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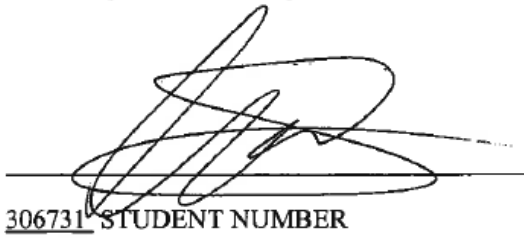
LLM DISSERTATION AT THE UNIVERSITY OF THE WITWATERSRAND

IS THE COMPANY AN INSTRUMENT OF COLONIALITY?: INTERROGATING THE RECOGNITION OF THE LEGAL PERSONALITY OF THE COMPANY

CHARMIKA SAMARADIWAKERA-WIJESUNDARA

FEBRUARY 2018

DECLARATION I, Charmika Samaradiwakera-Wijesundara , declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Master of Laws (LLM) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.



SIGNATURE

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With love and gratitude

Charmika Samaradiwakera-Wijesundara

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I INTRODUCTION

Background

There has been increasing scholarly attention to the power wielded by companies and the absence of consistent checks and controls on the manner in which that power has been exercised.[1] More particularly, the ability of companies to negatively impact human rights has received increased attention.[2] Often the point of departure in addressing the issue of corporate or company power takes the form of corporate accountability as a means of securing human rights obligations against companies.[3] In terms of the discourse on the corporate accountability or 'business and human rights', as it has recently crystallised into, the anthropomorphism of the company is either not interrogated or interrogated within a paradigm within which its continued legitimacy is assumed.[4]

What this approach elides, however, is the power dynamics in operation that create the concept of the company and enable human beings to wield company power in the first place. What is further obscured from interrogation is the manner in which company power contributes not only to individual or isolated violations of human rights, but systemic conditions of poverty and inequality. In fact, to the contrary, the interrogation of legal personality (also referred to as juristic personality) of the company and the exercise of company power depart from the assumption that the company is beneficial to the economy.[5] This assumption is often corollary to the assumption that the company is necessary for development and economic growth and in turn necessarily contributes to the amelioration of poverty and inequality.

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[1] Hahlo *South African Company Law Through the Cases* 6 ed (1999) 4.

[2] David Bilchitz 'Corporate law and the Constitution: Towards binding human rights responsibilities for corporations' (2008) 125 *SALJ* 754, 754 Erica George 'The Enterprise of Empire: Evolving the Understandings of Corporate Identity and Responsibility' in Martin & Bravo (eds) *The Business and Human Rights Landscape: Moving Forward, Looking Back* (2015) 19, 50.

[3] Ibid.

[4] Rehana Cassim 'The legal concept of a company' in Farouk HI Cassim (ed) *Contemporary Company Law* 2ed (2012) 28, 35; Hahlo (note 1 above) 3; Bilchitz (note 2 above); George (note 2 above).

[5] Morgan Ndlovu & Eric Nyembexi Makoni 'The globality of the local? A decolonial perspective on local economic development in South Africa' (2014) 29(4-5) *Local Economy* 503, 506; Bonita Meyersfeld 'Empty promises and the myth of mining: Does mining lead to pro-poor development?' (2016) *Business and Human Rights Journal* 1, 6.

Awareness of the assumptions that underpin the concept of the company in mainstream discourse allows for reflection on the validity of these assumptions. There are various theoretical lenses through which to interrogate these assumptions. I contend that central to the appropriateness of a lens is its ability to account for the dynamics of power that produce and influence social, political and economic relations. As such, I propose the use of the lens of decolonisation theory that would require situating the interrogation of the concept and purpose of the company in its socio-political, economic and historical context.

With reference to Mignolo's treatment of the broad project of decolonisation theory, I will proceed to briefly outline the value of the approach as well as some of its fundamental theoretical premises.[6] Decolonisation theory resulted in response to the imposition of European colonisation at its outset in the 16th Century where the conquest of territory and people with the attendant dissemination and enforcement of European modes of thinking and being.[7] Mignolo argues that the un-avowed corollary of European modernity is coloniality therefore that no 'global modernities' exist that are not concurrently 'global colonialities'.[8] Coloniality refers to the global system that operates within a 'colonial matrix of power'.[9] In terms of this, the world operates fundamentally in accordance with racial hierarchies imposed by colonisation that have dissected human beings along the dichotomy of being (subject) or non-being (object),[10] This operates to organise the relations of human beings in accordance with this dichotomy according to a hierarchy that categorises beings as superior to non-beings.[11]

As coloniality represents the colonial ordering of power relations, decoloniality refers to a delinking from that colonial order with view to preventing the operation and influence of that order.[12] While decolonisation may refer to the literal undoing of colonisation as in the removal of colonial administration of territories and direct

[6] Walter D Mignolo 'Coloniality: The darker side of modernity' https://www.macba.cat/PDFs/walter_mignolo_modernologies_eng.pdf 39.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid 42.

authority over people in order to end the operation and influence of colonisation then decoloniality must take place.[13]

The perverse relationship between modernity and coloniality that Mignolo describes as the 'darker side of modernity' that global modernities and global colonialities are linked in the lauded progress of knowledge/science and exchange/economy that was brought on by European Renaissance and Enlightenment.[14]In other words, coloniality operates along European epistemes and global capitalism necessarily as a corollary of modernity.[15]

The unavowed role of colonisation in the dissemination and entrenchment of this world order is the side of modernity that is obscured by shadow in favour of the 'lighter side' being progress.[16] It is that unavowed side of colonisation that operated between the 16th and 20th Centuries that facilitated the reinvestment of surplus value created by accumulating appropriated land and extracting slave labour that lead to the expansion of the global market; and the unfolding of the European frame of reference as the universalised 'point of enunciation' that circularly justified the appropriation from and subjugation of other human beings.[17]

In this sense modernity can has been described as the conquest of both space and time to the extent that territory was conquered while framing that conquest as the beginning of history in accordance with the entry of the European coloniser.[18] This was represented as the beginning of civilisation and progress along the lines of knowledge encompassing political and economic organisation of relations.[19] This was done to the exclusion of pre-existing of co-existing civilisations with the effect of denying the colonised an existence in time prior to colonisation.[20]

Furthermore, modernity became synonymous with salvation and civilisation through the theologically motivated divine right of conquest and the civilising obligation of the

[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid 40-41.
[17] Ibid 41-42.
[18] Ibid 43.
[19] Ibid.
[20] Ibid.

West.[21] Mignolo elaborates how even after the Second World War where the United States of America (USA) took the formal stance of supporting the decolonisation of Africa and Asia it still championed economic development, free trade and globalisation which are all machinations of modernity.[22]

The European origin and Western[23] ownership of the concept and project of modernity has been recognised stemming from two central pillars of modernity.[24] These are the nation-state and the capitalist mode of production and relation. To recognise that these are concepts have been authored and disseminated by the West is to attribute modernity to the West.[25] Mignolo compels us to then necessarily recognise the corollary being that coloniality is a Western project also constitutive of these existent pillars of authority and economy.[26] This argument recognises the colonisation by the West as extending to monopolistic control over authority, in the administration of the corporeal, as well as control over the incorporeal command of knowledge, truth and ultimately reality.

The further significance of this argument is, as the West is the author of modernity, the rest of the world is positioned to passively consume the scholarship produced by this author without having an entry point to contribute except to the extent that that contribution demonstrates an understanding of and appreciation Western thought.[27] This is because in order to be legitimate and credible, scholarship must comply with that of the author of modernity in order to be credible failing which it would be deemed regressive.

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[21] Ibid.

[22] Anthony Giddens *The Consequences of Modernity* (1990) 174 in Mignolo (note 6 above) 43.

[23] Kenneth B. Nunn 'Law as a Eurocentric Enterprise' (1997) 15 (2) *Law and Inequality: A journal of theory and practice* 323; in accordance with Nunn's definitional parameters at 325 footnote 5, and 338 in this dissertation I use 'European' to mean of or related to Western Europe, the Unites States of America, Canada and Australia and 'Western' or 'West' to refer to countries that have championed or prescribed to colonization and imperialism founded on European culture in the sense of habit and behaviour informed by ideology. Reference to Western culture does not seek to suggest that those characteristics are necessarily exclusive to Western culture nor to be reductive or essentialise Western culture, but to observe the relationship between ideology and behaviour that manifests as and in the ordering of European society and 'social and cultural productions' of that society.

[24] Mignolo (note 6 above) 44.

[25] Ibid.

[26] Ibid.

[27] Partha Chatterjee 'Talking about modernity in two languages' *A Possible India. Essays in Political Criticism, New Dehli: Oxford India* (1998) 263-85 in Mignolo (note 6 above) 45.

On encountering other human beings in order to justify subjugation, the category of 'other' had to be created as distinct and inferior in order to justify treatment as objects rather than subjects while maintain the coloniser's sense of being human.[28] In other words, the objectification of the colonised allowed for the dichotomy of colonised (non-human) and coloniser (human) exaggerated the subjectivity and personhood of the coloniser. This tendency to dichotomise and then hierarchically categorise according to greater and lesser value is, according to Nunn, characteristic of Eurocentric culture.[29] Eurocentric is understood here to mean '…the practice of viewing history, law, science or other human practices, from a European perspective, as if Europe was the point of origin or reference for human affairs.'[30] A further characteristic of Eurocentric culture is the tendency to objectify that which is external to the European subject thus rendering 'the world beyond self [as] objects to be controlled' rather than subjects to be engaged with.[31]

This relation between colonised and coloniser set the tone for racial classification which pegged the authority on what it means to be human and who gets to decide who is human on the white male coloniser.[32]

According to Mignolo coloniality can be understood to operate over four perceptible 'domains' of human existence granting the power to influence and control behaviour and circumstances in respect of,

a) 'subjectivities' fundamentally meaning identity as human and the location from which reality is conceptualised and experienced;
b) 'authority' being the formal theocratic or secular structures of governance of social and political relations and behaviour;
c) 'economy' as the approach to organisation and distribution of land and efforts of labour, especially in relation to the surplus extracted from labour and allocation of natural resources, including the attendant social relations needed to produce these relations; and

[28] Mignolo (note 6 above) 47.
[29] Nunn (note 23 above) 334-5.
[30] Ibid 331 footnote 31.
[31] Ibid 336.
[32] Mignolo (note 6 above) 47.

d) ‘knowledge’ relating to the generation, production and dissemination of truth as well as the monopolisation of reason and aesthetics rendered in the image of the author.[33]

These four domains are anchored in two points of operation. These are race and gender as the organising principles of coloniality which produce white supremacist and patriarchal power relations.

Viewed through the lens of decolonisation theory, the origin of the concept of the company as a colonial instrument and its conferment of personhood in the context of its role in perpetuating the objectification, through slavery, dispossession and the subjugation of black[34] people and women[35] can be examined. Furthermore, a more critical assessment of the function that the design of the company enables may suggest that the company is in fact a rent-seeking institution rather than an efficient and productive one. This suggests that the company is not the product of the organic development of economic forces but is instead an artificial construct deliberately created to privilege colonial interests of subjugation and exploitation of conquered peoples.

I will now make recourse to the critical perspective of Nunn in order to highlight the relevance of decolonisation theory to the law by unpacking the relationship between the law and coloniality.[36] The law both operates within and is constitutive of the global colonial system of power relations. The law is informed by the coloniality of power and simultaneously is used to construct and regulate identities and relations between people.[37] As such the law as imposed by colonisation has a particular European character and facilitates the above mentioned domains of subjectivity including legal personhood, authority including the constitution of the state as

[33] Ibid 49.
[34] Nunn (note 23 above); In keeping with Nunn’s definitional parameters 329 footnote 20, but departing slightly with view to cognisance of the South African context within which I write I refer to ‘black’ in the specific context of this dissertation broadly as a racial and cultural identity to which people of colour identified as ‘African’, ‘Coloured’ or ‘Indian’ during apartheid subscribe to or are prescribed as a result of social, political and economic constructs that translate into a lived experience.
[35] The definitional parameters of the word ‘woman’ or ‘women’ similarly operate in the context of this dissertation broadly to signify the social and experiential identity of the gendered female human being.
[36] Nunn (note 23 above).
[37] Ibid 343.

legitimate authority, economy including legal tender and the regulation of exchange and ‘knowledge’ including how the law is defined, understood and interpreted and who may legitimately author and administer the law.

According to Nunn, the Eurocentric identity of the law reveals the European ideology embedded in the custom or culture that gave rise to the laws as they are framed and operate to the extent that productions of a society will reflect the culture and custom of that society which in turn will be founded on the prevailing ideologies of such society.[38] For example, the individualistic and materialistic character of European culture prioritises survival as the competitive accumulation of material resources to the exclusion of others with view of the world as comprising of a finite amount of resources in a necessarily zero-sum-game.[39] This competitiveness necessitates dominance and control for survival. [40] This ideology can be identified in the construction and operation of colonial law that dichotomises and categorises in a fashion that determines relations to power and therefore resources.

Within classical Western jurisprudence, the nature of law can be basically explained with reference to either natural law or positivist theories.[41] In accordance with theories of natural law, legal rules are creations of God or nature external to human beings accessible through reason and discernible through what resonates with man’s inherent sense of reason.[42] In other words, if an idea was accessible and made sense to the white male in authority it was potentially natural law. Nunn points out that natural law has been used to justify genocide and domination as natural.[43] Legal positivism on the other hand disconnected law from external sources and reduced it to the product of the power of the prevailing authority. This produced a conception of law that was abstract, finite, absolute and capable of being structured scientifically. [44]

While natural law provided possible avenues for limitations on the validity of law as interpreted by human beings, positivism did away with the limitation, making the law

[38] Ibid 332 and 338.
[39] Ibid 332.
[40] Ibid.
[41] Ibid 340.
[42] Ibid 340-2
[43] Ibid 341.
[44] Ibid.

legitimate by virtue of being enacted by authority essentially by virtue of power.[45] The purported ideological and moral neutrality of the law and achieved through hiding the locus of enunciation has two effects.[46] The first is that it creates the impression that there was no law in pre-colonial societies and therefore that colonial law brought about progress in the form of order and stability.[47] The second is that it places the law beyond consideration for taint of ideological or political bias.[48]

I take the position in this dissertation that the law is the product of power relations between people without a universal or internal logic. In other words, in keeping with Nunn's approach I take a 'law-in-context' approach as opposed to an approach that abstracts the law from the realm of human relations and experience.[49]

This position allows recognition of the ways that '[law] organizes society and indeed the world in ways that make it Easier for Eurocentric culture to assert dominance.'[50] In this way the nation-state uses the law to control its own constitution, political, social and economic activities.[51] Therefore the law is an instrument of control employed in the conquest, categorisation and control of colonised people.[52]

Importantly, the instrumentality of the law is not innocuous. The law has a coercive character in its command of subservience and compliance.[53] The law has secured compliance with Eurocentric expectations with threat of social pressure or force.[54]Law sets the parameters of when social conduct is outside the bounds of itself and what force may be legitimately exacted against the law-breaker. Necessarily the law polices the parameters of resistance to it and thereby to Eurocentricity.[55] By asserting its own universality and neutrality while simultaneously

[45] Ibid 341-2.
[46] Ibid 347.
[47] Ibid.
[48] Ibid 351.
[49] Ibid 342-3.
[50] Ibid 351.
[51] Ibid.
[52] Ibid 352.
[53] Ibid 355
[54]Ibid 356
[55] Ibid 357

avowing superiority and the idealisation of European culture the law has been 'an instrument of cultural hegemony.[56]

Colonisers used law to legitimise conquest in the interests of justifying the colonised and maintaining their own image of authority and legitimacy. [57] In this way, international law and treatises have historically been used to legally validate genocide, slavery and mass appropriation of land and other fixed and movable resources.[58] This operated in conjunction with the colonisation of time that secured the ideology of the upward incline of history that validates the imposition of European law as the introduction of civilisation and progress.[59]

South African company law is based on English law and common law derived from Roman Dutch Law.[60] South Africa had been colonised at various points and to varying degrees in territorial scope, by the Dutch, the English and more contentiously, has been subject to the imperial influence of the USA.[61] Therefore, South Africa provides for a compelling base to interrogate the coloniality of the company particularly with reference to the European colonial project that is categorised by capitalist, racist and patriarchal ideology.

The implications of this is that law cannot be uncritically accepted as neutral and universal nor assumed to operate progressively for the benefit of all people. The relationship between coloniality and the law provides a basis to interrogate the role of the company in creating and contributing to systemic racialized and gendered poverty and inequality. This is especially with a view to accounting for the limitation of liability that the company by definition affords the persons that animate it and interrogating the location of that displaced liability given that the company itself is a mere construct or fiction

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[56] Ibid 261.
[57] Ibid 362.
[58] Ibid.
[59] Ibid.
[60] Hahlo (note 1 above) 1.
[61] Sampie Terreblanche *Lost in Transformation: South Africa's Search for a New Future Since 1986* (2012) at 17-36; *Anne McClintock Imperial Leather: Race, Gender and Sexuality in the Colonial Context (1995)*13; and on American neo-liberal empire generally see Noam Chomsky *Profit Over People: Neoliberalism and Global Political Order* (1999); and Wendy Brown *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015).

Thesis

The company as a concept is an instrument of European colonisation and continues to facilitate colonial power relations that contribute to the subjugation of black people and women.

Furthermore, that support for this proposition can be observed at significant moments in South African history through the manner in which the legal construct of the company had been used to systematically oppress black people and women in securing white supremacist and patriarchal power.

Context

Recalling specifically the lens of decoloniality theory, I will adopt the position that 'post-colonial' is a premature description of social relations given sustained operation of colonial power relations.[62] As Sibanda argues, notwithstanding the attainment of political independence liberated colonies tend to nonetheless retain the residual economic, legal, political and cultural institutions the normative underpinnings of which often go without interrogation.[63] Modiri contends to this end, that it is not the pronouncement of the end of racial oppression that constitutes its true end but rather '…the rejection of white supremacy tethered to a commitment to the eradication of the substantive conditions of racial subordination and domination…'[64] This would be borne out in both ideological substance and institutional and experiential form given that '[w]hile the laws of the country have changed considerably, the architecture, framework and logic of *colonialism-apartheid* remains.'[65]

As such, it has been asserted that the description of South Africa as post-colonial or post-apartheid is premature as there has not been a demonstrated commitment to the rejection of the ideology underpinning either. That is, that there has been no fundamental rejection of the racism that facilitates white supremacy otherwise manifested as Eurocentrism. It is in light of this reasoning that current global systems

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[62] Anibal Quijano 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1(3) *Nepantla: Views from South* 533, 543.

[63] Sanele Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 3 *Stellenbosch Law Review* 482, 495.

[64] Joel M Modiri 'Towards a '(post-) apartheid ' critical race jurisprudence: 'Divining our racial themes ' (2012) 27 *SAPL* 231, 265.

[65] JM Modiri 'Law's poverty' (2015) 18(2) *Potchefstroom Electronic Law Journal* 224, 225.

can be construed as a reconfiguration rather than a transformation of the operation of colonialism.

Research Questions

a) What is the nature and origin of the concept of the company's legal personality?

b) How has the company in South Africa historically facilitated coloniality?

c) What is the company's role in continuing colonial power relations linked specifically to the production of racial and gender poverty and inequality?

Methodology

This study is based on desktop research. It includes an analysis of legislation, judicial precedent and academic literature. In approaching the law critically, it will reflect on historical context, interrogate the influence of economic principles, and draw on philosophical and sociological accounts of personhood and being. In order to do this, I will primarily employ decolonisation theory.

Structure and theoretical development

In this dissertation, I will set out an analytical framework for interrogating the coloniality of the company that: accounts for its original design and purpose and the implications of granting the company legal personality while depriving humans of that status; and recognises the significance of race and gender in the systemic generation of poverty and inequality. I intend on doing this in a manner that adequately accounts for gender without either rendering gender secondary or obfuscating the primacy of the operation of race in the colonial project.

I then intend on proceeding to use this framework to analyse some noteworthy moments in the history of South Africa. I will do this by selecting moments where the concept of the company has played a significant role in creating and affirming the racial and gendered categories of human beings and the concomitant division of labour and control and occupation of land. I will assess whether the dynamics produced are consistent with classifying the company as an instrument of colonial interests. Finally, I will endeavour to reflect on the implication of the instrument of the company under the constitutional dispensation of the Constitution of the Republic of South Africa, 1996 (Constitution, 1996 and new Constitution) and comment on

whether this can be described as a break from colonial ideology and instrumentality or whether it simply reaffirms or entrenches the same.

As such, I will be in a position to interrogate the relationship between conspicuously racialized and gendered poverty and inequality in South Africa[66] and the company at various moments of time. These moments are: the colonisation of the Cape by the Dutch East India Company (DEIC also referred to as the Verenigde Oostindische Compagnie or VOC); the incorporation and capitalist expansion of the British South Africa Company (BSAC); and the incorporation of the company into the settler colonial Union of South Africa especially with regard to its operation under apartheid. I will then submit concluding reflections on whether political independence and the new Constitution broke the ideological underpinnings of the concept of the company.

Literature outline

Broadly three bodies of literature can be framed that are relevant to this study for the purpose of a contextual interrogation of the company. While there are a multitude of sources in these bodies, I will not attempt an exhaustive treatment of the literature but rather actively identify and engage with some seminal material and central ideas in each of the bodies and give a brief analysis as to how they link to each other.

The first is the discourse on legal personality with specific focus on the legal personality of the company. This considers the nature and purpose of legal personality as well as the pivotal question of the source of the authority under which the company operates. Interestingly, the conceptual fundaments of the legal personality of the company and that of the state is interrogated in early literature on the topic but appears to dissolve into silence as the binary of public and private law becomes crystallised in mainstream imagination and discourse. This sets the tone for the critique of the assumptions of the company as an economic instrument that is organic and efficient.

The second is the critical discourse on systemic oppression engendered through institutions such as the law and in this specific instance, the company. This can be viewed through the lens of decolonisation theory that provides a structure for analysing power relations that are organised along the lines of race and gender in

[66] United Nations Development Project *The Impacts of Social and Economic Inequality on Economic Development in South Africa* (2014) 21.

the domains of subjectivity, politics, economics and knowledge. Within these themes, interrogating the concepts of and relationship between capitalism, white supremacy and the oppression in the form poverty and inequality provokes a challenge to the assumptions that the company is natural and beneficial to the economy, and therefore necessarily an agent for poverty alleviation and equality.

The third is the historical account of the company and its role in creating and ordering power relations in South Africa. Through this material, I will be able to consider the nature of the company as against the power relations that it creates and affirms.

