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Land Loss and Labour Control: The Intersection of Land Dispossession and Labour Law in South African History

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ABSTRACT

This article considers the intricate relationship between labour law and the dispossession of property, with a focus on the profound impact this interplay had on the lives of indigenous South Africans. Central to this discourse is the thesis that the dispossession of land catalysed a transition for indigenous populations from landowners to labourers, a shift that markedly diminished their quality of life. This exploration is contextualised through the lens of the landmark case of *Izaacs v Government of the Republic of South Africa and Others*, which serves as a contemporary reference point for understanding the enduring effects of historical injustices. The article explores the nature of labour or work prior to colonisation, offering insights into the indigenous socio-economic structures and their transformation post-colonisation. It traces the history of colonisation in South Africa, with a particular emphasis on how the systematic dispossession of land was instrumental in forcing indigenous populations into a new form of labour and servitude. This historical analysis is crucial in understanding the genesis of the socio-economic challenges faced by these communities. Furthermore, the article scrutinises the evolution of labour in the context of this dispossession. It argues that the legal framework surrounding labour, especially the contract of employment, played a pivotal role in perpetuating the subjugation of dispossessed populations. It is shown how the contract of employment, with its inherent element of control, became a tool for entrenching the disadvantaged position of indigenous peoples within the labour market. In its conclusion, the article synthesises these historical and legal analyses to argue that the legacy of land dispossession and the subsequent transformation of labour law have had a lasting and detrimental impact on the lives of indigenous South Africans. This exploration will not only shed light on a significant aspect of South African history but also contributes to the broader understanding of how legal frameworks can both reflect and perpetuate social inequalities.

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1. INTRODUCTION

The founding document of the International Labour Organisation (ILO) declares that labour should not be regarded *merely* as a commodity.[1] Later on, this idea was strengthened and the ILO has now taken the position that labour is *not* a commodity.[2] This foundational principle represents a significant ideological shift in the perception and treatment of labour within the global economic and social context. It underscores a fundamental departure from traditional economic theories that equate labour to a mere input in the production process, akin to raw materials or capital, which could be bought and sold at market-determined prices.[3] The assertion that labour is not a commodity challenges the commodification of human work and effort, which historically led to exploitative practices such as unfair wages, poor working conditions and the absence of rights for workers. By advocating this stance, the ILO emphasises the intrinsic value of human labour, which extends beyond its economic utility. This perspective inherently recognises the dignity of the worker and the need for equitable, just and humane conditions of work.[4]

This article considers the complex interplay between labour law and the dispossession of property, particularly examining its significant effects on indigenous South Africans. At the heart of this analysis is the argument that the expropriation of land was a pivotal factor in transforming indigenous communities from landowners into labourers. This fundamental shift had a profound and detrimental impact on their quality of life, marking a significant change in their socio-economic status and living conditions. It is argued that the colonial processes of dispossession and the consequent subjugation of workers to the control of the employer worked in tandem to commodify labour. As Phillips has shown, 'legal history, perhaps paradoxically, frees us from the past, allows us to make our own decisions by seeing that there is nothing inevitable or preordained in what we currently have'.[5]

[1]The International Labour Organisation Constitution, 1919 (Part XIII of the Treaty of Versailles) art 427.

[2]The Declaration of Philadelphia, 1944, art 1.

[3]See David Card, Ana Rute Cardoso, Joerg Heining and Patrick Kline, 'Firms and Labor Market Inequality: Evidence and Some Theory' (2018) 36 *Journal of Labor Economics* 13.

[4]See Fabiola Mieres and Christiane Kuptsch '"Labour is not a Commodity": A Gentle Reminder' (2022) 2 *Global Social Policy* 364.

[5]Jim Phillips, 'Why Legal History Matters' (2010) 41 *Victoria University of Wellington Law Review* 293, 295.

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Nichols has suggested viewing dispossession as a macrohistorical process, not just as an aggregation of individual acts. This broader view encompasses the systemic transformation of land into private property and its effects on Indigenous peoples.[6] This broader perspective is crucial in grasping the full scope and impact of dispossession. The macrohistorical view recognises that the dispossession of land from Indigenous peoples was part of a systematic process. This process involved transforming land from a communal or collectively held resource, deeply integrated into the social and cultural fabric of Indigenous societies, into private property. This transformation was underpinned by legal, economic and political changes that redefined land ownership and use. The macrohistorical view highlights the profound and multifaceted impacts of dispossession on Indigenous peoples. This includes not just the loss of land but also the disruption of traditional lifestyles, economies and social structures, leading to long-lasting consequences for Indigenous communities.[7] By adopting a macro-historical lens, the article allows for a deeper understanding of the long-term consequences of dispossession, including ongoing struggles for land rights, socio-economic disparities and cultural erosion among Indigenous peoples.[8]

The article aims to demonstrate the link between land dispossession and labour control through a careful selection of significant historical events. While a comprehensive account of this process would be ideal, the limitations of space make it impossible to provide an exhaustive historical narrative. Instead, the article focuses on key moments and policies that illustrate this connection, aiming to capture the essence of this historical relationship rather than providing an encyclopedic account. As Du Plessis aptly notes, '[t]he spirit of this history is more significant than the "historical facts" (in other words, the events connected with the genesis of such law)'.[9] This perspective informs the approach taken in the article. The selected historical events are chosen not merely for their factual content but for their ability to reveal the underlying patterns and motivations that linked land dispossession to labour control. The intent is to show how land dispossession and labour control were intertwined and mutually reinforcing throughout South African history. The article considers the multifaceted dimensions of this

[6] Robert Nichols, *Theft is Property! - Disposession and Critical Theory* (Durham: DUP, 2020) 101, 109–10.
[7] Ibid. 39.
[8] Ibid. 156–7.
[9] Lourens Du Plessis, 'Interpretation of the Bill of Rights' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Cape Town: Juta, 2014) 32–170.

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transformation, scrutinising how historical dispossession of land served as a catalyst for fundamental change in the nature of labour relations. Central to this discourse is the understanding that land is not merely a physical asset but a cornerstone of cultural identity, economic independence and social stability. The loss of land, therefore, signalled a profound disruption to the traditional socio-economic structures of indigenous communities, thrusting them into a new paradigm of labour that was marked by exploitation and control.

This article also considers the legal underpinnings of this transformation, examining how colonial labour laws, particularly the contract of employment and the powers of control granted therein, became instruments in perpetuating the subjugation and marginalisation of dispossessed populations. The evolution of these laws, often intertwined with the broader political and economic objectives of the colonial and Apartheid regimes, reflects a broader narrative of how legal systems can be utilised to both reflect and reinforce societal inequalities.

2. BEFORE COLONIALISM

At the heart of managing the traditional system of land ownership lay the influential roles of its leadership figures. The chiefs and local leaders were perceived not merely as figureheads, but as caretakers of their people's welfare. This duty encompassed the equitable distribution of land to ensure that each head of a family had enough ground to sustain their kin. They provided, for example, a plot for building a home, fertile plots for farming and shared access to essential communal assets such as pastures for livestock and water sources. However, the tenure of these land rights was not absolute or indefinite. They were held on a conditional basis, often tenuous in nature. Should a family decide to relocate from the area or if there were no surviving members to lay claim to the land, these rights would be forfeited. In such events, the land would revert back to the community's leaders. It was then their responsibility to reassess and reassign the land to another family, thus ensuring the continuous and fair provision of resources in accordance with the community's needs and traditions.[10]

[10]TW Bennett, 'African Land – A History of Dispossession' in Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Oxford: OUP, 1996) 71.

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In pre-colonial Southern African communities,[11] labour was conducted in numerous ways, depending on the society and its economic structure. In this sense, it is problematic to generalise the labour practices of all the various pre-colonial communities within the region into a single Southern African narrative. It is nevertheless worthwhile to describe some of the critical features of pre-colonial labour in Southern Africa to compare pre-colonial and post-colonial labour patterns to understand the differences between the organisation of work in pre- and post-colonial eras and to appreciate the effects of colonisation through the common-law contract of employment.

In some communities, the production of food, goods and services was structured around the family unit, with each family member contributing to the production of these items.[12] Work was also structured around the village or community, especially regarding larger agricultural projects, with everyone contributing to the common effort.[13] This observation resonates with the African worldview that the individual can only be understood through the collective. The individual cannot exist alone and the community makes the individual.[14] Work was, however, also pre-eminently characterised by control. According to Cohen et al.

