu has been applied as a legal value in the South African legal system.

4 3 Ubuntu as a legal value

4 3 1 Introduction

In as much as Ubuntu is a philosophical concept and a socio-cultural value, it is also a legal value.[599] Despite inherently forming part of African and South African culture, Ubuntu was initially ignored in the legal, formalistic sense. Accordingly, Ubuntu first appeared formally in the South African legal system in the post-amble of the interim Constitution.[600]In it, the creation of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("Promotion of National Unity Act") was mandated, thereby bringing the Truth and Reconciliation Commission into existence.[601] The post-amble stated that:[602]

> "…there [was] a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for Ubuntu but not for victimisation".

[598] Shutte *Ubuntu* 32.
[599] IJ Kroeze "Doing Things with Values: The Case of Ubuntu" in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) 333 334. See also *Port Elizabeth Municipality v Various* Occupiers 2005 1 SA 217 (CC) para 37 where Justice Sachs refers to Ubuntu as the "unifying motif of the Bill of Rights" and expresses that its spirit suffuses the entire constitutional order.
[600] See also Himonga et al (2013) *PER* 370-371; Cornell & Van Marle (2005) *AHRLJ* 207.
[601] Furman "Ubuntu and the Law" in *Curating the Archive* 151.
[602] Post-amble of the interim Constitution Act 200 of 1993.

Ubuntu was not included in the final Constitution.[603] The reason for this omission is unclear. Moosa argues that this oversight should be interpreted to indicate that the Constitution was "de-Africanised" in its redrafting process and that the "religio-cultural values of African people" were also diminished in the process.[604]

Contrastingly, there have been numerous instances of the application of Ubuntu in case law. This section of the study will discuss, critically, four such matters in order to highlight the ways in which Ubuntu has been applied by South African courts. This also encapsulates an analysis of whether, or not, Ubuntu has been successfully applied in case law. Finally, there will be a conclusion reached regarding the changes necessary in the application of Ubuntu in order to render it, possibly, successfully applicable in other spheres of the law – such as land reform. The cases that will be dealt with in this section of the study are: *S v Makwanyane and Another* ("*S v Makwanyane*"),[605] *Port Elizabeth Municipality v Various Occupiers*,[606] *Afriforum and Another v Malema and Others* ("*Afriforum v Malema*")[607] and *Dikoko v Mokhatla*.[608]

4 3 2 Ubuntu-inspired jurisprudence

4 3 2 1 S v Makwanyane

The matter of *S v Makwanyane* concerned the pronouncement of the Constitutional Court on the permissibility of the death penalty in the new constitutional order.[609] As a very well-known case which is often cited, it has been discussed and commented on at length by academics and commentators. To this end, this discussion is not an all-encompassing analysis.[610] Of importance is that *S v Makwanyane* has been described as the "judicial birth of Ubuntu".[611] It's been said that its pronouncements on Ubuntu

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[603] Cornell & Van Marle (2005) *AHRLJ* 207.
[604] 207-208, Cornell & Muvangua quoting E Moosa "Tensions in Legal and Religious Values in The 1996 South African Constitution" in M Mamdani (ed) *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (2000) 121 131.
[605] 1995 3 SA 391 (CC).
[606] 2005 1 SA 217 (CC).
[607] 2011 6 SA 240 (EqC).
[608] 2006 6 SA 235 (CC).
[609] 1995 3 SA 391 (CC) para 5. See also Furman "Ubuntu and the Law" in *Curating the Archive* 152.
[610] See generally A Klaasen "Constitutional Interpretation in the So-Called 'Hard Cases': Revisiting *S v Makwanyane*" (2017) 50 *De Jure* 1 - 17; K Van Marle "Broken Lives and Deaths and the Potential of Politics After *Makwanyane*" (2005) 20 *SAPL* 243 – 252; I Keevy "The Constitutional Court and Ubuntu's 'Inseparable Trinity'" (2009) 34 *JJS* 61 – 88; J Van der Walt "Vertical Sovereignty and Horizontal Plurality: Normative and Existential Reflections on The Capital Punishment Jurisprudence Articulated in *S v Makwanyane*" (2005) 20 *SAPL* 253 253-255.
[611] Himonga et al (2013) *PER* 374.

have had enduring value[612] and that it had given Ubuntu its most comprehensive judicial exposition.[613] In this light, the court concluded that the death penalty was no longer appropriate, and the reasons provided included that it violated the spirit of Ubuntu.[614]

Ubuntu was mentioned in the main judgment by Chaskalson P and in the concurring judgments by Madala J, Mokgoro J, Mahomed J, Langa J and Sachs J.[615] The most notable expressions on Ubuntu, namely those by Chaskalson P, Langa J, Madala J and Mokgoro J, as contained in their judgments will be explored, in some detail below.

Chaskalson P elucidated that a society that was consistent with the value of Ubuntu was one that "wishe[d] to prevent crime . . .[not] to kill criminals simply to get even with them".[616] Langa J expressed that one of the remarkable features of Ubuntu was the emphasis that it placed on the value of life and human dignity, thus treatment that was degrading, cruel and inhumane was bereft of Ubuntu.[617] Langa J further explained that, among other features, Ubuntu regulated the exercise of rights through the emphasis that it placed on "sharing, co-responsibility and the mutual enjoyment of rights by all".[618] Madala J provided that Ubuntu permeated the entire Constitution and that it was a concept that espoused "humanness, social justice and fairness".[619]

Mokgoro J expressed that Ubuntu was a "golden thread" that transcended cultural lines.[620] She explained that it was a concept with key values such as "group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity"[621] and that it emphasised a shift from confrontation to conciliation.[622]

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612 376.
613 Bennett *Ubuntu* 70.
614 Paras 131 and 151.
615 See generally 1995 3 SA 391 (CC). See also Furman "Ubuntu and the Law" in *Curating the Archive* 152.
616 1995 3 SA 391 (CC) para 131.
617 Para 225.
618 Para 224.
619 Para 237.
620 Para 307.
621 Para 308.
622 Para 308.

While the *S v Makwanyane* judgment has been commended for its "wise, thoughtful, and open-minded justices"[623] and for its attempt to promote "African jurisprudence",[624] it has also attracted some criticism.[625] The role that Ubuntu played in the judgment has been questioned, with Furman arguing that the same decision could have and would have been reached without reference to Ubuntu.[626] Van der Walt argues that the main reason that the death penalty was declared unconstitutional was because it was considered a disproportionate punishment, especially since there were alternative sentences available to the court.[627] In this instance, he questions whether Ubuntu formed part of the main rationale for the judgment and whether the pronouncements thereon were simply *obiter*.[628]

Bennett argues that despite the court's constant reference to Ubuntu in the judgment, the legal position of Ubuntu still remained obscure after the judgment.[629]Kroeze contends that the definitions of Ubuntu proffered in the judgment rendered it a "bloated concept" that was explained in terms that had "no self-evident meaning" and that were "by and large empty".[630]

The application of Ubuntu in the *S v Makwanyane* judgment has also been defended.[631] Contrary to the argument that Ubuntu played a subsidiary role in the decision to abolish the death penalty, Bennett contends that Ubuntu was, arguably, one of the principal foundations on which the judgment was based.[632]

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[623] Himonga et al (2013) *PER* 378. See also Cornell *Law and Revolution in South Africa* 170.
[624] Keevy "Ubuntu Versus The Core Values" in *Curating the Archive* 54.
[625] Furman "Ubuntu and the Law" in *Curating the Archive* 152-158; Himonga et al (2013) *PER* 384-388; Bennett *Ubuntu* 92-93; Kroeze "Doing Things With Values" in *Ubuntu and the Law* 334-337.
[626] Furman "Ubuntu and the Law" in *Curating the Archive* 152.
[627] Van der Walt (2005) *SAPL* 253-255.
[628] 256-260. Bekker argues that *S v Makwanyane* was a politically-motivated decision that was arguably necessary to legitimate the then-newly established South African constitutional order: see T Bekker "The Re-Emergence of Ubuntu: A Critical Analysis" in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) 377 379.
[629] Bennett *Ubuntu* 92.
[630] Kroeze "Doing Things With Values" in *Ubuntu and the Law* 340.
[631] Radebe & Phooko (2017) *SAJP* 246; Furman "Ubuntu and the Law" in *Curating the Archive* 158; Himonga et al (2013) *PER* 383-389; Cornell *Law and Revolution in South Africa* 170-171; Bennett *Ubuntu* 71.
[632] Bennett *Ubuntu* 71.

English argues that Ubuntu is both under-explained and over-explained to the extent that it is ambiguous.[633] This is echoed by Kroeze who, as alluded to above, contends that Ubuntu is a "bloated" concept described in "empty terms" and that it crumbles under the weight of too many expectations.[634] As a response to this criticism, Himonga *et al* argue that the difficulty present in explaining abstract notions such as Ubuntu does not render them devoid of meaning.[635]They argue that these terms can still be meaningfully and legitimately applied by judges.[636] Further, it has also been argued that the meaning of Ubuntu should be broad, generalised and somewhat open-ended, like other constitutional values such as human dignity, if it is to play its transformative role in the legal system.[637]

4 3 2 2 Port Elizabeth Municipality v Various Occupiers

The *Port Elizabeth Municipality v Various Occupiers* judgment is considered significant because it was the first judgment to acknowledge Ubuntu as a constitutional value in the private law sphere.[638] It is also said to have marked the beginning of the courts' close association of Ubuntu with restorative justice.[639]

The matter was brought before the court by the Port Elizabeth Municipality, in response to a petition signed by 1600 people in the affected area, including the land owners of the affected property.[640] The Municipality sought an eviction order against residents who were unlawfully occupying privately owned land. It also sought a ruling from the court that, in instances where the Municipality was evicting unlawful occupiers, it was not bound to provide alternative accommodation or land to the occupiers.[641]

In the unanimous, majority judgment, Sachs J made explicit reference to Ubuntu in the court's refusal to uphold the eviction order that would render a large number of people

[633] English (1996) *SAJHR* 645.
[634] Kroeze "Doing Things With Values" in *Ubuntu and the Law* 340.
[635] Himonga et al (2013) *PER* 384-385.
[636] 384-385.
[637] Bennett *Ubuntu* 37. See also Himonga et al (2013) *PELJ* 384-386.
[638] Bekker "The Re-Emergence of Ubuntu" in *Ubuntu and the Law* 379.
[639] Himonga et al (2013) *PER* 395.
[640] 2005 1 SA 217 (CC) para 1.
[641] Para 6.

homeless.[642]In the judgment, Sachs J expressed that the spirit of Ubuntu, which formed part of the cultural heritage of the majority of the population, suffused the whole constitutional order and that it combined individual rights with a communitarian philosophy.[643]Sachs J further described Ubuntu as the "unifying motif of the Bill of Rights"[644] which highlighted the "need for human interdependence, respect and concern".[645]

The court placed the issue of evictions in its historical context by contrasting the pre-democratic era during which time expulsions and dispossessions of black people deemed as "squatters" were commonplace and constituted grave assaults to the dignity of black people; to the current dispensation that is concerned with fairness and "humanised procedures".[646] Skelton argues that while the judgment did not make direct reference to restorative justice, its emphasis on mediation, dialogue, compromise and reintegration into the community effectively reflected this notion.[647] In this context, Cloete argues that this judgment mandates courts, in eviction cases, to ensure that the "formal structure of the law and the outcome of the cases reflect compassion and grace".[648]

Some have criticised the application of Ubuntu in this judgment on the basis that the term was only mentioned in one paragraph in the entire judgment, which, arguably, brings into question the actual role that Ubuntu played in the conclusion that was reached.[649] Bekker contends that the use of Ubuntu in this judgment could be viewed as amounting to the lack of an attempt to develop Ubuntu as a constitutional value,

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[642] Paras 37, 59 & 60. See also N Bohler-Muller "Some Thoughts on the Ubuntu Jurisprudence of the Constitutional Court" in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) 367 371.
[643] Para 37. See also Bekker "The Re-Emergence of Ubuntu" in *Ubuntu and the Law* 380.
[644] Para 37.
[645] Para 37.
[646] Paras 8-13. See also Bohler-Muller "Some Thoughts on the Ubuntu Jurisprudence" in *Ubuntu and the Law* 372.
[647] A Skelton "Face to Face: Sachs on Restorative Justice" (2010) 25 *SAPL* 94 98. Skelton describes restorative justice as being concerned with "the acceptance of responsibility, making restitution and promoting harmony" – Skelton (2010) *SAPL* 95. See also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 39-47 for the court's discussion on mediation and its possible benefits in matters such as this one.
[648] CT Cloete *A Critical Analysis of the Approach of the Courts in the Application of Eviction Remedies in The Pre-Constitutional and Constitutional Context* LLD thesis, Stellenbosch University (2016) 93.
[649] Bekker "The Re-Emergence of Ubuntu" in *Ubuntu and the Law* 380. See also Furman "Ubuntu and the Law" in *Curating the Archive* 155; Bohler-Muller "Some Thoughts on the Ubuntu Jurisprudence" in *Ubuntu and the Law* 372.

and instead the concept was used as a "catchphrase" to strengthen a particular argument.[650]In contrast to these criticisms, Cornell has argued that the employment of Ubuntu in this judgment was "exemplary" because in balancing the interests of the land owners and the occupiers, the court took heed of the history of forced removals, leading to a more generous interpretation of the enabling legislation, namely the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). This approach also took account of ethical considerations in deciding to refuse to uphold the eviction order.[651]Himonga *et al* also argue that this judgment was significant because it set precedence for an Ubuntu-based jurisprudence in eviction matters.[652]For his part, former Justice Sachs has asserted that he could not have adequately resolved the complex legal and institutional aspects in this matter, so as to justify overturning the eviction order, without reference to Ubuntu.[653]

4 3 2 3 Afriforum v Malema

The *Afriforum v Malema* judgment is claimed to have provided optimism regarding the applicability of Ubuntu in the legal decision-making process[654] and it is, arguably, one of the few matters in which Ubuntu was a principal consideration for the final judgment.[655] In this matter, the court had to decide on whether or not the singing, publicly, of a struggle song[656] containing the lyrics, "shoot the Boer", amounted to hate speech in present-day South Africa.[657]

The Equality Court found that the singing and publication of the song indeed constituted hate speech.[658]Accordingly, the court issued an interdict against the respondents to prevent them from singing this song as it was said to undermine the principles of Ubuntu and national unity.[659] Lamont J indicated that complying with this

[650] Bekker "The Re-Emergence of Ubuntu" in *Ubuntu and the Law* 380.
[651] Cornell *Law and Revolution in South Africa* 115-116.
[652] Himonga et al (2013) *PER* 395.
[653] Cornell *Law and Revolution in South Africa* 116.
[654] Furman "Ubuntu and the Law" in *Curating the Archive* 117.
[655] Bennett *Ubuntu* 79.
[656] In 2011 6 SA 240 (EqC) para 92, struggle songs are defined as songs that were sung by anti-apartheid soldiers during the armed struggle against apartheid.
[657] Para 55.
[658] Para 108. The court held that Malema "published and communicated words which could reasonably be construed to demonstrate an intention to be hurtful, to incite harm and to promote hatred against the white Afrikaans speaking community including the farmers who belong to that group".
[659] Para 108. See also Bennett *Ubuntu* 77.

order was itself a matter of "both law and Ubuntu".[660] In reaching its decision, the court made substantial reference to Ubuntu in the judgment.[661]The court held that the Constitutional Court, in particular, had developed an Ubuntu-based jurisprudence, thereby resulting in Ubuntu being recognised as an important source of law.[662] In defining Ubuntu, Lamont J identified twelve principles of Ubuntu, namely that "Ubuntu:[663]

(i) should be contrasted with vengeance;
(ii) dictates that a high value be placed on the life of a human being;
(iii) is inextricably linked to the values of dignity, compassion, humaneness and respect for the humanity of another;
(iv) dictates a shift from confrontation to mediation and conciliation;
(v) favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the respondent without ruining the plaintiff;
(vi) dictates good attitudes and shared concern;
(vii) favours restorative rather than retributive justice;
(viii) operates in a direction favouring reconciliation rather than the estrangement of the disputants;
(ix) works towards sensitising a disputant or 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;
(x) promotes mutual understanding rather than punishment;
(xi) favours face-to-face encounters of disputes with a view to facilitating differences being resolved, rather than conflict and victory for the most powerful; and
(xii) favours civility and civilised dialogue premised on mutual tolerance".