Purpose of research

The purpose of this research is to develop existing jurisprudential discourse on legal personhood of the company. I seek to achieve this by interrogating the widely unchallenged nature and purpose of legal personality especially in relation to the power dynamics between human beings that the construct of the company facilitates. In other words, the analytical framework seeks to make visible the racialized and gendered oppression that the construct of the company facilitates and thereby explore the company as operating as an instrument of coloniality.

II: THE ORIGIN OF THE CONCEPT OF THE LIMITED LIABILITY COMPANY: UNPACKING THE RATIONALE OF THE DISTINCT LEGAL PERSONALITY OF THE COMPANY

Defining the parameters of the company as a concept

A practical starting point for this analysis would be to define the parameters of the object of analysis. This seemingly straightforward task is, however, immediately complicated by the evocation of the question of whether it is in fact an object (as in thing) or a subject (as in person) that is being interrogated? What is the nature of the company? This is a question that has vexed jurists who have tended to settle on the observation that 'it has neither a body to be kicked nor [a] soul to be damned'[67] Therefore, the short answer appears to be that the company is neither an object nor a subject.

This observation presents the quintessential characteristic of the company: juristic personality.[68] The company is not legally the collective of its members nor is it a self-animated spectre of a person granted legal recognition. It is here that the terms fiction and construct may be useful to bridge the chasm. While potentially synonymous, these terms have come to describe prominent, but distinct theories of the legal personality of a company (juristic personality) in South Africa.

Before delving into these theories that seek to explain the nature of the company, it may be useful to elaborate on the essential or defining characteristics of the company. For the many similar definitions of a company it is the fact of distinct legal personality that occasions the other perceptible characteristics of the company. As such, it is prudent to consider what it means to be a legal subject or have legal personality. According to Jordaan & Davel 'a legal subject can be defined as a bearer of judicial capacities, subjective rights (including the appropriate entitlements) and legal duties.'[69]

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[67] According to Cassim this statement cannot be traced to a primary source but has been widely quoted and credited to Lord Chancellor Baron Thurlow in the late 18th see Farouk HI Cassim 'Introduction to the new Companies Act: General overview of the Act' in Farouk HI Cassim (ed) *Contemporary Company Law* 2ed (2012) 31; *Century in Commissioner Inland Revenue v Richmond Estates (Pty)* Ltd 1956 (1) SA 602 (A) 606; *Manong and Associates (Pty) Ltd v Minister of Public Works* 2010 (2) SA 167 (SCA) para 4.

[68] Cassim (note 4 above) 29.

[69] Jordaan & Davel *The Law of Persons* (1995) 3.

Broadly, legal subjects may exist in one of two categories namely natural persons or juristic/artificial persons.[70] While the intuitive distinction between the categories would be that natural persons are all persons of flesh and blood, this would not be historically accurate. Jordaan & Davel record that historically not every human being was recognised as a legal subject, citing the example of Roman slaves. However they proceed to suggest that this was never the case in South Africa as slavery had been abolished by the time the Union of South Africa came into existence.[71] They submit '[n]o legal system striving for justice could deny that all persons are legal subjects.'[72] This, however accurate in principle, is more contentious then the authors suggest in the context of Sought Africa given its history as a territory and as a country and the status of 'black people' and 'women'. The meaning and content of personhood is significant to an analysis of the company and will be elaborated on further in this dissertation. On the other hand juristic persons are defined as '…social entities, in other words, associations of people, who according to the law have an independent right of existence.'[73]

According to Boberg '[t]he importance of being a person in the eyes of the law, both public and private, lies in the fact that only a person can have rights and duties. This is the essential characteristic that distinguishes a person from a thing.'[74] The consequence of legal subjectivity is being able to engage in legal intercourse with other legal subjects. Jordaan & Davel use the term legal personality to distinguish the legal subjectivity of a juristic person from that of a natural person.[75] I will apply this convention in this dissertation.

A human being is granted legal subjectivity once they are born alive and able to live independently once separated from their biological mother and carries this till death; while this status may be diminished through declaration of prodigality or insanity it remains an entitlement to an infant that is recognised as a human being till death.[76] As such, theoretically every human being posses legal personality and while that

[70] Boberg *Law of Persons and The Family* 2 ed (1999) 4-5.
[71] Jordaan & Davel (note 69 above) 3.
[72] Ibid 4.
[73] Ibid.
[74] Boberg (note 70 above) 3.
[75] Jordaan & Davel (note 69 above) 5.
[76] Ibid 12.

personality may be diminished, for example through declaration of insanity or prodigality, it cannot be denied in entirety.[77]

The company on the other hand, is granted legal personality upon complying with prescribed formalities.[78] Historically this could occur in three ways. The first was by charter of the sovereign. The second was by legislation or, in other words, charter of the legislature. Finally, there was incorporation by registration or registration following processes legislatively recognised as means of conferring legal personality on a company. [79] In the words of Boberg '[t]he law is at liberty to confer legal personality upon any entity that it sees fit, thereby enabling it to acquire rights and duties on its own account.'[80] Who the law is and what conditions are required for it to see it fit to grant legal personality is not elaborated upon.

Distinct legal personality encompasses legal capacity which can be described as the capacity to enter legal contracts, litigate and hold office.[81] The consequences of this distinct legal personality are the following often described defining characteristics of the company. These are:

a) the ability to own property in its own name (perpetual succession);
b) the ability to sue and be sued in its own name;
c) separation of ownership (members/shareholders) and control (directors) in and of the company; and most significantly
d) limitation of liability of the members/shareholders of the company for the liability or debts incurred by the company.[82]

Both Boberg and Jordaan & Davel posit the explanation for jurist personality being the collectives of natural persons behind the legal construct.[83] While this may provide a descriptive account of the juristic personality it does not explain why the construct exists or what it entails. Having established essentially what a company is we may turn to the question of how this is achieved? What is the nature of legal personality?

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[77] Ibid 7.
[78] Jordaan & Davel (note 69 above) 4.
[79] Hahlo (note 1 above).
[80] Boberg (note 70 above) 4.
[81] Jordaan & Davel (note 69 above) 7-8.
[82] Hahlo (note 1 above), Cassim (note 4 above); Cassim (note 67 above); R.C Williams 'Companies: Part I' in W A Joubert (founding ed) *The Law of South Africa* 4 (1) (1999), para 62.
[83] Boberg (note 70 above) 6; Jordaan & Davel (note 69 above) 6.

The nature of legal personality: theories

'The nature of corporate personality has attracted considerable attention, particularly in the realm of political theory.'[84] The origins of the company as a legal person have been attributed to Roman law.[85] The early 'fictional theory' of legal personality is credited to Pope Innocent IV (who is incidentally also a champion of the 'divine right to conquest') in the context of ecclesiastic corporate bodies being immune to criminal or civil sanction on account of having no body to be punished nor any will to be condemned.[86] It is from this that the theory of the corporation as an immortal fictional person is said to have arisen.[87] The recognition of this fiction was later developed, as the concept of the nation state rose to prominence, into the theory that the state alone that could grant recognition of the personhood.[88] This came to be known as the 'concession theory' on the basis that the recognition of capacity of the juristic person was a concession by the state as the presiding authority over social relations.[89] This it is argued, was done in an attempt to entrench power and simultaneously exercise that power to prevent the collective power of ecclesiastical and business groupings from encroaching on the power of the state by limiting the possibility of these groupings becoming more influential and more powerful than the state.[90]

Alternatively, the 'will theory' suggests an interpretation of 'fictional person' as nuancedly distinct from an 'artificial person'.[91] In terms of this 'artificial person' makes recourse the 'concession theory' to hold that the juristic person is artificially constructed by and given content through legal recognition.[92] Whereas 'fictional person' suggests that a fictional being comes into 'existence' in the formation of a juristic person. [93] The 'will theory' as classically suggested by Michoud presents the

[84] Williams (note 82 above) para 63.
[85] John Dewey 'The historic background of corporate legal personality' (1926) 35(6) *The Yale Law Journal* 655, 656; Maitland 'Moral personality and legal personality' (1905) 6(2) *Journal of the Society of Comparative Legislation* 192, 195; Sigmund Timberg 'Corporate fictions: logical, social and international implications' (1946) 46(4) *Columbia Law Review* 533, 540; Hahlo (note 1 above).
[86] Ibid.
[87] Dewey (note 85 above) 666-9.
[88] Ibid.
[89] Ibid.
[90] Ibid 667.
[91] Ibid 670-3.
[92] Ibid.
[93] Ibid.

collective volitions of the members or shareholders (particularly the majority thereof) as culminating into the distinct volition of the company that takes on a character and volition of its own.[94]

In a similar vein, the 'group personality theory' relies on Maitland's conception of the company as being an combination of groups of people collecting to pursue specific interests which culminate in an intellectual being having an actual rather than fictitious personality.[95] This has also been described as the 'organic' or 'realist theory' in terms of which the company is seen as an organic being capable of formulating a will and executing action and potentially influencing the individuals that compose it.[96] An alternative take, borrowed from the Savigny's conception of the state, is that a company functions as distributive rather than collective.[97] This is particularly in the context of the contestations for power within the various collectives pursuing at times contrary interests. [98] As such, the company displays its own will and is consisted of the various groupings within it but is essentially psychically distinct from each of the groupings.[99]

The 'representative theory' centres on the separation of ownership and control, in terms of which collective ownership is represented in shareholding/stake holding.[100] The shareholders'/members' rights are invisible and their individuality is irrelevant. They operate within a nexus of association.[101] This theory requires accepting either that rights are held by a non-existent (unreal) entity or that the collection of rights lose the properties of each individual right and are aggregated into the will of the majority.[102] This would have the effect of excluding minority or dissenting shareholders/stakeholders from the 'nexus of association'.[103] In terms of this theory, technically minorities should not be entitled to interfere with the will of the majority –

[94] Ibid.
[95] Maitland (note 85 above) 200; see also Dewey attributing this theory to Maitland in Dewey (note 85 above) 670-3.
[96] Williams (note 82 above).
[97] Dewey (note 85 above) 670.
[98] Ibid.
[99] Ibid.
[100] George F Deiser 'The juristic person II' (1909) 57(4) *University of Pennsylvania Law Review and American Law Register* 216, 228-9.
[101] Ibid.
[102]Ibid.
[103] Ibid.

but this is not the case as justiciable minority shareholder/stakeholder protections are granted in several jurisdictions.[104] The representative theory proves contradictory in that the legitimacy of juristic personality is founded in the representation of constituent rights-bearing individuals acting collectively however when acting in association that individual necessarily loses individuality as rights attach to the share/stake.

A solution to this tension appears in the idea of collective holding of rights contained in Deiser's suggestion that property ownership can either be individual or collective. [105] Therefore, the juristic person is symbolic and merely serves as an administrative device for collective property ownership.[106] Interests in the property are not distinct but exist for the purpose of common benefit.[107] This recognises that the ultimate rights holders and beneficiaries of the juristic person are always natural persons.[108] Rights existing only in abstraction and never engaging in the real world of natural persons have no content. [109] As such, the rights attributed to the juristic persons belong to natural persons who constitute it albeit in different capacities than would be the case if those rights were directly held.[110]

The binary of juristic and natural persons originally departed from the premise that natural persons have inviolable rights by virtue of being human.[111] However this practical distinction was eroded over time as juristic persons were granted rights by virtue of interpretation of what it meant to be 'persons' for legal purposes endowed with the authority to act as a natural person to the extent 'possible'.[112] This resulted in a gradual movement of the recognition of juristic persons as merely artificial entities representing collective persons to persons in the 'equal' sense as natural persons has generated 'immortal persons'.[113] Furthermore, as the concept of distinct

[104] Ibid.
[105] Ibid 229-233.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Dewey (note 85 above) 669.
[112] Ibid.
[113] Chomsky (note 61 above) 97.

personality grew, specificity about purpose stated in the charter or memorandum of incorporation became less determinative.[114]

Dewey suggests that the aim of theories of juristic personality is to make sense of the recognition of an entity through which natural persons can act with limited liability for the consequences of their actions. [115] This is in the context of an 'individualistic age' concerned primarily with the right to private property.[116] The fiction is employed as a way of deflecting accountability from the natural person towards the concept of a fiction the company enabling natural persons to benefit while simultaneously being shielding from reproach. In this way 'person' may come to represent any content that the law attributes to it including being a 'right-and-duty bearing unit' as classically described by Maitland.[117]

On the other hand, Deiser suggests that the theory of juristic personality exists to establish a conceptual foundation for understanding and solving corporate problems and not '…to furnish the doctors of jurisprudence with a cadaver that might serve for dissecting purposes'.[118] As such, the nature of juristic personality is important only to the extent that it determines the parameters of the rights and obligations of the juristic person. The fiction generated around collective activity and the recognition of legal personality creates the illusion of a robust concept in the law. This is however misleading as the content of the fiction is dependent on the intricacies of the jurisdictions within which the fiction applies.[119] The absence of acknowledgement of this fact, however, results in the elasticity of the concept being used to mean what is beneficial for those who employ the fiction at a given place and time. Ultimately ''[p]erson' signifies what the law makes it signify.'[120] In the same vein, in the South African context, Williams submits that the 'truth' is that legal personality is necessarily a creation of the law, suggesting that'[s]ince the existence of legal

[114] Ibid.
[115] Dewey (at note 85 above) 673.
[116] Ibid.
[117] Dewey (note 85 above) 673; Maitland (note 85 above) 193.
[118] George F Deiser 'The juristic person III' (1909) 57(5) *University of Pennsylvania Law Review and American Law Register* 300, 305.
[119] Ibid 308.
[120]Dewey (note 85 above) 655.

personality entails the existence of right (the creation of a right and the creation of a subject are only two aspects of the same process.)'[121]

Reading Dewey and Deiser's suggestions together, we may conclude that the relevance of the nature of juristic personality can be situated in the purpose that the construction enables. Fundamentally whether the fictional theory, which the of *Dadoo Ltd and Others Appellants v Krugersdorp Municipal Council Respondents*[122]*,* discussed in Chapter II of this dissertation, has shown to have taken precedence in our law in close association with the concession theory, or collective rights theory is seen as the basis for existence of legal personality a common thread can be drawn.

This thread is the ownership of property for the end benefit of natural persons that are invested in the company with no correlate risk in that property or the activities associated therewith. In the words of Deiser: 'There are no persons but human beings…There are not two categories of persons. The law governs natural persons for freedom and benefit. What a legislator finds before him is men individuals, citizens, either isolated or in groups, and, when his law is unjust, it is no imaginary person that suffers.'[123]

Not surprisingly, the consequence of the limitation of liability of the natural persons who are invested in the juristic person, is the displacement of liability that would ordinarily rest in those persons were they to carry on business in their own name. This displaced liability is theoretically situated in this distinct juristic person. However, as this is a fictional person, the extent of its liability is limited against the assets it holds. The complexities of the interrelations between natural persons and any moral character of the potential impact of activities of the juristic person are in essence lost.

The case of *Salomon v Salomon & Co Ltd* set the tone for the bounds of the distinct character of the company and the concomitant scope of the limited liability of its incorporators, shareholders and/or directors.[124] In this case a shoe maker, Salomon, incorporated a company in which he was the sole director and he and six family

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[121] Williams (note 82 above).
[122] *Dadoo Ltd and Others Appellants v Krugersdorp Municipal Council Respondents 1920 AD 530*, 535-6 (hereafter '*Dadoo Ltd*').
[123] Ibid.
[124] *Salomon v Salomon & Co Ltd* [1896] UKHL 1, 35 and 57(*Salomon*).

members including children were shareholders.[125] The company was duly incorporated in terms of the companies act in force at the time and Salomon had fully paid up his shares as well as secured debentures when the company was first incorporated and in good financial standing.[126] When the company fell on hard times Salomon sought to cash his debentures as a preferential creditor, leaving the unsecured creditors with nothing, a move which the other unsecured creditors sought to litigate against on the basis that the company was a front of Salomon himself.[127] On this basis, the other creditors argued that Salomon should be personally liable for the debts of Salomon Ltd as the company served as front for him to enjoy limited liability.[128] The Court held that since the company was duly incorporated and no fraud was committed that the distinct legal personality ought to be respected and as such no claim could be made against Salomon in his personal capacity and no issue could be taken with him cashing in his debentures in Salomon Ltd.[129]

Consequently, there are very limited instances where the veil between the juristic person and its shareholders/members will be pierced (this will be further discussed in Chapter IV in relation to the Constitution, 1996).[130] This is necessarily so, as we have established that limitation of liability is a fundament of the construct of the juristic person.[131] The lack of accountability is exacerbated by the fact that a juristic person may comprise of members or shareholders that are numerous and disparate in space and time – and who may themselves be juristic persons. It becomes difficult to deconstruct the fragments of natural personality that constitute the juristic personality in order to secure accountability and limit harm.[132] This may be conceded to as part of the objectives of the fiction but, must be recognised as problematic in the context of the facilitation of subversion of duties that natural persons have in relation to each other.

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[125] Ibid 23-4.
[126] Ibid 24-5.
[127] Ibid 26.
[128] Ibid 26.
[129] Ibid 57.
[130] Deiser (note 100 above) 220.
[131] Ibid.
[132] Ibid.

The problem with the elasticity of the theories of juristic personality is that, due simply to a legal construct, juristic personality conveniently facilitates the pursuit of individualist interests without the burden of concomitant liability.[133] Recognising the sustaining notion of the company as a 'construct' may not provide universal content but is useful in confronting the reality that corporate personality is what the law allows it to be and as such the law is empowered, if not compelled, to dictate the parameters of action and the means of attaching accountability thereto.

In confronting the elasticity of the concept of the fiction or construct of the juristic person, which veils the natural persons that animate it, it is necessary to recognise that '[a] corporation cannot be for one purpose, so many men, for another purpose a person, and for another purpose a fiction.'[134] I submit that Deiser's conclusion that central to the nature of the juristic person is the matter of property ought to be accepted.[135] As such, the proposition that juristic persons are conduits for collective property holding becomes compelling. Nonetheless, the theories of legal personality do not conclusively answer the question of why it is that the company a distinct legal person?

Distinguishing the anatomy of the company from the purpose of granting it legal personality

When the question of what the purpose of a company is arises the following responses tend to be prevalent:

> *Companies play a very important part in the world economy and also in South Africa.*[136]
>
> *Companies play a vital role in wealth creation and social renewal. It no longer needs to be emphasised that a good corporate law system lies at the very foundation of a prosperous economy.*[137]

[133] Dewey (note 85 above) 668.
[134] George F Deiser 'The juristic person I' (1908) 57(3) *University of Pennsylvania Law Review and American Law Register* 131,135.
[135] Deiser (note 118 above) 305.
[136] Hahlo (note 1 above) 3.
[137] Cassim (note 67 above) 3.

> *It has only recently been widely acknowledged that company formation is good for the economy. Company formation stimulates commercial activity and the development of the economy. It also facilitates access to capital.*[138]
>
> *Because they enjoy the privilege of limited liability, business people are able to limit the risk of investing funds into a business venture. Thus the concept of limited liability encourages the growth and expansion of companies, which is of crucial importance to the economy because successful companies generate wealth and employment.*[139]
>
> *Company law provides the legal basis for one of the most important institutions organising and galvanising the economy, namely, corporate business entities. Corporations in various forms, are central to a country's economy and its prosperity - for wealth creation and social renewal.*[140]

Accordingly, it has been widely submitted that the idea of the company was designed to provide for the consolidation of capital from various sources to support the entrepreneurial ventures of individuals or groups of individuals.[141] The incentive of the shareholders to invest was presumably the limitation of risk to the extent of the initial investment (notwithstanding what liabilities may be engendered by those charged with growing the investment) and the additional potential for growth.

The notion that 'the business of business is business' has been credited to economist Milton Freedman and justifies the proposition that the purpose of a company is to maximise profit.[142] This had the effect of delegitimising activities of the company outside of making money or related to spending that were not specifically geared towards making more money. The shareholder value doctrine (advocating for the primacy of shareholder interests) achieved the status of conventional wisdom

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[138] Cassim (note 67 above) 8.
[139] Cassim (note 4 above) 35.
[140] *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* GN 1183 of 23 June 2004, 9 (South African Company Law Guidelines).
[141] Judith Katzew 'Crossing the Divide between the Business of the Corporation and the Imperatives of Human Rights – The Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *SALJ* 686, 694.
[142] Douglas G Baird & M Todd Henderson 'Other people's money' (2008) 60(1) *Stanford Law Review* 1309,1323-4; Milton Friedman *Capitalism and Freedom* (1962) 112; Hahlo (note 1 above) 4.

and dictates the approach of corporations in several jurisdictions.[143] This exonerates the company's obligations as the interests of the legal person are presented as exclusively profit maximisation.[144] The furtherance of these interests have been widely regarded as being subject only to the rules of the game being the operation of the free market and prohibition of deliberate acts designed to circumvent the functioning of the free market.[145] The company has therefore provided a vehicle for the avoidance of liability of investors and entrepreneurs that it seeks to invite with the prospect of gain relative to diluted or even nominal risk.[146]

While this profit seeking motive combined with the limited exposure to risk has been used to explain the granting of legal personality, I submit that this explanation tends towards a description of what legal personality enables rather than an explanation as to why it has been conferred to a company. To elaborate on this point, I turn to consider the matter of legal personality conferring limited liability more closely. Cassim describes limited liability as the 'characteristic at the core of company law.'[147] In terms of this principle, the company as a legal person is liable for its own debts. This means that the extent of liability of shareholders is limited to their investment in the company in order to acquire shareholding.[148] This is regardless of the extent of dividends drawn from the company. In other words, it's possible that limited liability translates to no liability considering that dividends may yield more than the initial investment and if the company becomes bankrupt the assets of the shareholders are safe as it is the company that is liable for its own debts.

It has been long held that the interests of the company are the interests of the shareholders.[149] Notwithstanding this, the interests of other stakeholders such as creditors, employees, and affected communities may be regarded as relevant to the interests of enlightened shareholders to the extent that the goodwill of the company is an asset that can be impacted by these other stakeholders. This has become

[143] Steve Denning 'The origin of 'the world's dumbest idea': Milton Freedman' http://www.forbes.com/forbes/welcome/?toURL=http://www.forbes.com/sites/stevedenning/2013/06/26/the-origin-of-the-worlds-dumbest-idea-milton-friedman/&refURL=https://www.google.co.za/&referrer=https://www.google.co.za/.
[144] Ibid.
[145] Friedman (note 142 above); Hahlo (note 1 above) 4.
[146] Bilchitz (note 2 above) 756.
[147] Cassim (note 4 above) 30.
[148] Ibid.
[149] Cassim (note 67 above) 20.

known as the enlightened shareholder value approach[150] Nonetheless the prevailing position is that the interests of the shareholders as a collective, that is the interest of profit maximisation, takes precedent over other competing interests.