> favoured categories of certain anthropologists such as kin groups, age groups, and lineage groups were often little more than masks serving to conceal from observed and dispossessed alike relations of dominance and disability, of... the expropriation of surplus value through 'class-like' social institutions.[15]

There is also evidence of slave labour within these communities, although not all societies practiced slavery.[16] The division of work was also categorised

[11] It is not feasible to detail the practices of every single community due to the diversity and variations among them. Each community had its unique economic structures and labour practices, making it problematic to generalise across the entire region. For instance, labour was conducted differently depending on the societal and economic context, with some communities focussing on agricultural cultivation and livestock farming while others engaged in the production of trade commodities. This variation underscores the complexity and diversity of pre-colonial Southern African communities.

[12] See Erik Green, 'Production Systems in Pre-colonial Africa' (2013) 1 *The History of African Development* 1.

[13] See Peter Delius, Tim Maggs and Maria Schoeman, 'Bokoni: Old Structures, New Paradigms? Rethinking Pre-colonial Society from the Perspective of the Stone-walled Sites in Mpumalanga' (2012) 38 *Journal of Southern African Studies* 409.

[14] John S. Mbiti, *African Religions and Philosophy*, 2nd rev edn (Portsmouth: Heinemann, 1969) 108–9.

[15] R Cohen, J Copans and PC Gutkind, *African Labor History* (London: SAGE, 1978) 11.

[16] Akosua Perbi, 'Slavery and the Slave Trade in Pre-colonial Africa' (University of Illinois conference, Urbana, 5 April 2001) <https://latinamericanstudies.org/slavery/perbi.pdf> accessed 23 January 2024.

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according to gender.[17] Men were responsible for hunting and fishing, while women were responsible for gathering, processing, preparing food and caring for the home and children.[18] Often, men contributed to agricultural projects, such as clearing new lands. In some communities, the division of labour was also based on age, with older members assuming greater responsibility for producing food and goods and younger members being responsible for gathering and processing.[19]

In some communities, labour was organised according to the production of particular items or services, such as iron smelting, pottery manufacture and weaving. In other societies, labour was structured around food production, with each household or village responsible for agricultural cultivation and livestock farming. Trade commodities such as salt, gold and ivory were also produced in other communities. In addition to the production of commodities and services, the organisation of labour centred on the upkeep of the community.[20] This includes the construction and repair of dwellings and necessary structures, the maintenance of roads and trails and the defence of the community against external dangers.

In pre-colonial Southern African societies, labour was also inextricably linked to land and the use thereof. The Constitutional Court has held that the systematic impoverishment and powerlessness of black Africans are traceable to their loss of land before and after 1913.[21] In pre-colonial African societies, the relationship between labour and land was based on communal ownership. In many African societies, the land was owned by the community and used to provide for the community's needs.[22] This meant that everyone had a stake in the land and was responsible for working the land and ensuring its productivity. This was the basis of the communal system of labour, where everyone was expected to contribute to the collective effort of working the land.[23] The communal labour system was also closely

[17] Delius, Maggs and Schoeman (n 13) 409.
[18] Ibid.
[19] Ibid. 409.
[20] See A Hammel, C White, S Pfeiffer and D Miller, 'Pre-Colonial Mining in Southern Africa' (2000) 100 *Home Journal of the Southern African Institute of Mining and Metallurgy* 49.
[21] *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC). See also *Makwickana v eThekwini Municipality* 2015 (3) SA 165 (KZD).
[22] W.J. du Plessis, 'African Indigenous Land Rights in a Private Ownership Paradigm' (2011) 14 *Potchefstroom Electronic Law Journal* 45, 48–50.
[23] See A.K. Segobye, 'Politics and Society in Pre-colonial Africa: Implications for Governance in Contemporary Times' in S. Oloruntoba and T. Falola (eds), *The Palgrave Handbook of African Politics, Governance and Development* (London: Palgrave Macmillan, 2007) 159, 159–72.

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tied to the concept of reciprocity.[24] In many African societies, labour was exchanged for goods and services and this was a way of ensuring that everyone had access to the resources they needed.[25] This system of reciprocity meant that everyone had a responsibility to contribute to the collective effort of working the land and that everyone should benefit from the collaborative effort.[26] The communal labour system was also tied to social status. In many African societies, the amount of land a person owned was a sign of their social status and determinative of their place in the social hierarchy.[27] This meant that those who owned more land were seen as more important and influential and expected to contribute more to the collective effort of working the land.

Forms of informal social protection arrangements existed within pre-colonial societies. These arrangements are still present in modern South African society, even though they have been supplemented by formal agreements which predominantly utilise the existence of an employment relationship for the operation of its protection.[28] Through the characteristic sharing of *ubuntu,* social protection mechanisms exist within the African kinship society.[29] Before formal government programmes existed, informal social security was plentiful. Informal social security takes the shape of a neighbourhood or kinship-based social security.[30] These forms of informal social security rely on reciprocity and solidarity and an openness towards the needs of humans within the family unit, extended family and community.[31]

Kinship-based social security relates to social protection provided to blood relatives.[32] Individual family members benefited from the extended family's social safety net. Typically, three to four generations lived together in an extended family. Mutual assistance was critical in preserving traditional family groupings, beginning with care for young children and

[24] Du Plessis (n 22) 49.
[25] Ibid.
[26] Ibid. See also A. Kelen, 'Reciprocity' in HK Anheier and S Toepler (eds), *International Encyclopedia of Civil Society* (New York: Springer, 2010) 1296–300.
[27] Ibid.
[28] Refer to the Skills Development Act 97 of 1998, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Unemployment Insurance Act 63 of 2001 and the Occupational Health and Safety Act 85 of 1993.
[29] Clarence Tshoose, 'The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa' (2009) 3 *African Journal of Human Rights* 12.
[30] Adriette Dekker, 'Informal Social Security: A Legal Analysis' (LLD thesis, UNISA, 2005) 13.
[31] Ibid. 106.
[32] Ibid. 106.

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continuing with reciprocal care for the elderly.[33] Kinship influenced every type of economic and social contact and relationships were established and maintained by the ongoing and reciprocal transfer of property and services.[34] Customary law guaranteed an individual's financial stability by establishing a system of rights and duties between family members (eg, parents and children). Because of these rights and responsibilities, parents and children might make socially recognised claims on each other's property and labour at various times. It was expected of parents to bear a more significant burden towards their children (and children were taught to recognise and respect their legal responsibilities towards parents and other relatives). The load lightened as the young grew older. As a result, the children's duties to their parents rose as they grew older. In this manner, parents could have adequate security in their old age. Economic security and customary law cannot exist in isolation.[35]

Neighbourhood- or community-based social security refers to mutual aid schemes that developed among people within a specific community.[36] An example of such social security scheme which still exists in South Africa is the *stokvel*. A *stokvel* is a revolving credit plan in which all participants contribute monthly to a shared pool. The monthly collection is then distributed to each member. This lump sum allows members to purchase capital goods, such as furniture, or pay school fees.[37] It is also common for members of the broader community to contribute towards the funeral expenses of the indigent within society.

3. COLONISATION AND LAND LOSS

A. The Story of the Izaacs Family

The relationship between land dispossession and being 'forced' into a position of servitude as a 'labourer' is highlighted in the case of *Izaacs v Government of the Republic of South Africa and Others*.[38] The facts of the case revolve around the Izaacs family, who lived on the farm Aries in the Gordonia area of the Northern Cape along the Orange River. The family

[33] Ibid. 113.
[34] Ibid. 113.
[35] Ibid. 113 n 112.
[36] Ibid. 106.
[37] Ibid. 134.
[38] (LCC 2018/206) [2023] ZALCC 30 (4 October 2023).

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owned the farm and two pieces of land known as a 'water-erf', which they rented out. The Izaacs were significantly affected by the events of the First World War, particularly when German soldiers captured them and took them as prisoners and later when rebels commandeered a large portion of their stock during the Afrikaner Rebellion of 1914.[39] The Izaacs, identified with a group pejoratively referred to as 'Basters' who faced discrimination and racism. This led to their economic exploitation and dispossession of land. This dispossession was part of a broader policy of segregation aimed at turning non-white landowners into labourers.[40]

The dispossession of the Izaacs family from their property was a result of racial discrimination by public officials, which prevented them from securing compensation for their losses from the Rebellion Losses Commission. As a result, they could not repay their debts, which led to the sequestration of their properties for payment of the debt.[41] Consequently, they were unable to repay their debts and lost their property. The properties were sold for £1,400, which reduced the Izaacs' liability to £600. However, this did not compensate for the £2,000 loan taken out in 1913 to buy livestock, which was commandeered within the year by rebels. The family was left with very little after being forced to leave Gordonia, despite having acquired land and reared livestock on it for almost 20 years.[42]

The State acknowledged that the Izaacs family was not given an opportunity to recover their losses or to receive compensation that should have been paid to them. This failure by officials to ensure the payment of reparations had a devastating effect on the family, forcing them off their land.[43] The original claimant in the restitution proceedings was Johan Donald Izaacs, who passed away before the trial commenced. His son, Ian Jacobie Izaacs, was substituted as the plaintiff. The case before the court was concerned only with the dispossession of the water-erfs, Keimoes, not the farm Aries. The plaintiff claimed R1.5 million for the dispossession and R8.562 million for the loss of use of the two erven, while the State contested the amounts.[44]

The Court recognised that the claimant satisfied the requirements of the Restitution of Land Rights Act 22 of 1994 in respect of being dispossessed of the farm Aries and the water-erfs, Keimoes as a consequence of past racially

[39] Ibid. [2]–[6].
[40] Ibid. [7]–[9].
[41] Ibid. [6].
[42] Ibid. [29]–[30].
[43] Ibid. [11].
[44] Ibid. [13]-[17].

