

**A CRITICAL INQUIRY INTO THE ROLE OF LAW AS AN INSTRUMENT FOR THE PROMOTION OF
SOCIAL COHESION IN POST-APARTHEID SOUTH AFRICA**

SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE LL.M DEGREE

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(MAY 2020)



Declaration

I, **MAWETO PP** hereby state that the LLM dissertation titled, '**A CRITICAL INQUIRY INTO THE ROLE OF LAW AS AN INSTRUMENT FOR THE PROMOTION OF SOCIAL COHESION IN POST-APARTHEID SOUTH AFRICA**' herein within fulfilment of the LLM degree is my own original work, contains no plagiarism and has, to the best of my knowledge, not been previously submitted by me or any other person to this or any other institution.

Signature of LLM candidate.....

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Signed in my presence on..... day of..... 2020

Commissioner of Oaths.....

Acknowledgement

I am overwhelmed in all humbleness and gratefulness to acknowledge my debt to all who have helped me to put these ideas, well above the level of simplicity and into something concrete.

I cannot express enough thanks to my primary supervisor Prof John-Mark Iyi for his unceasing professional and ethical support and encouragement without which the engagement of this study would not have been commenced or smoothly executed. With further aggregate, Prof Iyi is sincerely appreciated for his compounded mentoring and patiently developing my postgraduate abilities, knowledge and experiences. I would like to also thank my secondary supervisor, Adv TN Raphulu who ensured that this project became a master piece of academic writing. Thank you Adv for tirelessly ensuring that my work is clean, focused and in adherence to every single requirement. The combination of both my supervisors helped me in conducting an advanced research and learning new things. I am thankful and grateful to them.

My completion of this study could not have been accomplished if not for several people who contributed and assumed crucial roles in ensuring that I do not drop out and stay funded for this study. My deep and sincere gratitude in this regard goes to Dr E Lubaale, Prof A Jegede, Prof T Van Der Walt, Cde T Mhuru and others I may not be able to mention by name. Any attempt at any level would not have been sufficient or supersede the moral, financial and professional support you gave me throughout the journey. I am quite grateful.

I would like to also thank my family, parents in particular, for their patience and multidimensional support without which my completion of this project would not have been smooth. It was a great comfort and relief to know that you were supportive of this journey, thank you.

Lastly, I thank God for the unwavering and consistent mercies, endowment with wisdom, sense of direction and life blessings.

Abstract

Law as a system of rules promulgated for social function is one of the most crucial elements in promoting social order. Law generally sets frameworks for regulation of various and almost all levels of interaction between members of a society, and *inter-alia*, legal creations such as juristic persons. The functions of law are elementary in answering what law can do to promote social cohesion. This study evaluates the role of law in promoting social cohesion in the post-apartheid context under the constitutional dispensation in South Africa. The study makes an inquiry into the functions of law as well as its objectives in relation to promoting and advancing social cohesion in a society split by racial divisions, nationality differences, tribal diversity, and numerous rights of various kinds as well as political differences. The study utilises an empirical methodology as the primary methodology of gathering information by way of direct participation of community members. This methodology was instrumental in exploring empirical questions and gaps of law and underlying legal concepts. The responses of participants inform the major findings of this study that there is a relationship between the legal order and the social order based on mannerism of adoption, implementation and social calibration of laws. These laws however must be directed at reflecting the common values of people so as to facilitate the attainment of social cohesion. The findings of the study generate insights on the instrumentality, limitations and role of law in promoting social cohesion in the post-apartheid context of South Africa.

Keywords: South Africa, social cohesion, legal order, law, post-apartheid, and social order.

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CHAPTER ONE

INTRODUCTION

1.1. Background to the study

In the legal world it is common knowledge that each law is broadly categorised by way of giving reference to the exact issue which the particular law seeks to address. The enactment of law is a process in which the lawmaker aims to address a certain issue or problem. In this process, the prescribed functions of the law are the main guidance in the conception of a certain legal framework or statute.

It is almost three decades in South Africa after the dismantling of the apartheid governance and legal system. The apartheid system of governance was highly instrumental in dismantling social cohesion amongst diverse races, cultures, nationalities, tribes and age groups in South Africa. Law was utilised to impose a certain type of social order in the apartheid era mainly characterised by racial exclusion and bias. However, the 1994 democracy is the result of a series of needs and promises to redress injustices of apartheid rule. Amongst the needs and promises was the need to interweave the broken social ties, which became the embodiment of the term, “the rainbow nation.”¹ The current social cohesion status in South Africa has left some in a nostalgic state where they reminisce about the sociability networks of the apartheid era wherein majority of people were united as one society, in resistance of the minority apartheid system of governance.² The changes in the dynamics of society have left many communities scarred by competitiveness and battered relations between the people whereas before 1994 people were unified in ideals and desires of a common goal, to dismantle apartheid.

The post-apartheid era has seen increasing calls for the restoration of the glue that holds the bonds of society together, for instance the way *ubuntu* alone ostensibly held society together before ideals embodied in the 1996 constitution.³ This idealism has also been expressed as the need to resurrect a social domain torn apart by past repression and the rapidly growing contemporary changes. Social cohesion, in line

¹M Nowok & A R Luca *Post-apartheid South Africa: the first ten years* (2006) vii.

²J Dlamini *Native nostalgia* (2009) 9.

³C Smith ‘Seeking the glue that can help us grow together: City press’ (2017) retrieved from <https://city-press.news24.com/Voices/seeking-the-glue-that-can-help-us-grow-together-20171216> (accessed on 20/05/18).

with provisions of the constitution and those of the National Development Plan, has the potential to enhance productivity and support economic growth by addressing costs that come with mistrust and conflicts in a diverse society like South Africa.⁴

In the South African context, the constitution is the supreme law of the land such that any other law that is inconsistent with the provisions of the constitution is invalid.⁵ On this premise, it becomes apparent that all the provisions of the constitution are the cornerstones of the enactment and validated application of any other law or legal framework in South Africa. In that regard, scholars like Goldstone view the South African Constitution as the object of existence of the Republic since it mandates the lawmakers to push the idea of cohesion through the application of law.⁶ This shows that law plays a role in most interactions and issues arising from the societal webs formed out of the constitutional guarantees.

The global community applauded the realisation of democracy in post-apartheid South Africa. However, this democracy came with its own set of social problems and challenges. In illustration, fast-paced changes in infrastructure came with serious overcrowding in townships and the creation of informal settlements that have become breeding ground for some suffocating forms of socialisation.⁷ These new forms of social relations are material in explaining the decline in social cohesion. For instance, the new forms of social relations have directly facilitated the increase of other related societal problems such as crime, mostly in overcrowded places where there is no privacy and very little respect or conformity to differences in culture, nationality or race.

South Africa has, in recent times been increasingly referred to as “lawless,” indirectly indicating the expected role and importance of law in promoting social cohesion. This usually materialises after the occurrence of racism and xenophobic attacks or vigilante justice as a form of community action carried out by communities functioning and facilitated under the new forms of social relations. These manifestations are sometimes described as “South Africa is lawless”, which is a term that has become overused in cases where the lack of social cohesion is in question. In illustration, a

⁴ Smith ‘same as above’.

⁵ Sec 9 of the Constitution of the Republic of South Africa, 1996.

⁶ R Goldstone *The South African Bill of Rights* (1997).

⁷ V Barolsky ‘Democracy, Governance and service delivery programme’ (2015) *Human Sciences Research Council* 1-143.

reputable media source published that, “most violent so-called service delivery protests, rampant crime, vandalism and destruction of colonial statues and monuments and the xenophobia attacks is testimony or the epitome of the ‘lawlessness’ perpetuated at the ‘top’ and now emulated at the ‘bottom.’”⁸ This in turn shows how, ‘lawlessness’, as a word used in singular and in phrases, has become a tagline used to describe the state of breakdown of social cohesiveness. In light of this, this study looks at how one side of the same narrative is potentially negative while the other is positive, however, society feels the negative effect of gaps in law and enforcement more than the positives. In this regard, the study acknowledges that law is instrumental in making apparent social changes, simply by looking at how law served as an instrument for extreme social changes in the apartheid regime. The constitutional era has attributed to the formation of some legal developments aimed at eradicating barricades to cohesion such as section 9 rights to equality of the 1996 constitution.⁹

This inquiry aims to investigate what law can do in this contemporary context where, unlike in the apartheid era people unified in a socially structured manner to fight against the apartheid regime. However, in the post-apartheid era law has been material in dispensing various rights such as freedom, dignity and equality. These various rights have been the key to unlocking most of the prominent and dangerous avenues such as contesting the generational hierarchies such as how people disregard the dispensing of punishment.¹⁰

The current lack of stability in South Africa is arguably the best empirical evidence available to show the lack of social cohesion. This is evident by the imminent lack of trust, rising disparities, inequalities and most importantly, the marginalisation of members and certain groups in the society including foreign nationals. All of the abovementioned factors, have were described by Emile Durkheim as the most

⁸ News 24 ‘South Africa is rendered lawless and ungovernable’ (2015. Retrieved From: <https://www.news24.com/MyNews24/SA-is-rendered-lawless-and-ungovernable-20150418> (accessed 21 May 2018).

⁹ Sec 9 of the Constitution of the Republic of South Africa of 1996.

¹⁰ Dlamini ‘n 2 above’.

essential features of a cohesive society, however in this case, these elements are missing in the South African society in the post-apartheid context.¹¹

The constitution lays the most ascertainable grounds for legislatures to implement measures aimed at promoting cohesion by way of inclusion of chapter 2 in the constitution, which comprises of the Bill of Rights. Section 8 and 9 in particular seem to be more profound in giving the legislature directives on applicability and standards for facilitating social domains. In illustration is an excerpt from section 8 of the constitution: Application¹²

1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
2. A provision of the Bill of Rights binds a natural or a juristic 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.
3. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court

In order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and May develop rules of common law to limit the right, provided that the limitation is in accordance with section 36(1).

A juristic 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 juristic person.

This excerpt clearly shows that the Constitutional Assembly has already laid the ground for what law can do in addressing interactions of people at different levels of social relations or between citizens as well as between citizens and the state. With this notion in mind there surely is an answer to what law can do to address the issues of social cohesion which renders the two and half decades of democracy being nicknamed lawless.¹³

In this regard, an excerpt of section 9 of the constitution has also been included herein in order to give an insight on how the constitution touched lightly on redressing and restoring societal bonds in the form of equality: Equality¹⁴

¹¹J McLeod & K Von Treuer 'Towards a cohesive theory of cohesion' (2013) 3 (12) *International Journal of Business and Social Research* 1.

¹² Sec 8, the Constitution of South Africa of 1996.

¹³ News 24 'n 8 above'.

¹⁴ Sec 9 'n 5 above'.

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The issues addressed in section 9 are similar to those that serve as aggravating factors in dismantling social cohesion in South Africa. The above-cited provisions provide insight on grounds forbidden by the constitution as grounds for relating to or treating another person in a discriminatory or unequal manner. These provisions serve as the guide for the progressive realisation of social cohesion.

In light of the above background, this study looks at the issues addressed by the constitution as the highest law of the land. In ascertaining the role of the law in promoting social cohesion in post-apartheid South Africa, the researcher looks at the constitutional obligations of the judiciary and legislature in their capacity to make, develop, reform, interpret and apply the law. In this study, these obligations are suggestive of stimulating the attainment of social cohesion in “the rainbow nation” through the promulgation of laws that fulfil social functions of law, which in turn will aid in the attainment of social cohesion. Apart from regular summits and calls for social cohesion by the Ministry of Culture and the national development plans imposed, it has been quite unclear whether the judiciary and legislature have fulfilled the obligations to utilise law as a transformative tool for social cohesion.

1.2. Statement of the problem

In the transition from apartheid to democracy, in a society marred by differences, ranging from race, nationality, culture and orientations, law has been instrumental in both the apartheid and post-apartheid era. The constitution, as the new supreme legal instrument provides for rights and their application, as enshrined in the Bill of Rights

in chapter two of the constitution. It is however, unfortunate that in spite of all these attempts, the constitution standing as the fountain for the lawmaker and judicial officers to forge, develop, reform and apply law to promote orderly and peaceful coexistence of diversity in society, little has been done in this regard as evidenced by unending restlessness in South African communities. Cohesive social structures have become dismantled and dysfunctional in the absence of legal frameworks to follow up the new dispensation of various rights and freedoms. Most indicators and causes attributed to the decline of social cohesion in the face of such a powerful constitution, include factors such as political, social, economic and cultural differences, inequalities and deficient laws. The problem addressed in this regard pertains to what and how the law can promote social cohesion in the post-apartheid era. Since social cohesion became part of the National Development Plan agenda, there are annual report or reports on shocking increase in the numbers of discrimination cases based on race, nationality, culture, gender, disability, beliefs, yet the constitution has already addressed these issues under protected fundamental rights. In light of the aforementioned, questions arise on what the law can do, on the functions of law and most importantly, how law can promote social cohesion. The problem becomes more interesting when comparing the margins of differences in the apartheid era and the democracy era in terms of social cohesion. With the objectives of the constitution clearly indicating the need to redress past injustices of apartheid law, it becomes apparent that law has been instrumental during apartheid in the formation of a certain social order and social structures and influences the social order and structures in the current democratic era as well. Law was at the core of subjugating social structures in the apartheid era and influencing the pattern of social relations in South Africa. Hence, the need to inquire and address what law can do to promote social cohesion in post-apartheid South Africa.

1.3. Aims and objectives of the study

1.3.1. Broad Aim

To examine how law can contribute in promoting social cohesion in post-apartheid South Africa constitutional dispensation.

1.3.2. Specific objectives

In achieving the aim of this study, the following objectives are also pursued:

- To assess the impact of Apartheid legislation on social cohesion in South Africa,
- Examining the current state of social cohesion in South Africa under the transformative constitution,
- To assess levels of progress if any, by examining existing legislation/policies relating to social cohesion in South Africa and their shortcomings and,
- To examine the impact of sections 8 and 9 of the 1996 constitution on efforts to build social cohesion in South Africa.

1.4. Research questions

The questions addressed in this research are as follows:

- What roles and functions can be an outcome of the law in the promotion of social cohesion in post-apartheid South Africa?
- How is law applicable in the promotion of social cohesion in post-apartheid South Africa under the transformative Constitutionalism concept?
- What are the main constraints on attaining the envisioned social cohesion of the 1994 democracy ideal?

1.5. Hypothesis

The study is based on the hypothesis that law can be instrumental in promoting social cohesion in post-apartheid South Africa. This is from the fact that the Republic shifted from a regime of repressive laws whose effect created a negative oriented social order, to new regime of democracy and rights, however law's impact on social cohesion levels was evident in apartheid era and is still evident in post-apartheid era. Furthermore, law as a vital aspect is expected to play a social function such as maintaining social order, social relations, which are all stimulants of a cohesive society. Can the law be instrumental in promoting social cohesion in contemporary post-apartheid South Africa similar to the instrumentality of law during the apartheid era in imposing a certain social order of racial divisions and exclusions? This hypothesis is further affirmed and informed by reasoning from the case of

Soobramoney v Minister of Health, KwaZulu-Natal;¹⁵ the Constitutional Court held that societal transformation is the primary objective of the new constitutional order. This falls in line with Kelsen's viewpoint of a Grundnorm, which serves as the basic norm from which laws are made.¹⁶

1.6. Preliminary literature review

The interpretation of rights envisaged in the constitution is successful by looking at the underlying principles of the constitution, which are, freedom, equality and dignity. These are paramount in showing how South Africa has gone through a radical transition from a period of repression wherein parliamentary sovereignty was the dominant feature unlike the constitutional post-apartheid era. The constitutional democracy has committed itself to creating a society driven by democratic values, social justice and fundamental human rights.¹⁷ In this regard, The Council for the Advancement of the South African Constitution advances that the constitution lays ground for the provisions of a detailed framework for social and economic transformation of South Africa, which must take into account the effects of apartheid while promoting deliberate, participatory and inclusive democracy.¹⁸ These provisions would therefore require protection and advancement. This vision relates with the concept of social cohesion as it directly aims to establish a cohesive society where all persons are equal, have dignity and freedom. This is evident in constitutional disbursement of rights that prescribe for the equality of all persons.

In light of the above-mentioned, it is an important task to look at how the status of social cohesion has reached such levels of dysfunctionality without redress and intervention measures. The constitution lays grounds for the legislature to conceive frameworks that advance, realise and protect the idea of cohesiveness. Gumede submits that the public policies and legislative transformations implemented since the period of conception of the South African democracy are deliberate attempts to broaden the concept of liberty, human development and socio-economic justice.¹⁹

¹⁵ *Soobramoney v Minister of Health KwaZulu-Natal* 1998 1 SA 765 (CC), 1997 12 BCLR 1696 (CC).

¹⁶ H Kelsen *General Theory of Law and State* (1949) Republished (2005).

¹⁷ Basic provisions of the Constitution retrieved from:
<http://www.justice.gov.za/legislation/constitution/basicprov.html> (accessed 21 May 2018).

¹⁸ Council for the Advancement of the South African Constitution.

¹⁹ V Gumede 'Social and economic inclusion in post-apartheid South Africa: From Inequality to inclusive Growth' poverty and inequality (2011) 4 *Transformation Audit* 88.

This is a clear depiction of how law is pertinent to redressing the effects of the apartheid regime. In this regard, law finds its basis in the Grundnorm. Kelsen has expressed in the pure law theory that the Grundnorm is the basic norm, which is the underlying basis for law.²⁰ In the current context, the South African constitution suffices as the Grundnorm and any law inconsistent with it is invalid.

The topic of social cohesion attracts most international governance institutions, states and policymakers due to the increase in divisions and societal breakdowns stemming from economic inequalities and downturns, tensions resulting from ever-increasing migration as well as ethnic and cultural conflicts.²¹ Jenson asserts that the social fabric is frayed due to the increase in mounting differences between groups of people from different socio-economic groups who at times worry about cultural insecurity and are nostalgic about the old apartheid regime.²² The increase in socio-economic inequalities and cultural differences results in a significant reduction in tolerance and compassion, which are closely relatable factors to the situation prevalent in post-apartheid South Africa.²³

Burns describes the legislature in South Africa to have deepened their focus on social cohesion due to an increase in inequality, increasing unemployment rates and mostly the issue of racial inequalities.²⁴ Burns shows that only a very small number of people would oppose the conclusion that South Africa is a deeply divided society in need of the promotion of social cohesion.²⁵

Pillay presents a resourceful database on how South Africa has become fragile due to changes in the post-apartheid context, which makes this study objectively driven towards an answer on whether law can promote social cohesion in the post-apartheid context. Pillay argues that community practices in the post-apartheid context show more of an increase in fragmentation rather than unification.²⁶ The way in which

²⁰ H Kelsen 'n 16 above' 5-10.

²¹ J Burns et al 'Defining social cohesion' (2018) 216 *South African Labour and Development Research Unit* UCT 1-17.

²² J Jenson 'Mapping Social Cohesion: The State of Canadian Research' (1998) *Canada Policy Research Network Study* No F/03 Available at: http://cprn.org/documents/15723_en.pdf (accessed 28 May 2018)

²³ Burns 'n 21 above' 1.

²⁴ Burns 'same as above' 1.

²⁵ Burns 'same as above' 1.

²⁶ S Pillay 'Crime, community and the Governance of violence in post-apartheid South Africa' (2008) 35 (2) *South African Journal of Political studies Politikon* 141.

people cohere and relate is less positive and neither inclusive; there is rather an apparent increase in parochial forms of cohesion wherein people define themselves in defensive relation to other people.²⁷ This supposition presents a different challenge in dealing with the role of law in promoting social cohesion in post-apartheid South Africa, since the fragmentation is stemming from within the community itself. In illustration, the social forms where people are defensive for their own benefit in relation to others based on prejudice stemming from differences in nationality, race, age, disability, social status, gender, culture and beliefs. These are grounds of interaction already highlighted in section 9 of the constitution, yet it becomes a matter of what the courts can do only in instances where a person reports an issue of being a victim rather than what the law has already promised to do and how to deter such issues by stimulating social cohesion.

In this regard, the South African government has reduced efforts to promote reconciliation through the national policy agenda, but has instead turned its focus to social cohesion by using various mechanisms of intervention and initiatives.²⁸ For instance the National Strategy for Developing Inclusive and a Cohesive South African Society provide medium term strategic goals set for 2014 and long term millennium goals set for attainment 2030.²⁹ This document of plan sets out some objectives and indicators of social cohesion. The key objectives are to halve poverty before 2030, ensuring equitable distribution and access to benefits of economic growth, nation building towards a society free of all forms of racism, sexism, tribalism and xenophobia as well as improving citizenry safety through addressing and eradicating crime and corruption.³⁰ In addition to the National Development plan by the Ministry of Art and Culture mandate, policymakers are under constitutional mandate to stimulate a cohesive society as part of redressing past injustices and in recent times, for its proven advantages. Cuellar points out that a cohesive society produces far more stable democracies and better forms of civic participation.³¹ The notion by Cuellar is relevant to South Africa because of the criticism directed at South Africa's democracy for not

²⁷ Same as above.

²⁸ Burns 'n 21 above' 1.

²⁹ National Strategy for Developing Inclusive and a Cohesive South African Society 'creating a caring and proud society' Ministry of Arts and Culture.

³⁰ Same as above 23.

³¹ R Cuellar 'Social Cohesion and Democracy' (2009) International IDEA, Available at: <http://www.idea.int/resources/analysis/loader.cfm?csmodule=security/getfile&pageid=38089> (accessed 21 May 2018).

being as inclusive. Easterly points out that, issues such as increased productivity, growth and a guarantee for a solid economic boost are easily achievable in a cohesive society.³²

Pervaiz also affirms that social cohesion is visible through an increase or development in the quality of life for citizens, for instance a cohesive society is more liveable and sustainable for the citizens.³³ With this notion in mind, South African policymakers feel the obligation to reform policies that regulate and govern social relations since the social breakdown has become more and more apparent through incidents of rising xenophobic attacks on foreign nationals, issues premised on racial differences and socio-economic inequalities. Dheret submits that a cohesive society improves in inclusivity and tolerance for diversity and multiculturalism.³⁴ These aspects have also been lacking in South Africa as evidenced by the social fragmentations based on tribal and cultural diversity, and the exclusion of certain people of a certain social or economic standing, nationality or race from participation in economic or social interactions. The absence of the abovementioned aspects is a clear indication of the absence of social cohesion in South Africa. This has prompted this study in order to investigate how law can help to promote social cohesion in post-apartheid South Africa.

Looking at the prompts of this research, South Africa has received calls to commit to the principle of social cohesion, particularly because of xenophobia and racism, which are incidents that keep resurfacing on the national radar. In illustration, stronger conflict management and dispute resolution are among some of the key indicators of social cohesion in a society. A cohesive society is therefore categorised as one that does not grapple with conflict management and resolution. In the South African context, these issues have become more and more absent. South Africa has had increased rates in violence, violent protests, political divisions, which it has increasingly found hard to resolve and manage every time there is such an issue.

³² W Easterly & Woolcock 'M Social Cohesion, Institutions & Growth' (2009) *The Centre for Global Development* 10-11.

³³ Z Pervaiz & I van Staveren 'Diversity, Inclusiveness and Social Cohesion' (2013) *Institute of Social Studies* 5.

³⁴ C Dh eret 'Fostering social cohesion: the missing link in the EU's exit strategy from the crisis' (2015) *European Policy Centre* Available at: http://www.epc.eu/documents/uploads/pub_5459_fostering_social_cohesion.pdf (accessed 21 May 2018).

These elements have not only increased the dismantling of social relations, but have been a result and an indicator of the absence of social cohesion.

These incidents are mere indicators of lack of harmony in the society erupting throughout the country and at all levels of interaction mostly because of prejudice and bigotry, even at universities where future leaders are groomed. A social cohesion summit held in 2012 necessitated by the need to address and find ways to address the horrendous fragmentation of societal relations, showed the unceasing attacks on foreign nationals, as well as the baffling reality of the prevalence of racism in what is supposed to be the rainbow nation.³⁵

Due to an increase in xenophobic and race-based attacks, 2014 and 2016 came with more social cohesion summits and the national development plan board partaking in drafting initiatives on how to address the issues. In this whirlwind the Ministry of Arts and Culture published a statement saying that, “social cohesion in post-apartheid South Africa has become an important humanist philosophical mission intended to counter the apartheid belief system based on exclusion, partition and gross human abuse.”³⁶ It becomes evident from the supposition of the Ministry of Arts and Culture that social cohesion stems from and its presence significantly reduces inequality, exclusions and disparities based on gender, nationality, sexual orientation, disability, race, age, or any other factors.³⁷

The dismantling of the aforementioned elements is a means to achieving social cohesion. However, dismantling the elements is achievable by realising the constitutional guarantees through objective legal frameworks and measures. In that regard, this study becomes relevant to show the limits and extents to which law can be instrumental in promoting or stimulating social cohesion. The principle of nation building also forms the core of bolstering the aforementioned mission of social cohesion. Nation building requires the support of laws advocating and facilitating the coming together of the country’s diverse histories, languages, cultures, races and ethnic tribes. In this instance, law becomes a relevant solution since the problem is

³⁵ C Kronenberb ‘The conversation: why forging social cohesion still eludes post-apartheid South Africa,’ 22 November 2016 Retrieved at <https://theconversation.com/why-forging-social-cohesion-still-eludes-post-apartheid-south-africa-67256> (Accessed on 21 May 2018).

³⁶ Same as above.

³⁷ Same as above.

evidently stemming from multidimensional inequalities, which are conceptions of class divisions. The class divisions stem from economic inequalities which is not the sole issue since the rot goes all the way to culture and policies or legal frameworks of the country. In illustration, the constitution is highly instrumental in facilitating for a certain level of cohesion by affording recognition to previously disadvantaged and marginalized diverse peoples who are currently afforded the opportunity for expression and development with every other person in the Republic. This line of promoting social cohesion in a society where diversity is the most prevalent element seems to be the way in which law must progress towards in order to fulfil the constitutional obligation of creating a unified cohesive and equal society.

In this regard, champions of apartheid, in post-apartheid era call upon like-minded individuals and groups to safeguard the ideas behind the dismantling of apartheid. The objectives of the call can be achieved by creating an orderly and functional diverse society, which reigns on the rule of law.

In light of Kelsen's reasoning, the South African Constitution is the source of all other legal frameworks as enacted under any particular circumstances. This study, by looking at what law can do to promote social cohesion in post-apartheid era considers that the mechanism to promote social cohesion has already been provided for by the constitution in the Bill of Rights. The same Bill of Rights is responsible for facilitating a new kind of generational rights that are responsible for facilitating various sociability forms.³⁸ However, law is crucial and instrumental in dismantling the effects of apartheid in a manner that facilitates the promotion of social cohesion. In illustration, Keswell expounds that tremendous changes are noticeable in South Africa from the period after the end of apartheid to such an extent that South Africa is internationally heralded as one of the most prominent modern liberal societies, with some of the most ambitious constitutional guarantees and statements of liberties enshrined in law.³⁹

The aforementioned literature shows that law plays a significant role in promoting social cohesion in South Africa. Insight into the capabilities of law depicted in the literature of Nowak and Antonio⁴⁰ indicates that law has been socio-economically

³⁸ Dlamini 'n 2 above' 9.

³⁹ M Keswell *Education and Racial Inequality in Post-apartheid South Africa* (2004) 2.

⁴⁰ M Nowok & Luca A R 'n 1 above' vii.

instrumental in post-apartheid South Africa. Nowak and Antonio show that economic growth has doubled at a tremendous pace in the post-apartheid context due to progressive legal frameworks termed micro-economic policies.⁴¹ The literature by these scholars bears the analogies that show how law is primary and significant in influencing and promoting social change through socio-economic and political measures. In this regard, the question of what law can do to promote social cohesion may be met with just a few manageable complexities, however it remains a fact that law is capable of effecting change especially where the Grundnorm already has such an issue covered in its underlying values.

In pursuing an authentic answer as to what law can do to promote social cohesion in post-apartheid South Africa this study also looks at the most useful way to define law, its roles and functions in a way that shows how law is instrumental in carving and prescribing for measures to forge certain bonds at different levels and spectrums. Anderson published an article defining law as well as its roles. He shows that law is merely a system of rules adopted to allow the society to function.⁴² In that regard, society is functional only in the presence of a certain social order, which can come into existence in most cases only where there is the rule of law.⁴³ Law that is capable of promoting social cohesion is therefore the law that sets frameworks to accommodate, stimulate and promote all levels of interactions in a society notwithstanding the fact that each law can later on be broadly categorised in reference to its main objective or objectives. In this instance, the course and need for each law changes in spectrum of enforcement, consequences of breach, application, which will all be in line with societal changes, time and technological advancements.⁴⁴

The aforementioned specifics on law show that law is not a compilation of regulations locked away and an end in themselves, but are the basis of functionality in a society hence the need for them to change with the changes that come with time in order to keep on stimulating and promoting various interactions, in this case social cohesion.⁴⁵ In illustration, law has both macro and micro functions, for instance, in the case of macro functions the main idea is to foster either one between public order, political

⁴¹ Same as above vii.

⁴² Anderson, Functions of the Law. Retrieved at <http://www.abmm.co.za> (accessed on 21 May 2018).

⁴³ Same as above.

⁴⁴ Same as above.

⁴⁵ Pillay 'n 26 above'.

order, social order and moral order.⁴⁶ In the case of micro functions, law branches out to certain specifics, for instance, defining the limits of acceptable behaviour, creating regulatory frameworks, authorising state agents to take action, preventing the abuse of power as well as prescribing procedures for the use of law.⁴⁷ All of the aforementioned micro functions indicate the branching out of law in specific directions pertaining to macro functions of law, for instance law will branch out to defining the limits of acceptable behaviour in the spectrum of fostering social order. This supposition alone shows that law is capable of being more than ambitious, informing actual realisation of noteworthy changes, particularly in the direction of promoting social cohesion.

The policy coordination and advisory services have published their contribution on law and social cohesion. They point out that in this whole whirlwind, the state is one crucial member that plays a direct part in effecting change, influencing policy adoptions while simultaneously being the other side of the coin presenting a problem for the other innocent side.⁴⁸ This is by pointing at how the state is involved in embarrassing scandals masked in corruption, laziness and confusion.⁴⁹ These issues are some of the key causes of society's decline in trust in the state's capabilities to make law work for every citizen, such that most citizens always resort to self-serving violent forms of justice.⁵⁰ The elements mentioned in the above submission are some of the main causes of the fragmentation of societies and social cohesion.⁵¹ This also shows that in introspect the lawmakers and enforcers are to a certain extent, failing on their part as obliged by the constitution, for them to safeguard and realise smooth social relations across the diverse peoples of the Republic.

The concept of social cohesion as a concept of convenience⁵² can also be present yet its presence founded on and resulting in less positive results. In illustration is the cohesiveness found on grounds of beliefs, traditions, norms and culture where women

⁴⁶ Pillay 'same as above'.

⁴⁷ Same as above.

⁴⁸ Presidency, Republic of South Africa. 'Social cohesion and Social Justice in South Africa: Policy Coordination and Advisory Services (PCAS) (2004).

⁴⁹ Same as above.

⁵⁰ Same as above.

⁵¹ Same as above.

⁵² P Bernard 'Social cohesion: a dialectical critique of a quasi-concept' (2000) 491 *Strategic Research and Analysis Directorate Department of Canadian Heritage* 2-3.

hold lower class positions and status in society.⁵³ In this regard, this adoption is in contravention with various policies and international human rights instruments thus this study adopts the more positive oriented social cohesion to show the absence of social cohesion. This adoption positively aids in showing the role of law in promoting social cohesion. In this regard, the study will briefly look into the social functions of law in the contemporary society.

The social functions of law are understandable through looking at what law is for, since most legal philosophers deal extensively with the principle regarding what law is rather than its purpose, which is the key to understanding law.⁵⁴ It is therefore important to look critically into the social functions, as there are various functions of law identifiable in the process. Lewis asserts that both empirical and theoretical studies show that the functions of law may relate to a society or group of people to a certain extent based on how such law gets conscious or unconscious application.⁵⁵ In this regard, it becomes difficult for policymakers to stimulate social cohesion since law can be an instrument for private or public objectives regardless of serving a certain purpose.

The social utility of law is infused on the type of society in question particularly to the type of governance and racial formations, cultures, which in turn is used to determine if such a society is living up to its ideals or not. South African policies infuse individual freedoms in combination with social responsibility. This notion is evidenced by the government's responsiveness to public issues, which has been noted by Burns as an essential element to making the social functions of law serve the purpose of stimulating social cohesion.⁵⁶

This now brings focus of this discussion to how law can be instrumental in promoting social cohesion in the post-apartheid era. Funk shows that it is important to look firstly at whether the functions of law are absolute or relative especially with some historical periods.⁵⁷ This notion entails that the contemporary South African law may be promoting or attempting to promote social cohesion by relating to the past regime of

⁵³ Burns 'n 21 above' 3.

⁵⁴ CL Ovid 'law and logic, law and justice, and law and society respectively' (1970) *Western Reserve Law Review* 361.

⁵⁵ O Lewis 'Systems Theory and Judicial Behavioralism, (1970) 21 (3) *Western Reserve Law Review* 361-374.

⁵⁶ D Funk 'Major Functions of Law in Modern Society Featured' (1972) 23 (2) *Western Reserve Law Review* 257.

⁵⁷ Same as above 274.

the apartheid era wherein social relations were non-existent between the white and non-white races. As evidence to this notion, policies adopted in order to promote the dismantling and redressing of social and economic inequalities such as land redistribution, realising women rights, are active attempts to create a cohesive society.