As mentioned above, the origin of legal personality of the company is attributed to the Roman Law distinction between *corpus* (body) and *universitas* (corporate body).[151] This allowed recognition of the personhood of a collective while simultaneously veiling members of that collective from any personal liability that may attach to their individual actions conducted in the name of that collective. This recognition was granted in the context of the Papal Empire where power was purportedly derived from spiritual over temporal authority.[152] This authority was ostensibly exercised in the name of Christianity.[153] At a time when the problem of nature of the person was receiving increasing attention Thomas Aquinas recognised rationality, individuality and substance as definitional elements of legal personality. [154] By doing this, he crystallised the concept of the anthropomorphic fictitious legal person.

Notwithstanding the credit given to the fictional theory, not many corporate bodies were commercial at the time. The institution was created to allow perpetual succession of religious office and the property that attached to such office.[155] It appears that shifting dynamics of the source of power of the sovereign and the seat of authority of the sovereign impacted the concept of legal personality. As the nation state arose, so too did the tendency to centralise authority in response to the perceived threat that disparate religious organisations posed to the sovereign authority of the state.[156]

This arguably made recourse to the concession theory of legal personality. According to this theory, legal personality was a construct granted as a concession of power by the state. As reported by Maitland it was granted initially as a ‘gift’ or

[150] Ibid.
[151] Dewey (note 85 above) 655.
[152] Ibid.
[153] Ibid.
[154] Ibid.
[155] Edward Cavanagh ‘Corporations and Business Associations from the Commercial Revolution to the Age of Discovery: Trade, Jurisdiction and State, 1200-1600’ (2016) 14(10) *History Compass* 493, 495.
[156] Dewey (note 85 above) 656.

'privilege' by the sovereign.[157] As such, the authority of state to rule by law was utilised to legitimate certain collectives and criminalise others. Only companies with state sanctioned charters were authorised to conduct operations as a collective and enjoyed shielding from liability. This served as a control over group action that may have grown to compete with and possibly threaten the hegemony of the state's power over individuals.[158] This threat was neutralised by making any collectives that were not expressly authorised by the state illegal. The similarity between the concept of the company and the state in its enjoyment of legal personality is significant.[159]

From these accounts we may note that the recognition of legal personality granted by the prevailing authority served two fundamental purposes. The first was to legitimise the exercise of the power of the collective in the name of the prevailing authority. The second was to grant the members of the collective immunity from personal liability for the consequences of their actions in the name of the collective. In this way, the privilege of legal personality provided a shield of authority impermeable to liability but permeable to gain.

This position is distinguishable from that of collectives that may have acted in a similar fashion to the company. That is, acting as a collective with common purpose or towards a common goal. This distinction is explicit in the differences between the fundamental principles attaching to the partnership and the company. According to

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[157] Maitland (note 85 above) 197.

[158] Ibid.

[159] Hahlo (note 1 above) 4; Hahlo describes the relationship between companies and states as follows,

> *[i]n wealth, power and organisation today's great companies are states within the State. Their policies can make or mar fortunes of cities, provinces and whole nations. The relationship between the state and large companies is a complex one. The State depends on its companies for revenue, supplies and employment, but objects if one of its key companies proposes to pursue policy considered to be incompatible with national interest. The leading companies resent government interference but look to the government for contracts, licenses and supportive legislation. If threatened with financial catastrophe they expect the government to bail them out. In a power contest between the state and the company, the state invariably wins. In the last resort, though, the State and its companies are linked in a symbiotic relationship. They prosper or suffer together.*

The assumption that the State wins may be overly simplistic given the relative weakness of some nation states to large multinational corporations. The symbiotic relationship takes for granted a liberal capitalist paradigm which contributes towards the deregulation that seeks to attract foreign investment with view to encouraging economic growth notwithstanding the exploitation that that deregulation may open the country up to.

Ireland, the company remained the exception, granted as a privilege rather than a legal entitlement from the close of the 18th century to the early 19th century.[160]

During this time frame, the partnership was regarded as the norm for mobilisation of resources towards the generation and expansion of wealth. In other words, a social institution other than the company was capable of being responsible for the benefits of collective effort and trade. However, it was expected that all partners would be participants in the activities of the partnership and that accountability was an inextricable element to this risk and reward that the partnership was exposed to. In other words, even if a partner only contributed money or resources to the partnership and was not involved in the activities of the partnership such partner would remain jointly and severally liable for the debts of the partnership.[161] The opposite was the company in its enjoyment of distinct legal personality.

The theory that the company was an exception rather than an organic development facilitative of capitalism may be supported with reference to Adam Smith's explicit reservations about the company. He expressed that the joint stock company is in fact averse to the fundamental aspiration of capitalism being efficiency.[162] He characterised the design of the company as essentially one that enables rent-seeking by shareholders, who need do nothing but invest money, and opportunism by directors, who are paid for managing investors' money with a view to simply making more money.

Rent-seeking occurs when owners of capital gain disproportionality by simply being in control without adding value or creating meaningful growth or development. This is essentially parasitic behaviour that does not advance society economically but rather gains from having accumulated wealth in the past.[163] It can therefore be deduced that the justification for the recognition of legal personality of the company is not for economic efficiency purposes. In terms of this,

> *… the focus of rents relates to the private capture of value from assets such as natural resources that should accrue to society as a whole, but the term*

[160] Paddy Ireland 'Limited liability, shareholder rights and the problem of corporate irresponsibility' (2010) 34 *Cambridge Journal of Economics* 837, 839.
[161] Ibid 840.
[162] Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations (*1976) 573-4.
[163] Ibid 586-7; Ireland (note160 above) 480-1.

> *"rents" has come to apply to any context in which a benefit is secured for less than its real value with rent-seeking behaviour focused on the attempt to do just this, usually using forms of political leverage or monopoly power…Where there is scope to capture rents – to secure benefits for less than their value or secure preferential market advantage – this incentivizes a focus on such capture rather than on productive investment or innovation, with potentially negative impacts on economic development…*[164]

The concern that the design of the company facilitates rent-seeking behaviour and therefore economic inefficiency is exacerbated by the problems around the limitation of liability. Theoretically liability of shareholders and directors of a company is limited because the liability vests in the company. However, the company is at best no more than the sum of its assets. Furthermore, defining the actions of the company for the purposes of framing its conduct for the purposes of establishing liability is not a straightforward task. This is further complicated by the reality that separate legal personality means that holding companies are distinct from their subsidiaries. A vast matrix of actors and beneficiaries, possibly across territories and jurisdictions, is created thus potentially making the identification of actors practically impossible.[165] This is not essentially unexpected considering that a fundamental of the company is limited liability. The practical reality is however, that liability cannot be limited in the abstract and is inevitably displaced onto something or someone else.

If it is the case that there is no fundamental economic efficiency justification for the company and that the company was not an organic consequence of the operation of trade globally, it begs the question of what the basis for the granting of legal personality was and continues to be?

Since the source of authority for the granting of legal personality was the incumbent sovereign that sovereign would authorises the doctrine of fiction or the concession theory.[166] As such, it may be submitted that the decision to grant the company legal personality was in fact a political one on the allocation and regulation of power. On reflecting upon GW Paton's contention that the theory of legal personality has played

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[164] United Nations Development Project (note 66 above) 15-6.
[165] Jeroen Veldman & Martin Parker 'Spectres, Inc: The elusive basis of the corporation' (2012) 117(4) *Business and Society Review* 413, 416.
[166] Otto Gierke *Political Theories of the Middle Age* (1900) 68.

a limited role malleable to the 'economic and social desires' of those who draw upon them Hahlo ventures, '[s]uffice to say that a juristic person is a reality from a juristic point of view, although the exact definition and explanation of its legal nature may be illusive.'[167]

Having ventured to define the parameters of the company as a concept it has become evident that descriptive accounts of the company that elaborate on the identifiable characteristics of a company tend to be more prevalent than explanatory accounts. In addition to this, theories of legal personalities postured to explaining the nature of the company as a legal person tend not to give much more content than to concede that the company is essentially what the authority in charge of recognising the company allows and furthermore desires it to be.

The recognition of the fluidity of the nature of the company allows for awareness of when the anatomy of the company, in other words what a company looks like or what it can do, does not amount to an explanation of how it is that it achieves what it can do nor why it is that it should be entitled to. In other words, the question of why it is the company is allowed to be constructed and why it is desirable that the construct exists is not explained by the theories of legal personality. To seek an answer to this question, I return to the enabling force behind the recognition of the legal personality of the company being the power of the authority that grants it recognition. As such, where and how the company fits into the global system of power will be considered next.

[167] GW Paton *A Textbook of Jurisprudence* 4 ed (1972) 409 in Hahlo (note 1 above) 9.

III THE TAXONOMY OF POWER: THE POLITICAL ECONOMY OF THE COMPANY

The nature of the company may appear to be a banal theoretical debate, however upon reconsideration of systemic power wielded by companies over individual lives historically and in the present the matter of what the purpose of the company is and its legitimacy is a relevant one. Companies are involved in virtually every feature of human life, from the sourcing and distribution of basic resources such as food and water; to features of protection and leisure such as housing, clothing and music; to health and wellbeing from medicine to fitness equipment; to the employment upon which the access of several human beings to participation in the economy through which the these and other goods and services are made accessible to us depend.[168] Given the fact the company is not necessarily the fundamental instrument of economic development that it is presented as, but that it is, to the contrary, inconsistent with some of the basic tenants of fee market economics such as efficiency closer consideration of its nature is warranted.

Before venturing into that consideration it is worth observing that the preceding Chapter has made several assumptions. I submit that the tendency to make these assumptions do not arise inadvertently, but rather are a result of a phenomenon that can be situated in the Eurocentric paradigm of law. That is to say, why there is a concept of the company with essential characteristics that exists in the law and operates as an ambiguous fiction or construct having originated in the West but having application across the globe has real historical context with legal, economic and political dimensions that ultimately account for and simultaneously influence to relations between persons.

This historical context explains why in the 21st Century I can be analysing the company as a concept with heavy reliance on USA, United Kingdom and Roman Dutch law and still be referring to a construct in full force in the South Africa and in the rest of the continent of Africa with no qualifications or comment on social, cultural or other situated factor of relevance or significance. That historical context is

[168]Paul O' Connell 'Brave new world?: Human rights in the era of globalisation' in Baderin & S. Senyonjo (eds) *International Human Rights Law: 60 Years after UDHR* (2010) 195, 202.

colonisation. Theoretically this ended in the 20th Century.[169] Notwithstanding this, in the 21st Century has there been ground-breaking local or continental or even 'global South' development in the concept of the company that interrogates the legitimacy of the fundamental characteristic of legal personality? In other words, has there been any discourse that begins before the default assumption that the company as a concept is a permanent and legitimate fixture of the legal landscape notwithstanding the inability to sustain an explanation for it? It appears that the answer would be no at least to any sort of intervention that might have reached mainstream legal discourse locally or internationally. This may be evidenced by the point of departure in interrogation of the company in varying contexts being the assumed legitimacy of it as a concept.[170]For why it is that this is the case, I turn to seek elucidation with recourse to the theory of the coloniality of power.

The coloniality of power and personhood

Colonialism has been described as the '…conquest of national territory and the oppression of people…' and 'the organization of the domination of a nation…' by another political authority.[171] Moreover it has been described as, 'subjugation at the methodological level'.[172] The multiple dimensions of colonisation have made the matter of decolonisation more complicated than simply the political liberation of a national territory and people from colonial administration.[173] This has become evident from the systemic operation and impact of colonialism in shaping a colonial order of power through the continuation of European colonialism in social organisation and knowledge systems.[174] This refers to the 'coloniality of power' as

[169] Ramón Grosfoguel 'A decolonial approach to political economy: Transmodernity, border thinking and global coloniality' (2009) 6 *Kult* 10, 21.
[170] Cassim (note 4 above); Hahlo (note 1 above); Bilchitz (note 2 above) 769; Katzew (note 141 above); Tshepo Mongalo 'South Africanizing company law for a modern, competitive global economy' (2004) 121 *SALJ* 93, 98-89; Bilchitz (note 2 above) 754; George (note 2 above).
[171] Frantz Fanon *Toward the African Revolution* (1967) 81 and 83.
[172] Lewis R Gordon 'Through the hellish zone of nonbeing: Thinking through Fanon, disaster, and the damned of the earth' (2007) 5(12) *Human Architecture: Journal of the Sociology of Self-knowledge* 5, 8.
[173] Grosfoguel (note 169 above) 21-2.
[174] Enrique Dussel *Philosophy of Liberation* (1985) 14-15; Quijano (note 62 above) 543; Walter D Mignolo 'The geopolitics of knowledge and the colonial difference' (2002) 101(1) *The South Atlantic Quarterly* 57, 60-2; Ramón Grosfoguel 'What is racism?' (2016) 22(1) *Journal of World-Systems Research* 9,10.

the division of labour, accumulation of capital and distribution of resources in accordance with an entrenched colonial epistemic and ontological paradigm.[175]

Modernity has been described as the other side of the coin of coloniality.[176] Acknowledging the 'myth-of modernity' exposes the presentation of the West as the harbinger of progress and development as a perverse justification for and subscription to the 'civilising mission' of the West and its related purported superiority.[177] This critique of modernity and the linear conception of history debunks the myth that colonisation ushered in a global era of progress by instating superior social and political institutions that are neutral of the interests of colonizers but laden with the potential for civilisation and progress.[178]

As such, colonialism can be perceived as an ongoing project that orders social identities and relations, as well as control and distribution of resources globally.[179] This entails that colonialism extends beyond the material control of land and labour into non-material dimensions of social existence. In keeping with this it has been submitted that the signifiers of white and black; man and woman are both necessarily created and maintained by colonialism.[180] This process of social ordering of power has been argued to pre-date European colonialism in the operation of intra-European colonisation thus emphasising the importance of recognising and interrogating the dynamics of power underlying the superficial contestations of categorisation.[181]

In order to unpack this understanding of the systemic operation of the coloniality of power in the ordering of social relations, I begin with a central pillar of this world system being the domain of the political economy.[182] The system of global capitalism may be historically contextualised as the product of rivalry between European colonizers.[183] In the words of Grosfoguel,

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[175] Quijano (note 62 above) 572.
[176] Mignolo (note 6 above).
[177] Ibid.
[178] McClintock (note 61 above) 10; and Modiri (note 65 above) at 225.
[179] Quijano (note 62 above) 557.
[180] McClintock (note 61 above) 10.
[181] Cedric J Robinson *Black Marxism: The Making of the Black Radical Tradition* (1983) 15-18.
[182] Mignolo (note 174 above) 49.
[183] Grosfoguel (note 169 above) 17.

> *…the capitalist-world-system would be primarily an economic system that determines the behaviour of the major social actors through the logic of making profits as manifested in the extraction of surplus value and the ceaseless accumulation of capital on a world scale. Moreover the concept of capitalism implied in this perspective privileges economic relations over other social relations.* [184]

The privileging of the ideology of capitalism as a means of social relation can be further contextualised in the normalising process of Western philosophy. Western philosophy has claimed objectivity by concealing the subject that produces it. In so doing, knowledge is presented as the universal truth rendering any knowledge in contradiction of it at best subjective/particular or totally false. By doing this an 'epistemic location' is created that subsumes the geo-political and 'social location' of the subject such that even those socially oppressed are compelled inadvertently to adopt a Western epistemic location.[185] This potentially explains how in Chapter I, I can be epistemically located in what is essentially Western corporate jurisprudence notwithstanding the presentation of that content as universally applicable regardless of my social and geo-political location.

The shift from spiritual to secular authority in the Middle Ages essentially shifted the status and authority of 'God' onto the Western man.[186] The Eurocentric conception of the human was based on the distinction between the physical body and reason which originates from the soul. The white man was conceived of as the possessor of reason and this served as point of distinction that justified his dominium over beings that were perceived to possess lower capabilities of reason and non-beings perceived as being incapable of reason that were reducible to mere bodies.[187] This colonial order of power operates on various signifiers that distinguish the 'superior' colonizing subject from the 'inferior' colonized object. At its core however, it has been

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[184] Ibid 14.
[185] Ibid.
[186] Grosfoguel (note 169 above) 15.
[187] Frantz Fanon *The Wretched of the Earth* (1963) at 54-5; Quijano (note 62 above) 555; Sylvia Wynter 'Unsettling the coloniality of being/power/truth/freedom' (2003) 3(3) *The New Centennial Review* 257, 305.

argued that there are two central signifiers to European colonization. These are race[188] and gender[189].

Put differently, racial classification and gendered ordering was strategic in justifying and executing colonisation. According to the colonizers' Eurocentric conception of being, the body was the object of reason and only the possessor of reason was entitled to subjectivity. The distinction between body and reason (stemming from the idea of a metaphysical soul) facilitated the theorisation of racial hierarchy ranging from the reasoned body of the white man to the mere body of the black woman. This allowed for the viewing of the bodies classified as certain races as mere objects thus inherently inferior to reasoned subjects.[190]

Fanon exposes the Hegelian 'I' and 'other' that animated by the colonizers' Eurocentric (and concomitantly racist and patriarchal) conception of the human self.[191] As such, it has been contended that in this scheme there is no black other as the black is conceived of as an object while the other remains a human subject despite otherness. [192] He thus presented blackness as state of non-existence as a human.[193] This has been termed as the 'zone of non-being' as converse to the 'zone of being' as in being human.[194] Persons in the zone of being are recognised socially as human beings and thus reap the fruits of humanity including rights and access to resources.[195] The sub-human or non-human exists in a zone of contested humanity or negation.[196] The zone of non-being is characterised by violence and inconsequentiality where social practices and convention normalised arbitrary death and status as non-human.

The signifiers of race and gender operate like axis that divides the inhabitants of the world into human subjects and non-human objects. [197] In other words, the coloniality of power can be understood as a taxonomic representation of Fanon's conception of

[188] Grosfoguel (note 174 above) 10.
[189] María Lugones 'The coloniality of gender' (2008) *Worlds & Knowledges Otherwise* 1, 2.
[190] Quijano (note 62 above) 555.
[191] Fanon F *Black skin, white masks* (1967) 82.
[192] Gordon (note 172 above) 11.
[193] Grosfoguel (note 174 above) 12.
[194] Gordon (note 172 above) 10.
[195] Ibid 8.
[196] Fanon (note 191).
[197] Grosfoguel (note 174 above) 13.

the zones of being and non-being.[198] The categorisation of subjects and objects along these signifiers is used to justify subordination and oppression in varying manners and to varying degrees.

Within this taxonomy, race has been referred to as the 'primary contradiction' by virtue of being the primary signifier for the organisation of relations along the central axis of human and non-human.[199] In considering the coloniality of the company, it is important to consider gender in a manner that adequately accounts for the power dynamics engendered by this signifier and its relationship to and within race. This is not meant to dilute the contention of race being a fundamental signifier in the conception of the system of power relations.[200] This is however meant to employ the same reasoning behind the recognition that race is simultaneously a construct and a material experiential reality.[201] The ontological creation of the gendered subject is often overlooked.[202]

Nonetheless the point of reference being race is justified on the basis of the understanding of race as the dividing line between the zones of being. This comprehends relations such as class, sexual orientation and gender operate as factors within the zones which therefore manifest as oppression that are experienced differently in the zone of being than in the zone of non-being. According to Grosfoguel's taxonomy, therefore, racism is structural hierarchy related to dichotomy between being and non-being that determines the recognition of humanity. The racist violence of dispossession in colonialism is thereby ostensibly justified as it is conceived of as the dispossession of objects or non-human that would ostensibly otherwise be unjustifiable as against human beings.[203]

To this end, essentially the colonial ordering of subjects and objects places black people in a zone of non-being primarily by denying them human status. 'Women'

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[198] Ibid.
[199] Charles W Mills *From Class to Race: Essays in White Marxism and Black Radicalism* (2003)155-6.
[200] Ibid 167; and Quijano (note 62 above) 555; Helen Bradford 'Women, gender and colonialism: Rethinking the history of the British Cape Colony and its frontier zones, c. 1806-70' (1996) 37 *Journal of African History* 351*,* 368.
[201] Sylvia Wynter 'Afterword "Beyond Miranda's Meanings: un/silencing the 'Demonic Ground' of Caliban's Woman"' in Carole Boyce Davies & Elaine Savory Fido (eds) *Out of the Kumbla: Caribbean Women and Literature* (1990) 355, 357-8.
[202] Lugones (note 189 above) 2.
[203] Ibid 14.

operate in various quadrants of the zone of being either as non-human or as human but nonetheless deficient. Race as a signifier is pegged on phenotype and gender is pegged on 'biology'. The use of these signifiers to classify human and sub-human were supported by purportedly scientific characteristics that correspond with phenotypical or biological difference from the ostensibly fully human.[204] At its base therefore the white man occupies the zone of being as a subject with full human status. In contrast to this, the white woman occupies the zone of being but by virtue of being a woman is regarded as deficient and therefore of inferior status. Black persons occupy the zone of non-being as objects rather than subjects. The black woman is regarded as non-human and is deficient even as an object. [205]

If we adopt a more critical conception of gender we may contend that defining the classifier is not an essentialist activity (nor is it meant to be deconstructionist to the point of pithy abstraction). What this suggests is that within the construct of race the construct of gender is inevitably contained.[206] That is – biology or anatomy has been used in gender as much as it has been in race to construct and impose onto a subject an ontological reality.[207] Epistemic and ontological dimensions so deeply ingrained in our subjectivity as to be dismissed as biological in the same breath that race can be seen as a non-biological factor but is given biological in the sense of material significance through a construct.[208] What this elides is the operation of colonization in creating and maintaining the construct and content of gender and imposing upon racialized gendered subjects the attendant social relations and introducing a hierarchy within gender by racializing subjects already gendered.[209] The existence of gender identity in pre-colonial societies itself does not presuppose patriarchy and the attendant privileging of the interests of men over women.[210] Therefore the concept of gender as it currently operates cannot be viewed as entirely independent of the conceptual paradigm imposed by Western colonization.[211]

[204] Grosfoguel (note 174 above) 14.
[205] Lugones (note 189 above) 7.
[206] Ibid.
[207] Ibid 6.
[208] Mills (note 199 above) 168.
[209] Grosfoguel (note 174 above) 20.
[210] Lugones (note 189 above) 10.
[211] Ibid 12.