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discriminatory laws or practices.[45] The plaintiff claimed R1.5 million for the dispossession and R8.562 million for the loss of use of the two erven. The State conceded that the Izaacs family was dispossessed but contested the amount of compensation, arguing that the family had received partial compensation and that the total amount should only be R1,149,830. Additionally, the State contended that the family was not entitled to compensation for past loss of use of the property.[46] The court referred to the leading case of *Florence v Government of the RSA*[47] to outline the legal framework for restitution in the form of compensation. The starting point is to determine the market value at the time of dispossession and then adjust it to current values based on the Consumer Price Index (CPI). Other factors under section 33 of the Act may then result in an adjustment of the figure determined in the first leg of the calculation.[48] The court is required to take into account the equality provision of the Constitution and must consider all relevant factors, including the desirability of providing for restitution of rights in land, remedying past violations of human rights, the requirements of equity and justice and the history of the dispossession, among others.[49] The historic market value of the erven at the time of dispossession was £1,200, which adjusted by CPI to current values amounted to R475,000. However, contemporary sales suggested that the current value of the erven, being cultivated as a vineyard, on the open market would be R1.5 million.[50]

In the case of the Izaacs family, the Court acknowledged that they had used their lands to their best potential and were financially able to do so but for the dispossession. The Court was satisfied that if at the time of dispossession, the establishment of vineyards was the best use of the land, then the family would have done so. Therefore, the family was entitled to have this taken into account to satisfy the requirements of the section, including the spirit and objects of the Constitution and to mitigate their hardship and suffering, which was directly attributed to the racially motivated disrespect, indignity and economic exploitation they endured.[51] The Court therefore ordered the payment of this amount to the descendants of the Izaacs family. These principles and findings reflect the court's effort to balance the

[45] Ibid. [12].
[46] Ibid. [15]–[16].
[47] 2014 (6) SA 456 (CC).
[48] *Izaacs* (n 37) [18]–[19].
[49] Ibid. [19]–[20].
[50] Ibid. [22]–[23].
[51] Ibid. [22], [59].

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interests of the claimant with the public interest, taking into account the historical context and the impact of racially discriminatory practices on the dispossession of land.

The relationship between the dispossession of land and being forced into the category of 'labourer' in South Africa is highlighted in this case as a consequence of racially discriminatory policies and practices. The dispossession of land from the 'Bastards' was a deliberate policy aimed at reducing them to labourers by stripping them of land ownership. This policy of segregation was intended to turn non-white populations into labourers by dispossessing them of land they owned, as described in the case:

> The 'Bastards' were expropriated and reduced to labourers in Gordonia by being dispossessed of land. This was the purpose of the policy of segregation: turn blacks (or browns) into labourers by dispossessing them of land that they owned. This, it is submitted, was a deliberate policy by public officials.[52]

Furthermore, the dispossession resulted in a complete reversal of fortunes for the Izaacs family, who were financially well-off farmers before being reduced to labourers. This dispossession was directly related to discriminatory practices and resulted in the family having to leave the land and endure a life of thwarted opportunities:

> The dispossession itself resulted in a complete reversal of fortunes for a solid farming family who had been financially well off. They were effectively reduced to the clothes on their back, unable to provide even a decent education for their children. The failure to compensate was directly related to discriminatory practices and directly resulted in the Izaacs family having to leave the land and endure the life of labourers and of thwarted opportunities.[53]

These sentiments illustrate the direct link between land dispossession and the forced transformation of a self-sufficient farming family into labourers due to racially motivated policies. Land restitution aims to correct the effects of land dispossession and restore the dignity of those affected by addressing past violations of human rights and the requirements of equity and justice. The Restitution of Land Rights Act 22 of 1994 provides a framework for this process, emphasising the importance of remedying past injustices and restoring the rights of those dispossessed under racially discriminatory laws or practices.[54] The court's findings suggest that land restitution can serve as a

[52] Ibid. [5].
[53] Ibid. [47].
[54] Ibid. [12].

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means to acknowledge past wrongs and provide a form of redress that goes beyond mere financial compensation. It can help in restoring the dignity of those affected by dispossession by recognising their historical attachment to the land, the potential uses they could have made of it and the economic and emotional suffering they endured as a result of being dispossessed. This approach aligns with the broader objectives of the Constitution to promote equality and redress the results of past racial discrimination.[55]

B. Colonisation and Land Loss

The story of land dispossession and land theft is however not unique to the Izaacs family. Indeed, the history of land theft and dispossession is as old as the processes of colonialisation. The history of land dispossession in South Africa is a complex narrative that spans several centuries, marked by systemic exploitation and legal disenfranchisement of the indigenous populations by European settlers and later, the Apartheid regime.[56] Upon Dutch colonisation of the Cape, the applicable law relating to land appropriation was unclear and inconsistently applied. Roman law regarded colonised peoples to be rightless and therefore landless—their land being forfeited to the state.[57] Roman-Dutch law, however, based on natural law accepted that colonised peoples retained various fundamental rights which were unaffected by colonisation.[58] If a community had a recognisable legal system, it would be regarded as a sovereign nation. If they were not regarded as a sovereign nation, their land was regarded as *terrae nullius* that could be required by occupation.[59] The Dutch East India Company had no real policy towards indigenousness peoples. In some instances, the Company would buy land from the Khoi and San, implying that they were a sovereign nation. In other instances, the Company would simply appropriate land. Dutch settlers, although unsanctioned by the Company, were constantly appropriating new land.[60] This appropriation of land, combined with factors such as dwindling resources, newly introduced diseases and repeated conflict with

[55] Ibid. [8], [9], [19], [22].
[56] See Dylan Anton Sparks, 'Land in South Africa: Dispossession, Constitutionalism, Political Expediency' (2019) 1 *Senior Projects Spring* 223.
[57] Bennett (n 10) 65.
[58] Ibid. 66.
[59] See Martin Chanock *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (Cambridge: CUP, 2001) 155–96.
[60] Bennett (n 10) 67.

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the Company and Dutch settlers, meant that the Khoi and San peoples had no other option but to become farm labourers or to flee further inland.[61]

Upon British colonisation, the fate of the Khoi and San would not improve. In English law, when land was required, radical title to all was vested in the Crown. Britain's policy was however to respect indigenous law and land titles provided that it was a 'civilised' legal system that was in place.[62] The British only regarded Roman-Dutch as a 'civilised' legal system and only the rights that were granted by the Company were recognised.[63] All other rights which the Khoi and San peoples might have had were ignored.[64] In 1828, the British colonisers granted the rights to acquire and dispose of land to persons 'of colour'[65] but few indigenous persons at that time were in possession of land or had the means to acquire land.[66] This dispossession forced many indigenous people into becoming labourers, as they lacked the resources and legal recognition to maintain their traditional ways of life or economic independence.

As with their Dutch predecessors, the British had little control over the actions of settlers who had ventured outside of the British domain of *de facto* control beyond the Fish River.[67] The settlers clashed with peoples such as the Southern Nguni and bands of refugees from the North such as the Mfengu migrated into the region. Rivalries amongst the Southern Nguni gave Britain the pretext to further acquire land. Initially, Britain did not regard these lands as *terrae nullius* but utilised treaties to obtain territory. The validity of these treaties were dubious. They were often obtained under duress. Parties were often not of the same minds and African leaders, who often did not have the authority to represent their people, often did not understand the concept of selling land as this idea was foreign to African customary law.[68] Africans also had no legal mechanism to challenge the

[61] Ibid. 66.

[62] See Lilla Secher, 'Implications of the Crown's Radical Title for Statutory Regimes Regulating the Alienation of Land: "Crown Land" v "Property of the Crown" Post-Mabo' (2011) 34 *Monash University Law Journal* 9–52.

[63] See Eduard Fagan, 'Roman-Dutch Law in its South African Historical Context' in Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Oxford: OUP, 1996) 32–64.

[64] See Ashley Brenner, 'The "Dutch have made slaves of them all, and they are called Free": Slavery and Khoisan Indentured Servitude in the Eighteenth-century Dutch Cape Colony' (MA dissertation, Emory University 2018).