[660] Para 112.
[661] Para 18.
[662] Para 18.
[663] Para 18.

While some have praised the way in which Ubuntu was applied in this judgment,[664] others have criticised it heavily.[665]Pillay argues that although it is clear that Ubuntu played an important role in the adjudication process in this judgment, there was still a lack of a proper analysis and implementation of the relevant principles of Ubuntu and the relevant case law in deciding whether the song was still appropriate in contemporary South Africa.[666] It is further argued that the extent of the court's application of Ubuntu in this judgment was the statement that "[m]embers of society are enjoined to embrace all citizens as their brothers" and that this "must be fostered" "in the spirit of Ubuntu".[667]Modiri argues that, in this instance, nation-building, reconciliation and Ubuntu were co-opted in the protection and the prioritisation of "white interests".[668] Buitendag and Van Marle likewise criticise the judgment for, among others, a limited engagement with history.[669]Radebe and Phooko argue that this judgment amounted to an "erroneous" usage of Ubuntu due to a misunderstanding of the concept.[670] They argue that the court incorrectly used Ubuntu to suppress freedom of expression, and the part of South African history and heritage that is embodied in the struggle song.[671]

4 3 2 4 Dikoko v Mokhatla

This matter came before the Constitutional Court as an appeal against an order granted by the Pretoria High Court against the applicant, Dikoko, who was found to have defamed the respondent, Mokhatla.[672]On appeal, the Constitutional Court was required to decide whether or not the special privilege enjoyed by municipal councillors, such as Dikoko, in the exercise of their duties, provided immunity against a finding of defamation.[673] The applicant also sought a judgment indicating that the

[664] Furman "Ubuntu and the Law" in *Curating the Archive* 155-156; Bennett *Ubuntu* 76-79; Himonga et al (2013) *PER* 406-407.
[665] K Pillay "From 'Kill the Boer' to 'Kiss the Boer' – Has The Last Song Been Sung?" (2013) 28 *SAPL* 221 229; Modiri (2013) *SALJ* 291-292; Radebe & Phooko (2017) *SAJP* 247; N Buitendag & K van Marle "*Afriforum v Malema*: The Limits of Law and Complexity" (2014) 17 *PELJ* 2893 2910.
[666] Pillay (2013) *SAPL* 229.
[667] 229.
[668] Modiri (2013) *SALJ* 291-292.
[669] Buitendag & Van Marle (2014) *PELJ* 2910.
[670] Radebe & Phooko (2017) *SAJP* 247.
[671] 247.
[672] 2006 6 SA 235 (CC) para 20.
[673] Para 23.

quantum of damages amounting to R110 000 awarded by the High Court was excessive under the circumstances.[674]

Given the focus of this study, the legal question of privilege as a defence against defamation in this case is not relevant for this discussion. The considerations regarding the amount of damages that was awarded by the High Court are more germane to this study.

On behalf of the majority of the court, Moseneke DCJ held that, while excessive amounts for damages in the case of defamation would deter freedom of expression and foster attitudes of intolerance towards free speech,[675] there were no special circumstances in this matter that warranted an interference with the order of the High Court.[676] In their dissenting judgments, both Mokgoro J and Sachs J invoked Ubuntu as a consideration for deciding that the amount of damages ordered by the High Court was inappropriate.[677]

Mokgoro J argued that the aim of the law in cases of defamation should be to re-establish harmony in the relationship of the parties instead of seeking to "enlarge the hole in the defendant's pocket".[678] She averred that a remedy based on Ubuntu could be more useful in restoring the dignity of the plaintiff – as is the primary aim of a compensatory measure – than imposing a monetary award that sometimes worked to estrange the parties even further.[679] Mokgoro J contended, further, that the two primary considerations of defamation law should be reparation that is essential to repair the injury to one's dignity and honour; and an attempt to re-establish dignified and respectful relations between the parties.[680]To illustrate this point, she argued that an apology would be a better display of Ubuntu, in its truest sense, in that the humanity of the plaintiff would be acknowledged and there would be the possibility of resultant harmony between the parties.[681] Sachs J furthered this argument by contending that

[674] Para 24.
[675] Para 92.
[676] Paras 95 & 102.
[677] Paras 68, 69, & 112.
[678] Para 68.
[679] Para 68.
[680] Para 69.
[681] Para 69.

the emphasis in defamation proceedings should be placed on *repairing* rather than *punishing*.[682]He argued that this would be possible if greater allowance was made for the constitutional value of Ubuntu in defamation matters.[683]

Sachs J also argued that Ubuntu was not merely a phrase to be invoked as an afterthought to legitimate a legal finding that was already concluded.[684]He asserted that Ubuntu was "intrinsic to and constitutive of our constitutional culture"[685] and that the principles of Ubuntu were aligned with the rapidly evolving international conceptions of restorative justice.[686]

The reception of the application of Ubuntu in the minority judgments of Mokgoro J and Sachs J has, largely, been positive.[687]Malan has described these judgments as, possibly, the most important judgments regarding the role of Ubuntu in the law.[688]Bekker argues that these judgments should be "highly commended" because they are "the first real and genuine attempt to give substance and meaning to the concept of Ubuntu in a specific context".[689] Further, Bekker contends that these judgments offer a workable definition of Ubuntu, namely, a value that is used to promote reconciliation and restorative justice to parties in a legal dispute.[690]Bohler-Muller expresses that, in their minority judgments, Mokgoro J and Sachs J introduced an ideal for a different kind of South Africa.[691]

4 3 3 Conclusion

From the case discussions above, it should be clear that Ubuntu is recognised as a constitutional value in the South African legal system. Although its omission in the final Constitution might have given the impression of its relegation as a legal value, the

[682] Para 112.
[683] Para 112.
[684] Para 113.
[685] Para 113.
[686] Para 114. Sachs J provides the principal elements of restorative justice that have been identified as being: encounter, reparation, reintegration and participation.
[687]K Malan "The Suitability and Unsuitability of Ubuntu in Constitutional Law – Inter-Communal Relations Versus Public Office-Bearing" (2014) 47 *De Jure* 231 236; Himonga et al (2013) *PER* 400; Bohler-Muller "Some Thoughts on the Ubuntu Jurisprudence" in *Ubuntu and the Law* 374-375; Bekker "The Re-Emergence of Ubuntu" in *Ubuntu and the Law* 382, 385-387.
[688] Malan (2014) *De Jure* 236.
[689] Bekker "The Re-Emergence of Ubuntu" in *Ubuntu and the Law* 385.
[690] 387.
[691] Bohler-Muller "Some Thoughts on the Ubuntu Jurisprudence" in *Ubuntu and the Law* 374.

judiciary, specifically the Constitutional Court, has been adamant about its inclusion and development as part of South African jurisprudence. However, the courts have not always been successful in this endeavour.

The main criticism against judgments such as *S v Makwanyane* and *Port Elizabeth v Various Occupiers* is that the definitions of Ubuntu proffered by the courts in these judgments still left the meaning of the concept obscure and ambiguous. [692] The judgment of *Afriforum v Malema,* however, is accused of having misunderstood and misused Ubuntu.[693] The *Dikoko v Mokhatla* judgment seems to be the best-received of the judgments discussed above. The reason for this seems to be that the courts focussed on certain components of Ubuntu in the judgment, specifically restorative justice and reconciliation, [694]instead of offering the broad definitions that are usually associated with Ubuntu, such as those in *S v Makwanyane*.[695] It seems that highlighting certain components of Ubuntu that are most relevant for a particular issue leads to more clarity, a more workable definition in case law and thus a better utilisation of Ubuntu in law.

4 4 The critique levied against the application of Ubuntu in law

In addition to the specific points of critique highlighted above, other criticisms have also been advanced against the application of Ubuntu in law. The most common of these criticisms will be explored in this section of the study and their rebuttals will also be highlighted.

It has been argued that Ubuntu, as a legal value, is (i) redundant,[696] (ii) romanticised and outdated,[697] (iii) in conflict with constitutional rights,[698] (iv) patriarchal and

[692] Bennett *Ubuntu* 92; Kroeze "Doing Things With Values" in *Ubuntu and the Law* 340.
[693] Modiri (2013) *SALJ* 291-292; Radebe & Phooko (2017) *SAJP* 247.
[694] 2006 6 SA 235 (CC) paras 69 & 114; Bekker "The Re-Emergence of Ubuntu" in *Ubuntu and the Law* 387.
[695] 1995 3 SA 391 (CC) para 308.
[696] Bennett *Ubuntu* 51-52; Himonga et al (2013) *PER* 387-388.
[697] Vervliet *The Human Person* 28-29; Metz (2011) *AHRLJ* 533-534; Bennett *Ubuntu* 39; Cornell & Van Marle (2005) *AHRLJ* 196.
[698] AO Oyowe "Strange Bedfellows: Rethinking Ubuntu and Human Rights in South Africa" (2013) 13 *AHRLJ* 103 119-124; Cornell *Law and Revolution in South Africa* 163-164; Bennett *Ubuntu* 38; Shutte *Ubuntu* 13.

conservative,[699] and (v) is a denial of redistributive justice. The merits and drawbacks of each of these arguments will be explored in this section of the study.

Some have argued that the South African legal system is already well-equipped with values, rules and principles that fulfil the same function as Ubuntu,[700] and that courts are often able to reach the same conclusions without reference to Ubuntu,[701] thereby making Ubuntu redundant as a legal value.[702] In response to this criticism, Keep and Midgley argue that the overlap between Ubuntu and the Bill of Rights is, in reality, beneficial because it constitutes a harmonisation between African and Western values.[703] Himonga *et al* and Mokgoro and Woolman argue that a more effective synchronisation between the Bill of Rights and Ubuntu would serve to legitimise the South African legal order and render it more inclusive.[704]Bennett furthers this argument by averring that Ubuntu has introduced a new discourse to the existing jurisprudence, specifically one that prioritises community and cultivates a sense of responsibility towards all members of that community.[705]In this way, it is argued that Ubuntu has an important role to play in South African law.

The second common criticism of Ubuntu is that it is a romanticised and outdated perspective on African customs and culture.[706]As a response to this critique, Cornell contends that the argument that Ubuntu is neither relevant nor applied in contemporary African society constitutes an empirical assertion that should be substantiated with empirical evidence.[707]Bennett argues that a claim that Ubuntu is no longer realised in people's every day behaviours is one that would be difficult to prove as it concerns the investigation of people's attitudes towards profound moral questions, and as such, it is a claim that should not be accepted at face value.[708]He

[699] Keevy "Ubuntu Versus The Core Values" in *Curating the Archive* 66-67.
[700] Bennett *Ubuntu* 51.
[701] Himonga et al (2013) *PER* 387.
[702] Bennett *Ubuntu* 51-52; Himonga et al (2013) *PER* 387-388.
[703] H Keep & R Midgley "The Emerging Role of Ubuntu-Botho in Developing a Consensual South African Legal Culture" in F Bruinsma & D Nelken (eds) *Explorations in Legal Cultures* (2007) 29 48.
[704] Y Mokgoro & S Moolman "Where Dignity Ends and Ubuntu Begins: A Response by Y Mokgoro & S Moolman" in D Cornell (ed) *Law and Revolution in South Africa: Ubuntu, Dignity, and the Struggle for Constitutional Transformation* (2014) 169 171; Himonga et al (2013) *PER* 389.
[705] Bennett *Ubuntu* 59.
[706] Vervliet *The Human Person* 28-29; Metz (2011) *AHRLJ* 533-534; Bennett *Ubuntu* 39; Cornell & Van Marle (2005) *AHRLJ* 196.
[707] Cornell *Law and Revolution in South Africa* 165.
[708] Bennett *Ubuntu* 39.

asserts that even if it was found that Ubuntu, as a cultural ideal, was waning in public morality, that this would neither discredit the value of the concept nor prevent its possible revival through institutionalisation and consistent application by a mechanism, such as the law.[709]Metz argues that in the same way that Roman-Dutch law, as it is applied in South African law, is not a complete reproduction of all of its original features, Ubuntu is also still valuable in modern conditions outside of its pre-colonial origins.[710] Being a dynamic value, it thus remains potentially relevant.