Grosfoguel presents a definition of racism that accounts for its systemic nature being "… a global hierarchy of superiority and inferiority along the line of the human that have been politically, culturally and economically produced and reproduced for centuries by the institutions of the 'capitalist/patriarchal western-centric/Christian-centric modern/colonial world-system.'"[212] As such, racism by Grosfoguel's definition is primarily but not necessarily reliant on race as a signifier to the extent that it is premised on whichever signifier that deprives the subject of human status. As such colonisation is foundationally racist.

With the significance of legal personhood in mind, in this colonial order of power, I contend that the recognition of legal personality of the company facilitates its occupation of the zone of being. Moreover, that this occupation is instrumental in maintaining black people in the zone of non-being and white women in a quadrant of the zone of being that is deficient. This allows for the continued justification of an exploitative division of labour and distribution of resources. This occupation of the zone of being by the company is facilitated by granting it anthropomorphic characteristics of a person that are implicit in the recognition of legal personality. I turn to analyse some of the general aspects of this argument in order to create the base for an analysis situated in moments of the history of South Africa in Chapter III.

The racial and gender profile of the personhood of the company

In appreciating the significance of the juristic personality of the company we may consider that personhood at the time that the legal personality of the company was first recognised had a particular profile. This is the profile of authority being the white man.[213] It is evident that the first companies were not owned or controlled by women or black people; did not carry on activities aimed at benefiting women or black people; were not sanctioned by the authority of women or black people; and status as a legal person at the time was not attributable to women or black people. The recognition of the legal personality of the company therefore, implies that the company could not be characterised as either a woman or black person. Attribution of personhood meant attribution of the status of the white man. Therefore, within this colonial frame of reference the person that the legal person of the company is

[212] Grosfoguel (note 174 above) 10.
[213] Ibid 15.

equated to is the white man. The company therefore entered system of world power as a colonizer.

With this recognition came an array of legal entitlements that allowed the company to exercise dominance over those perceived as non-humans and deficient humans. It also provided various legal protections to secure personal interests and privileges. Colonizers acted under their own proclaimed authority, in their own interests, and within an epistemic paradigm that regarded them as human and superior to the colonized thereby circularly justifying their acts of conquest and subjugation.[214] Though the motivation behind granting legal personality to a company may be a political decision it is enacted through the law. This is consistent with a reading of the law as an instrument of conquest.[215]

The company as an instrument to sanitize the perpetuation of the coloniality of power

Pivotally the instrument of the company allows for the process of exploitation to be sanitised in the name of profit maximisation. In the words of Stephens,'…the pursuit of profit is, by definition, an amoral goal – not necessarily immoral, but rather morally neutral.'[216] This sanitization can be traced from the moment of moral justification for colonization and imperial commercial endeavours through appeal to religious sensibilities of the divine right of conquest to various configurations appealing to the pseudo-scientific and secular civilising mission of the West.[217]

One theory that was drawn on heavily to justify the rise of the profit-maximisation ethos of the company was the vogue theory of Social Darwinism which drew on the Spencer's concept of the 'survival of the fittest.'[218] In terms of this theory fatal competition in human economics could be justified and the privilege and progression of the wealthy classes could be explained as a function of the prevailing of the

[214] McClintock (note 61 above) 6.
[215] Nunn (note 23 above) 352; Joel M Modiri 'The colour of law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 405,415.
[216] Beth Stephens 'The amorality of profit: Transnational corporations and human rights' (2002) 45 *Berkeley Journal of International Law* 45, 46.
[217] Ibid.
[218] Diane B. Paul 'The Selection of the "Survival of the Fittest"' (1988) 21(3)4 *Journal of the History of Biology* 11, 413.

superior over the inferior in a struggle for survival.[219] This logic prescribed to the notion of humanity progressing on a linear upward incline where those that perished in the process were simply the inevitable casualties of progress.[220]

Conspicuously this social logic was contradictory to the biological logic that the stronger of the species would flourish and that flourishing would be measured by procreation – at a time when the privileged classes were outnumbered by the supposedly inferior classes of human and non-humans. Nonetheless the relationship between social Darwinism and the pseudo-science of eugenics from 18th-19th provided a means to navigate this contradiction through the suggestion that social Darwinism was being reversed by the lack of procreation by the 'superior' privileged classes and races.[221] This distorted logic provided that 'fittest' was synonymous with proclaimed superiority in the image of the Western man (as white or of European origin) and a circular justification of the enjoyment of privilege. This of course operated in a vacuum separated from the state supported colonisation that secured this privilege.

While express recourse to the 'survival of the fittest' to justify the harm to some in the interests of deprivation of others became more contentious, after the Second World War as growing recognition in public imagination and discourse of the notion of basic human rights emerged, this concept remained as a justification of the continued operation of the company.[222] This can be observed in the platitude that free-market capitalism, or even economics as an ambiguous conceptual whole, is a zero-sum game. That is that there are a limited amount of resources and that necessarily the more some people have the less there will be for others to have and vice versa. The competitive nature of the process of acquiring and maintaining these resources would theoretically justify the more competitive, i.e.' superior,' taking a greater share of resources no matter what the cost is to the less competitive or less effective 'inferior'. In accordance with a liberal approach to the free-market all would have equal opportunities to compete and as such the outcome would be just as the 'fittest'

[219] Ibid 413.
[220] John Micklethwait & Adrian Wooldridge *The Company: A Short History of a Revolutionary Idea* (2003) 75.
[221] Paul (note 218 above) 423.
[222] Stephens (note 216 above) 71.

would prevail.[223] This does not entail that everyone will have a piece of the finite pie, but rather that everyone will at least have affair shot at getting a piece of that pie. Necessarily that means that those who starve do so because they were not competitive enough to deserve their piece of the metaphorical pie.

O'Connell reflects on how the nation-states that become ostensibly independent from colonial administration are unconsciously inculcated into this capitalist free-market logic by virtue of prior positioning and participation in the global capitalist system. [224] He submits, '[t]he dominance of global capitalism and its complex suite of neoliberal policies and strategies compelled the newly democratised state to conform to the dictates of the market, which itself produces inequalities.'[225] An institution that has been fundamental to this conformity is that of the company as a distinct legal person. The idea that legal persons in their current form are essential for development and create employment plays into the 'trickle-down effect' notions that have somehow not been deterred by evidence of increasing inequality and the absence of broad based redistribution of wealth globally and in South Africa particularly.[226] Ndlovu & Makoni draw attention to the fact of 'trickle-down thinking' that idealises international investment and job creation simply perpetuates inequalities as indigenous people generally operate as cheap labour dependent on others who own of the means of production.[227] To this end, globalisation can be recognised as a construct informed by specific underpinning ideology as opposed to being an objective and organic consequence of progress.[228]

The fundament of legal personality, being the limited liability of the shareholders of the company, becomes more problematic when cognisance is taken of the fact that the design of the company facilitates rent-seeking behaviour and therefore economic inefficiency.[229] This creates the picture of an '…economic system that facilitates the privatisation of gains in the hands of ever smaller elites while also socialising risks

[223] O' Connell (note 168 above) 207.
[224] Ibid.
[225] Ibid.
[226] Ndlovu & Makoni (note 5 above) 512.
[227] Ibid.
[228] O' Connell (note 168 above) 199.
[229] Smith (note 162 above) 586-7.

(losses)…'[230] This socialising of risk speaks to what becomes of the displaced liability. Limitation of liability operates to limit the potential loss experienced by shareholders to their conscious investment in the company. Furthermore the fact that the company is a distinct entity capable of owning shares in other companies facilitates liability being isolated into specially purposed vehicles for liability that, in complex corporate structures, can be liquidated without impacting the finances of the shareholders at all.[231] Hence, the relentless pursuit of 'shareholder value' is possible by whatever means and at whatever human, social and environmental cost.'[232]The effect of limited liability and therefore the displacement of liability is that those taking the risks and making the profit are not positioned directly on the receiving end of the manifestation or costs of the risk.

Ownership, including ownership of shares, remains in the hand of the wealthiest.[233] Public companies can be misleading to the extent that that ownership of shares is so diluted that real control occurs through a few key individuals or entities obtaining proxy control of voting on major decisions; this is especially to the extent that smaller shareholders are not interested the management of the company or do not possess sufficient numbers to influence the votes significantly enough to warrant active participation therefore are willing to give away their authority by proxy to larger shareholders.[234] As such, wealthier investors, with ownership of significant tranches of shares are more likely to have control over the management of the company.[235] This limitation does not account for the dividends paid out by the company over time – which can translate to the complete absence of liability (or net loss) on the part of shareholders.

How does this reality square with the argument that that the company is necessarily beneficial due to facilitating growth and development of the economy? The short answer is that the operation of the company, and commercial endeavours through

[230] Stephanie Blankenburg, Dan Pelsch & Frank Wilkinson 'Limited liability and the modern corporation in theory and practice' (2010) 34 *Cambridge Journal of Economics* 821, 821.
[231] Ibid 830.
[232] Ireland (note 160 above) 582.
[233] Blankenburg, Pelsch & Wilkinson (note 230 above) 852.
[234]André D P Cummings, Steven A Ramirez & Cheryl L Wade 'Toward a critical corporate law pedagogy and scholarship' (2014) 92(2) *Washington University Law Review* 397, 410.
[235]Ibid.

this instrument, do not necessarily translate to economic development and rather can translate to social cost.

The 'trickle-down-effect' of company gain is skewed by the assumption that the owning-class and working-class binary is desirable and legitimate or at the very least inevitable; and that the state of the working-class who have no choice but to sell their labour is natural thus ignoring the role of the company in land dispossession and creating dependence on a capitalist economy by stifling subsistence.[236]

Furthermore, the logic of 'trickle-down' benefits to workers general living standards ignores the practical reality that business (business may be understood as natural persons carrying on business or, as more commonly the case, operating through business entities such as the company) has interests in keeping labour cheap by keeping demand for labour low and mainlining conditions of desperation and dependence. What incentive would a company have to create conditions where labourers can exercise choice in labour and thereby drive up the cost? The answer to this question can be evidenced by the historical fact of company collaboration in the creation and support of policies that have secured cheap labour.[237] In other words, it is in the interests of business to maintain high levels of poverty to the extent that this drives down the cost of labour and increases the competition for employment – placing less pressure on the employer to create conditions of employment that would attract or maintain a workforce out of real choice.[238]

The argument that the company secures growth and development by appealing to a trickle-down-effect also does not address the question of how it does this. That is how the company is best suited to deliver growth and development and why 'trickle-down' distribution of wealth is more effective in eradicating poverty and addressing inequality than a more direct form. Finally, this trickle-down logic evades the pressure to reconcile the implications of the company's avowed primary profit maximisation purpose. In other words if the company seeks to maximise what it gets out of its activities what is left to trickle-down but for indirect generic numerical

[236] Ndlovu & Makoni (note 5 above) 506 and 511.
[237] Harold Wolpe 'Capitalism and Cheap Labour power in South Africa: From segregation to apartheid' in William Beinart and Saul Dubow (ed) *Segregation and Apartheid in Twentieth-Century South Africa* (1995) 60, 67-8.
[238] Ibid.

growth of the economy that may have no tangible impact across society? As such, I submit that the question of whether this is an appropriate trade-off for the privilege of limited liability, and concomitant social risk, has not been sufficiently interrogated.

The concerns around the effectiveness and appropriateness of trickle down logic are exacerbated by the fact that poverty and inequality is growing rather than lessening. If the benefits derived from the separate personality of the company do not in fact trickle down in a fashion that meaningfully contributes to the alleviation of poverty and inequality; and if in fact it is in the interests of the persons who benefit from the separate legal personality of the company in terms of displacement of liability to maintain poverty and inequality then it becomes apparent that the construct of the company has the potential to simply obfuscates the exploitation of the poor and subordinated while simultaneously displacing risk which may ultimately be borne by the poor and subordinated.

This is accounted for with reference to the operation of the coloniality of power on the domains of the economy and subjectivity of the company in relation to those that experience poverty and subordination. It has been argued that there is a relationship between poverty and subordination and the recognition of personhood.[239] In South Africa the racialized and gendered dimensions of this poverty and inequality in the context of the operation of the coloniality of power provoke closer consideration of the role that the company has played in respect of the relationship between poverty and personhood. As such, I turn to unpack the relationship between poverty and personhood in relation to the company given the enjoyment of personhood and concomitant participation in the zone of being that the company enjoys.

Poverty and personhood

A poignant component of this continued coloniality is persistence of poverty and growing inequality. There are multiple and competing definitions of poverty. Poverty is often described with reference to material lack or scarcity of basic resources that are needed for sustenance.[240] As such, it is often regarded tacitly or expressly as a natural and a-contextual phenomenon. While it is decried as a social ill that is

[239] Mabogo Percy More 'Fanon and the Land Question in (Post) Apartheid South Africa' in Nigel C Gibson (ed) Living Fanon: Global Perspectives (2011)173, 179.

[240] Sandra Fredman 'The potential and limits of an equal rights paradigm in addressing poverty' (2011) 3 *Stellenbosch Law Review* 566, 566.

undesirable it is not typically associated with historical operations of power.[241] In other words, in the mainstream discourse it is not conceived as a product of systemic oppression. Moreover, it is not in mainstream legal discourse often regarded in relation to its production of/by the signifiers of race and gender.[242] Looking through the lens of decolonization theory we may appreciate that domination and subordination in colonial terms did not cease upon the declaration of the end of colonial administration.[243] Furthermore political liberation did not simultaneously end colonialism and restore the power imbalances, material and non-material, that it created.[244]

Colonizers deprived colonised peoples of land and, in the process of appropriation, displacement and enslavement, the very status of being human while accumulating wealth and entrenching a globally hierarchical division of labour.[245] Land is quite literally the foundation upon which life exists. It is material in the sense that it is the source of shelter and food but it is also representative of dignity in the sense of the right to define and pursue a life with agency. Through deprivation, colonialism created conditions for the majority of the colonised to be condemned to poverty and death.[246]

Lost land and lost sovereignty in the form of displacement, and deprivation of freedom for masses of indigenous peoples is a legacy of colonialism.[247] The distinction between freedom and liberty is important to note for the purposes of understanding the continued subordination of persons into the zone of non-being.[248] Although potentially free of constraints and physical bondage, liberated, persons are not free to determine what a meaningful existence would amount to. Instead for

[241] Ibid.
[242] Modiri (note 65 above) 228-31; Catherine Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the constitutional court' (2011) 3 *Stellenbosch Law Review* 591, 592.
[243] McClintock (note 61 above) at 10; Modiri (note 65 above) 225.
[244] Ramose (note 311 above) 495.
[245] Quijano(note 62 above) 550.
[246] More (note 239 above)179.
[247] Ibid179.
[248] Ibid175.

survival and literally for the entitlement to occupy space, someone else's space, persons must sell their labour on terms they have little or no power over.[249]

It has been argued that, '[t]he reasons for the persistence of poverty in an era of globalisation are embedded in the very structures of the global, economic, political and legal status quo'.[250] It follows that poverty is a function of the structure of economic relations and not a natural and inevitable phenomenon. Rather 'epistemic fundamentalism' dressed in the garb of universality and neutrality perpetuates the thinking that solutions to problems will be found by addressing the symptoms rather than the cause of systemic inadequacies.[251] The reality of the 'zero-sum' nature of the capitalist economic system that incorporates basic goods and services and forces them onto a global scale make it a natural, if not necessary, that some are deprived while others enjoy excess.[252]

Poverty as oppression

According to the coloniality of power, notwithstanding political independence, institutions of colonialism remain and perpetuate a form of colonialism through the maintenance of economic and social relations that operate in accordance with the coloniality of power.[253] These institutions operate both at a distributive and psychological level.[254] In the context of South Africa, this can be observed through the entrenched racialized patterns of property ownership, spatiality and division of labour.[255] On a psychological level it operates to internalise an ontology of non-being that extends to the rejection of epistemes and cosmologies that are outside the Eurocentric reference. This reference point has been entrenched as aspirational if not the default position.[256]

The limitations of regarding the world as post-colonial are evident in unpacking the remaining institutions that operate on and perpetuate power relations that resemble

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[249] MB Ramose 'In Memoriam: Sovereignty and the 'New' South Africa' (2007)16(2) *Griffith Law Review* 310, 319.
[250] O' Connell (note 168 above) 205.
[251] Ndlovu & Makoni (note 5 above) 505.
[252] O' Connell (note 168 above) 204.
[253] Morgan Ndlovu 'Living in the Marikana world: The state, capital and society' (2013) 8(1) *International Journal of African Renaissance Studies* 46 , 47-8.
[254] Modiri (note 65 above) 226-7.
[255] United Nations Development Project (note 66 above) 21.
[256] Ramose (note 249 above) 313.

closely those evident during colonialism[257]. Coloniality as the more nefarious and subtler operation of Western 'modernity' and 'development' maintains the 'zones of being and non-being'.[258] This ideology can be described as a continuation of the extractive ideology underpinning colonialism. The fact of the subsistence of racialized poverty serves as a point of departure when understanding the relationship between poverty and inequality. This reaffirms the need for the interrogation of mainstream liberal economic discourse around the issue and its relationship to legal institutions. This involves placing economic actors and policy as well as the law in its historical context.

It is understood that significant portions of initial acquisition and accumulation of capital is a direct result of colonialism.[259] The consequent deprivation of the colonised is therefore not an accident or product of agency but a function of conquest, capture and control of land and labour. As such, notwithstanding liberal presumptions of equality of opportunity, '[n]o society grappling with high inequality today started on a level playing field. There has always been some process – deep in the mists of history or more recent – in which dispossession and the capture of resources by others informed patterns of ownership.'[260]

This has real consequences for the present day. This can be understood with returned attention of the concept of rent-seeking. It operates circularly in entrenching the power and influence of capital holders with no real concomitant benefits to the economy. The role of institutions in this process is significant. They do not only sustain inequality but actively participate in its creation. To this effect,

> *[i]n contexts of high inequality, elites are typically able to influence the rules of the game and shape institutions across the full spectrum, including the education system, the courts, competition policy, tenure regimes, labour market institutions, industrial policy and much more. In so far as these institutions favour the elites, they are likely to perpetuate inequalities in power, status and wealth.*[261]

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[257] Ndlovu & Makoni (note 5 above) 507.
[258] Ibid 507-8.
[259] Ibid.
[260] United Nations Development Project (note 66 above).
[261] Ibid.

It has been suggested that '[c]loser examination of the relationship between wage income and corporate profits in the composition of inequality in South Africa is needed – rather than just the contribution of profits to personal income.'[262] This would facilitate a more clearly evidenced picture of how inequality contributes to poverty and, more pertinently, what policy interventions are necessary to avert this. This is, however, made difficult due to the complexities of corporate structures and the distribution of profits along with the legally sanctioned lack of transparency that is facilitated by the separate legal personality of the company. Furthermore, the sanitised object of a company being the amoral pursuit of profit neatly elides any of the earlier violent interests of securing the control of the labour and land of others in order to accumulate wealth and power. Therefore, the role of the company in creating and sustaining poverty and inequality is obscured from interrogation.

Modiri argues that poverty is not merely a distributive issue but that it has both material and immaterial dimensions.[263] It extends to areas of 'culture, epistemology and social power, the division of labour, decision-making procedures, autonomy and agency'.[264] He draws on Marion Young's framing of oppression as a structural concept to recognise the ways in which structures, notwithstanding their purportedly social justice commitments, perpetuate oppression of the majority of black South Africans in, what can be equated to, the zone of non-being.[265] Moreover, he argues that the systemic nature of oppression operates to displace the need for an identifiable oppressive group organised around the aims of that oppression but is perpetuated in the workings of power.[266] This includes unquestioned norms and assumptions about existence.[267]

Importantly, according to this conception the operation of the oppression of poverty is systemic.[268] This means that oppression cannot be reduced to a monolithic oppressor calculated at oppressing a specified group in definitive ways.[269] Rather that it is a vector of social, cultural, economic and political forces that operates with

[262] Ibid 34.
[263] Modiri (note 65 above) 228.
[264] Ibid.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Ibid 230.
[269] Ibid.

the momentum of the initial conception and implementation of oppression; and translates into the way society, consciously or unconsciously, operates.[270]

Viewing poverty as a form of colonial oppression helps us to understand the relationship between poverty and inequality. Oppression subordinates some in favour of others therefore is necessarily inimical to equality. This in turn may aid us in appreciating the role that the company has played as an institution of coloniality in the creation and perpetuation of inequality and poverty. In order to do this, we may consider the facets of oppression that Modiri draws on to characterise the racialized poverty and inequality that is prevalent in South Africa.[271] He explains that poverty has 'psychic, symbolic and ontological dimensions' in arguing that legal and policy interventions into poverty fail to account for the manner in which the law and policy operates to affirm these dimensions in the very act of framing the impoverished for the purposes of 'intervention'.[272]This poverty and inequality is not a natural phenomenon that emerged ahistorically, but is systematic and can be recognised in the conditions of the 'five faces of oppression' being 'exploitation, marginalisation, powerlessness, cultural imperialism and violence' that is inherent in colonialism.[273]

The five faces of oppression are presented as conditions that manifest oppression rather than requirements.[274] This takes cognisance of the different ways in which oppression operates, avoiding an essentializing or reduction of the phenomenon, while simultaneously providing a framework for the identification of oppression in a fashion that allows it to be named. Recourse to the five faces of oppression in this dissertation is sought to trace the manifestation of oppression backwards to the actors involved in the vector of power relations that produce oppression with specific focus on the company. I begin with an overview of the five faces of oppression.

a) Exploitation

Exploitation is characterised by the exercise of the purported entitlement to claim the product of the efforts or labours of others.[275] According to Marx's

[270] Ibid.
[271] Ibid 274.
[272] Ibid 242.
[273] Ibid 274.
[274] Young *Justice and the Politics of Difference* (1990) 40.
[275] Ibid 48

theory of exploitation this class privilege is legitimated by constructed class distinctions that attach value on people according to a hierarchy between superior upper classes and inferior lower classes.[276] What makes this exploitative is that the capacities and efforts of those marked inferior are controlled by those who purport to be superior for their own benefit and often to the exclusion of proportionate benefit to those whose toils produce yields.[277]

It is ownership and control of the means of production that facilitates the systematic transfer of the power of the labour of some namely workers to the benefit others namely capitalists s.[278] This system produces benefit for the capitalists at the expense of the alienation of workers from their work, agency over their lives and essentially their dignity as independent beings.[279] According to Young, 'social rules about who does what work for whom, how work is compensated and the social processes by which the results of the work are appropriated operate to enact relations of poverty and inequality.'[280]

Modiri demonstrates how these social relations are racialized with reference to the private ownership and accumulation originating from colonisation allowed for the entrenchment of exploitative racialized division of labour.[281] Servile work in South Africa and globally is still largely premised on race as the fundament of the purported inherent inferiority as referred to earlier in this Chapter.[282]

The fact of this exploitation being more than purely distributive exposes the operation of coercive structures that force workers into submitting their labour by limiting the choices available to workers and forcing a dependency on capital for survival. [283] This precipitates a cycle where a small number of people are able to accumulate more and in turn control ever more people and

[276] Ibid 47.
[277] Ibid 49.
[278] Modiri (note 65 above) 231.
[279] Young (note 274 above) 49.
[280] Ibid 50.
[281] Ibid 231; see also T Madlingozi 'Post-apartheid social movements and the quest for the illusive 'New' South Africa (2007) 34 (1) *Journal of Law and Society* 77, 98.
[282] Young (note 274 above) 52.
[283] Ibid 52-3.

have an increasing influence on the distribution of resources and division of labour. [284]

In the context of the company the surplus value of persons can be extracted (workers and the unpaid or undervalued domestic support received) by shareholders with no risk beyond the initial investment due to limited liability. Therefore, the company's facilitation of owners of capital taking large risks with the limitation of liability operating against those who may bear the brunt of that displaced risk.

b) Marginalisation

Young describes 'marginals' as persons who the labour market excludes with the consequence of cutting such persons off from participation in society, subjection to material deficiency and/or eventually death.[285] These persons are deprived of the opportunity to engage socially and be recognised through the exercise of their capacities as human beings.[286] It appears that the only practical available way for many to avoid marginalisation is to submit to exploitation.