[65] Ordinance 50 of 1828, art 3.

[66] Bennett (n 10) 68.

[67] Ibid.

[68] Ibid. 69.

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lawfulness of Britain's territorial expansion in a British (or any other court), as the Crown's actions in the international sphere were non-justiciable.[69]

After the War of the Axe in 1846–7,[70] Britain abandoned its approach of negotiating treaties with indigenous peoples in favour of all-out annexations of the territories. This saw the annexation of first the southeast part of what is today the Eastern Cape of South Africa (then referred to as Kaffraria) and then to the Transkei.[71] White migration to these territories was initially confined to a few prescribed areas. Driven by British notions of 'civilisation' conversion to Christianity and a need to legitimise the colonial enterprise, the British began to experiment with new forms of land tenure in Kaffraria and the Transkei.[72] The quitrent system was regarded to be particularly suited for new colonial settlements. Under quitrent, individuals were granted secure rights to land, encouraging them to invest in agricultural production.[73] However, the Crown retained ultimate control over the land, ensuring control over land use and a steady revenue stream from the rents, which were set below market value. In this system, the land titles were subject to several conditions. Titleholders could not speculate on the land, as alienation, subdivision and subletting were prohibited, although they could pass their rights to heirs. Tenure was dependent on good behaviour and the Crown could evict holders for various breaches, such as non-payment of rent, failure to use land beneficially or disloyalty. Upon termination of the lease, the land would revert to the Crown for reallocation. This system thus aimed to foster individual land ownership and agricultural development while maintaining Crown control and revenue.[74] Economic success was limited as the size of the land was too small to allow for commercial farming and as additional land accumulation was prohibited.[75]

Colonisation of Natal commenced first via treaties but again was followed by conquest, first by the Dutch *voortrekkers* and then by the British.[76]

[69] See B.A. Oyeniyi, 'Colonialism, Coloniality, and Colonial Rule in Africa' in SO Oloruntoba and T Falola (eds), *The Palgrave Handbook of Africa and the Changing Global Order* (London: Palgrave Macmillan, 2022) 75–102.

[70] See Susan Blackbeard, '"An Unprecedented but Significant Atrocity": A Window into the War of the Axe, 1846–1847' (2015) 67 *South African Historical Journal* 202–21.

[71] Bennett (n 10) 69. See in general George McCall Theal, *History of South Africa since September 1795* (Cambridge: CUP, 2010) 200–19.

[72] Ibid. 72–3.

[73] Vuvuyo Wotshela, 'Quitrent Tenure and the Village System in the Former Ciskei Region of the Eastern Cape: Implications for Contemporary Land Reform of a Century of Social Change' (2014) 40 *Journal of Southern African Studies* 727, 729.

[74] Bennett (n 10) 73.

[75] Ibid. 74.

[76] See Elizabeth Eldredge *The Creation of the Zulu Kingdom, 1815–1828: War, Shaka, and the Consolidation of Power* (Cambridge: CUP, 2014).

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Annexation was however not immediately following British colonisation and the British had initially restored a King to the Zulu throne with the Zulu kingdom continuing to maintain a precarious form of independence. Later when it became apparent that the Transvaal or Germany may attempt to establish a harbour in Natal, the British assumed authority.[77] Later, as Natal was believed to be well suited to commercial farming, the British encouraged immigration into the region. African land rights would have been entirely distinguished if 10 land reserves had not been created. Reduction or alienation of this land was prohibited. The reserves were meant to protect indigenous peoples from encroachment by settlers.[78] Initially the reserves were deemed to be Crown land, where Africans only had occupancy rights. Later on, these reserves were placed in trust for the benefit of Indigenousness persons. African leaders were also utilised for the administration of these territories and chiefly courts and customary law were ultimately recognised.[79]

The Orange Free State and the Transvaal were not colonised in the conventional sense, as the settlers there were Dutch-speakers fleeing British rule in the Cape, not colonial agents. These settlers, upon arriving in the Free State, bought land from local chiefs and allied with indigenous leaders. Despite Britain annexing the Free State in 1848, it later withdrew and recognised its independence in 1854. The Free State's domestic policies were distinct in South African history, initially granting autonomy to certain territories which later became reserves. Land ownership was restricted to the Republic's burghers, excluding people of colour.[80] The special status of the Rolong peoples of the Free State ended in 1884 when the Free State annexed their territory following a succession dispute, turning it into a reserve.[81]

Effective control over the South African Republic (Transvaal) took over 50 years, with land appropriation complicated by the trekkers' claim that the region was 'empty' or *terra nullius* upon their arrival. This claim's credibility is linked to the Mfecane events,[82] where the formation of the

[77] Bennett (n 10) Ibid. 75.
[78] Ibid. 76. See also H Slater, 'Land, Labour and Capital in Natal: The Natal Land and Colonisation Company 1860–1948' (1975) 16 *The Journal of African History* 257–83.
[79] Ibid. 77.
[80] Ibid. 77.
[81] Ibid. 78.
[82] The Mfecane, also known as Difaqane or Lifaqane, was a period of widespread chaos and warfare among indigenous ethnic communities in Southern Africa during the early nineteenth century. It was characterised by massive destruction, migration and cultural changes. See Carolyn Hamilton (ed) *Mfecane Aftermath—Reconstructive Debates in Southern African History*, online ed (Johannesburg: Wits University Press, 2009).

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Zulu kingdom led to widespread turmoil and displacement in the interior, notably by Mzilikaz's Ndebele.[83] By 1837, much of Transvaal was believed depopulated, supporting the trekkers' claim. However, in 1836, the trekkers defeated Mzilikazi, significantly impacting the region's control.[84]

In 1837, Hendrik Potgieter declared the annexation of territory previously under Ndebele control, forming the South African Republic (ZAR), with vague borders including western Transvaal. Land appropriation in northern areas was informal. The Republic's land title was ambiguous, based on various claims like conquest or occupation. In eastern Transvaal, titles were acquired through trekkers' agreements with local leaders, though these were disputed, as with Potgieter's 1845 land grant from Pedi leader Sekwati, contested by the Swazi. Relations with the Pedi deteriorated, leading to British intervention and annexation of Transvaal in 1879. This approach reflected the European attitude during the scramble for Africa, often presuming subject status for African nations, an issue glossed over at the 1885 Berlin Conference.[85]

African sovereignty was often overlooked in international politics. After Britain recognised Transvaal's borders, all within were deemed subjects, with native peoples lacking international representation unless supported by a European power. The Transvaal Government paid little attention to African governance or land needs. Initial policies in 1853 allowed land grants to Africans based on good behaviour, but this was reversed in 1855, forbidding land ownership by non-burghers. Britain eventually secured indigenous land rights in the 1881 Pretoria Convention, allowing Africans to acquire land and obligating the ZAR to establish reserves in certain districts. However, the application of trusteeship principles to these reserves was unclear. Land purchased by Africans was held in trust by the Locations Commission.[86]

During the Anglo-Boer War, both the British and Boer forces utilised African labour extensively, often coercing Africans into labour on military fortifications or as transport workers.[87] The war disrupted African communities, leading to forced migrations and the loss of land as these communities

[83] Christopher Saunders, 'Pre-Cobbing Mfecane Historiography' in Carolyn Hamilton (ed) *Mfecane Aftermath: Reconstructive Debates in Southern African History* (Johannesburg: Wits University Press, 1995) 21–34.
[84] Bennett (n 10) 78.
[85] Ibid. 79.
[86] Ibid. 80.
[87] Garth Conan Benneyworth 'Land, Labour, War and Displacement: A History of Four Black Concentration Camps in the South African War (1899–1902)' (2019) 64 *Historia* 1, 6.