A report submitted to the Ministry of Arts and Culture shows the role played by law during apartheid and the perceived role of law in post-apartheid for purposes of promoting social cohesion. The laws implemented during the apartheid era imposed a system of divide and rule where social bonds were broken in a system of intentional under-development of the black majority.⁵⁸ The frayed social relations of apartheid times spilled over into the post-apartheid era based on race, class or status, gender and space.⁵⁹ The state in trying to promote social cohesion has mainly focused on policy reform pertaining to socio-economic development, aimed at removing the prevalent inequalities that have been manifest and expressed in the adoption of protests for services in a violent manner, such violence and anger directed at foreign nationals.⁶⁰ In illustration, the year 2018, political leaders adopted and endorsed land redistribution Bill as an attempt to undo the socio-economic inequalities brought by colonisation and apartheid, which were instrumental in dividing races, tribes and cultures.

Reeskens reasoning in defining social cohesion in a diverse society adopted in this study sheds more light on how law is at the core of promoting social cohesion. The notion establishes that, in the scholar's research, generalised trust is the proxy variable for social cohesion since it was found to be the best indicator, available, to show the cohesiveness of a society.⁶¹ This shows that the best indicator for the presence of social cohesion is general trust amongst members of society since these are critical elements of social cohesion as they lead to the formation of interactions and relations between members of society.⁶² Reeskens shows that relations and interactions of groups and individuals in the absence of discrimination, limited inequalities, especially horizontal inequalities, will stimulate the creation of trust

⁵⁸ South African Cultural Observatory Research Report 'Developing a Measure of Social Cohesion for South Africa' submitted to the Department of Arts and Culture 2018.

⁵⁹ Same as above.

⁶⁰ South African Cultural Observatory 'n 58 above'.

⁶¹ T Reeskens 'Defining Social Cohesion in Diverse Societies: How generalized trust Relates to social cohesion. Unpublished PHD Thesis (2007).

⁶² Same as above.

amongst the groups as well as a sense of national identity.⁶³ In this regard, adopting this sense of direction, measuring social cohesion is possible by including the perceptions of people on the quality of social bonds as mere metrics of social cohesion. However, in order to achieve these heights Reeskens shows that the state must firstly deal with discrimination and inequalities in order to remove horizontal relations and interactions, mostly by dealing with the pertinent issue of poverty.⁶⁴ In this manner, it is evident that the effects of apartheid on policymaking, on how to promote social cohesion, are the basis of the barriers to social cohesion and need serious redress.

This study submits that in light of complexities surrounding the concept of law as serving social functions and complexities in conceptualising social cohesion, context is of importance. By applying the South African context, exploring apartheid and post-apartheid contexts, the constitution is the focal point of this study in conceptualising social cohesion and determining the utility of law in promoting social cohesion in post-apartheid South Africa.

1.7. Research methodology

This research adopts the empirical research methodology. Empirical research methodology is a method of gathering information by way of direct and indirect observation. This is a methodology of research into empirical questions and gaps of law and underlying legal concepts. This is a qualitative research method, which merely aims to understand various aspects of social life, in this case, the role of law in promoting social cohesion in post-apartheid South Africa. The choice of this research methodology is because this study evaluates the instrumentality of law in a social sphere thus the need to engage with societal members.

The justification for this type of research methodology is based on the empirical cycle of AD de Groot, broken down in five aspects namely; observation, induction, deduction, testing and evaluation.⁶⁵ This entails observing the phenomenon and inquiry of the research study, followed by the formulation of a general explanation of the problem and designing a practical method to test the hypothesis in order to confirm

⁶³ Reeskens 'n 61 above'.

⁶⁴ Same as above.

⁶⁵G Heitink *Manual for Practical Theology* (1999) 233.

if it is true or false. Lastly, the formulation of a method of collecting data and data analysis in order to design a theory that clearly presents the results of the practical investigation serving as the best empirical explanation of the phenomenon. In this regard, the empirical research approach is more suited in building a theoretical argument on the unproven hypothesis of this study on whether law can create social cohesion similar to its instrumentality in creating repressive and exclusionary social order regimes in the apartheid era. This methodology will therefore precisely elaborate the social instrumentality of law in relation to social cohesion. The researcher will therefore calibrate the social functions of law by applying them to the known setup of the South African society and its standards.

1.8. Data collection and Analysis

In qualitative research, the collection of data is through three main methods, used singly or in combination, namely, direct observation, in-depth interviews and analysis of documents. The researcher collected data through a questionnaire, employed as the primary tool for direct inquiry and in-depth investigation. The questionnaire was designed as the primary mode of data collection in a bid to determine the existence or the lack of social cohesion and the general feeling about capability of the post-apartheid laws to promote social cohesion. The phase of data collection aimed to ascertain the role of law in promoting social cohesion in post-apartheid context. The phases of data collection are done in the following ways:

Identifying participants:

As qualitative research often puts focus on a limited number of respondents purposefully selected to participate because they possess an in-depth knowledge of an issue known little about: the questionnaire targets various members of the Thohoyandou local community (purposively selected participants). The identified participants have particular knowledge or experience regarding the apartheid era and post-apartheid socio-legal situation. In illustration, these categorically include people who were first-hand witnesses of apartheid, the shift to democracy and those who did not witnesses these changes, different age groups, working class and non-working class as well as foreign nationals both working class and non-working class. The structure of the questionnaire is to ascertain thoughts, feelings, experience about apartheid and mostly post-apartheid social cohesion situation. In that regard, the

questionnaire also ascertains whether the participants feel that post-apartheid laws have contributed to the attainment of social cohesion by being inclusive.

- The participants show variation in how they respond to the questionnaire, for instance, variation in thoughts, feelings, experiences with the apartheid laws and the post-apartheid laws made as an attempt to revive social cohesion.

Particulars of the target subject group:

Type	Explanation
Particular characteristics of the target group (e.g. age, cultural, traditional, religious derivation, background, physical characteristics, orientations, etc.)?	<p>Age of the primary target group is from 50 to 80 years and particular attention is paid to memory and recollection and level of sensitivity. The target population is any South African from any traditional, cultural, socio-economic and political background within the abovementioned age range, which categorises them as witnesses of both apartheid and post-apartheid. There are no further physical or other exceptional exclusions from the abovementioned ones.</p> <p>A secondary target group is people aged between 30 to 50 years of age. This is to determine further how they perceive the constitution to be a legal tool for promoting achievement of the rainbow nation also referred to as cohesive South African society by inquiring into their experiences in socio-economic, political, cultural and traditional spheres of interaction, and observations of experiences of their parents and grandparents.</p> <p>Due to limitation of resources, individuals and groups involved in law making or policy agenda drafting at local and national level did not form</p>

	<p>part of this inquiry (this part is substantiated by conceptual and theoretical analysis of social functions of law)</p> <p>Additionally, legislation and official policy documents are utilised in the study to make cardinal and substantive deductions as well as allow the study to be flexible enough within both doctrinal and empirical experiences relevant to the study.</p>
<p>Target population location</p>	<p>Vhembe district: The subjects are from within local communities of Thohoyandou within the Vhembe district. This is for purposes of maximising the quality of responses from people of diverse cultural, religious, socio-economic and political backgrounds.</p>
<p>Specific groups from which subjects are drawn</p>	<p>The target population is an equal mix of the following groups: working or non-working class, both males and females, from any economic, social, cultural religious or political background</p>
<p>Minimum and maximum estimation number of target group</p>	<p>The researcher solicited participation of 58 participants to give solid and credible research findings.</p>

1.8.1 Sampling

All researchers need to consider whom to interview, or what to observe or analyse, and how many participants or data sources are necessary to elicit findings in which one may have confidence. The researcher considered the following sampling methods in his attempts to identify suitable participants, administer the questionnaire and get a profound variation in response:

- *Extreme or typical case sampling* – learning from unusual or typical cases such as expecting that people of a certain race, colour and age are in possession of experiences, thoughts, feelings and knowledge about the apartheid and post-apartheid laws that have an effect on social order and or are attempting to promote social cohesion.
- *Snowball sampling* – asking others to identify people who interview well, because they are open and because they have an in-depth understanding about the issue under study. Exponential non-discriminatory snowball sampling was applied where each subject was recruited through extreme case sampling was asked to provide any other multiple referrals, with each new referral participating and being asked for further provision of other referrals. The method was chosen as it may be difficult to locate people with experiences and knowledge relating to the study inquiry. Considerations made for participants wary about their identity further justified the need to avoid complicated and long identification of participants involved without referrals. Additionally, the method made it quicker to find more subjects; it is cost effective, and aided in cases of subjects that are hesitant because referral made it easy for them to participate in the study.

These sampling methods were adopted based on the fact that qualitative research tends to focus on a smaller number of observations or data sources, whether people or events or documents, considered to be data-rich and thus worthy of study, and to examine them in-depth. The researcher was not concerned with making the people or situations to be a statistical representation because the aim was to make findings that are generalizable to an entire population. Instead, the study is a focused in-depth study designed to go beyond description in order to find meaning, even if the meaning relates to an individual's experiences of the apartheid and post-apartheid era or the perceptions of a small number of people on the status of social cohesion and the instrumentality of law in post-apartheid South Africa's social cohesion. This in-depth

study afforded the researcher the opportunity to learn how research participants understand the South African society and how they interact with each other in and outside ambits of law in a bid to promote social cohesion.

1.8.2. Research design

In adopting the most effective research design, the researcher considered whether a case-study method, surveys and interviews, participant observation and ethnography, documentary analysis, or a combination of such methods is likely to enable answering the research questions effectively. The adoption of questionnaire surveys and participant observation ranked as more favourable in pursuing the objectives of the study. The design focuses on individual questionnaire execution, with an option for group questionnaire execution. Individual and group questionnaires were preferred because they provide the researcher with access to participants' memories of experiences and perceptions. Individual questionnaire execution is the main tool utilised by qualitative researchers examining legal phenomena, and perceptions of law such as the inquiry on the role of law in promoting social cohesion in post-apartheid South Africa.

1.8.3. Data analysis to find meaning

After gathering data, the researcher organised and analysed the data through adoption and utilisation of the thematic analysis tool. Themes of society, social cohesion and function of law as driven by both research questions and objectives of the study formulated the basis of each theme. Thematic analysis is a flexible research technique that is not tied to a specific philosophical orientation and its goal is to identify, analyse and describe patterns or themes across a data set. Thematic data analysis was instrumental in capturing key ideas about the data in relation to the research questions and the ideas that represent some level of patterned response or meaning within the data set.⁶⁶ Data analysis also involved summarising data to obtain answers to research questions.

The data is analysed narratively. Maree defines narrative analysis as a variety of procedures for interpreting data to give meaning of the narratives generated in the

⁶⁶ V Braun & V Clarke *Using Thematic Analysis in Psychology* (2006) 82-85.

research.⁶⁷ For this study, a narrative format presents the data. Where the participants shared the same sentiments, the researcher captures the responses as it is for as long as it is clear to understand and elaborate in a manner that clearly answers the question posed to the participant.

1.9. Ethical issues

The researcher considered ethical issues pertaining to the research participants, colleagues and the targeted audience for the research findings. In the context of working with a social aspect that relates to social divisions and exclusions; the following was seriously considered in the designing and conducting of research questionnaires and interviews:

- Ensuring quality and integrity of the research;
- Acquiring informed consent from participants and respondents;
- Maintaining confidentiality and anonymity of research respondents;
- Ensuring that participants will participate in the study voluntarily;
- Avoiding harm to participants; and
- Showing that the research is independent and impartial.

1.10. Definition of key concepts

The definitions of certain key terms provided hereinafter are the definitions in relation to how the terms and concepts apply in this study and may, however bear a different meaning elsewhere.

Social cohesion, Law, Post-apartheid and social order

The South African Department of Arts and Culture provides a definition of social cohesion, adopted in this research when examining the capability of law in the post-apartheid era to impose social order.

Social cohesion is the degree of social integration and inclusion in communities, society and the extent to which solidarity finds expression among diverse individuals

⁶⁷ K Maree *First Steps in Research* (2016)121.

and communities.⁶⁸ In terms of this definition, a community or society is cohesive to the extent that inequalities, exclusions and disparities based on ethnicity, gender, class, nationality, age, disability or any other distinction which engender divisions, distrust and conflict are significantly reduced or totally dismantled in an acceptable and sustainable manner. In this regard with the active participation, working together of citizens and community members, for the attainment of a common goal whether agreed upon or designed to improve living standards for everyone.⁶⁹

Law is a system of rules or norms created and enforced through social or governmental institutions in order to regulate behaviour. In this instance, law ensures that individuals or the community are in full adherence to the state in order to induce order and functionality in society. This definition takes into account the position of legal positivism as expounded by Kelsen in explaining the concept of the Grundnorm, which also forms an integral part of this study. It also takes into account the supposition of Hart in explaining how law relates to social rules by being a normative social phenomenon that is not construable to non-normative social facts.⁷⁰

Post-apartheid era is the period after the end of or dismantling of segregation based on race in South Africa, also referred to as post-1994.⁷¹ This is important to distinguish and define as it marks the commencement of this study's inquiry into what law can do to promote social cohesion as well as the period from which social cohesion became an issue in South Africa.

Social order is the system of linked social structures, institutions, relations, customs, values and practices directed towards the preservation, conservation, maintenance and enforcement of a particular pattern of relating or behaviour within a society.⁷² In this instance, the societal members and institutions distinguish between social order and social chaos with social order referring to a stable, organised society in which the prevalent social order is accepted and maintained. This concept is crucial to distinguish and define as it helps in illustrating that this study is due to the increased

⁶⁸ Department of Arts and Culture: Republic of South Africa. Retrieved at [http://www.dac.gov.za/sites/default/files/WHAT%20IS%20SOCIAL%20COHESION%20AND%20NATION%20\(3\).pdf](http://www.dac.gov.za/sites/default/files/WHAT%20IS%20SOCIAL%20COHESION%20AND%20NATION%20(3).pdf) (accessed 30 May 2018).

⁶⁹ Department of Arts and Culture: Republic of South Africa. 'same as above'.

⁷⁰ R Shiner 'Philosophy of Law: Cambridge Dictionary of Philosophy' (1999). Retrieved at https://is.muni.cz/el/1421/podzim2014/LJMgrB07/um/Cambridge_Dictionary_of_Philosophy.pdf (accessed 21 May 2018).

⁷¹ Global disseminator of Knowledge retrieved at <https://www.igi-global.com/dictionary/post-apartheid-era/52610>. (accessed 30 May 2018).

⁷² M Hechter & C Horne *Theories of Social Order* (2003).

decline in social cohesion regardless of the existence of laws aimed at safeguarding social relations.

1.11. Overview of chapters

CHAPTER ONE: INTRODUCTION

Chapter one covers the background to the study, aims and objectives of the study, research questions, statement of the problem, the hypothesis, preliminary literature review, the methodology, definition of key concepts and overview of the chapters.

CHAPTER TWO: THE CONCEPT OF SOCIAL COHESION

This chapter looks at the concept of social cohesion from a socio-legal point of view. It discusses the concept of social cohesion as conceived under academic perspectives and as a concept for policymakers. The chapter looks at common elements and distinctions between the concepts of academics and those of policymakers. The overall idea is to find, develop or adopt a suitable concept of social cohesion that is applicable in this study. This discussion is important because a concept of social cohesion as conceived in this study must be applicable to the South African context and most importantly, be capable of operationalization for purposes of collecting qualitative responses in this study. Such a conception serves as basis on which the inquiry into the role of law in promoting social cohesion revolves.

CHAPTER THREE: THE LAW AS AN INSTRUMENT IN APARTHEID AND POST APARTHEID CONTEXT

The chapter dives into a critical discussion of law in South Africa by examining the constitution as the underlying law related to promoting social cohesion in post-apartheid South Africa. This discussion is on the backdrop of the apartheid regime and an overview of apartheid laws that were instrumental in imposing a certain social order of exclusions and conflict among different races, cultures and beliefs. The discussion develops through an examination of the right to equality under the concept of transformative constitution. The discussion determines the nature of equality, looking at how equality is interpreted and applicable in eradicating inequalities that affect the realisation of social cohesion.

CHAPTER FOUR: DATA COLLECTION AND ANALYSIS

This chapter is the core of the study as it finishes off the enquiry into what law can do to promote social cohesion by providing qualitatively analysed empirical findings. The findings reflect on post-apartheid law under the positive transformative constitutionalism concept and cohesion relations, reflecting on whether the constitution has progressively realised social cohesion. The chapter provides insight on why and what law ought to do from the onset. This chapter conclusively determines the status of South African society divisions and provides foundational insight on the ability of law in bridging the gap in social cohesion in post-apartheid South Africa.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

This chapter starts with a brief overview of the previous chapters of the whole study and an overview of the major findings. It then proceeds to provide recommendations to societies, institutions of governance, enforcement and law makers, on areas where loopholes are present in the application, enactments, enforcement and acceptability of the law in relation to fostering social order. These recommendations are articulated and drawn based on the main themes of probing into social cohesion attainment through law as formulated in the study.

1.12. BUDGET ESTIMATION

EXPENDITURE DESCRIPTION	AMOUNT	REASON FOR EXPENDITURE
1 SERVICES	R10 000	
Research assistants		Appointment of two research assistants for help with research, analysis and collection of resources data
2 SUPPLIES	R10 000	
STATIONERY JOURNAL/ARTICLES BOOKS		These will help with perfecting the work for editing, proof reading and other necessary print outs.
3 EQUIPMENT	R10 000	
Printer Ink cartridges		For the purposes of, printing reports, recording progress and any other necessary work
4 Travelling and subsistence	R20 000	
		Research will travel within South Africa in the process of researching. There will be need for money to pay for travelling costs, accommodation and food.
TOTAL	R50 000	

CHAPTER TWO

THE CONCEPT OF SOCIAL COHESION

2.1 Introduction

This chapter looks at the concept of social cohesion from a socio-legal point of view. The chapter looks at social cohesion as a conceptualised goal in a governance structure based on positive transformative constitutionalism as in South Africa. The concept of social cohesion is explored based on definitions and concepts developed by academics as well as social cohesion concepts developed by policymakers. This is aimed at determining the potential and capability to conceptualise social cohesion under the transformative constitution in post-apartheid era. The main objective of this chapter is to provide justifiable rationale and basis for conceptualising social cohesion in this study, suited and applicable to the post-apartheid South African context, with inclusivity of concepts made by policymakers or academics. Additionally, the chapter explores well sharpened concepts of social cohesion. This chapter also reflects on how social cohesion can exist in both the negative oriented sense and the positive oriented sense.

2.2. The concept of social cohesion

Chan refers to social cohesion as a popular term among academics and policymakers.⁷³ Regardless of the popularity of the term among academics and policymakers, the term requires a clear and sound definition. Caution is therefore necessary to exercise when adopting a definition of the concept of social cohesion. Chan proposes how to avoid adopting a loosely made definition or irrelevant to one's study or intention by conducting a critical review of methods under which social cohesion has been conceptualised in various works of literature without focusing on potentially loose definitions developed based on causes and effects of social cohesion.⁷⁴ In this regard, the study is inclined to adopting a definition of social cohesion that is far from being ambiguous. This is because of the need to adopt a definition capable of being an operational measurement tool to facilitate the ensuing

⁷³J Chan et al 'Reconsidering social cohesion: Developing a definition and analytical framework for empirical research (2006) 75 *Social Indicators Research* 273–302.

⁷⁴ Same as above.

empirical work in Chapter 4, which looks into the status of social cohesion and the capability of law to promote social cohesion in post-apartheid South Africa.

One of the most apparent elements surrounding social cohesion is its ability to increase socio-economic development. Hence, international organisations such as the Organisation for Economic Co-operation and Development and the World Bank have increased their advocacy for the concept to be a global mission.⁷⁵ The concept is however over used, ill-defined and over manipulated. In illustration, some scholars associate the concept with ideas of trust and solidarity while other scholars relate with the term to bring out ideas of inclusion, social capital, and poverty.⁷⁶ Oloffsson notes that some sociologists theoretically associate the concept with ideas of social integration and system integration.⁷⁷ The lack of universal consensus on what the concept of social cohesion relates to is a subject and reason for further debate on the relevance and authenticity of the term itself. Scholars like Bernard critically analyse the theoretical and definitional confusion by stating that social cohesion is merely a quasi-concept or a mere concept of convenience, flexible enough to accommodate the meanderings and drives of day-to-day political conduct.⁷⁸ Other scholars like Chan partially agree with Bernard's criticism of how social cohesion is a quasi-concept or a term of convenience. This study however argues that the vagueness around the concept of social cohesion is merely because of the lack of a clear and sound definition.

The abovementioned uncertainty is one of the issues that the study will clarify in subsequent discussions. The basis for supporting the instrumentality of social cohesion as an effective concept lies in the fact that the absence of social unity and social flow, or alternatively the development of social divisions of any kind regardless of the cause or the effects are described as the lack of social cohesion. In this regard, the study will discuss the concept in two different forms. The first point of exploring the concept is on how academics adopt written meanings of the concept particularly in the discipline of social sciences where the concept finds most application. The second

⁷⁵ J Ritzan 'Social Cohesion, Institutions and Growth' (2006) 94 *The Centre for Global Development, Working Paper*.

⁷⁶ Chan 'n 73 above' 274.

⁷⁷ I Gough and G Oloffsson 'Introduction: New Thinking on Exclusion and Integration' in I, Gough and G, Oloffsson (eds) *Capitalism and Social Cohesion: Essays on Exclusion and Integration* (1999) 21.

⁷⁸ P Bernard 'Social cohesion: a dialectical critique of a quasi-concept' (2000) 491 *Strategic Research and Analysis Directorate, Department of Canadian Heritage* 2-3.

analysis will help with another major discussion of the entire study's aim is how the concept is conceptualised by policymakers. In developing and adopting a single conceptualisation of the term 'social cohesion,' the study places much emphasis on how the term is conceptualised by academics and policymakers globally and how such concepts apply to the South African context particularly for the purposes of narrowing and making the definition relate to the questions being addressed in this study.

2.2.1. Social cohesion as an academic concept in the social sciences

In the academic sphere most scholars universally agree that Emil'e Durkheim is one of the important founders of modern social studies particularly those relating to social cohesion.⁷⁹ In contemporary times, several scholarly contributions aid in understanding social cohesion under social studies.⁸⁰ In both contemporary and older literature under social studies, there exist common key features describing and analysing social cohesion. In an attempt to define social cohesion these key features raise and address questions based on social integration, stability and disintegration.⁸¹ This entails that the indicators of the presence or absence of social cohesion as well as the effects thereof are material to measuring and defining social cohesion but most importantly, the outcome depends on the circumstances applied or society model used for the study.

In defining and illuminating the concept of social cohesion under social studies, Berger's study analyses normative conflicts such as ethnic conflicts and secessionist movements in contemporary societies and the readily available means of institutional mediation for such normative conflicts.⁸² In relation to the contemporary South African society, one would be correct to describe South Africa as divided by the abovementioned normative conflicts as witnessed in increasing divisions based on tribe, ethnic origins, race and nationality. These developments do not only introduce this study but also indicate the absence of social cohesion and the researcher submits that the ability to resolve these conflicts by relevant institutions has the potential

⁷⁹ S Dick 'What Do We Know about Social Cohesion: The Research Perspective of the Federal Government's Social Cohesion Research Network' (2003) *The Canadian Journal of Sociology* 233.

⁸⁰ Chan 'n 73 above' 275.

⁸¹ Chan 'same as above'.

⁸² R Berger-Schmitt 'Social Cohesion as an Aspect of the Quality of Societies: Concept and Assessment. EU Reporting Working Paper' (2000)14, Centre for Survey Research and Methodology. Available at:
http://www.gesis.org/fileadmin/upload/dienstleistung/daten/soz_indikatoren/eusi/paper14.pdf.

outcome of facilitating social order, which in this case would be social cohesion in post-apartheid South Africa. A further illustration is the successful establishment of institutions backed by policy directed at creating and enforcing a social order of racial division, exclusion and oppression by the apartheid government in South Africa. The study places this as empirical evidence on institutional injustice facilitated by law during the apartheid era, which resulted in a form of social cohesion among the oppressed as they united or cohered against the oppressive government.

Gough and Oloffson take a different approach in their attempt to define and conceptualise social cohesion and social studies. They attempt to formulate a link between themes of social integration and social exclusion.⁸³ These two themes are part of the discussion as key themes when investigating, addressing and measuring the status, presence or absence of social cohesion in a certain society. In illustration, this study has shown in the introductory chapter how social exclusion unfolded in the apartheid era as facilitated by law to implement a particular form of social order. It is further discussed how the 1996 Constitution was founded as a transformative Constitution amongst other objectives, directed towards social integration in order to establish a cohesive society while redressing past injustices such as economic and political exclusion and most importantly social exclusion. The fact that either one of these two themes was present or both simultaneously present during apartheid or in post-apartheid era are all indicators and aids of defining social cohesion in relation to the South African contemporary society.

The literature provided by Berger and Gough and Oloffson can be used in a broader sense to try and refine a definition of social cohesion since their work does not directly define or conceptualise social cohesion under social studies. These authors have merely provided hints and relatively abstract concepts of social cohesion without defining or showing how the scope of operationalization of the concept.⁸⁴

On the other hand, Bollen and Hoyle argue that there are two perspectives to the issue of cohesion, objective and perceived cohesion.⁸⁵ Objective cohesion is a group's attribute involving composite measures based on the known closeness of each

⁸³ Gough & Oloffson 'n 77 above'.

⁸⁴ Chan 'n 73 above'.

⁸⁵ KA Bollen and RH Hoyle 'Perceived cohesion: A conceptual and empirical examination' (1990) 69 *Social Forces* 479-504.

individual to other members of the group.⁸⁶ On the other hand, perceived cohesion refers to the functions of each member's perception regarding his or her own position and standing in the group.⁸⁷ Bollen and Hoyle substantiate their concept of social cohesion by submitting that the authenticity and functionality of a social cohesion concept depends on each individual's feeling of belonging to the group and also how association to the group fuels the individual's morale.⁸⁸ This concept is criticised by other scholars for lacking enough persuasiveness and reflection of social cohesion at a societal level because it is too general and abstract.⁸⁹ The successful application of this concept in respect of the South African society would demonstrate the side of the individual feeling or trying to be part of a group notwithstanding having a sense of belonging. A question of genuine belonging remains unanswered. During apartheid, black indigenous South Africans experienced rejection and exclusion from participating towards the development of society regardless of their sense of belonging to the entire South African society. Post-apartheid events where many foreign nationals can, over time, develop a sense of belonging within and to the South African society, yet due to unrelated economic or political downturns; foreign nationals are blamed, rejected and forced out of the South African society, thus, the lack of belonging becoming apparent only after time are events indicative of Lockwood's concept. These kinds of events are necessary to point out and address societal conditions necessary in refining and building a rounded or functional concept of social cohesion. The concept by Bollen and Hoyle can only be applied to a lesser extent as it lacks in substance to develop a well refined concept of social cohesion by being too general which may result in failure on practical application.

However, the literature from Lockwood is widely accepted in social studies as offering an acceptable definition of social cohesion. Lockwood defines social cohesion as a state of strong primary networks such as kinship and local voluntary organisations at communal levels.⁹⁰ Lockwood substantiates his definition by stating that social cohesion in conjunction with civic integration or institutional order at the macro-societal level merely represents levels of social integration concerning either orderly or

⁸⁶ Same as above.

⁸⁷ Same as above.

⁸⁸ Same as above.

⁸⁹ Chan 'n 73 above'.

⁹⁰ D Lockwood 'Civic Integration and Social Cohesion' In Gough and Oloffson (eds), *Capitalism and social cohesion chapter 4*, 1999.

conflictive relationships between actors or persons in a society.⁹¹ This means that similar to the themes raised by Gough and Oloffson, Lockwood presents social cohesion as a concept of two extremes. One extreme pertains to social cohesion while the other is the opposite, social dissolution under the theme of social exclusion.⁹² Lockwood further explains that in line with his definition of social cohesion the key indicators of social cohesion include trust in and willingness to help those beyond one's primary network.⁹³ This conceptualisation of social cohesion also finds relevance in the contemporary South African Society. The increase in lack of trust and lack of willingness to help those beyond one's primary networks is are key indicators alluding to the lack of social cohesion and are factors indicating the increase of social dissolution. An example is the social media campaigns and protests for laws and those in power to legislate and advocate for policies to put South Africans first. In this regard, there is no willingness to help those beyond the identity of being South Africa regardless of living within, contributing to development and sustainability of certain sectors in South Africa. The new age classism where people only want to help themselves shows further the societal conditions substantiating the concept of Lockwood. The increase in corruption even civic corruption, which has also lessened the ability of people to trust institutional order, is further illustration and affirmation of Lockwood's concept. Dheret points out that a cohesive society improves in inclusivity and tolerance for diversity, and multiculturalism,⁹⁴ and these are aspects that are lacking in South Africa as evidenced by the social fragmentations based on tribes, cultural diversity, the exclusion of certain people of a certain social or economic standing, nationality or race from participation in economic or social interactions.

In recent literature developments, different conceptualisations and adoptions of social cohesion are a still a constant feature. However there are several qualitative and empirical attempts at calibrating and adopting concepts of social cohesion that applicable to contemporary society challenges and structures. Mcleod and Von Treuer note that social cohesion is "group members' inclination, desire to forge social bonds, resulting in members sticking together and remaining united."⁹⁵ Social cohesion is

⁹¹ Same as above.

⁹² Same as above.

⁹³ Lockwood 'n 90 above' 69.

⁹⁴ C Dhéret (Head of Social Europe & Well-being programme and Senior Policy Analyst).

⁹⁵ J McLeod & K Von Treuer 'Towards a cohesive theory of cohesion' (2013) 3 (12) *International Journal of Business and Social Research* 1.

therefore regarded to be a fundamental group variable because of how cohesion and group outcomes are related.⁹⁶ This notion echoes concepts of cohesion as envisaged by early researchers. On the other hand Fonseca et al asserts that the 21st century societies are faced with certain socio-economic challenges that hinder the realisation of resilient societies.⁹⁷ Contemporary societies are regarded as organised in a way that easily reflect any underlying socio-economic disparities and inequalities.⁹⁸ These issues are regarded further as manifestations and evidence of the difference in social infrastructure as opposed to the physical infrastructure. Social dimensions have to be considered as a way of driving towards social cohesion and in this regard most concepts of social cohesion draw infant-like concepts that fail politically, economically and socially.⁹⁹

The three most common conceptualisations of social cohesion adopted by several societies through policymaker mandate level in the 21st century are part of academic discourse. These definitions are drawn at a policymaker level, the Council of Europe (2008) defines social cohesion as “the capacity of a society to ensure the well-being of all its members, minimizing disparities,”¹⁰⁰ Canadian Government adopts that social cohesion is “the on-going process of developing a community of shared values, shared challenges and equal opportunity within the society, based on a sense of trust, hope and reciprocity among all members of society,”¹⁰¹ and by the OECD (2011) defines social cohesion as “ a society that works towards the well-being of all its members, fights exclusion and marginalization, creates a sense of belonging, promotes trust, and offers its members the opportunity of upward mobility.”¹⁰² At an academic level, Bulmer and Solomos add that these three definitions are not fit enough for the contemporary societies whose conceptions keep on shifting.¹⁰³ These definitions are

⁹⁶ Same as above.

⁹⁷ X Fonseca et al ‘Social cohesion revisited: a new definition and how to characterize it, innovation’ (2019) 32 (2) *The European Journal of Social Science Research* 231.

⁹⁸ Same as above.

⁹⁹ M Sellberg M et al ‘Resilience Assessment: A useful approach to negative urban sustainability challenges’ (2015) 20 (1) *Ecology and Society*.

¹⁰⁰ Council of Europe ‘Report on high-level task force on social cohesion: Towards an active, fair and socially active Europe’ 2008.

¹⁰¹ SM Jeanotte ‘Singing alone? The contribution of cultural capital to social cohesion and sustainable communities’ (2003) *International Journal of Cultural Policy* 9.

¹⁰² OECD ‘Perspectives on global development 2012, Perspectives on global development (OECD publishing 2011.

¹⁰³ M, Bulmer & J, Solomos ‘Multiculturalism, social cohesion and Immigration shifting concepts in the UK’ (2017) *Ethnic and Racial Studies*.

criticised for lack of identifying diversity of people and diversity of shared values, tolerance levels required of each person to coexist peacefully with other different people as well as voluntary participation by each member.¹⁰⁴ Further criticism is on the failure of all definitions to address the existence of diversity in values and how it is the key determinant of social cohesion in the 21st century societies.¹⁰⁵

This study submits that regardless of Lockwood being criticised for being more focused on the negatives or social pathologies as a mechanism to define and illustrate his conceptualisation of social cohesion, his conceptualisation finds more relevance in the South African society in the post-apartheid era. For instance, the way Lockwood presents a yardstick for social cohesion by using issues of the absence or presence of crime, urban riots and family disorganization.¹⁰⁶ Chan notes that the approach of Lockwood is more legitimate and more useful in understanding social cohesion as well as refining or trying to develop and adopt a different concept of social cohesion.¹⁰⁷ These indicators relate to the South African society, as they magnify the most prevalent issues concerning the social unrest in South Africa today. Social conditions are characterised by an increase in crime and protests over service delivery as well as other kinds of urban riots based on legitimate and non-legitimate reasons such as xenophobic riots aimed at removing all foreign nationals from South Africa. The conception of Bulmer and Solomos are crucial in this study as they relate to the current diversified nature of South Africa and how that should be used as one of the key determinants of social cohesion attainment.¹⁰⁸

In brief, the social studies or academic approach to conceptualising and defining social cohesion provides crucial insights. The main gap and implication in this regard pertains to failure to adopt such literature in order to develop a satisfactory and operational definition of social cohesion across the academic chatter. On this regard, it is necessary to explore the policymakers' conceptualisation of social cohesion.

2.2.2. Social cohesion as a concept for policy makers

¹⁰⁴ Same as above.

¹⁰⁵ Same as above.

¹⁰⁶ Lockwood 'n 90 above'.