The third common criticism of the application of Ubuntu in law is the claim that Ubuntu is inconsistent with the Bill of Rights. In this regard, it is alleged that the communitarian focus of Ubuntu could constitute a possible infringement on individual freedoms.[711]As a rebuttal to this argument, Vervliet contends that Ubuntu is concerned with the complementarity of the individual and the community.[712] He argues that Ubuntu does not advocate for the prioritisation of the community's interests above those of the individual. Instead, it is as an attempt to reconcile personal autonomy with interpersonal relations and interpersonal solidarity.[713] Louw argues that Ubuntu does not negate individuality, instead, it discourages the notion that the individual should always take precedence over the community.[714]He argues further that because Ubuntu values consensus and dialogue, an oppressive communitarianism would constitute an abuse of Ubuntu.[715]Ogude avers that Ubuntu is often concerned with the reconstitution of community – especially in times of crisis – through the achievement of consensus as opposed to "group tyranny" or "herd mentality".[716]Bennett contends that while community forms the basis of an Ubuntu ethic, the well-being of the individual is not necessarily neglected, instead it is realised in and through the community.[717]

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[709] 40.
[710] Metz (2011) *AHRLJ* 536.
[711] Oyowe (2013) *AHRLJ* 119-124; Cornell *Law and Revolution in South Africa* 163-164; Bennett *Ubuntu* 38; Shutte *Ubuntu* 13.
[712] Vervliet *The Human Person* 56.
[713] 56.
[714] Louw *Ubuntu and The Challenges of Multiculturalism* 16.
[715] 16.
[716] Ogude "Introduction" in *Ubuntu and Personhood* 4.
[717] Bennett *Ubuntu* 38.

The fourth criticism that is, at times, advanced against the inclusion of Ubuntu in the legal system is that Ubuntu, as a value, is conservative and that it reinforces a patriarchal worldview.[718]Keevy argues that Ubuntu "sustains the deep-seated patriarchy in traditional African societies".[719] She argues this on the basis that "traditional African societies" consist of patriarchal hierarchies where the assignment of rights is dependent on factors such as communal membership, family, status or achievement.[720] Although the link between Ubuntu and the patriarchy is not clearly established in her argument, Keevy concludes that because individuals in these societies are not equal,[721] "ubuntu's patriarchal hierarchy" is inconsistent with the Constitution's core values. [722]As a direct response to this claim, Radebe and Phooko argue that Keevy presents an unsubstantiated argument, with no evidence provided except "sweeping claims" of discrimination.[723] They also argue that Keevy fails to show the rational link between Ubuntu as a value and the alleged existence of patriarchal notions in African societies.[724]Contrastingly, they contend that a society that is grounded in Ubuntu is one that supports equality.[725]To echo this notion, Bhengu describes an Ubuntu philosophy as displaying, among others, ". . .awareness of what is just and unjust, what is humane and inhumane … and is therefore completely contrary to inhuman behaviour".[726]

The final point of criticism of Ubuntu to be explored here is the argument that the focus that Ubuntu places on harmony and community building has the potential of silencing those who demand redistributive justice.[727] In this regard, Swartz argues that notions of sacrifice, reconciliation and respect for and loyalty to rulers that are associated with Ubuntu are often used by the government to introduce neoliberal economic policies, which delay the redistribution of economic resources.[728] Contrary to this perspective,

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[718] Keevy "Ubuntu Versus The Core Values" in *Curating the Archive* 66-67; Cornell *Law and Revolution* 164.
[719] Keevy "Ubuntu Versus The Core Values" in *Curating the Archive* 66-67.
[720] 66.
[721] 69.
[722] 69.
[723] Radebe & Phooko (2017) *SAJP* 248.
[724] 248.
[725] 248.
[726] As quoted by J Broodryk *Understanding South Africa: The Ubuntu Way of Living* 3 ed (2010) 57.
[727] S Swartz "A Long Walk to Citizenship: Morality, Justice and Faith In The Aftermath of Apartheid" (2006) 35 *J Moral Educ* 551 560.
[728] 560.

Graness argues that an Ubuntu ethic promotes the distribution of wealth in ways that will ensure a harmonious communal life.[729]He argues that when there are people in society who are dehumanised by their living conditions, there cannot be peaceful coexistence as these people are unable to play their social role in the shared humanity that is envisaged in an Ubuntu-based society.[730]Metz and Gaie also argue that in order to ensure the social harmony that is one of the goals of Ubuntu, resources and goods must be distributed fairly.[731]They contend that it is difficult to establish a sense of community in instances of gross economic inequality.[732] Shutte argues that the values of Ubuntu could be a humane and fair guide in ensuring the equitable distribution of resources, such as access to healthcare systems.[733]Therefore, it seems that Ubuntu is not opposed to redistributive justice, and that it in fact, encourages it.[734]

It has been argued that Ubuntu requires a more demanding form of justice, as it requires reparations and equitable redress while also encouraging reconciliation and communal forgiveness – particularly in societies that are plagued with traumatic and violent histories, like South Africa.[735]

4 5 Conclusion

Ubuntu is both a socio-cultural and constitutional value. It is encapsulated by the Nguni maxim that provides that, “umntu ngumntu ngabantu”.[736] The direct translation of this maxim is “a person is a person through other persons”.[737] This maxim contains the three most defining components of Ubuntu, namely its conceptualisation of

[729] Graness “Becoming a Person” in *Ubuntu and Personhood* 53.
[730] 55.
[731] Metz & Gaie (2010) *J Moral Educ* 277.
[732] 277.
[733] Shutte *Ubuntu* 150-151.
[734] Graness “Becoming a Person” in *Ubuntu and Personhood* 53; Shutte *Ubuntu* 150-151; Metz & Gaie (2010) *J Moral Educ* 277.
[735] Ogude “Introduction” in *Ubuntu and Personhood* 6-8; Graness “Becoming a Person” in *Ubuntu and Personhood* 51-56.
[736] Vervliet *The Human Person* 20; Bennett & Patrick “The Ethics of Traditional Religion” in *Traditional African Religions* 238; Mokgoro (1998) *PELJ* 2.
[737] Vervliet *The Human Person* 20; See also Louw *Ubuntu and the Challenges of Multiculturalism* 5; Shutte *Ubuntu* 12; Bennett & Patrick “The Ethics of Traditional Religion” in *Traditional African Religions* 238.

personhood;[738] its emphasis on community[739] and its promotion of group solidarity.[740] In an Ubuntu-based society, one's humanity is inextricably linked to and affirmed by the recognition of the humanity of others.[741] Ubuntu is a way of life that is aimed at the achievement of peaceful co-existence and harmonious relations in a community.[742] In instances of conflict or instability, the socio-cultural value advocates for the acknowledgment of truth;[743] restorative justice[744] and actions that are necessary to restore equilibrium and harmony in the community.[745] Ubuntu also encourages a participatory democracy that is based on dialogue and consensus.[746]

The various ways in which the communitarian ethics of Ubuntu manifest themselves in modern-day South Africa include, but are not limited to, the existence and operations of stokvels and burial societies;[747] the ways in which children are raised and protected by the community;[748] the ways in which bereaved families are supported by the community through donations and human capital in preparation for the funeral;[749] and the approach to land ownership which is, traditionally, communal.[750]

The first official acknowledgement of Ubuntu, in the South African legal system occurred in the post-amble of the interim Constitution where it was recognised that there was "…a need for Ubuntu, but not for victimisation".[751] The post-amble mandated the promulgation of the Promotion of National Unity Act which, subsequently, brought the Truth and Reconciliation Commission into existence.[752] Ubuntu was not included in the final Constitution. Moosa has argued that this exclusion

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[738] Shutte *Ubuntu* 12; Ogude "Introduction" in Ubuntu *and Personhood* 1.
[739] Shutte *Ubuntu* 13. See also Bennett & Patrick "The Ethics of Traditional Religion" in *Traditional African Religions* 238; Metz (2011) *AHRLJ* 538.
[740] Mokgoro (1998) *PELJ* 8. See also Sachs "Towards the Liberation and Revitalization" in *Ubuntu and the Law* 310; Metz (2011) *AHRLJ* 538.
[741] Ramose *African Philosophy* 106.
[742] Graness "Becoming a Person" in *Ubuntu and Personhood* 44.
[743] Cornell *Law and Revolution in South Africa* 113; see generally Gade *A Discourse on African Philosophy* 1-89.
[744] Mokgoro (1998) *PELJ* 8-9; Himonga et al (2013) *PER* 381; Metz & Gaie (2010) *J Moral Educ* 278.
[745] Radebe & Phooko (2017) *SAJP* 242; Cornell *Law and Revolution in South Africa* 73.
[746] Louw *Ubuntu and the Challenges of Multiculturalism* 9; Vervliet *The Human Person* 28.
[747] Tshoose (2009) *AJLS* 15; Louw *Ubuntu and the Challenges of Multiculturalism* 15.
[748] Masango (2009) *AJLS* 938. See also Radebe & Phooko (2017) *SAJP* 240.
[749] Radebe & Phooko (2017) *SAJP* 241-242.
[750] 243. See also See also Cousins (2007) *J Agrar Change* 293-294; Du Plessis & Pienaar (2010) *Fundamina* 75-76.
[751] Post-amble of the interim Constitution Act 200 of 1993.
[752] Furman "Ubuntu and the Law" in *Curating the Archive* 151.

amounted to the "de-African[inisation] of the Constitution.[753] However, the possibility of Ubuntu being recognised as a constitutional value was rekindled in the *S v Makwanyane* judgment. In this pioneering judgment, the Constitutional Court made frequent references to Ubuntu as one of the justifications for the judgment.[754] Ubuntu was also mentioned in *Port Elizabeth Municipality v Various Occupiers*. Sachs J interpreted PIE through an Ubuntu-inspired perspective, and the court declared Ubuntu as "the unifying motif of the Bill of Rights".[755] In *Afriforum v Malema*, the court identified twelve principles of Ubuntu and decided the merits of the matter on the basis of these principles.[756] In *Dikoko v Mokhatla*, Mokgoro J and Sachs J, in their dissenting minority judgments, argued that Ubuntu should play a more substantive role in defamation law because of the emphasis that Ubuntu places on repairing relationships, as well as on restorative justice.[757]

The application of Ubuntu in *S v Makwanyane* and in *Port Elizabeth v Various Occupiers* has been criticised for allegedly failing to provide a workable definition of Ubuntu[758] and, further, it is argued that Ubuntu played a negligible role in the conclusions that were reached by the courts.[759] *Afriforum v Malema* has been criticised for allegedly misunderstanding and misusing Ubuntu,[760] while the minority judgments by Mokgoro J and Sachs J in *Dikoko v Mokhatla* have been praised for providing a clear and concise legal definition of Ubuntu, namely a value that promotes reconciliation and restorative justice – and for indicating how these components could be applied in defamation law. [761]

It seems that the application of Ubuntu in case law has not always been successful, and that the value of Ubuntu in the legal system remains to be disputed. However,

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[753] Cornell & Van Marle (2005) *AHRLJ* 207-208.
[754] *S v Makwanyane* 1995 3 SA 391 (CC) paras 224, 225, 237, 307 & 308.
[755] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.
[756] 2011 6 SA 240 (EqC) paras 18 & 108.
[757] 2006 6 SA 235 (CC) paras 68, 69, 112 & 113.
[758] Bennett *Ubuntu* 92; Kroeze "Doing Things With Values" in *Ubuntu and the Law* 340; Bekker "The Re-Emergence of Ubuntu" in *Ubuntu and the Law* 380.
[759] Furman "Ubuntu and the Law" in *Curating the Archive* 152, 155; Van der Walt (2005) SAPL 253-260; Bekker "The Re-Emergence of Ubuntu" in *Ubuntu and the Law* 380; Bohler-Muller "Some Thoughts on the Ubuntu Jurisprudence" in *Ubuntu and the Law* 372.
[760] Modiri (2013) *SALJ* 291-292; Buitendag & Van Marle (2014) *PELJ* 2910; Radebe & Phooko (2017) *SAJP* 247.
[761] Bekker "The Re-Emergence of Ubuntu" in *Ubuntu and the Law* 385; Bohler-Muller "Some Thoughts on the Ubuntu Jurisprudence" in *Ubuntu and the Law* 374.

there seems to be more opportunities than challenges in the utilisation of Ubuntu in the South African legal system. These opportunities include the possible harmonisation between the Western influences in the law and African values; the ways in which the recognition of an African value in the legal system could possibly serve to legitimise the legal order and render it more inclusive; the possible changes that could be effected by the application of components of Ubuntu, such as the acknowledgment of truth, restorative and redistributive justice; and the promotion of reconciliation and harmony in contentious areas of the law, such as land reform.

It is argued that the meaning and value of Ubuntu can only crystallise through consistent usage and exploration. One of the ways to achieve this is by investigating the effect that the application of Ubuntu could have in different spheres of the law, such as in land reform. Therefore, in the following chapter of this study, the possible opportunities and drawbacks of utilising the identified components of Ubuntu in the identified problematical areas of the land redistribution and land restitution sub-programmes of the land reform programme will be investigated. To conclude, in the words of Bohler- Muller,[762]

> " …if we dare to ask what good we are without others, if we dare to imagine a revitalised philosophy of Ubuntu…we may have stories worth telling future generations of South Africans".

[762] Bohler-Muller "Some Thoughts on the Ubuntu Jurisprudence" in *Ubuntu and the Law* 376.

Chapter 5: Possible opportunities and challenges of the application of Ubuntu in the land reform programme

5 1 Introduction

Given the historical background, leading to the necessity of a land reform programme, and the resultant concerns in the relevant sub-programmes as identified, the question arises as to whether Ubuntu has a role to play in ameliorating such concerns and to, ultimately, improve land reform. In chapter 4, Ubuntu as a value was explored in detail, including highlighting its essential elements and principles. In this concluding chapter of the study, the opportunities that could arise from the application of Ubuntu in the land reform programme, specifically with regard to land redistribution and restitution, will be discussed and recommendations will be made in this regard. Additionally, the criticisms levelled against and limitations of Ubuntu will also be explored, with ways of possibly overcoming these characterisations and limitations suggested. This will be done in order to highlight the value and potential of Ubuntu in land reform.

This chapter is divided into five sections: the first section provides an overview of this study to better contextualise the chapter; the second section discusses the Truth and Reconciliation Commission ("TRC") as the first attempt in the country to utilise Ubuntu in an endeavour to promote restorative justice and national reconciliation and draws lessons on the limitations of Ubuntu in this context; the third section of this chapter provides recommendations on the different ways in which Ubuntu can be utilised in the land reform programme to alleviate some of the issues highlighted in the third chapter of this study; the fourth section of this study discusses the challenges posed by the application of Ubuntu in land reform and, finally, the fifth section concludes the study by summarising the main findings of this study as they relate to the various hypotheses advanced in chapter 1.[763]

5 2 Overview of the study

As discussed in the second chapter of this study,[764] land dispossession and territorial segregation were the bedrock of the colonial and apartheid systems of oppression.

[763] Chapter 1 4
[764] Chapter 2 2.