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were dislocated.[88] After the war, the British implemented policies that further alienated Africans from their land, as they sought to compensate white settlers for their losses and consolidate control over the region. The post-war settlement, particularly the Treaty of Vereeniging (1902), while officially ending hostilities between the British and Boers, ignored the rights and claims of the African population. The British, in an effort to placate the Boers, made concessions that continued to marginalise Africans. One significant impact was the reinforcement of policies that restricted African land ownership and facilitated further land dispossession.[89]

The war and its aftermath significantly disrupted African economic activities. Many African farmers were dispossessed of their land either through direct confiscation or because the war destroyed their ability to farm effectively. The British and Boer administrations, both before and after the war, enacted policies that prioritised white agricultural expansion at the expense of African land rights and forcing these newly dispossessed persons to become labourers.[90] The pivotal moment in the history of land dispossession is the enactment of the Native Land Act 27 of 1913, which prohibited black South Africans from purchasing or owning land outside of reserves, which were a mere 7.3% of the land in South Africa.[91] This Act was a direct response to the demands of the white farming sector and the mining industry for cheap labour. By dispossessing black South Africans of land, the government ensured a supply of cheap labour for these sectors.[92]

The Act resulted in nearly a million black South Africans being designated as 'squatters' and becoming homeless. This approach drastically hindered the progress of African farming by curtailing the expansion of arable land. A combination of reduced land availability and a growing African populace led to a situation where those living in the designated reserves relied on employment in white-owned farms and the mining sector for their livelihood. Essentially, segregation turned these reserves into sources of labour.[93] This created an opportunity for white farmers to exploit the newly homeless black population by offering them exploitative wages in return for the right to stay on their farms. This policy was aligned with the Apartheid

[88] Ibid. 4.
[89] See Saul Dubow, *Racial Segregation and the Origins of Apartheid in South Africa, 1919–1936* (London: Macmillan, 1989).
[90] See William Worger, Nancy Clark and Edward Alpers, *Africa and the West: A Documentary History* (Oxford: OUP, 2010).
[91] Bennett (n 10) 81.
[92] Sparks (n 56.) 9–10.
[93] Bennett (n 10) 81.

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state's long-term goal of providing cheap black labour for the benefit of the white population.[94] The Native Land Act also destroyed the small but growing black commercial farming sector, which had begun to provide the black population with a degree of economic independence. This law was the first of many that sought to socially and economically alienate the black population.[95]

Government encouraged individual land ownership while preserving communal systems. This approach signified a shift from Britain's goal of 'civilising' its colonies to a strategy of 'retribalising' the African population. Implemented in the 1920s, this policy emerged at a time when traditional leaders were weakened and losing support, with their former subjects forming an urban proletariat. This group, through political and labour organisations, began to challenge the government. The era was characterised by labour unrest in urban areas and increasing resistance to state land tenure policies in rural areas, with the revival of African institutions seen as a way to avoid direct confrontation.[96]

Next, the government turned its attention to the advancement urban segregation, following the principle that towns were for whites and Africans were only temporary residents. This led to the Natives (Urban Areas) Act 20 of 1923 which required local authorities to create African locations and single-sex hostels in urban areas, restricting Africans to these zones and barring non-Africans from land rights there. The Native Administration Act 38 of 1927 established a comprehensive system for controlling Africans, forming a significant part of the Apartheid structure. The Governor-General was granted ultimate authority over the creation and movement of tribes in South Africa, but in practice, these powers were exercised by the Native Affairs Department. This department, operating independently, prepared legislation concerning Africans and controlled separate courts for African civil suits. During the 1930s depression, the detrimental effects of segregation were evident, with land in reserves suffering from erosion, overstocking and overpopulation, leading to declining food production. The 1936 Native Trust and Land Act 18 of 1936 aimed to address these issues by expanding reserves and establishing the South African Native Trust to manage land tenure and welfare for Africans.[97]

[94] Sparks (n 56.) 13.

[95] Leepo Modise and Ndikho Mtshiselwa, 'The Natives Land Act of 1913 – Engineered the Poverty of Black South Africans: A Historico-ecclesiastical Perspective' (2013) 39 *Studia Historiae Ecclesiasticae* 359, 378.

[96] Bennett (n 10) 82.

[97] HJ Kloppers and GJ Pienaar 'The Historical Context of Land Reform in South Africa and Early Policies' (2014) 17 *Pothefstroom Electronic Law Journal* 677, 682.

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Previous trusts were consolidated into the South African Native Trust (SADT), which became the nominal owner of all Crown land in reserves. This land was subject to special statutory tenure, overseen by the Department of Native Affairs. 'Native commissioners' had the authority to control and allocate SADT land, with their written permission required for occupancy, transfer, leasing, subletting and subdivision. Occupancy rights, based on the principle of one man, one lot, were precarious and not intended to diverge from customary tenure. Tenancy depended on good behaviour and adherence to regulations. All SADT land was subject to 'betterment planning', an intervention that, despite arguably good intentions, caused significant resentment in rural areas due to its disruption of established tenure patterns and an authoritarian approach.[98]

The governmental response to land degradation in reserves during the 1930s, primarily attributed to overstocking, involved a series of interventions. Initially, in 1937, a proclamation to upgrade livestock pedigree was introduced, but it failed to yield improvements due to the continuing poor quality of pasturage. Subsequently, a more comprehensive enactment in 1939 targeted SADT lands and other designated 'betterment areas'. This policy led to the culling of livestock and the reorganisation of rural communities into 'betterment villages', segregating residential, arable and grazing lands. These measures, particularly the culling of cattle, was met with strong resistance from local populations. Cattle held not only economic value but were also essential in savings, religious ceremonies and the cementing of social relationships.[99] The government's land management scheme in the 1930s and 40s was overwhelmingly negative and seen as a means to preserve white control. This resulted in countrywide revolts, including cutting fences, removing beacons and refusing to relocate to betterment villages. Nonetheless, post-Second World War, the Secretary for Native Affairs advanced an even more comprehensive 'New Era of Reclamation', advocating the use of reason over tradition to enhance life quality. This new approach focussed on developing a small group of commercially viable farmers. However, it necessitated over 50% of reserve inhabitants, who were not part of this group, to leave the land.[100]

[98] D. van der Merwe, 'Land Tenure in South Africa: A Brief History and Some Reform Proposals' (1989) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 663, 679.
[99] Bennett (n 10) 86.
[100] Ibid. 8.

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The effects of these policies were further compounded by the creation of the homeland or Bantustan system.[101] These homelands designed to segregate the black population from the white population and to deprive black South Africans of their citizenship by relegating them to designated 'homelands'. These homelands were intended to be self-governing nation-states where each ethnic group could develop independently of the white-run South Africa. However, in practice, they were economically dependent on South Africa and were governed by leaders sponsored by the Apartheid regime.[102] The homeland system stripped black South Africans of their citizenship and relegated them to undesirable land.[103] The land allocated for the homelands was fragmented and economically unviable, unable to provide sufficient food and job opportunities for the designated populations.[104] The homeland system allowed for free and unregulated labour, where people had no recourse if they became sick or injured, due to the absence of even the most rudimentary labour protection.[105] The system frustrated both rural and urban development, leading to the creation of 'squatter camps' on the outskirts of cities, occupied by black South Africans who provided labour and services to the urban white population. The homeland system was a tool of the Apartheid state to maintain white supremacy and control over the black population by segregating them into economically unsustainable regions, thereby ensuring a supply of cheap labour for white-owned industries and farms. It was a system that contributed significantly to the socio-economic disparities that persisted in South Africa even after the end of Apartheid.[106]

The dispossession of land was not only a means of economic exploitation but also a tool for social and political control. The Land Act criminalised the presence of black people living on white farms who were not working as servants, effectively evicting those who were considered 'squatters'.[107] The homeland system and forced removals frustrated both rural and urban development. 'Squatter camps' were erected on the outskirts of cities, occupied

[101] Through the Group Areas Act 41 of 1950 and the Group Areas Act 36 of 1966.
[102] Sparks (n. 56.) 15–6.
[103] For example, section 13 of the Group Areas Act 36 of 1966 prohibits the acquisition of immovable property in a controlled area, while section 20 placed restrictions on the occupation of land in a controlled area.
[104] Sparks (n. 56.) 16–7.
[105] L. Platzky and C. Walker *The Surplus People: Forced Removals in South Africa* (Johannesburg: Ravan, 1985) para 2.5.
[106] Sparks (n. 56.) 18–9.
[107] Ibid. 10–1.

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by black South Africans who provided labour and services to the urban white population, with few opportunities for business or advancement.[108] This law was the first in a series that sought to alienate the indigenous black population in their own country, both socially and economically.[109]

Sparks has highlighted the intrinsic relationship between land ownership, security of tenure and the pursuit of prosperity, which was denied to the black population through the 1913 Act. The dispossession of land, therefore became a central issue for the anti-apartheid movement, with the African National Congress (ANC) advocating for land rights since its inception in 1912.[110] The Freedom Charter of 1955, adopted by the ANC and the responses to forced removals during the Apartheid era further contextualised the struggle for land rights.[111] The issue of land has been omnipresent in South African history and is closely intertwined with the country's political and social fabric. The dispossession of land, forced removals and the codification of discriminatory laws relating to land in the twentieth century are critical to understanding contemporary policy and rhetoric surrounding land reform in South Africa.[112] This dispossession and the subsequent struggle for land rights are not only historical facts but also deeply emotional issues that have shaped the identity and politics of South Africa.[113]

4. COLONISATION AND LABOUR CONTROL

The historical account given herein shows the relationship between land dispossession and indigenous peoples becoming labourers. A further effect was that these persons were further subjected to the colonial contract of employment and the control inherent to the employment relationship. The common-law employment contract (the *locatio conductio operarum* or the *dienstcontract*) was transplanted into South African law.[114] The existence thereof was a prerequisite for the establishment of an employment relationship.[115] Administration of justice was, however, poor in the Cape and, by

[108] Ibid. 19.
[109] Ibid. 10–1.
[110] The Abolition of Racially Based Land Measures Act 108 of 1991 was promulgated to bring an end to the racialised nature of allowable land ownership in South Africa.
[111] Sparks (n. 56.) 7–8.
[112] Ibid. 6–7.
[113] Ibid. 7–9.
[114] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 56A.
[115] M.J.D. Wallis, *Labour and Employment Law* (Durban: Butterworths, 1995) 2–17.