The element of marginalisation speaks to the relegation of the status of the underclass to the inferior other that operates outside of or on the margins of veritable members of society. This underclass, which we can conceive of with reference to occupants of the zone of non-being, is brought about through material deprivation and massacre while this reality is simultaneously presented as being a natural or inevitable function of the purported inherent inferiority and subsequent unimportance of members assigned to that class. In other words, the violent stereotypes of black persons as being unresourceful, lazy and entitled are used to ostensibly excuse the phenomenon of large scale depression, mortality and dispossession.[287] In the context of the company workers and the community are relegated to dispensable functionaries. Agency is removed from those disposed of land

[284] Ibid.
[285] Ibid 53.
[286] Ibid 53.
[287] Modiri (note 65 above) 233-4.

and forced to seek employment as it is available at the remuneration deemed fit by employers. In the context of colonisation mass dispossession deliberately created excess supply of labour rendering labourers at the mercy of capital.

c) Powerlessness

Powerlessness is the consequence of social and material deprivation that results in the 'voicelessness, invisibility and social immobility' of those paralysed by the lack of resources with which to take action and the state of being without recourse by virtue of being situated as ontologically deficient.[288] It is characterised by the absence of choice of available actions or influence on the conduct and direction of life.[289] This places persons in the position of being acted upon rather than being an actor and agent.[290] Over societies and generations scope for growth and mobility as well as status, authority and worth is limited by virtue of lack of power.[291]

Deprived of land and stripped of humanity relegated to a state of non-human servitude the racialised underclass is positioned as largely powerless to escape participation the system within which roles and limitations have been predefined and prescribed. Modiri relates this powerlessness beyond material conditions to a state of being unrecognised as worthy of legitimate desires and demands for socio-economic rights and basic services; where needs and desires are unfulfilled and at times violently denied, dismissed and subdued.[292]

d) Cultural imperialism

Cultural imperialism occurs where the dominant group establishes its knowledge systems as objective truth and its image as the default image of human to the exclusion of all others who are marked as 'other' and inherently

[288] Ibid 234-5.
[289] Young (note 274 above) 56.
[290] Ibid 56.
[291] Ibid 57.
[292] Modiri (note 65 above) 235.

deficient.[293] In accordance with cultural imperialism the assumption of the superiority of the dominant group crystallises into a fact of social relations manifesting in forms and structures of everyday life and existence solidifying the dominant group as exclusively representative of humanity.[294]

The effect of cultural imperialism other than to silence or render invisible other cultures, is to categorise difference as 'deviant' and/or 'inferior' and that in that way negatively stereotype and discourage nonconformity to the cultural norm.[295] This generates a paradox between invisible and inferior where entrenched negative stereotypes about the other become presumptions that fall outside of the mainstream scope for contestation.[296] In this way both positive assumptions about the dominant group and negative assumptions of the subordinate group are granted the status of fact in the mainstream imagination. This is evident in the continued dominance of Western aesthetics, language and culture in colonised territories notwithstanding the end of formal colonial administrations.[297] In this way, coloniality operates as the 'epistemicidal' overwriting of experience and knowledge of colonised peoples with the experience and knowledge of the coloniser from the point of enunciation of the coloniser veiled as the perspective of the omniscient.[298]

e) Violence

Finally violence is characteristic of both physical and psychic means of securing control and the submission of the subordinated.[299] The experience of violence occurs as arbitrary and gratuitous aimed simply at hurting, humiliating and/or annihilating the subordinated human being.[300] This exists in overt and covert forms from physical harm, suffering induced by material lack, humiliation and indignity engendered through dehumanisation.[301] This violence extends beyond the state authority positively exacting violence into

[293] Young (note 274 above) 59.
[294] Modiri (note 65 above) 235.
[295] Young (note 274 above) 59.
[296] Ibid 59.
[297] Modiri (note 65 above) 235.
[298] Ibid 235; Ramose (note 249 above) 313.
[299] Young (note 274 above) 61.
[300] Ibid 61.
[301] Modiri (note 65 above) 237-8.

the legal sanction of violence, absence of recourse for victims of violence and the abstract normalisation of attack on the body and person of the subordinated.

Therefore the focus is not the act of violence in and of itself, but rather the environment that is created that facilitates, enables and even encourages violence against the body and being of the subordinated persons.[302] This normalisation extends to the persistence of internalised violence.[303] Young describes this violence as being of a 'systematic character' and a 'social character' directed at members of a group for the fact of their belonging to that group.[304] This may be related back to the notion of the sub-human or non-human that exists in a zone of challenged humanity or denial.[305]

The zone of non-being is characterised by violence and inconsequentiality where social practices and convention normalised arbitrary death and status as non-human.[306] For the black person, any attempt to escape this condition is necessarily an act of violence.[307] Gordon explains that this was because change of condition necessitates visibility which is violent when that visibility is of an existence that is supposedly is illegitimate.[308] To this effect, Modiri evokes the example of legally endorsed violence that manifests in the form of police torture, beatings and killings in answer to service delivery protests, wage protests, evictions and demolitions.[309]

Fear or the threat of impending violence is operates as a suppressant to keep oppressed groups submissive.[310] This relates back to the threat of marginalisation and the inevitable consequences proliferated by this.

This conception of poverty rejects the assumption that it is simply an accident of particular society. Instead, poverty is understood as '…the logical outcome of a

[302] Young (note 274 above) 61.
[303] Gordon (note 172 above) 11.
[304] Young (note 274 above) 62.
[305] Fanon (note 191) 37 and 40.
[306] Gordon (note 172 above) 11.
[307] Ibid.
[308] Ibid.
[309] Modiri (note 65 above) 238.
[310] Young (note 274above) 62.

system that distributes benefits and opportunities along a specific axes of social power.'[311] In that way it can be seen as an 'inherent feature of neoliberal capitalist democratic order'.[312] It links race to poverty in recognising the affective components to poverty behind the distributive elements that are central to the conventional social justice paradigm of poverty alleviation efforts. [313] This is done to call into question what informs the very distributive patterns to which poverty is generally attributed.[314]

With view to the content of the conditions or manifestations of oppression, I will proceed to consider the ways in which oppression manifests in relation the company at the following moments in South African history. While there may be overlap in the conditions and the actions that precipitate them, I will seek to maintain the five faces as distinct in order to derive a sense of the oppressive capacity of the company and its role in the production of poverty and inequality amongst black men and women and consequently its role in ascribing and maintaining black people to the zone of non-being. This is with view to surfacing and naming the oppression and the reality that it produces and reinforces. As mentioned above, reference to the five faces of oppression will track the manifestation of oppression backwards to the company actors involved.

[311] Modiri (note 65 above) 239.
[312] Ibid 239.
[313] Ibid 242.
[314] Ibid 242.

III An analysis of the coloniality of the company at various moments of South African history

Having discussed the ambiguous nature of juristic personality and the significance of personhood in the coloniality of power, with particular consideration of the oppression of poverty as a consequence of the coloniality of power, I turn to contextualise this theory in the context of South Africa. These moments serve as a sample to consider the construct of the juristic person in South African history in order to reflect on the thesis of the assertion that the company has facilitated colonial interests. This is not an empirical exercise but one that seeks to ground in context the more abstract/theoretical preceding Chapters.

These moments are deliberately framed prior to the inauguration of the Democratic Republic of South Africa in 1994 (the 'new' South Africa) with the enactment of the Constitution, 1996 with a justiciable Bill of Rights that theoretically recognises all persons in accordance with the values of freedom, equality and dignity. This is based on the position that, at least prior to this point, South Africa was operating conspicuously in accordance with the coloniality of power. This recognises the occupation of territory of South Africa by the Dutch, the British and finally by the settler colonial population self-defined within the territory that became known as the Union of South Africa in 1910.[315] This perspective regards the span of the colonial project over four hundred years including the era of apartheid as a configuration of colonialism.[316] As such, I refer to South Africa in this Chapter as a geographical and political territory interchangeably.

I will in particular examine the thesis that the company is an instrument of coloniality by observing the company's involvement to the five faces of oppression as articulated by Modiri in expansion of Young's theory at various moments of South African history.[317]

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[315] Joel M Modiri 'Reading Choreographies of Black Resistance: Courtroom Performance as/and Critique' in A Allo (ed) *The Courtroom as a Space of Resistance: Reflections of the Legacy of the Rivonia Trial* (2015) 213, 214 ft 5; Madlingozi (note 340 above) 10.

[316] Ibid; The implications of the coloniality of power on the accuracy of describing the post-1994 Democratic Republic of South Africa (the 'new' South Africa) as post-colonial and post-apartheid will be interrogated in Chapter IV of this dissertation.

[317] Modiri (note 65 above) 274.

I will begin with the moment of entry and colonisation by the DEIC, as a chartered company of the United Holland, of the Cape. The next moment that will be turned to will be that of the inland colonial expansion championed by the infamous British state chartered company the BSAC which occurred after slavery was formally abolished–. I will then turn to the moment where companies had become incorporable by registration in terms of companies legislation in the Union of South Africa and consider the broader operation of companies in the Union of South Africa specifically in the continuation of the colonial project during apartheid.

At the conclusion of the Chapter, I will turn to draw a conclusion based on the recurrent themes in these moments and comment on the implications of this to the thesis. In Chapter IV, I will contrast this to the company in the new South Africa and reflect on whether or not there appears to have been an ideological break from the company of the past.

The colonisation of the Cape by the DEIC

I begin the analysis in the Cape Colony in 1652 as the first documented European colonisation of the inhabitants and the territory of South Africa. The DEIC was granted legal personality, as a privilege, by a charter authorised by the States General of the United Holland.[318] According to Geen, although the DEIC operated as a private company, it was inherently a national enterprise.[319] The Dutch government had substantial shareholding in it.[320] The Steward of the early Dutch Republic was the Chairman of the DEIC.[321] Shareholding was limited to Dutch subjects and small shareholders were encouraged.[322] It was granted status as a legal person by a charter granted by the States General of Holland empowering The Council of XVII which required a payment to the government over 21 years that was ostensibly reinvested into the colonial operations of the DEIC.[323]

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[318] 'A Translation Of The Charter Of The Dutch East India Company (Verenigde Oostindische Compagnie or Voc): Granted by The States General of The United Netherlands, 20 March 1602' http://rupertgerritsen.tripod.com/pdf/published/VOC_Charter_1602.pdf (Charter of the DEIC)

[319] Geen MS *The making of the Union of South Africa* (1946) 7.

[320] Ibid.

[321] Ibid.

[322] Ibid.

[323] Ibid.

Colonial occupation of the Cape was led by Jan van Riebeck who was the Ship Surgeon and Commander of the DEIC mission to set up a refreshment station for Dutch ships bound East.[324] In 1660 he was promoted to the rank of Governor, swearing obedience to the Governor General at Batavia and constituted himself as Commander of the DEIC and Governor, a Council of Policy.[325] This Council notably included a Law Officer who established a High Court of Justice, Senior Merchants, a Chief Salesman, Bookkeeper, Treasurer and two Military Officers.[326] In effect the DEIC had established itself as a monopoly trader and independent authority over the Cape.

Groitus' extrapolations on legal personality and the right of conquest resulted in the justification of the DEIC acting as both a merchant and a self-governing authority or sovereign in the territory of the Cape Colony.[327] As such, the DEIC was granted status equal to that of a person in accordance with the laws of Holland. This meant that the DEIC was empowered by law to conduct trade, accumulate colonial possessions, sustain an army and enter into treaties with foreign authorities.[328] The law that empowered this was imposed over the territory and inhabitants of the Cape Colony by force.[329] This was conceivably in the interests of the furtherance of the economic and political interests of Holland.

The DEIC therefore entered the system of world power as a colonizer. This colonizer had a particular profile. As considered in Chapter III of this dissertation, this profile may be understood in accordance with the fact that the DEIC was not owned or controlled by women or black people; did not carry on activities aimed at benefiting women or black people; was not sanctioned by the authority of women or black people; and its status as a legal person at the time was not attributable to women or black people. The recognition of the legal personality of the DEIC therefore, implies that the DEIC could not be characterised as either a woman or black person.

[324] Ibid 8-9.
[325] Ibid 8-9.
[326] Ibid 8-9.
[327] Lucas G *An archaeology of colonial identity: Power and material culture in the Dwars Valley, South Africa* (2004) 32.
[328] Charter of the DEIC; Geen (note 319 above).
[329] Lucas (note 327 above).

Attribution of personhood of the DEIC meant attribution of the status of the white man.

In this was the DEIC as a company, occupied the zone of being and it was this recognition of being a legal person that gave it access to entitlements including the doctrine of the divine right of conquest and dominium. Incidentally, a doctrine propounded by Pope Innocent IV and observed by acclaimed Roman and Roman Dutch jurists that followed such as Groitus.[330] It was regard and observation of the divine right of conquest that justified colonization through the appropriation of land and subjugation of those relegated to the zone of non-being by the DEIC.

The philosophy of the jurist Grotius motivated the stance of the DEIC in respect of both the entitlement to trade as well as that of conquest. Grotius specifically extended recognition of personhood to legal persons when expounding on the right of persons to carry on war and assume dominium over conquered territories and indigenous peoples.[331] He also influenced the proposition that the DEIC could legitimately be a sovereign and a subject of the United Holland simultaneously. This ideological context, Stern notes, explains the mutually reinforcing character of the nation state and the company.[332] The fact that both of these institutions are legal persons draws into focus the at times artificial distinction between public and private power.[333] We are reminded that juristic persons with commercial interests were at the helm of the dissection of Africa into nation states at the 1648 Berlin Conference.[334]

The appropriation land and the labour of the subjugated can be considered to be an ideological golden thread that runs through the encounter of the company situated in South Africa. Conquest of South Africa is ascribed to Holland and the Dutch generally while practically it was carried out through the activities attendant to the commercial endeavours of the DEIC.[335] This demonstrates an indivisible 'symbiotic relationship' between commercial and political-expansion endeavours that have

[330] Dewey (note 85 above) 655.
[331] Chomsky (note 61 above) 433.
[332] Ibid.
[333] Gierke (note 166 above) 99.
[334] Ndlovu (note 253 above) 56.
[335] Rao V 'A brief history of the corporation 1600-2100' http://www.ribbonfarm.com/2011/06/08/a-brief-history-of-the-corporation-1600-to-2100/

occurred locally and globally.[336] Companies have justified the appropriation of land in the furtherance of commercial pursuits in contexts ranging from unapologetic and 'theologically motivated' conquest to variations of theme of a 'crusade for democracy' in territories where barriers to the entry by foreign companies into markets were perceived.[337] This may be observed repeatedly at various moments in South African history.

While the DEIC exercised control over the Cape it introduced and maintained very deliberate social ordering consisting of four main groups being DEIC servants (employees), Free Burgers (employees that had been relieved of service and contracted to hold land in exchange sustain farming operations), slaves and the Khoi.[338] Of these groups the employees and Free Burghers were mostly white with the exception of some employees and manumitted slaves who were referred to as 'free blacks' some of whom originated from other Dutch colonies.[339]

Literature on the DEIC is largely silent on the gendered dynamic of social relations at the time.[340] Archival records also tend to limit records on slaves to proprietary terms. Worden remarks that '…silences in the [DEIC] paper empire in relation to slave lives and histories…has been scrutinised not only for what it seems to yield with ease, but also for that which it cannot communicate.'[341] Bradford comments on the tendency of the texts on the DEIC to move from 'male particular to the human universal' and to make generalisations that render invisible the experience of women.[342] This too is a pattern that emerges from historical accounts of South Africa; however this silence can be read for its implications on the invisibility of gender in relations of power.

We see the deliberate maintenance of social ordering in Lucas' characterisation of DEIC expansion in the Cape. As the DEIC operations in the Cape are recorded to have grown more self-sufficient as they expanded territorially.[343] Wars were deliberately initiated with indigenous communities to remove perceived threats to

[336] Callinicos A *Imperialism and Global Political Econo*my (2009) 136.
[337] Chomsky (note 61 above) 65-8.
[338] Lucas (note 327 above) 32.
[339] Ibid.
[340] Nigel Worden 'Cape Slaves in the Paper Empire of the VOC' (2014) 40 *Kronos* 22, 44.
[341] Ibid.
[342] Bradford (note 200 above) 369.
[343] Lucas (note 327 above) 72.

DEIC control.[344] This is said to have eventually resulted in the DEIC securing annual tributes and taxes from Khoi communities in the form of cattle and increased intervention into Khoi internal affairs that led to the disintegration of the economic and socio-political existence of the Khoi.[345] This is credited for the shift in the relationship of the Khoi people to the [DEIC] from 'independent traders' to 'dependent labourers'.[346]

The significance of the shift in relationship of the indigenous persons to the DEIC may be argued to be both literal and ontological. From independent free agents to dependent utilities whose occupation of space became dictated by European settler-colonisers. Significant further, was the fact that the DEIC both utilised this labour without reward on the terms of their own making. Those terms couched in the Roman Dutch common law, imposed by the DEIC, formed the foundations of mercantile law and labour relations in South Africa while overshadowing and reconstituting indigenous law and governance systems. To this effect, the divine right of conquest utilised the law to create a Eurocentric epistemic paradigm of the law.[347] It is this paradigm that enables the identification is the company as an instrument for control.

Considering the five faces of oppression we may observe:

a) Exploitation

The DEIC on arrival in the Cape in 1652 was short on labour consisting of a few sailors, merchants and soldiers as well as a few 'personal slaves' amounting to about 20 people.[348] It was purportedly only in 1658 that Jan van Reibeck's requests to be provided with robust ships for slave capturing voyages were met by the Council of XVII.[349] The DEIC sponsored ships sailed to Madagascar and 'outlets' on the South East Coast of Africa.[350] They also returned with slaves from other Dutch colonies such as Sri Lanka (Ceylon)

[344] Ibid.
[345] Ibid.
[346] Ibid.
[347] Ramose (note 249 above) 314.
[348] 'The Early Cape Slave Trade' http://www.sahistory.org.za/article/early-cape-slave-trade
[349] Ibid.
[350] Ibid.

and other parts of South East Asia.[351] Slaves were also purchased from slavers on route to other destinations.[352] Slaves were to the DEIC simply commodities to be traded for profit. By 1658 the DEIC commanded the slave trade at the Cape.[353]

The economy of the Cape Colony was highly dependent on the work carried out by slaves that included farm work, work in DEIC gardens and warehouses, construction of forts and public infrastructure.[354] Slaves were also relied on for domestic labour which is noted to have been exceptionally laborious in the absence of amenities such as running water and electricity.[355] It is documented that some slaves performed skilled work in town and while those regarded as their owners were remunerated in wages for their efforts.[356] At its base the labour of the slaves was extracted with no return. This was a clearly an exploitative dynamic enforced by violence and dispossession at the helm of which the DEIC stood.

In addition to this, it is recorded that the initial relationship between the DEIC and the indigenous Khoi communities around the Cape was one of trade in terms of which the DEIC would obtain livestock from the Khoi.[357] It is recorded that the DEIC did not enslave or disposes the Khoi at its first encounter with them.[358] This changed as white farming began to successively infringe on the grazing lands of the Khoi.[359] Overtime the unwillingness of the Khoi to trade on the terms of the DEIC and to simply surrender land to it resulted in clashes between the company and the Khoi.[360] Eventually the DEIC adopted more aggressive means of raiding cattle and inciting war.[361] Eventually, this

[351] Ibid.
[352] Ibid.
[353] Ibid.
[354] 'The work of slaves' https://slavery.iziko.org.za/workofslaves
[355] Ibid.
[356] Ibid.
[357] George M Fredrickson *White Supremacy: A comparative study in America and South African History* (1981) 30.
[358] Ibid.
[359] Ibid.
[360] Ibid.
[361] Ibid.

resulted in the erosion of the Khoi communities' territory and leadership through annexation of land.[362] This further resulted in the fractured communities shifting from independent communities to a significant source of cheap labour from the 18th Century.[363] This too was a form of exploitation exacted by the company.

b) Marginalisation[364]

Slaves lived in abject conditions and as traded commodities and were deprived of the status of human.[365] They were evidently not regarded as part of the society of persons that constituted the Cape. Furthermore in the social ordering of persons free black persons traversed the margins of society. Annihilation through war or through deprivation was a reality that existed in polarity with the pressure to submit to subordination.

The Khoi were regarded as uncivilised and as such Jan van Riebeck in first making the argument that the DEIC should change its initial policy of trade with the Khoi and simply enslave them and seize their land and cattle in 1654 is reported to have said that they are 'a dull, rude, lazy and stinking nation.'[366] The effect of the eventual encroachments of the DEIC onto Khoi territory and the securing of tribute tax from local communities had the effect of materially depriving the Khoi of land, free movement and the means of sustenance that those provided in addition to the ontological dehumanisation that prevailed.

c) Powerlessness

The DEIC's imposition as sovereign and trader both over and in the black people of the territory was indisputable. Resistance was met with violence and therefore the slaves as well as the Khoi, notwithstanding resistance, were rendered powerless against the expanding encroachment and conquest of the DEIC.

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[362] Ibid 31-3.
[363] Ibid 35.
[364] Ibid.
[365] Ibid.
[366] Fredrickson (note 357 above) 34.