¹⁰⁷ Chan 'n 73 above' 276.

¹⁰⁸ Bulmer and Solomos 'n 103 above'.

Due to increased calls for global attempts at social cohesion, most policy makers and policy analysts have engaged in attempts to refine and conceptualise social cohesion through policy frameworks.¹⁰⁹ Much reference is on policies aimed at defining and conceptualising social cohesion in post-apartheid the South Africa. Chan notes that the point of departure in this case is looking at how social cohesion has become a key issue on the policy agenda.¹¹⁰

In consideration of policy frameworks that address social cohesion in South Africa, policy makers list and deal with issues that contribute to social cohesion as policy agenda. This emanates from the mid-2000s.¹¹¹ The Presidency's Fifteen Year Review in 2008 raised concerns on persisting income inequalities, criminal victimisation, declining public confidence in political institutions and state performance, low levels of interpersonal trust, racism, xenophobia and the straining of traditional family and community safety nets.¹¹² More recently, the National Planning Commission's diagnostic document on nation-building in 2011 referred to a series of fault lines that serve as an impediment to social cohesion and that need to be addressed urgently.¹¹³ These are; the divisive effects of institutionalised racism; class divisions; social fragmentation; language; spatial exclusion; sexism; unemployment; crime, corruption, unequal experiences of the law; and moral decline.¹¹⁴ The African National Congress as the ruling party also issued a statement to the effect that promoting unity and social cohesion continue to be a key goal of the ANC and its government.¹¹⁵

In South Africa, policymakers consider social cohesion as a condition and step that is necessary to deal with issues emanating from social, economic and political imbalances and inequalities.¹¹⁶ These issues include crime, poverty, socio-economic inequalities, racism, protests, unemployment, corruption xenophobia and others. The basis for all policies such as the land expropriation without compensation policy bill is the provisions of the Constitution of South Africa. South Africa's Constitution was

¹⁰⁹ The Department and Ministry of Arts and Culture 'statement on taking social cohesion as a philosophical mission in South Africa' 2014.

¹¹⁰ Chan n 73 above' 277.

¹¹¹ Same as above.

¹¹² The Presidency 'towards a fifteen-year review: Synthesis report' The Presidency, Pretoria 2008a.

¹¹³ National Planning Commission 'Nation building diagnostic' The Presidency, Pretoria 2011.

¹¹⁴ Same as above.

¹¹⁵ ANC 'Statement of the National Executive Committee of the African National Congress on the occasion of the 99th Anniversary of the ANC' 8 January 2011.

¹¹⁶ Same as above.

founded as a transformative Constitution aimed at creating a rainbow nation comprising of smoothly cohering diverse nationalities, races, ethnic groups and tribes working together in unity and with a sense of belonging. The issues pertaining to South African policymakers taking a stance to include social cohesion in its policy agenda gives an answer to the proposition made by Chan, that the point of departure in getting the conceptualisation of social cohesion provided by policymakers is by looking at how social cohesion has become a key issue on the policy agenda.¹¹⁷ In this regard, the South African Department of Arts and Culture defines social cohesion as the degree of social integration and inclusion in communities, society and the extent to which solidarity finds expression among individuals and communities.¹¹⁸ The only question that becomes important to answer in light of such a definition by policymakers is whether such a definition is capable of being adopted and further developed into a functional and operative concept that can be used in empirical circumstances.

Canadian and the European Union policy makers have in recent times, developed impressive concepts of social cohesion. The Canadian policymakers included social cohesion on their policy agenda in 1990.¹¹⁹ The main drive behind this inclusion was out of need to drive the promotion of multiculturalism within the public sphere.¹²⁰ In the 2001 annual report of the Canadian Department of Cultural Heritage it was pointed out that a cohesive and inclusive society depends on respect for all ethnic groups and the fullest possible participation of all citizens in civic life.¹²¹ In considering a policy-based definition of social cohesion, social cohesion has gradually developed to an overarching notion that connects and covers many policy areas with the passing of time.¹²² In light of this, the Canadian policy makers engaged in structural conversations with various civic society players. These structural conversations resulted in the conclusion that social cohesion should comprise a wide range of elements such as income distribution, employment, housing, universal access to

¹¹⁷ Chan 'n 73 above'.

¹¹⁸Department of Arts and Culture: Republic of South Africa. Retrieved at [http://www.dac.gov.za/sites/default/files/WHAT%20IS%20SOCIAL%20COHESION%20AND%20NATION%20\(3\).pdf](http://www.dac.gov.za/sites/default/files/WHAT%20IS%20SOCIAL%20COHESION%20AND%20NATION%20(3).pdf) (accessed 30/05/18).

¹¹⁹ Chan 'n 73 above'.

¹²⁰ Same as above.

¹²¹ Department of Cultural Heritage, 2001 7.

¹²² Chan 'n 73 above'.

health care and education systems, to political and civic participation with the idea for inclusion of everyone in the society.¹²³

The European Union on the other hand made an inclusion of multiculturalism as a key step towards its inclusion of social cohesion in policy agenda.¹²⁴ This step results from how population mobility and diversity have intensified since the establishment of the European Union thus creating new forms of social challenges.¹²⁵ Chan notes that the social cohesion concept developed by policymakers from Canada does not base entirely on ethnic or regional issues but also on social and economic issues.¹²⁶

In light of the above, most policy makers who include social cohesion in their policy agenda are not merely driven to address social and political issues.¹²⁷ Policy makers in contemporary times seem more inclined to drive policies for social cohesion because of its potential economic benefits that are attainable through high societal cohesion levels.¹²⁸ The World Bank's policy paper states that the level of social cohesion of a country determines the capacity to establish effective institutions, which will have positive effects on the economy of a country.¹²⁹ In developing policy directed towards social cohesion, most policymakers consider that the new contemporary forms of socialisation require a different approach in governance and policy frameworks.¹³⁰ These new policies find basis in the need to promote trust or solidarity in line with traditional welfare and economic policies. It would also entail promoting recognition of the importance of participation as similar to the outcome and lastly a more holistic approach to public policy and coordination.¹³¹ Jeannotte points out that the post-industrial and advancements currently present in most countries have had an impact on public disenchantment with democratic politics, intensifying unemployment rates emanating from economic restructuring, gradual population increase, mobility

¹²³ <http://canada.justice.gc.ca/en/ps/rs/rep/comsocohe.pdf> (accessed on 09 February 2019).

¹²⁴ Chan 'n 73 above' 278.

¹²⁵ Same as above.

¹²⁶ Same as above.

¹²⁷ Dick 'n 79 above'.

¹²⁸ Same as above.

¹²⁹ Same as above.

¹³⁰ Same as above.

¹³¹ Jeannotte et al 'Buying in or Dropping Out: The Public Policy Implications of Social Cohesion Research (2002a) 631 *Strategic Research and Analysis, Department of Canadian Heritage* 631.

and diversity, and new forms of exclusion in the contemporary era of information technology and network society.¹³²

In comparison with the academic concepts of social cohesion, the concepts of policymakers are more problem driven. The policymakers' concepts of social cohesion also raise some questions of how policymakers will address the confusion that emanates from the constituents, causes and effects of social cohesion. Chan notes that regardless of social studies and policymakers drawing varying concepts, there are some distinctive features with similar elements, and are capable of further development into uniform, principled and coherent concepts of social cohesion.¹³³ The common feature of inadequacy is how both schools of thought fail to develop a clear definition of social cohesion capable of being functional and operationalized.¹³⁴

2.3. Common elements in academic and policymakers' perspectives of the nature of social cohesion

The above discussion breaks down Social cohesion into a discussion of two schools of thought, an academic perspective and the policymaker perspective. Both perspectives on the concept portray similar elements that can be categorised as elements indicative of the nature of social cohesion. Regardless of different goals driving the academic and policymaker perspectives of social cohesion, both concepts are composed of certain common elements that allude to the nature of social cohesion. The policymaker, more inclined to achieving social stability, economic development and political control perceives social cohesion as the sameness of society, whereas the scholarly or academic perspective alludes to social cohesion for conceptualisation and definition purposes as the acceptance of diversity and the fusion thereof in a socially stable environment. With the aid of empirical South African social structures and their functionality, the following discussion will identify key elements or themes closely linked to social cohesion and informing basis for conceptualisation capable of application in South Africa. These elements are crucial to identify and discuss as they provide insight on how to define social cohesion. The next discussion will focus on the

¹³²Same as above.

¹³³ Chan 'n 68 above'.

¹³⁴ Same as above.

nature of social cohesion as derived from academic and policymaker's perspective of social cohesion collectively.

2.3.1. Cohesion as self-willingness to cooperate among diverse groups in a society

Struwig submits that both scholars and policymakers believe that in respect to contemporary times social cohesion alludes to self-willingness across diverse backgrounds to create a common vision to work towards the interest of the nation.¹³⁵ One contemporary example is in the majority vote reached by diverse policymakers from different political affiliations and objectives, in favour of expropriating land without compensation as a form of cooperation among diverse groups in order to promote interests of the nation.¹³⁶ This move subsequently received support from majority of South Africans from diverse backgrounds, in the spirit of best interests of the nation to the exception of DA, COPE, ACDP, FF PLUS and IFP.¹³⁷ The department of Social Development in its white paper addressing the issue of families, conceptualised social cohesion as the process of building shared values and communities of interpretation, reducing disparities in wealth and income, generally allowing people to have a sense of common goal in light of shared challenges among members of the same community.¹³⁸

This study submits that the concept of shared values among people of diverse backgrounds is relevant in conceptualising social cohesion in South Africa. This is on the backdrop of South Africa's experiences of racial exclusions and segregation wherein the advent of the constitution created a codification of shared values of equality, freedom and human dignity, to gradually redress past injustices and disadvantages that affected majority of South Africans. The overall objective of these shared values in the constitution is to create similar public interest of nation building among diverse groups by redressing past injustices.¹³⁹ The notion of shared values is therefore important in this study insofar as it incorporates the values of the

¹³⁵ J Struwig et al 'From bonds to bridges: toward a social cohesion barometer for South Africa' (2011) 9 (4) *Human Sciences Research Council Review* 1. Available at: <http://www.hsrc.ac.za/en/research-data/view/5766>.

¹³⁶ T Mokone Timeslive "parliament votes to make land expropriation without compensation a reality early next year" 06 December 2018. Accessed on 08 December 2019 (available at www.timeslive.co.za/amp/politics/2018-12-06-push-to-make-land-expropriation-without-compensation-a-reality/)

¹³⁷ Same as above.

¹³⁸ Department of Social Development 'White paper policy on families' 2012 4.

¹³⁹ Preamble of the Constitution of South Africa of 1996.

transformative constitution as main values of diverse South Africans to create a cohesive society, working cohesively to achieve those values without pointing at diversity as a factor for exclusion and discrimination against any class of people. , Social cohesion is therefore achievable through the direct application of constitutional entrenchments, based on desire to progressively realise equality, enjoy freedoms and enjoy human dignity among all South Africans. This means that the constitution as the supreme law of the land is to be utilised to create policies and measures directed towards the realisation of and more awareness of the national values. The shared values are progressively positive oriented, which has the ability to significantly change peoples' sense of belonging, sense of nationhood, sense of society and create basis for increased tolerance inter-alia trust while working with each other smoothly from the confines of diversity in culture, beliefs, traditions and orientations.

2.3.2. Shared values and sense of belonging

Some early formulations of social cohesion from a policymaking perspective state that social cohesion is an umbrella term for shared values by a particular community.¹⁴⁰ Green also adds that such shared values find expression through a sense of belonging being the product or factor for achievement or of achievement depending on the circumstances of the case.¹⁴¹ Shared values formulate a key subject matter in scholarly work and in policy agendas. Norton and De Haan advocate for policymakers to advance social cohesion as a concept of shared values conceived under shared identities and shared norms in order to facilitate equality and tolerance across diverse groups of people.¹⁴² The World Bank adopts and recommends these similar dimensions of conceiving social cohesion in the quest for world development.¹⁴³ In this regard, concepts such as *ubuntu* find expression as shared values among indigenous Africans in particular. The only question becomes that of how *ubuntu* is capable of operationalization as a shared value in the contemporary society built on rights, entitlements, obligations and differences that overlap with classism.

¹⁴⁰ T Southphommasane 'The challenge of Social Cohesion: Speech given at the ANU Research School of Psychology Annual Lecture' 2016.

¹⁴¹ A Green & J Janmaat *Regimes of Social Cohesion: Societies and the Crisis of Globalization* (2011).

¹⁴² A Norton & A de Haan 'Social Cohesion: Theoretical Debates and Practical Applications with Respect to Jobs, Background paper for the World Development Report: World Bank 2013. Available at: <https://openknowledge.worldbank.org/handle/10986/12147>.

¹⁴³ Same as above.

This study submits that the concept of shared values is relevant in the constitutional era insofar as it finds expression by policymakers and scholars as a key factor in attaining social cohesion or in enjoying social cohesion. The major distinction is that, the principle of shared values is not well elaborated or advanced to include values purported in the constitution. This study submits that the constitution is the supreme law of the land and in its two and half decades it has transformed the social, economic, political and customary environments. Shared values have therefore evolved from merely being those of tolerance, harmony or *ubuntu*, but for everyone to share the values of being equal, being free, having equal self-worth and most importantly to have equal protection and benefit of the law. In this regard, both academic and policymakers' perspectives of the concept of social cohesion cannot be effectively developed outside the ambits of the constitution. Shared values is therefore a relevant concept in conceptualising social cohesion, to the extent which such social or shared values compliment constitutional values to avoid negative oriented cohesion based on conflict or exclusion of other groups of people but to progressively share values of equality, freedom and dignity among diverse cultures, beliefs and traditions.

2.3.3. Togetherness, tolerance and harmony

Scholars and policymakers often talk about social cohesion as a form of togetherness, tolerance of differences and creating a harmonious society.¹⁴⁴ Scholars such as Staveren define social cohesion bluntly as a phenomenon of togetherness objectively aimed at creating unity and harmony in the society.¹⁴⁵ In governance structures of apartheid and post-apartheid, policymakers often made longwinded speeches on the need for a united and harmonious society. The major distinction is that in the post-apartheid era, during national holidays such as Freedom Day and Africa Day, politicians/policymakers speak of togetherness, unity and harmony in the negative sense of ousting previously oppressive institutions and persons or in some cases simply speaking of unity against other opposing political groups or parties.¹⁴⁶ These

¹⁴⁴T Southphommasane 'n 140 above'.

¹⁴⁵ I Staveren, Z Pervaiz, AR Chaudhary 'Diversity, Inclusiveness and Social Cohesion' (2013) 1 *Institute of Social Studies, Working Paper* Available at: http://www.indsocdev.org/resources/ISD_Working_Paper_20131_Diversity_Inclusiveness_and_Social_Cohesion.pdf. (accessed 28 September 2018).

¹⁴⁶ The ANC at its 25th annual celebration 2005.

calls can be broken down to mean calls for the relevant audience to be cohesive under the notion of obtaining what they desire as a group.

Understanding of cohesion under this notion has increased chances of being subject to bias, as it then becomes a concept of convenience capable of easy twist to suit either a negative or positive orientation at the same time, while the outcome is to be social cohesion regardless. The United Nations Development Programme (UNDP) cautions against exclusive or conflict-based cohesion as it can pose a risk to the safety and security of the other group,¹⁴⁷ yet it is common expression for this notion of social cohesion under both scholarly and policymaker's concepts of social cohesion. This study submits that togetherness, unity and harmony are products of social cohesion and not the factors that facilitate the attainment of social cohesion. This is mainly because the ability of diverse peoples to co-exist across their different cultures, traditions and beliefs creates a smooth-running society. However this harmony, unity and togetherness, is one of a large-scale nature where almost everyone coheres on the same ground, values and understanding regardless of differences.

2.3.4. Accepting diversity and legitimacy

Australia is an exemplary case of the most cohesive societies in terms of definitions of social cohesion developed for academic purposes.¹⁴⁸ One of the reasons for this is the common element of people's attitude towards minorities and newcomers within a particular society. This element is part of academic and policy endeavours as one of acceptance and legitimacy. One could argue that it complements the element of sense of belonging; however, it deals extensively with the attitude of the society that is receiving newcomers or that has a minority group amongst it. In contemporary times South Africa struggles with accepting certain diversity when it comes to foreign nationals from certain impoverished African regions. Certain stereotyping of foreign nationals, as taking opportunities and flourishing to the disadvantage of South African citizens are ideas shared and unanimously agreed on, motivating the majority to resent foreign nationals. The eventual manifestation of such resentment of diversity through violent outburst of society results in negative oriented cohesion of one group united

¹⁴⁷ United Nations Development Programme 'Predicting Peace: The Social Cohesion and Reconciliation Index as a Tool for Conflict Transformation' UNDP: Cyprus 2015 15, Available at: http://www.scoreforpeace.org/files/config/score_book_pdf/1/Score%20Book.pdf (accessed 28 September 2018)

¹⁴⁸ Same as above.

against another under prejudicial drives, subsequently manifesting conflict and exclusion of a certain different minority group.

This study therefore argues that the concept of accepting diversity is a crucial one to conceptualising social cohesion in South Africa. The South African constitution acknowledges diversity and advocates for respect, equal protection and benefit of the law without discrimination based on being different from others.¹⁴⁹ The issue of diversity is therefore important in this discussion as it serves as one of the underlying predictors for the holes in the fabric that holds South African people together. The failure to tolerate and accept diversity attributes mostly to the death of *ubuntu* yet the constitution affirms and purports values of *ubuntu*. This study further submits that both policymakers and scholars only have to confine their notion of accepting diversity to entrenchments of the constitution. The reason behind this is that constitutional entrenchments are interdependent such that the violation of one right affects other rights and realising one right opens up realisation of other rights. This can be highlighted by the decision of the court *aquo* in the case of *Prince v President, Cape Law Society*¹⁵⁰ where by denying the applicant his right to equality; he was further denied the right to religious freedom, right to freely choose a profession which further limited his right to dignity.¹⁵¹ Such denial of rights resulted from the application of formal equality, which drives towards consistently creating sameness instead of the constitutional approach to substantive equality of accepting and respecting diversity. This decision as later reversed to accept diversity in terms of the progressive entrenchments of the constitution shows the impact of denying basic right on arbitrary grounds.¹⁵² Additionally the concept of accepting diversity and legitimacy must be in line with assertions of Bulmer and Solomos on the need to accept diversity as a determinant of social cohesion.¹⁵³

¹⁴⁹ Sec 9 of the Constitution of South Africa.

¹⁵⁰ *Prince v President, Cape Law Society* [2002] ZACC 1; 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 (CC).

¹⁵¹ Same as above.

¹⁵² *Minister of Justice and Constitutional development and others v Prince (Clarke and others Intervening); National Director of Public Prosecutions and others v Rubin, National Director of Public Prosecutions and others v Acton* (CCT108/17) [2018] ZACC 20; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 396 (CC); 2019 (1) SACR 14 (CC) (18 September 2018).

¹⁵³ Bulmer & Solomos 'n 103 above'.

2.4. The constitution informed concept of social cohesion in South Africa

Prior to the constitution, South Africa's system of parliamentary sovereignty dictated and decreed without being subject to questioning or criticism. This led to the creation of forced cohesion under decrees and policies of exclusion and segregation. The advent of the constitution has brought the culture of rights, transformation and redressing past injustices. This study argues that an accurate definition of social cohesion in South Africa is conceivable in line with the entrenchments of the constitution. With the right to equality being a substantial piece of creating social cohesion under this study, it is important to look at how the right to equality has been interpreted and applied to transform and redress past injustices against minorities, the marginalised and the vulnerable

By using the constitutional entrenchments and objectives, it becomes less complex to conceptualise social cohesion in South Africa, for use by both scholars and policymakers. Due to the context, circumstances and past of South Africa, a negative oriented social cohesion existed under apartheid laws. The constitution aims to redress this in a positive way. In dealing with the facts and factors giving rise to the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others*,¹⁵⁴ the Constitutional Court dealt with a challenge on the right to equality. A marginalised and previously disadvantaged group with minority status in terms of different sexual orientation sought to recognition in the South African society through the ambits of law. In addressing the issue, the court pointed that a substantive approach to equality is the preferable approach to achieve objectives of the constitution.¹⁵⁵ One of these objectives is a rainbow nation, united (cohesive society). In dealing with affording marginalised and vulnerable people, the court noted that the desire for equality is not basis for action to eliminate difference in order to create sameness.¹⁵⁶

For purposes of understanding social cohesion in terms of the constitution, the approach of the court in *National Coalition* case is worth interpreting. In order to create cohesion among different races, ethnic groups, beliefs, tribes, nationalities, ages,

¹⁵⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others*¹⁵⁴ [1998] ZACC 15; 1999 1 SA 6 (CC).

¹⁵⁵ Same as above.

¹⁵⁶ Same as above 66.

genders, orientations and other classifications living in one society, all such difference must be recognised, protected and promoted on an equal basis found on equal human worthy.¹⁵⁷ In this regard, cohesion among different groups and people is attainable through recognising people as substantive equals.¹⁵⁸ An illustration of the accuracy of this conceptualisation is found in how the South African Human Rights institutions and South Africans in their individual selves fight for equality in social, economic, political and customary spheres, with the land redistribution movement being a practical example. Within those differences, the constitution seeks to afford everyone equal protection and benefit of the law for purposes of addressing past injustices which includes a negative oriented cohesion to a positive oriented cohesion of accepting, protecting and respecting differences.¹⁵⁹

This study employs and adopts the view of the highest court in developing a concept of social cohesion as one founded on the need for substantive equality, to create substantive equals for purposes of accepting, recognising, respecting and protecting differences instead of creating sameness. Fredman supports this notion further by submitting that substantive equality operates in a way aimed at dismantling and redressing the cycle of disadvantaged individuals and systematic marginalisation of people.¹⁶⁰ With adoption of a substantive approach to social cohesion, the right to equality facilitates the promotion of respect for diversity within society while significantly reducing stereotypical representation of certain orientations, gender, beliefs, cultures, nationalities or races.¹⁶¹ These changes are crucial as they inform how people will not only have a sense of belonging but will quash differential treatment of different people by creating one unified diverse society.

The National Development Plan (NDP) 2030 conceptualises a practical notion of social cohesion for South Africa.¹⁶² The NDP 2030 identifies social cohesion as a long-term, development goal directly linked to a series of outcomes such as; promotion of the entrenchments of the constitution to foster constitutional values to become shared

¹⁵⁷ Same as above.

¹⁵⁸ Same as above.

¹⁵⁹ Sec 9 of the Constitution of South Africa.

¹⁶⁰ S *Fredman Discrimination Law* (2011) Chap 1.

¹⁶¹ Fredman 'same as above'.

¹⁶² Department of Planning, Monitoring and Evaluation 'National Development Plan 2030 Our Future, Make it Work. National Planning Commission' Available at: <http://www.nationalplanningcommission.org.za/Pages/Downloads.aspx>.

values. Secondly, to equalise opportunities while promoting inclusion and redress of past injustices, which is essentially the actual realisation of constitutional entrenchments.¹⁶³ Thirdly, increasing interactions across races and different classes, and lastly, to create a social compact that serves as basis for equality, inclusion and prosperity for all.¹⁶⁴ This substantially adds to the notion adopted by this study, that a concept of social cohesion in South Africa can only be relevant, accurate and capable of operationalization if it finds basis and revolves around the entrenchments of the constitution.

The above discussion also highlights why the topic of *ubuntu* is pivotal to the concept of cohesion. Through *ubuntu* and equality people in their individual selves will view their self-development as the development of the entire society since ‘I am because you are’, is the attribute of *ubuntu*. *Ubuntu* and equality therefore create individuals that make a society of well-respected and accepted differences, because those individual differences are facilitative factors in making the society. From this point, not only can we expect peaceful co-existence, but also most of the attributes of social cohesion as individually discussed by policymakers and scholars to be social cohesion, become more visible, thus resulting in actual social cohesion. This concludes that social cohesion is not the elimination of differences to create sameness. Social cohesion is the realisation of differences, respecting such differences and the ability for such differences to co-exist peacefully with the objective of making one society where everyone holds equal human worth. This echoes the objectives of the constitution and the idea of a rainbow nation.

2.5. Conclusion

This chapter concludes that social cohesion needs to be developed and conceptualised within the ambits of the constitution in order to be practically effective and capable of operationalization in South Africa. It is crucial to take the South African circumstances and context into consideration before creating a policy worthy of the concept of social cohesion. Some of the critical reasons for using the constitutional entrenchments in drawing up a concept of social cohesion applicable in South Africa are mainly, policy or social changed made in line with such a definition will eventually

¹⁶³ NDP 2030 same as above.

¹⁶⁴ NDP 2030 same as above.

require operationalization. Such implementation is impractical outside the scope of the actual environment and circumstances of South Africa. The chapter has also shown that the discussion on *ubuntu*, a customary and traditional value of social unity and cohesion, is a crucial tenet in people accepting, respecting and promoting respect for differences without the need to create sameness. In this regard, the objective of creating substantive equals through respect and realisation of diverse cultures, traditions, beliefs, nationalities, ethnic groups, races and orientations, ultimately creates a cohesive diverse society premised on equal human worth. The following chapter engages the circumstances of South Africa and its experiences during apartheid and post-apartheid, in order to facilitate a discussion on the role of law in promoting social cohesion through exploring the two different eras, different governance structures, different policies and laws and different experiences. The right to equality is part of the discussion to show how its interpretation and application in post-apartheid to create respect of differences and ensure everyone has equal benefit and protection of law. This discussion seeks to provide rationale for law's ability to promote social cohesion in positive oriented way in the post-apartheid era as compared to the negative oriented cohesion of the apartheid era premised on exclusions and segregation based on race and gender.

CHAPTER THREE

THE LAW AS AN INSTRUMENT OF SOCIAL COHESION IN APARTHEID AND POST-APARTHEID CONTEXTS

3.1. Introduction

The previous chapter discussed the complexities and variations imminent in defining the concept of social cohesion. The chapter showed that a concept of social cohesion with relevance and applicability to South Africa's circumstances must find basis from and revolve within the ambits of South Africa's experiences and most importantly within the ambits of the Constitution. This chapter delves into a critical discussion of the utility of law in South Africa. The discussion develops to purposeful exploration of certain figments of law such as the right to equality as entrenched in South Africa's supreme law and how its intended utility and functions in the realisation of social order and cohesion. The closing evaluation will look at steps the government and stakeholders have taken to address the problems associated with utility of law as well as the outcome of such efforts.

The abovementioned objective of this chapter entails examining the circumstances of South Africa and experiences in apartheid and post-apartheid eras. This serves to facilitate basis for the discussion on the role of law in promoting social cohesion through exploring the two different eras, different governance structures, different policies and laws and different experiences. The discussion on the right to equality is to objectively show interpretation and application of law in post-apartheid as basis for creating respect for differences and ensure everyone has equal benefit and protection of law, in building a cohesive society. The right to equality is a significant value of the Constitution's objective to redress past injustices and an important concept to the realisation of positive oriented social cohesion through eradication of inequalities across social, economic, political and cultural differences that form basis for social disorder and inherent indicators of the lack of social cohesion, thus important in this study. A thorough discussion of the abovementioned key aspects will serve as rationale for law's ability to promote social cohesion in a positive oriented way in the post-apartheid era as compared to the negative oriented cohesion of the apartheid era premised on exclusions and segregation based on race and gender.

3.2. Background on law as a social tool

In this study, law influences the conditions of social situations to which such law applies.¹⁶⁵ In this regard, law drives the social situation it applies to, focusing on how the law plays a role in creation, maintenance, development or reform of the relevant social situation.¹⁶⁶ This is a justification for the need to look at apartheid law and post-apartheid law, focusing on the role of such law in creating, maintaining, developing or reforming the social situation of the relevant context.¹⁶⁷

Stone asserts that in order to understand law as a social tool, certain gaps on effects of the legal order on social order as well as effects of social order on the legal order have to be analysed and interpreted.¹⁶⁸ The effective understanding of this concept would necessitate looking at what courts say and do, examining the words and provisions of statutes and what courts do under them.¹⁶⁹ Further examination of the measures for executive action of enforcement, and duties of executive officials is also necessary.¹⁷⁰ Lastly, there is need to examine gaps in rules of conduct on matters as prescribed by statute or judicial decision or juristic writing and the actual conduct of citizens, and the assumed or expressed objective of legislature or court in formulating a rule and the actual consequence of observance of such a rule is important.¹⁷¹

The classification made by Stone is crucial to understanding law, its role in society regardless of the assumed and expressed objective of law. This is true in both apartheid and post-apartheid contexts of South Africa where law and rules implemented with an assumed and expressed objective yet resulting in a direct impact on the social order, which inter alia had an effect on the very same legal order that facilitated such social order.

In light of these thin lines between the connectedness of social order to legal order as well as legal order to social order, it becomes complex to define law in this study without incorporating the social utility of law in that definition. As a set of rules to regulate conduct and interactions at a social, economic and political level, all of these

¹⁶⁵ See generally (Cchiff Socio-legal theory and Stone on Law and Social Sciences in the Second half Century in Dimensions of Law and Justice).

¹⁶⁶ See generally (Cchiff Socio-legal theory and Stone on Law and Social Sciences in the Second half Century in Dimensions of Law and Justice).

¹⁶⁷ JE Penner & E Melissaris *McCoubrey & White's Textbook on Jurisprudence* 2012 33-39.

¹⁶⁸ J Stone *Law and Social Sciences in the second half century: Dimensions of Law and Justice* (1996).

¹⁶⁹ Same as above.

¹⁷⁰ Same as above.

¹⁷¹ Same as above.

exist within a social structure and have a direct and indirect effect on social order. In light of this, the adoption of law may seek to and be founded on need to regulate and promote social order.¹⁷² In light of this, it is important to draw an overview of law as a legal phenomenon classified under certain theories of law.

3.2.1. Theoretical classifications of law and its social function

Since this is part of the background on law and its role, three main classes of inquiries into law formulate basis of discussion under this section namely natural law, positive legal philosophy and realist school of legal philosophy. Natural law philosophy probes into *priori* legitimacy of the legal phenomena in areas of justice and nature.¹⁷³ The positive legal philosophy delves into the identification of legal phenomena, its normative structure and its validity among humans.¹⁷⁴ Lastly, the realist school of legal philosophy is more concerned with the interpretation of laws in social and psychological contexts and replacing normative standards with casual ones.¹⁷⁵

3.2.1.1. Natural legal philosophy

Natural Law theory is one of the theories ascribed as the first legal theory. The theory was founded by Greek philosophers namely Aristotle (384-322BCE), and Socrates (470 – 399 BCE) regardless of the Socrates problem pertaining contradictions in accounts of his philosophies, he is known for moral philosophy. Socrates. Heraclitus (535-475BCE) on the other hand is known for providing his legal theory in oracular terminology on the doctrine of the universal flux and the unity of opposites, fire being the basic material of the world, collectively bringing contradicting interpretations.¹⁷⁶ Heraclitus is criticised mainly for being in contradiction with principles of logic and making knowledge unobtainable and more complex to develop.¹⁷⁷ Plato (427 – 347 BCE) a devoted follower of Socrates who developed two key philosophies of forms and doctrine, and the Republican concept of a good society ruled by a philosophical states-man. Plato persists over human pessimism on prospects of happiness founded on the genuine appreciation of how radical morality and intellectual conversion can

¹⁷² Same as above.

¹⁷³ DN Cchiff 'Socio-legal theory: social structure and law' (1976) 39 (3) *The Modern Law Review* 287.

¹⁷⁴ Same as above.

¹⁷⁵ Same as above.

¹⁷⁶ A Laks & WM, Glenn *Early Greek Philosophy* (2016).

¹⁷⁷ J Barnes *The Pre-Socratic Philosophers* (1982).

redeem humanity.¹⁷⁸ Additionally, Plato opines that from this conception, the human rationale is no less dark, features opposing poles of reason, emotion and desire to render it all liable to the internal conflict, which builds moral defects.¹⁷⁹ As pure as the natural law reasoning advanced and explained law and rules, it is develops further in the discourse of Roman philosophers. Aquinas (1221–1274) whose philosophy derives from scriptural theology focuses on what is naturally true between God and human beings. Aquinas distinguishes between law in general, kinds of law, eternal law, human law and divine law. In essence of all of Aquinas’s philosophies, law amounts to the integration of human law founded on the basis of natural law.¹⁸⁰ The rationale in this regard is that from natural law there exist general and indemonstrable principles that allow the human reasoning to ascertain laws. Natural law is therefore more perfect than these laws as it is law with moral substance and deals with necessary instead of variable elements.¹⁸¹ It follows that under natural law of Aquinas, due to reasoning in human nature, good is to be done and evil to be avoided.¹⁸² Kant, Rousseau, Locke (1632–1704), Grotius (1583–1645) and Hume (1711–1776) adopted and followed the reasoning of Aquinas.

This legal theory generally looks into the relation between nature and society by providing two legal concepts that govern society. The first concept stipulates that for social governance purposes, a policymaker intending to regulate social relations purposefully creates applicable law and these may vary from society to society and from time to time. The second concept entails there is no person who purposefully creates law for social regulation but law naturally controls all persons.

Natural law therefore sustains as law of reason, eternal law and principles of natural justice. The natural law school of thought creates need to establish the normative judgment of the moral substance of the law in question. An illustration is the speech made by Nelson Mandela before the passing of judicial judgment on his conduct that allegedly was in violation of apartheid laws.¹⁸³ In his speech, he justifies his conduct

¹⁷⁸ RE Allen *Studies in Plato’s Metaphysics*, London: A collection of mostly seminal essays by various hands (1965).

¹⁷⁹ TH Irwin *Plato’s Ethics: A Major philosophical study* (1995).

¹⁸⁰ T Aquinas, *Summa Theological*, I, I: 8, available at <http://www.summatheologica.info/summa/parts/?p=1> (accessed on 02 November 2020).