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the time of the British occupation, in 1795 and 1806, no employment culture had developed during the Dutch control of the Cape.[116] This is so because most work was performed by enslaved people and managed as *locatio re*, although there were also free artisans.[117] To a limited extent, the Dutch East India Company made white labourers available to farmers on loan in a type of labour broking arrangement.[118]

The first forms of enacted law meant to regulate free labour in the Cape were introduced following the arrival of British settlers, who represented the first introduction of artisans. Le Roux explains:

> Since many of them absconded from their assigned masters to work for others, Proclamations were passed in 1803 and again in 1818, aimed at preventing the desertion of such white indentured servants and apprentices as well as preventing third parties from luring these servants away from their assigned masters: the former was punishable by imprisonment, the latter by a fine. These proclamations represent the earliest form of 'free' labour regulation at the Cape and introduced a pattern of disparities between the position of employees and employers that would dominate the South African labour market until at least the repeal of the Master and Servant Laws in 1974.[119]

In 1806, the slave trade was abolished in the Cape (although auctions took place until 1808). A shortage of labour followed and legislative interventions were sought to address the shortfall. A Proclamation of 1809 secured KhoiKhoi labour through a pass control system and the registration of contracts lasting a month or longer and assumed a master–servant relationship between the KhoiKhoi people and Europeans.[120] This proclamation was repealed by Ordinance 50 of 1828, the so-called 'Hottentot' Ordinance of 1828, which endeavoured to introduce full civil rights for all KhoiKhoi, limited the powers of employers, abolished the obligation of the KhoiKhoi to carry passes, gave the KhoiKhoi the same right as Europeans to buy and

[116] Rochelle le Roux, 'The Regulation of Work: Whither the contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers' (LLD thesis, University of Cape Town 2008) 22–3.

[117] Ibid. 23.

[118] Ibid. See also GG Visagie, *Regspleging en Reg aan die Kaap van 1652–1806* (Cape Town: Juta, 1969) 89–90.

[119] Ibid. 27.

[120] Ibid. See also Leslie Clement Duly, 'A Revisit with the Cape's Hottentot Ordinance of 1828' in Hector Menteith Robertson and Marcelle Kooy (eds), *Studies in Economics and Economic History; Essays in Honour of Professor HM Robertson* (Durham: DUP, 1972) 34–56.

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own land, limited oral contracts to one month, limit written agreements to one year and banned child labour without the permission of their parents.[121]

A series of regulations were introduced to regulate the treatment of enslaved people until slavery was finally abolished, from 1 December 1834.[122] The Master and Servant Ordinance of 1841 removed the distinction between the KhoiKhoi and enslaved people.[123] The Master and Servant Act of 1856 and similar legislation were introduced in the other British territories, the Boer Republics and Natal.[124] The Master and Servant laws were only repealed in South Africa in 1974.[125] The principal objectives of these laws were to make the registration of contracts compulsory and to make a breach of contract criminally punishable. However, these laws also showed early traces of protective legislation. They provided, among other things, for paid sick leave; notice periods; the provision of food and lodging; the protection of the wife and children of a servant against forced labour; the limitation of the age at which a child could be apprenticed and for the limitation of the duration of contracts.[126]

Although these laws were racially neutral, in practice, they only applied to non-white workers employed in a limited number of services (they were predominantly reserved for the agricultural and domestic sectors). In practice, several black workers were excluded through pass and influx control laws.[127] Pass laws were designed to control black workers' movement, employment and settlement.[128] Influx control laws were aimed at ensuring adequate supply of black workers to the white employers.[129] Influx control legislation was also designed to secure 'better control' over the cities by limiting the growth of the urban black population.[130] In The Master and Servant laws placed several duties upon workers, backed by criminal sanction. These laws were cumbersome to enforce as they required employers to appear before the magistrate, while pass laws prosecutions did not. As such, '[t]he eventual demise of the Master and Servant laws is linked to pass law prosecutions' as it was easier to control the non-white workforce in this way.[131]

[121] Ibid. 28.
[122] Ordinance 1 of 1841.
[123] Le Roux (n. 116) 29.
[124] Act 15 of 1856.
[125] General Law Amendment Act 94 of 1974.
[126] Le Roux (n. 116) 30–1.
[127] Ibid. 32.
[128] Doug Hindson, *Pass Controls and the Urban African Proletariat* (Johannesburg: Ravan, 1987) 11.
[129] Deborah Posel *The Making of Apartheid* (Oxford: Clarendon, 1997) 75.
[130] Ibid. 116.
[131] Le Roux (n 105) 34 and C Bundy, 'The Abolition of the Masters and Servants Act' (1975) 2 *South African Labour Bulletin* 37, 40.

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The history of labour law (and labour exploitation) has run lockstep with the history of Apartheid.[132] As the Congress of South African Trade Unions (hereafter COSATU) has pointed out, 'apartheid's labour laws, pass laws, forced removals and cheap labour system were all to the benefit of the business community'.[133] Without the system of apartheid, many businesses would not have been as financially successful.

The effects of colonialism, therefore, worked in a double movement of removing and depriving black workers of their economic means by depriving them of land and introducing them to a system geared towards protecting primarily white males. The link between the land dispossession of black people and the creation of cheap black labour is that the dispossession of land from black people forced them to work for low wages in the capitalist cash economy. They were also subjected to the control of their colonial masters through the employment contract. The Land Act of 1913 in South Africa prescribed that African people could occupy and own land only in the reserve areas, making up 13% of all land in South Africa. This law was designed to force black people who derived their living from the land into the capitalist cash economy and wage slavery. The profitability of mines depended on cheap black labour and keeping it that way. The discovery of minerals in the late nineteenth century onwards—diamonds near Kimberley in 1867 and gold in 1886 near Johannesburg—drastically changed the economic and political structure of South Africa. Due to this, more foreign capital was invested in South Africa than in the whole continent combined. But diamond, and especially gold mining in South Africa, required lots of expensive machinery and an abundance of labour to extract it from the ground. The racism of minework reserved better wages and positions of authority for whites. The control of black labour was achieved through laws that severely limited the right of black people to own mining claims or to trade their products. Black workers were also legally forbidden from living wherever they wanted and were forced to stay on the outskirts of segregated towns or mining compounds. This created a system of cheap black labour used by mining capitalists to earn super-profits.[134]

[132] C. Matthew Smith, 'The Right of Revolution: Black Trade Unions, Workplace Forums, and the Struggle for Democracy in South Africa' 2000 (28) *Georgia Journal of International and Comparative Law* 595.

[133] Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (Abingdon: Routledge, 2012) 158.

[134] Leonard Gentle, Luli Callinicos, Martin Jansen, Noor Nieftagodien and Richard Jordi, *A History of Trade Unionism in South Africa* (Johannesburg: Workers' World Media Productions, 2018) 1–3.

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All labour legislation before 1971 had the distinguishing feature of excluding black workers from its ambit.[135] To do this, two mechanisms were employed; either black workers were excluded directly from the provisions of the Act or workers were indirectly excluded from the provisions of an act due to their inability to comply with the statutory definition of the term 'employee'.[136] One industrial relations system emerged for white, coloured and Indian workers and another for black workers. Black workers were subject to a different legislative regime than white, coloured and Indian workers.[137]

The general law of contract was reserved predominantly for white workers.[138] Le Roux has shown that, as in the case of England, the binary divide between independent contractors and employees was first introduced only with the adoption of social welfare legislation.[139] This point can be illustrated with references to employee compensation legislation, although the point has also been made concerning other social security legislation.[140] The Workmen's Compensation Acts of 1914[141] and 1934[142] defined the term 'workman' in terms of a 'contract of employment'.[143] The Workmen's Compensation Act of 1941[144] restricted the term workman in terms of a 'contract of service'.[145] This terminology was maintained in the Compensation for Occupational Injuries and Diseases Act of 1993,[146] although 'workman' was replaced with 'employee'.[147] As Le Roux shows, it was the period following the adoption of the Workmen's Compensation Act of 1941 when the binary divide between employees and independent contractors emerged.[148] It was not until 1993 that a semblance of the unitary concept of the employee was achieved.[149]

[135] John Grogan, *Collective Labour Law*, 3rd ed (Cape Town: Juta, 2019) 4.
[136] Wiehahn Commission, *The Complete Wiehahn Report with Notes by Prof NE Wiehahn* (Durban: Lex Patria, 1982) xx–xxii.
[137] For example, the Native Labour (Settlement of Disputes) Act 48 of 1953 which was renamed in 1964 to the Bantu Labour (Settlement of Disputes) Act, in 1973 to the Bantu Labour Relations Regulation Act, and in 1978 to the Black Labour Relations Regulation Act.
[138] Le Roux (n. 116) 36.
[139] Ibid. 36–41.
[140] Ibid. 39–40.
[141] Act 25 of 1914.
[142] Act 59 of 1934.
[143] S 2 of the acts.
[144] Act 30 of 1941.
[145] S 3.
[146] Act 130 of 1993.
[147] S 1.
[148] Le Roux (n. 116) 39.
[149] Ibid. 41.