In this way the deprivation of subjectivity and reduction of black people to objects to be acted upon with resulting material deprivation resulted in the lack of influence and agency over life. This was in addition the absence mechanisms for recourse to take action or be empowered by virtue of being situated as inferior and sub-human or non-human.

d) Cultural imperialism

The DEIC in establishing itself as sovereign imposed the laws, language and religion of Holland on the territory. As noted under subheading 2, the depiction of the indigenous peoples as savage served to justify either the divine right to conquest or the civilising mission of Western man depending on what the need of the DEIC was at the time.[367]

In administering the territory the social and legal norms of the Dutch prevailed. Furthermore the aesthetics of the Dutch, through the DEIC, were set as the default and aspiration. The DEIC also shaped the emerging society through the creation of a Eurocentric culture of materialism.[368] This extended to the expected social dress and decorum and the necessary participation in consumerism in order to emulate this. We may consider the more superficial similarity between the DEIC in the Cape Colony and modern company in respect of the purchase carried by company identity and the significance thereof including a company logo carried on all manner of objects ranging from packages to dinner plates.[369] This materialism was an imposition of a Eurocentric conception of value and social relation.

As mentioned above the DEIC enforced social ordering based largely on race. Within slave groups informal hierarchies were developed based on the origins of the slaves that determined relative status and division of labour.[370] Slaves

[367] Ibid 8-9.
[368] Lucas (note 327 above) 28.
[369] Lucas (note 327 above) 28.
[370] The Early Cape Slave Trade (note 348 above).

were generally imposed names upon arrival at the Cape as means of destroying links to personal identity and history of freedom.

e) Violence

In terms of physical violence, mortality rates of slaves were high during voyages estimated at 20-50 percent.[371] The treatment of slaves in the Cape was similarly poor and this resulted in limited procreation of slaves and a constant demand for the inflow into the Cape.[372] Furthermore it was through military violence that territory was appropriated from the Khoi.[373] The violence of dispossession operated on both the material and psychic level. The DEIC used its status as a person and acting in white supremacist interests to supress those relegated into the zone of non-being into service and submission.

The incorporation and capitalist expansion of the British South Africa Company

A British Royal Charter of 29 October 1889 incorporated the British South Africa Company into existence upon the request of mining magnate Cecil John Rhodes;[374] the BSAC was by charter authorised to colonise and govern an indeterminate area of South-central Africa.[375] The directors were Dukes of Abercorn and Fife including Cecil John Rhodes (Rhodes). Their task was to promote 'trade, commerce, civilization and good governance' in the territory.[376] BSAC was granted a monopoly over public works including water and transportation.[377]

In 1890 Rhodes was granted power of attorney in respect of the BSAC in terms of which he had complete discretion over its affairs.[378] Shares in the BSAC were held by an exclusive number including Rhodes himself and Britain based Gold Fields and

[371] Ibid.
[372] Ibid .
[373] Lucas (note 327 above) 72.
[374] John Flint *Cecil Rhodes* (1974) 118.
[375] 'Royal Charter of the British South Africa Company 20 December 1889' http://www.rhodesia.me.uk/Charter.htm accessed 7 January 2018 Art 2 and 24 (Charter of the BSAC).
[376] Flint (note 374 above) 118; Charter of the BSAC.
[377] Flint (note374 above) 119; Charter of the BSAC article 20.
[378] Flint (note 374 above)120.

De Beers.[379] Contemporaneously Rhodes was made Prime Minister of the Cape Colony which office he occupied in until 1895.[380] Interestingly, here again we see the confluence of business and colonial interests down to a personified white male figure head.

Considering the 'five faces of oppression'[381] we may observe:

a) Exploitation

'In effect, the profits earned by Rhodes and his associates from established Southern African diamond and gold interests were speculatively reinvested in the BSAC and thus in the conquest of regions of Africa where land, looted cattle, gold, other minerals and assets, and the labour of Africans might be exploited.'[382] Rhodes and his associates utilised the wealth that he had obtained through company activity in South African diamond mining exploits to pursue the expansion of white settlement in the rest of Africa. He had envisioned British control from 'Cape to Cairo.'[383]

The BSAC had a claim over mineral rights and land in the territory. It had the power to make the law to which it and others in the territory were bound. 'The [BSAC] would thus become a vast holding company, profiting always from successful enterprises, losing nothing but paper from failures.'[384] Flint comments that the BSAC was a success as an 'instrument' for the conquest of land.[385]

Furthermore the BSAC, with Rhodes at the helm, leveraging British Imperial interests in keeping British and Dutch camps in Southern Africa politically aligned while manoeuvring control obey law making, adjudication and administration of the territory to use the black population to meet the needs of 'the white mining community'.[386]

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[379] Ibid.
[380] Ibid.
[381] Modiri (note 65 above) 274.
[382] Flint (note 374 above) 120.
[383] Ibid.
[384] Ibid 131-2.
[385] Ibid 145-6.
[386] Flint (note 374 above) 145-6.

b) Marginalisation

In 1899 the BSAC formed a legislative Council with seats elected from the white settler population.[387] Racial hierarchy was established and accepted from the onset of the company.[388] While the BSAC concentrated its trade and mining operations in North and South Rhodesia (now Zimbabwe, Zambia and Malawi) the relationship with South Africa is relevant in its extension of the settler colonial ideology of both the divine right of conquest and the civilising mission. The perception of the 'black man barbarian' and sub-human status was imposed as a justification for conquest, but also as a means to limit the risk of uprising by depressing the morale of the black population.[389] Fundamentally this relegated black persons in the territory to the margins of society with mediated access to participation in the economy.

c) Powerlessness

The BSAC had control over distribution of land, but for a small allocation of native reserves.[390] These reserves followed closely the patterns of South African reserves which allocated the majority of prime land to white settlers and relegated the majority of black people to less desirable land.[391] Notwithstanding attempts at resistance leadership was overthrown and resistance violently culled.[392]

As Austin observes the economic and political submission of the black communities in the BSAC controlled territories was a consequence of the dispossession of land.[393] As seen with the DEIC the encroachment on land forcing communities to pay rent to white farmers, 'hut tax' for continued occupation of ancestral land forced black people into the British monetary economy.[394] This facilitated forcing the local communities into a position of

[387] Reginald Austin *Racism and Apartheid in Southern Africa: Rhodesia* (1975) 23.
[388] Ibid.
[389] Bulawayo Chronicle 31 March 1938 page15 in Austin (note 387 above) 28.
[390] Flint (note 374 above) 147 and 155.
[391] Ibid (note 387 above).
[392] Ibid (note 374 above).
[393] Ibid (note 387 above).
[394] Ibid.

cheap labour in order to sustain life. In other words black people were through material deprivation denied of control of the direction and design of their lives. Again they were treated as objects whose lives could be manipulated and utilized rather than independent and creative beings with unique desires and conceptions of what it means to pursue a meaningful life.

d) Cultural Imperialism

Roman Dutch law was retained in South Africa notwithstanding periodic occupations by the British- while company law was largely copied directly from English company law.[395] While at the time of incorporation of the BSAC slavery had been abolished – racial hierarchies and division of labour had become entrenched in South African society. This dynamic was secured by various strategies including the taxation and appropriation of land that forced black people into waged labour relations with white agriculture and mining interests.[396] Language, decorum and aesthetics were modelled after British reference points for decency, civility and essentially humanity while the outward impression of respect of difference was created. To this end Article 4 of the Charter of the BSAC stated:

> *In the administration of justice to the said peoples or inhabitants, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer and disposition of lands and goods and testate or intestate succession thereto, and marriage divorce and legitimacy and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid, and applicable to the peoples or inhabitants thereof.*[397]

In essence, regard had to be paid to the personhood of the black peoples in the territories within which the BSAC operated – except when it didn't.

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[395] Geen (note 319 above) 45.

[396] Mike Morris 'The development of capitalism in South Africa' in Martin J Murray (ed) *South African Capitalism and Black Political Opposition* (1982) 39, 44.

[397] Flint (note 374 above) 119; Charter of the BSAC article 4.

e) Violence

The BSAC also had its own police force which it used to brutally supress resistance.[398]The BSAC was notorious for its overt use of force to overthrow leaders of the territories it conquered.[399] As aforementioned, violence was used as a display of power and a reminder of control to supress overtly, but also to depress morale and therefore resistance by black people.

This expansion of the BSAC through the investments of Rhodes and others in the pursuit of white supremacist colonial interests must be seen in the context of the social and political environment in South Africa at the time.

In respect of juristic persons the *Dadoo Ltd* case confirmed the separation between the legal fiction that is the company and the natural persons who are invested in it even before the legislated segregation policies of apartheid. This was taken so far as to validate the purchase of land by a company wholly owned by persons classified as 'Indian' in Krugersdorp in the Transvaal notwithstanding the prohibition of the ownership by 'coloureds' in terms of the predecessor of the Natives Land Act, Law No 3 of 1885 which prohibited 'Asiatics' from becoming the owners of fixed property in the Transvaal.[400] The Court in *Dadoo Ltd* held that the duly incorporated company purchasing land in the Transvaal was not in fraud of the legislation.[401] This was, notably only recognised, once the case had been appealed before the Appellate Division at which point the Act in question itself had been amended in order to avoid the occurrence of black controlled companies owning land through the instrument of the company. In terms of this amendment a company in which black people held a controlling interest was prohibited as a natural person who was black would be.[402] As such, while appearing progressive the case of *Dadoo Ltd* only had a limited effect in preventing the retrospective nullification of the transfer of property to Dadoo Ltd.

[398] 'The role of Cecil John Rhodes in the British South African Company in the Conquest of Matabeleland' http://www.sahistory.org.za/article/role-cecil-john-rhodes-british-south-african-company-conquest-matabeleland#endnote-10; Austin (note 387 above) 35.
[399] Ibid (note 374 above).
[400] *Dadoo Ltd* (note 122 above) 530.
[401] Ibid 562.
[402] Ibid 549-50.

Therefore practically black ownership of land in South Africa was scarcely legal, even though the conduit of a legal person, until the Act was repealed in 1991.[403]

Following *Dadoo Ltd* the Court in *Gumede v Bandhla Vukani Bakhiti Ltd* 1950 4 All SA 401 (N)[404] held that the company was not capable of having the racial characteristics of its members since it was separate person from its members and as such was not subject to the race test. This had the effect of maintain the sanctity of the juristic person in terms of the law; however the operation of the Native's Land Act prevented the juristic person from being used by black people factually to avoid the restrictions on land ownership. This means that the instrument of the juristic person could only be fully utilized by white people. I submit that the practical effect of the legal race neutrality of the company, read in the context of the rest of the legal framework and its colonial ideological underpinnings, had the effect of retaining the white male profile of the company rather than making it non-racial.

In keeping with this line of argument, I draw on the explanation tendered by Morris of how the first pass regulations were introduced by companies as a means of controlling the movement and concentration of black mine labour in the early 1890s.[405] He maintains that the 1913 Natives Land Act[406] was not simply an ideological move to separate black and white but one calculated to pressurise black subsistence farmers to become a reliable source of migrant labour for white mining, farming and manufacturing interests.[407] This is accurate when read against the model adopted by both the DEIC and BSAC in ensuring submission by capturing land and forcing local populations into the settler controlled colonial economy. Significantly Terreblanche situates the strategy behind the 1913 Native Land Act to the companies comprising the 'Mineral Energy Complex' (MEC) on account of having been responsible for the appointment of the commission that was authorised by the South African government and was tasked with determining why black people

[403] Abolition of Racially Based Land Measures Act No 108 of 1991.
[404] *Gumede v Bandhla Vukani Bakhiti* 1950 (4) All SA 401 (N) 402
[405] Morris (note 396 above) 45.
[406] Natives' Land Act No 27 of 1913 (Natives' Land Act).
[407] Morris (note 396 above) 52.

were not taking up employment in the mines and consequently how to secure black people doing so.[408]

The Natives' Land Act '…was designed to entrench white power and property rights in the countryside – as well as to solve the 'native problem' of African peasant farmers working for themselves and refusing their labour power to white employers.'[409] It facilitated legal displacement of the country's black inhabitants into what Plaatje described as one eighteenth of the country's territory.[410] This thereby established a 'captive labour force' and organised the colonial project into apartheid.[411] It is relevant to note that the Natives' Land Act was only repealed in 1991. The Natives' Land Act prohibited natives (classed as all black peoples including 'Africans', 'Coloureds' and 'Indians') from owning or buying land anywhere but for in native reserves. Factually even in these spaces tittle was generally granted in terms of long leases by the municipality. In this way, the property rights of the legal person in land that entrenched white control of most of the land in South Africa.

The shift from imperial to state sovereignty marked a shift in the seat of authority for granting legal personality to a company, but did not markedly change either the law or underpinning ideology attached to legal personality.

The incorporation of the company into the Union particularly in respect of its role in apartheid South Africa

Thus far I have observed a clear link between the colonial white supremacist colonial interests and the chartered company as manifested in the DEIC and BSAC. At the period of the close of the tenure of the BSAC we begin to see the shift of authority from imperial sovereign to settler colonial state. At this point, the company became more readily incorporable upon compliance with legal formalities of registration. This has been described as the shift of incorporation as a privilege to incorporation as a right.[412] Nonetheless as seen in the *Dadoo Ltd* case this right only practically served those in the zone of being given the wider legislative framework within which the company operated.

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[408] Terreblanche (note 61 above) 47.
[409] Plaatjie ST *Native Life in South Africa – After and since* 4 ed (1916) 3.
[410] Ibid 16-7.
[411] More (note 239 above) 179.
[412] Cassim (note 67 above) 8.

I therefore turn to focus on the company under the Union of South Africa especially under the legislated colonial regime of apartheid. There are numerous examples to explore of the company's role in apartheid from the indirect funding of the apartheid state to directly discriminatory labour practices. With view to an attempt at systemic understanding of this role, in this Chapter I focus on the overarching fabric that has presented itself conspicuously thus far throughout the company's involvement in colonisation in the form of the threads of land and labour in relation to those displaced into the zone of non-being; and its significance in respect of the economic, political and subjective domains of existence. The absence of focus on a specific company is a function of the general instrumental contribution of the concept of the juristic person operating in the range of companies during this time. In keeping with the coloniality of power my point of departure is that apartheid was a continuation of the colonial settler project seeking to further white supremacist interests by oppressing those relegated to the zone of non-being.

South Africa derives it company law from England. This began with the Joint Stock Companies Registration Act 1844[413]. It did not confer limited liability at this stage, but allowed registration of a company without direct government sanction in the form of a charter, letter of patent or enabling parliamentary act. It is heralded as the step that 'replaced incorporation as a privilege with incorporation as a right.'[414]The Limited Liability Act 1855[415] amended the Joint Stock Companies Registration Act allowing limited liability for all members of a company duly registered in terms of the that Act.[416]

The Cape Colony based its Joint Stock Companies Limited Liability Act 23 of 1862 (C)[417] on Limited Liability Act. The Cape Companies Act 25 of 1892 (C)[418] then repealed the Joint Stock Companies Limited Liability Act following the enactment of the English Companies Act of 1862.[419] In the Transvaal *De Akte van Maatskappijen met Berkte Verantwoordelijkheid* Law 5 of 1874 mirrored the Cape Companies Act.

[413] (7 & 8 Vict c110) 'Joint Stock Registration Act'.
[414] Hahlo (note 1 above).
[415] (18 & 19 Vict c 133) 'Limited Liability Act'.
[416] Hahlo (note 1 above) 2.
[417] 'Joint Stock Companies Limited Liability Act'.
[418] 'Cape Companies Act'.
[419] (25 & 26 Vict c 89) 'English Companies Act'

[420] While in the Orange Free State *De Wet over Beperkte Verantwoordelijkheid van Naamlooze Vennootschappen* of 1891 followed the Cape Model Law 2 of 1892 which too followed English Law.[421]These were consolidated, modelled on the Transvaal company legislation, into the Union Companies Act 46 of 1926.[422]This was amended according to English company law from time to time. The highest court of appeal in the Union of South Africa remained the Privy Council of England until the Privy Council Appeals Act 16 of 1950 was enacted. Viewed from another perspective we may infer that the charters that formed the DEIC and BSAC that ideologically informed the concept of company law and attendant legislation of England became the formal foundations of South African company law.

While this company legislation does not articulate the agenda of conquest and exploitation as bluntly as the charters of the DEIC and BSAC the legislative framework surrounding the Company Acts are revealing of the colonial ideology underpinning those chartered companies and the coloniality of power in operation.

Of the several accounts of the motivation behind the policy of apartheid, attributed to Legasick, is that of the capturing of cheap black labour in the interests of exploitation.[423] This is with the view to feeding the demand of white capital and the burgeoning industrialisation of South Africa while simultaneously protecting the interests, and securing the support, of the white working class that was facing increased competition from black workers.[424] Wolpe situates this account of the motivation behind apartheid in context by extending it to include the deliberate destruction of subsistence in black communities in ‘native reserves’ of Bantustans and locations; and the intervention into ‘tribal political institutions’ and communal relations.[425] This is with view to shifting the power dynamics that create and sustain this captive cheap migrant source of labour.[426] This is consistent with the racialized exploitative capitalist operations of power present in the territory South Africa from 1652.

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[420] Hahlo (note 1 above) 2.
[421] Ibid.
[422] Ibid.
[423] Wolpe (note 237 above) 62-3.
[424] Ibid.
[425] Ibid 63.
[426] Ibid.

Wolpe remarks on the capitalist mode of production that has been evident in South African history from imperial control through to the establishment of the Union of South Africa in 1910 and characterises the formalisation of power relations between black and white as follows,

> *[h]ere we arrive at the critical point of articulation between ideology, racial political practice and the economic system. Whereas segregation provided the political structure appropriate to the earlier period, apartheid represents the attempt to maintain the rate of surplus value and accumulation in the face of the disintegration of the pre-capitalist economy. Or, to put it another way, apartheid, including separate development, can best be understood as the mechanism specific to South Africa in the period of secondary industrialisation, of maintaining a high rate of capitalist exploitation through a system which guarantees a cheap and controlled labour force, under the circumstances in which the conditions of reproduction (the redistributive African economy in the reserves) of the labour force is rapidly disintegrating*[427]

In other words, apartheid sought to maintain rent-seeking behaviour by capitalists by maintain conditions that facilitated the continued to capture and exploitation of the labour of black people in the face of the contracting South African economy.

Wolpe's argues that apartheid came about not simply on the basis of an ideology of white supremacy, but to mutually sustain capitalist relations of production.[428] What is useful about this assertion is the notice taken of the deliberate organisation of society along the axis of race in the pursuit of the interests of one racial group was exercised through the instrument of the company. However a more accurate understanding of the operation of the coloniality of power would suggest that white supremacy and capitalist interests are not historically distinct or mutually exclusive phenomena, but that capitalist exploitation of black labour is a necessary condition and mode of enacting white supremacy.[429]

According to Johnstone, '[a]partheid refers to the South African government's racial policies and ideology, while 'white supremacy' refers to the overall power structure in

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[427] Ibid at 67-8.
[428] Wolpe (note 237 above) 87.
[429] Robinson (note 181 above) 100.

South Africa which is partially maintained by apartheid policies.'[430] Writing in 1970, and published in 1982, he challenged the assertion at the time that industrialisation and capitalist modes of production were inconsistent with the aims of apartheid. Rather, he argued that the two aspirations where in fact mutually reinforcing on the basis of the racial power dynamics in that had been perpetuated. That is, effectively, that white supremacy was the overarching social organiser and that apartheid served these interests as much as capitalism did.[431] In situating this argument in the context of the coloniality of power recognition may be given to the fact that apartheid ideological organisation of political authority and social relations simply consolidated the economic, political and social modes existent throughout the colonial period. This is consistent with the activities of companies before this point in time considering the DEIC and BSAC.

As such, recourse in this Chapter to Legasick, Wolpe and Johnstone is made to support the theory of the coloniality of power and the capitalist dimension inherent rather than to insert a distinct Marxist critique of the company. Thus drawing on the Marxist analytic as presented by Mills as a tool for social analysis that provides a 'social ontology' based on classes and the class interests propelling them.[432] This while noting, as Mills does, the limitations of this tool as being one fundamentally conceptualised from and within the broader Eurocentric framework rooted in the conception of a linear history poised towards modernity where the history of the world is the history of the Western world and the silent perspective is that of those in the zone of being.[433] In accordance with coloniality theory the position is taken that the picture of the relationship between the company and land and labour would not be complete without the taxonomy of power operating on the antagonism of race, with necessary implications on gender, being accounted for.

Considering the 'five faces of oppression'[434] we may again observe:

a) Exploitation

[430] Frederick A Johnstone 'White Prosperity and White Supremacy in South Africa Today' in Martin J Murray (ed) *South African Capitalism and Black Political Opposition* (1982)17, 38.
[431] Ibid 33-4.
[432] Mills (note 199 above) 148.
[433] Ibid 151.
[434] Modiri (note 65 above) 274.

Increased displacement and material deprivation facilitated forcing more black people into the apartheid monetary economy whether it is in the form of tax imposed on households within subsistence communities, rent payable in native reserves or on farm lands that precipitated mass migrant labour.[435] Companies were complicit in planning and implementation of these racially policies that facilitated exploitation in various sectors of the economy including mining, agriculture and domestic labour.[436] Driving black people from self-sufficiency into the monetary system at pains of legal sanction yet again forced black people to become dependent labour or dependant on labour in order to remain alive. Therefore terms of engagement of this labour were set within the operation of a major imbalance of power between the state and companies on the one and the persons captured as dependant labour on the other. As such the companies enjoyed the right to gain the surplus of the efforts of black workers in the public and domestic sphere.

b) Marginalisation

The effect of imposing a national monetary economy and engineering special and social divisions between the zone of being occupied by white people and the zone of non-being occupied by black people delineated the margins of white society around which black societies were situated. Literal margins were constructed in terms of the bordering of reservations on towns and industrial sites in order to allow the occupants of the margins to serve the main society when conducive, but return to the margins in order not to blur the lines.

Again black people where not attributed the status of persons belonging to the society that constituted the Union of South Africa. Death and abject poverty lingered as realities of the socio-economic and political environment that was designed to serve those within and not those on and across the margins.

c) Powerlessness

Yet again the dispossession and psychic violence of designation to the zone of none being had contributed to the powerlessness, notwithstanding resistance of the oppressed. The racialized division of labour and prevalence

[435] 'Land, Labour and apartheid' http://www.sahistory.org.za/article/land-labour-and-apartheid .
[436] Terreblanche (note 61 above) 47.

of poverty and violence in the 'native reserves' suggest that they were designed as storage facilities for labour rather than accommodation for human beings.