¹⁸¹ Same as above.

¹⁸² Same as above.

¹⁸³ D Johnson et al *Jurisprudence: A South African Perspective* (2008) (See their discussion of Natural Law).

by drawing a distinction on the morality of the rational abilities of every human being and the legality of positive law regulating each country.¹⁸⁴ This speech interprets into an expression of the connectedness of morality and human conscience, showing that under natural law theory a rational human being has a higher duty than merely obeying law.¹⁸⁵ The same notion is echoed by Kant who believes in autonomy of reason and will.¹⁸⁶ Kant advances that human reasoning is law creating and comprises moral order.¹⁸⁷ Kant asserts further on the need for rules in order to create social order based on just and reasonable rules.¹⁸⁸ In this instance, Kant shows that a human being's reason will naturally compel him to join society if by reason he or she is aware that society and wrongdoing are incompatible.¹⁸⁹ It is therefore under natural law where law created out of pure reason derived from the need of social order or cohesion, there is a guarantee of social peace, order and union from the implementation of such law.¹⁹⁰ Natural law is subject to criticism for failing to relate with any real system of law. In this regard, natural law attributes to a comparative yardstick that falls short as a criterion for determining the validity of law.¹⁹¹

3.2.1.2. Positive legal philosophy

The positive school of thought believes that law aims to facilitate and attain justice, morality or any normative end and consequentially the success or failure of law will not be a determining factor of its validity. In this regard, the positivists opine that law needs proper adoption and formulation in accordance with socially acceptable rules. For this reason, law is valid regardless of it being an unjust law according to any other standard. The maintenance of order and governance of society should be the aim of the particular law in order for its validity to be authentic. However, the pioneers of the positivist school of thought shun from addressing the question of mandatorily abiding to such law or not.

The main voices theorising concepts of positivism are John Austin, Hans Kelsen and Herbert LA Hart. As one of the first positivist, John Austin theorises a utilitarian

¹⁸⁴ N Mandela *The Struggle is My Life* (1990) 148-154.

¹⁸⁵ Same as above.

¹⁸⁶ A Follesdal & M Reidar *Kantian theory and human rights* (2014).

¹⁸⁷ Same as above.

¹⁸⁸ Same as above.

¹⁸⁹ Same as above.

¹⁹⁰ Same as above.

¹⁹¹ Same as above.

approach wherein he perceives law to be commands backed by threat of sanctions coming from a sovereign leader who is in command of habitually obedient citizens.¹⁹² In contemporary times, other jurists have taken a different perspective to positive law, in particular Hart. Kelsen provides the pure law theory in the 20th century where law is merely binding norms, however, not providing for evaluating those particular norms.¹⁹³ In this approach, Kelsen provides that there is a Grundnorm that serves as the basic norm on or under which the adoption and making of all other laws unfolds and depends on for their validity.¹⁹⁴ On the other hand, Hart provides that law is a system of social rules.¹⁹⁵ Hart rejects the pure law theory of Kelsen by providing that law as a social phenomenon does not depend on threats of sanction for efficiency and neither does it need to revolve in non-normative social surroundings.¹⁹⁶ On this note, Hart divides rules into primary and secondary rules wherein primary rules pertain to conduct while secondary rules deal with administrative rules for officials administering primary rules.¹⁹⁷

3.2.1.3. Legal realism

Legal realism theorises that law must be understood according to how it is interpreted in practice in the courts and in enforcement by executive officials. The realist legal philosophy in this case does not clearly explain law, its role and validity before the making and interpretation of the law in question. This means that to a certain extent, a certain law is as valid and relevant as its interpretation by a court or in practice instead of the significance of the actual or direct flow of consequences before interpretation and enforcement. The problem associated with applying this theory is that it does not provide policymakers with background on which and how law making processes must be in line with certain objectives or creating a certain order.

Oliver Wendell Holmes is the leading figure of Legal Realism view as a prophecy of what the courts would do. Wendell submits that law is not a mystery but a well-known profession pertaining to what we want to appear before the judicial officers for or how

¹⁹² J Austin *The Providence of Jurisprudence Determined* (1831).

¹⁹³ Follesdal & Reidar 'n 186 above'.

¹⁹⁴ H Kelsen '*Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, Charlottenburg Pan-Verlag Rolf Heise*' (1928) translated as "Natural Law Doctrine and Legal Positivism" in H Kelsen *General Theory of Law and State* (1945) 389–446.

¹⁹⁵ HLA Hart *The Concept of Law* (1961).

¹⁹⁶ Same as above.

¹⁹⁷ Same as above.

to stay out of court.¹⁹⁸ In this regard, public force vests in the judiciary whereas the state's power remains reserved for use in enforcing judicial judgements.¹⁹⁹ Wendell explored law in deviation from the common supposition that law is an orderly system of rules within which deducing a decision is easy to do. Legal rules under Holmes are however, not developed from formal logic but developed through an active process of each person's self-government.²⁰⁰ The gist and fulcrum of Holmes's philosophy revolves on the need to develop common law to allow better determination of results of individuals' conduct and determining the proper measure for liability for such individual conduct.²⁰¹ In essence, it meant law is the general collection of what judges have done, acting within the rules of conduct, which subsequently determines when the force of the state and how much of it is unleashed. In this regard, the decisions of court officials develop into law and rules of conduct with the passing of time, becoming legal duties. These assertions are conflictual with the natural school of thought as it deviates from the application of the natural or moral order since Holmes insinuates that men make their own law instead of law deriving from a mysterious omnipresence in terms of natural law.²⁰² In this case, the prophecies of what courts may or are likely to do is in fact not pretentious but law in terms of Holmes's prophecies of law.²⁰³

Karl Llewellyn is another pioneer of the realist legal philosophy who adds substantial theorisation and consideration of judicial roles and conduct as the main explanations and defining elements of law. He considered a court to be in a state of discharging its duties if such duties are carried out with clear consciousness of their effect, reasoning and with purposive intention and intricately addressing a wider range of situations.²⁰⁴ Llewellyn adds that legal practitioners have to be trained to deliver arguments with a strong persuasive effect, placing emphasis on facts of the case because facts of a case are ordinarily more significant to and influence the outcome as compared to the applicable law.²⁰⁵ It is therefore outcomes from the applied facts that constitute law instead of logical reasoning on legal rules, a deductive science under other theories

¹⁹⁸ OW Holmes 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

¹⁹⁹ Same as above.

²⁰⁰ OW Holmes *The Collected Works of Justice Holmes* (1995) 7.

²⁰¹ Same as above.

²⁰² Same as above.

²⁰³ S Vannatta *The Pragmatism and Prejudice of Oliver Wendell Holmes Jr* (2019).

²⁰⁴ NEH Hull et al *Searching for an American Jurisprudence* (1997).

²⁰⁵ Same as above.

of law.²⁰⁶ These assertions were met with criticism, initially on the basis that legal realism is generally complex to apply and also that in terms of Llewellyn's philosophy legal practitioners would have to go beyond mere potential in order to argue a case effectively in order to learn all possible factors that can affect the outcome.²⁰⁷ In this regard, the notion of law being a system of well set rules applied invariably to each and every situation remains the norm as compared to Llewellyn's assertions.

3.2.2. Jurisprudential conception of social functions of law

Roscoe Pound submits that in the 20th century the problem is not in understanding what law is, but what law does, how it does it, what it can be made to do and how.²⁰⁸ The second issue in this regard pertains to the yardstick of valuing conflicting and overlapping interests and claims that must be harmonised or reformed by the legal order.²⁰⁹ Durkheim's analysis of the correspondence between social structures of a particular state and its legal order gives responsive insight to Pound's questions. Durkheim asserts that law reproduces primary forms of social solidarity (social cohesion) and we only have to classify the various types of law applicable in establishing the various types of social solidarity that correspond to such law.²¹⁰ This advances an idea of structural functionalism of law where law regulating a society expresses the types of solidarity that unites members of the society.²¹¹ To understand the meaning of law and its social function in this case, Durkheim asserts that by law assuming the form of juridical rules it presents two kinds of juridical rules namely repressive and restitutive rules.²¹² Repressive rules make up penal law while restitutive rules assert restoration of things through civil law, procedural law, administrative law and constitutional law.²¹³ In this regard, the attainment of social solidarity (social order/cohesion) out of the two juridical rules, informs the type of social structure or cohesion among the members of the society.²¹⁴

²⁰⁶ S Steven *The Bramble Bush: On Our Law and Its Study* (1930), (2009).

²⁰⁷ WL Twining *Karl Llewellyn and the Realist Movement* (1943).

²⁰⁸ E Ehrlich & R Pound *Fundamental Principles of the Sociology of Law* Translated by L Walter, (1962) 25.

²⁰⁹ Same as above.

²¹⁰ DE Durkheim '*De la Division du Travail Social (on the division of Labour in Society)*' Translated by G Simpson Division of Labor in Society (1933).

²¹¹ Same as above 68.

²¹² Same as above 69.

²¹³ Same as above.

²¹⁴ Same as above.

Two distinct forms of solidarity or cohesion are used to justify this interpretation of law and its social function. The mechanical solidarity and the organic solidarity model are applied in this case. Mechanical cohesion is informed by the collective and common conscience that exists between members of society as a result of shared values and desires, beliefs, habits and attitudes.²¹⁵ The common and collective similarities of members of a society therefore inform a common reaction to a deviant or unaccustomed act by another member thus showing the relationship between law and common morals.²¹⁶ In this regard, common conscience of a society does not get shocked because an act is criminal in nature but an act is a crime because it has shocked the common conscience of society thus it is not rebuked because it is a crime but it is a crime because society reproves it.²¹⁷ In this instance Durkheim indicates that law is merely a tool for society whose structure is based on mechanical cohesion and such law would have to be repressive or penal to safeguard the values of the society.

On the other hand, organic solidarity or cohesion corresponds with legal order of a restitutive nature. In this regard, law is regarded as playing a role in society by looking at the degree which society divides labour according to developments of co-operative law that has restitutive functions.²¹⁸ This kind of law does not depend on common and collective conscience of society but is merely law of positive co-operation. Durkheim notes that such law arises out of diversity and specialisations in society which leads to mutual dependence on the co-operation of all members of the society.²¹⁹ Both mechanical and organic cohesion indicate that aspects of law vary with the variation of the social relations which law governs.²²⁰ This further indicates that law and social order are connected and dependant on each other and the connection can either be direct or indirect.

Duguit incorporates Durkheim's assertion but minimises the function of the state by providing that law is not a creature of the state, but exists independent of the state.²²¹ Duguit asserts further that law is not given the juridical norm to rule by state

²¹⁵ Same as above.

²¹⁶ Same as above 73

²¹⁷ Same as above 81.

²¹⁸ Same as above 128-129.

²¹⁹ Same as above.

²²⁰ DE Durkheim 'An anthropological definition of law' in M Bronislaw *Crime and Custom in Savage Society* (1951) 55.

²²¹ L Duguit *Law in Morden State* (1921) 290-296.

intervention but by the existence of social fact in social cohesion.²²² The rationale behind this assertion is that a rule of law comes into existence when a group of individuals that compose a society understand and admit that reacting to a violation of the rule or law can be socially organised.²²³ Shortcomings in Duguit's assertions are overshadowed by Durkheim's structural functionalism of law where law cannot be distinguished from the concept of society and Durkheim acknowledges effectiveness of legal rules from social determinants.²²⁴ In this case there is no secondary relationship between the concept of law and that of society since what law is depends on what society is or the understanding of it.

The background given here will serve as basis for understanding the following discussion on the utility of law in South African context of apartheid era and post-apartheid era. The objective is to prove that law has social function and promotes social order. The social context of apartheid time was directly linked to the legal order the same way the current social context is a result of the apartheid legal order which also paved way for society's outcry for a change of legal order in the form of the transformative constitution (current legal order), to regulate and create a new social order of equality, dignity and freedoms.

3.3. The Apartheid governance, laws and impact on social cohesion

The apartheid era was characterised by the most repressiveness and segregation ever witnessed in South Africa. The vibrancy and basis for success of such repression and segregation was the manner in which law adopted and utilised by the apartheid system of governance. Law was utilised to impose and create a certain social setup based on exclusions and segregation of certain races, gender, cultures and beliefs. The underprivileged, marginalised and disadvantaged position of the majority was the outcome of the apartheid system of governance, which forms the essence of what the 1996 constitution aims to redress, towards creating an inclusive and socially cohesive society.

²²² Same as above.

²²³ same as above 27.

²²⁴ Same as above.

It is argued that from around 1948, the architects of apartheid advanced laws that can be equally compared to the Nuremberg laws of the Nazi ideology.²²⁵ The effect of apartheid laws was the creation of a negative oriented cohesion based on conflict and exclusion between races as a primary factor, while other factors such as gender, orientations, culture, beliefs, nationality and orientations were merely secondary. Bunting asserts that apartheid laws removed fractions of privileges previously enjoyed by the majority in social, economic and political spheres.²²⁶

The apartheid regime is described as rooted in concepts of slavery, colonisation and segregation; to which there was legislation for a continuum of discrimination against non-whites.²²⁷ Apartheid laws therefore ignored culture, tradition and beliefs of the indigenous people while gradually developing a law based system of 'separate but equal'.²²⁸ This ideology is discussed in the previous chapter as one of the fundamental concepts informing the concept of social cohesion in this study, whereby constitutional entrenchments aim to promote respect and protection of diversity instead of creating sameness.²²⁹ Dubow gives a relevant analysis of what the apartheid system did to the social structures of South Africa through operation of law. Dubow asserts that law-based segregation became an ideology for organisation of white supremacy objectively to defend and maintain the prevailing social order from the threat of the growing potentially militant African proletariat.²³⁰

In light of this, it is important to look at some of the laws passed by the apartheid government to create a sense of organised separate society on racial lines. This is mainly to identify the curtailed functions of law in imposing a certain social organisation and structure. Regardless of the cohesion created by apartheid being negative oriented to create rigid exclusions and segregation; it is worth exploring some of the laws in order to determine the function of law in promoting the so-called social forms and structures of apartheid era. It is noteworthy that in this study it is not possible to

²²⁵ B Bunting *The Rise of the South African Reich* (1986)158-193.

²²⁶ Same as above.

²²⁷ J Peires 'The Holocaust and Apartheid: Similarities and Differences A Comparative Study,' MA Dissertation, University of Cape Town 2004.

²²⁸ Same as above 5.

²²⁹ The preamble of the Constitution of South Africa of 1996.

²³⁰ S Dubow *Racial Segregation and the Origins of Apartheid in South Africa 1919-36* (1989) 1.

consider all apartheid legislation because of space. Hence only a few of the most notable laws used to promote a racial segregation social order will be discussed below

3.3.1. The Population Registration Act 30 of 1950

As part of creating social forms and structure of exclusion based on racial exclusions, the apartheid regime implemented laws for race classification. The Population Registration Act of 1950 was one such Act aimed at systematically classifying race, in order to implement rigid separation of races effectively as a new form of social order. This Act provided for the compilation of a register of the population of the Union so as to keep a record of all people under classification and categories of birth and race.²³¹ Section 5 of the Act provided for the Director of the Population Register to classify people as white, coloured or native, with coloured and native further classified according to the ethnic or relevant group they belonged to.²³²

Through this Act, the social order of exclusion was consolidated as all identified persons were required to play their roles from within their identified population groups. This meant by using law to separate races and identifying people, a certain social order was created in the form of rigidly separated people who were further conferred roles and duties towards the state but discharged from within the respective population group of every person. Regardless of the law possessing ulterior primary objective of oppression by making non-whites do what whites did not wish to do, a certain social order was created through these laws. In essence society cohered across racial lines, across identified population groups. This indicates that law has the potential to significantly impose on or influence social change, social structures and the lines across which people can cohere, unite or even divide.

3.3.2. Prohibition of Mixed Marriages Act 55 of 1949

To also further consolidate the system of racial exclusion as a form of social order, the apartheid government enacted law to limit and prohibit interracial marriages so as to maintain some form of racial purity. The Prohibition of Mixed Marriages Act of 1949 was enacted as law to safeguard and magnify racial lines and difference, further ensuring that the social order of racial exclusions is safeguarded by not legally

²³¹ Same as above.

²³² Sec 5 of the Population Registration Act of 1950.

recognising interracial marriages. The Act provided that a marriage between a European and a non-European could not be solemnised and any such marriage solemnised in contravention of the Act would be void.²³³ Exceptions to this were only available for a marriage between a European and non-European concluded and solemnised in good faith and where the parties appeared to be European and habitually consorted with Europeans as a European and alternatively where a European appeared non-European and consorted with non-Europeans.²³⁴ Also a male who married someone who is domicile outside the Union, whom he could not have married in the union, such a marriage was void in the Union.²³⁵

This particular legislation can be described as a protective measure by prohibiting and limiting 'contamination' of the superior white group by non-whites. The impact of this on the social order was the birth of the coloured group also separated from being part of the white group. The legislation extended separation lines across race as a form of regulating social forms, structure and order. By being hell-bent on maintaining racial purity and superiority, social structures and the social order was significantly changed through such laws aimed at safeguarding white/racial supremacy. This further indicates that through implementation and enforcement of law aimed at fostering political and economic supremacy, social structures and social order was significantly influenced into a negative oriented social cohesion based on exclusions and separation across racial lines.

3.3.3. Bantu Homelands Citizenship Act (National States Citizenship Act) 26 of 1970

The Bantu Homelands Citizenship Act is another form of law that consolidated racial exclusions and separation between whites and non-whites was through identification of citizenship. This law had an impact on the social order of the time as it directly recognised whites as citizens of the Union while other non-whites were citizens of self-governing territorial authorities in 'Bantu Homelands'. The chairman of Bantu Affairs Commission, Froneman MP in 1968 reflected on the recognition of Bantu homelands by noting that the apartheid government did not recognise Bantu as one single people but as groups of people divided by language, culture and tradition making them

²³³ Prohibition of Mixed Marriages Act 55 of 1949.

²³⁴ Same as above.

²³⁵ Same as above.

different nations.²³⁶ He further added that the policy on Bantu Homelands and Citizenship was not racial policy but merely recognised the existence of the white nations and several Bantu nations.²³⁷

This study submits that this piece of law created and furthered the rigid separation between whites and non-whites in terms of territory and sense of where a particular person ought to feel like they belong. The consequential social forms and order was fostered on the backbone of race-based policy, with a negative orientation of creating separation and exclusions. The impact and consolidation of inequalities by this law in other spheres such as economic and political spheres would only have to be complimented by subsequent legislation as will be shown below. This indicates that law has the potential to foster a certain social order which can be either negative or positive oriented social order. In the case of apartheid laws, the desired social order was one of distinction between racial groups through social structures where non-whites cohered and existed on their own separate from whites based on social, economic and political privileges.

3.3.4. Reservation of Separate Amenities Act 49 of 1953

To further consolidate the identified races, citizenship basis, territory and groups to which each race belonged, the apartheid government ensured that there would be some form of social order through maintaining cultural purity. The Reservation of Separate Amenities Act of 1953 was implemented to further reserve certain public spaces, public transport or portions of such to the exclusive access and utilisation of a certain racial group or class.²³⁸ Owners of certain public spaces or vehicles were required by law to set aside part or all of such property for the exclusive use of a certain race and ensure there were notices of such restrictions in English and Afrikaans only.²³⁹ Contravening these laws by being at restricted places would result in a fine not exceeding 50 pounds or imprisonment not exceeding 3 months.²⁴⁰

By limiting mixed group activities, this restrained developments of the depth of social ties between the different groups. The resulting social order from this law of exclusion

²³⁶ Address to the Institute of Citizenship, Cape Town, by Mr. G.F. Van L Froneman M.P & Chairman of the Bantu Affairs Commission 30 May 1968.

²³⁷ Same as above.

²³⁸ Same as above.

²³⁹ Same as above.

²⁴⁰ Same as above.

and rigid separation was one of social and cultural exclusivity. In essence law was used in any way possible to create a social order of two defined cohesive societies of the white and non-whites, at conflict. The ability of law to promote social cohesion is evident in this case insofar as it created a negative oriented cohesion during apartheid, redressing these unjust laws and positions created through law, has the potential to significantly promote positive oriented cohesion under shared values of all diverse people as entrenched in the constitution.

3.3.5. Group Areas Act 41 of 1950

The apartheid government also enacted laws to consolidate racial segregation and restrain freedom of movement through laws that separated residential territories of different race groups. In the Group Areas Act, people were grouped into certain racial groups such as whites, native, coloured and anyone who was not a member of the white or native group.²⁴¹ Section 34 prescribed powers to the Governor General to define ethnic, linguistic, and cultural or group of persons fitting as members to a white, native or coloured group.²⁴² Such classification required that a person classified and registered under a certain group be part of the group. Section 20 to 25 dealt with property rights, indicating a person from one group could not own, inherit or dispose property to a person from another group when the property is located in an area demarcated for another different group.²⁴³

The overall effect of this policy framework was manifest on social structures to the extent of fostering social forms and order of exclusion. By limiting the ability of certain identified groups to compete with another, to share the same resources such as land, it ultimately meant the different races could not socially coexist outside the scope of the physical and social order fostered by the apartheid laws such as the Group Areas Act. These laws had a direct and indirect impact on social order, for instance, directly creating the social order of divided racial groups, however indirectly creating another form of social order among the repressed conceived to cohesively work towards political, socio-economic equality and freedom. The form of social order primarily created through operation of apartheid laws, gave birth to a secondary form of positive

²⁴¹ Same as above.

²⁴² Sec 34 of the Group Areas Act 41 of 1950.

²⁴³ Secs 20-25 of the Group Areas Act 41 of 1950.

oriented cohesion based on shared values to outdo racial supremacy and retain equality in political, economic and social fields.

3.3.6. Native Laws Amendment Act 54 of 1952

This Act aimed at limiting the influx of natives in white group areas through law establishing certain conditions under which non-whites could access and permanently live in whites only areas. These conditions identified people born in that area and had continuously lived in such area, people who had continuously worked for 10 years for one employer in the area, the wives, unmarried daughters and sons under 18 years of anyone who qualified in terms of the first two provisions and lastly to people who had been granted permission to be in such white group areas by authorities generally in cases of migrant and contract workers.²⁴⁴

Almost similar to the Group Areas Act, the Native Laws Amendment Act had its own impact on the social order of the day. It directed people to live in identified and confined areas for such a particular group. This was to further tear the racial fabric and to consolidate the social order of exclusion and rigid separation. In essence, law consolidated the intended separatism social order across races, with further exclusion from political, economic and social spheres being the norm. This social order in its negative orientation bore conflict at a gradual pace as the repressed groups cohered against the apartheid system, after the system had successfully fostered through law, a social order of exclusion and separation across racial lines. This supports the positive notion of this study that law is greatly capable of fostering and promoting social cohesion with a positive orientation of unity, harmony, respect for diversity and equality across economic, social, political and cultural lines.

3.3.7. Black (Native) Laws Amendment Act 54 of 1952

The Act aimed to maintain the social order of exclusion through regulating labour and economic opportunities by reserving most skilled and sought-after opportunities for whites. By regulating the registration of trade unions and safeguarding against inter-racial competition, the Act managed to reserve certain opportunities for whites.²⁴⁵ The effect of such regulations was further division among the white and non-white races

²⁴⁴ Secs 1-4 of the Native Laws Amendment Act 54 of 1952.

²⁴⁵ Sec 6 (same as above).

with the intention to consolidate the political and economic position of the white. This however, directly and indirectly promoted a certain social order on which the divided races increasingly found reasons to cohere as the effects of discriminative laws also magnified the importance of realising shared values of a single , uniform society.

3.4. The overall impact of apartheid laws in fostering social order of rigid exclusions and racial separation

The laws discussed above, in their individuality had a specific purpose to limit and regulate certain interactions and direct the flow of social cohesion between white and non-white races from within economic, political, social and customary confines. The effect of apartheid laws is described by Marioti and Fourie as still shaping the South African Society 2 decades after its abolishment.²⁴⁶ Abel affirms that the laws that forced the relocation of natives affected inter-ethnic trust such that in present day South Africa, people living in former Bantu Homeland have less trust of other South Africans, are less proud to be South African and relevant to this study are drawn to the idea of a united country.²⁴⁷ This entails that the effect of the forced social order during apartheid, insofar as it broke the fabric holding together diverse tribes, cultures, nationalities, races and classes affected social cohesion during apartheid and is still an issue in present day South Africa, hence engaging an inquiry into the role of law in promoting social cohesion in post-apartheid South Africa. The impact of apartheid laws on social order was not only an issue during apartheid, but had significant impact that is still felt in the present-day context as contributing to key issues of inequalities, trust and shared values that inform basis of inquiring into the status of social cohesion in South Africa.

The effect of apartheid laws on social order can be described in line with Bourdieu's assertion that in fostering social order, social relations are a factor independent from individual will because what exists in the social world is relations instead of interactions between agents or inter-subjective ties between individuals.²⁴⁸ This refers to objective

²⁴⁶ M Marioti & J Fourie 'The Economics of Apartheid: An Introduction, Economic History of Developing Regions' 2014. available at <https://doi.org/10.1080/20780389.2014.958298>.

²⁴⁷ M Abel 'Long-run effects of forced removal under apartheid on social capital' Mimeo, Presented at: African Economic History meetings, London School of Economics and Political Science, 25–26 October 2014 MA thesis, Harvard University, 2014.

²⁴⁸ P Bourdieu. & LJD Wacquant *An Invitation to Reflexive Sociology* (1992) 97.

relations existing independent of individual consciousness and will.²⁴⁹ It would be correct to assess apartheid laws as resulting in two forms of cohesion that are related, with the first one being the direct result of discriminatory law aimed at separating and excluding people based on race therefore creating a social order of exclusions. The second form of social order is a product of the first result of forced social separation and exclusion which entails the cohesion among the excluded people premised on the idea of relating within spheres of political, economic and social exclusions that were felt from the operationalized laws.

In this regard, it would be accurate to argue that the contemporary post-apartheid question of social cohesion can be redressed through operation of law as already envisioned in the constitution. This entails that the attainment of social cohesion in post-apartheid can be a direct result of redressing apartheid law and its effects. This would further entail that at the core of post-apartheid laws is the advancement of shared values of equality, dignity and freedom to create a more cohesive society in the positive direction. This means that the dynamics of apartheid laws essentially created social differentiation through policy of exclusion in social, economic and political spheres which informed social order of that time and have also impacted conceiving post-apartheid social cohesion hence engaging this study. One thing that has become clear is that law is capable of facilitating, fostering and promoting a certain desired social order. In that regard, imposition of unfair laws that do not safeguard the realisation of shared values by the whole community creates a social order of conflict, exclusion and rigid separation. However, an all-inclusive legislative approach that safeguards the realisation of shared values of the whole diverse community has the potential to promote social cohesion in the positive sense.

Clark and Worger submit that key aspects of apartheid legislation were that people resident in South Africa enjoyed different rights and privileges on the basis of race.²⁵⁰ These differences were for a certain period visible in South African social ties and social structures. The social order became that of differentiation. This section concludes that apartheid laws indeed influenced changes in social cohesion through changes in social relations, social ties and social structures. Post-apartheid era has been a long process of transforming society's economic, political, social and cultural

²⁴⁹ Same as above.

²⁵⁰ NL Clark & WH Worger *South Africa: The Rise and Fall of Apartheid* (2011) 49.

differences in order to legally facilitate the harmonious coexistence of diversity. The effects of apartheid are still greatly felt two and half decades after the end of apartheid. Law has therefore become the main tool to utilise in fostering a positive oriented social cohesion in South Africa. The following discussion will focus on the post-apartheid era, to examine the situation and the available law that can significantly promote social cohesion in the positive oriented sense.

3.5. Social cohesion in post-apartheid South Africa

The post-apartheid era is legally based on the constitution. South Africa's constitution was developed on the backdrop of apartheid injustices and inequalities. The overall objective of the constitution is to foster transformation in economic, social, political and cultural spheres through legal tools based on equality, freedom and dignity. The constitution is therefore 'the supreme law of the land and any law inconsistent with it is invalid'.²⁵¹

Regardless of the constitution's commitments and ambitious provisions, certain social gaps exist due to the slow progress in realising transformation in the economic, political, social and cultural spheres. For one or several reasons the fabric that holds society together from within the ambits of shared values entrenched in the constitution has increasingly become incapable of developing or maintaining a cohesive society. Social indicators of these gaps are mostly out of causes of a socio-economic nature such as increased inequalities, poverty, issues on equal access to opportunities such as quality education and healthcare as well as unemployment rates among the black majority South Africans as compared to the white minority.²⁵² Majority of factors contributing to low social cohesion levels in South Africa are primarily based on socio-economic factors or conditions. Political indicators of social divisions are visible in how the ruling party African National Congress has been gradually losing support due to the majority of diverse South Africans from across all racial lines losing faith in the political capabilities of the ANC towards attaining the shared values committed in the constitution.²⁵³ The following is a brief overview of post-apartheid indicators of and

²⁵¹ Sec 2 of the Constitution of South Africa of 1996.

²⁵² VL Birkisdóttir 'The Impact of Racial Segregation in South Africa' BA in Sociology Thesis, The University of Iceland 2018.

²⁵³ Same as above 29.

causes of lack of social cohesion prompting the need to realise constitutional values in order to promote social cohesion through application of law.

3.5.1. Economic indicators

The United Nations Human Development Report on South Africa indicates that South Africa is the richest country in the Sub-Saharan African region with a gross domestic product of \$ 12, 390 per capita as of 2015/2016.²⁵⁴ On the other hand economic growth per person is only at 1 to 2% per year, which is not sufficient enough to eradicate poverty rapidly.²⁵⁵ The 2019 Human Development Report on South Africa indicates that inequalities in human development have damaging effects in society and negatively weaken social cohesion and general trust in government and institutions.²⁵⁶ In South Africa, 6.3% of the population are multidimensionally poor while an additional 12.2% classified as vulnerable to multidimensional poverty.²⁵⁷ The breadth of deprivation (intensity) in South Africa, which is the average deprivation score experienced by people in multidimensional poverty, is 39.8%.²⁵⁸ These economic indicators have increasingly created classism of upper, middle and lower economic classes. This has been a cause for concern as people find it difficult to relate harmoniously and cohesively at a social level while facing different economic challenges on the backdrop of past injustices of apartheid which the constitution committed to redress compounded as shared values of the nation.

The World Bank Gini Index for South Africa asserts that inequality in South Africa is very high with measurements of inequality standing at 0.63 being the highest in the world.²⁵⁹ Furthermore, the Palma ratio of South Africa stands at 7.1 as the highest ratio in the world where the richest 10% of the population attain 7 times as much of the national income portion as the poorest 40%.²⁶⁰ Another indicator of these disturbing inequalities is in the calculation drawn by the Pew Research Centre in 2013

²⁵⁴ S Jahan 'Human development report 2016 human development for everyone.' New York: United Nations Development Programme 2016.

²⁵⁵ Birkisdóttir 'n 252 above'.

²⁵⁶ Human Development Report 'Inequalities in Human Development in the 21st Century: Briefing note for countries on the 2019 Human Development Report South Africa,' 2019.

²⁵⁷ Same as above.

²⁵⁸ Same as above.

²⁵⁹ GINI index available at

https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZA&name_desc=false (World Bank Estimate) (accessed 02 August 2020).

²⁶⁰ Human Development Reports, Retrieved from <http://hdr.undp.org/en/composite/IHDI>. (accessed 02 August 2020).

to indicate that it is only during Nelson Mandela's tenure, where the income of black people grew more steadily than that of the white, Asian and coloured counterparts.²⁶¹ Statistics South Africa also showed that the total income in white households is five times higher than that of the black households at a rate of 300 000 rand against 70 000 rand.²⁶² In 2019 Pew Research further reported that increasing racial divisions and pessimism over democracy loom as attitude towards institutions have increasingly become negative leading to some form of social disorder.²⁶³ Additional to this is the increasing negative attitude towards foreigners and consolidated beliefs on increased crime and terrorism as a 60% contribution by foreign nationals. The social fabric has been weakened in this regard as at least 55% of South Africans opine that in this regard, foreigners merely want to adopt South African customs and ways of life.²⁶⁴ These are alarming inequalities that also clarify why there has been growing social instability and less social cohesiveness in the post-apartheid contemporary times. One could argue that these inequalities in what is supposed to be an equal society are a constant reminder of the legacy of apartheid governance system. This is a legacy that tore social ties across racial lines.

The fabric that holds society together has endured the test of post-apartheid developments in the wake of constitutional values and provisions directed at addressing and eradicating inequalities. Income and wage inequalities that affect economic circumstances have in contemporary times resulted in broken social ties to manifest through public outrage, protests, riots and acts of violence against foreign nationals from neighbouring African countries, shop owners and against the government as well as a sharp increase in crime. All of these are indicators of the effects of inequalities on social cohesion in post-apartheid South Africa. One of the key effect in this regard is lack of trust which is a key tenet for people to work together cohesively in any society.

²⁶¹ D DeSilver 'Chart of the Week: How South Africa changed, and didn't, over Mandela's lifetime,' 06 December 2013. Retrieved from <http://www.pewresearch.org/facttank/2013/12/06/chart-of-the-week-how-south-africa-changed-and-didnt-overmandelas-lifetime/>. (accessed 02 May 2020)

²⁶² PJ Lehohla 'Living Conditions of Households in South Africa: An analysis of household expenditure and income data using the LCS 2014/2015,' South Africa: Statistics South Africa 2017).

²⁶³ C Tamir & A Budiman In South Africa, racial divisions and pessimism about democracy loom over elections (May 2019) (accessed at: <https://www.pewresearch.org/fact-tank/2019/05/03/in-south-africa-racial-divisions-and-pessimism-over-democracy-loom-over-elections/> (accessed on 26 October 2020).

²⁶⁴ Same as above.