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Black workers were also statutorily excluded from participating in collective bargaining mechanisms. The Industrial Conciliation Act of 1924 denied black workers the right to participate in strike action.[150] Due to increased pressure from black trade unions and the international community, black trade unions were formally allowed to register and commence union activities in 1979.[151] Only those workers that were brought into the protection ambit of protection established by exclusion within the concept of 'employee' could participate in these activities and benefit from it. Those outside or at the periphery of the concept could not and these workers have historically been black.[152]

The emancipation of white women and their ability to enter the labour market in South Africa heavily depended on black workers taking over the domestic tasks of white women.[153] This is because, before the emancipation of white women, they were confined mainly to the home and were expected to take on the domestic tasks of running the household. This included cooking, cleaning and caring for children. As such, white women could not pursue employment outside the home. The emancipation of white women in South Africa was mainly due to the influx of black workers willing to take on the domestic tasks of white women. This allowed white women to pursue employment outside the home, such as in factories, offices and other industries. This was a significant step forward for white women in South Africa, as it allowed them to gain financial independence and have a greater say in their lives.

This same movement confined black women to precarious forms of employment. In South Africa, for example, domestic workers are primarily women and black.[154] Domestic work is a form of precarious work in South Africa for several reasons. Amongst others, domestic workers are often employed on a casual basis, meaning that they are not guaranteed a regular

[150] Act 11 of 1924.

[151] Johann Maree, 'Trends in Collective Bargaining: Why South Africa Differs from Global Trends' (15th ILERA World congress, Sydney, 28 August 2009) <http://www.ilera-directory.org/15thworldcongress/files/papers/Track_4/Wed_P4_MAREE.pdf> date last accessed 23 January 2024.

[152] Sandra Fredman and Judy Fudge, 'The Contract of Employment and Gendered Work' in Mark Freedland (ed), *The Contract of Employment* (Oxford: OUP, 2016) 234.

[153] C. Albertyn, 'Feminism and the Law' in C. Roederer and D. Moellendorf (eds), *Jurisprudence* (Cape Town: Juta, 2004) 291–326.

[154] Elmarie Fourie, 'Gender and Race in the Informal Economy: The South African Framework' in Mies Westerveld and Marius Olivier (eds), *Social Security Outside the Realm of the Employment Contract: Informal Work and Employee-like Workers* (Cheltenham: Edward Elgar, 2018) 58, 62.

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income or job security.[155] In addition, enforcement of labour standards is often not difficult in the context of domestic workers, with the effect that domestic workers do not benefit from the same protections as other workers, such as the right to a minimum wage, sick leave or other benefits.[156] This means that they are vulnerable to exploitation and abuse from employers.

Black and women workers are more likely to be in the informal economy due to historical and structural inequalities, such as the apartheid regime in South Africa, which excluded African people, particularly African women, from the formal economy.[157] This exclusion meant that informality and race became inextricably linked and African women were forced to enter the informal economy as unskilled labourers.[158] Additionally, women workers are often engaged in under-recognised and undervalued work, such as unpaid care work and domestic work, which is more prevalent in the informal economy.[159] Gender hierarchies also exist within the informal economy, with men being predominantly employers or regular wage workers with higher average wages and lower poverty risks, while women are more prevalent as casual wage workers, homeworkers, industrial outworkers and unpaid family workers, with irregular and low wages and high poverty risks.[160]

Perhaps because of the scarcity of writings on this legal instrument in Roman and Roman-Dutch law, South African courts sought guidance from English law to determine who would be party to the employment relationship and who would be not.[161] The judiciary sought a single definitive criterion to identify the employment relationship.[162] When the problem of identifying the employee first came before South African courts between 1915 and 1927, the courts considered control to be the most important element in determining whether a person was an employee or an independent contractor.[163]

[155] Marius van Staden and Elmarie Fourie, 'Domestic Workers, (In)dignity and Occupational injuries - *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC)' (2021) 84 *Tydskrif vir die Hedendaagse Romeins Hollandse Reg/Journal of Contemporary Roman Dutch Law* 422, 446.

[156] Ibid.

[157] Fourie (n. 154) 7.

[158] Ibid.

[159] Ibid. 60.

[160] Ibid.

[161] Paul Benjamin, 'An Accident of History: Who is (and Who Should Be) an Employee Under South African Labour Law' 2004 *ILJ* 787, 791.

[162] Ibid.

[163] *Phillips v Situpa* 1915 EDL 289; *De Beer v Thompson & Son* 1918 TPD 70; *Townsend v Honkey* Municipality 1920 EDL 226; *Dennis Edwards & Co v Lloyd* 1919 TPD 291 and *Union Government v Lombard* 1926 CPD 150 and *Imperial Cold Storage v Yeo* 1927 CPD 432.

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When the matter first came before the Appellate Division in 1931 in *Colonial Mutual Life Assurance Society Limited v Macdonald*,[164] a different approach was followed with the court recognising several different factors, including the nature of the task, the freedom of the individual, the extent of contractual reward, the existence of the power of dismissal, the circumstances in which payment may be withheld and control, supervision and subjection to orders to determine whether a person was an employee.[165] Although this judgment was interpreted as not endorsing the view[166] that control was the exclusive and ultimate element in identifying the contract of employment, the Court did hold that 'the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract'.[167] The court described the degree of control required as 'a matter of extreme delicacy'.[168]

Subsequently, the multifactorial approach of the court was ignored and the judgment was treated as endorsing the control test to the exclusion of all other factors.[169] Because of the 'delicacy' of the matter of control, it was also held that complete control relating to every aspect in which the work was to be performed was unnecessary.[170] What was necessary, however, was that the employer has the *right* to control the employee.[171] Such control could be general and did not have to be exercised daily.[172]

Kasuso lists the chief criticism against the control test as follows (the first point is that of Kahn-Freund):[173] First, the test failed to cope with the emergence of skilled professionals who had significant latitude in determining how work was to be performed. Second, the test was developed within the context of vicarious liability under the law of delict and not employment law. Third, it is pleonastic to prescribe a contract of employment based on control alone, as it is a consequence of a contract of employment. Fourth,

[164] 1931 AD 413.
[165] *Colonial Mutual Life Assurance Society Limited v Macdonald* 1931 AD 413, 434–5.
[166] Cf *Performing Rights Society v Mitchell and Booker* 1924 1 KB 672, 766–7.
[167] *Colonial Mutual Life Assurance Society Limited* (n 159) 435.
[168] Ibid. 434.
[169] Wallis (n. 115) 2–11 n 11, *R v Caplin* 1931 OPD 172; *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) 450C; *Padayachee v* Ideal *Motor Transport* 1974 (2) SA 565 (N); *Lichaba v Shield Versekeringsmaatskappy Beperk* 1977 (4) SA 623 (O) 635F-G and *Oak Industries SA (Pty) Ltd v John* 1987 (4) SA 702 (N) 702E-F.
[170] *R v Feun* 1954 (1) SA 58 (T) 61.
[171] *R v AMCA Services Limited* 1959 (4) SA 207 (A) 213.
[172] *Braamfontein Food Centre v Blake* 1982 (3) SA 248 (T) 240–51.
[173] Tapiwa Givemore Kasuso, 'The Definition of an "Employee" under Labour Legislation: An Elusive Concept' (LLM dissertation South Africa, 2015).