The implications of the capitalist division of labour on the creation and maintenance of radicalised-gendered power relations accounts, to some degree, for the relegation of the labour stereotypically attributed to women into the realm of the private and invisible. Black people were not agents free to determine the course of their futures, but rather had to accept the subordinate and exploitative roles pre-set for them or face the consequences of death engendered by resistance or by impoverishment of the resources necessary of survival.

d) Cultural Imperialism

Power was overtly racially ordered and the company complied with, participated and benefited from this.[437] Specific legislative interventions in this period can serve to highlight the link between the company and the interests sought to be secured by apartheid. Johnstone outlines some central legislation including the Bantu Labour Relations Regulation Act of 1964, Bantu Labour Regulations of 1965 and 1968 that barred movement of black people from locations elsewhere in South Africa unless a contract of employment, which was annual but renewable, was obtained from a government labour bureau; the Physical Planning and Utilization of Resources Act of 1967 that facilitated industrial development on the fringes of native reserves and the funnelling of black labour into these industries; the Industrial Conciliation Act of 1968 that facilitated racialized division of labour and remuneration and pursued a relationship of hierarchy between black and white labour; the Bantu Labour Act that prevented black unions and made the government the purported representative of black labour interests – effectively denying black people labour mobilisation and collective action (which operated with the Suppression of Communism Act); Bantu Education Act

[437] Truth and Reconciliation Commission of South Africa Report Volume 4 (1998) Chapter 2 'Business and Labour' para 161 (TRC Report Volume 4).

1953 which was geared at preparing labourers and entrenching stratified social relations.[438]

The imposition of a capitalist mode of social relations and the entrenchment of the protection of individualist property relations, cemented by accumulation over time, maintained and perpetuated the containment of black people in the zone of non-being. Fundamentally, the Western administrative institutions including the law operated to serve white supremacist interests.[439] This was not only tacitly in operation through the day to day operations of social, political and economic institutions, but overtly avowed in the white supremacist and patriarchal ideology expounded by apartheid and woven into the knowledge systems that were crystalized and imposed at the time. This can be seen in the imposition of Afrikaans, the normalisation of the inferior and separate amenities accorded to black people from education to housing. The ontology of deficiency and submissiveness to authority was literally endorsed and enforced through the law. The company both perpetuated through involvement in the development of the law and policy and enforced through relations and activities that generated the condition of cultural imperialism within which black people were constrained.

e) Violence

In physical form, deprivation and ontological subjugation violence prevailed and was exacted by the company at times directly through alienation and force; and indirectly through participation in the apartheid economy premised as they were on deliberately skewed relations of power; police and private security were at the disposal of the company to literally secure compliance and obedience of black people to the systems engineered.[440]

The consideration of some of the conditions of oppression faced by black people in relation to the company, with recourse to the five faces of oppression in each moment of history listed, are not meant to attempt to artificially cauterise the oppressive effects of the company in each moment as if each moment operated in a

[438] Johnstone (note 430 above) 21-24.
[439] Morris (note 396 above) 46-7.
[440] Ibid 52-3; TRC Report Volume Four para 161.

vacuum. Rather, it serves to consider each moment in order to be able to recognise the patterns that construct the bigger picture in greater detail. This consideration reveals the consistent exploitation, marginalisation, powerlessness, cultural imperialism and violence that furthered the colonial project at various moments in South African history to the benefit and through the instrumentality of the company as a legal person. The significance of the availability of the instrument as opposed to the direct pursuit of these interests by individuals is considered next.

The sanitisation of conduct performed by natural persons with recourse to the instrument of the company during apartheid

In order to gain further insight into the operation of the company in apartheid South Africa, records on the transition from the Union of South Africa to the Democratic South Africa are illuminating. One particularly valuable source of information is the contained in the Truth and Reconciliation Commission of South Africa Report Volume Four in Chapter 2 documenting the institutional hearings on 'Business and Labour'. This Chapter records the responses of companies, or rather the persons employing or acting as agents of the instrument of the company, in response to accusations of complicity and beneficiation from apartheid on a systemic level. It is instructive of the instrumental potential of the company to note the extent of recourse to the argument that the company is an amoral actor was utilized in order to defend the presumed legitimacy of the company that had been and continues to be furthered. This speaks to the sanitising effect of the instrument of the company with recourse to the pseudonym of profit seeking which is employed to screen the moral stain of exploitation of labour and collective administration of appropriated land and other resources that the company actively facilitated and participated in; while simultaneously extending limited liability and some degree of transparency over the natural persons involved in that conduct.

To this effect, with regards to the sanitation of conduct through the company, I turn to consider a submission made to the TRC by Anne Bernstein, then the Head of the Centre for Development and Enterprise,

> *[c]orporations are not institutions established for moral purposes. They are functional institutions created to perform an economic task (production of goods and services and so on). This is their primary purpose. They are not*

> *institutions designed to promote some or other form of morality in the world. Other institutions exist to fulfil these purposes. This does not of course absolve individuals within companies from moral choices, but that is a different matter.*[441]

Notwithstanding variations on this theme that appeared from majority of the company submissions reflected in the TRC Report Volume Four that ranged from mildly apologetic to detached the TRC concluded,

> *[b]usiness was central to the economy that sustained the South African state during the apartheid years. Certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies. Other businesses benefited from co-operating with the security structures of the former state. Most businesses benefited from operating in a racially structured context.*[442]

Through its finding the TRC powerfully recognised the systemic operation of apartheid and the role of companies in that system even through less sensational instance of participation in the apartheid political economy. The TRC proceeded to make various recommendations that included a wealth tax on all companies. The recommendation of a wealth tax can be interpreted to mean recognition of the need to employ a mechanism to make the gains derived from property and other resources available for redistribution towards eradicating historical and systemically entrenched inequality that is built on accumulated and inherited wealth. [443] In this sense the TRC appeared to be expressly acknowledging the role of the instrument of the company in apartheid and the need for companies to account and make reparations for the exploitation and other harm precipitated by that role.

Notwithstanding this recognition and the consequent recommendations, companies such as Old Mutual were not remiss to remind the TRC that its official mandate related to 'gross violations of human rights' and therefore specifically related to isolated acts against individuals or identifiable groups which meant that it could not

[441]TRC Report Volume Four; Nattrass 'The Truth and Reconciliation Commission on Business and Apartheid: A critical evaluation' *African Affairs* 98 (1999) 373, 384.
[442] TRC Report Volume Four (note above) para 161.
[443] Ibid para 11; Thomas Pickety *Capital in the Twenty-First Century* (2014) 424-429.

be compelled to make submissions to the TRC. It has been suggested that this contributes to the diminution of detail that the TRC was able to obtain regarding the breadth and depth of company involvement in apartheid, and more importantly more information on the persons animating and benefiting from those companies.[444]

I submit that this is, however, not surprising given the mainstream acceptance of the nature of the company as a separate legal person and the argument that the prerogative of the company is profit maximisation and not social or political. What is surprising, however, is the fact that the new Constitution does not appear to reflect the TRC's avowed understanding of the systemic role that the company played in the subjugation of black people to the benefit of the apartheid government and white people. More importantly that this did not cause a re-evaluation of the very concept of the company is telling of a deep entrenchment of a capitalist Western episteme in the moments of the transition to a purportedly post-apartheid Constitutional Democracy.

The effect of this has been described as facilitating companies 'crossing a moral boundary without doing anything' and from being transformed in a moment in time from being complicit in apartheid South Africa, to being the backbone of the new Constitutional Democracy.[445] Nattrass comments on how apartheid agents had been ostensibly momentarily transformed by the fact alone of the political transition into economic agents of progress and development for example, 'Armscor, the vilified apartheid armaments producer, rose from the depths of moral culpability to the elevated status of 'national asset''[446]

[444] Nattrass (note 441 above) 381 and 390-1.
[445] Nattrass (note 441 above) 390.
[446] Ibid.

IV Concluding reflections: did political independence and the new Constitution break the ideological underpinnings of the concept of the company?

While a detailed analysis of the company under the Constitution, 1996 is beyond the scope of this thesis, an analysis of the company as an instrument of colonisation viewed in its operation in South Africa would not be complete without consideration of the impact of the Constitution, 1996. I will consider some broad concerns with view to setting up some points to ponder.

Terblanche comments on how ‘‘unfree black labour ‘…has been a permanent feature of South Africa’s economic history since 1652 and is destined to remain a defining characteristic of the South Africa landscape for decades to come’.[447] This assessment highlights a golden thread in the colonial history of South Africa of the relationship between the production of black subjugated subjectivity and exploitation of labour. Crucially this assessment was made well after the enactment of the Constitution, 1996 and the latest Companies Act, 2008[448]. Why this is particularly significant is that it suggests that there has not been a disruption in the ideological underpinnings of the company or the power dynamics facilitated by the construct.

In other words, the celebration of equality and a trajectory of development and the eradication of poverty and inequality can be seen to be premature given the institutional continuation – of the company – and the underlying ideology of white supremacy and patriarchy that it may be seen to have served at various moments in history.[449] In order to unpack this assertion, it may be useful to consider some crucial aspects of the history that gave rise to the Constitution of the Republic of South Africa Act No 200 of 1993 (Interim Constitution), which has been repealed, and the new Constitution as well as consequences of these.

Terreblanche contends that the shift of the democratic party, the African National Congress’ (ANC), economic policy from expressly socialist to ‘Americanized neo-liberal globalism’ as a product of the clandestine negotiations that took place between ANC leadership and leadership of the MEC; this position is supported by his elaboration on the fact that the substantive content of the Constitution, 1996 was in fact shaped and decided on by unelected and disproportionately represented

[447] Terreblanche (note 61 above) 4.
[448] Companies Act No 71 of 2008 (Companies Act, 2008).
[449] Sibanda (note 63 above).

parties towards what he characterises as conspicuously corporate interests, underpinned by prevailing white supremacist ideology.[450] Terreblanche asserts that the political and economic duality that resulted from the '…elite compromise in the early 1990s, together with embracing neoliberal ideology…' essentially restricted the elected government from implementing policies that would address poverty and inequality by moderating the power of companies.[451]

In a similar vein, the new Constitution has been contested as being a product of unpersuasive consent given the nature of compromise secured by the Convention for a Democratic South Africa (CODESA) negotiated settlement.[452] More posits that the new Constitution reaffirms the entitlement of the bearers of the fruits of the divine right of conquest.[453] This is by its resort to the claim of South Africa belonging to all those who live in it without genuine regard to the violence of displacement that gave birth to the country and therefore assists a convenient 'historical amnesia'.[454] Furthermore, he argues that that the latest transfer of political power, due to compromises secured in the negotiated settlement, has maintained economic power in white people and secured the original project of white supremacy.[455] Arguably this occurrence is not unique to South Africa as the situation of economic and military power outside of sovereign states in the former colonies has, according to Tully, made their political power appear merely 'tokenistic'.[456] That is to say that political power is for the most part simply superficial symbolic power with no substantive content.

The tokenistic operation of political power in the broader context of the coloniality of power extending to the domains of subjectivity, economics and knowledge may be observed in the scenario of the Khulumani Support Group (Khulumani) litigation against transnational companies implicated in apartheid atrocities. While a detailed account of the expansive advocacy and activist work involved in the litigation championed by the group is beyond the purview of this dissertation, I turn to consider

[450] Terreblanche (note 61) 63 -71.
[451] Ibid 81.
[452] More (note 239 above) 170; Sibanda (note 63 above) 482-3; Ramose (note 249 above) 310-1.
[453] More (note 239 above) 178.
[454] More (note 239 above) 178.
[455] More (note 239 above) 178.
[456] James Tully 'Modern constitutional democracy and imperialism' (2008) 46 *Osgoode Hall Law Journal* 461, 477.

some of the salient aspects of the litigation process that spanned over 12 years with view to exploring the observation of the tokenistic politically independent state. This is relevant as the extent of the state's independence from the colonial lattice of power has significant implications on the limitations and possibilities of the company in that state.

The relationship between the new South African State, some of the black people who speak out and the company

Khulumani was formed in 1995 to support survivors of apartheid testifying at the TRC – the name of the group translates to 'speak out' from isiZulu to English.[457] It was constituted by survivors and family members of those victimised by the violence perpetrated during apartheid and after having assisted with engagement in the TRC extended to the broader pursuit of reparations through advocacy and activism.[458] Failure of the South African government to implement the recommendations of the TRC in respect of business and concomitant failure of business, especially transnational companies, to account for their contribution to the maintenance of apartheid resulted in Khulumani actively pursuing recourse on other platforms including litigation in the USA.[459]

The TRC was constituted in terms of the Promotion of National Unity and Reconciliation Act[460] in order to investigate and make recommendations to the government in respect of 'politically motivated' 'gross human rights violations' committed within the time parameters of 1960-1994.[461] This was empowered by paragraph 251 of the Interim Constitution which referred to a preference for restorative justice in the sense of 'understanding…reparation…ubuntu' over retributive justice as 'vengeance…retribution…victimisation'.

The powers of the TRC were broad and granted in respect of specific mandates including the power to pardon individuals from criminal liability provided they made full and frank disclosures. To this effect, the TRC classified gross human rights violations as isolated individual acts as opposed to the systemic contribution towards

[457] Khulumani Support Group 'Background' https://www.khulumani.net/khulumani/about-us.html.
[458] Ibid.
[459] Mia Swart 'When the State Fails: The Role of the Khulumani Support Group in Obtaining Reparations for Victims of Apartheid' (2016) 31(1) *South African Public Law* 1, 4.
[460] Promotion of National Unity and Reconciliation Act No 34 of 1995.
[461] Swart (note 459 above) 10.

the operation of power in the domains of politics and economics.[462] In this way, the binary of victim and perpetrator categorised violations as a collection of personal encounters. Moreover, this approach focused on perpetrators as moral transgressors in need of redemptive forgiveness rather than on victims and their need to be empowered in order to take their place in society.[463]

In terms of the Alien Tort Claims Act[464] (ATCA) the district courts of the USA are granted jurisdiction over civil actions taken by non-USA citizens or residents ('aliens') for delictual matters (referred to as 'torts' in the USA) that violate 'the law of the nations or treaty of the [USA].'[465] Khulumani mounted litigation in terms of ATCA, on the basis that specified transnational companies including IBM, General Motors, Ford, Daimler Chrysler, Shell, BP and Barclays Bank numbering thirty eight in total aided and abetted the apartheid government of South Africa committing crimes against humanity, in terms of the Rome Statute of the International Criminal Court (1998), by providing the arms, technology, finance and energy resources necessary for maintaining apartheid.[466] The harm suffered by the individual named victims in three groups of defendants included rape, torture, grievous bodily assault, arbitrary deprivation of liberty and extra-juridical killing under apartheid.[467]

The broad causal link in delict between the conduct of the companies and the harm suffered by the survivors and family of the survivors was premised on the assertion: were it not for the knowing disregard of sanctions and provision of material support, in the form of finances, goods and services, then the apartheid government would not have been able to carry out the harm and would not have been able to sustain itself as long as it did.[468]

The protracted litigation that followed ended without reparation. According to Swart 'it is not only the outcome of the…case that is important but also the *process*.'[469] Moreover, Swart states that despite the failure of the case to deliver the aspired

[462] Ibid 14.
[463] Ibid.
[464] Alien Tort Claims Act 28 of 1789 US Code para 1350.
[465] Swart (note 459 above) 4.
[466] Swart (Note 459 above) 20; Narnia Bohler-Muller 'Against Forgetting: Reconciliation and Reparation after the Truth and Reconciliation Commission' (2008) 3 *STELL LR* 466, 474
[467] Swart (note 459 above) 20.
[468] Ibid 21.
[469] Ibid 20.

outcome the case was still a victory for Khulumani.[470] While I agree with the assertion that the struggle for justice is commendable and the energy expended was not entirely in vain on account of the impact of the advocacy, I contend that the outcome of the failure of the case is a significant knock to justice not simply for the failure to achieve reparations, but for why it is that the case failed and what this reveals about the coloniality of power and the law as an instrument of oppression. Furthermore, I contend that this supports the argument of the sanitising tendency of the company on the moral accountability of the people who are responsible for the conduct of the companies that supported and facilitated apartheid.

I turn to briefly chart the key aspects that ostensibly led to the failure of the litigation. The first complaints were filed in 2002 by three groups of plaintiffs whose cases were consolidated and referred to the Southern District of New York where the case was dismissed on primarily two grounds.[471] One ground was the assertion that aiding and abetting human rights violations did not amount a human right violation and therefore was not justiciable.[472] The other was that the case was based on political issues and matters of foreign relations and therefore not justiciable.[473]

Bohler-Muller contends that this decision was significantly influenced by the then Minister of Constitutional Development and Justice, Penuell Maduna, who lodged an ex parte application as an amicus curiae advocating for the dismissal of the case on the basis that the TRC had already addressed this political issue; and that failure to dismiss the case would have adverse consequences for foreign direct investment into South Africa.[474] Prior to this, the then President of South Africa Thabo Mbeki is reported to have opposed the litigation on the bases that it interferes with South Africa's sovereign entitlement to deal with the legacy of apartheid in accordance with internal politics and constitutional arrangements.[475]

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[470] Ibid 24.
[471] Bohler-Muller (note 466 above) 474-5; *In re South African Apartheid Lit*igation, 346 F Supp 2 d 538, 542 (SDNY, 2004)
[472] Ibid.
[473] Ibid.
[474] Ibid 475-6.
[475] Rebecca Davis 'General Motors concedes to Khulumani in apartheid reparations case' https://www.dailymaverick.co.za/article/2012-03-01-general-motors-concedes-to-khulumani-in-apartheid-reparations-case/#.WoVii4Nua01

Davis notes how the South African government's insistence that the case be dismissed lest economic relations with the USA be jeopardised gives the impression of neo-imperialism. [476] In extension of this this I would contend that this dynamic can be explained with reference to the coloniality of power and particularly the colonial design of the economic domain and the default imbrication of the knowledge system attendant to it. This would explain why, rather than simply supporting the litigation in favour a possible compensatory award to South Africans who have suffered under apartheid, the government could allow itself to be positioned in opposition to those interests rather in the interests of maintaining good favour with the economic powers that prevail. The gravity of the implications of this on the new South Africa in the context of the coloniality of power is chilling.

In 2007 the Second Circuit Court of Appeals in *Khulumani v Barclays National Bank Ltd*[477] held that aiding and abetting violations of human rights is a violation of international law and referred the case back to the District Court of New York were it was heard in 2009. The New York District Court this time rejected the argument that the litigation is bared on the basis of international relations and politics and concluded that litigation would not amount to inference with the TRC.[478] The Court proceeded to strike down claims against all but five of the initial 38 defendants leaving Daimler, Ford Motor Company, General Motors, IMB and Barclays Bank open to litigation.[479]

The remaining defendants were proceeded against, however in the time frame that this process occurred two principles emerged in USA jurisprudence in relation to the ATCA that condemned the Khulumani litigation efforts to failure.[480] The first was that aiding and abetting in terms of ATCA was interpreted to require demonstrable motive to violate international law in terms of the case *Presbyterian Church of Sudan v Talisman Energy Inc* ;[481] and the second principle was that ATCA could not be utilised in respect of conduct performed in the territory of another sovereign state in

[476] Ibid.
[477] *Khulumani v Barclays National Bank Ltd* 2007 504 F 3d 254 (2d Cir 2007).
[478] Swart (note 459 above) 22.
[479] Ibid.
[480] Ibid.
[481] *Presbyterian Church of Sudan v Talisman Energy Inc.,* 2009 582 3d 244,259 (2d Cir 2009).

accordance with the case *Kiobel v Royal Dutch Petroleum Co*.[482] As such in *Balintulo v Daimler AG*[483] the Second Circuit ruled that USA courts have no jurisdiction over Khulumani on the basis that the allegedly harm causing conduct took place outside the USA.[484]

A noteworthy segue from the litigation above, was the settlement between GM and Khulumani that was reportedly endorsed by court in 2012. [485] While it appears to be limited publicly available detail on the settlement, it has been suggested that this settlement was a victory for Khulumani and provided some redress following the arduous litigation that preceded it.[486] While in terms of most settlement agreements, liability is not admitted and privacy of the details agreed to are ensured, Davis interprets the fact of settlement as a tacit admission of liability.[487] The settlement reportedly consists of a symbolic gesture of one and a half million dollars in GM shares to be awarded when GM surfaces from bankruptcy.[488] If this is accurate then I submit that there is powerful symbolic significance to the irony presented by this gesture. Shares that allow participation and inclusion in the GM the company have been given as reparation to those that have suffered harm – harm that the company itself ostensibly facilitated. Is the only escape from victimhood in the coloniality of power assimilation into the oppositional category of perpetrator? What guarantees that no similar harms are being facilitated or perpetrated by GM?

Returning to the South African governments antagonistic stance to the Khulumani litigation efforts I would submit, in keeping with the understanding of the operation of the coloniality of power, that it is not exceptional that Khulumani was not supported by its government in seeking redress nor that I was denied redress in Western courts from companies furthering the fundamentally Western interests.

Rather the process itself may be taken to demonstrate the operation of global power in the production of the inferior black subject in dichotomous relation to the white subject. I consider Swart's statement that '…the work of civil society organisations

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[482] *Kiobel v Royal Dutch Petroleum Co* 2013 133 s Ct 1659 (No 10 1491).
[483] *Balintulo v Daimler AG* 2013 727 F 3d 174, 192 (2d Cir 2013).
[484] Swart (note 459 above) 23.
[485] Davis (note 475 above).
[486] Ibid.
[487] Ibid.
[488] Ibid.

has been frequently credited with putting victims and human rights on the agenda.[489] This is not an unfamiliar sentiment, but it is an unsuspectingly value laden one. To draw out some of this laden content I pose the questions: who is it that is the venerated position to pass judgement and thereafter credit these civil society organisations, and whose agenda are victims and human rights being placed on? This speaks to the criticism Madlingozi levels at transnational justice entrepreneurs who rob victims of their agency, appropriate and alter their stories producing them into inferior and politically disempowered racially stereotyped recipients of justice.[490] This plugs quite neatly into the ideological framework in operation through the coloniality of power.

Furthermore this stripping of agency and full human subjectivity may be related to the claim that companies exist in the interests of all people by virtue of their role in economic development exemplified by the trickle down logic of benefit. Inadvertently this logic turns the victim of the oppression of poverty into a hapless subject to be acted upon by this logic as opposed to a political agent who may have an independent design on what form liberation from this oppression should look like. For example, the kind of reparation that would allow subsistence and the pursuit of a life that does not prescribe to the logic of submission to the predefined means of survival available. That is the kind of reparation that would not reduce black people to grateful recipients of employment on terms predefined in order to endeavour to survive – as in to avoid perishing from lack of material resources for sustain life.