3.5.2. Social indicators

Certain inequalities of a social nature also impede the progressive realisation of social cohesion in post-apartheid South Africa. With education becoming an essential good, the uneven distribution of education facilities in South Africa has increasingly resulted in strains on social cohesion. With 23 universities and a number of primary and secondary schools offering the best quality education, there are concerns aired on how the education system reflects a legacy of the apartheid era of discrimination.²⁶⁵ Access to quality education at primary and secondary level is an issue and access to tertiary education is far more demanding on resources which also relates to subsequent uneven results. To indicate the effect of this on social cohesion, there has been an increase in student protests especially at higher learning institutions, which has become a common occurrence throughout the country.²⁶⁶

The same social indicators bore from inequality are also evident in terms of access to healthcare services. Sulla asserts that the poor are far from health facilities while the rich are close resulting in uneven access to healthcare services.²⁶⁷ This is a big concern, considering that South Africa is reported to be the most affected country by the HIV and AIDS infection with 7.1 million people living with the virus as of 2018 contributing to 19% of the global population that is living with the disease.²⁶⁸ This and other health circumstances increase the need for access to healthcare. In light of the impoverished and uneven economic circumstances, these are indicators of social fragmentation due to the high levels of inequalities at all levels of interaction.

Further indicators such as inequalities in terms of housing have been tabled in several national plans of action as fundamental steps to overcome poverty and inequalities. In 2015, 39% of the South African population was defined to be overcrowded with the poor measured to have an overcrowded rate of 60.8% while the non-poor's overcrowded rate is 23.6%.²⁶⁹

²⁶⁵ Birkisdóttir 'n 252 above' 32.

²⁶⁶ Same as above.

²⁶⁷ V Sulla & P Zikhali 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities' Washington, D.C.: World Bank Group, 2018 23.

<http://documents.worldbank.org/curated/en/530481521735906534/OvercomingPoverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-andOpportunities>

²⁶⁸South Africa. Retrieved from <http://www.unaids.org/en/regionscountries/countries/southafrica> (2018 January).

²⁶⁹ Sulla 'n 267 above'.

Personal safety within the society has become another crucial point of indication of broken social ties due to the increase in different kinds of crime. The United Nations reported that in 2017 the murder rate in South Africa was at 34.1 per 100 000 people in comparison with that of the whole of Africa which was at 12.5 and stands at 3 in Europe.²⁷⁰ The Eastern Cape Province was recorded as of 2016/17 to have the highest murder rate of 55.9 per 100 000 people with 52.1 being the rate of people murdered everyday on average.²⁷¹ Other crimes such as rape in South Africa are also considered to be the highest in the world with 109.1 rape cases being recorded per day in 2016/17.²⁷² In 2020 the Institute for Statistics South Africa reports that crime detected as a result of police action has increased in some areas and reduced in others, for instance contact crimes (inclusive of rape, murder, attempted murder, sexual offences, common assault and robbery) increased from an average of 617 210 in 2019 to 621 282 in 2020, while commercial crimes have increased with 0.1% from 2019 to 2020.²⁷³ These indicators are alarming signs of a society growing less and less cohesive as trust has been lost, harmony has been lost, and ideals of shared values and *ubuntu* losing influential utility in this plague of inequalities.

3.5.3. Political and governance indicators

In as much as apartheid ended in 1994, politics and governance largely remain race based, with the ANC dominating among the majority black population which gives it two thirds of the votes and the Democratic Alliance (DA) dominating among other ethnic groups.²⁷⁴ Corruption has become one of the biggest political indicators and factor for society to distrust and be at loggerheads socially. The 2017 Ibrahim Index of African Governance rated South Africa as number 6 out of 54 countries with high political and governance corruption.²⁷⁵ South Africa's biggest corruption tide has been in relation to the presidential tenure of President Jacob Zuma who was charged with 16 counts of corruption involving racketeering, fraud and money laundering among other charges such as rape and accepting bribery for access to certain resources of a

²⁷⁰ United Nations Office on Drugs and Crime 2017/18.

²⁷¹ Factsheet 'South Africa's crime statistics for 2016/17' (2017, October 24). Retrieved from <https://africacheck.org/factsheets/south-africas-crime-statistics-201617/> (accessed 20 October 2020).

²⁷² UNODC 'n 270 above'.

²⁷³ Crime Statistics Crime 'Situation in Republic of South Africa twelve (12) months (2019 April to March 2020)' 2020.

²⁷⁴ Birkisdóttir 'n 252 above' 35.

²⁷⁵ Same as above.

public nature.²⁷⁶ The major result of this has been social unrest in the form of protests and riots that pushed for inquiries and later the resignation of Jacob Zuma in 2018. The society as a whole has grown less cohesive in this regard due to the little trust in political institutions and their governance.

The ideals of shared values have been getting eroded within the constitutional dispensation. Achieving social cohesion requires narrowing focus to realising entrenchments of the transformative constitution with social cohesion being the primary and ultimate objective.

3.6. South Africa's transformative constitution as supreme law that can promote social cohesion in post-apartheid era

This study submits that, from previous discussions, the fundamental normative character of social cohesion in South Africa entails a positive approach to realising shared values, respecting, realising and protecting diversity so as to promote the peaceful coexistence of different races, ethnic groups, cultures, beliefs, nationalities and orientations on basis of equal worth. This study has already established that apartheid laws were used to create a certain social order where social cohesion was determined by racial lines and the subsequent inequalities under which peoples related. It is therefore undeniable that law has the ability to promote social cohesion in the positive oriented sense. This study will discuss the transformative Constitution of South Africa as law that can facilitate social equity, social change and ultimately social cohesion through realising the shared values of all diverse people in the form of equality, freedom and dignity.

The Constitution of South Africa is the dawn of democracy and the birth of the rights movement in South Africa. This framework was developed on the backdrop of apartheid rule and the adverse effects thereof to objectively redress the results and effects of apartheid rule. A fundamental issue in redressing these past injustices is that of transforming South Africa into a rainbow nation where diversity thrives and excels under equal worth as enshrined in the Constitution. Purporting commitments to transform social, economic, political and cultural spheres, the constitution thrives on shared values of equality, dignity and freedom. The right to equality is perceived in this

²⁷⁶ Same as above.

study as informing social change due to how previous discussions have shown that during apartheid and in post-apartheid, rifts in social ties and social cohesion have been caused by inequalities in the economic, political and social spheres of interaction.

The right to equality as enshrined in the constitution is the fundamental starting point of promoting social cohesion in South Africa through elimination of inequalities. In *President of the Republic of South Africa v Hugo*, Goldstone J noted that in promoting equality so as to prohibit unfair discrimination, the purpose of the constitution becomes that of establishing a society in which all people are accorded equal worth in all regards regardless of diversity or membership to particular groups.²⁷⁷ He further noted that, the achievement of such a society in light of the deeply inegalitarian past would not be easy but is the primary goal of the constitution which cannot be overlooked.²⁷⁸ This assertion means that, it is the primary goal of the constitution to eliminate inequalities as a way of redressing the social order of apartheid era so as to create a positive form of social cohesion based on shared values entrenched in the constitution.

In the case of *Government of the Republic of South Africa and Others v Grootboom and Others*,²⁷⁹ it was highlighted that in realising the objectives of the constitution, human dignity; freedom and equality are fundamental and shared values that can be denied to someone by merely denying someone food, shelter and clothing which are socio-economic amenities.²⁸⁰ This compliments the previous discussions on indicators of social cohesion wherein socio-economic inequalities are regarded an indicator of the absence of social cohesion. This further supports the notion that the constitution is the law that can be used to promote social cohesion because its primary objective is to create a society without social, economic and political inequalities.²⁸¹ The importance of tapping into the social fabric of cohesion by eliminating inequalities through constitutional values was also affirmed in the case of *Khosa v Minister of Social Development*.²⁸² It was noted that ‘within the idea of shared values; sharing the responsibility for the problem and consequences of poverty equally as a society is a representation of the extent which rich members of society view the minimal well-being

²⁷⁷ *President of the Republic of South Africa and Another v Hugo* 1997 6 BCLR 708 (CC) para 41.

²⁷⁸ Same as above.

²⁷⁹ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 42

²⁸⁰ Same as above para 23.

²⁸¹ Case of Hugo ‘n 277 above’.

²⁸² *Khosa v Minister of Social Development* 2004 6 BCLR 569 (CC).

of the poor as connected with their well-being and the well-being of the whole society'.²⁸³ This also consolidates that the attainment of social cohesion in post-apartheid South Africa is possible through elimination of inequalities by realising and operationalizing of shared values safeguarded in the constitution.

The negatively oriented social order of apartheid era flourished at the expense of positive oriented social cohesion because it was facilitated by discriminatory laws where by society was divided into groups, races, tribes, cultures, genders, classes. These inequalities among different groups in society resulted in conflicted cohesion between the oppressed and the oppressor with the oppressed cohering to fight for equal protection and benefit of law as the oppressors. The ultimate objective of the constitution is to redress the social order created by the discriminatory laws of apartheid that created unevenness and systematic inequalities. In this regard, it will be important to examine the right to equality as the key legal basis for promoting inclusive social cohesion in South Africa.

3.7. The right to equality as underlying law for promoting inclusive social cohesion in post-apartheid South Africa

The right to equality as provided in the constitution guarantees and aims to create equal protection and benefit of law.²⁸⁴ This equality is in line with all rights and freedoms. In this regard, the legislature is required to implement law and measures designed to protect and advance categories of persons, disadvantaged by unfair discrimination.²⁸⁵ Furthermore, the state is prohibited to discriminate directly or indirectly based on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.²⁸⁶ This non-discrimination against anyone directly or indirectly based on one or more grounds is also extended to individuals with an additional obligation on the legislature to enact law to safeguard such a realisation.²⁸⁷ The importance of the right to equality in this entire inquiry is premised on the notion that, it is the underlying law that expressly deals with circumstances of inequalities that have been identified in this study as factors

²⁸³ Same as above para 74.

²⁸⁴ Sect 9(1) of the Constitution of South Africa of 1996.

²⁸⁵ Sec 9(2) (same as above)

²⁸⁶ Sec 9(3) (same as above)

²⁸⁷ Sec 9(4) (same as above).

contributing to broken social cohesion in South Africa. The same classified grounds are also the consequences of and similar to grounds for discrimination under apartheid laws that substantially contributed to the creation of the apartheid social order of exclusion and rigid separation. In this regard, the right to equality does not merely aim to redress political and economic inequalities but objectively endeavours to influence social change and social order through redressing certain social circumstances or conditions (disadvantages and privileges) that can influence or promote a certain social order to be the norm. As already indicated a social order based on inequalities and discrimination presents a negative oriented social cohesion based on conflict and exclusion.

In this study the right to equality is therefore regarded as the legal basis for promoting social cohesion in South Africa as it retrospectively and prospectively drives towards eradicating inequalities in a society previously torn by race-based policy that imposed social order of separatism. The context, within which the right to equality is developed, advances the legal intention to change social order to a level of cohesiveness through equality and equal benefit of law within political, social, economic and cultural spheres of societal interaction.

In order to understand the functionality of the right to equality in promoting social cohesion it is important to give an overview of the normative character of the right to equality and how it has been interpreted, developed and applied in South Africa to redress inequalities that affect social cohesion attempts. The following discussion on equality will elaborate how this right applies in this study as the underlying law by which the social cohesion indicators can be addressed and social cohesion itself be achieved through law, in post-apartheid South Africa.

3.7.1. Concept of the right to equality

The right to equality is embedded within universal human rights and has been adopted in South Africa as one of the founding values of the supreme law of South Africa in post-apartheid. The right to equality similar to other rights is not absolute and can be limited in terms of law of general application.²⁸⁸ However, in its own functionality, the right ensures that there is realisation of equal protection and benefit of law afforded to

²⁸⁸ Sec 36 of the Constitution of South Africa of 1996.

everyone with the idea to eradicate inequalities. The nature of equality has been noted by the Human Rights Commission as easy to understand from the context of South Africa's history of inequalities and a divided society.²⁸⁹ Smith submits that giving the right to equality a construed definition is a complex process as it can result in different concepts of equality depending on the case at hand;²⁹⁰ however, there are certain distinctions that have been made by South African courts in interpreting and applying the right to equality to redress past injustices.

3.7.2. Formal and Substantive approach to equality

In South Africa, equality is theorised and interpreted in two broad distinctions namely formal equality and substantive equality with substantive equality repeatedly affirmed as the most favourable in the post-apartheid context.²⁹¹ Formal equality conceptualises equality as the process of treating similar situations in a similar way.²⁹² Formal equality perceives equality to be achieved when there is consistency in treating similar situations the same way. Regardless of this form of equality intending to eradicate perceived formal and informal inequalities, it possesses certain shortcomings. Formal equality essentially aims to create sameness, which is a big deviation from the objectives of the constitution as a whole. The constitution aims to create and promote respect for diversity instead of creating sameness. People are seen as equals through being afforded equal worth from within their diverse spheres of cultural, social, economic and political existence. Finley notes that to employ formal equality would result in marginalisation and disempowerment of certain groups in society.²⁹³ This would be similar to reverting to the approach of apartheid laws that created a social order of exclusion through laws that marginalised and disempowered certain groups in society.

The concept of formal equality was applied in one distinct case in South Africa. The *court a quo* in the case of *Prince v President, Cape Law Society*,²⁹⁴ applied formal

²⁸⁹ South African Commission of Human Rights report 2012.

²⁹⁰ A Smith 'Equality constitutional adjudication in South Africa' (2014) 2 *African Human Rights Law Journal* 14.

²⁹¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* (1998] ZACC 15; 1999 1 SA 6 (CC).

²⁹² LH Rifkin 'Aristotle on Equality: A Criticism of A. J. Carlyle's Theory' (1953) 14 (2) *Journal of the History of Ideas* 276-283.

²⁹³ LM Finley 'Transcending Equality theory: a way out of the maternity and the workplace debate' (1986) *Columbia Law Review* 1118.

²⁹⁴ *Prince v President, Cape Law Society* [2002] ZACC 1; 2002 3 BCLR 231 (CC); 2002 2 SA 794 (CC).

equality to arrive at a decision. In a case where the plaintiff sought for his right to equality to be realised, challenging unfair discrimination based on beliefs, the court refused to recognise such right by applying formal equality through the lenses of achieving equality by consistently creating sameness instead of promoting respect for diversity.²⁹⁵ The decision to refuse a Rastafarian access to the legal profession on the basis of his beliefs meant that the court expected people to be similar in order to fulfil the idea of equality instead of applying constitutional values of promoting respect for diversity. Such conception of equality is essentially based on advancing discrimination under the need to create sameness in order to realise equality.

Due to the deviation of formal equality from values and objectives of the constitution, formal equality will not be applied in this study as the underlying law to promote social cohesion.

The concept of substantive equality has however been applied and affirmed in several instances in South African jurisprudence to compliment values and objectives of the constitution such as fostering social cohesion of the rainbow nation. Substantive equality focuses on transforming a negative oriented right on non-discrimination to a positively oriented right of substantive equality.²⁹⁶ This compliments the idea of redressing the negative oriented social order facilitated by the discriminatory apartheid laws, to a positively oriented social order based on equality. Substantive equality therefore operates as a legal tool to eradicate subordination of disadvantaged and marginalised groups through operation of law and policies. This has the ultimate effect of restructuring social order to a more cohesive level. Smith submits that substantive equality achieves the realisation of equality in society through making individuals substantive equals by recognising diversity.²⁹⁷ This study submits that substantive equality is a fundamental concept of law that can be operationalized to be an effective tool in eradicating and curbing factors that affect social cohesion as well as clear out indicators of the absence of social cohesion while effectively promoting the social environment for restructuring to more cohesive levels.

²⁹⁵ Same as above.

²⁹⁶ Smith 'n 290 above'.

²⁹⁷ Smith (same as above).

In *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others*²⁹⁸ a minority group of LGBTI was excluded from equal enjoyment of the right to practice freedom of sexual orientation. In this case the Constitutional Court considered both formal and substantive equality before arriving at a decision. It was noted that the desire for equality cannot be used as a means for elimination of difference to create sameness.²⁹⁹ In this regard, the idea of treating people the same does not infer nor create equality rather it creates inequality.³⁰⁰ In this regard, a fundamental structure of substantive equality must be realised, which requires each human being to be treated as deserving equal treatment on the basis of equal worth.

By adopting a substantive approach to equality in South Africa, this study argues that it is easy to realise other constitutional values because of the endemic nature of equality as basis for the realisation of other rights.³⁰¹ This approach to equality as applied in different cases has progressively redressed instances of marginalised and disadvantaged groups within political, social, economic and cultural spheres of interaction. This approach is relevant based on how social cohesion tensions are significantly contributed to by the conditions in political, social, economic and cultural spheres of interaction. Removing inequalities in these spheres of interaction to objectively to promote and facilitate equal worth, equal respect, equal benefit and protection of diversity refutes political, social, economic and cultural reasons for society not to be relatively and inclusively cohesive.

Fredman submits that a substantive approach to equality primarily operates by way of dismantling a cycle of systematic disadvantages and marginalisation of people while promoting equal respect and human dignity.³⁰² The attainment of equal respect and human dignity fostered through substantive equality is significantly capable of reducing

²⁹⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* [1998] ZACC 15; 1999 1 SA 6 (CC).

²⁹⁹ Same as above.

³⁰⁰ Same as above para 66.

³⁰¹ *Minister of Justice and Constitutional development and others v Prince (Clarke and others Intervening); National Director of Public Prosecutions and others v Rubin, National Director of Public Prosecutions and others v Acton* (CCT108/17) [2018] ZACC 20; 2018 (10) BCLR 1220 (CC); 2018 6 SA 396 (CC); 2019 1 SACR 14 (CC) (18 September 2018) and *Jordan & Others v S* [2002] ZACC 22; 2002 6 SA 642 (CC).

³⁰² S Fredman *Discrimination Law* (2011) see chap 1.

stereotypical associations and stereotypical representation of diverse cultures, beliefs and traditions.³⁰³

All of these factors can be collectively deemed as indicating that by applying the right to equality substantively, the objectives of the constitution to redress past injustices of apartheid laws and its social order of exclusion would be practically achieved. This study submits that a substantive approach to equality as enshrined in the constitution is the primary legal basis for law to promote social cohesion in post-apartheid South Africa.

3.7.3. Endemic nature and function of equality on a practical approach to promoting social cohesion

Within the constitutional dispensation, realising a single right to the exclusion of others is not facilitative enough to address or eradicate flawed social cohesion. It is therefore important to further explore the right to equality as an important underlying concept of law that can effectively promote social cohesion. The endemic nature of the right to equality entails that it has the ability to affect all other rights in the Bill of Rights.³⁰⁴ The rights in the Bill of Rights as developed during CODESA to shift from apartheid to constitutionalism were developed as a matter of consensus on the shared values of everyone within the political, social, economic and cultural spheres. The right to equality has an endemic character wherein if it is realised, directly and indirectly other inter-dependent socio-economic, political and cultural rights are realised, and an adverse effect and impact on other rights occurs if the right to equality is denied to someone.

In the case of *Prince v President, Law Society of the Cape*, the *court aquo's* decision denied to recognise the applicant's right to equality and not be unfairly discriminated based on his beliefs, which had an adverse effect on his right to freely choose a profession, his right to religious freedom and ultimately his overall human dignity was infringed on.³⁰⁵ The failure to realise the right to equality in this regard further marginalised Rastafarians in social, economic and cultural perspective, thus maintaining inequalities among a nation of diversity which is contrary to the

³⁰³ Same as above.

³⁰⁴ Fredman (same as above).

³⁰⁵ *Prince v President, Law Society of the Cape 'n above'*.

constitution. The envisioned rainbow nation which the constitution endeavours to create by safeguarding rights is premised on the potential of legal influence on social structures and forms of peaceful, harmonious and cohesive coexistence of a diverse people in society. In an appeal to the Constitutional Court, two decades after the court *aquo*'s decision, substantive equality was later applied in the case of Prince. This is after the initial decision that denied realisation of his right to equality and not be discriminated. In realising substantive equality in the Constitutional Court's decision, the rights to freely choose a profession, right to religious freedom and that of human dignity of the marginalised and previously disadvantaged Rastafarians were also realised through equality.³⁰⁶

This study submits that the right to equality is basic to the recognition of all other fundamental rights contained in the Bill of Rights hence an important concept of South African law with relevance to this study. The importance and effect of this assertion is understood in the context of South Africa's history of inequalities and exclusions. The apartheid regime invested in laws that excluded and discriminated against non-whites in political, economic and social spheres of interaction. The adverse effect was not only the denial of equality but the denial of all other rights that are realised through realising equality. The advent of the constitution as the supreme law by which law as a tool facilitates the restructuring of the divided society to a more unified one that is more cohesive. In this regard, the core of the process of social cohesion attainment in the post-apartheid era is the concept of equality which *inter alia* affects the recognition of other fundamental rights as shown in the case of Prince.

In this case, any law or measure subject to the constitution that fails to reflect the concept of equality is invalid and inapplicable towards cohesive interactions in economic, political, social or cultural spheres. The invalidation of such inconsistent laws that deviate from constitutional entrenchments can be construed as ensuring that the progressive realisation of a cohesive society is not slowed or hindered by a repetition of apartheid-like inequalities and discrimination. This means that the

³⁰⁶ *Minister of Justice and Constitutional development and others v Prince (Clarke and others Intervening); National Director of Public Prosecutions and others v Rubin, National Director of Public Prosecutions and others v Acton* (CCT108/17) [2018] ZACC 20; 2018 10 BCLR 1220 (CC); 2018 6 SA 396 (CC); 2019 1 SACR 14 (CC) (18 September 2018).

practical attainment of social cohesion is possible through safeguarding and realising equality in post-apartheid South Africa.

3.7.4. Functional applicability and realisation of the right to equality in promoting social cohesion through section 8 of the constitution

Section 8 of the Constitution is important in this study as it gives a directive on how to apply the rights (shared values of society) in the constitution so as to redress past injustices of a discriminatory social order. Section 8(1) provides that the Bill of Rights 'is applicable and binding to all laws, the legislature, executive, judiciary and all other organs of state'.³⁰⁷ This section sets the basis for the obligation of law making and the particular direction in which such law should be made, interpreted and then enforced by all organs of state. This means that the legislature in post-apartheid is bound to make laws based on constitutional ideas and values of equality, freedom and dignity to inform and promote cohesiveness of society in political, social, economic and cultural spheres. Furthermore, this provision obligates the judiciary to interpret laws on the backbone of constitutional entrenchments for purposes of developing and giving decisions that promote social cohesion through realising shared values that are safeguarded by the constitution. Lastly, it also obligates the mechanism of law enforcement to be aligned with the same constitutional ideals of redressing the apartheid social order of discrimination and exclusion in political and socio-economic spheres. The constitution subtly acknowledges in this regard that law is a tool for social order and can structure society's cohesion in any way that compliments the nature of such law. In this case the nature of South Africa's supreme law is directed towards the eradication of inequalities and past injustices, with the objective to create a more cohesive society based on respect of and equal worth across diversity.

Section 8(2) of the Constitution provides that provisions in the Bill of Rights are binding on both natural and juristic persons to the extent which the provisions are applicable, considering the nature of the right and nature of duty imposed by the right at hand.³⁰⁸ The notion that the right to equality aims to create substantive equals and not sameness implies that equality applies to the realisation of all rights in the Bill of Rights. The realisation or non-realisation of any right has an adverse effect on equality which

³⁰⁷ Sec 8(1) of the Constitution of South Africa 1996.

³⁰⁸ Sec 8(2) (same as above).

informs the creation of substantive equals in society. This indicates that failure to interpret and apply any right from a point of substantive equality can lead to discrimination or inequalities based on unfair discrimination whichever may be applicable. The existence of any form of inequalities is the only required condition for social cohesion to become affected. Similarly, the successful realisation and application of equality in eradicating inequalities is the most important legal condition for social cohesion to be promoted among diverse groups in society.

Equally important is how section 8(a) and (b) provide for the application of the Bill of Rights to natural persons by obligating the judiciary to make orders that give effect to rights in the Bill of Rights, and where necessary to develop common law in instances where legislation does not give effect to a right in the Bill of Rights.³⁰⁹ This means that, in the quest to give effect to the shared values of society as entrenched in the constitution, the judiciary has a task to supplement and develop law where subordinate law and legislation fails to realise a certain right in the Bill of Rights. This indicates that the drafters of the constitution intended for redressing of inequalities created by apartheid regardless of the existence or lack of legislation that gives an express provision to facilitate such realisation.³¹⁰ This means that subordinate laws and legislation are not the primary legal tools for redressing the social order but constitutional provisions.³¹¹ These constitutional provisions can be interpreted and applied to reform and develop common law or create binding precedent on the eradication of inequalities, which ultimately influences social cohesion in society.

The above discussion provides insight into the nature of equality. It further indicates that there is need to give an overview of how the right to equality has been adjudicated, interpreted and applied to give effect to the shared values of redressing the apartheid social order and create a more cohesive society of diverse people.

3.8. Adjudication, interpretation and application of the right to equality in political, economic and social spheres to eradicate inequalities and redress social order

³⁰⁹ Sec 8(a) and (b) of the Constitution of South Africa of 1996.

³¹⁰ Same as above.

³¹¹ See generally *President of the Republic of South Africa and Another v Hugo*.

This section is going to focus on exploring how the right to equality has been adjudicated, interpreted and applied in South Africa considering the diverse nature of South Africa's demographics and culture.

3.8.1. Case of MEC for Education KwaZulu-Natal and Others v Pillay

In this case the Constitutional Court applied substantive equality in order to accommodate diversity while realising equal worth of minorities' rights in an environment controlled by majority beliefs and culture. A learner was prohibited from wearing a nose stud at school because it was regarded a violation of the school's code of conduct. However, the learner was only wearing the nose stud as part of the requirements of her Hindu religion. The school was sued for a discriminatory code of conduct because of how such prohibition was regarded a violation and limitation of the right to freedom of expression and conflicted with the right to freedom and cultural expression.³¹² Unlike in the case of Prince there was a more proactive approach by the Constitutional Court by applying a substantive approach to promoting the right to equality.

In interpreting the application of the right to equality, the court noted that the provisions of the code of conduct as a form of regulating rules and law were an avenue for indirect discrimination. This indirect discrimination similar to that of apartheid laws derived from allowing other groups of learners to have freedom of expression of their religious and cultural beliefs while denying the same opportunity to the minority groups thus creating inequalities.³¹³ This was labelled as 'withholding the benefit, opportunity and advantage of fully enjoying culture and practising religion, constituting indirect discrimination of the affected party.'³¹⁴

In explaining the effect of such discrimination Justice O' Regan highlighted that pupils who had previously been granted an exemption, such as Hindu pupils allowed to wear 'Lakshmi strings' in honour of the Goddess Lakshmi, and pupils who had been allowed to wear hide bracelets as a mark of respect when a close relative died, would have been a better comparison.³¹⁵ The discrimination posed by the code of conduct

³¹² MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 2 BCLR 99 (CC) para 115.

³¹³ Same as above para 130.

³¹⁴ Same as above para 15.

³¹⁵ Pillay case (same as above) para 130.

imposed disparate impact on certain religions and cultures³¹⁶ and not others, such a code is regarded as 'not neutral but enforces mainstream and historically-privileged forms of adornment at the expense of minority groups and historically-excluded forms'.³¹⁷

The facts and developments made in this case indicate that a certain social order is imposed by measures, rules and laws that create a certain expectation of conduct among different groups. This means that the more that law differentiates people without affording equality, is the more other (marginalised and previously disadvantaged) groups get discriminated thus creating a divided society. Furthermore, this case indicates that the pupils would be forced to stay in a school environment that does not accept them based on different culture and religious beliefs and practices.

The right to equality is applied as part of restitutive laws and restoring a certain social order whereby there are no subordinates, no marginalised and no disadvantaged groups through quashing all forms of inequalities that can be created directly or indirectly by law or rules. The effect of not enforcing the right to equality is inequalities that develop into certain social, economic, cultural and political differences, further manifesting in the absence or presence of social cohesion as applicable. The end of apartheid was the advent of a long journey into eradicating inequalities and discrimination through operation of a supreme law namely the Constitution. To create a rainbow nation (cohesive society of diverse peoples) equality has to be realised in social, economic, political and cultural spheres of interaction. As shown by the apartheid social order, laws that differentiate and discriminate create a negative oriented social cohesion where one group and another are cohesive in being at conflict.

3.8.2. Du Toit & Another v Minister of Welfare and Population Development & Others³¹⁸

This case dealt with a situation of direct discrimination. The court had to determine a violation of the right to equality by provision of the Child Care Act of 1983³¹⁹ and Guardianship Act 1933.³²⁰ The main issue was whether a same-sex married couple

³¹⁶Pillay case (same as above) para 44.

³¹⁷Pillay case (same as above) para 44.

³¹⁸ *Du Toit & Another v Minister of Welfare and Population Development & Others* [2002] ZACC 20; 2003 2 SA 198 (CC).

³¹⁹ Child Care Act 74 of 1988

³²⁰ Guardianship Act 1933

had the right to adopt a child since the aforesaid pieces of legislation did not provide for such a group of couples as eligible to adopt. The court had to look at the inequality in the situation based on the ground of sexual orientation and that of marital status. The court pointed out that the case would open the enclaves and concepts of family, spouses and domestic relationships under constitutional values.³²¹

The Constitutional Court adopted a substantive notion of equality, as it embraced the notion of equality in emphasising the importance of accepting people for what they are and not based on stereotypical prejudices that prohibit or hinder people from enjoying and exercising their rights and fundamental freedoms simply because they are 'different from the rest of society.'³²² Furthermore, the advancement of equality was brought one step forward by the Constitutional Court reading in words to the impugned provisions to ensure that they cover the rights of same-sex life partners to jointly adopt children. The Constitutional Court in this case adopted a substantive approach to equality.³²³

This case is important to this study as it indicates that social order can be affected by the direct discrimination emanating from the inadequacy or silence of laws on a certain subject that affects equal access to benefit and enjoyment of the law. The consequences that flow from such inadequate laws are more social in nature because of how they create a distinct differentiation of people in society, further marginalising and consolidating stereotypes that impact the smooth flow of social ties between people of diverse beliefs, cultures, traditions and orientations. The impact of laws on social ties and social order can therefore be remedied by ensuring that laws, regardless of regulating either political, socio-economic or cultural spheres, afford equal benefit and enjoyment of all rights to all diverse groups of people.

3.8.3. National Coalition for Gay and Lesbian Equality v Minister of Justice & Others³²⁴

This case dealt with repealing a position of discrimination based on sexual orientation as criminalised by statute. Such a position of criminalising same-sex relations had been inherited from apartheid laws and common law. Similar to the case of Pillay and

³²¹ Du Toit 'n 318 above'.

³²² Same as above.

³²³ Same as above para 22.

³²⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* [1998] ZACC 15; 1999 1 SA 6 (CC) (National Coalition).

Du Toit, the primary objective in this case was to discharge the need to recognise and protect the other, who would be a minority, previously unprotected and disadvantaged group.³²⁵ Ackerman stated that;

“The desire for equality is not a hope for the elimination of all differences, the experience of subordination of personal subordination, above all lies behind the vision of equality. To understand ‘the other’ one must try, as far as is humanly possible, to place oneself in the position of ‘the other’. It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of societies are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.”³²⁶

The assertion by Ackerman indicates that social ties should be on equal basis and equal worth to avoid differentiation that imposes marginalisation or forces the minority to be assimilated by the dominant norm of the majority. In this regard, the social structures created by law are directly linked to the social order that will exist in such a society. Sachs J in concurrence with the decision of Ackerman pointed out that it is fundamental to recognise diversity and look at rights from their contextual sphere than looking at rights in an abstract manner.³²⁷ Sachs substantiated this reasoning by noting that “One consequence of an approach based on context and impact would be the acknowledgment that grounds of unfair discrimination can intersect, so that the evaluation of the impact of discrimination is done not according to one ground of discrimination or another, but on a combination of both, that is, global and contextual, not separate and abstract.”³²⁸

This case explored several key factors that are necessary to the development of smooth running social structures through law that eradicates inequalities. It indicated that in creating substantive equals, the biggest determinant is the entire context within which law based on equality is to be calibrated. This means when looking at the South African context one would explore the impact of maintaining a discriminatory position of law and also the effect of reforming such a discriminatory position. A look at the impact of apartheid laws indicates that discriminatory laws negatively magnifies

³²⁵ Same as above.

³²⁶ National Coalition case (same as above) para 22.

³²⁷ Same as above.

³²⁸ National Coalition case (same as above) para 113.

diversity and creates a negative oriented social order of divided groups cohesively at conflict whereas the constitutional approach is found on shared values of equality and eradication of discrimination. The realisation of equality in political, economic, social and cultural spheres of interaction has the impact of restructuring society to a more cohesive level since eradication of inequalities will equally facilitate the eradication of conflict amongst diverse groups.

3.8.4. *Jordan & Other v S*³²⁹

Unlike most cases, the *Jordan* case was an exception indicating the impact of not applying and recognising substantive equality in the South African context. The Constitutional Court applied a formal approach to equality. In interpreting provisions of the Sexual Offences Act that criminalise commercial sex work or prostitution toward the sex worker and not the client. A unanimous decision on the unconstitutionality of keeping a brothel was reached and a split decision was reached on the unconstitutionality of criminalising sex workers amounting to unfair discrimination.³³⁰ The provisions were found to be constitutionally valid because of being gender neutral as well as clear differentiation between dealer and customer.³³¹ On the other hand the minority judgement of Sachs and O' Regan found that the sections of the provisions constituted an unfair discrimination based on sex as the prohibition only applied to the conduct of the prostitute and not of the client.³³² It has been argued that the technical approach used in the majority judgement was not sufficient because of overlooking the way gender inequality is a major feature of the apartheid regime. The failure to employ a contextual approach in this regard resulted in ignoring the background on which the right to equality is a fundamental value of South African law as well as the impact of discrimination on the affected group. Albertyn and Goldbatt assert that contextual analysis shifts the enquiry from being an abstract one where similar individuals at similar poles are compared, to an examination of the actual damage and impact of the alleged rights violations within the socio-economic circumstances of the affected group.³³³

³²⁹ *Jordan & Others v S* [2002] ZACC 22; 2002 6 SA 642 (CC).