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measuring the degree of control sufficient to qualify as an employee is difficult.[174] According to Le Roux, the rigid application of the control test, particularly in its original form, risked excluding relationships traditionally regarded as employment. This criticism highlights the test's failure to evolve alongside the changing nature of work, suggesting a need to reconsider and potentially reformulate the foundations upon which employment relationships are determined.[175]

The recognition of the control test's shortcomings led to judicial efforts to modify its application. By the mid-1970s, the control test was seen as inadequate to explain the nature of modern employment relationships. The emergence of the 'dominant impression' test reflected this shift, acknowledging that the strict criteria of control did not adequately capture the essence of contemporary employment relationships. This recognition suggested a move beyond a simplistic binary understanding of employment based on control towards a more nuanced.[176]

Irrespective of the usefulness of 'control' in determining the parties to the employment relationship, the element of control remains a key element of the employment relationship. In the words of Davies and Freedland,

> [t]he law does and to some extent must conceal the realities of subordination behind the conceptual screen of contracts considered as concluded between equals. Capital resources cannot be utilised by anybody... without exercising a command power of human beings... [as] economic purposes cannot be achieved without a hierarchical order within the economic unit. However, the power to command and the duty to obey can be regulated.[177]

Control is not merely a means of directing employee actions but is integral to defining the nature of the employment relationship itself. The degree and manner in which management exercises control can significantly influence the dynamics between employer and employee, impacting everything from job satisfaction to productivity.[178] It has also been found that control is not just about oversight and direction but also about creating an environment of

[174] Ibid. 16.
[175] Rochelle le Roux, 'The Evolution of the Contract of Employment in South Africa' (2010) 39 *ILJ* 139, 155–7.
[176] Ibid. 157–8.
[177] Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law*, 3rd ed (London: Stevens 1983) 15, 18.
[178] Emmanuel Orakwue, Nicholas Gyambrah-Adaefie and Alex Kweku Hammond, 'Employment Relationship and Management Control of Labour Process' (2006) 1 *Journal of Business and Retail Management Research* 14, 25.

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reliability and predictability. When employees perceive control systems as fair and just, it can lead to enhanced trust in the organisation, which is crucial for a stable and productive employment relationship.[179] In addition, it has been found that control in the employment relationship extends beyond task management to include aspects of work-life integration.[180]

The control inherent in the employment relationship is rooted in the historical context of the employment contract, which evolved from the medieval master-and-servant relationship.[181] The contract of employment, especially in the long term, is inherently 'incomplete' or 'open-ended', requiring the employer to have the power to direct employees for efficiency.[182] This reality was summed up in the so-called control test to establish whether an employment relationship came into existence.[183] In a constitutional state, committed to values such as equality, freedom, dignity and fair labour practices, this control, however, must not impose an 'unacceptable and unjustifiable limitation' on the rights of employees and should be confined within the bounds of necessary instructions for the work involved.[184]

The subjugation of Indigenous peoples also obtained a racialised character as the black and landless labourers worked under the control of the white 'baas'.[185] Dispossession was not merely about taking land but was also

[179] Robert M Verburg, Ann-Marie Nienaber, Rosalind H. Searle, Antoinette Weibel, Deanne N. Den Hartog and Deborah E. Rupp, 'The Role of Organizational Control Systems in Employees' Organizational Trust and Performance Outcomes' (2018) 43 *Group & Organization Management* 179, 199.

[180] Lonnie Golden, Susan Lambert, Julia Henly and Barbara Wiens-Tuers, 'Working Time in the Employment Relationship: Perceived Control and Work-Life Balance' in K Townsend and A Wilkinson (eds), *The Edward Elgar Handbook on Work and Employment Relations* (Cheltenham: Edward Elgar, 2011) 13–4.

[181] For an explication of these processes, see A. Merritt, 'The Historical Role of Law in the Regulation of Employment - Abstentionist or Interventionist?' (1982) 1 *Australian Journal of Law and Society* 56, 58 and M. Olivier, 'Die Belang van Status en Kontrak vir die Diensverhouding' (1993) 1 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 17 19.

[182] Merrit Ibid. 57–8.

[183] Jon Clark and Lord Wedderburn, 'Modern Labour Law: Problems, Functions and Policies' in Lord Wedderburn et al. (eds), *Labour Law and Industrial Relations: Building on Kahn-Freund* (Oxford: Clarendon, 1983) 147.

[184] Darcy du Toit, 'The Right to Equality Versus Employer "Control" and Employee "Subordination": Are Some More Equal Than Others?' (2016) 37 *ILJ* 1, 5.

[185] The term 'baas' in South African employment relations historically signifies a master-servant dynamic, where 'baas' refers to 'boss' or 'master'. This term, deeply rooted in the Apartheid era, was commonly used to address white male employers, symbolising the hierarchical and racially segregated structure of the workforce during that time. See Danelle van Zyl-Hermann, '"Baas or Klaas?": Afrikaner Working-Class Responses to Transformation in South Africa, ca. 1977–2002' (2014) 86 *International Labor and Working-Class History*, 142–58.

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a strategic move to create a pool of cheap labour. Black and landless individuals, having lost their means of livelihood, were compelled to work in white-owned farms and industries, often under exploitative conditions and under the control of these white employers. The control exerted by the white 'baas' over black labourers was not just economic but also social. Segregation policies, part of the broader apartheid system, institutionalised racial discrimination, reinforcing the dominance of white South Africans over black and other racial groups. This social control was manifest in various aspects of life, including where people could live, work, and the type of jobs they could hold.[186] This racialised subjugation has had long-term effects on South African society. The economic disparities and social injustices rooted in this period continue to influence the socio-economic landscape of South Africa. The legacy of land dispossession and racialised labour exploitation remains a significant challenge in the country's efforts towards equality and social justice.[187]

The concept of control is intertwined with the idea of subordination, which is a defining feature of the employment relationship. This subordination must involve obeying lawful instructions from the employer, reflecting a balance between the employer's right to direct work and the employee's rights. However, as Du Toit points out, this subordination often extends beyond purely functional power, indicating a legal inequality that reflects socio-economic differences between employer and employee.[188] Therefore, the control exerted by employers should not infringe upon the foundational values of equality, freedom and dignity. The justification for any control exerted by the employer must be rooted in the functional needs of the job, rather than arbitrary power dynamics. This implies that while employer control is necessary for efficient business operation, it must be balanced against the fundamental rights of employees, ensuring that their dignity and equality are respected within the employment relationship.[189] Instead, control should be seen as a balancing act between employer demands and employee rights. Understanding and managing these conflicts through

[186] See Alex Lichtenstein, '"The Hope for White and Black?" Race, Labour and the State in South Africa and the United States, 1924–1956' (2004) 30 *Journal of Southern African Studies* 133.

[187] See Oliver Mtapuri and Partson Tinarwo, 'From Apartheid to Democracy' (2021) 21 *Southern African Journal of Demography* 104.

[188] Ibid. 9–11.

[189] Ibid. 24–6.

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appropriate control mechanisms are essential for maintaining a harmonious and effective workplace.[190]

5. CONCLUSION

The historical trajectory of land dispossession in South Africa and its intersection with the transplantation of colonial labour law instruments presents a complex and multifaceted narrative, deeply embedded in the socio-economic and legal fabric of the nation. The transformation of Indigenous populations from landowners to labourers, catalysed by colonial and apartheid policies, has had profound and lasting impacts on their quality of life and socio-economic status. The case of *Izaacs* poignantly illustrates the enduring legacy of these injustices, highlighting the need for a comprehensive understanding of the historical context to address contemporary challenges effectively.

The dispossession of land, a fundamental asset for economic and social stability, forced Indigenous populations into a vulnerable position where they had to rely on employment under conditions often characterised by exploitation and subjugation. The employment contract, as a legal instrument, played a pivotal role in this transformation, serving as a tool for controlling and perpetuating the disadvantaged position of these populations within the labour market. This historical analysis underscores the importance of viewing labour not merely as a commodity, but as an integral aspect of human dignity and social justice.

Recommendations for addressing these historical injustices and their ongoing impacts should focus on several key areas. First, there is a need for continued and enhanced efforts towards land restitution and reform. This should not only involve financial compensation but also consider the restoration of land rights and support for sustainable land use and development, thereby addressing both the economic and emotional aspects of dispossession. Second, labour laws and policies must be critically evaluated and reformed to ensure they reflect and promote the principles of equality, dignity and fair labour practices. This includes strengthening the protection of workers' rights, particularly for those in precarious employment situations, and ensuring that labour regulations are effectively enforced. Third,

[190] Paul Edwards and Andy Hodder 'Conflict and Control in the Contemporary Workplace: Structured Antagonism Revisited' (2022) 53 *Industrial Relations Law* 220, 234.

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education and awareness raising about the historical context and its impact on contemporary socio-economic conditions are crucial. This can foster a greater understanding and empathy, facilitating more informed and inclusive policy-making and societal attitudes. It can also assist us to reconsider the nature of colonised nature of employment in South Africa. In essence, addressing the legacy of land dispossession and the transformation of labour law in South Africa requires a multifaceted approach that not only rectifies historical injustices but also lays the foundation for a more equitable and just society.

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