Swart comments on the shift from states serving as centre point of obligations towards upholding human rights to non-state actors such as multinational companies and civil society organisations.[491] What is notable about this proposition is not the simply the growth of power centres influential enough to compete with the state, but the fact of the existence of power centres outside the state and the intimation that their relationship is independent of the state. In other words, we may ask what is the implication of the centring of obligations outside of the state on state power? This is not from the perspective if the implications on state sovereignty, but rather in the

[489] Swart (note 459 above) 2.
[490] Tshepo Madlingozi 'On Transnational Justice Entrepreneurs and the Production of Victims' (2010) 2(2) *Journal of Human Rights Practice* 208, 213.
[491] Swart (note 459 above) 2.

interests of understating the extent to which states have influence or control over the power of non-state actors. In other words whose authority legitimates the existence of whom? If it is not the state which through recognition legitimates the authority of transnational companies or civil society organisations who or what is the source of authority of those actors? Again, recourse to the coloniality of power reminds us of the domain of subjectivity and authority that produces a global dynamic where black subjectivities are acted upon rather than acting. In other words those sovereign states that have been released from colonial administration have control over the powers that interact with and within it appear to be an illusion. Therefore, the control that a state ostensibly has to alter law is limited to the extent of its participation in the colonial order. An example of this may be the constraints on the state from remaking the company outside of its Western ideological construction to the extent that this is required for participation in the purportedly Western global world.

How new is the new South African Companies Act?

Upon return to the fundamental provocation of the purpose of granting the company juristic personality we may consider that common law definitions of natural and legal persons prevail for the purposes of the contemporary Companies Act, 2008 as the terms are not specifically defined there or in other South African legislation.[492] The Companies Act, 2008 in section 7 does however make specific reference to the purpose of promoting the rights in the Bill of Rights in the application of company law. While this may suggest an inclination towards a respect for rights that would break from the construct of a company as being an instrument for exploitation as outlined above, further exposition suggests that a commitment to rights may be more an inclination to the preservation of existing dynamics of power.

As described in a contemporary South African government publication issued before the introduction of the latest companies act,

> *[c]ompany law has existed in South Africa since 1861, beginning with the Joint Stock Companies Limited Liabilities Act No 23 of 1861 of the Cape Colony, which, along with other provincial company legislation, was a carbon copy of equivalent English legislation. The first national company law was introduced in 1926 with the Union Companies Act, which was amended from*

[492] Companies Act No 71 of 2008 (Companies Act, 2008 and new Companies Act).

> *time to time along the lines of the latest English legislation. The 1926 Act was replaced in 1973 with the Companies Act No 61 of 1973, which, despite efforts to innovate and develop a direction more appropriate for South Africa, remains much in the mould of English law.*[493]

Interestingly the modernisation of company law took the form of alignment largely with Australian and USA, particularly the State of Delaware, company law; and some cursory references to the Constitution, 1996 in the preamble and definition sections. If this line of reasoning is adopted then it is not surprising that in terms of section 8(2) and (4) of the Constitution respectively '[a] provision of the Bill of Rights binds a natural or a legal person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right' and that 'a legal person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that legal person'. This begs the question: what entitles a legal person to rights generally regarded as 'human' rights? [494]

To this end, a significant innovation of the Companies Act, 2008, that may mitigate concerns around the instrument of the juristic person facilitating lack of accountability of natural persons, is s 20(9) which provides for the 'piercing' of the corporate veil to potentially delimit the liability of persons who 'unconscionably abuse' the juristic personality of the company to be brought by 'interested parties'. This appears to broaden the instances in which the corporate veil may be pierced and may provide some relief for the concerns that the juristic personality gives rise to. In the case of *Ex Parte Gore* the Court utilised this section to prevent a holding company from escaping the liabilities of its subsidiaries where the group acts in consortium and the records kept are such that the distinct identities of the companies are indistinguishable.[495] The operation of this section against shareholders or directors brought by stakeholders is yet to be tested by the courts as is the ambit of the term 'interested person'. Nonetheless s 20(9) does not exclude the application of the common law.[496]

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[493] South African Company Law Guidelines (note 140 above) 12.

[494] Interestingly the only right in the Bill of Rights of the Constitution, 1996 qualified as 'human' is dignity.

[495] *Ex Parte: Gore NO and* Others (18127/2012) [2013] ZAWCHC 21, 34 (*Gore*)

[496] Ibid 31.

On the matter of when it would be appropriate to 'pierce the corporate veil' Justice Binns-Ward opined,

> *In my view the determination to disregard the distinctness provided in terms of a company's separate legal personality appears in each case to reflect a policy based decision resultant upon a weighing by the court of the importance of giving effect to the legal concept of juristic personality, acknowledging the material practical and legal considerations that underpin the legal fiction, on the one hand, as against the adverse moral and economic effects of countenancing an unconscionable abuse of the concept by the founders, shareholders, or controllers of a company, on the other. The courts have shown an acute appreciation that juristic personality is a statutory creation and that 'their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted'.*[497]

While this may provide an interesting avenue for potential public interest litigation where the corporate personality is abused, it does not address the systemic operation of the company and the legitimised profit seeking priority that I have suggested serves as a means to veil what manifests as continued exploitative conduct in the operation of the coloniality of power.

The pressing question remains what the purpose of conferral of rights on legal persons would be? That is notwithstanding the possibility of disregarding separate juristic personality in undefined circumstances on a case by case basis – what is the justification for separate juristic personality in the first place? There the answer, in terms of More's reasoning about the new Constitution being a compromise document, I deduce would be that the entitlement to property rights would secure the property of the legal person amongst other rights. Consider, for example, the right to privacy which would secure the non-transparency of the legal person) and the right to free speech which would secure the right of the legal person to influence policy.[498]

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[497] *Gore* (note 495 above) 29 with reference to *ADT Security (Pty) Ltd v Botha and Others* [2010] ZAWCHC 563 at paras 16-18.

[498] Brown (note 61 above) 161.

The case of *Palala Resources v Minister of Resources and Energy*[499] concerned whether or not a company loses its mineral prospecting rights after being deregistered for failing to file its company returns as required by the Companies Act, 2008.[500] While previously the courts have held that deregistration has the effect on a juristic person of death on a natural person,[501] in this instance the Court sought to establish '…whether the learned judge was correct in her finding that restoration does not constitute a Biblical Lazarus moment for a lapsed mining right.'[502] The Court held that, in the interest of third parties who may not know that the company is no longer registered and other assets and rights that re-vest upon registration, the company does not lose its mineral prospecting rights.[503] In other words, reregistration does constitute a 'Biblical Lazarus moment'.

I contend that, this seemingly germane case is laden with significance. This is because it avows two commitments. The first is the commitment to the juristic person as an immortal holder of property capable of perpetual succession as the definition of the company noted by Pennington from the classic USA case of *Dartmouth* of a company being,

> *… an artificial being existing only in contemplation of law….it possesses only those properties which the charter of its creation confers upon it, either expressly on as incidental to its very existence. Among the most important are immortality, and, if the expression allowed, individuality; properties by which perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand…By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being*. [504]

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[499] *Palala Resources v Minister of Resources and Energy* (479/15) [2016] ZASCA 80. (*Palala Resources*)
[500] Ibid para 3.
[501] *Miller & others v Nafcoc Investment Holding Company Ltd & others* [2010] ZASCA 2 para 11.
[502] *Palala Resources* (note 499 above) para 5.
[503] Ibid para 12.
[504] Penington R *Origin of Corporations* (1931) 2 *Corporate Practice Review* 33, 36.

The second commitment is that of the law to the Eurocentric ideology of personhood and being that is centred in the original Western Christian paradigm of the universitas evidenced by the Biblical reference to Lazarus.

The new Constitution in Context: limitations of human rights – serving the zone of being

On a national scale the new Constitution is often promoted as the solution to the ills of injustice and inequality however, the abstract ideals are not widely reconcilable with the concrete experiences of poverty and inequality.[505] The rights based approaches to addressing injustice and inequality are disjoint with the ways in which the law produces the subjects it seeks to protect by necessitating the adoption of a victim-subjectivity in order to benefit from such protection.[506] Those who do not have the means to enforce their rights must appeal to the benevolence of others to act on their behalf or alternatively be satisfied with remaining in the zone of non-existence. The net effect is an attempt to temporarily mitigate the effects of poverty and inequality in particular instantiations of it rather than eradicate its causes or even envision a society where poverty and inequality is so intolerable that it impacts daily activities – in other words that it is not something described as intolerable while life for those not directly negatively impacted by it continues as usual.

Modiri exposes a contradiction in the recourse to rights as a remedy to end poverty. Fundamentally, the utilisation of these rights to secure the institutions and systems which generate poverty operates in contrast to the effect of appeal to rights to create carve outs in respect of deviant conduct, in attempt to mitigate harmful effects of institutions rather than call into question the legitimacy of the very institutions and the power they have to create harm.[507] It also frames harm as sensational instances that offend conceptions of what is permissible but does not require accountability of an actor in the scheme of social power dynamics and the ways in which dynamics of subordination and control are maintained.[508] To this effect, Sibanda questions whether the liberal democratic constitutional paradigm is conducive to bring about the structural change that is necessary in order to free impoverished people from the

[505] Modiri (note 65 above) 224-5.
[506] Brown W 'Suffering rights as paradoxes' (2000) 7(2) *Constellations* 230, 231.
[507] Modiri (note 65 above) 255.
[508] Ibid.

scripted status of dependent non-beings.[509] Rights, in their current context, require an appeal to power without questioning the legitimacy of the existence or exercise of that power.

In the context of the company, this manifests as recourse to finding and enforcing human rights obligations of juristic persons for violations of the rights of natural persons. This involves balancing the so called human rights of juristic persons against those of natural persons in a context that purports an even scale. This as opposed to, having recognised the fictional and at best artificial nature of companies, reimagining the acceptable parameters of activity or even legitimate purposes of juristic persons in society. Recourse to rights to mitigate the plight of those relegated to the zone of non-being neglects the manner in which rights entrench the system that created the conditions for relegation into that zone in the first instance. In other words when this approach is taken the paradoxical operation of rights is neglected.[510]

Brown cautions that '[w]e must take into account what rights discourse does not avow about itself'.[511] We must be critical of an approach that incrementally solves problems or seeks to mitigate problems with view to a later solution the extent that our energies and attentions are occupied with the alleviating the symptoms of injustice rather than addressing the causes thereof.[512] This puts people in a position of chasing the mitigation of ills rather than securing an end to the production of those ills. She argues one of the paradoxes of rights is that they regulate by circumscribing the category that they serve to protect and simultaneously dismantle.[513] They are presented as protections that persons simply '…cannot not want…' notwithstanding their limiting effect on systemic solutions.[514] The paradox stems from the irreconcilability of the challenge to a system that seeks to modify the outcomes of a system while simultaneously appealing to that very system to be more accommodating and thereby necessarily legitimating that system.[515] Rights are

[509] Sibanda (note 63 above) 497.
[510] Brown (note 506 above) 234.
[511] Ibid 237-8.
[512] Ibid.
[513] Ibid.
[514] Ibid.
[515] Ibid 238.

premised on a liberal individualism. They formulate power as a zero-sum game that requires, at best, a balancing act that maintains status quo in political and social orders.

It has been argued that oppression is contextual and as such the remedy thereof must address context '…[y]es the abuse must be stopped but by whom, with what techniques, with what unintended effects, and above all unfolding what possible futures?'[516] Frustrations with human rights do not necessarily stem from a conceptual rejection of rights but rather the ways in which rights discourse is used to patronise those with the lived experiences of poverty and injustice in the face of the protection of those institutions that perpetuate that experience.

Madlingozi argues that colonial-apartheid creates an ontology of being where being white is equated to being human is greater than being black which is equated to being sub-human.[517] In this way the new Constitution operating on the ostensibly linear upward incline in continuing with the momentum of modernity, engendered a bifurcation of society that allowed for elite black people to assimilate a putative white status in their proximity to whiteness while the majority of the black population remained in the zone of non-being.[518] This is why the measure of the success of the constitutional democracy cannot be pegged on the scale of the elite black population but rather, in the words of Modiri, '[w]hat is important is not who constitutes the capitalist class, but who constitutes the large majority of the poor, unemployed and working class (viz Blacks).'[519]

The zone of non-being continued in the liminal past where injustice, inequality and violence are real and legitimated by the coloniality of power operation through the continued persistence of colonial ideology and institutions. In this sense, for those static in the zone of non-being there is no meaningful recourse to the promises of the new Constitution and there is no regard or protection for their humanity.[520] In this sense, the transition into constitutional democracy represented merely a transition in

[516] Wendy Brown '"The most we can hope for…" human rights and the politics of fatalism' 103:2/3 (2004) 2(3) *The South Atlantic Quarterly* 451, 460.
[517] Tshepo Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' 1 *STELL LR* (2016) 123, 124.
[518] Madlingozi (note 340 above) 128-9.
[519] Modiri (note 65 above) 232.
[520] Madlingozi (note 340 above) 129.

phases of coloniality and not liberation – in the sense of restored humanity in the ontological and material sense in terms of restored dignity and land and agency over that land including the terms of subsistence on and with that land.[521] To this end, human rights discourse extends the discourse of determination of who is human and who is not and the pursuit of the recognition of human rights translates into the aspiration towards being white as Western as prerequisite for existence in the zone of being.[522]

Cognisance of this argument would suggest that the very framing of the contemplative title of this dissertation, 'did political independence and the new Constitution break the ideological underpinnings of the concept of the company?' gives itself away. Perhaps then the more prudent question would be: did the new Constitution break the ideological underpinnings of colonialism-apartheid? For pondering how it would break the ideological underpinnings of the company would be frivolous if the new Constitution is operating broadly within the same ideological paradigm with the same social, political and economic institutions as colonialism-apartheid as experienced by the majority of the people of South Africa. The answer would be that there is no reason to assume that there would be such a break in the first instance.

In this context Madlingozi refers to the Marikana Massacre where on August of 2012, 34 human beings occupied as miners were killed in the course of demanding a living wage and in essence contesting their occupation in the zone of non-being where they are obliged to accept the terms of life prescribed as objects to be acted upon or as mere functionaries in a system.[523] While intuitively, the words tragedy or outrage would describe the Marikana Massacre to qualify it with such words at this stage seems to be in bad taste given the conspicuous lack of a critical mass of national outrage and urgent and drastic reaction following the massacre.

Some of the questions that are begged when considering the Marikana Massacre are what was the role of the company in facilitating the massacre? In what way did or does the instrument of the company prevent the ascertainment of liability of who is responsible for the escalation into physical violence seen that day? What caused the

[521] Madlingozi (note 340 above) 135.
[522] Madlingozi (note 340 above) 135.
[523] Madlingozi(note 340 above) 138-9.

deaths of those persons and between the state and the companies implicated can there ever be a plausible explanation that does not take into account the systemic operation of the coloniality of power? However compelling these questions may appear Ndlovu profoundly contends that they ought not to be the primary concern. This is because they address the more descriptive question of 'what happened?' rather than the more elucidating question with more transformative potential being 'why did it happen?'[524]

While a full treatment of these questions is beyond the scope of this thesis, the contentions of Ndlovu on the Marikana Massacre are informative, in their situation of the massacre in its systemic context.[525] They question whether state actors can fathom an economic system different to that which enabled the conditions that facilitated the massacre; moreover, they note that for as long as exploitation continues resistance thereto makes the occurrence of violent suppression inevitable.[526] Part of the project of coloniality is the undermining of the rationality of the perspective of the oppressed in the context of a reference point that is positioned as neutral but is nonetheless Eurocentric.[527] This means that the answer to the question of why the Marikana Massacre happened is deflected from its context of being the result of people who occupy the zone of non-being daring to challenge the coloniality of power by demanding to be free of that zone and insisting relentlessly on their being.[528]

The conditions that prevail over the majority of black South Africans that occupy the zone of non-being are violent and inhumane.[529] Most sectors of the economy remain dominated by white people (as ownership or control) and black people are relegated to being cheap labour.[530] Perhaps the most disturbing aspect of this dynamic is the purported neutrality with which poverty is viewed. The conduct of the state that facilitates and perpetuates inequality cannot be dismissed without, again, turning our attention to the historical context that informs the very formation of states in post-

[524] Ndlovu (note 253 above) 47.
[525] Ndlovu (note 253 above) 56.
[526] Ibid.
[527] Ibid.
[528] Ibid 57.
[529] Ibid.
[530] Ibid.

colonial countries. The relationship between the state and juristic persons must be viewed in relation to the historical fact that juristic persons with commercial interests were at the helm of the dissection of Africa into nation states at the 1648 Berlin Conference.[531]

Meyersfeld, also writing on the Marikana Massacre, confirms the challenge to the narrative of trickle down development by acknowledging that '[t]he reality is that mining operations often result in worse conditions after the conclusion of the operations, than existed before mining began.'[532] She further notes the relationship between companies, in the context of mining, and labourers are exploitative and not only increases poverty, but banks on it.[533]

Grosfoguel has submitted[534] decolonisation of the current global political economy requires formal redistribution of accumulated wealth of the North to the South and the cession of disproportionate extraction of wealth from the South to the North.[535] The question is whether or not this would be possible without reassessing the purpose and consequence of the company as a juristic person?

The relationship between the new South African State and the company as existing in fundamentally the same form under fundamentally the same regulatory framework as its colonial constructions; viewed in the context of the limitations of human rights under the new Constitution as truly transformative tool suggests that the zone of being remains occupied by the company to the detriment of and in maintenance of the zone of non being. This conveys the impression that the company has been retained as an instrument of coloniality.

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[531] Ibid.
[532] Meyersfeld (note 5 above) 2 and 18.
[533] Ibid.
[534] Ibid.
[535] Grosfoguel (note 169 above) 32.

V CONCLUSION: THE LIMITS OF THE JURISTIC PERSON: RETURNING TO THE RELATIONSHIP BETWEEN THE STATE AND THE COMPANY

Finally it is prudent to contemplate the fundamental question of what the source of power of one person or peoples over another is. Deiser submits that control is ultimately a function of the power of the strong over the relatively weak. [536] Inevitably, some persons therefore are able to exert force over others and as such influence or compel others to act in accordance with their own will and for their own benefit.[537] This begins centrally at the state.[538] The classic social contract theory posits that the state's power and authority to govern is derived from the consent of the governed.[539] With this authority comes the obligation to regulate relations between persons and peoples in a manner that is just and equitable.[540]

The existence of the company as a juristic person is a creation of the law authorised by the state. In its current construction it operates as an instrument that allows the pursuit of gain without personal liability for the risks taken. It facilitates the perpetual accumulation of wealth and enjoys the rights that natural persons do ensuring the privacy of those operating the instrument without regard to the imbalance of power created by historic accumulation and subjugation.

Natural persons have utilised the construct of the juristic person and the amorality of profit seeking to exert and maintain control without personal accountability. This has been exacerbated by the potentially nebulous control structures that the fiction enables that at times makes identification of the persons behind the fiction itself a nearly incomprehensible task. This is evidenced by the manner in which persons have profited from the oppression performed by companies in the form of dispossession, slavery and genocide in South Africa and across the world.[541] The fiction of the juristic person has thus far been employed to effect the imposition of the interests of the strong over the person of the weak – including the interest of maintaining a relative position of strength. The fiction has operated, largely unquestioned, within a colonial frame of reference in the coloniality of power.

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[536] Deiser (note 134 above).
[537] Ibid.
[538] Deiser (note 100 above) 226-7.
[539] Ibid.
[540] Ibid.
[541] Stephens (note 216 above).

The historical operation of the company in South Africa have been revealed the DEIC, BSAC and incorporated company during apartheid to be instruments that have been used by white men to facilitate the dispossession and exploitation of black people. As such, the company while occupying the zone of being has been an instrument of those in that zone for maintaining black people in the zone of non-being while simultaneously overtime having the effect of sanitising the interests of exploitation with resort to the ostensibly amoral pursuit of profit.

Furthermore, it is clear the continued legitimacy of the operation of this instrument has not been decisively challenged in the entrance into the new Constitutional era. Rather the relationship between the coloniality of power in operation encompassing both the state, the company and persons lead us to conclude that the company continues to operate to oppress those relegated to the zone of non-being in the interests of those that occupy the zone of being.

In order to fathom decolonisation beyond the tokenistic into tangible transformation of power relations, the reality and consequences of dispossession must be addressed.[542] Therefore, the systemic nature of poverty and the manner in which the company operates as an instrument in this system is relevant and must be accounted for. So too is the manner in which this construct has operated to obscure the racialized relations between natural persons and the dehumanising consequences of coloniality. The golden thread of control of land and labour is significant against the backdrop of the company's application in historical and continued dispossession. The occupation of the juristic person of the zone of being at the expense of persons consigned thereby to the zone of non-being is central in this process of questioning. The manner in which the construct empowers the inequitable control of land and the generation of captive labour is foundational to this.

The contention that coloniality imposes an epistemological paradigm that proclaims itself inevitable and absolute may explain this lack of such interrogation. A hesitation towards the re-imagination of this paradigms affirmed be Ramose's argument that colonialism was not only genocidal but epistemicidal in that indigenous epistemologies were discredited and replaced with a Eurocentric monopoly on

[542] Eve Tuck & K Wayne Yang 'Decolonization is not a metaphor' (2012)1:1 *Decolonization: Indigeneity, Education & Society* 1 at 7.

reason – which extended to the purportedly neutral principles that have informed and animated institutions such as the company.[543] In the words of Grosfoguel,

> *Western monologism and monotopic design relates to other cultures and peoples from a position of superiority and does not acknowledge non-western cosmologies and epistemologies. The imposition of Christianity on the savages and barbarians in the 16th century, followed by the imposition of the white man's burden and his civilising mission in the 18th and 19th century, the imposition of the developmental project in the 20th century, have all been imposed by militarism and violence under the rhetoric of modernity of saving the other from his own barbarianisms*.[544]

The utility and desirability of the construct, as such, can and must be interrogated by the state which in theory confers upon the construct its very existence. In this process, the epistemic point/s of reference must be consciously situated when populating the construct of the company bearing in mind the real consequences that the construct has on lives of persons of flesh and blood. Only in this way will is a world in which other worlds are possible fathomable;[545] and in this way is a world in which all human beings live alongside each other as human beings possible.

[543] Ibid.
[544] Grosfoguel (note 169 above) 25.
[545] 'As the Zapatistas say, *luchar por un mundo donde otros mundos sean posibles* (to fight for aworld where other worlds are possible)' Grosfoguel (note 169 above) 33.

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