Beginning with the settlement of the first permanent Dutch settlers in 1652;[765] South Africa was plagued with a history defined by wars, discriminatory laws, segregation, dispossession, and the general disenfranchisement of the indigenous people of South Africa.[766]

The legacy of dispossession that had been established in the 17th to 19th century was entrenched by the legislative framework that emerged following the formation of the Union of South Africa in 1910.[767] The most definitive pieces of legislation of this era, namely the Natives Land Act,[768] the Native Trust and Land Act[769] and the Group Areas legislation,[770] were discussed in chapter 2 of this study.[771]

As discussed, the Natives Land Act facilitated the drastic limitation on the security of tenure of black people to the extent that they could be arbitrarily evicted by the government or any private person or owner.[772] It also caused the abrupt conversion of black people to a class of wage labourers who were exploited as cheap labour at the mines and on white-owned farms.[773] The Native Trust and Land Act, *inter alia*, determined that the South African Development Trust was to own and administer the areas that were isolated for black occupation.[774] Collectively, the Natives Land Act and the Native Trust and Land Act were key instruments in the expulsion of black people from South Africa and into the dehumanising and neglected reserves on the outskirts of the country.[775] Similarly, the Group Areas legislation, with its accompanying racial classification through the Population Registration Act,[776] solidified racial segregation in urban areas.[777] This legislation was especially devastating on black, coloured and Indian communities who were forcibly moved from their homes, which led to increased poverty and social disintegration.[778]

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[765] Chapter 2 2 2.
[766] Chapter 2 2 – 2 6.
[767] Chapter 2 2 5 5.
[768] Natives Land Act 27 of 1913.
[769] Native Trust and Land Act 18 of 1936.
[770] Group Areas Act 41 of 1950; Group Areas Act 77 of 1957; Group Areas Act 36 of 1966.
[771] Chapter 2 4 – 2 6.
[772] Chapter 2 4 3.
[773] Chapter 2 4 3.
[774] Chapter 2 5 3.
[775] Chapter 2 4 – 2 5.
[776] Population Registration Act 30 of 1950.
[777] Chapter 2 6 3.
[778] Chapter 2 6 4.

Having set out the historical background leading up to and encompassing full scale apartheid, chapter 3 of the study proceeded to deal with the demise of apartheid in the late 1980s and early 1990s and the corresponding expectation of the redress of land dispossession.[779] Accordingly, in 1994, the ANC government adopted the Restitution of Land Rights Act[780] and in 1997, the then Department of Land Affairs released its White Paper on Land Policy.[781]The White Paper listed the principal components of the land reform programme as comprising of land redistribution, tenure reform and land restitution.[782] It also highlighted the government's commitment to a WSWB principle in relation to land acquisition with respect to both redistribution and restitution.[783]

As highlighted in this study, the land reform programme is generally in crisis.[784]The land redistribution and restitution sub-programmes, that are the focus of this study, are plagued by a variety of issues, spanning institutional, substantive and procedural concerns. Some of the problematic institutional issues are alleged corruption and elite capture;[785] funding issues such as an insufficient budget being allocated for land reform purposes and the lack of post-settlement support that is given to land reform beneficiaries.[786] Substantive issues include the slow pace of land reform in general[787] and the controversy regarding the government's WSWB approach to land acquisition.[788] Procedural issues include the beneficiary selection criteria for land redistribution and the 1913 cut-off date for land restitution.[789] While the broad spectrum of difficulties and shortcomings impact detrimentally on the land reform programme as a whole, in this study, emphasis was placed on certain aspects of the redistribution and land restitution programmes, specifically:[790] the WSWB principle; the links between land reform and poverty reduction and the insufficient post-settlement support that is afforded to land reform beneficiaries. In this context, the

[779] Chapter 3 1.
[780] Restitution of Land Rights Act 22 of 1994.
[781] Chapter 3 2 3.
[782] Chapter 3 2 3.
[783] Chapter 3 2 3.
[784] Chapter 3 1; RSA *Final Report of the Presidential Advisory Panel* 4-132.
[785] Chapter 3 1.
[786] Chapter 3 1.
[787] Chapter 3 1.
[788] Chapter 3 1.
[789] Chapter 3 1.
[790] Chapter 3 3 1.

issues that were identified with the WSWB approach to land acquisition included that it was time-consuming[791] and expensive;[792] that it was skewed in favour of land owners[793] and that it amounted to a minimisation of South Africa's colonial and apartheid past as it related to land dispossession.[794] It was also argued in this study that although the links between land and poverty reduction were contested, there were other economic and social benefits that accrued as a result of access to land.[795] Finally, it was argued that the government provides inadequate post-settlement support to land reform beneficiaries to the detriment of the beneficiaries and their land reform schemes.[796]

As mentioned in chapter 3 of this study, the Draft Constitution Eighteenth Amendment Bill was published for comment on 13 December 2019.[797] The long title of the Draft Bill expresses the aim of the Bill as "to provide that where land and any improvements thereon are expropriated for the purposes of land reform, the amount of compensation payable may be nil".[798] While it is envisaged that land reform should be improved by the amendment, it is, at this stage, still unclear what the precise effect of the imminent amendment of section 25 will have on the WSWB approach to land acquisition and on the land reform programme in general.[799] It is also unclear what effect the Property Valuation Act and the 2020-Expropriation Bill will have on the existence or the application of the WSWB principle of land reform.[800] In the midst of this uncertainty, there are still various unresolved issues in the land reform programme. Therefore, it seems imperative that alternative approaches to certain aspects of the land redistribution and restitution sub-programmes are considered. It is in this context that this study assesses the opportunities and challenges that could result from the application of Ubuntu in a land reform context.

[791] Chapter 3 4.
[792] Chapter 3 4.
[793] Chapter 3 4.
[794] Chapter 3 4.
[795] Chapter 3 5.
[796] Chapter 3 6.
[797] Chapter 3 4.
[798] Chapter 3 4.
[799] Chapter 3 4.
[800] Chapter 3 4.

As discussed in chapter 4 of this study, Ubuntu is both a socio-cultural value and a legal value.[801] As a socio-cultural value, Ubuntu is aimed at the achievement of peaceful and harmonious co-existence.[802] It has been argued in this study that the guiding principles of Ubuntu are its unique conceptualisation of personhood; its communitarian ethic and the emphasis that it places on group solidarity.[803]In this regard, Ubuntu advocates for the acknowledgment of truth;[804] restorative justice[805] and actions that are necessary to restore equilibrium and harmony in the community.[806]

The first official acknowledgment of Ubuntu in the South African legal system was in the post-amble of the interim Constitution.[807] As already mentioned in chapter 4 above,[808] Ubuntu was not included in the final Constitution. However, there have been numerous references to Ubuntu in post-apartheid jurisprudence.[809] In this study, the application of Ubuntu in four particular matters, namely: *S v Makwanyane*,[810] *Port Elizabeth v Various Occupiers*,[811] *Afriforum v Malema*[812] and *Dikoko v Mokhatla*[813] was interrogated. It was concluded that while the application of Ubuntu was not without criticism, there seemed to be more opportunities than challenges in the application of Ubuntu in the South African legal system.[814] These opportunities include: the possible harmonisation between the Western influences in the law and African values;[815] the ways in which the inclusion of Ubuntu in the legal system could render the legal system more inclusive and thus legitimise the legal order;[816] and the potential opportunities that could arise from the application of Ubuntu in polarising areas of the law - such as land reform.[817]

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[801] Chapter 4 1.
[802] Chapter 4 2 2 2.
[803] Chapter 4 2 2 1.
[804] Chapter 4 2 2 2.
[805] Chapter 4 2 2 2.
[806] Chapter 4 2 2 2.
[807] Post-amble of the interim Constitution of the Republic of South Africa Act 200 of 1993.
[808] Chapter 4 3 1.
[809] Chapter 4 3 1.
[810] 1995 3 SA 391 (CC).
[811] 2005 1 SA 217 (CC).
[812] 2011 6 SA 240 (EqC).
[813] 2006 6 SA 235 (CC).
[814] Chapter 4 5.
[815] Chapter 4 5.
[816] Chapter 4 5.
[817] Chapter 4 5.

It is in this context that this chapter aims to explore the possible utilisation of Ubuntu in a land reform context, specifically.

5 3 Lessons from the application of Ubuntu in the Truth and Reconciliation Commission

5 3 1 Introduction

The Truth and Reconciliation Commission ("TRC") was established in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995, with the objectives of promoting national unity, reconciliation and restoring the dignity of victims of past injustice. In the execution of its mandate, the TRC invoked frequently the value of Ubuntu.[818] In reflecting on a land reform programme in flux and a fractured society, some have suggested a revival of the TRC to address the land reform issue and to encourage a more socially and economically integrated society.[819] It is in this context that this section of the study seeks to analyse the application of Ubuntu in the TRC, which constituted the first attempt in South Africa to utilise Ubuntu on a national scale in addressing past division, in order to draw lessons from this experience that can be utilised in the application of Ubuntu in a land reform context. Inevitably, the lessons learnt, along with the principal components of Ubuntu as discussed in chapter 4, are reconstituted within a land reform context specifically, with a view of highlighting possible solutions to the identified issues in the redistribution and restitution sub-programmes.

5 3 2 The legacy of the TRC

[818] A Krog "Research into Reconciliation and Forgiveness at the South African Truth and Reconciliation Commission and Homi Bhabha's 'Architecture of the New'" (2015) 30 *Can J Law Soc* 203-217; PGJ Meiring "Bonhoeffer and Costly Reconciliation in South Africa – Through the Lens of the South African Truth and Reconciliation Commission" (2017) 38 *Verbum et Eccles* 18 22-27; L Allais "Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission" (2011) 39 *Philos Public Aff* 331-363.

[819] T Metz "South Africa's Truth and Reconciliation Commission in the Light of Ubuntu: A Comprehensive Appraisal" in M Swart & K van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On* (2017) 221 246; 222; G Bradshaw & N Breakfast "Searching for Common Ground: A Proposal For Managing Land Reform-Related Conflict in South Africa" (2018) 53 *J Public Adm*. 376 391.

The legacy of the TRC is contested.[820] There are some who argue that because the TRC's reparative aspects never fully materialised, the form of restorative justice that was advocated by the TRC amounted to a denial of justice.[821] In this regard, it has been argued that without reparations, there had been a lack of the economic restoration of the society and thus an unjust society prevailed.[822] It has also been argued that the reconciliation that the TRC proposed failed to materialise because there was the lack of assumption of responsibility on the part of the perpetrators and beneficiaries of apartheid alike.[823]

There have also been criticisms regarding the ways in which Ubuntu was employed in the TRC process.[824] In this regard, Wilson argues that the concept of Ubuntu was abused to sell a reconciliatory approach to human rights to black South Africans.[825] In other words, he argues that the notion of Ubuntu was exploited by the powerful to render their political ideologies more palatable to unsuspecting people.[826] Further, Jones argues that there was an expectation from the TRC that white South Africans would "share the load" that reconciliation required, in the name of Ubuntu, and that this expectation was never met.[827] Jones expresses that, in actuality, the TRC

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[820] See generally M Mamdani "Amnesty of Impunity? A Preliminary Critique of the Truth and Reconciliation Commission of South Africa (TRC)" (2002) 32 *JHUP* 32-59.; T Madlingozi "Good Victim, Bad Victim: Apartheid's Beneficiaries, Victims, and the Struggle for Social Justice" in W le Roux & K van Markle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years After Azapo v President of South* Africa (2007) 107-126; RC Slye "Putting the J into the TRC: Kenya's Truth Justice and Reconciliation Commission" in M Swart & K van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On* (2017) 282-307; A Jones "The Settler Problem', Ubuntu and South Africa's Truth and Reconciliation Commission (2014) 3 *Ubuntu J. of Conflict Transformation* 7-33.

[821] R Oelofsen "Afro-Communitarian Implications for Justice and Reconciliation" (2016) 63 *Theoria* 1 9 quoting Mahmood Mamdani; Slye "Putting the J into the TRC" in *Limits of Transition* 286-287; N Mogale "Ten Years of Democracy in South Africa: Revisiting the AZAPO decision" in W le Roux & K van Markle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years After Azapo v President of South* Africa (2007) 127 130; K van Marle "Jurisprudence after the Truth and Reconciliation Commission – 'Welcoming Other Ways of Being' and a 'Jurisprudence of Sense'" in M Swart & K van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On* (2017) 41 42.

[822] W Gumede "Failure to Pursue Economic Reparations has, and Will Continue to Undermine Racial Reconciliation" in M Swart & K van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On* (2017) 59 61.

[823] Oelofsen (2016) *Theoria* 15.

[824] Wilson *The Politics of Truth and Reconciliation in South Africa* 13; Jones (2014) *Ubuntu J. of Conflict Transformation* 25.

[825] Wilson *The Politics of Truth and Reconciliation in South Africa* 13.

[826] A Krog "Rethinking Reconciliation and Forgiveness at the South African Truth and Reconciliation Commission" in M Swart & K van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On* (2017) 11 21.