³³⁰ Same as above.

³³¹ Same as above para 10.

³³² *Jordan* case (same as above) paras 59 & 68.

³³³ C Albertyn & B Goldbatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248-260.

The Jordan case, unfortunately for both the claimant and the agenda of advancing gender equality in South Africa, the majority judgment adopted an abstract approach which resulted in a 'missed opportunity to make a difference in the lives of women.'³³⁴ The majority judgement therefore failed to consider the history on which equality is a fundamental concept of post-apartheid law and agenda, in this case directed at redressing sex workers' disadvantaged conditions such as being primarily uneducated women from poor socio-economic backgrounds. These women engage in prostitution knowingly accepting the risk of demeaning their dignity, a point noted by the minority but ignored by the majority, and which reflects the reality that many female prostitutes become involved in prostitution because they have few or no alternatives to support their socio-economic sustenance.³³⁵

To indicate the impact of not affording substantive equality in this case, Sachs JJ delivered the minority judgement. He noted that criminalising the supplier in an industry where women are known to be suppliers meant that the customers are indirectly liable as accomplices or co-conspirators hence advancing and reinforcing certain harmful prejudices against women.³³⁶ Furthermore, such differentiation of supplier and purchaser is of substance as it perpetuates gender stereotypes in a way that creates discrimination.³³⁷ By inferring that the man (purchaser) is not the creator of the problem but the woman (supplier), is differentiation with the potential to impair fundamental rights such as dignity and the personhood of women.³³⁸

The split judgement shows consideration of realising equality and the impact of not doing so in a context where South African demographics are characterised by disadvantaged groups and a divided society based on the impact of apartheid laws. The majority judgement took a conservative approach that maintains the legacy of apartheid while the minority echoed progressive realisation of respect for diversity and equal worth. Regardless of certain moral issues concerned with prostitution, the same can be said about same-sex relations yet in all situations it is consenting adults, acting

³³⁴MJ Maluleke & T Madonsela 'Gender equality jurisprudence & in landmark court decisions' Department of Justice and Constitutional Development 2004 16. Retrieved from: http://www.justice.gov.za/docs/otherDocs/2009_Women_law_court-decisions.pdf (accessed 07 August 2019).

³³⁵ Jordan case 'n 329 above' para 66.

³³⁶ *S v Jordan* para 65 (minority judgement).

³³⁷ Same as above.

³³⁸ *S v Jordan* para 65 (minority judgement).

in private yet the same-sex relations are afforded equal benefit and enjoyment of law in a society where majority of cultures and beliefs resent such relations. The approach in the case of Jordan has an impact on socio-economic circumstances of affected parties, also freedoms and dignity because of failure to afford them equal benefit and enjoyment of the law. Social conflict becomes imminent in this case and social ties become severed due to members of society feeling encouraged to report and consolidate their negative view and stereotypes on prostitution while on the other hand the prostitutes will be, as members of the society in conflict with the society and the state system. The mere existence of unjustifiable and divided conflicts in society has an impact on the cohesion of such a society.

3.9. Chapter conclusion

This chapter concludes that, law indeed has a function in society and ability to influence social order. These functions revolve around various things ranging from conduct, the structure of society, views and values of society, all emanating from how the law in question regulates social, economic, political and cultural spheres of interaction within that society. In this case, it is accurate to conclude that in defining law it is impractical not to include society since law and society relate with one another. Law has the ability to affect and influence the social order while social order has an impact and ability to influence the outcome or position of validity of law and the legal order. The chapter has therefore shown that the ability of law to influence social order was used in apartheid to organise society in a certain way. Subsequently the social order had an impact on how society reacted against the repressive and discriminative legal order of apartheid. The constitutional dispensation has therefore been shown to be a result of the apartheid legal order created out of need to restore social order among people of diverse cultures, beliefs and traditions. The main tool used in redirecting social structures to a cohesive level has been shown to be the provision of equality aimed at eradicating inequalities and marginalisation based on unjustified discrimination. This chapter has justified and shown the role of law in promoting social cohesion. However, due to the socio-legal nature of this inquiry it is crucial to also get responses and views of the members of society on whether they perceive law as an effective instrument in promoting social order in post-apartheid South Africa. On this note, the next chapter will engage the empirical evaluation of qualitative responses to questions that inquire into how members of society from diverse beliefs, traditions and

cultures perceive law as an instrument that can be calibrated to promote social order in post-apartheid South Africa.

CHAPTER FOUR

DATA PRESENTATION, INTERPRETATION AND ANALYSIS

4.1. Introduction

The previous chapter demonstrated that the common approach by both policymakers and academics is that law has undeniable social function. These functions revolve around the influence of law on the structure of society and the relations thereof, views and values of society, all emanating from how the law in question regulates social,

economic, political and cultural spheres of interaction within that society. In this case, it is imperative to have a working definition of the concept of law that is applicable to society. Law has the ability to affect and influence the social order while social order has an impact and ability to influence outcomes and responses to the legal order. The chapter also drew empirical evidence of the social utility of law as demonstrated from the ability of law to influence social order during apartheid. The current or post-1996 constitutional dispensation has therefore been shown to be a result of the apartheid legal order and conceived out of need to restructure social order so as to facilitate more cohesive relations among people of diverse cultures, beliefs and traditions. One of the main legal tools that has been operationalized and given practical effect in redirecting social structures to a cohesive level has been shown to be the principle of equality aimed at eradicating inequalities and marginalisation based on unjustified discrimination. The role of law in promoting social cohesion has therefore been demonstrated at the level of doctrinal qualitative analysis. However, the present chapter builds on the analyses in previous chapters of this inquiry by presenting and analysing data on what and how law can promote social cohesion in post-apartheid South Africa. These qualitatively collected and analysed empirical findings demonstrate perceptions of members of society on diversity, equality, social cohesion and the role of law in fostering cohesive relations in the present post-apartheid context, based on lessons from apartheid.

This chapter discusses the main findings of the study as reflected in the data collected through participants of the study. The data was collected through a structured questionnaire. The findings reflect on social relations in the post-apartheid context under the positive transformative constitutionalism paradigm, reflecting on progress made thus far since the end of apartheid. The chapter looks into instances where either social cohesion or post-apartheid laws, have failed individually or collectively in order to clearly leave room for looking into what the law can do to promote social cohesion. In concluding, this chapter determines the status of social cohesion in the South African society and also the basis on which law is capable of socially bridging that gap in social cohesion.

4.2. Background on data collection

The study notes that qualitative research primarily focuses on smaller numbers of observations or data sources either people or events or documents, considered to be data-rich and worthy of study, and to examine them in-depth. Additionally, the study is not concerned with making the people or situations to be a statistical representation because the aim is to draw findings that are generalizable to an entire population. The research was designed to go beyond description in order to find meaning, even if that meaning is related to an individual's experiences of the apartheid and post-apartheid era or the perceptions of a small number of people on the status of social cohesion and how it can be promoted by law in post-apartheid South Africa.

The study aimed to have a minimum of 50 and no more than 150 participants. In light of certain limitations as denoted under the section on limitations of the study in chapter 5, a questionnaire was administered to 75 participants within the target population in the local community of Thohoyandou in the Vhembe District. Out of the 75 participants only 58 managed to answer all 9 questions on the questionnaire (see appendix B). Purposively targeted participants were believed to possess in-depth knowledge on the issue of social cohesion in South Africa and the role of law in fostering such social cohesion. The participants indeed, demonstrated variation in their responses to the questions on the instrument by relating their thoughts, feelings, experiences with law and the status of social cohesion in post-apartheid South Africa. This chapter will therefore conclude with all the empirical stages in the empirical cycle of AD de Groot; observation, induction, deduction, testing and evaluation.³³⁹

4.2.1. Table of Biographical information of the participants

Age range	Race	Number of participants
30-49 years	Non-white	42
50-80 years	Non-white	16
Total participants		58

³³⁹ G Heitink *Manual for Practical Theology* (1999) 233.

4.2.2. Data analysis

The thematic analysis tool is utilised to categorise data collected through questionnaires. Themes of society, diversity, social cohesion and function of law as driven by both research questions and objectives of the study were utilised to formulate the basis of the themes. Thematic analysis is a flexible research technique that is not tied to a specific philosophical orientation and its goal is to identify, analyse and describe patterns or themes across a data-set as the case in this study. Thematic data analysis is used in this study to capture the key idea about the data in relation to the research questions and which represents some level of patterned response or meaning within the data-set.³⁴⁰ The data analysis will therefore involve summarising data to obtain answers to research questions, which are:

- What roles and functions are expected of law in promoting social cohesion in post-apartheid South Africa?
- How can law be used to promote social cohesion in post-apartheid South Africa under the transformative constitutionalism concept?
- What are the main constraints of attaining the envisioned social cohesion of the 1994 democracy ideal?

This study presents and analyses the data narratively. Maree defines narrative analysis as a variety of procedures entailing the interpretation of data objectively to give meaning to the narratives generated in the data.³⁴¹ Where participants shared the same sentiments, the researcher captures the response as it is for as long as it is clear to understand and elaborate in a manner that clearly answers the question posed to the participant.

4.3. Presentation of results

The participants expressed their views regarding the role of law in promoting social cohesion through responses to a set of questions requiring in-depth responses. This will be presented in a detailed presentation based on the identified themes and

³⁴⁰ V Braun & V Clarke *Qualitative Research in Psychology* (2006) 82-85.

³⁴¹ K Maree *First Steps in Research* (2016) 121.

subthemes with regard to the role of law in promoting social cohesion in a post-apartheid context.

4.3.1. Table of themes and subthemes

	Theme	Subthemes
1	Perceptions and practical implications of Diversity (related to questions 1, 2 and 5 on the questionnaire) also related to substantive contributions in chapter 2.	<ul style="list-style-type: none"> • The impact of diversity on the attainment of social cohesion • The adequacy of law in enabling respect and equal protection of diversity to so as to facilitate social cohesion among diverse groups in South African society.
2	The utility of law in fostering social cohesion. Related to question 6 and 8 on the questionnaire) also related to substantive arguments in chapter 3 of the study, see pages 49-63	<ul style="list-style-type: none"> • The effectiveness of law as an instrument to foster social cohesion in post-apartheid South Africa <i>inter-alia</i> its success in fostering a social order of racial division during apartheid • The ineffectiveness of law, and existing gaps if applicable in

		<p>the social sphere for purposes of fostering cohesion among the diverse groups in society</p>
3	<p>The efficacy of the legal standard of equality and the cultural/social norm of <i>ubuntu</i> (related to questions 3, 4 and 7 on the questionnaire) also related to substantive contributions in chapter 3 pages 72-84.</p>	<ul style="list-style-type: none"> • The effectiveness of the standard of equality as imposed by the constitution in order to create a rainbow nation with cohesive communities • How communities perceive the effectiveness of <i>ubuntu</i> alongside the legal standard of equality in contemporary times for purposes of cohesion
4	<p>Society's perceptions of what ought to be done to promote social cohesion (related to question 9 on the questionnaire) (also related to the preliminary literature in chapter one of the study)</p>	<ul style="list-style-type: none"> • Other necessary legal measures required to make diversity cohere at a social level • Other non-legal measures applicable and necessary to foster social cohesion across the diverse

		peoples of South Africa
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4.3.2. Narrative presentation of responses

Theme One:	Perceptions and practical implications of diversity
<i>Question One</i>	Asserted the diversity of South Africa and posed the question of what participants think about law being utilised to impose cohesive social structures and forms.
Responses to question one affirming utility of law in the creation of social order in light of diversity.	<ul style="list-style-type: none"> • Law has allowed for different opportunities across the diverse peoples without limitations. • Law has allowed for equal participation in different spheres and opportunities while minimising divisions across racial lines. • Law can be used as a tool to prevent people from doing what causes hatred. • Law can be effectively applied and is capable of promoting social order, certainty and equality. • Law promotes the desire for peace, end to discrimination and violence while also promoting effective social ideals, socialism, tolerance and learning each other's culture etc. • The constitution is helping to unify the country and its people. It is one law governing everyone equally without distinction as to race, gender or culture. • Law can promote social cohesion through legislative and administrative responses to new social conditions and ideas as well as judicial interpretations of law. The making of law should be carried out objectively to promote social changes through key areas such as education, housing, transportation, healthcare and human rights.

	<ul style="list-style-type: none"> • Law is a good thing as it brings order and equality. • All spheres of government should ensure there effective equal application of law without reference to racial diversity. • Changes to law addressing inequalities and lack of supportive social structures and institutions can aid in promoting social cohesion. • Law can be made to end discrimination and promote peace. • Law is capable of stabilising and remedying social cohesion gaps in South Africa especially those emanating from difference in culture and traditions which causes discrimination. <p>Law makes everyone equal and the same law should apply to all races equally.</p>
<p>Responses to question one perceiving that law cannot or has not been effectively utilised to create social structures of cohesion mainly because of diversity</p>	<ul style="list-style-type: none"> • Since Nelson Mandela's reign, there has been a noticeable change in law; however, the presence of diversity and differences makes the change in law less effective in social cohesion. • Law has not changed anything regarding race since racists still live amongst us. In tradition, law does not have practical solutions for issues such as girls and women being treated differently because of their gender, customary practices and beliefs. • The difference in what people believe makes it difficult to unite them. Even laws made to unite people of different beliefs will not stop conflicts from arising as the people do not respect each other simply because of difference in beliefs that inform their judgement and decisions. • Laws cannot be used to change people; you cannot force unity on people.

Question 2	Asks a follow up question, enquiring on what participants think was in apartheid laws that increased the level of torn social fabrics among the diverse peoples.
	<ul style="list-style-type: none"> • Apartheid laws were intended to control black people • Apartheid law were biased, created by white minority to make themselves superior. The law allowed prejudice and racism to reign. • The law was not democratic, majority were denied their rights and law was for the whites. • There were inequalities and blacks were treated differently from white people. • People were treated differently because of their race as imposed by law. • The law entrenched hatred and abuse of power to oppress others unfairly. • There was extreme discrimination which pulled racism to its peak. Even Afrikaans women did not have equal rights to their male counterparts. • People were divided because of power as each group wanted to rule the other which caused conflict. • Apartheid was a political and social system of white minority rule which divided people on the basis of race. Laws were implemented to only ensure that segregation was enforced and obeyed. • There was discrimination, unequal treatment and unequal opportunities. • Apartheid laws were for white privilege to the exclusion of black people. • Apartheid law restricted freedom of the blacks. • People were divided according to race, giving whites superior positions and privileges which has not been reversed up to date.

	<ul style="list-style-type: none"> • South Africans were divided by race and forced to live separately. • All the laws of the time favoured white people while being harsh on black people. • The law was self-serving for the benefit of one race of the whites who benefited and perceived themselves as superior, so division will always be there. • It separated different races and tribes and the society as a whole had nothing in common to fight for as people were scattered without thinking of the apartheid system as the enemy. • It allowed white people to get more access to resources than any other race.
Question 5	Enquired on what participants think of racial divisions serving as a factor in the current state of social cohesion.
Responses to question 5 perceiving racial diversity to be a key factor in the current state of post-apartheid social cohesion.	<ul style="list-style-type: none"> • Difference in race contributes to different views based on different problems faced. • People generally prefer working and partaking with their own than those of a different race. • Race makes people judge each other thereby perpetuating perceptions of black race being inferior to whites. • A few individuals among the previously oppressed races relate in a cohesive manner. The rest still harbour recriminations towards those who oppressed them and their forefathers. • White people are still enjoying positions of privilege from what they gained during apartheid, while black people blame all underprivileged circumstances on the position of the white race. Black communities, at large, behave in non-cohesive manner.

	<ul style="list-style-type: none"> • People from certain tribes and races have the tendency to think of themselves as superior over others of a different race or tribe. • People of different races do not behave the same way so it is difficult for diverse races to be cohesive. • The existence of different races comes with the inability to behave the same across those different races. • Racial differences force people to judge each other. • Racial differences contribute to non-cohesive social forms. • The privileges enjoyed by whites during the apartheid era contribute to the racial gap in relations across races in South Africa. • Race is a contributing factor for social divisions due to differential treatment; we are practically not equal before the law. • The whites are perceived to be superior thus creating inferiority complexes of non-white races. The impact is further illuminate diversity as a reason to justify differential treatment and inequalities. • The race with more resources perceives the less privileged race as inferior and seeks to exploit them.
<p>Responses to question 5 perceiving racial diversity to be an insignificant factor in the current state of post-apartheid social cohesion.</p>	<ul style="list-style-type: none"> • Racial diversity has no impact on social ties if the diverse people in such one community share certain things in common and have something to offer to each other. • All people do not see race the same way, others are not racist while others are and treat people differently on the basis of race. • As Desmond Tutu said “differences are not intended to separate, to alienate, we are different to realise our need of each other.” Racial difference should therefore

	<p>bring into contact and harmony different views and experiences.</p> <ul style="list-style-type: none"> • The diversity in South Africa makes the country a global model.
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Theme two: Utility of law in fostering social cohesion

Question 6: theme 2	A direct enquiry into how and what participants think law should be in order to be a tool for promoting social cohesion among different people in their respective communities.
Responses perceiving utility of law in promoting social cohesion.	<ul style="list-style-type: none"> • Law is influential in promoting social cohesion. • Law can be implemented directly to promote social cohesion, and attract punishment for failure to comply. • Law can promote social cohesion by ensuring equal application of law among the people. • Law is effective in promoting social cohesion as it emphasizes equality. Civil and criminal law can be used to promote social cohesion. • Laws must be introduced to arrest and punish those who treat others differently on a discriminative basis such as race. • Law must be enacted to encourage people to socialise across their diverse lines such as race or culture. • Enforcing law to punish discrimination, social exclusion and inequalities as well as for violating rights of others can promote respect for differences. • Law must abolish racial violence and acts. Law must be enacted and enforced to ensure all people are treated fairly and equally. • Law should be used to reflect prevailing values of society as perceived by the law-makers. • Criminal and civil law can be used to promote social cohesion and protecting rights of individuals.

	<ul style="list-style-type: none"> • Law is effective in promoting social cohesion through equality. • Law should be strict and harsh towards those who break it. • Law should make everyone comfortable, not excluded or discriminated.
Responses to question 6 deviating from the perception of law as instrumental in promoting social cohesion	<ul style="list-style-type: none"> • Law has already been implemented and applied, but, what needs to change is the attitude of people towards law in dealing with issues of difference in society. • Law cannot be used to make people live peacefully amongst each other. People only choose to understand the ones they choose to understand regardless of what the law says. • Social cohesion cannot be achieved overnight, it is a process that will be achieved after some time, but people should be taught to respect differences. • Promote socialism in the country so that everyone participates and benefits from resources in the country. • Socialisation should be promoted across different races • Communities should fight discrimination and establish equality.
Question 8: theme 2	<p>An inquiry into how participants perceive the utility of law considering the transition from apartheid laws to constitutional democracy laws aimed at creating a rainbow nation. The question further requested participants to identify changes based on legal transition from apartheid era to the constitutional post-apartheid era, that have aided in the attainment of social cohesion except if the participant is of the opinion the transition has not changed the state of social cohesion from apartheid to post-apartheid context and objectives.</p>
Responses to question 8	<ul style="list-style-type: none"> • There is peace and equality.

<p>indicating that the transition from apartheid regime to the post-apartheid constitutional era has been instrumental in promoting social cohesion</p>	<ul style="list-style-type: none"> • Democracy has brought change, for example, black people now have a political voice and participation in economic activities which has forced all races to work together in different sectors. • Democracy and the Constitution have promoted unity and equality. • Now people live in peace and equality. • Many people became socially cohesive, however the position is still not entirely fair to blacks and racism still exists.
<p>Responses to question 8 perceiving the transition in law as ineffective in promoting social cohesion</p>	<ul style="list-style-type: none"> • People are still stuck in the apartheid regime. • Unity and cohesion are still lacking. People are aware of corruption and government maladministration resulting in loss of faith in law and government. • Social cohesion still lacking due to inequality in access to opportunities and social segregation and discrimination still persists. • Unity is still lacking, for example, some white children do not want to be in the same classes with black children and also white people are being killed on farms because of land. • Unity and cohesion are still lacking as there are sectors and spheres where discrimination practices still occur. • People still find it difficult to have access to equally good services and opportunities such as healthcare and education, which affects cohesion. • Social segregation and discrimination is still taking place even though the Constitution is active. • Cohesion is still lacking since there are still many black people working for white minorities as compared to whites working for blacks, which is similar to apartheid times.

	<ul style="list-style-type: none"> • The Constitution came as a technical failure to promote unity and equality due to the fact that the white people previously advantaged did not lose what they gained through apartheid. • People still behave the way they did during apartheid as there are black and white tensions. • Unity and social cohesion is still lacking, it feels like we are still in apartheid because even racism is still present. • No change, they just gave apartheid a new name “rainbow nation”, Unity and social cohesion are still a dream too far for South Africa. • Social cohesion and unity still lacking because we are still dealing with things like racism and inequality.
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Theme three: Functionality of the legal standard of equality and the cultural/social norm of ubuntu

Question 3	an enquiry into how participants perceive the status of social cohesion and ubuntu in their community.
Responses to question 3 perceiving the presence of ubuntu and social cohesion	<ul style="list-style-type: none"> • All people are part of the community and participate in social activities, programs and events. • <i>Ubuntu</i> and cohesion levels are balanced but affected by the fact that humans have free will and freedom of opinion, so it is human nature to look down on others such as the less privileged or those who are different. As human beings we have the ability to hate, commit horrible acts, and also choose between right or wrong. • Social cohesion is embraced on the basis of equal treatment and same rights. <i>Ubuntu</i> is smooth regardless of differences in culture. • People are living in peace, sharing cultural norms and tend to understand each other without looking at each other’s background.

	<ul style="list-style-type: none"> • People live in peace and anywhere they want with no hate or discrimination. • People still follow culture in this community which allows promoting unity and respect for one another. <i>Ubuntu</i> is high with no discrimination on gender or a person's background. • There is equal treatment of everyone; <i>ubuntu</i> is smooth with harmony regardless of diverse cultures. • Everyone is enjoying equal opportunities. • In my community everyone is free to follow his or her own beliefs or religion without any question. <i>Ubuntu</i> is very high; we help and support anyone in any way possible. • In my community everyone is of the same race and culture so <i>ubuntu</i> and cohesion are very high. • <i>Ubuntu</i> is very much alive in my community. NGOs are providing the poor with what they are lacking and people are giving each other jobs without looking at backgrounds or differences.
<p>Responses to question 3 perceiving the lack of ubuntu and social cohesion</p>	<ul style="list-style-type: none"> • There are only a few people in the community who care about other people and have <i>ubuntu</i>. Others steal, bully, abuse and treat others differently. There is no unity or harmony, the youth especially, treat others differently. • There is lack of support among people, so there is no cohesion as others are even threatened by the success of others. • There is no <i>ubuntu</i> in my community, it is an everyman for himself situation.
<p>Responses to question 3 perceiving there is improvement but not complete</p>	<ul style="list-style-type: none"> • Social cohesion is improving in the community due to political stability and focus on economic growth with people of difference races, ethnic origin living together without discrimination.

<p>social cohesion or <i>ubuntu</i></p>	<ul style="list-style-type: none"> • Looking at where South Africa is coming from, there is a lot of improvement; however, tribalism and racism are still dominant factors. More needs to be done for people to appreciate diversity. • Present day <i>ubuntu</i> and cohesion is merely working towards well-being of community members, creating a sense of belonging, trust, respect for dignity, compassion, demanding conformity and loyalty to the group of community.
<p>Question 4: theme 3</p>	<p>A direct enquiry on how participants perceive the social consequences of differences and inequalities in economic, social, political attainment of key services and opportunities.</p>
<p>Responses to question 4 perceiving that differences and inequalities affect smooth social ties, social forms, social order</p>	<ul style="list-style-type: none"> • People become violent and chaotic to the extent of killing each other regardless of the need to feel accepted and sense of belonging. Differences contribute to vulnerability or being seen as a threat. • Inequalities based on gaps in law are affecting majority of the youth and how they relate with older generations. • People strongly believe in their culture and religion such that they do not easily shake from those beliefs or easily tolerate and accommodate difference in culture, religion. Money is power, due to economic differences; the wealthy have access to better services and more opportunities than the poor. Majority of South Africans however, rely on public institutions, services and facilities which are bad and poor. This weakens socialism across such different groups. • Without similar abilities people cannot have similar or equal access. • It causes contradictions in peoples' views in the society which causes social instability. • People from different backgrounds will never understand or relate to one another.

	<ul style="list-style-type: none"> • Political differences are resulting in inequalities and differences in access to opportunities. • People across different political views and religious beliefs look down on each other based on those differences. • Differences and inequalities make people not to trust each other, which results in less opportunities for the less privileged. • Lack of understanding based on culture or religious differences causes hatred because of those differences.
<p>Responses to question 4 perceiving that differences and inequalities have no effect on social ties, social forms, social order</p>	<ul style="list-style-type: none"> • People trust each other in a good way across diverse lines as they all desire to improve themselves and their communities. • People live in a good way and treat each other with love and respect. People do not look down on each other even where their views on religion and beliefs are different, they show each other <i>ubuntu</i>. • Religion in particular helps with the well-being of individuals, families and communities. It reduces conflicts, risky behaviour and crime. • People still treat each other good and live in peace. • In my community everyone has different culture but it does not entirely affect the way we live because we respect each other. • In my community of black people we relate well and believe in the spirit of <i>ubuntu</i> which reduces conflicts.
<p>Responses to question 4 perceiving that differences and inequalities carry both negatives and positives</p>	<ul style="list-style-type: none"> • People are using differences to learn from each other; however there are cases of belittlement and resentment across people of diverse cultures and religion.

towards social cohesion	
Question 7: theme 3	Enquired on possible consequence if law fails to realise equal access to opportunities, protection and benefit of law based on diversity such as race, culture, beliefs etc. The enquiry further sought to establish the alternative possible consequences related with attaining equality through law.
Responses to question 7 indicating the perceived impact of law failing to realise equality on access, protection and benefit of law to all people of diverse categories and backgrounds	<ul style="list-style-type: none"> • It results in automatic inferior and superior categories by virtue of inequalities, which also contributes to conflicts. • Law related inequalities have a big impact on the vulnerable and disadvantaged, and those people also stop believing in the law which can result in a surge in crime and violence. • Some people will be privileged while others will be suffering. Crime rate can also go up and result in restlessness, violence and hatred across diverse groups in the society. • It makes community members to hate each other regardless of all of them being South African citizens who voted for the same government. • There will be intense conflict and violence, increase in poverty and also increase in crime. • There will be discrimination and violation of other people's rights by others. • All black people will die poor. • Level of poverty will increase and no development will occur. • Inequalities result in division based on similarities and differences which creates inferiors and superiors. • Violence and hatred will emerge in the community as some people will be privileged while others are suffering.

	<ul style="list-style-type: none"> • It will lead to depression and strain of relations among the young generation. • Some people will become incapable of contributing socially and economically. • There would be extreme conflict among cultural groups. • Law would have failed and extreme conflicts would ensue. The rich will remain rich and the poor become poorer. • It will cause people to hate each other and also cause conflicts. • If people realise law they tend to make their own rules and laws or come up with destructive ways to respond not equally or fairly treats them. • The law has been failing to give equality to everyone so there is nothing the community can do since the elected leaders only care about themselves. • The rate of poverty and crime will increase.
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Theme four: Society's perceptions of what ought to be done to promote social cohesion

<p>Question 9: theme 4</p>	<p>Sought to determine what participants think has to be done, or what is generally missing, whether legal or non-legal, in order to achieve social cohesion among the diverse people of South Africa.</p>
<p>Responses perceiving the need for more legal responses directed towards promoting social cohesion in post-</p>	<ul style="list-style-type: none"> • Beliefs and culture are the biggest aggravating factors for differences to slow down realisation of social cohesion, so there is need for more legal measures to regulate conduct undermining culture, political views, race and religion. • Strategic planning to align policies, actions and performance as indicators of committing to social cohesion as a priority.

apartheid South Africa	<ul style="list-style-type: none"> • Law can emerge to embrace equality and exercise of rights. Unity programmes must be implemented.
Responses to question 9 perceiving non-legal mechanisms to promoting social cohesion in post-apartheid South Africa	<ul style="list-style-type: none"> • There is need for the restructure the chain of command in South Africa and rebuild it once again to suit current contextual needs. • Government should have unity among the leaders so that everyone else can follow. • Socialisation can play an important role in unifying people. • Educate people on unity and then develop public healthcare and education facilities as a step towards removing neglect of certain communities over others. • All people must have equal access to opportunities and all people must be considered. • Develop proactive strategies to boost socialisation • Socialisation can promote unity. • Promoting local based production and giving equal access to opportunities. • People should be taught to respect diversity. • <i>Ubuntu</i> should be promoted so that it can bring unity in South Africa. People can then be treated fairly and not discriminated. • Everyone must be treated fairly regardless of race. • Share resources equally among all South Africans and give everyone equal opportunities.
Response to question 9 perceiving nothing should be done to promote social cohesion in post-apartheid.	<ul style="list-style-type: none"> • Nothing, because the effort would go to waste. People of different race, culture, religion etc. just do not want to be in cohesive relations with others.

4.4. Data analysis, interpretation and findings

4.4.1. Theme One: Perceptions and practical implications of Diversity

This study has already established that diversity is a key issue in the post-apartheid South African society. This diversity relates to all spheres and classes of interaction such as social, economic, political, cultural, religious, gender, race and ethnic origins. All these factors play a role in directing perceptions on social cohesion as well as its practical implications for the attainment of social cohesion. It has also been demonstrated that apartheid laws capitalised on these aspects of diversity by legitimising further division and oppression of certain groups in society based on these identified classes of diversity, mainly race, gender and ethnic origins. It has also been noted that scholars such as Berger already identified diversity as a factor in normative conflicts exploding through society in contemporary South African society, for instance tribal conflicts, expulsion of foreign nationals, which all points to the lack of social cohesion or creating practical barriers to attaining such social cohesion.³⁴²

Additionally, the issue of diversity is a key theme in this study as it relates to some findings made in the doctrinal enquiries in chapter two. This relates to social cohesion either being objective or perceived. Bollen and Hoyle submit that social cohesion can exist even in diversity but it can either be perceived or objective. Perceived cohesion refers to the functions of each member's perception regarding his or her own position and standing in the group.³⁴³ Objective cohesion on the other hand refers to a group's attribute involving composite measures based on the known closeness of each individual to other members of the group.³⁴⁴ On another hand a practical approach to making diversity effective in attaining social cohesion as discussed in this study is submitted by Struwig. Struwig notes that South African scholars and policymakers collectively accept that the notion of self-willingness across diverse groups of diverse backgrounds, cultures and beliefs, to work towards a common interest would be the perfect basis for attaining social cohesion in post-apartheid South Africa.³⁴⁵ An

³⁴² Berger-Schmitt 'n 82 above'.

³⁴³ Bollen & Hoyle 'n 85 above'.

³⁴⁴ Same as above.

³⁴⁵ Struwig 'n 135 above'.

example of how majority of diverse political parties with diverse compositions, diverse backgrounds and interests with the exception of the DA, COPE, ACDP, FF and IFP, voted in favour of a common interest of expropriation of land without compensation in order to redress past injustices.³⁴⁶ This led to the conclusion that diversity does not, in perception or practical terms, hinder the attainment of social cohesion since attributes such as shared values,³⁴⁷ self-willingness cooperation,³⁴⁸ sense of belonging, togetherness, accepting and tolerating diversity³⁴⁹ are all reckoned attributes for the existence and attainment of social cohesion. Bulmer and Solomos assert on the need for all current definitions of social cohesion to identify the importance of diversity as a determinant of social cohesion.³⁵⁰ Bulmer and Solomos point out that even the shared values are diverse across diverse people in a society and these social constructs must be considered in developing social cohesion within a diversified society.³⁵¹

The responses for question one under theme one are interpreted as follows. First set of responses indicates, society's perception that law can facilitate the attainment of social cohesion regardless of society being ridden by multitudes of diversity. The responses in regard to the theme of diversity varied yet are in line with the developments in law. There is resonance of responses with principles held in *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others*.³⁵² Ackerman J stressed on the paths of diversity and that law plays a role in compelling diverse people to feel the need to be cohesive. Ackerman J noted that the desire of South African law to attain equality is not a desire to eliminate differences.³⁵³ This means that social relations are to be on equal basis as prescribed under and facilitated by law.³⁵⁴ The responses in this regard can further be examined through the implications of maintaining discriminatory laws that promote inequalities as compared to laws aimed at reforming inequalities and eradicating discrimination. The case of *MEC for*

³⁴⁶ T Mokone Timeslive 'n 135 above'.

³⁴⁷ Southphommasane 'n 140 above'.

³⁴⁸ J Struwig (n 327 above).

³⁴⁹ Staveren et al ' n 145 above'.

³⁵⁰ M, Bulmer & J, Solomos 'Multiculturalism, social cohesion and Immigration shifting concepts in the UK' (2017) *Ethnic and Racial Studies*.

³⁵¹ Same as above.

³⁵² *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* [1998] ZACC 15; 1999 1 SA 6 (CC) (National Coalition).

³⁵³ Same as above.

³⁵⁴ Same as above.