[827] Jones (2014) *Ubuntu J. of Conflict Transformation* 25.

inaugurated a process in which "blacks did most of the talking and whites did too little listening".[828]

Contrary to these criticisms, there have been some who have defended the legacy of the TRC.[829] Krog argues that the South African TRC is credited for being the first Truth Commission to hold victim hearings in public; to grant amnesty to individuals; and to allow victims who had been on opposing sides during apartheid to testify in the same forum.[830] Further, Hay argues that the TRC was given a nearly impossible and overly ambitious task to engender national unity and reconciliation within a limited time frame and with limited resources.[831]He argues that, in spite of these restrictions, the TRC's positive effects outweighed its limitations.[832]

5 3 3 Lessons from the TRC

Arguably, a lot can be learnt from the TRC experience. It has been said that the TRC was created not only to legitimise the new, democratic state but also to give birth to a nation that would be built on substantive equality, dignity and freedom.[833] The TRC effected its mandate through three committees, namely the Human Rights Violation Committee; the Reparation and Rehabilitation Committee and the Amnesty Committee.[834] The task of the Human Rights Committee was to investigate human rights violations that occurred between 1960 and 1994, using statements made to the TRC as the foundation for the investigation.[835] The Reparation and Rehabilitation Committee's mandate was to ensure that the TRC process restored the dignity of the victims and "to formulate policy proposals and recommendations on rehabilitation and healing of survivors, their families and community at large".[836] The Amnesty

[828] 31.
[829] Krog "Rethinking Reconciliation and Forgiveness" in *The Limits of Transition* 21; M Hay "Grappling With the Past: The Truth and Reconciliation Commission of South Africa" (1999) *AJOL* 29 43-44.
[830] Krog "Rethinking Reconciliation and Forgiveness" in *The Limits of Transition* 21.
[831] Hay (1999) *AJOL* 43.
[832] 44.
[833] Madlingozi "Good Victim, Bad Victim" in *Law, Memory and the Legacy of Apartheid* 107.
[834] Department of Justice and Correctional Services "Welcome to the Official Truth and Reconciliation Website" (2020) *Truth and Reconciliation Commission* <https://www.justice.gov.za/trc/> (accessed 27-01-2020).
[835] Department of Justice and Correctional Services "Welcome to the Official Truth and Reconciliation Website" (2020) *Truth and Reconciliation Commission* <https://www.justice.gov.za/trc/> (accessed 27-01-2020).
[836] Department of Justice and Correctional Services "Welcome to the Official Truth and Reconciliation Website" *Truth and Reconciliation Commission.*

Committee's primary function was to consider applications for amnesty for acts, omissions or offences associated with political objectives committed between 1 March 1960 to 6 December 1993.[837]

Being granted amnesty meant that the perpetrators were free from prosecutions for those particular acts.[838] Each perpetrator was required to disclose the truth before receiving amnesty from legal prosecution.[839] The victims were forbidden from seeking the criminal prosecution of those who had been granted amnesty.[840] Therefore, justice for the victim would neither be punitive nor retributive, but restorative.[841] The term, restorative justice, in this context, is used to refer to the reintegration of a community, violated by conflict, through dialogue and negotiation.[842] Much like Ubuntu, restorative justice fosters interpersonal reconciliation between victims and offenders, and social reconciliation between the offenders and the community.[843]

In the TRC, this meant that the acknowledgement of the harm caused to victims would be followed by reparations.[844]In essence, the TRC advocated for amnesty for individual perpetrators in exchange for the truth for society, and acknowledgment and reparations for the victims.[845]

As previously discussed, much has been written regarding the TRC's limitations and shortcomings.[846]This section of the study will focus on those criticisms that are relevant for the proposed solutions to the identified challenges in land reform. Therefore, the criticisms of the TRC that will be discussed in this section of the study are: the TRC's failure to address land dispossession as a human rights violation;[847]

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[837] Department of Justice and Correctional Services "Welcome to the Official Truth and Reconciliation Website" *Truth and Reconciliation Commission.*
[838] Department of Justice and Correctional Services "Welcome to the Official Truth and Reconciliation Website" *Truth and Reconciliation Commission.*
[839] Mamdani (2002) *JHUP* 33.
[840] 33.
[841] 33.
[842] DJ Louw "The African Concept of Ubuntu and Restorative Justice" in D Sullivan & L Tifft (eds) *Handbook of Restorative Justice: A Global Perspective* (2008) 161 162.
[843] 167.
[844] Mamdani (2002) *JHUP* 33.
[845] 33.
[846] 32-59; Madlingozi "Good Victim, Bad Victim" in *Law, Memory and the Legacy of Apartheid* 107-126; Jones (2014) *Ubuntu J. of Conflict Transformation* 7-33.
[847] E du Plessis "Property in Transitional Times: The Glaring Absence of Property at the TRC" in M Swart & K van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On* (2017) 94 96-97.

the TRC's failure to address the structural inequality resulting from apartheid;[848] the delayed and arguably insufficient reparations that were given to the identified victims of apartheid;[849] and the TRC's decision to focus on individual perpetrators of apartheid as opposed to the beneficiaries of the system.[850]

5 3 3 1 The TRC's failure to address land dispossession

The Human Rights Violation Committee of the TRC declared someone a "victim" only if the person had suffered severe physical and/or mental injury in the form of killing, abduction, torture or severe ill-treatment as a result of apartheid.[851]The TRC did not consider land dispossession as a form of human rights violation that fell within its mandate.[852]Du Plessis argues that dispossession did not have a merely economic or punitive effect, but that it was a political act that crushed the "social fibre of communities" and often led to perpetual poverty in once economically-stable families.[853]She argues further that these devastating effects of land dispossessions have had an intergenerational spill-over.[854]Du Plessis opines that had the TRC considered land restitution, it would have demanded more than the return of the land, but that it would have also focussed on the need to address the lost memories of the victims and to restore their dignity.[855]She argues that the TRC would have urged the beneficiaries of apartheid to consider and acknowledge the cost of their memories and wealth, and that it would have required the beneficiaries to make some sacrifices towards national unity and reconciliation.[856]

5 3 3 2 The TRC's failure to address structural inequality

The TRC is also criticised because of its alleged failure to address the socio-economic effects and violations caused by the apartheid system.[857]Gumede argues that the lack

[848] Slye "Putting the J into the TRC" in *Limits of Transition* 287; Gumede "Failure to Pursue Economic Reparations" in *The Limits of Transition* 61.
[849] Gumede "Failure to Pursue Economic Reparations" in *The Limits of Transition* 67.
[850] Madlingozi "Good Victim, Bad Victim" in *Law, Memory and the Legacy of Apartheid* 116-117.
[851] Du Plessis "Property in Transitional Times in *The Limits of Transition* 96-97.
[852] 100.
[853] 100.
[854] 100.
[855] 116.
[856] 117.
[857] Slye "Putting the J into the TRC" in *Limits of Transition* 287.

of emphasis on economic redress during the TRC process and the lack of reparations in the post-TRC era constitute the core weaknesses of the programme.[858]He argues that apartheid left a legacy of "socio-economic maldistribution" that necessitates reconciliation responses that focus on redistribution for the historically disadvantaged as well as an acknowledgement of their oppression.[859] Gumede argues further that the TRC did not conduct a thorough investigation of the role that the different sectors of the economy played in perpetuating the apartheid system.[860]He argues that many public and private institutions failed to acknowledge their complicity in the economic deprivation of black South Africans.[861]

In this regard, Slye contends that certain scholars in the transitional justice sector have criticised the failure of truth commissions to examine the ways in which economic power relates to oppression and these scholars have argued that this is a grave oversight in addressing an oppressive past.[862]

In this context, the term transitional justice refers to the ways in which societies address legacies of past human rights abuses or other severe social trauma to ensure a more just and peaceful future.[863] Coles provides that transitional justice is concerned with granting victims voices and agency, recording past atrocities and facilitating collective memory.[864]

Slye argues that because of the TRC's failure to address the crime of apartheid, little regard was given to those who had benefited from the system of apartheid due to their racial classification.[865] Slye elaborates that this has contributed to the difficulty prevalent in present day South Africa with regard to addressing seriously the economic disparities engendered by apartheid.[866]

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[858] Gumede "Failure to Pursue Economic Reparations" in *The Limits of Transition* 67
[859] 61.
[860] 67.
[861] 67.
[862] Slye "Putting the J into the TRC" in *The Limits of Transition* 286.
[863] CM Cole "Performance, Transitional Justice and the Law: South Africa's Truth and Reconciliation Commission" (2007) 59 *Theatre J* 167 168.
[864] 171.
[865] Slye "Putting the J into the TRC" in *The Limits of Transition* 286.
[866] 288.

5 3 3 3 The delayed and arguably insufficient reparations that were given to the identified victims of apartheid

The TRC has also been criticised for offering allegedly inadequate reparations to victims of apartheid.[867]In this context, the TRC is criticised for, firstly, placing the onus for reparations solely on the state while the apartheid business model was founded, *inter alia*, on labour market discrimination against black people.[868] Gumede argues that businesses in the private sector benefitted greatly from apartheid's racial discriminatory and oppressive policies, and as such, they should have been obligated to contribute to a reparations fund for the victims of apartheid.[869] In this regard, the TRC proposed a reparations fund that would have been contributed to by businesses.[870] However, this recommendation was not implemented and Gumede argues that this amounted to a denial of responsibility by the private sector.[871]

The second point of criticism regarding the reparations facilitated by the TRC is that the TRC recommended that the identified apartheid victims be given R21 000 each per year for six years.[872] In April 2013, former President Thabo Mbeki announced that reparations would in actuality be a once-off payment of R30 000 to individuals declared as victims by the TRC.[873] Between 2003 and 2004, 16 000 individuals declared as victims by the TRC received once-off payments of R30 000 each.[874] The Khulumani Victims Support Group estimates that about 100 000 individuals who classified as "victims" under the TRC definition had not received these reparations.[875]One of the reasons advanced for this alleged oversight is that the Human Rights Violation Committee, that was responsible for identifying victims of human rights violations under apartheid, operated for only two years - while the Amnesty Committee continued to operate beyond the TRC's formal existence.[876] Marjorie Jobson of the Khulumani Victims Support Group has stated that a large number of people had only become

[867] Gumede "Failure to Pursue Economic Reparations" in *The Limits of Transition* 67.
[868] 69.
[869] 69-70.
[870] Metz "South Africa's Truth and Reconciliation Commission" in *The Limits of Transition* 244.
[871] Gumede "Failure to Pursue Economic Reparations" in *The Limits of Transition* 70.
[872] 68.
[873] 68.
[874] 68.
[875] 68.
[876] 68.

aware of the TRC's existence and operation after it had already stopped receiving statements from victims.[877]

The third point of criticism regarding the TRC's reparations process is that it recommended reparations for individuals that had been the victims of gross human rights violations and not for the broader black society which had arguably all been disadvantaged by the system of apartheid.[878] In this regard, Mamdani argues that the victims of a "system of enforced racial discrimination and separation" could not be individuals but that it had to be entire communities oppressed on the grounds of their race and ethnicity, as such, he argues that reparations should have been awarded to communities.[879]

5 3 3 4 The TRC's decision to focus on individual perpetrators of apartheid as opposed to the beneficiaries of the system

The final point of criticism of the TRC discussed here, is the argument that the TRC was misguided in focusing only on the individual perpetrators of apartheid and not examining the role of the beneficiaries of apartheid.[880] Madlingozi argues that the sharp distinction that was drawn between the perpetrators and beneficiaries of apartheid had the effect of silencing questions regarding general benefits and privileges that were accrued during apartheid.[881] He argues that this amounted to the abandonment of redistributive justice in favour of "feel-good myths" regarding a "united rainbow nation".[882] Similarly, Meister argues that drawing a distinction between perpetrators and beneficiaries of injustice meant that the victims of past injustice had to accept the continued benefits that the beneficiaries of apartheid continued to enjoy in order to be viewed as having truly reconciled.[883] Madlingozi argues that this approach also led to the beneficiaries of apartheid dissociating themselves from the perpetrators, and that it distorted the structural consequences to apartheid which made it easier for the beneficiaries of injustice to minimise and/or deny the links

[877] 68.
[878] Metz "South Africa's Truth and Reconciliation Commission" in *The Limits of Transition* 244.
[879] Mamdani (2002) *JHUP* 54. Unfortunately, the author does not detail how exactly these community-based reparations would have been awarded.
[880] Madlingozi "Good Victim, Bad Victim" in *Law, Memory and the Legacy of Apartheid* 116-117.
[881] 116.
[882] 116.
[883] 116.

between black poverty, white privilege and apartheid.[884] In this regard, Mamdani argues that in order to ensure true reconciliation, the focus has to move from perpetrators to beneficiaries.[885]

5 3 4 Conclusion

As has been highlighted, the land reform programme in South Africa is in crisis and one of the methods that has been suggested for confronting the issues in land reform has been a reincarnation of the TRC, or in other words, a "TRC 2.0".[886] It has been suggested that the path to true reconciliation could possibly be found in an inclusive and representative national dialogue in which South Africans discuss the ways in which South Africa continues to be a fractured state and to attempt to plot the way forward as a collective.[887] It is argued in this study that a revival of the TRC for land reform purposes is not the solution for reasons such as those elucidated by Bradshaw & Breakfast.[888] Bradshaw & Breakfast argue that a land reform inquest, similar to the operation of the TRC, would be unsuccessful in contemporary South Africa because the circumstances have changed.[889] They argue that racial animosity has intensified;[890] economic circumstances have gotten direr;[891] and political parties are less inclined to encourage such a process as they have become more concerned with electoral victories as opposed to long-term solutions.[892] It is also argued in this study that a revival of the TRC in a land reform context would be unwelcome due to the perceived failings of the TRC.

Although a revival of the TRC may not be the solution to the pertinent issues in land reform, this study has attempted to illustrate that valuable lessons stand to be learnt from the TRC experience. Accordingly, the lessons that can be learnt from the TRC experience are that, firstly, there can never be a legitimate achievement of restorative

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884 118-119.
885 117.
886 Metz "South Africa's Truth and Reconciliation Commission" in *The Limits of Transition* 246; 222; Bradshaw & Breakfast (2018) *J Public Adm*. 391.
887 Metz "South Africa's Truth & Reconciliation Commission" in *The Limits of Transition* 246; 222; Bradshaw & Breakfast (2018) *J Public Adm*. 391.
888 Bradshaw & Breakfast (2018) *J Public Adm*. 393.
889 393.
890 393.
891 393.
892 393.

justice without reparations;[893] secondly, the socio-economic effects of past racial injustice have to be addressed through effective means, which may include redistribution;[894] and finally, the focus has to move from the individual perpetrators of past injustice to the current beneficiaries of said injustice.[895]

5 4 Land reform and Ubuntu: Recommendations

In light of the lessons gleaned from the TRC experience, set out above; and the principles inherent in Ubuntu, a variety of recommendations regarding the use of Ubuntu in a land reform context are suggested. These recommendations deal with (a) adjustments to existing processes, bodies and institutions, in other words, better employment of extant tools; and (b) the establishment or development of new processes, bodies and institutions.

5 4 1 Adjustments to existing processes, bodies and institutions

5 4 1 1 Commission on Restitution of Land Rights

The Commission on Restitution of Land Rights ("CRLR**"**) was established in terms of section 4 of the Restitution of Land Rights Act.[896] The purpose of the CRLR is to ensure that redress is provided to everyone who was dispossessed of their land rights because of racial discriminatory laws or practices after 19 June 1913.[897]

The CLCR is plagued with various institutional issues such as the staff lacking the proper legal and historical training necessary to be able to fulfil their duties;[898] the filing and digital systems being in disarray;[899] high staff turnover which contributes to poor institutional memory;[900] poor management of critical functions;[901] difficulty in validating and researching claims;[902] and corruption.[903] The analysis and discussion of all these

[893] Oelofsen (2016) *Theoria* 9 quoting Mahmood Mamdani.
[894] Gumede "Failure to Pursue Economic Reparations" in *The Limits of Transition* 61.
[895] Madlingozi "Good Victim, Bad Victim" in *Law, Memory and the Legacy of Apartheid* 116-117.
[896] S4 of the Restitution of Land Rights Act.
[897] S6 of the Restitution of Land Rights Act.
[898] Parliament *Report of the High Level Panel* 234.
[899] 233.
[900] 233.
[901] 244.
[902] 244.
[903] 233; 240.

issues is beyond the scope of this study. Therefore, this section of the study will only discuss and propose solutions for the following issues besetting the CLCR, namely: the ineffective communication between the CLCR and the land claimants;[904] and the alleged lack of accountability of the CLCR. [905] It is argued in this study that an Ubuntu-driven approach to these issues would ameliorate them and in doing so, assist in expediting land restitution and restoring the dignity of the affected.

In a study published in 2014, Atuahene set out to explore why some dispossessed individuals and families who received compensation through the land restitution process perceived the process to be fair while others did not.[906] Atuahene argued that a process that was believed to be fair could contribute to the restoration of dignity.[907] In this context, Atuahene, quoting Robert MacCoun, provided that there were two fundamental dimensions to the perception of fairness of process, namely: the ability to tell one's story and fair, dignified treatment.[908] Interestingly, this also resonates, to some extent, with the TRC process. Atuahene elaborated that when people were given the opportunity to provide input into a decision-making process, they then regarded that decision to be fairer and they reacted more favourably to the decision, decision-makers and the institution represented by those decision-makers.[909]

Atuahene contends that the dispossessions in South Africa formed part of a larger strategy of dehumanisation and infantilisation and as such, she proposes a remedy of dignity restoration whereby the deprivation of property is addressed through a process that affirms the individual's or community's equal worth and autonomy.[910] A key element to the remedy proposed by Atuahene is a sustained conversation between the claimants and commission officials.[911]A sustained conversation is defined as

[904] Parliament *Report of the High Level Panel* 253; RSA *Final Report of the Presidential Advisory Panel* 50.
[905] Parliament *Report of the High Level Panel* 38; B Atuahene *We Want What's Ours: Learning from South Africa's Land Restitution Program* (2014) 65.
[906] B Atuahene "The Importance of Conversation in Transitional Justice: A Study of Land Restitution in South Africa" (2014) 39 *LSI* 902 902.
[907] 904.
[908] 905.
[909] 905.
[910] 911.
[911] 911.

multiple rounds of information exchange at various points in the restitution process. In this context, commission officials would be encouraged to:[912]

(i) adequately explain the processes involved;

(ii) respond to claimants' enquiries and requests;

(iii) abide by the promises they make; and

(iv) claimants would be encouraged to respond to the requests of the officials and to compile the necessary documentation in a timely fashion.

The concept of sustained conversation is aligned with one of the distinguishing characteristics of Ubuntu, briefly discussed in chapter 4, namely, the importance of reaching consensus.[913] Ubuntu is often invoked to refer to the traditional African culture of pursuing consensus and reconciliation, often though *indaba* (an open discussion by a group of people with a common interest*) or imbizo* (a mass congregation for the purpose of discussing issues of national importance*).*[914]

The notion of increasing dialogue between the claimants and the commission officials is also supported in the Final Report of the Presidential Advisory Panel. In the Final Report, the panel suggests that a reformed land reform programme should be based on the intensive participation and inclusion of beneficiaries or their groups in the identification, planning, implementation and financial management of their projects.[915] This recommendation is supported in this study.

The second issue facing the CRLR that will be discussed in this section of the study is its perceived lack of accountability.[916] The CRLR plays a vast range of roles in the restitution process. The CLCR is required to, simultaneously, defend the state's interests in the restitution process; advocate for the claimants and assist them in launching their cases for restitution; decide on how the process is to be conducted and ultimately decide on the type of compensation that claimants are to receive.[917] These multifarious roles lead to both a consolidation of power in the CRLR, which makes it

[912] 911.
[913] Chapter 4 2 2 2.
[914] Louw "The African Concept of Ubuntu" in *Handbook of Restorative Justice* 162; Vervliet *The Human Person* 28.
[915] RSA *Final Report of the Presidential Advisory Panel* 50.
[916] Atuahene *We Want What's Ours* 65; Parliament *Report of the High Level Panel* 38
[917] Atuahene *We Want What's Ours* 65.

vulnerable to corruption[918] and constitute an overextension of its capacity.[919] Both these outcomes have the effect of slowing down the restitution process and rendering it inefficient. To curtail this state of affairs, Atuahene suggests two alternatives which are wholly supported in this study.

The first alternative is to involve South Africa's civil society in the restitution process.[920] In this regard, civil society – in the form of land activists and non-governmental organisations ('NGOs") – could advocate for the claimants at all stages of the restitution process.[921] This would lessen the burden on the CRLR, assist the claimants in navigating the bureaucracy of the process and it would also be useful in facilitating sustained conversations between the parties. As alluded to above, the latter also resonates with an Ubuntu approach.

The second alternative is to establish an independent review unit in the CLCR that would be mandated with reviewing the CRLR's work to ensure compliance with established policies and laws.[922] To maintain its independence, Atuahene suggests that this unit be staffed with both CRLR employees and qualified members of civic society.[923] In this way, an automatic review mechanism would be built into the process without requiring claimants to lodge court proceedings.[924] Both these communal approaches to land restitution would promote the communitarian ethic of Ubuntu, which was discussed in chapter 4, and could ultimately also expedite the land restitution process.

5 4 1 2 Better usage of section 33 of the Restitution of Land Rights Act

Section 33 of the Restitution of Land Rights Act contains the factors to be taken into account by a court in determining any particular matter before it relating to land restitution.[925] Of particular relevance to this study is section 33(cA) of the Restitution of Land Rights Act which lists as a factor for consideration the following:

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[918] 65; Parliament *Report of the High Level Panel* 233.
[919] Parliament *Report of the High Level Panel* 233; RSA *Final Report of the Presidential Advisory Panel* 50.
[920] Atuahene *We Want What's Ours* 65
[921] 65 – 66.
[922] 66.
[923] 66.
[924] 66.
[925] The factors to be taken into account by a court in terms of section 33 are as follows:

"if restoration of a right in land is claimed, the feasibility of such restoration".[926] In this context, the High Level Panel expressed that there was not enough detail provided by the Restitution of Land Rights Act on how feasibility or equitable redress should be determined.[927] The Panel suggested that the meaning and application of the concept of "feasibility" of restoration be clarified and that clear criteria be established for the adjudication of this factor.[928]

For their part, courts have developed a list of factors to be considered in adjudicating on the feasibility of land restoration.[929] In *Re Kranspoort Community* [930]("*Kranspoort*"), the court held that although the definition of feasibility was not provided in the Restitution of Land Rights Act, the test to be applied was whether or not the restoration of the land right to the claimant would be possible and practical, having regard to:[931]

(i) "the nature of the land and the surrounding environment at the time of the dispossession;
(ii) the nature of the claimant's use at the time of the dispossession;
(iii) the changes which have taken place on the land itself and the surrounding area since the dispossession;
(iv) any physical or inherent defects in the land;

(a) "the desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
(b) the desirability of remedying past violations of human rights;
(c) the requirements of equity and justice;
(cA) if restoration of a right in land is claimed, the feasibility of such restoration;
(d) the desirability of avoiding major social disruption;
(e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;
(eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
(eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
(eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
(f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution."

[926] S33 (cA) of the Restitution of Land Rights Act.
[927] Parliament *Report of the High Level Panel* 243.
[928] 249.
[929] *In Re Kranspoort Community* 2000 2 SA 124 (LCC); *Baphiring Community v Uys and Others* 2010 3 SA 130 (LCC); *Baphiring Community and Others v Tshwaranani Projects CC and Others* 2014 1 SA 330 (SCA).
[930] 2000 2 SA 124 (LCC).
[931] Para 92.

(v) official land use planning measures relating to the area; and
(vi) the general nature of the claimant's intended use of the land concerned".

The court also warned against judicial enquiries into the social and economic viability of the claimant's intended use of the land as, according to the court, courts are not well-equipped to assess such social and economic viability.[932]

In *Baphiring Community and Others v Tshwaranani Projects CC and Others* ("*Baphiring*"),[933] the Supreme Court of Appeal contradicted the court in *Kranspoort* and held that the cost implications of the restoration were at the heart of a proper assessment of feasibility.[934] In this context, the court elaborated that the factors that had to be taken into account in considering feasibility of the restoration of land rights included:[935]

(i) "the number of families who are expected to be resettled;
(ii) the institutional and financial support for the resettlement;
(iii) the envisaged land use if the land is restored;
(iv) the cost of expropriating the land from the current landowners;
(v) the extent of the loss of food production to the local community, should farming activities not be continued at current levels;
(vi) the extent of social disruption to the current landowners and their families should they be required to physically leave their farms;
(vii) the number of farmworkers who are dependent upon the incomes from their employment on the farms and the extent and social impact of social disruption, including the loss of employment to them; and
(viii) should the land be restored, how the problem of 'overcompensation' of the claimants will be avoided."

While all of the above factors are indeed useful and relevant, they remain rather context-sensitive. It is thus argued that Ubuntu ought to also be a factor in the determination of feasibility in terms of section 33(cA). The court in *Baphiring*

[932] Para 92
[933] 2014 1 SA 330 (SCA).
[934] Para 14.
[935] Para 18.

pronounced that social and economic factors could have a bearing on the determination of feasibility.[936] Therefore, it seems appropriate that the principal aims of Ubuntu, as identified in chapter 4 of this study,[937] should have a bearing on the consideration of whether, or not, the restoration of land rights would be feasible. These aims, which should form part of the deliberations under section 33(cA), are the acknowledgment of historical truth; communitarianism and restorative justice.[938] Arguably, this would lead to more judgments that are aligned with justice and equity; and this would improve the land restitution programme generally. Further, it is also argued in this study that there should be a greater reliance on section 33 of the Act in judgments on restitution of land rights by the courts.

5 4 1 3 *Monitoring as a formal step in the land redistribution and land restitution process*

Currently, there is a lack of monitoring of the impact of land reform[939] and there is inadequate evidence on the impact of land redistribution on livelihoods.[940] This lack of monitoring contributes to the lack of post-settlement support that is afforded to land reform beneficiaries which then limits the developmental potential of land reform projects and hinders the improvement of livelihoods, as discussed in chapter 3.[941]

The Final Report of the Presidential Advisory Panel recommended that government develop outcome indicators for monitoring and evaluating land reform.[942] The Panel explained that government would have to define the concept of "success" for different land reform objectives and identify corresponding outcome indicators.[943] The Panel suggested that the government's evaluation system should include "baseline surveys of beneficiaries, longitudinal monitoring over time, and a control group of people who

[936] 2014 1 SA 330 (SCA) para 14.
[937] Chapter 4 2 2 2.
[938] Chapter 4 2 2 2.
[939] RSA *Final Report of the Presidential Advisory Panel* 33; See also SG Mahule *Exploration of Contributing Factors Leading to a Decrease in Agricultural Productivity in Restituted Farms of Ehlanzeni District Mpumalanga Province* Masters in Public Administration thesis, Stellenbosch University (2015) 22, 55.
[940] RSA *Final Report of the Presidential Advisory Panel* 13.
[941] Chapter 3 6.
[942] RSA *Final Report of the Presidential Advisory Panel* 99.
[943] 99.

are not part of the land reform programme".[944] These recommendations are supported in this study.

It is also recommended in this study that the definition of success for land reform objectives that should be developed by the government, as recommended by the Panel, should specifically include considerations of Ubuntu. The government should include whether, or not, the beneficiaries of land reform record feelings of restored dignity and a sense of the rectification of a historical wrong, through their experience with land reform. These considerations would ensure that both redistributive and restorative forms of justice are achieved (or, at the least, being worked towards) in the land reform programme.

5 4 2 Establishment of new processes, bodies and institutions

Although the adjustment of extant processes, bodies and institutions will promote more effective land reform, as argued above, adjustments alone are not sufficient. In this regard, given the Ubuntu-dimension, the development of various new processes and establishment of new bodies and institutions are recommended in particular.

5 4 2 1 Land Reform Fund

5 4 2 1 1 Introduction

The TRC process has highlighted that, where injustice has occurred, reparations must follow. In this vein, the Final Report of the Presidential Advisory Panel recommended that a land reform fund be established to finance land reform.[945] However, the Parliamentary Cabinet dismissed this suggestion as being without merit.[946] Contrary to the Cabinet's stance on this matter, it is argued in this study that the establishment of a land reform fund as contained in the Final Report could be vital in encouraging the recognition of the lasting legacy of dispossession; providing reparations and achieving a measure of restorative justice. Accordingly, it is argued that a land reform fund could provide the funds necessary for acquiring land for land reform purposes and for providing post-settlement support to land reform beneficiaries. It will also be

[944] 99.
[945] RSA *Final Report of the Presidential Advisory Panel* 82.
[946] Q Masuabi "Cabinet Approves Most Land Reform Proposals from Presidential Advisory Panel" (19-12-2019) *City Press* <https://city-press.news24.com/News/cabinet-approves-most-land-reform-proposals-from-presidential-advisory-panel-20191219> (25-01-2020).

argued that the existence and operation of a fund of this nature could also facilitate reconciliation. Further, a possible framework for the operation of the fund will be set out. Finally, a conclusion will be reached regarding the feasibility and possible solutions that could be engendered by the establishment of such a land reform fund.

5 4 2 1 2 Recognition, Rectification and Restorative Justice (Ubuntu)

Mostert argues that the irrevocability of the country's past and the trauma thereof, especially in relation to property, must first be acknowledged.[947] In this context, Atuahene argues that South Africa's history of land dispossession has to be understood as a socio-political phenomenon in which the confiscation of property formed part of a "larger strategy of dehumanisation".[948] As such, she argues that South Africa requires a land reform programme that does more than just return property, but one that also embarks on the larger project of restoring the dispossessed group or individual's relationship to society.[949]

In a similar vein, Cuneen argues that reconciliation cannot be achieved where there is a general feeling of injustice and non-accountability for injustice.[950] Desmond Tutu, who was a key figure in the TRC, echoes this sentiment. He argues that restorative justice cannot be achieved without reparations.[951] Tutu elaborates that apartheid afforded white people enormous advantages and privileges while the victims of the system were deprived and exploited. In Tutu's view, in order for justice to be done, this state of affairs would have to be rectified.[952] As already highlighted, Mamdani also argues that restorative justice without reparations amounts to a "denial of justice".[953]It is in this context that one of the guiding principles of Ubuntu, namely, communitarianism is relevant.