*Education KwaZulu-Natal and Others v Pillay*³⁵⁵ provides further insight to the above responses on why diversity cannot be perceived to be a barrier to attaining social cohesion if there are applicable laws. With a learner being prohibited from wearing a nose stud at school as a way to silence difference and diversity in order to create sameness, this was seen as withholding the benefit, opportunity and advantage of fully enjoying culture and practising religion.³⁵⁶ This case indicates and supports responses perceiving that rules or laws can actually be made and implemented to promote social ties and order in a certain way. In this regard, law can be made and reformed to objectively be inclusive of all diversity or similar to the apartheid laws objective, to exclude based on diversity. Diversity in this regard cannot be used to exclude the role of law in promoting social cohesion as indicated by the responses and Constitutional Court precedents on the application of equality and elimination of discrimination. In unison, the responses of participants and legal developments, equality sees no diversity but affords diversity equal benefit, protection and respect in terms of law. The responses in this regard can be seen in light of Bollen and Hoyle submission that cohesion can exist even in diversity but it can either be perceived or objective. Perceived cohesion refers to the functions of each member's perception regarding his or her own position and standing in the group.³⁵⁷ Objective cohesion on the other hand refers to a group's attribute involving composite measures based on the known closeness of each individual to other members of the group.³⁵⁸ Additionally the submissions of Bollen and Hoyle are to be viewed in light of their lack to address 21st century sustainable societies as exposed by Sellberg who notes that the current impediment to social cohesion is the application of concepts that do not acknowledge the diversified nature of modern societies.³⁵⁹

Other respondents had a different view, indicating that diversity is rather more of a barrier to the realisation of social cohesion through instrumentality of law. In order to ascertain the true meaning of those responses that perceive diversity as a barrier in the attempts by law to promote social cohesion, the study draws from the remarks of

³⁵⁵ *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC)

³⁵⁶ Same as above para 15.

³⁵⁷ Bollen & Hoyle 'n 85 above'.

³⁵⁸ Same as above.

³⁵⁹ M Sellberg M et al 'Resilience Assessment: A useful approach to negative urban sustainability challenges' (2015) 20 (1) *Ecology and Society*.

O' Regan in the case of *Jordan & Other v S*.³⁶⁰ In the case, O' Regan noted that in order to understand that law plays a role in promoting perceptions, relations and ties in society, one must use a contextual approach.³⁶¹ By failing to understand the context under which prostitution happens in South Africa, and the gender most involved as service providers inter-alia clients, the court's decision did not promote substantive equality by not apportioning equal guilt or equal reprieve. In this regard, the responses that suggest that diversity is a barrier to the attainment of social cohesion under legal concepts of equality can be analysed as lacking contextualisation of where South Africa has come from and where it is in post-apartheid era. The mere fact that during apartheid, diverse groups, cultures and races could not mix, work together or live in the same neighbourhoods on the basis of law, and that in post-apartheid era, diverse groups, races, cultures can live together, work together on the basis of law that enables and promotes such practice is the best empirical evidence that diversity is not the problem but how law is made to reflect, promote and enable social cohesion among the diverse groups in South Africa. The study therefore establishes that contextualisation is crucial when dealing with diversity and its implications in the attainment of social cohesion on the basis of law. However, the responses perceiving that diversity is a barrier to the attainment of social cohesion are important as they indicate a similar notion with that advanced by Fonseca and Bulmer and Solomos. Bulmer and Solomos provide an analysis of the 3 widely adopted social cohesion concepts in the current societies. They identify diversity as a factor in normative conflicts exploding through society in contemporary societies, similarly to South African experiences with diversity as manifest in tribal conflicts, expulsion of foreign nationals, which indicates and further erode social cohesion or creates practical barriers to attaining such social cohesion.³⁶² So the responses suggesting that diversity is a barrier to social cohesion consolidate the notion that social ties and relations are currently not on a cohesive basis in post-apartheid South Africa, but do not entirely dismiss the capability of law to facilitate smooth social relations across diverse people of South Africa. Fonseca defines contemporary societies as organised in a way that easily reflect any underlying socio-economic disparities and

³⁶⁰ *Jordan & Others v S* [2002] ZACC 22; 2002 6 SA 642 (CC).

³⁶¹ Same as above para 59 & 68.

³⁶² M, Bulmer & J, Solomos 'Multiculturalism, social cohesion and Immigration shifting concepts in the UK' in *Ethnic and Racial Studies* 2017.

inequalities.³⁶³ In this regard, diversity is an underlying issue manifesting in South Africa through the lack of sustainability and cohesion in terms of Bulmer and Solomos, As presented above various responses to question 2 were issued on what participants perceive to have been in apartheid laws that contributed to the breakdown of social cohesion among diverse people. All the responses in this regard echoed a similar understanding that apartheid laws only furthered the tear and break down of social cohesion through laws that promoted discrimination, exclusion and oppression across lines of differences with race being the basis. These responses are therefore in line with submissions made by Clark and Worger that apartheid legislation ensured that all peoples resident in South Africa enjoyed different rights and privileges based on race.³⁶⁴ The differences and diversity had already been there, but apartheid laws made it more visible. Furthermore, Bourdieu's assertion that apartheid laws had an effect on social cohesion is applicable here since social order, social relations are independent from individual will and since what exists in the social world is relations instead of interactions between agents or inter-subjective ties between individuals.³⁶⁵ The responses made in this regard by participants are further proof that diversity does not automatically impede social cohesion but that the role of law is decisive on whether it can be made either to serve as the glue that holds together different races, tribes, cultures, religions and gender, or alternatively made to breakdown the fabric or the cohesion itself directly as was the case with apartheid laws. Furthermore, the responses to question 2 read together with those of question 1, echo a similar understanding that diversity is not the problem in efforts to attain social cohesion, but the process of making law the fabric for social cohesion is the central issue as indicated by scholars noted here and collectively affirmed by participants' responses in this study.

The final look into theme one on society's perceptions and the practical implications of diversity through question 5 that sought to determine perceptions of society on racial divisions as a contributing factor to the current state of social cohesion. Most respondents agreed in their varied responses that racial diversity is significant in the

³⁶³ X Fonseca et al 'Social cohesion revisited: a new definition and how to characterize it, innovation' (2019) 32 (2) *The European Journal of Social Science Research* 231.

³⁶⁴ NL Clark & WH Worger *South Africa: The Rise and Fall of Apartheid* (2011) 49.

³⁶⁵ P Bourdieu. & LJD Wacquant *An Invitation to Reflexive Sociology* (1992) 97.

broken fabric of social ties. In the most general expression of these responses, the perception is that race naturally comes with different environment, different views and different perceptions of other races, resulting in the creation of superior and inferior racial groups in society which further aggravates divisions. The first set of responses perceives racial diversity to be a contributing factor to the current state of social cohesion in post-apartheid South Africa. The responses in this regard affirm and concur with section 3.4 of this study on the impact of apartheid laws in fostering social order of rigid exclusion and racial separation. Marioti and Fourie submit that even after 2 decades since apartheid ended, race has shaped and is still shaping perceptions and relations in South Africa based on racial diversity.³⁶⁶ These responses also concur with the submission of Abel who affirms that the laws that forced the relocation of natives affected inter-ethnic trust such that in present day South Africa, people living in former Bantu Homeland have less trust of other South Africans, are less proud to be South African, and relevant to this study is the fact that they are keen on the idea of a united country.³⁶⁷ This suggests that the effect of the forced social order during apartheid illuminated differences and further broke the fabric that held together all diverse tribes, cultures, nationalities, races, ethnicities and socio-economic classes. This study inquires on the possibilities of attaining social cohesion across the same diverse lines that existed during apartheid, however under and in light of a different legal regime that is directed towards the attainment of equality across diverse people. This means that the responses are not only relevant but indicate affirmation of the notion that people who were previously disadvantaged and oppressed because of their race, lack trust across racial lines even though they are keen on the attainment of a socially cohesive society in the present post-apartheid context. These responses also indicate that in instances where law is enacted and implemented without reflecting common and shared values of all the diverse peoples, the result will be a non-cohesive society. This also indicates that if law is made or reformed objectively to reflect shared values of the people; such law is as good as serving the function of promotion social cohesion among the diverse groups of people governed by such laws. These findings resonate with deductions made by Pieres on

³⁶⁶ M Marioti & J Fourie 'The Economics of Apartheid: An Introduction, Economic History of Developing Regions' 2014 (available at <https://doi.org/10.1080/20780389.2014.958298>).

³⁶⁷ M Abel 'Long-run effects of forced removal under apartheid on social capital' Mimeo, Presented at: African Economic History meetings, London School of Economics and Political Science, 25–26 October 2014, MA thesis, Harvard University 2014.

role of law by noting that the apartheid regime was rooted in concepts of slavery, colonisation and segregation; to which there was legislation for a continuum of discrimination against non-whites.³⁶⁸ This consolidates the responses as echoing the importance of underlying values of law fostering social relations in a society regardless of diversity.

In opposition to the above responses, another set of responses in this regard affirm that racial diversity is insignificant to the attainment of social cohesion. These responses can be inferred to be very current as they reflect contemporary context of post-apartheid South Africa's attempts to unify all races as well as how races live and relate in all spheres, with improvement and difference from apartheid times. The responses disregarding racial diversity to the attainment of social cohesion further indicate that in contemporary times racial diversity is insignificant in the realisation of social cohesion but makes the attainment of social cohesion a more interesting objective for South Africa. The participants in this regard, considered the actual context and environment in which changes are taking place and how racial diversity is becoming less and less of the key impediment in the attainment of social cohesion as it was during apartheid times. This also echoes findings made above that racial diversity has become less of a social problem as it was during apartheid and cannot be solely blamed for the lack of socially cohesive relations. It also supports other findings of the study, that new issues such as corruption, lack of trust in government and public institutions and other inequalities are now the dominant factors for the lack of social cohesion in post-apartheid South Africa.

4.4.2. Theme two: Utility of law in fostering social cohesion

There are several factors that have already been established on the utility of law in fostering social cohesion in post-apartheid South Africa. The background to this demonstrates undeniable utility of law during apartheid to change, impose and create a certain social order of repression and racial division. There is enough evidence that South Africa has already had distinct forms of social relations based on law. In contemporary times, the constitution is the starting point as it aims to redress past injustices of apartheid and create a rainbow nation where diversity is respected,

³⁶⁸ J Peires 'The Holocaust and Apartheid: Similarities and Differences A Comparative Study,' MA Dissertation, University of Cape Town 2004.

promoted and protected on equal basis under the clause of equality.³⁶⁹ As already established, Stone submits that in order to understand that law has social utility one has to examine the effects of law on social order.³⁷⁰ The connectedness of the legal order to the social order is therefore acknowledged in this study but still has to be tested on the empirical conditions of the South African society. The natural law theory, positivist theory and legal realism were briefly discussed to extract their explanations of the social utility of law. With a jurisprudential overview from scholars such as Roscoe Pound³⁷¹ and Durkheim,³⁷² law is established as reproducing primary forms of social solidarity (social cohesion) or the lack thereof.³⁷³ The views of these authors are also affirmed by recent studies such as McLeod and Von Treuer who develops and affirms Boyle's assertions by noting that cohesion is strongly related to performance. This is based on how better cohesion leads to sharing goals. However empirical and Meta analytic studies have not been capable of demonstrating consistency in the closeness of cohesion and performance.³⁷⁴ The problem in this regard is mainly because of inconsistencies with the definition of social cohesion both legal and non-legal conceptualisations.

Question 6 is the first point of enquiry into what and how society perceives law should be in order to be a tool facilitating the promotion of social cohesion among the diverse people of South Africa. Most of the responses in this regard were more general in their affirmation of the utility of law in promoting social cohesion. Most responses focused on the need for implementation, and punishment on the basis of law directed to promote social cohesion. This is in line with other findings of this study that the manner in which law is enacted, implemented and enforced will have a corresponding effect on social order. For instance, Dubor submits that a correct analysis of the effect of apartheid laws on social order entails that law enacted, implemented and enforced to create segregation became an ideology for the organisation of white supremacy with the objective of maintaining and protecting the prevailing social order against the

³⁶⁹ The preamble and section 9 of the Constitution of South Africa.

³⁷⁰ J Stone *Law and Social Sciences in the second half century* (1996).

³⁷¹ Ehrlichm E & Pound R *Fundamental Principles of the Sociology of Law* Translated by L Walter (1962) 25.

³⁷² DE Durkheim '*De la Division du Travail Social (on the division of Labour in Society)*' Translated by G Simpson Division of Labor in Society (1933).

³⁷³ Same as above.

³⁷⁴ J McLeod & K Von Treuer 'Towards a cohesive theory of cohesion' (2013) 3 (12) *International Journal of Business and Social Research* 1.

potentially militant proletariat non-white South Africans.³⁷⁵ This means that law is effective, but the substance, rationale and objective of law is more important as it bears and calibrates similar responses to social order. The issue in this regard as evaluated by Steven is that, understanding what law does over what law is, is the yardstick of valuing conflicting and overlapping interests and claims that must be harmonised or reformed by the legal order.³⁷⁶ Some of the responses indicate that law should be strict, harsh and reflect prevailing values of society in advancing values of equality. This is relevant to the study as it affirms that society perceives the substance, rationale and objective of law, and responds accordingly at a social level. The mere desire of participants for law to be enacted in a strict manner reflecting values and desire for equality underscores that the corresponding reaction from society would equally be equitable social order and cohesion for as long as law perceives and afford everyone with equal and enforces the principle strictly.

However, other respondents issue deviating ideals reflecting that law does not play a role in the attainment of social cohesion. The responses in this regard present a deviation from the notion that something can be done in making, implementing and enforcing law with the objective to promote social cohesion. The responses in this respect, regardless of appearing to be general, base their argumentation on the need for a change in attitudes towards law, the free will and autonomy of people as being incapable of being moved or driven by law and others believe that social cohesion is not about law but an issue of promoting socialism. This study applies the issue of contextual detachment by noting that these responses are *prima facie* incapable of being applied to the post-apartheid context as they are detached from all the changes and landmark legal advancements that have occurred and how they have impacted social order in different spheres of interaction. For example, two landmark decisions of the Constitutional Court with similar factual causations and different outcomes prove the role of law in redressing, promoting and protecting everyone. In the case of Soobramoney, the applicant was denied equal benefit and enjoyment of law on access to emergency treatment, which he claimed on the basis of law and was also denied on the basis of law, noting the limitation of socio-economic rights to the availability of

³⁷⁵ S Dubow *Racial Segregation and the Origins of Apartheid in South Africa 1919-36* (1989) 1.

³⁷⁶ S Steven *The Bramble Bush: On Our Law and Its Study (1930)* (2009).

resources.³⁷⁷ In the case of *Grootboom* with entirely similar factual causations and legal basis, the applicants were granted their socio-economic right request for adequate housing on the basis of the same law which *Soobramoney* was denied.³⁷⁸ These two cases are illustrative of how advancements in law are setting the tone of social contact, social relations, socialisation structures and social forms by facilitating more allowance, more tolerance, acceptance and ensuring that shared values are at least realised. The mere fact that socialisation could not be spoken of during apartheid because of apartheid laws but that socialisation can be freely spoken of and embarked on in post-apartheid context speaks volumes of the impact changed laws have on fostering such avenues and relations.

Question 8 followed up on theme 2 (perceptions and utility of law) directly asking participants to reflect on social changes that happened as a result of the legal transition from apartheid to post-apartheid laws. The first set of respondents indicated that there are certain social changes such as peace, equality, black empowerment materialising as a result of the legal transition from apartheid to post-apartheid constitutional dispensation. Responses in this regard perceive that the transition from apartheid to post-apartheid legal regime has been instrumental in promoting social cohesion. These responses are relevant to the study as they confirm that law is capable of promoting social cohesion. The responses identify the differences and shift in forms of socialisation from apartheid to post-apartheid context, which is empirical evidence of the impact of the transition from apartheid discriminatory laws to the 1996 constitutional era (one, oppressive and exclusive while the later, inclusive, fair and just towards everyone).

As the preamble of the constitution provides, the constitution seeks to redress past injustices and endow everyone with rights and freedoms under the values of equality, freedom and dignity.³⁷⁹ The responses affirming social changes facilitated by the transition of legal regimes therefore affirm that the fundamental issue in redressing the past injustices, past broken social ties and order, revolve around transforming South Africa into a rainbow nation where diversity thrives and excels under equal worth of all

³⁷⁷ See generally *Soobramoney v Minister of Health KwaZulu-Natal* 1998 1 SA 765 (CC), 1997 12 BCLR 1696 (CC).

³⁷⁸ See generally *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

³⁷⁹ Preamble of the Constitution of South Africa of 1996.

as enshrined in the constitution. Declaring commitments to transform social, economic, political and cultural spheres, the constitution thrives on shared values of equality, dignity and freedom. These responses as the current perception of society in this study also echo the remarks of Goldstone J in *President of the Republic of South Africa v Hugo*, where he noted that in promoting equality to prohibit unfair discrimination, the purpose of the constitution becomes that of establishing a society in which all people are accorded equal worth in all regards regardless of diversity or membership to particular groups.³⁸⁰ Furthermore the achievement or attainment of such a society in light of the deeply inegalitarian past would not be easy but is the primary goal of the constitution which cannot be overlooked.³⁸¹

There is however a set of participants who perceive the transition from apartheid to constitutional rule as ineffective towards social cohesion and changes. The responses in this regard deviated from the notion that the transition in law from apartheid to post-apartheid has helped in promoting social cohesion. The first issue clarified by these responses, regardless of what each responses says, relating to (discrimination, inequality, racism, conflicts, social segregation) is that social cohesion is lacking in South Africa. These assertions by participants also echo the submissions of Pervaiz and Staveren that, conflict management, racial conflicts, inclusivity and tolerance for diversity become issues in a less cohesive society.³⁸² Secondly, there is a gap between the responses of participants and advancements made in socio-legal studies about the effect of social utility of law. Pillay submits that law is not a compilation of regulations locked away and an end in themselves, but the basis of functionality in a society hence the need for laws to change with the changes that come with time in order to keep on stimulating and promoting various interactions, in this case social cohesion.³⁸³

In advocating for socialisation and stressing the inability of law to promote social cohesion, the non-affirming responses are shrouded in lack of understanding of the fact that the social utility of law is infused on the type of society in question, considering

³⁸⁰ *President of the Republic of South Africa and Another v Hugo* 1997 6 BCLR 708 (CC) para 41.

³⁸¹ Same as above.

³⁸² Z Pervaiz & I van Staveren, *Diversity, Inclusiveness and Social Cohesion* (2013) Institute of Social Studies 5.

³⁸³ S Pillay 'Crime, community and the Governance of violence in post-apartheid South Africa' (2008) 35 (2) *South African Journal of Political studies Politikon* 141-158.

the type of governance and racial formations, cultures, which in turn is used to determine if such a society is living up to its ideals or not. In this case South Africa is governed by policies that prescribe for individual freedoms in combination with social responsibility. This notion is evidenced by how the government is responsive to public issues, which has been noted by Burns as an essential element to making the social functions of law serve the purpose of stimulating cohesion.³⁸⁴ The only question that would have to be answered further in this context would be whether or not the process of enacting laws that have social utility has been a success in South Africa, which can further be drawn as the source for the responses in this regard. Law has not been fully adopted and executed socially by all relevant organs or institutions such as the judiciary or social institutions even though it is there in its drafts and enactments.

The last thing clarified by these responses is that the effects of apartheid laws are not yet fully addressed and still serve as a key barrier to the attainment of social cohesion in the post-apartheid era

4.4.3. Theme three: Functionality of the legal standard of Equality and the cultural/social norm of *ubuntu*

The contemporary legal dispensation based on the constitution aims at redressing past injustices and eradicating inequalities *inter-alia* conferring rights and freedoms. Equality is seen as a shared value of South Africans, entrenched in law, and also embodied in the spirit of *ubuntu* from before the advent of the constitution. Substantive equality is identified in this study as the accepted form of equality in South Africa, with the ability to recognise diversity and accord the necessary protection, respect and equality. As already discussed, the purpose of the constitution is to help facilitate the establishment of a society in which all people are accorded equal worth, in all regards regardless of diversity or membership to particular groups.³⁸⁵ Furthermore the achievement of such a society in light of the deeply inegalitarian past is not easy however, it remains the primary goal of the constitution to eradicate and redress past injustices.³⁸⁶

³⁸⁴ J Burns et al 'Defining social cohesion' Cape (2018) 2 *South African Labour and Development Research Unit* UCT.

³⁸⁵ *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at 41

³⁸⁶ Same as above.

Question 3 was the starting point of enquiry into theme 3 on the functionality of *ubuntu* and legal concept of equality towards the attainment of social cohesion. In this regard the responses of the participants. Question 3 probed into how participants perceive the presence of *ubuntu* and social cohesion in their communities. Most participants affirmed the effectiveness of the standard of equality and cultural norm of *ubuntu* by indicating the presence of *ubuntu* and social cohesion in their community. The level of *ubuntu* is reverberated across majority of responses as high. These responses echo the argument of the study that equality is the legal basis for promoting social cohesion. The South African Cultural Observatory also submitted that in trying to promote social cohesion focus must be on policy reform pertaining to socio-economic development, aimed at removing the prevalent inequalities.³⁸⁷ In this case promoting and enforcing equality, which is a key value of the constitution, is one way in which *ubuntu* and cohesion can be conceived and perceived. The mere fact that there used to be inequalities on the basis of repressive laws and now replaced laws prescribing for equality is *prima facie* suggestion of better levels of socialisation and cohesion. Reeskens shows that, relations and interactions of groups and individuals in the absence of discrimination, limited inequalities, especially horizontal inequalities, will stimulate the creation of trust amongst the groups as well as a sense of national identity.³⁸⁸ This can be determined to be the current legal situation which is still to be developed fully in the practical context of the South African society.

In response to the above question, another set of respondents perceived that both *ubuntu* and social cohesion are lacking in South Africa. The responses in this regard assert that there is no social cohesion or *ubuntu* and relate to some of the proxy variables for social cohesion identified by Reeskens and applied to this study such as trust among members of society, tolerance for diversity, sense of belonging.³⁸⁹ These responses regardless of being few indicate some of the key issues identified as indicators for the lack of social cohesion in post-apartheid South Africa. These indicators range from political, social, economic to cultural indicators, in issues and social conditions such as poverty and socio-economic classes, government

³⁸⁷South African Cultural Observatory 'Research Report: Developing a Measure of Social Cohesion for South Africa' submitted to the Department of Arts and Culture 2018.

³⁸⁸ T Reeskens 'Defining Social Cohesion in Diverse Societies: How generalized trust Relates to social cohesion. Unpublished PHD Thesis (2007).

³⁸⁹ Same as above

maladministration of public services and facilities, corruption and deep economic and social inequalities in education and healthcare access and services. For instance where a participant notes that “it is an everyman for himself situation” it indicates how people have lost faith in the government and its institutions and also how people are focused on their own self well-being either to feel like they belong or to feel superior. These responses indicate that social cohesion indeed can be perceived or objective. Perceived cohesion being the functions of each member’s perception regarding his or her own position and standing in the group.³⁹⁰ Objective cohesion on the other hand refers to a group’s attribute involving composite measures based on the known closeness of each individual to other members of the group.³⁹¹ Struwig also notes that South African scholars and policymakers collectively accept that the notion of self-willingness across diverse groups of diverse backgrounds, cultures and beliefs, to work towards a common interest would be the perfect basis for attaining social cohesion in post-apartheid South Africa.³⁹² This indicates that there is a gap in these responses. An example of advancements in contemporary times is how majority of diverse political parties with diverse compositions, diverse backgrounds and interests to the exception of DA, COPE, ACDP, FF and IFP, voted in favour of a common interest of expropriation of land without compensation in order to redress past injustices.³⁹³

A third variation in response to the above question indicates the perception that there is improvement but not complete attainment of social cohesion and *ubuntu*. The responses in this regard are similar to those perceiving social cohesion and *ubuntu* to be a work in progress with little noticeable improvements from the time of transition from apartheid to post-apartheid democracy. The participants also related to the proxy variables of social cohesion of stability, better relations across diverse groups than before, shared values of society and improvement in the notion of sense of belonging.

³⁹⁰ Bollen & Hoyle ‘n 85 above’.

³⁹¹ Same as above.

³⁹² J Struwig et al ‘From bonds to bridges: toward a social cohesion barometer for South Africa’ (2011) 9 (4) *Human Sciences Research Council Review* 1. Available at: <http://www.hsrc.ac.za/en/research-data/view/5766>. (accessed 02 August 2020).

³⁹³ T Mokone Timeslive “parliament votes to make land expropriation without compensation a reality early next year” 06 December 2018 (available at: www.timeslive.co.za/amp/politics/2018-12-06-push-to-make-land-expropriation-without-compensation-a-reality/) (accessed 08 December 2019).

The submissions of Bollen and Hoyle and Struwig are also applicable in evaluating these responses. The distinction between perceived and objective social cohesion is applicable in this case. Perceived cohesion being the functions of each member's perception regarding his or her own position and standing in the group,³⁹⁴ and on the other hand objective cohesion being group's attribute involving composite measures based on the known closeness of each individual to other members of the group.³⁹⁵ It entails that in one community or society some members may perceive cohesion to be present simply because of their self-willingness to be cohesive and be part of the community while others may feel there is no cohesion because they relate at a group level where the attributes of the entire group determine the presence or absence of cohesion.

Question 4 added on to the inquiry by probing into how participants perceive the effect of differences and inequalities on the attainment of smooth interactions across all diverse people. The first set of responses indicated that differences and inequalities affect smooth social ties, social forms and social order. The responses in this regard, identify different issues that are relevant to what impedes the realisation of social cohesion. Furthermore, these responses provide current insight as they also relate to some findings on global indicators of social cohesion as well as indicators in South Africa. For instance, a summation of findings on economic indicators as reported by The United Nations Human Development Report on South Africa indicates that South Africa is the richest country in the Sub-Saharan African Region with a gross domestic product of \$ 12, 390 per capita as of 2015/2016.³⁹⁶ On the other hand economic growth per person is only at 1 to 2% per year, which is not enough to eradicate poverty rapidly.³⁹⁷ The 2019 Human Development Report on South Africa indicates that inequalities in human development have damaging effects in society and negatively weaken social cohesion and general trust in government and institutions.³⁹⁸ In South Africa, 6.3% of the population are multidimensionally poor while an additional 12.2% are classified as vulnerable to multidimensional poverty. The breadth of deprivation

³⁹⁴ Bollen & Hoyle 'n 85 above'.

³⁹⁵ Same as above.

³⁹⁶ S Jahan 'Human development report 2016 human development for everyone' United Nations Development Programme 2016.

³⁹⁷ Birkisdóttir 'n 252 above'.

³⁹⁸ Human Development Report 'Inequalities in Human Development in the 21st Century Briefing note for countries on the 2019' Human Development Report South Africa 2019.

(intensity) in South Africa, which is the average deprivation score experienced by people in multidimensional poverty, is 39.8%.³⁹⁹ These economic indicators show an increase in classism of upper, middle and lower economic classes (new age inequalities). This has been a cause for concern as people find it difficult to relate harmoniously and cohesively at a social level while facing different economic challenges on the backdrop of past injustices of apartheid which the constitution committed to redress compounded as shared values of the nation. In this regard, this study goes back to the main argument of using law to promote social cohesion by bridging the gap in treatment of diverse peoples similar to the way law was applied in Grootboom to enhance, realise, promote and protect the disadvantaged and marginalised, instead of how it was applied to deprive Soobramoney who was denied equality.

Another small number of respondents perceive that differences and inequalities have no effect on social ties, social forms or social order. The responses in this regard are related and can be evaluated as further proof of the submissions of Bollen and Hoyle on perceived cohesion being and individuals identification within a community whereas objective cohesion is dependent on a group's attributes. This means that even where the majority feel there is no cohesion, there will be individuals who perceive that all social ties and relations are smooth and in order when in actual fact they are not.

Question 7 made further inquiries into theme 3 by probing into perceptions of participants on the possible consequences in case where law fails to facilitate and realise equal access to opportunities, protection and benefit of law across all diverse people of South Africa. The first set of responses indicated acceptance that law plays an important role in promoting the direction of social order and social relations. The responses in this regard express that the failure of law amounts to a society filled with conflict and problems that impede the realisation of social cohesion. In this regard law cannot fail. An illustrative approach is derived from the studies on the impact of apartheid laws. In the apartheid era, laws were successful in segregating and oppressing the majority while making the white minority superior ultimately rearranging the social order. In the same instance, the very same apartheid law failed dismally at promoting cohesive relations among those diverse people. It only enabled further

³⁹⁹ Same as above.

erosion of the fabric that holds diverse groups together. The role and importance of law in promoting social cohesion can be inferred from how South Africa has been referred to as lawless. This usually occurs after the incidence of racism and xenophobic attacks or vigilante justice as a form of community action carried out by communities functioning under the new forms of social relations. These manifestations are sometimes framed as “South Africa is lawless”, which is a term that has become overused in cases where the issues of social cohesion are in question. In illustration, a reputable media source published that most violent so-called service delivery protests, rampant crime, vandalism and destruction of colonial statues and monuments and the xenophobia attacks is testimony or the epitome of the ‘Lawlessness’ perpetuated at the ‘top’ and now emulated at the ‘bottom’.⁴⁰⁰ This in turn shows how the term, ‘lawlessness’ is used as a tagline used to describe the state of breakdown of social cohesion. In this regard and on these responses by participants, the study maintains that law is instrumental in making apparent social changes, just as law was used to make extreme social changes in the apartheid regime. The constitutional era has contributed to the formation of some legal developments aimed at eradicating barriers to social cohesion through realisation and enforcement of provisions such as section 9 right to equality of the 1996 constitution.⁴⁰¹ This also brings back the assertion of Pillay that law is not a compiled set of regulations locked away and an end in itself but the basis of functionality in society hence the need for law to change with the change of time in order to keep on maintaining and promoting cohesive social relations.⁴⁰² In this regard law that is capable of promoting social cohesion is therefore characterised by ability to set for adoption of frameworks that accommodate, stimulate and promote all levels of interactions across diverse people in a society notwithstanding the fact that each law can later on be broadly categorised in reference to its main objective or objectives.

4.4.5. Theme four: Society’s perceptions of what ought to be done to promote social cohesion

⁴⁰⁰South Africa is rendered lawless and ungovernable: News 24 (2015. Retrieved From: <https://www.news24.com/MyNews24/SA-is-rendered-lawless-and-ungovernable-20150418> (accessed 21 May 2018).

⁴⁰¹ The Constitution of the republic of South Africa of 1994. Section 9.

⁴⁰² See generally Pillay as discussed in chapter 3 of this study *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

Question 9 related to theme 4 and probed into perceptions of participants on best practices and recommendations for legal and non-legal responses directed at addressing mechanism to facilitate social cohesion attainment in post-apartheid South Africa. The responses in this regard, offer legal based recommendations and are assimilated in the study at a recommendation level, on how to utilise law to promote social cohesion in post-apartheid South Africa. The participants in this regard, subscribe to the notion that it is within law where action, strategic planning or enforcement has to occur in order to promote social cohesion in post-apartheid South Africa. However some participants opine that non-legal mechanisms such as social mechanisms, education and awareness campaigns and *ubuntu* are key issues pertinent in promoting social cohesion in post-apartheid South Africa.

4.5. Chapter Conclusion

This chapter concludes that the participants provided different and varying responses to all questions addressing the main 4 themes of the study. The responses were presented, analysed and interpreted in thematic-narrative form with regards to the role of law in promoting social cohesion in post-apartheid South Africa. The responses echo and affirm the general lack of social cohesion and affirm that effects of apartheid are still a barrier to full attainment of social cohesion as some people still see diversity as a barrier while others do not. This makes it difficult to measure social cohesion because in one case some members of a society subscribe to perceived cohesion while others subscribe to objective cohesion, regardless of the true state of relations and ties within the society. With such variation in responses, the chapter established that law indeed has social utility; diversity is the key feature of South African society and has no significant impeding effect on the attainment of social cohesion in the present context as compared to the impact it had during apartheid times where conflict among diverse lines was perpetuated through laws that magnified diversity and capitalised on it, which is not the case in the present post-apartheid context. Participants also indicated concern over levels of cohesion and *ubuntu* and questioned the actual ability of law to promote social cohesion in post-apartheid South Africa.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

This chapter presents conclusive points of the study. It commences with a brief overview of the study, which is followed by another overview of the major findings of the study. It then proceeds to provide recommendations to stakeholder—communities, institutions of governance, enforcement agencies and law-makers, on areas where loopholes are present in the application, enactment, enforcement and acceptability of law in relation to facilitating and fostering social cohesion. As a final note, the researcher provides concluding remarks in summing up the whole study. The conclusion sums and bundles various findings of the study and considers their meaning, suggesting their importance with regards to law and the promotion of social cohesion in the post-apartheid South African context.

5.2. Overview of the study

Chapter one provided the background of the study, statement of the problem, aim and objectives of the study, research questions, preliminary literature review, research methodology, hypothesis and defined key terms as well as presenting the chapter organisation.

Chapter two conducted an in-depth overview of the concept of social cohesion. The concept of social cohesion was determined to be one that cannot be understood and effectively conceptualised in South African context outside the scope of the constitution. It is crucial to take the South African circumstances and context into consideration before developing a sound concept of social cohesion or creating a policy worthy of the concept of social cohesion. The chapter justified the strict approach to conceptualisation of social cohesion in South Africa on basis and necessity of need for such a concept of social cohesion to be capable of being operationalized in South Africa. Such practical implementation cannot be carried out outside the scope of the actual environment, conditions and circumstances of South Africa. The chapter also demonstrated that the discussion on *ubuntu*, a customary and traditional value of social unity and cohesion, is a crucial tenet to people's attitudes towards accepting, respecting and promoting respect for differences without the need to create sameness

Chapter three explored the utility of law as an instrument for social cohesion in apartheid and post-apartheid contexts. The chapter demonstrated that law indeed has a function in society. Law has the ability to affect and influence the social order while

social order has an impact and ability to influence the outcome or position of the legal order. The chapter established that the ability of law to influence social order was used in apartheid to organise society in a certain way. Subsequently the social order had an impact on how society reacted to and against the repressive and discriminative legal order of apartheid. The constitutional dispensation has therefore been shown to be a result of responses to the repression of the apartheid legal order and the need to restore social order among people of diverse cultures, beliefs and traditions. The main tool used in redirecting social structures to a cohesive level has been shown to be the provision of equality and legislative measures underlying the concept, aimed at eradicating inequalities and marginalisation based on unjustified discrimination. The chapter established the utility of law in promoting social cohesion and social order during apartheid and the potential of constitutional law to facilitate the same in the post-apartheid context.