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[947] H Mostert & C Young "Between Custom and Colony: Social-Norm Based Property Law in South Africa's Post-Constitutional 'No-Man's Land'" in P Babie & J Viven-Wilksch (eds) *Leon Duguit and the Social Obligation Norm of Property: A Translation and Global Exploration* (2019) 371 376.
[948] T Kepe, E Lewison, R Ramasra & S Butt "The Elusive 'Fair Deal' in South Africa's Land Reform" (2011) 38 *Forum Dev Stud* 371 373.
[949] 373.
[950] Oelofsen (2016) *Theoria* 1.
[951] 6.
[952] 6.
[953] 9

Oelofsen argues that afro-communitarianism is concerned with collective virtue.[954]She contends that it is the understanding that self-realisation is not possible in a society that lacks an individual and communal commitment to equity and justice.[955] Oelofsen elaborates that communitarianism or collective virtue is "communal self-realisation through the promotion of harmony".[956] Oelofsen argues that the communitarian understanding of virtue would necessitate that collective responsibility be taken for structural harms.[957] She contends that because the aim of restorative justice is to repair relationships, there would need to be due recognition given to the harms that occurred if they still have a direct and profound impact on the victims' lives in the present.[958]

Oelofsen contends that in order for the dignity of the victims of injustice to be restored, reparations have to occur as a result of the perpetrator and beneficiaries taking collective responsibility for the harm that occurred.[959] She argues that without such recognition of responsibility being proffered, there will be neither healing of the community, nor repairment of the relationships because the perpetrators and beneficiaries will not have shown a willingness to enter into a relationship based on mutual respect and deference with the "victim group".[960]

Michnik clarifies that collective guilt does not exist.[961] He reasons that those who are guilty of something have to answer to that as individuals.[962]He differentiates collective guilt from collective responsibility by highlighting that collective responsibility exists for "a mental and cultural context that makes crimes against humanity possible".[963]

5 4 2 1 3 The possible framework for the operation of the fund

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954 1.
955 1.
956 1.
957 14.
958 14.
959 Oelofsen (2016) *Theoria* 15.
960 15. In Mamdani (2002) *JHUP* 56-57, Mamdani argues that, once restorative justice has been achieved, it will be possible to recognise both perpetrators and victims of apartheid as both being victims of the conflict of the past.
961 Jones (2014) *Ubuntu J. of Conflict Transformation* 29 quoting Adam Michnik.
962 29 quoting Adam Michnik.
963 29.

As already mentioned, the Final Report recommended that a land reform fund be established for purposes of financing land reform.[964] The Panel argued that finance was a key pillar and necessity for achieving land reform outcomes.[965]

It was argued that the fund would enable land acquisition for land reform purposes, asset building and the provision of post-settlement support to land reform beneficiaries.[966] The Panel recommended that the private sector, namely "commercial banks, asset managers and pension funds" should be mobilised to contribute to this fund and to respond to the urgent need to finance the country's excluded majority.[967] The Panel recommended that the funding take the form of capital donations, developmental finance at preferential rates and joint venture funding.[968] These recommendations, although rejected by the Cabinet, are supported in this study. It is further suggested, in this study, that individuals should also be able to contribute to the fund. It is recommended that, along with a monetary contribution, contributors should also submit a letter of acknowledgement of the country's history of dispossession and a pledge to work towards a more equitable future. It is argued that this method would be a step towards true reconciliation which is defined as the "reconstitution of relationships" through acknowledging a traumatic past and envisioning a shared and interdependent future.[969]

It is also argued that this community-driven approach would fulfil the afro-communitarian and restorative justice ethics of Ubuntu that are necessary for a harmonious and flourishing society.[970] Further, these monetary contributions by the private sector and individuals to a land reform fund would facilitate the important impetus of providing post-settlement support to beneficiaries of land reform and enable the acquisition of land for land reform purposes. Lastly, the notion of the nation's collective responsibility for the success of the land reform programme would be encouraged by the existence and operation of this land reform fund. This is crucial,

[964] RSA *Final Report of the Presidential Advisory Panel* 82.
[965] 82.
[966] 82.
[967] 83.
[968] 83.
[969] SB Maphosa & A Keasley "Disrupting the Interruptions: Re-Considering Ubuntu, Reconciliation & Rehumanization" (2015) 12 *IJARS* 16 25.
[970] Oelofsen (2016) *Theoria* 13.

given the huge and diverse demands made on government funds, ranging from health, housing, developmental and energy needs and demands.

The Panel was unclear as to whose responsibility it would be to operate and manage the fund; presumably, it would be the government's. However, it is recommended in this study that this fund be managed and operated by a non-governmental organisation that is concerned with land reform and the plight of the dispossessed. This would not only circumvent issues such as the alleged elite capture of land reform[971] and governmental ineptitude,[972] it would also be in line with the communitarian and group solidarity components of Ubuntu as discussed in chapter 4.[973] The government's role in this instance would be limited to mobilising and incentivising the private sector and individuals to contribute to the fund. The non-governmental organisation would have to be accountable to both the government and the general public to ensure compliance with the goals and objectives of the land reform fund.

5 4 2 1 4 Conclusion

It is submitted that the identified issues of land reform such as the lack of post-settlement support and land acquisition issues would be ameliorated by, among those already discussed, the financing that would be availed through a land reform fund. Further, the acknowledgement of the continuing dehumanisation engendered by dispossession[974] and a communal commitment to redress would be the display of Ubuntu that is currently sorely missing in the land reform dialogue.

It is also contended in this study that there is a need for land reform to be considered as the nation's responsibility, and not just the government's. A move in that direction would be a true embodiment of Ubuntu.

[971] Chapter 3 1.
[972] Chapter 3 1.
[973] Chapter 4 2 2 1.
[974] Mostert & Young "Between Custom and Colony" in *Leon Duguit and the Social Obligation Norm* 376, 394; Gumede "Failure to Pursue Economic Reparations" in *The Limits of Transition* 72 -74.

A valuable lesson to be learnt from the TRC is that placing the responsibility for historical redress solely on the government is an egregious error that festers resentment and societal disharmony.[975]

The history of racialised dispossession, that has contributed to continuing racial animosity,[976] and the communitarian ethic of Ubuntu that proclaims that "I am because you are" mandate that possible solutions to access to land issues be community-driven and conscientious of the generational trauma of dispossession.[977] A community-driven land reform fund project; sustained conversations between the CRLR's officials and land restitution claimants; a section 33 interpretation that is conscientious of historical truths and the need for restorative justice; and a definition of success for land reform that considers the restoration of dignity are examples of some of these solutions – all Ubuntu-oriented.

5 4 2 2 Land donations

5 4 2 2 1 Introduction

Accounts of farmers voluntarily offering substantial parcels of land to farmworkers have emerged since the inception of the land reform programme.[978] It is argued in this study that these are acts of Ubuntu that have to be encouraged and regulated. In this regard, the Final Report of the Presidential Advisory Panel recommended that a policy framework be developed for land donations.[979] This recommendation was supported and implemented by the Parliamentary Cabinet,[980] and is also supported in this study, as are the provisions of the draft Beneficiary Selection and Land Allocation Policy of

[975] Krog "Rethinking Reconciliation and Forgiveness" in *The Limits of Transition* 21-22; Metz "South Africa's Truth and Reconciliation Commission" in *The Limits of Transition* 222.
[976] Du Plessis "Property in Transitional Times in *The Limits of Transition* 117; Slye "Putting the J into the TRC" in *The Limits of Transition* 288-289; Gumede "Failure to Pursue Economic Reparations" in *The Limits of Transition* 70 -71.
[977] Mostert & Young "Between Custom and Colony" in *Leon Duguit and the Social Obligation* 376, 394; Gumede "Failure to Pursue Economic Reparations" in *The Limits of Transition* 72 -74.
[978]B Jordan "Harvest of Happiness: Farmer Hands Over R30m Village To His 150 Workers" (02-09-2018) Sunday Times <https://www.timeslive.co.za/sunday-times/news/2018-09-01-harvest-of-happiness-farmer-builds-villas-for-his-150-farmworkers/> (accessed 01-09-2019); M Thamm "Farmers Are Doing It For Themselves – Finding Common Ground in Contested Terrain" (21-11-2019) Daily Maverick <ihttps://www.dailymaverick.co.za/article/2019-11-21-farmers-are-doing-it-for-themselves-finding-common-ground-in-contested-terrain/> (accessed 22-12-2019).
[979] RSA *Final Report of the Presidential Advisory Panel* 95.
[980] National Policy for Beneficiary Selection and Land Allocation (Draft) in GN 2 *GG* 42939 of 03-01-2020.

2020 ("Land Allocation Policy") that relate to land donations.[981] Indeed, the Land Allocation Policy was published for public comment on 03 January 2020[982] and the Land Donations Policy was published for public comment on 07 February 2020.[983] In this section of the study, an analysis regarding the ways in which land donations could contribute to alleviating the land reform issues identified in this study, while also restoring the dignity of the dispossessed through acknowledgement and restorative action as is required by Ubuntu, follows.

5 4 2 2 2 The possible framework for a land donations policy

The Panel stated that in response to the interest of private owners in donating land and in recognition of the potentially unifying role of such action, it was advising the then Department of Agriculture and Land Reform to develop a land donations policy.[984] The Panel listed "churches, mining companies, financial institutions, agribusinesses and others" as possible land donors.[985] The Panel urged government to call on these possible donors to audit their landholdings and identify land to be donated, and to also convene discussions with potential beneficiaries, including existing occupiers.[986]The Panel proposed that the land donations policy should allow for an exemption of donations tax for land that is donated for land reform purposes.[987] Furthermore, the Panel suggested that the state should be responsible for the conveyancing costs of land transfer once the beneficiaries of the donated land had been identified.[988] The Panel expressed that the act of donating land could be instrumental to nation building.[989]

[981] National Policy for Beneficiary Selection and Land Allocation (Draft) in GN 2 *GG* 42939 of 03-01-2020.
[982] National Policy for Beneficiary Selection and Land Allocation (Draft) in GN 2 *GG* 42939 of 03-01-2020.
[983] Land Donations Policy (Draft) in GN 117 *GG* 43004 of 07-02-2020.
[984] RSA *Final Report of the Presidential Advisory Panel* V.
[985] 95.
[986] 95.
[987] 95.
[988] 95.
[989] RSA *Final Report of the Presidential Advisory Panel* V.

Accordingly, on 7 February 2020, the Land Donations Policy was published for public comment.[990] The Land Donations Policy lists a number of problems as being the issues that it seeks to address, the most relevant for this study being:[991]

(i) The slow pace of land reform;
(ii) The sustained challenges of inequality, unemployment and poverty;
(iii) Poor post-transfer/production support.

Further, the key principles of the Land Donations Policy are listed as being, among others, "being part of a caring nation" and "contributing to social cohesion and nation building".[992] These principles are aligned with the components of Ubuntu identified in this study as being the recognition of a shared humanity, communitarianism and solidarity.[993] This policy also seeks to achieve the aims of Ubuntu, which have been identified in this study, as restorative justice and the promotion of harmony.[994]

The main criticism of this policy, from an Ubuntu-perspective, is the failure of the government to decentralise the Land Donations process. Currently, the registration process, the due diligence process and the disposal of the donated land is all left to the state.[995] As previously explained, a sustained conversation in which both officials and land claimants listen to each other and provide space for mutual engagement is more conducive to facilitating a restoration of dignity.[996] Therefore, it would be advisable for the government to provide opportunities for engagement between the donors, beneficiaries and the relevant officials at various stages in the process to ensure that (i) sustained conversations; and the resultant restoration of dignity and agency in the dispossessed are encouraged and (ii) that opportunities for reconciliation are provided.

5 4 2 2 3 Conclusion

The Land Donations Policy's communitarian approach to land reform relies on the nation's spirit of Ubuntu and collective responsibility. This approach is wholly

[990] Land Donations Policy (Draft) in GN 117 *GG* 43004 of 07-02-2020.
[991] 2.
[992] 2.
[993] Chapter 4 2 2 1 – 4 2 2 2.
[994] Land Donations Policy (Draft) in GN 117 *GG* 43004 of 07-02-2020 2; Chapter 4 2 2 2.
[995] Land Donations Policy (Draft) in GN 117 *GG* 43004 of 07-02-2020 5
[996] Atuahene *We Want What's Ours* 107.

supported in this study. It is argued that the tenets of Ubuntu, such as a definition of personhood that relies on the recognition of a shared humanity; group solidarity, restorative justice and the pursuit of societal harmony are encompassed in this approach to land reform. It is contended that the Department of Agriculture, Rural Development and Land Reform will have to make a concerted effort to educate the population regarding South Africa's history of dispossession and its continuing legacy, in order to highlight the significance of decisively and collectively addressing the issue of the inequitable distribution of land. The Department will also have to shift the narrative of land reform from one where it is solely government's responsibility to one where it is the responsibility of every South African who is invested in a reconciled and politically stable future.

It is argued in this study that educational projects such as workshops, civic engagements, social media and other media platforms will be instrumental in championing Ubuntu in land reform and in encouraging land donations from far and wide. It is also suggested in this study that the government should create opportunities within the Land Donations process for continuing engagement between donors, beneficiaries and officials in order to facilitate the restoration of dignity of the dispossessed and to create opportunities for reconciliation.

5 4 3 Reflection: Ubuntu and the identified concerns in the redistribution and restitution sub-programmes

The recommendations outlined above would collectively improve the pace of land reform; ensure the provision of post-settlement support through monitoring the outcome and impact of land reform projects; and provide the funds necessary for land acquisition and for the provision of post-settlement support to land reform beneficiaries. Additionally, as it was argued in the third chapter of this study, a successful land reform is more likely to improve livelihoods generally.[997] Therefore, two of the three issues identified in this study would be alleviated directly by the implementation of the recommendations in this chapter. These issues being: the provision of post-settlement support to land reform beneficiaries and the improvement of livelihoods.

[997] Chapter 3 5.

The WSWB issue is more challenging as it is both very contentious and rapidly developing, as discussed in chapter 3 of this study.[998] However, Ubuntu may assist with this principle in that the land reform fund could be utilised to acquire land (from willing sellers) or the donations policy may assist in that no money would need to be paid due to landowners donating voluntarily. Moreover, both these possibilities could co-exist and in doing so, lessen the financial burden of the WSWB method of land acquisition on the government[999] (through the land reform fund) and ameliorate the alleged offending effect of the WSWB principle[1000] (because the land donations would constitute an acknowledgement of the generational trauma of dispossession and constitute an acceptance of responsibility).