Chapter four dealt with an empirical inquiry into perceptions of members of society on the social utility of law in promoting social cohesion in post-apartheid South Africa. This was conducted on the background of events of apartheid and the inception of the constitution as a legal framework directed at redressing conditions and circumstances of past injustices persisting in the form of inequalities and discrimination in the post-apartheid context, whose effect is tearing social ties. The chapter presented; analysed and interpreted responses of participants. The chapter established in its findings that law is perceived to have social utility and capable of promoting social cohesion by a majority of participants, with some responses concurring but also indicating weaknesses of law in this regard.

5.3. Major study findings

5.3.1. Theme One: Perceptions and practical implications of Diversity

Diversity is a state of nature and has no effect on social cohesion in the present South African context. It was however magnified and utilised during apartheid to inform and

qualify separatism across different groups of people through utility of law. In the present post-apartheid context, diversity is not the key barrier to social cohesion. Participants, however note that some classes of diversity such as religion and culture are common grounds for conflictual relations in society. On the other hand some participants indicate that they live peacefully in their communities regardless of diversity in their demographic compositions as almost everyone is different in culture, race, ethnicity, background, socio-economic standing, religion or beliefs. The major finding in this regard is that diversity does not impede the attempts of law to promote social cohesion as already elaborated by the Constitutional Court in a number of cases such as *Pillay* and *National Coalition for Gays and Lesbians* cases where law was applied to elaborate on diversity, calibrate equality, eradicate inequalities in that regard and ultimately facilitating and enabling better relations and equal worth across such diverse lines.

5.3.2. Theme two: Utility of law in fostering cohesion

Law has been established to have social utility and also capable of promoting social cohesion. Participants indicated that there are noticeable the changes to social relations across different spheres of interaction from the time of transition from apartheid laws to post-apartheid laws. Without affirming that total social cohesion has been achieved, the responses indicated that there are positive changes to the social order merely by affording and facilitating for diverse groups to work together, live together and for communities to work towards the well-being of the entire society as unified unit. Some participants however indicated that law is perceived to be incapable of promoting social cohesion through suggestions that what needs to change is the attitude of people towards law in order for social cohesion to be attained, while others emphatically assert that law cannot impose or force unity on people. The overall findings in this regard can be reduced to the idea that law as a set of rules to govern society has the ability to promote social cohesion in post-apartheid South Africa if examined, enacted and implemented from the context of the history of South Africa and all other related developments made up to date.

5.3.3. Theme three: Functionality of the legal standard of Equality and the cultural/social norm of *ubuntu*

Most participants indicated that there are high levels of *ubuntu* and social cohesion, and others differed by indicating that they still feel like they are in the apartheid times. The functionality and effectiveness of equality and *ubuntu* were established by participants who relate with being afforded equal opportunities across all diverse people of South Africa, as a great development compared to the apartheid context of inequalities. Regardless of difference and variation in responses, some participants believe that the legal and social transition from apartheid society to the constitutional society is inadequate basis for the facilitation and realisation of social cohesion post-apartheid. With establishment of the importance of shared values of a society as perceived by the lawmakers and put into law, the study found that equality is a shared value and *ubuntu* is a common and shared desire by majority of the people which makes these values functional and relevant in the endeavour to promote, facilitate and realise the attainment of social cohesion.

5.3.4. Theme four: Society's perceptions of what ought to be done to promote social cohesion

Majority of the participants perceive the utility of law in promoting social cohesion to be an accurate assertion. They add further that there is need to adjust implementation, strategy, enforcement or education and alignment of all of these efforts in order to reach the apex of promoting social cohesion in post-apartheid South Africa. Some of the participants perceive the need for non-legal mechanisms in order to promote social cohesion and these mechanisms relate mostly to notions of socialism and educating communities about equality and cohesion. The overall finding in this regard is that law has a crucial role to play in promoting social cohesion in post-apartheid South Africa.

5.4. Recommendations

The section that follows outlines recommendations from findings in relation to the four themes as summarised above and discussed in detail in the previous chapter:

5.4.1. Theme One: Perceptions and practical implications of Diversity

The attainment of the rainbow nation as perceived at the dawn of the constitutional democracy entails that all diverse groups have to interact and work together towards nation building with equal respect for diversity. Several social programs and events can be implemented through social and public institutions across all spheres of

interaction in order to enable contact across diverse people, which is the only way they can work together and respect each other.

5.4.2. Theme two: Utility of law in fostering cohesion

Law indeed has social utility from doctrinal and substantive points. There is however need for calibration of that social utility into actual active social change. This calls for the support of social and public institutions in working with communities.

Law needs to be executed and applied at a social level, objectively to strengthen and promote cohesion across all groups of people in the society.

5.4.3. Theme three: Functionality of the legal standard of Equality and the cultural/social norm of ubuntu

Equality is the basis of undoing inequalities and making people feel that they belong or share similar values. As a legal standard it also needs further calibration at a social level through various mechanisms such as social and public institutions. These institutions should further make it a mission to get into contact with communities over the substance and significance of equality.

Most people relate with the value of *ubuntu*, noting how it only needs further social calibration through enforcement and creation of social institutions to put it into action, all purposively and objectively to promote good social ties and social order.

5.4.4. Theme four: Society's perceptions of what ought to be done to promote social cohesion

Perceptions of society are filtered to some extent, which informs general perceptions that social matters require socialisation and social mechanisms. There is need for more socio-legal contact between experts in the field and the communities intended to be enlightened.

Perceptions of society with regards to the role of law in society need to be enhanced and informed with understanding of law, its abilities and empirical demonstrations of its effect in transitions from apartheid to post-apartheid.

5.5. Limitations of the study

- All ethics were considered and participants were informed about the ethics observed for this study including confidentiality and privacy of participants.

However, some of the participants were uncomfortable to respond freely and comfortably to some of the questions relating to apartheid and issues on the subject of diversity in religion, culture, race and gender. Some participants stopped mid-way in their participation as they felt the questionnaire was too deep and needed more time to execute.

- Time was a serious constraint. Participants were targeted randomly but purposively and as such soliciting for interviewing them during work hours was not easy due to issues of covid-19 associated issues and regulations. In instances where the participants indicated unavailability of time, the researcher had to negotiate with most participants to execute the questionnaire at times most convenient for the participants.
- Time frame for the study considering covid-19 implications and limited resources was sufficiently adequate enough but the researcher worked tirelessly to ensure the completion of this study and also ensured that its quality was not compromised by these challenges.
- The study was confined to one local community, the community of Thohoyandou in Vhembe District which limits the ability to fully generalize and apply the findings to all other communities and the entire South African population on a more empirical level.

5.6. Recommendations for future studies

- This study focused on views of community members on the role of law in promoting social cohesion, further studies are necessary to also widen the focus and include law-makers, traditional leaders and other social institutions, on how they perceive the utility of law in promoting social cohesion or otherwise what non-legal mechanism they propose as facilitative of social cohesion in post-apartheid South Africa..
- The role of the State in the promotion of social cohesion in post-apartheid South Africa should also be explored further.
- It is necessary to conduct similar studies in other institutions of higher learning for purposes of comparing results and authenticity of findings.

5.7. Conclusion

The first three chapters provided insight into the position of social cohesion, position of the law and how it has been interpreted to have social utility as well as how it has in previous apartheid times fostered or facilitated a certain social order of exclusion and segregation. The data collected from participants added to, and shed new light on issues of diversity in the present context, on utility of law and how law can promote social cohesion in the post-apartheid context. A collective of findings inform the major findings of the study that law indeed has the ability to promote social cohesion, law has been playing that role and there is need for more adjustments so that policymakers put into law the shared values of everyone and then calibrate and execute them at a social level. Certain changes of note from the transition from apartheid to post-apartheid on the basis of law serve as irrefutable empirical evidence of law's ability to promote social cohesion. In this regard, apart from the effects of apartheid hindering the realisation of social cohesion through law, new social forms come with new problems such as visible economic and social inequalities, urbanisation and overcrowding in towns and corruption and lack of trust in the government which also hinders the attainment of social cohesion. The underlying conclusion of the study is that law can promote social cohesion in post-apartheid South Africa, with proper calibration of law at social levels across all spheres of interaction as enabled, supported and facilitated by all relevant stakeholders in this regard.

7. Bibliography

Books

Allen, RE *Studies in Plato's Metaphysics: A collection of mostly seminal essays by various hands* Routledge & Kegan Paul: London 1965.

Austin , J *The Providence of Jurisprudence Determined* London 1832.

Aquinas, T *Summa Theological* translated by Fathers of the English Dominican Province 1920.

Barnes, J *The Pre-Socratic Philosophers* revised ed Routledge and Kegan Paul: London 1982.

Bourdieu, P & Wacquant, LJD *An Invitation to Reflexive Sociology* University of Chicago Press: Chicago & London 1992.

Braun, V & Clarke, V *Using Thematic Analysis in Psychology Qualitative Research in Psychology* University of West England 2006.

Bulmer, M & Solomos, J *Multiculturalism, social cohesion and Immigration shifting concepts in the UK* Ethnic and Racial Studies Taylor & Francis: New York 2017.

Bunting, B *The Rise of the South African Reich* Mayibuye Books: South Africa 1986.

Clark, NL & Worger, WH *South Africa: The Rise and Fall of Apartheid* 2nd ed Longman/Pearson 2011.

Dubow, S *Racial Segregation and the Origins of Apartheid in South Africa 1919-36* Macmillan Press: London 1989.

Ehrlichm, E & Pound, R *Fundamental Principles of the Sociology of Law* Translated by L Walter Russel & Russel Inc: New York 1962.

Follesdal, A & Reidar, M *Kantian theory and human rights* Routledge: New York 2014.

Fredman, S *Discrimination law* Oxford University Press: Oxford 2011.

Green, A & Janmaat, J *Regimes of Social Cohesion 'Societies and the Crisis of Globalization* Palgrave Macmillan: London 2011.

Hart, HLA *The Concept of Law* Oxford University Press: Oxford 1961.

Hechter, HC & Horne C *Theories of Social Order A Reader* 2nd ed Stanford University Press: Stanford 2009.

Heitink, G *Practical Theology: History, Theory, Action Domains: Manual for Practical Theology* Grand Rapids MI: Wm B Eerdmans Publishing 1999.

Holmes, OW *The Collected Works of Justice Holmes* University of Chicago Press: Chicago 1995.

Hull, NEH, Pound, R & Llewellyn, K *Searching for an American Jurisprudence* University of Chicago Press: Chicago 1997.

Irwin, TH *Plato's Ethics A major philosophical study* Oxford University Press: Oxford 1995.

Jeffrey L & Shirelle P *West's Encyclopedia of American Law* Gale: Detroit 2005.

Johnson, D, Pete, S & Du Plessis, M *Jurisprudence: A South African Perspective* Lexis Nexis Durban 2008.

Twining, WL *Karl Llewellyn and the Realist Movement* Weidenfeld and Nicolson: London 1943.

Kelsen, H *General Theory of Law and State* Harvard University Press: Cambridge 1949 (Republished 1st edition Routledge 2005).

Laks, A & Glenn, WM *Early Greek Philosophy* vol 3 Harvard University Press: Cambridge 2016.

Mandela, N *The Struggle is My Life* Pathfinder Press: New York 1986 & 1990.

Penner, JE & Melissaris, E *McCoubrey & White Textbook on Jurisprudence* 5th edition Oxford University Press: Oxford 2012.

Mona, P *Legal Education and Research Methodology* 3rd edition Central law Publications 2016.

Maree, K *First Steps in Research* 2nd edition Van Schaik Publishers: Pretoria 2016.

Nowok, M & Luca, RA *Post-apartheid South Africa: the first ten years* International Monetary Fund 2006.

Steven, S *The Bramble Bush On Our Law and Its Study* (1930) Oxford University Press: Oxford 2009.

Vannatta, S *The Pragmatism and Prejudice of Oliver Wendell Holmes Jr* Lexington Books: New York 2019.

Book Chapters

Duguit L 'Law in Modern State Theory of Objective Law anterior to the State in Modern French Legal Philosophy' in Jones, HS *The French state in Question: public law and political argument in the Third Republic* Cambridge: Cambridge University Press 1993.

Durkheim DE 'An anthropological definition of law Chapter XI' in Bronislaw, M *Crime and Custom in Savage Society* 6th impression 1951 London 1926.

Durkheim DE 'De la Division du Travail Social' Translated by G Simpson *The Division of Labor in Society* Free Press of Glencoe: New York 1933.

Gill R 'Chapter 10 Discourse Analysis' in Bauer, MW, Gaskell, G & Allum, NC (eds) *Qualitative Researching with Text, Image and Sound A Practical Handbook* Sage Publications: London 2000.

Gough I & Olofsson G 'Introduction: New Thinking on Exclusion and Integration' in I. Gough, I & Olofsson, G *Capitalism and Social Cohesion: Essays on Exclusion and Integration* Macmillan: Basingstoke 1999.

Kelsen H *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, Charlottenburg: Pan-Verlag Rolf Heise* 1928; translated as "Natural Law Doctrine and Legal Positivism" in Kelsen, H *General Theory of Law and State* Harvard University Press: Cambridge 1945.

Lockwood D 'Civic Integration and Social Cohesion' In Gough, I and Olofsson, G (eds), *Capitalism and social cohesion* chapter 4 McMillan: Basingstoke 1999.

Journal Articles and Reports

Albertyn, C & Goldblatt, B 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal of Human Rights Law* 248.

Barolsky V 'Democracy, Governance and service delivery programme' (2015/16) *Human Sciences Research Council* 1-143.

Berger-Schmitt, R 'Social Cohesion as an Aspect of the Quality of Societies: Concept and Assessment' (2000) 14 *EU Reporting Working Paper: Centre for Survey Research and Methodology* 1-31.

Bernard, P 'Social cohesion: a dialectical critique of a quasi-concept' (2000) *Strategic Research and Analysis Directorate*, Department of Canadian Heritage, Ottawa 491.

Bollen KA & Hoyle RH 'Perceived cohesion: A conceptual and empirical examination' (1990) 69 *Social Forces* 479.

Burns, J, Hull, G, Lefko-Everett, K & Njozela L 'Defining social cohesion' (2018) 216 *South African Labour and Development Research Unit* UCT 1-17.

Cchiff, DN 'Socio-legal theory: social structure and law' (1976) 3 (39) *The Modern Law Review* 287.

Chan, J 'Reconsidering social cohesion: Developing a definition and analytical framework for empirical research' (2006) *Social Indicators Research* 273.

Dick, S 'What Do We Know about Social Cohesion: The Research Perspective of the Federal Government's Social Cohesion Research Network' (2003) 28 *The Canadian Journal of Sociology* 233.

Easterly W, Ritzan J & Woolcock M 'Social Cohesion, Institutions and Growth' (2006) *The Centre for Global Development Working Paper* 94.

Finley, LM 'Transcending Equality theory: a way out of the maternity and the workplace debate' (1986) *Columbia Law Review* 1118.

Fonseca, X, Lukosc, S & Brazier, F 'Social cohesion revisited: a new definition and how to characterize it, innovation' (2019) 32 (2) *The European Journal of Social Science Research* 231.

Funk, DA 'Major Functions of Law in Modern Society Featured' (1972) 23 (2) *Case Western Reserve Law Review* 257.

Goldstone, R 'The South African Bill of Rights' (1997) *Texas International Law Journal* 32.

Gumede, V 'social and economic inclusion in post-apartheid South Africa: From Inequality to inclusive Growth' poverty and inequality (2011) 4 *Transformation Audit* 88.

Holmes, OW 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

Jeannotte 'Buying in or Dropping Out: The Public Policy Implications of Social Cohesion Research' (2002a) *Strategic Research and Analysis, Department of Canadian Heritage, Ottawa* 631.

Jeanotte, SM 'Singing alone? The contribution of cultural capital to social cohesion and sustainable communities' (2003) 9 *International Journal of Cultural Policy* 35.

Jenson, J 'Mapping Social Cohesion: The State of Canadian Research' (1998) *Canada Policy Research Network Study* No F/03. 1-39.

Keswell, M 'Education and Racial Inequality in Post-apartheid South Africa' (2004) *DPRU/FES Second Annual Conference on Labour Markets* 02-008.

Langer, A, Stewart, F, Smedts, K & Demarest, L 'Conceptualising and Measuring Social Cohesion in Africa: Towards a perceptions-based index' (2015) 21 *Centre for Research on Peace and Development (CRPD)* Available at:

<http://soc.kuleuven.be/crpd/files/working-papers/wp21.pdf> (accessed 06 May 2020).

Lewis, O 'Systems Theory and Judicial Behavioralism' (1970) 21 (3) *Western Reserve Law Review* 361.

McLeod J & Von Treuer K 'Towards a cohesive theory of cohesion' (2013) 3 (12) *International Journal of Business and Social Research* 1.

Ovid, C 'Lewis Case law and logic, law and justice, and law and society respectively' (1970) 21 (3) *Western Reserve Law Review* 361.

Pillay, S 'Crime, community and the Governance of violence in post-apartheid South Africa' (2008) 35 (2) *South African Journal of Political studies Politikon* 141.

Pervaiz, Z, Chaudhary, AR & Van Staveren, I 'Diversity, Inclusiveness and Social Cohesion (2013) 1 *Institute of Social Studies* Available at:

http://www.indsocdev.org/resources/ISD_Working_Paper_20131_Diversity_Inclusiveness_and_Social_Cohesion.pdf accessed on 26 June 2018)

Rifkin, LH 'Aristotle on Equality: A Criticism of AJ Carlyle's Theory' (1953) 14 (2) *Journal of the History of Ideas* 395.

Ritzan, J 'Social Cohesion, Institutions and Growth' (2006) 4 *The Centre for Global Development* 94.

Smith, A 'Equality constitutional adjudication in South Africa' (2014) 14 (2) *African Human Rights Law Journal* 609.

Struwig, J 'From bonds to bridges: toward a social cohesion barometer for South Africa' (2011) 9 (4) *Human Sciences Research Council Review* Available at: <http://www.hsrc.ac.za/en/research-data/view/5766> (accessed 28 June 2018).

Case law

Du Toit & Another v Minister of Welfare and Population Development & Others [2002] ZACC 20; 2003 2 SA 198 (CC).

Government of the Republic of South Africa v Grootboom 2000 11 BCLR 1169 (CC).

Jordan & Others v S [2002] ZACC 22; 2002 6 SA 642 (CC).

Khosa v Minister of Social Development 2004 6 BCLR 569 (CC).

MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 2 BCLR 99 (CC).

Minister of Justice and Constitutional development and others v Prince (Clarke and others Intervening); National Director of Public Prosecutions and others v Rubin, National Director of Public Prosecutions and others v Acton (CCT108/17) [2018] ZACC 20; 2018 10 BCLR 1220 (CC); 2018 (6) SA 396 CC; 2019 1 SACR 14 (CC) (18 September 2018).

National Coalition for Gay and Lesbian Equality v Minister of Justice & Others [1998] ZACC 15; 1999 1 SA 6 (CC)

President of the Republic of South Africa and Another v Hugo 1997 6 BCLR 708 (CC)

Prince v President, Cape Law Society [2002] ZACC 1; 2002 3 BCLR 231 (CC); 2002 (2) SA 794 (CC)

Soobramoney v Minister of Health KwaZulu-Natal 1998 1 SA 765 (CC), 1997 12 BCLR 1696 (CC)

Statutes

Bantu Homelands Citizenship Act (National States Citizenship Act) 26 of 1970.

Child Care Act 74 of 1983.

Group Areas Act 41 of 1950.

Native Laws Amendment Act 54 of 1952.

Prohibition of Mixed Marriages Act 55 of 1949.

Reservation of Separate Amenities Act 49 of 1953.

The Constitution of the republic of South Africa of 1994.

The Population Registration Act 30 of 1950.

The Guardianship Act 1933.

Reports/media etc

ANC 'Statement of the National Executive Committee of the African National Congress on the occasion of the 99th Anniversary of the ANC, 8 January 2011.

Council of Europe 'Report on high-level task force on social cohesion: Towards an active, fair and socially active Europe' 2008.

National Planning Commission (2011) Nation building diagnostic. The Presidency, Pretoria.

Norton, A & De Haan, A 'Social Cohesion: Theoretical Debates and Practical Applications with Respect to Jobs: Background paper for the World Development Report for 2013. Published by the World Bank, 2013. Available at: <https://openknowledge.worldbank.org/handle/10986/12147> accessed 06 May 2020).

OECD 'Perspectives on global development 2012, Perspectives on global development (OECD publishing 2011).

South African Cultural Observatory 'Research Report: Developing a Measure of Social Cohesion for South Africa' January) submitted to the Department of Arts and Culture, 2018.

Southphommasane, TS 'The challenge of Social Cohesion, (Speech given at the ANU Research School of Psychology Annual Lecture, 2016.

The Department and Ministry of Arts and Culture 'statement on taking social cohesion as a philosophical mission in South Africa,' 2014.

The Department of Social Development: White paper policy on families (2012) 4.

The Presidency 'towards a fifteen-year review: Synthesis report' The Presidency, Pretoria, 2008b

Van, L GF 'Address to the Institute of Citizenship' Cape Town, 30 May 1968.

Thesis and dissertations

M Abel 'Long-run effects of forced removal under apartheid on social capital' Mimeo Presented at: African Economic History meetings, London School of Economics and Political Science 25–26 October 2014 MA dissertation, Harvard University, Cambridge, 2014.

VL Birkisdóttir 'The Impact of Racial Segregation in South Africa' BA Thesis, The University of Iceland, 2018.

J Peires 'The Holocaust and Apartheid: Similarities and Differences A Comparative Study' MA Dissertation in Jewish Studies, University of Cape Town, 2004.

T Reeskens 'Defining Social Cohesion in Diverse Societies: How generalized trust Relates to social cohesion' Unpublished PHD Thesis, 2007.

Internet and other sources

Anderson G at <http://www.abmm.co.za> (accessed on 21 May 2018).

Aquinas T *Summa Theological* available at:

<http://www.summatheologica.info/summa/parts/?p=1> (accessed on 02 November 2020).

Basic provisions of the constitution Retrieved from:

<http://www.justice.gov.za/legislation/constitution/basicprov.html> (accessed on 21 May 2018).

Council for the Advancement of the South African Constitution: retrieved from: <https://www.casac.org.za/core-principles-and-values/> (accessed on 21 May 2018).

Cuellar R 'Social Cohesion and Democracy' International IDEA, 2009. Available at: <http://www.idea.int/resources/analysis/loader.cfm?csmodule=security/getfile&pageid=38089> (accessed 21 May 2018).

DeSilver D 'Chart of the Week: How South Africa changed, and didn't, over Mandela's lifetime' (2013, December 06). Retrieved from

<http://www.pewresearch.org/facttank/2013/12/06/chart-of-the-week-how-south-africa-changed-and-didnt-overmandelas-lifetime/> (accessed 02 June 2020)

Department of Arts and Culture: Republic of South Africa. Retrieved at [http://www.dac.gov.za/sites/default/files/WHAT%20IS%20SOCIAL%20COHESION%20AND%20NATION%20\(3\).pdf](http://www.dac.gov.za/sites/default/files/WHAT%20IS%20SOCIAL%20COHESION%20AND%20NATION%20(3).pdf) (accessed 30 May 2018)

Department of Cultural Heritage, 2001 retrieved from:

<http://canada.justice.gc.ca/en/ps/rs/rep/comsochoe.pdf> (accessed on 09 February 2019).

Department of Planning, Monitoring and Evaluation 'National Development Plan 2030 – Our Future, Make it Work. National Planning Commission' Available at:

<http://www.nationalplanningcommission.org.za/Pages/Downloads.aspx> (accessed on 03 May 2020).

Dhéret C 'Fostering social cohesion: the missing link in the EU's exit strategy from the crisis' European Policy Centre, 2015. Available at:

http://www.epc.eu/documents/uploads/pub_5459_fostering_social_cohesion.pdf (accessed 06 May 2020).

Department of Arts and Culture: Republic of South Africa. Retrieved from [http://www.dac.gov.za/sites/default/files/WHAT%20IS%20SOCIAL%20COHESION%20AND%20NATION%20\(3\).pdf](http://www.dac.gov.za/sites/default/files/WHAT%20IS%20SOCIAL%20COHESION%20AND%20NATION%20(3).pdf) (accessed 30 May 2018).

FACTSHEET: South Africa's crime statistics for 2016/17. (2017, October 24). Retrieved from <https://africacheck.org/factsheets/south-africas-crime-statistics-2016/17> (accessed 15 May 2020).

Global disseminator of Knowledge Retrieved at:

<https://www.igi-global.com/dictionary/post-apartheid-era/52610> (accessed 30 May 2018)

GINI index, retrieved from:

https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZA&name_desc=false (World Bank Estimate) (accessed 15 May 2020). .

Human Development Report (2019) Inequalities in Human Development in the 21st Century Briefing note for countries on the 2019 Human Development Report South Africa Human Development Reports. (n.d.). Retrieved from :

<http://hdr.undp.org/en/composite/IHDI> (accessed 03 June 2020)

Jahan, S 'Human development report 2016 human development for everyone' New York: United Nations Development Programme, 2016.

Kronenberb, C 'why forging social cohesion still eludes post-apartheid South Africa'. The conversation (November 22 2016) Retrieved from

<https://theconversation.com/why-forging-social-cohesion-still-eludes-post-apartheid-south-africa-67256> (Accessed on 21 May 2018).

Lehohla, PJ 'Living Conditions of Households in South Africa: An analysis of household expenditure and income data using the LCS 2014/2015' South Africa: Statistics South Africa 2017.

Maluleke, MJ & Madonsela, T 'Gender equality jurisprudence in landmark court decisions' Department of Justice and Constitutional Development 2004 retrieved from: <http://www.justice.gov.za/docs/other> (accessed 20 May 2020).

Marioti, M & Fourie, J 'The Economics of Apartheid: An Introduction, Economic History of Developing Regions' 2014. Retrieved from:

<https://doi.org/10.1080/20780389.2014.958298> (accessed on 20 May 2020).

Mokone, T 'parliament votes to make land expropriation without compensation a reality early next year' Times-live, 06 December 2018. available at www.timeslive.co.za/amp/politics/2018-12-06-push-to-make-land-expropriation-without-compensation-a-reality (accessed 26 May 2019).

Presidency, Republic of South Africa 'Social cohesion and Social Justice in South Africa' Pretoria: Policy Coordination and Advisory Services (PCAS) 2004.

Shiner R, "Philosophy of Law", Cambridge Dictionary of Philosophy

Smith, C 'Seeking the glue that can help us grow together' City press, 2017. Retrieved from <https://city-press.news24.com/Voices/seeking-the-glue-that-can-help-us-grow-together-20171216> (accessed on 20/05/18).

South Africa is rendered lawless and ungovernable: News 24 (2015). Retrieved From:<https://www.news24.com/MyNews24/SA-is-rendered-lawless-and-ungovernable-20150418> (accessed 2 May 2018)

Sulla, V & Zikhali, P 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities' 2008 Washington, D.C.: World Bank Group retrieved at:

<http://documents.worldbank.org/curated/en/530481521735906534/OvercomingPoverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-andOpportunities> (accessed 02 June 2020)

Tamir, C & Budiman, A 'In South Africa, racial divisions and pessimism about democracy loom over elections' (May 2019) retrieved from::

<https://www.pewresearch.org/fact-tank/2019/05/03/in-south-africa-racial-divisions-and-pessimism-over-democracy-loom-over-elections/> (accessed on 26 October 2020).

The ANC at its 25th annual celebration 2005: Party statement.

United Nations Development Programme (2015). Predicting Peace: The Social Cohesion and Reconciliation Index as a Tool for Conflict Transformation. Cyprus: UNDP. Available at:

http://www.scoreforpeace.org/files/config/score_book_pdf/1/Score%20Book.pdf (accessed on 03 May 2020).

Appendices

Appendix A: Ethical clearance

ETHICS APPROVAL CERTIFICATE

RESEARCH AND INNOVATION
OFFICE OF THE DIRECTOR

NAME OF RESEARCHER/INVESTIGATOR:

Mr PP Maweto

STUDENT NO:

14000329

PROJECT TITLE: **A critical inquiry into the role of law as an instrument for the promotion of social cohesion in post-apartheid South Africa.**

PROJECT NO: SL/20/JUR/01/1711

SUPERVISORS/ CO-RESEARCHERS/ CO-INVESTIGATORS

NAME	INSTITUTION & DEPARTMENT	ROLE
Prof John Mark Iyi	University of Venda	Supervisor
Adv N Raphalu	University of Venda	Co - Supervisor
Mr PP Maweto	University of Venda	Investigator - Student

Type: Masters Research

Risk: Minimal risk to humans, animals or environment

Approval Period: November 2020 - November 2022

The Research Ethics Social Sciences Committee (RESSC) hereby approves your project as indicated above.

General Conditions

While this ethics approval is subject to all declarations, undertakings and agreements incorporated and signed in the application form, please note the following.

- The project leader (principal investigator) must report in the prescribed format to the REC:
 - Annually (or as otherwise requested) on the progress of the project, and upon completion of the project
 - Within 48hrs in case of any adverse event (or any matter that interrupts sound ethical principles) during the course of the project.
 - Annually a number of projects may be randomly selected for an external audit.
- The approval applies strictly to the protocol as stipulated in the application form. Would any changes to the protocol be deemed necessary during the course of the project, the project leader must apply for approval of these changes at the REC. Would there be deviation from the project protocol without the necessary approval of such changes, the ethics approval is immediately and automatically forfeited.
- The date of approval indicates the first date that the project may be started. Would the project have to continue after the expiry date; a new application must be made to the REC and new approval received before or on the expiry date.
- In the interest of ethical responsibility, the REC retains the right to:
 - Request access to any information or data at any time during the course or after completion of the project,
 - To ask further questions; Seek additional information; Require further modification or monitor the conduct of your research or the informed consent process.
 - Withdraw or postpone approval if:
 - Any unethical principles or practices of the project are revealed or suspected.
 - It becomes apparent that any relevant information was withheld from the REC or that information has been false or misrepresented.
 - The required annual report and reporting of adverse events was not done timely and accurately.
 - New institutional rules, national legislation or international conventions deem it necessary

ISSUED BY:

UNIVERSITY OF VENDA, RESEARCH ETHICS COMMITTEE

Date Considered: September 2020

Name of the RESSC Chairperson of the Committee: Prof Takalani Mashau

Signature:



UNIVERSITY OF VENDA OFFICE OF THE DIRECTOR RESEARCH AND INNOVATION 2020 - 11 - 17 Private Bag X5050 Thohoyandou 0950





University of Venda

A CRITICAL INQUIRY INTO THE ROLE OF LAW AS AN INSTRUMENT FOR THE PROMOTION OF SOCIAL COHESION IN POST-APARTHEID SOUTH AFRICA

My name is Patrick Maweto, a Master of Laws (LLM) student at the University of Venda. I am conducting research on the role of law in promoting social cohesion in post-apartheid South Africa to determine if law can be an instrument for change in social order. The questionnaire consists of 9 questions in 4 pages and will take not long than 15 minutes to complete. The identity of all participants and their responses will be anonymous and no participant will be identifiable or asked to identify themselves in this research. Participation in this research is voluntary; no participant will be forced to participate. At any time you feel uncomfortable answering this questionnaire you may, if you want, discontinue participation.

Participant age range and race(mark with x in the relevant box)

50-80 years	<input type="checkbox"/>	White	<input type="checkbox"/>
30-49 years	<input type="checkbox"/>	Non-white	<input type="checkbox"/>

Meaning of terms in this questionnaire

	Term	Meaning/ Definition
1	Social cohesion	The ability of people from different backgrounds, race, culture, beliefs, ethnic origins, gender, political, social and economic classes and orientations, to coexist in one society in unity, harmony and smooth relations such as under <i>ubuntu</i> .
2.	Race/ Racial	Black, white, Asian, Indian, Coloured, Hispanic etc
3	Relate/Relations	How people in South Africa manage to co-exist in the same society across their differences

1. South Africa has people of different races, different cultures traditions, and beliefs. What do you think about law being made and used to change how these different people in society relate with each other from being divided to being united?

2. What do you think was in apartheid laws that made the South African society of apartheid time to be more divided and be at conflict?

3. How do you describe the social cohesion and level of *ubuntu* in your community today?

4. What effect have you seen in how people relate in your community because of different cultures and religion or because of different political views, different ability to access good healthcare and education or because of all of these and other reasons?

5. What do you think about racial differences serving as contributing factors on how people relate in a cohesive manner or non-cohesive manner in South Africa?

6. How do you think law can be used to promote social cohesion among different people in your community?

7. If law fails to give everyone equal opportunities, equal benefit, protection and enjoyment of law based on racial differences, culture and beliefs, how do you think it will affect the different people in your community?

8. Nelson Mandela in 1996 said, new (Constitutional) law would be made and used to make South Africa a rainbow nation of unity and harmony. Do you think changes from apartheid laws to democracy have changed people to become more united and socially cohesive or is unity and social cohesion still lacking?

9. What do you think should be done or can be done to promote social cohesion among the different people in South Africa across, race, cultural, religious, political, economic status and access to social goods such as healthcare and education?

Conclusion: Thank you for your participation, please hand over the questionnaire to the facilitator who gave it to you.