Depending on the reformulation of section 25 of the Constitution and the corresponding implications, expropriation with nil compensation may replace the WSWB principle. In this context, Ubuntu would still be relevant as the guiding principle on land acquisition – even on an expropriation with nil compensation basis. In this context, the decisions, processes, procedures and outcomes of the government's decision to expropriate with nil compensation would still have to comply with the components and aims of Ubuntu.

5 5 Ubuntu in the land reform context: possible challenges

As discussed, the most common criticisms that are levelled against the utilisation of Ubuntu in the legal system are that it is (i) redundant;[1001] (ii) it is romanticised and outdated;[1002] (iii) it is in conflict with constitutional rights;[1003] (iv) it is patriarchal and conservative;[1004] and (v) that it constitutes a denial of retributive justice.[1005]

These criticisms were explored and rebutted in detail in chapter 4 of this study. Therefore, in this section of the study, a brief exposition of the rejection of these

[998] Chapter 3 4.
[999] Chapter 3 4.
[1000] Chapter 3 4.
[1001] Chapter 4 4.
[1002] Chapter 4 4.
[1003] Chapter 4 4.
[1004] Chapter 4 4.
[1005] Chapter 4 4.

characterisations of Ubuntu will be launched. This will be done to highlight the value that Ubuntu has to offer in our legal system and society, and to promote its increased usage and application. However, it is important to note that Ubuntu is impossibly the universal solution for all the land reform issues in South Africa and as such, the limitations of Ubuntu in this context will also be briefly discussed.

Despite assertions to the contrary,[1006] the overlap between Ubuntu and the Bill of Rights is not a sign of redundancy, but rather one of synchronisation between African and Western conceptions of fairness and this is something to be celebrated.[1007] This synchronisation renders the South African legal system more inclusive, representative and legitimises it.[1008] Moreover, Ubuntu is not outdated and romanticised. As discussed in chapter 4, there are numerous examples of the application of Ubuntu in contemporary South Africa.[1009] Further, as Louw argues, Ubuntu is a large part of Africa's cultural heritage, and it is both a given and a task.[1010] As such, even if it were outdated, there would be nothing amiss with revitalising it to resolve present-day issues.[1011] The argument that Ubuntu is in conflict with the Bill of Rights rests on the fear that the communitarian ethic of Ubuntu could constitute an infringement of individual freedoms.[1012] This is not the case. As discussed, Ubuntu is concerned with the complementarity of the community and the individual,[1013] and it merely discourages the view that the individual's interests should always take precedence over the community's interests.[1014]

Keevy argues that Ubuntu reinforces a conservative and patriarchal worldview.[1015] Unfortunately, this argument is not clearly elucidated.[1016] As discussed in chapter 4, treatment that is unjust and inhumane is antithetical to the demands of Ubuntu,[1017] and as such, the argument that Ubuntu reinforces a patriarchal worldview is without

[1006] Chapter 4 4.
[1007] Chapter 4 4.
[1008] Chapter 4 4.
[1009] Chapter 4 2 2 3.
[1010] Louw "The African Concept of Ubuntu" in *Handbook of Restorative Justice* 170.
[1011] 170.
[1012] Chapter 4 4.
[1013] Chapter 4 4.
[1014] Chapter 4 4.
[1015] Chapter 4 4.
[1016] Chapter 4 4,
[1017] Chapter 4 4.

merit. Finally, it has also been suggested that the notions of sacrifice and reconciliation that are associated with Ubuntu are often used by the government to introduce policies that delay the redistribution of resources.[1018] In this context, it is argued that because peaceful and harmonious co-existence is not possible in an unequal society, an accurate interpretation and utilisation of Ubuntu is one that encourages the distribution of resources in a manner that ensures social harmony.[1019] Therefore, an interpretation of Ubuntu that curtails redistributive justice is a misuse of the value.

As can be expected, there are limits to what can be achieved with Ubuntu. In the land reform programme specifically, the expression of Ubuntu cannot be forced upon people. As an example, in the acquisition of land, willing sellers and willing buyers cannot be compelled to engage with each other in the spirit of Ubuntu. This can be encouraged and advocated for, but ultimately, changing people's attitudes and philosophies is an incredible task – even with Ubuntu.

However, by institutionalising the value and allowing it to inform the land reform programme, it is possible to have processes, procedures and ultimately, outcomes that reflect the spirit of Ubuntu. In this way, it is argued that the land reform programme would not only be more effective, but it would also ensure the promotion of redistributive and restorative justice which would, arguably, lead to a more reconciled and harmonious society.

5 6 Summary

This section of the study provided an overview of the study; examined the ways in which Ubuntu was applied in the TRC and recommended ways in which Ubuntu could be applied to already existing and new processes, bodies and institutions within the land reform programme to promote both redistributive and restorative justice. The recommendations that were made in this chapter were as follows:

(i) The promotion of sustained conversations between the CRLR's officials and land restitution claimants in order to render the land restitution process more efficient and amenable to the restoration of dignity of the dispossessed; and

[1018] Chapter 4 4.
[1019] Chapter 4 4.

the inclusion of land claimants in the planning and implementation of their land reform projects;[1020]

(ii) A more frequent reference to section 33 of the Restitution of Land Rights Act in adjudicating on land restitution matters and an interpretation of section 33(cA) of the Act that is inclusive of the components and aims of Ubuntu;[1021] and possibly adding Ubuntu specifically as a factor to be considered.

(iii) The implementation of monitoring and evaluation systems in the land redistribution and land restitution programmes to measure the outcome and impact of land reform projects.[1022] It was suggested that the definition of success for land reform be inclusive of the objectives of Ubuntu, thus ensuring that land reform projects are monitored and supported post-transfer and that a reconstitution of community is also being encouraged;[1023]

(iv) The establishment of a land reform fund that would generate the funds necessary for land acquisition and post-settlement support while also ensuring that land reform is viewed in a light of collective responsibility, as opposed to only being the government's;[1024] and

(v) The establishment of a land donations system (as already being developed by the Department of Rural Development and Agriculture) that would encourage and regulate these acts of Ubuntu, thus making land available for land reform and possibly circumventing the issues of WSWB. [1025]

This section of the study also explored the challenges and limitations with the application of Ubuntu to the land reform programme. In this context, the obstacles with the application of Ubuntu to the WSWB principle were highlighted and ways of overcoming these obstacles were suggested.[1026] The criticisms often advanced in relation to the use of Ubuntu in the legal system were also reiterated and the responses to these criticisms were restated.[1027]

[1020] Chapter 5 4 1 1.
[1021] Chapter 5 4 1 2.
[1022] Chapter 5 4 1 3.
[1023] Chapter 5 4 1 3.
[1024] Chapter 5 4 2 1.
[1025] Chapter 5 4 2 2.
[1026] Chapter 5 5.
[1027] Chapter 5 5.

5 7 Conclusion

The issue of land reform is contentious and polarising, arguably, for good reason. As Pienaar expresses, the history of South Africa has largely been characterised by wars waged over the access and ownership of land.[1028] As discussed in chapter 1 of this study, the significance of land to black South Africans, specifically, surpasses its material benefits.[1029] In African spirituality, land is a connection both to the ancestors that are buried in it and to the newborn babies whose umbilical cords are ceremoniously buried in the homestead.[1030] A common way, specifically among Xhosa people, to enquire about a person's belonging is to ask where that person's umbilical cord is buried.[1031] In African culture, the concept of land is indivisible from notions of identity, spirituality and belonging.[1032] This is not, however, to understate the material benefits that can accrue from access to land. As discussed in chapter 3 of this study, although the connection between access to land and poverty reduction is difficult to ascertain with complete certainty, there are considerable economic and social benefits that can accrue as a result of increased access to land.[1033] Therefore, it seems undeniable that access to land is, for many South Africans, a crucial aspect of self-actualisation.

Despite its importance, access to land is an impossibility for many South Africans.[1034] This is largely due to the colonial and apartheid history of South Africa that was essentially centred on racial segregation and the dispossession of indigenous South Africans.[1035] As discussed in chapter 2 of this study, the history of systemic land dispossession in South Africa began in 1652 and was solidified in the apartheid

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[1028] Pienaar *Land Reform* 53.
[1029] Chapter 1 6 1 2 2; Chapter 1 6 1 2 3.
[1030] M Littlejohn "Sacred Xhosa Birth Rituals: South Africa" (08-03-2011) *Spiritual Birth* <http://www.spiritualbirth.net/sacred-xhosa-birth-rituals-south-africa> (accessed 02-01-2020): it is explained in this article that "inkaba" is the ritual of burying the umbilical cord and the placenta and that this ritual seals the baby's attachment to his/her ancestral lands.
[1031] M Littlejohn "Sacred Xhosa Birth Rituals: South Africa" (08-03-2011) *Spiritual Birth* <http://www.spiritualbirth.net/sacred-xhosa-birth-rituals-south-africa> (accessed 02-01-2020): further to the above, it is explained that inkaba comes to represent one's ancestral home and symbolises the relationship between the individual, his/her clan, the land and the spiritual world.
[1032] Chapter 1 6 1 2 2; Chapter 1 6 1 2 3.
[1033] Chapter 3 5.
[1034] Chapter 2 1.
[1035] Chapter 2 2 – Chapter 2 6.

era.[1036] The dispossession of indigenous South Africans had devastating and reverberating effects:[1037] communities were impoverished; familial ties were broken and the extent of the psychological wounds that were inflicted remains immeasurable and intergenerational.[1038]

Viewed in this context, it seems plausible that there are some who believe that the issue of access to land will "make or break" South Africa[1039] and others who have even proclaimed "land or death".[1040] The way in which South Africa responds to the issue of land is crucial. The current land reform programme, as comprised of land redistribution, tenure reform and restitution is failing.[1041] As discussed in chapter 3 of this study, the land reform programme is plagued by a plethora of issues such as funding issues, the slow pace of land redistribution and land restitution, the WSWB approach to land acquisition, alleged elite capture, alleged corruption, the lack of post-settlement support for land reform beneficiaries and so forth.[1042] There is a desperate need for innovative and efficient solutions to land reform. It is argued in this study that a focus on Ubuntu could engender such solutions.

Former Justice Mokgoro expresses that it is "notoriously difficult" to define Ubuntu.[1043] In the same vein, English (the scholar) states that Ubuntu is a concept that "means all things to all men". Contrary to this assertion, it has been argued in this study that Ubuntu has specific components and aims. Essentially, it has been argued that Ubuntu is concerned with the acknowledgement of truth; restorative justice and the promotion of societal harmony.[1044] The main objective of Ubuntu, as postulated in this study, is the achievement of peaceful and harmonious co-existence.[1045] In order to fulfil this objective, the tools that Ubuntu has to offer include communitarianism, solidarity and

[1036] Chapter 2 2 – Chapter 2 6.
[1037] Chapter 2 2 – Chapter 2 6.
[1038] Chapter 2 2 – Chapter 2 6.
[1039] V Gumede "The Land Issue Will Make or Break South Africa" (31-05-2019) *City Press* <https://city-press.news24.com/Voices/the-land-issue-will-make-or-break-south-africa-20190531> (25-09-2019).
[1040] *Strydom v Black First Land First* (11/2018EQJHB) [2019] ZAEQC 1 (6 May 2019) - this matter concerned the question of whether or not the slogans of the organisation Black First Land First, among which was "Land or Death", amounted to hate speech.
[1041] Chapter 3 1.
[1042] Chapter 3 1.
[1043] Mokgoro (1998) *PELJ* 1 2.
[1044] Chapter 4 2 2 2.
[1045] Chapter 4 2 2 2.

an understanding of personhood that is reliant on one's ability to recognise the humanity of others and to act in accordance with that recognition.[1046] It is advanced in this study that these are all elements that are currently missing in the land reform discourse.

Having learnt from the application of Ubuntu in the TRC that (i) restorative justice cannot be achieved without reparations or redistributive justice; (ii) socio-economic inequity breeds animosity and hinders reconciliation; and (iii) in dealing with the question of injustice in South Africa, the focus should shift from the perpetrators of past injustice to the beneficiaries of said injustice, this section of the study suggested ways in which Ubuntu could be applied to the land reform programme in a manner that curtails the pitfalls of the TRC.

In this context, it was recommended that there should be increased meaningful engagement between the officials of the CRLR and land claimants; there should be frequent reliance on section 33 of the Restitution of Land Rights by the courts in adjudicating matters related to land restitution and that the interpretation of section 33(cA) of the Act should be such as to include considerations of Ubuntu; and that there should be a monitoring and evaluation system developed by the government to record the progress of land reform projects and render the necessary support. It is argued that these recommendations would, collectively, expedite land reform; and improve the provision of post-settlement support while also promoting restorative justice.

The land donations policy that has been proposed by the Department of Agriculture, Rural Development and Land Reform and the establishment of a land reform fund as suggested by the advisory panel in the Final Report were both also advanced as possible Ubuntu-inspired solutions to some of the issues plaguing the land reform programme. Besides the monetary and material benefits that these two proposals facilitate, they also encourage a recognition of a harm that was caused and a communal commitment to rectifying that harm.

[1046] Chapter 4 2 2 1.

In order for land reform to meet its objectives, there has to be recognition of the ongoing trauma of dispossession; there has to be an acknowledgement of accountability from the beneficiaries of this historical injustice and there has to be collective responsibility taken by all South Africans for ensuring a more equitable redistribution of land, which would, arguably, lead to a more reconciled and harmonious society.

Mamdani argues that recognising victims and perpetrators of apartheid is only the first step.[1047] The next step entails recognising both as survivors who must, collaboratively, shape a common future.[1048] He argues that restorative justice is a precondition for the achievement of a reality in which perpetrators and victims are integrated into a single community of survivors.[1049] This view is supported in this study and it is argued that the recommendations advanced in this study for the land reform programme are aligned with the notion of a community of survivors collaboratively shaping a common future.

As proposed by the hypothesis at the beginning of this thesis, this study concludes that a shift from a market-oriented approach to land reform to a people-oriented one would, almost certainly, improve the land reform programme.

In the words of Bantu Stephen Biko,[1050]

> "The great powers of the world may have done wonders in giving the world an industrial and military look but the great gift still has to come from Africa – giving the world a more human face".

[1047] Mamdani (2002) *JHUP* 56.
[1048] 56.
[1049] 56.
[1050] Chronic "Some African Cultural Concepts by Steve Biko" (11-09-2017) *Chimurenga* <http://chimurengachronic.co.za/some-african-cultural-concepts-by-steve-biko/> (accessed 25-09-2019).

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